Chapter 1

Access to Law-Related Information as a Fundamental Right

1.1 Definitions – Meaning of "Access to Law-Related Information"

1.2 Access to Law-Related Information and the Rule of Law

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This chapter will explore the argument that access to law-related information in Canada is – or should be – a fundamental right. For many, this should not be too controversial an argument; however, others may take it for granted that the right exists but fail to realize that such a right is not always effectively realized. Another issue is the extent of the right to access law-related information – does the right, for example, require the government to take positive steps to provide the information? As will be seen below, courts are quite deferential in some circumstances in upholding the right of the government to rely on statutory exceptions to be exempt from providing information under access to information legislation. In addition, although the right to receive information is constitutionally entrenched, this right is usually regarded as a "negative" right that limits the government from preventing access in the appropriate situation and not a "positive" right that requires the government to provide the information. To examine these issues, I will first explore the meaning and scope of "the right to access law-related information" in Canada and what is meant by both "access" and by "law-related information." With this definitional framework in mind, I will then look to the

nature of the right as an essential component of the rule of law; in other words, I will argue that the rule of law (in the broad, democratic sense) cannot survive if there is not also a right to access law-related information. Following this, I will provide a brief comparative overview how international law and nations other than Canada respond to the notion of a right to access law-related information. Finally, in this chapter I will look at the vibrancy of the right to access law-related information and how it manifests itself in Canadian jurisprudence. An understanding of the basis for the existence of access to law-related information as a fundamental right will lay the foundation in subsequent chapters for more detailed analyses regarding factors that impair the right, including, for example, such things as the complexity of the Canadian legal system (Chapter 2), the small size of the Canadian legal publishing industry (Chapter 3), the existence of Crown copyright as a deterrent to the free flow of law-related information (Chapter 4) and the transformation of law-related information as a public good into a private good and confusing government information policies (Chapter 5).

1.1 Definitions – Meaning of "Access to Law-Related Information"

Access to law-related information will likely mean different things to different people. In some ways it is narrower than "access to the law," which ordinarily raises issues of the ability (or, in most cases, the inability) of the average citizen to litigate issues before the courts due to the cost of litigation and hiring a lawyer, cutbacks in legal aid funding, civil procedure complexities and other structural barriers. But "access to law-related information" *is* related to "access to the law" and some overlap in discussion and analysis will occur, where relevant, such as the complexities within the legal system

that act as barriers to lay litigants both in the procedures and costs involved but also in the difficulties in understanding the law and one's legal rights or options. Access to law-related information is relevant not only for persons wishing or needing to enforce their legal rights in court (including lay litigants and their non-lawyer representatives and also including lawyers themselves); it is also relevant to a broad range of society, including, for example, journalists who wish to investigate accountability by officials within the government or legal system and researchers wishing to obtain information and other law-related data to support their research. As such, access to law-related information is an aspect of "access to the law" with a focus on the information components of such access.

1.1.1 Meaning of "Access"

In this thesis, I will use the word "access" in the phrase "*access* to law-related information" to mean the ability of the average person to *find* or *obtain* law-related information in any possible manner, whether print-based or online, incurring little or only reasonable costs in so doing. Thus, for example, this would include such things as the ability to look up (in print or online) a section of the *Criminal Code*, a tax interpretation bulletin or a local municipal bylaw regarding fence heights in a residential neighborhood. The issue of the *cost* of accessing this information is a complex one that will be discussed in more detail later on – for example, if there is a fundamental right to access law-related information, does this by necessity require that such access be free? In addition,my analysis will also look at both print and online access since in some cases – such as historical legislative research, for example – there is no choice but to use print materials.

And with the growing importance and availability of the Internet, it will be important to consider how access to information has changed as a result of new technologies.

Although the foregoing definition of access is relatively straightforward, I will also at times be using a broader definition of "accessing" to also encompass the notion of "understanding" or "comprehending," a notion raised by Friedland in his study.[1] The rationale for this enhanced meaning of access is simple: the ability to access law-related information is greatly diluted if the information itself cannot be understood. In other words, if one of the main purposes of the right to access law-related information is, for example, to allow persons to find information that would allow them to defend or protect their legal rights, the right to access is rendered meaningless if the persons cannot understand or apply that information. I will comment throughout this thesis on this expanded notion of "access and comprehend" since, at times, it may be asking too much to expect that all providers of law-related information (i.e., private legal publishers, for example) make their information *comprehensible* for all persons in addition to also making it *accessible*. Nonetheless, the relationship between access and comprehension is important and cannot be overlooked.

1.1.2 Meaning of "Law-Related Information"

The other major component of the phrase under consideration is "law-related information," a potentially broad term capable of many meanings. Chapter 2 will highlight some of the complexities of the Canadian legal system that affect access to law-

[1] *Supra*, Introduction, note 3 at 4-5.

related information; in that chapter, I will expand upon the different types of law-related information, primarily in the context of individuals seeking to enforce or learn about their legal rights (although, as already mentioned, the need to access law-related information arises in other circumstances, such as access to this information by journalists or researchers). For the purpose of my discussion at this stage, I will use the phrase "law-related information" to generally include the following types of information:

