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# *Fact Sheet*

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## **Order-Making Power for the Information Commissioner**

### **How does the new order-making power work?**

The government committed to empowering the Information Commissioner to order the release of government information.

Bill C-58 would amend the Access to Information Act to give the Information Commissioner the power, following an investigation of a complaint, to make binding orders in relation to access to information requests, including ordering the release of government records.

If passed, the bill would transform the Information Commissioner's role from ombudsperson to an authority with a legislated ability to order the release of records, as well as make orders concerning time extensions, access in the official language requested, and format of release for accessibility purposes.

Orders issued by the Information Commissioner would normally take effect after 30 business days. In cases where a third party or the Privacy Commissioner has a right of review, there would be an additional 10 business days before the order takes effect to allow these rights to be exercised.

A government institution that believes it must challenge an order could seek judicial review by the Federal Court within 30 business days of receiving the order. The new power preserves the careful balance in the Access to Information Act between the public interest in transparency and accountability, and important considerations, such as privacy and national security.

The order-making power would not apply to the new part of the act setting out proactive publication measures.

### **How is this different from the current system?**

Currently, if a requester is dissatisfied with the records they receive or the way their request was handled, they may complain to the Information Commissioner.

The Information Commissioner's office will investigate, and may recommend the release of material. If the government institution does not follow the recommendation, the Information Commissioner or a complainant can challenge the institution's decision in court.

Providing the Information Commissioner with order-making power would reverse the onus: if the Commissioner finds a complaint well-founded, he or she could make an order and the government institution would be required to comply with the order, unless it applies to the Federal Court for review.

If the government believes it must challenge the order, it would have 30 business days to apply to the Federal Court for review of the matter that is the subject of the order; the Federal Court would consider the issue anew. The government institution would have the burden of demonstrating that the order should be set aside (that is, that the institution is authorized to refuse to follow the order).

Similarly, the complainant could apply to the Federal Court for a review of the matter that is subject of the complaint.

The Privacy Commissioner and third parties, whose information is implicated in the order, would also be able to seek review of the matter in Federal Court. They would have an additional 10 days after the initial 30-day period in which to file their review.

### **How will the public know what the Information Commissioner has ordered?**

Bill C-58 would give the Information Commissioner clear authority to publish reports of findings, including any orders made. This will establish a public body of precedents and make institutions aware of the Information Commissioner's position on their obligations under the act. It would also help avoid the Commissioner needing to reinvestigate the same issues.

### **Why doesn't the order take effect immediately?**

The new model provides 30 business days for the government to weigh all considerations before seeking judicial review of an order of the Information Commissioner. It provides a meaningful remedy for the government in instances where it believes the Commissioner's order has been wrongly issued and allows the government to ask the Federal Court to review the order when it believes information should be protected.

This new model maintains Ministerial accountability for the release of government information.

Similarly, the additional 10-business day delay allows for the Privacy Commissioner and third parties whose information is implicated in the order, to challenge the order.

### **How would personal information be protected?**

The order-making model includes checks and balances to ensure the Privacy Commissioner has an opportunity to intervene if an order is made for the release of personal information. The Information Commissioner would have discretion to consult the Privacy Commissioner when considering making an order for the release of personal information and would be required to notify the Privacy Commissioner when such an order is made. Government institutions would also have discretion to engage the Privacy Commissioner in the investigation process.

While government institutions and complainants would have 30 business days to apply for review of an order, the Privacy Commissioner (and third parties) would have 10 additional business days following the expiry of the initial 30 business days to apply to the Federal Court to have their respective interests in the matter reviewed.

The Privacy Commissioner would also have standing to be added as a party to a Federal Court review started by any other party (a government institution, the complainant, or any third parties).

### **How would confidential commercial information of third parties be protected?**

The order-making model also provides for checks and balances when it comes to the release of third party information or trade secrets.

Third parties would be given written notice by the Information Commissioner before she or he makes an order for the release of third party information, and would have an opportunity to make submissions. Third parties would also be provided with a copy of the final report with the order and the government institution's response.

As noted, while government institutions and complainants would have 30 business days to apply for review of an order, third parties (and the Privacy Commissioner) would have 10 additional business days following the expiry of the first 30 business days to apply to the Federal Court.