- **Legislation**: An important source of the law includes statutes, regulations, orders-in-council and other related legislative documents, including such things as Hansard transcripts and Parliamentary committee reports, for example. In Canada and other federal states, there is legislation at both the federal and provincial level (and also a third level of legislation at the municipal level in the form of municipal bylaws). As will be seen, current legislative materials are increasingly being made available online for free by governments but historical legislative materials remain largely print-bound. Researching legislation in Canada is difficult, even for experienced researchers.[2]

- **Case law**: Another important primary source of law in Canada is case law – or the common law – made up of the decisions of judges at all levels of courts, and to a slightly different extent, the decisions of administrative tribunals and arbitrators. In Canada, there are very few "official" reporters[3] and most Canadian courts accept any reliable version of a case. And although only

[2] "Despite the importance of legislation to our legal system, very few people enjoy conducting legislative research" – Ted Tjaden, *Legal Research and Writing*, 2nd ed. (Toronto: Irwin Law, 2004) at 52. There are a number of reasons why legislative research is so difficult, ranging from arcane legislative terminology and procedure, delays in publishing and the use of print-based "Tables of Public Statutes" to update legislation in the traditional manner.

[3] The *Supreme Court Reports* and the *Federal Court Reports* are regarded as "official" reporters because they are both issued directly by the courts by legislative degree – see the *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 17 and the *Federal Court Act*, R.S.C. 1985, c. F-7, s. 58. The *Ontario Reports* are concerned "semi-official" since, although published by a private publisher (Butterworths Canada), they are authorized through the Law Society of Upper Canada. All other current print reporters in Canada (e.g., *Dominion Law Reports*) are concerned "unofficial" since they are published by private, commercial publishers.

Canadian case law is generally binding on Canadian courts, case law from jurisdictions from outside of Canada can have persuasive value and is also sometimes important and therefore needed for legal research.[4] Case law is also increasingly found online but, as will be seen, it is a much more chaotically organized form of legal literature (in both its print and online versions) compared to legislation. As such, finding and researching cases can be daunting at times, even for experienced researchers.

- **Government information**: Although legislation and case law are probably the most important types of law-related information for those seeking to protect or learn about their legal rights, there is a wide range of government information that is also relevant to legal research. This type of government information would include such materials as tax interpretation bulletins, policy/position papers, law reform reports, statistics and surveys, to name just a few examples of different types of government-produced information. As will be seen in Chapter 4, a lot of government information in Canada – above and beyond legislation and case law – is subject to Crown copyright, something which can hinder access to the law. In addition, Canadian governmental information policies (discussed in the final two chapters), such as retention policies and privacy policies, also affect access to this type of law-related information.

- **Personal information**: Another type of law-related information includes personal information that is gathered by or on behalf of the government or other organizations that has the potential to impact one's legal status. This information can range from health and medical records, one's credit rating and other financial information. Section 2 of Ontario's *Freedom of Information and Protection of Privacy Act*,[5] for example, has a very broad definition of "personal information":

[4] Tjaden, *supra* note 2 at 135-136.
[5] R.S.O. 1990, c. F.31.

> s. 2(1) "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except where they relate to another individual,
> >
> > (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
> >
> > (g) the views or opinions of another individual about the individual, and
> >
> > (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Personal information is, as might be expected, subject to a number of protections – discussed below – that affect who can access that information and what type of personal information may be affected. Although "privacy law" concerns are generally beyond the scope of this thesis, I will be examining the relationship between privacy law and access to law-related information when these interests intersect.

- **Secondary legal literature**: One final category of law-related information falls into the category of "secondary" legal literature, being books, journals, encyclopedias, case law digests, indexes, websites and other materials that provide commentary or explain the law. Typically, by their nature, secondary

> legal resources lack the force of law and are not binding on the courts, but they can be an important source of information about the law and help explain the law. As will be seen in Chapter 2, secondary literature, such as books and journals, were traditionally print-based and relatively expensive. In recent years, there has been a move for some publishers to create online secondary legal resources with value-added features, but many of these online versions are not free or publicly available.

As a general rule, most legislation, case law and government information is – or should be – freely and publicly available to an individual. There are, however, some exceptions to the right of an individual to access some types of law-related information.

- **<u>Certain court proceedings (publications bans and family law)</u>**:

> As a general rule, court proceedings and documents in court files are publicly accessible in Canada.[6] The "open courts" principle is well-established in Anglo-American jurisprudence, being recently described by the Supreme Court of Canada as "a hallmark of a democratic society" that applies to all judicial proceedings.[7] It has been defined as "the right to be present in the courtroom as the proceedings are conducted and the right to access the court record and docket information upon which the judicial disposition was made."[8] However, there are limitations on the principle. These limitations typically arise when there is a matter before the court, where, if exposed to public scrutiny (particularly by the media), the rights of the accused or other parties before the court will be severely prejudiced. In these circumstances, there may be an application by the concerned party or his or her lawyer to have the court file sealed or a publication ban ordered,

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[6] See, for example, s. 137 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides: "On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise."

[7] *Vancouver Sun, Re* (2004), [2004] 2 S.C.R. 332, 2004 SCC 43 ¶ 23.

[8] Judges Technology Advisory Committee, "Background Paper on Open Courts, Electronic Access to Court Records , and Privacy" at 18 (May 2003). Available online: <*http://www.cjc-ccm.gc.ca/cmslib/general/OpenCourts-2-EN.pdf*>.

which is then in turn sometimes opposed by the media or other members of the public. Section 137(2) of the Ontario *Courts of Justice Act*, for example, permits a court to "seal" the file:

> A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

The sealing of a file is "to be resorted to sparingly, in the clearest of cases and on the clearest of materials"[9] and there is a presumption in favour of public access with the burden of proof resting with the person opposing public disclosure.[10] Cases where the sealing of the file is likely to be granted include family litigation files (especially where children are involved) or cases where competitors would obtain access to trade secrets or other unfair advantages if the file is not sealed.[11]

In criminal law cases, there is also a presumption that trials will be held in open court, but a judge may, on specific grounds, exclude all or any members of the public from the court room for all or part of the proceedings.[12]

Also, under s. 486 of the *Criminal Code*, a judge may also order a ban on publication on the identity of a complainant or witness in certain cases[13] or in other cases where the judge is satisfied that the order is necessary for the proper administration of justice.[14] There are also provisions allowing for publication bans in other criminal law circumstances, including for preliminary inquiries[15] and for proceedings involving young offenders.[16] A review of Canadian *Charter* cases on publication bans and sealing of court files indicates that courts enter into

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[9] *S. (P.) v. C. (D.)* (1987), 22 C.P.C. (2d) 225 (Ont. H.C.) at 231.
[10] *CTV Television Inc. v. Ontario Superior Court of Justice* (2002), 59 O.R. (3d) 18 (C.A.).
[11] *McCormick v. Newman* (1986), 15 C.P.C. (2d) 1 at 3 (Ont. Master).
[12] *Criminal Code*, R.S.C. 1985, c. C-46, s. 486(1). The specific grounds on which the trial may be closed to the public include: where the judge is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice, or that it is necessary to prevent injury to international relations or national defence or national security.
[13] *Ibid*., s. 486(3).
[14] *Ibid*., s. 486(4.1).
[15] *Ibid*., ss. 539 and 542(2).
[16] *Youth Criminal Justice Act*, S.C. 2002, c. 1, ss. 110-111.

a balancing exercise to ensure that limitations to the "open courts" principles are kept to the necessary minimum.

In *MacIntyre v. Nova Scotia (Attorney General)*,[17] a decision pre-dating the *Charter*, at issue was the request by a C.B.C. investigative journalist to access a number of sworn informations used by the police to obtain search warrants in an ongoing investigation. In deciding whether to provide such access, the Court was guided by several broad policy considerations, including "respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of 'openness' in respect of judicial acts."[18] In ruling that a member of the public could inspect a search warrant after it has been executed (and the information on which it is based), the Court (in a 5-4 majority) held that there is a presumption in favour of public access to the courts and court information and that the burden of contrary proof lies upon the person who would deny the exercise of the right.[19]

In *Edmonton Journal v. Alberta (Attorney General)*,[20] the Supreme Court of Canada held that provincial legislation imposing tight restrictions on the publication of information relating to matrimonial proceedings was overly broad and hence unconstitutional under the *Charter*. In so holding, Cory J. emphasized the importance of open courts to freedom of expression, democracy and the rule of law:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for

[17] [1982] 1 S.C.R. 175.
[18] *Ibid*. ¶ 53.
[19] *Ibid*. ¶ 70.
[20] [1989] 2 S.C.R. 1326.

> example, from s. 8 of the Charter, which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances . . . .
>
> There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public . . . .
>
> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.[21]

In *Dagenais v. Canadian Broadcasting Corp*.,[22] at issue was a court order that proposed to ban the broadcast by the C.B.C. of the show *The Boys of St. Vincent*. The ban was sought by four accused who were former or present Catholic priests charged with offences similar to those in the fictional television drama; the accused argued that their current and upcoming trials would be prejudiced by the negative publicity. The Supreme Court of Canada, in overturning the publication ban, ruled that where a judge has discretion to order a publication ban, he or she must exercise that discretion "within the boundaries set by the principles of the *Charter*."[23] The court established a test that a publication ban should only be ordered when:

> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[24]

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[21] *Ibid*. ¶ 78, 80 and 84.
[22] [1994] 3 S.C.R. 835.
[23] *Ibid*. ¶ 71.
[24] *Ibid*. ¶ 77.

Likewise, in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General),*[25] the court also emphasized the importance of open courts. In that case, the Supreme Court of Canada held that the trial judge incorrectly excluded the public and media from the courtroom during the sentencing portion of the accused's trial on sexual assault charges. La Forest J. emphasized the importance of the principle of "open courts" in relation to the freedom of expression and freedom of the press guaranteed by s. 2 (b) of the *Charter*:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.[26]

In *R. v. Mentuck,*[27] at issue was a publication ban over evidence gathering by undercover police in the prosecution of the accused. In partially upholding the ban regarding the names and identities of the officers involved, the Supreme Court of Canada removed the ban regarding the operational aspects of the investigation. In doing so, the Court reformulated the test in *Dagenais* that a judge must consider in deciding whether to order a publication ban (with the test subsequently being referred to by many courts at the *Dagenais/Mentuck* test):

> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[28]

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[25] [1996] 3 S.C.R. 480.
[26] *Ibid.* at 496.
[27] [2001] 3 S.C.R. 442, 2001 SCC 76.
[28] *Ibid*. ¶ 32.

Before a ban will be ordered, the risk in the first part of this test to the administration of justice "is a *serious* danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained."[29]

In *Re Vancouver Sun*,[30] the Supreme Court of Canada was called upon to rule on the extent of the open court principle in the context of an investigative hearing by the Crown relating to the Air India terrorist attacks. In that case, the Crown sought and obtained an order that its investigative hearing involving a potential Crown witness be held *in camera*. Although the Supreme Court of Canada held that the identity of the potential witness was properly kept confidential,[31] the Court otherwise held that the hearing should have been kept open to the public, based on the open courts principle:

> Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law" . . . . Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.
>
> The open court principle is inextricably linked to the freedom of expression protected by s. 2(b) of the Charter and advances the core values therein . . . . The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression . . . . The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions . . . . Consequently, the open court principle, to put it mildly, is not to be lightly interfered with . . . .
>
> This Court has developed the adaptable *Dagenais/Mentuck* test to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the Oakes test . . . . The rights and interests considered are broader than simply the administration of justice and include a right to a fair trial . . . and may include privacy and security interests.

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[29] *Ibid*. ¶ 34.
[30] *Supra* note 7.
[31] *Ibid*. ¶ 47.

> While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban . . .; is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances . . .; or under rules of court, for example, a confidentiality order . . . . The burden of displacing the general rule of openness lies on the party making the application . . . .[32]

In *Toronto Star Newspapers Ltd. v. Ontario*[33] – one of the most recent pronouncements by the Supreme Court of Canada on the open courts principle – the Court confirmed that the *Dagenais/Mentuck* test applies even to search warrant *applications*. In that case, the Court upheld the setting aside of a sealing order on search warrants in relation to a provincial investigation of a meat packing plant, except for the names of the confidential informants.

One final note on the "open courts" principle – consistent with the notion of open courts is the philosophy and mandate of legal information institutes around the world (which includes the Canadian Legal Information Institute[34]). Their philosophy, which will be touched upon in Chapters 5 and 6, is that free access to law-related information (and court decisions) is essential:

> Legal information institutes of the world, meeting in Montreal, declare that:
>
> - Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;
>
> - Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge;

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[32] *Ibid*. ¶ 25-26, 28, 31.
[33] 2005 SCC 41.
[34] Canadian Legal Information Institute (CanLII), "Home Page." Available online: <*http://www.canlii.org*>. CanLII will be discussed in more detail throughout, particularly in the final two chapters.

- Independent non-profit organisations have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published.[35]

- **<u>Certain types of government information:</u>**

Although federal and provincial legislation[36] provide a right of access to records in the custody or under the control of a government institution, there are also a number of exceptions to this right of access. The most important exceptions that impact legal research and the right to access law-related information fall into the following categories[37]:

- **Cabinet records and advice to government**: Current Cabinet records at the federal and provincial level are not accessible and the Crown may resist production of such records.[38] In addition, section 39(1) of the *Canada Evidence Act*,[39] for example, gives broad power to the Crown to protect such information:

> 39. (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

[35] World Legal Information Institute, "Declaration on Free Access to the Law" (October 2002). Available online: <*http://www.worldlii.org/worldlii/declaration/*>.
[36] See, for example, the *Access to Information Act*, R.S.C. 1985, c. A-1 and the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.
[37] See "Access to Information and Protection of Privacy," *Canadian Encyclopedic Digest*, 3rd ed. (Ontario), Vol. 1, Title 1.1, §§ 33-65. I have used the same categories as this publication for sake of convenience.
[38] For an example of a provincial statute that restricts access to Cabinet records, see the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 12(1). In Ontario, "current" for this purpose means the most recent 20-year's worth of Cabinet records. The protection period varies across jurisdictions but is generally in this range.
[39] R.S.C. 1985, c. C-5.

> In this section, "confidences of the Queen's Privy Council for Canada" is defined broadly and includes such things as proposals made to Cabinet, discussion papers, Cabinet agendas and draft legislation.[40]

When courts interpret this section, they have typically shown extreme deference to the claim by the government to withhold production of the Cabinet-related information. In *Singh. v. Canada (Attorney General),*[41] for example, the Federal Court of Appeal, upheld the validity of s. 39 of the *Canada Evidence Act*. In that case, the appellants sought production of government records surrounding the conduct of members of the R.C.M.P. at the 1997 Asia-Pacific Economic Co-operation conference where the appellants allege their rights as protesters were violated by the police. In response to a request for such documents at a public inquiry, the clerk of the Privy Council filed certificates under s. 39(1) of the Act objecting to the disclosure of government records on the ground that the information in certain documents constituted confidences of the Privy Council. In dismissing the appellants action that this section was *ultra vires* and inconsistent with ss. 2(b) and 7 of the *Charter*, the Court acknowledged the obvious importance of the secrecy of Cabinet deliberations to our system of government and upheld the refusal to have the Cabinet records disclosed.[42]

> More recently, in *Babcock v Canada (Attorney General),*[43] at issue was a lawsuit by Crown lawyers against the government for breach of contract and breach of fiduciary duty as a result of their salaries being lower than Crown lawyers in Ontario. An issue arose over some of the documents listed by the Crown and whether Cabinet confidentiality under s. 39 of the *Canada Evidence Act* applied to prevent disclosure of some of the documents where the Clerk of the Privy Council provided the necessary certification under the Act. The majority of the

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[40] *Ibid.*, s. 39(2).
[41] (2000) 183 D.L.R. (4th) 458, 251 N.R. 318, [2000] 3 F.C. 185 (C.A.), leave to appeal to S.C.C. refused, (2000) 259 N.R. 400 (note).
[42] *Ibid*. ¶ 21.
[43] [2002] 3 S.C.R. 3, 2002 SCC 57.

Supreme Court of Canada held that the s. 39 certificate, properly certified, prevented disclosure of the Cabinet documents, unlike the position at common law that at least allowed the court to balance the competing interests.[44] In applying the *Singh* decision, the Court ruled that s. 39 did not offend the Preamble to the *Charter*:

> I share the view of the Federal Court of Appeal [in *Singh*] that s. 39 does not offend the rule of law or the doctrines of separation of powers and the independence of the judiciary. It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.[45]

- **Law enforcement**: Another category of government information that is subject to restricted access is information relating to police investigations that could, for example, lead to the identification of a confidential police informant or that might otherwise harm the safety of a police officer.[46]

In *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security),*[47] at issue before the Ontario Divisional Court was a request by the Criminal Lawyers' Association ("CLA") for the Ontario government to produce a 318-page police report, a memo and a letter that related to an official investigation by the provincial police into findings by a Superior Court of Justice trial judge that the *Charter* rights of two men accused of murder had been violated by "abusive

[44] *Ibid*. ¶ 19-23.
[45] *Ibid*. ¶ 57.
[46] See, for example, the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 14(1).
[47] (2004) 70 O.R. (3d) 332 (Div. Ct.), leave to appeal allowed, 2004 CarswellOnt 3875 (19 July 2004).

conduct" on the part of police and Crown officials.[48] The police investigation was related to the arrest and detention of two men accused of murder where the charges were subsequently dismissed as a result of police misconduct. Nine months after the charges were dismissed and an internal police investigation conducted, the police released a statement that their investigation revealed no misconduct by the police.[49] The government refused production of this report and supporting materials under sections of the Ontario *Freedom of Information and Protection of Privacy Act*[50] that exempt from disclosure government information relating to law enforcements records, solicitor-client privilege and personal privacy. The CLA sought a review of this refusal before the office of the Information and Privacy Commissioner of Ontario, but this appeal was dismissed. CLA then appealed that refusal to the Divisional Court of Ontario arguing that the refusal to produce the information violated CLA's s. 2(b) freedom of expression under the *Charter* and also violated the fundamental constitutional principle of democracy:

> Stripped to its essentials, the Applicant's position is that members of the public have a general constitutional right – founded upon the s. 2(b) freedom of expression and the principle of democracy – to have access to government-held information and documentation, and to comment thereon, unless a balancing exercise, conducted on a case-by-case basis, demonstrates that what is in the public interest favours non-disclosure. To the extent that the *Freedom of Information and Privacy Act* excludes law enforcement records

[48] *Ibid*. ¶ 3.
[49] *Ibid*. ¶ 6.
[50] *Supra* note 46.

> and documentation protected by solicitor-client privilege from this "public interest override," it is unconstitutional.[51]

In dismissing CLA's appeal and upholding the action of the government in not releasing this information, the Court noted that the Act had two purposes: "(a) to provide a statutory right to access to government information where no such general right existed previously – subject to specific exemptions – and (b) to protect personal privacy."[52] The Court specifically rejected CLA's argument that the principle of democracy mandated openness and access to documents such as documents relating to the police's internal investigation:

> The CLA argues that the principle of democracy necessarily includes a principle that institutions fundamental to our society - like the courts and the criminal justice system - must be subject to scrutiny and open discussion. Information concerning their operation must be accessible to the public, based on this governing principle of openness and subject to reasonable limits and restrictions imposed in the public interest 39
>
> I do not accept this submission. As Professor Hogg has noted, "unwritten constitutional principles are vague enough to arguably accommodate virtually any grievance about government policy" and the courts should be cautious about invalidating government initiatives on the basis of such principles . . . . In *Babcock v. Canada (Attorney General)* . . . , the Supreme Court rejected the argument that s. 39 of the *Canada Evidence Act*, which allows the federal government to withhold cabinet documents from court proceedings to which the documents are irrelevant, contravened unwritten constitutional principles. At para. 55, McLachlin C.J. noted that "the unwritten principles must be balanced against the principle of Parliamentary sovereignty."[53]

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[51] *Ibid.* ¶ 32.
[52] *Ibid.* ¶ 16.
[53] *Ibid.* ¶ 39-41.

In so holding, the Court reasoned that principles of democracy and other unwritten constitutional principles are already embedded in the s. 2(b) freedom of expression and that it was therefore improper or unnecessary to consider these principles separate from the balancing mechanisms provided under the *Charter*:

> . . . [I]t would be redundant to apply the unwritten principle of democracy as a separate ground for attacking the purported governmental restriction on the Applicant's expressive activity. Moreover, to do so would undermine the equilibrium mechanism carefully put in place by the Charter, namely, the constitutional entrenchment of freedom of expression in s. 2(b) balanced by the s. 1 saving justification. If the unwritten constitutional principles are imbedded in the s. 2(b) freedom in the first place then it does not advance the argument to reconsider them, either separately, or under the guise of being combined with the s. 2(b) analysis. I would therefore not give effect to the Applicant's submissions based upon the unwritten constitutional principle of democracy.[54]

Of significance is the Court's ruling that there is no positive obligation on the government to provide access to information to allow freedom of expression to occur and that there is therefore no constitutional obligation upon the government to provide access to the information in question:

> [This case] raises the question of whether a positive obligation on the part of government to provide access to information in order to facilitate expressive activity is a component of the s. 2(b) right. It is in this context that the question of balancing the public interest arises . . . .
>
> In my opinion, the authorities do not support the Applicant's position and I would be reluctant to extend the law to establish that there is a constitutional right to know, or a positive obligation on the part of government to disclose information - even subject to public interest balancing - in the circumstances of this case.[55]

[54] *Ibid*. ¶ 44.
[55] *Ibid*. ¶ 46, 58.

- **Government relations**: The government may also refuse production of documents that could reasonably be expected to prejudice international affairs or intergovernmental relations.[56]

- **Third party information**: Governments are also give fairly wide latitude to restrict access to information that might prejudice the interests of a third party, unless the government has the consent of that third party or there is a compelling public interest that clearly outweighs the interests of the third party.[57] Examples of "third party information" that will not likely be producible include such things as trade secrets of a third party; financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party; information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.[58]

- **Economic and other interests**: The government may also be able to resist production of its own information that contains valuable information, including such things as trade secrets or financial, commercial, scientific or technical information of monetary value that it owns.[59]

[56] See *supra* note 46, s. 23 and the *Access to Information Act*, R.S.C. 1985, c. A-1, s. 14.
[57] *Access to Information Act*, R.S.C. 1985, c. A-1, s. 20(1).
[58] *Ibid.*
[59] *Ibid*., s. 18(a).

- **Solicitor-client privilege**: Likewise, the head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor-client privilege.[60]

- **Personal privacy**: The head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in s. 3 of the *Privacy Act*[61] unless that person has the consent of the individual concerned, the information is already publicly available or unless the disclosure falls into the list of exceptions in s. 8 of the *Privacy Act*.[62]

- **Information subject to privacy laws**: A series of primarily provincial legislation and the federal *Personal Information Protection and Electronic Documents Act*[63] protect personal information and limit access to such information, often in (but not limited to) the fields of medical and credit information.

  In Ontario, for example, regarding medical information, s. 52(1) of the *Personal Health Information Protection Act, 2004*[64] provides that an individual has a right of access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian subject to a list of enumerated exceptions (such as where the granting of access to the medical information could reasonably be expected to result in a risk of serious harm to the treatment or recovery of the individual[65]). Section 31 of that same Act forbids a health information custodian who collects personal health information from using it or disclosing it unless required by law to do so.

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[60] *Ibid*., s. 23.
[61] R.S.C. 1985, c. P-21.
[62] *Supra* note 46, s. 19(1).
[63] S.C. 2000, c. 5.
[64] S.O. 2004, c. 3, Schedule A.
[65] *Ibid*., s. 52(1)(e)(i).

- **<u>Information subject to licensing/password control</u>:** Another very large source of law-related information in Canada resides on commercially owned databases, including, but not limited to, those owned by Quicklaw, LexisNexis, Westlaw*e*CARSWELL, Canada Law Book, Maritime Law Book and SOQUIJ. The information on these databases includes both public domain material (statutes and reasons for judgment from court decisions) and proprietary or copyrighted material (books and journal articles, for example, and headnotes added to the cases by the database providers). In most situations, access to these databases is for a fee (often in the range of $200 or more per hour) and requires an account name and password.

Thus, as can be seen, there are a number of restrictions – largely arising out of confidentiality and security concerns – that are placed on accessing certain types of law-related information. For now, it is sufficient to be aware of these restrictions. As my analysis proceeds, however, it will be necessary to constantly question the need and scope of these restrictions and how new technologies impact these issues.

With this broader understanding of the types of "law-related information" and some of the broader types of "limitations" that affect access to some of these types of law-related information, it is time now to look at the relationship between access to law-related information and the rule of law.

1.2 Access to Law-Related Information and the Rule of Law

The rule of law in Canada is a fundamental aspect of our legal tradition – the preamble to the *Charter* says as much: "Whereas Canada is founded upon principles that recognize the . . . *rule of law*" (emphasis added). One of the main attributes of a country

governed by the rule of law is that the rules that govern its citizens are published and made available to everyone. Oft-quoted is Dicey's definition of the rule of law that incorporates three separate but related meanings. Professor Schneiderman describes it this way:

> It refers to no one single idea, but to a cluster of ideas. It is a term often associated with the English legal scholar Albert Venn Dicey who described the 'rule of law' as a paramount characteristic of the English Constitution. It was comprised of three "kindred conceptions": (1) that government must follow the law that it makes; (2) that no one is exempt from the operation of the law - that it applies equally to all; and (3) that general rights emerge out of particular cases decided by the courts.[66]

In *The Reference re Quebec Secession*,[67] relying in part on Dicey's traditional definition, the Supreme Court of Canada's explanation of the rule of law inherently assumes a legal system with pre-established, stable rules accessible to all as a means of verifying compliance with the law:

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law is "a fundamental postulate of our constitutional structure." As we noted . . . "[t]he 'rule of law' is a highly textured expression, importing many things . . . but conveying, for example, *a sense of orderliness, of subjection to known legal rules* and of executive accountability to legal authority." At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs . . . .
>
> . . . [T]he rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, *we explained . . . that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order . . . .*" A third aspect of the rule of law is . . . that "the exercise of all public power must find its ultimate source in a legal rule." Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.[68] [emphasis added]

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[66] David Schneiderman, "Rule of Law" in "Constitutional Keywords", Centre for Constitutional Studies. Available online: <*http://www.law.ualberta.ca/ccskeywords/rule_law.html*> Date accessed: 15 April 2005, citing A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1885) at 175-84.
[67] [1998] 2 S.C.R. 217.
[68] *Ibid.* at ¶ 70-72.

In a country governed by the rule of law, access to law-related information is inherently tied to this right. Without access to law-related information – be it legislation, case law, court documents or government information – it is that much more difficult to verify what the law is or should be. This also makes it more difficult for public officials to be held accountable if the media or the public are unable or have difficulty in accessing the variety of law-related information that is integral to our legal and political systems. For some, the Internet holds great promise in improving access to this information and strengthening the rule of law:

> One of the greatest promises of the global information infrastructure is improved public access to government information. As court decisions, legislative enactments, and rules of administrative agencies become available through the Internet's World Wide Web, the rule of law is strengthened. The legitimacy of public institutions increases when the public knows what the institutions are doing. Compliance with the law increases when the law is available. Accountability and quality of government decision-making improves when members of the public have information allowing them to express meaningful views before decisions are made.[69]

Tied to this notion of accountability as a component of the rule of law is the notion of transparency, that good government – and hence the rule of law – requires that governments operate transparently in an open manner:

> A cornerstone of the human rights movement is establishing the rule of law; without the rule of law, the very meaning of the term "rights" dissipates. A foundational principle of the rule of law is governmental transparency, i.e., governments operating not secretly, but openly. One aspect of this transparency is ready access to the law. Having open and public laws that are relatively easily available is an important aspect of efforts to create or enhance the rule of law.[70]

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[69] Henry H. Perritt, Jr. and Christopher J. Lhulier, "Information Access Rights Based on International Human Rights Law" (1997) 45 Buff. L. Rev. 899.

[70] Steven D. Jamar, "The Human Right of Access to Legal Information: Using Technology To Advance Transparency and the Rule of Law" (2001) 1 Global Jurist Topics Article 6 at 1.

In connection to law-related information, transparency includes the entire range of law-related information discussed in the previous section, including the processes by which law-related information is generated:

> Transparency refers to a cluster of related ideas, including governmental action in the open, the availability of information (particularly law), and accuracy and clarity of the information. Official action, which includes the content of laws and regulations, the processes of enacting law, and the processes involved in enforcing the law, is transparent to the extent that the information relating to those processes or that content is readily available to interested or affected persons.[71]

The rule of law therefore assumes a pre-existing, codified and stable set of laws. One manifestation of this is that, in many situations, citizens are "deemed" to know the law. Section 19 of the *Criminal Code*,[72] for example, states that ignorance of the law is not excuse as a defence to a crime. A similar rule also applies in a common law context – *ignorantia juris non excusat*. This maxim is a statement of the general applicability of rules of law and operates to preclude individuals from seeking to excuse themselves from criminal or other liability. In municipal law, for example, ignorance of the law is not an excuse for the failure to provide a municipality of statutorily-required notice of a claim (even where the notice period is very short, as often is the situation in possible claims against municipalities).[73]

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[71] *Ibid.* at 3.
[72] R.S.C. 1985, c. C-46.
[73] *Egan v. Saltfleet (Township)* (1913), 13 D.L.R. 884 (Ont. C.A.); *Biggart v. Clinton (Town)* (1903), 2 O.W.R. 1092 (H.C.), affirmed (1904), 3 O.W.R. 625 (C.A.).

1.3 Access to Law-Related Information around the World

Freedom of information is a fundamental right that is recognized at international law[74] and in the domestic law of most democratic nations throughout the world. The question remains, however, to what extent freedom of information translates into access to information and the extent to which these rights mandate positive obligations on governments to provide access to information as a corollary of freedom of information or freedom of expression laws.

1.3.1 Access to Law-Related Information at International Law

In 1946, the General Assembly of the United Nations affirmed in Resolution 59(1) the importance of freedom of information as a fundamental human right:[75]

> *Freedom of information is a fundamental human right* and . . . the touchstone of all the freedoms to which the United Nations is consecrated. [emphasis added]

Likewise, Article 19 of the *Universal Declaration of Human Rights*[76] affirms the right to receive information as part of the right to freedom of opinion and expression:

> Everyone has the right to freedom of opinion and expression; *this right includes freedom to* hold opinions without interference and to *seek, receive and impart information and ideas through any media and regardless of frontiers.* [emphasis added]

[74] See, for example, Geoffrey A. Hoffman, "In Search of an International Human Right to Receive Information" (2003) 25 Loy. L.A. Int'l. & Comp. L. Rev. 165.
[75] GA, 1946, 65th Plen. Mtg.
[76] GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

Article 19(2) of the *International Covenant on Civil and Political Rights*[77] (the "ICCPR") also affirms this right in slightly broader terms:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 19(3) of the ICCPR outlines that the right to receive information may be subject to limitations but only those that are provided by law and are necessary:

> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Meetings of the World Summit on the Information Society in 2001 were established by United Nations General Assembly Resolution 56/183 (21 December 2001). Participants in the World Summit include governments, UN bodies, IGO's, NGO's, civil society and the private sector. From its December 12, 2003 Declaration of Principles[78] come a number of endorsements in support of the right to access information:

> 1. We . . . declare our common desire and commitment to build a people-centred, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information and knowledge, enabling individuals, communities and peoples to achieve their full potential in promoting their sustainable development and improving their quality of life . . . .

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[77] 16 December 1966, 999 U.N.T.S. 171, Can T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).
[78] *Supra*, Introduction, note 1.

> 4. We reaffirm, as an essential foundation of the Information Society, and as outlined in Article 19 of the *Universal Declaration of Human Rights*, that everyone has the right to freedom of opinion and expression; that this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone, everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers.
>
> 24. The ability for all to access and contribute information, ideas and knowledge is essential in an inclusive Information Society.
>
> 25. The sharing and strengthening of global knowledge for development can be enhanced by removing barriers to equitable access to information for economic, social, political, health, cultural, educational, and scientific activities and by facilitating access to public domain information, including by universal design and the use of assistive technologies.
>
> 26. A rich public domain is an essential element for the growth of the Information Society, creating multiple benefits such as an educated public, new jobs, innovation, business opportunities, and the advancement of sciences. Information in the public domain should be easily accessible to support the Information Society, and protected from misappropriation. Public institutions such as libraries and archives, museums, cultural collections and other community-based access points should be strengthened so as to promote the preservation of documentary records and free and equitable access to information.
>
> 27. Access to information and knowledge can be promoted by increasing awareness among all stakeholders of the possibilities offered by different software models, including proprietary, open-source and free software, in order to increase competition, access by users, diversity of choice, and to enable all users to develop solutions which best meet their requirements. Affordable access to software should be considered as an important component of a truly inclusive Information Society.

The right to access information has also been repeatedly stressed by the Special Rapporteur Abid Hussain in his annual reports to the United Nations on the promotion and protection of the right to freedom of opinion and expression:

> III. ISSUES: A. The right to seek and receive information
>
> 11. The Special Rapporteur has consistently stated that the right to seek and receive information is not simply a converse of the right to freedom of opinion and expression but a freedom on its own.

> 14. The Special Rapporteur is of the view that *the right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems, including film, microfiche, electronic capacities and photographs*.
>
> 16. Finally, the Special Rapporteur supports the view that Governments have a responsibility to facilitate access to information which is already in the public domain such as the reports and recommendations of truth and reconciliation commissions, the State's reports to United Nations human rights treaty bodies, recommendations arising from consideration of the State's report by one of these treaty bodies, studies and impact assessments conducted by or on behalf of the Government in areas such as the environment and industrial development, and constitutional and legal provisions relating to rights and remedies. He notes that Governments may discharge this obligation for instance by systematically integrating information about key civic issues, such as human rights, international treaties binding on the State, elections and other political processes, into the education system and popularizing the information through the media. *Access to records such as court reports and parliamentary proceedings can be published in a timely fashion and disseminated through major public and university libraries throughout the country and, where technology permits, the Internet.*[79] [emphasis added]

In a more recent report, the Special Rapporteur called for governments to take legislative action to better implement access to information:

> On that basis, the Special Rapporteur directs the attention of Governments to a number of areas and urges them either to review existing legislation or adopt new legislation on access to information and ensure its conformity with these general principles. Among the considerations of importance are:
>
> - Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information; "information" includes all records held by a public body, regardless of the form in which it is stored;
>
> - Freedom of information implies that public bodies publish and disseminate widely documents of significant public interest, for example, operational information about how the public body functions and the content of any decision or policy affecting the public;
>
> - As a minimum, the law on freedom of information should make provision for public education and the dissemination of information regarding the right to have access to information; the law should also

[79] Report of the Special Rapporteur, Mr. Abid Hussain, "Promotion and Protection of the Right to Freedom of Opinion and Expression" E/CN.4/1998/40 (28 January 1998), pursuant to Commission on Human Rights Resolution 1997/26.

provide for a number of mechanisms to address the problem of a culture of secrecy within Government;

- A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non-disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest;

- All public bodies should be required to establish open, accessible internal systems for ensuring the public's right to receive information; the law should provide for strict time limits for the processing of requests for information and require that any refusals be accompanied by substantive written reasons for the refusal(s);

- The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants and negate the intent of the law itself;

- The law should establish a presumption that all meetings of governing bodies are open to the public;

- The law should require that other legislation be interpreted, as far as possible, in a manner consistent with its provisions; the regime for exceptions provided for in the freedom of information law should be comprehensive and other laws should not be permitted to extend it;

- Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrongdoing, viz. the commission of a criminal offence or dishonesty, failure to comply with a legal obligation, a miscarriage of justice, corruption or dishonesty or serious failures in the administration of a public body.[80]

1.3.2 Access to Law-Related Information in Other Countries

In addition to these rights at international law, most modern democracies have legislation that provides access to government information under freedom of information laws.[81] Less clear is the extent to which there is a constitutional right to information aside

[80] Paragraph 44, Report of the Special Rapporteur, Mr. Abid Hussain, "Promotion and Protection of the Right to Freedom of Opinion and Expression" E/CN.4/2000/63 (18 January 2000), pursuant to Commission on Human Rights Resolution 1999/36.

[81] See, for example: Canada: *Access to Information* Act, *supra* note 36; United States: *Freedom of Information Act*, 5 U.S.C. 552 (1966); United Kingdom: *Freedom of Information Act 2000* (U.K.), 2000, c.

from access to information legislation. In many situations, the right to access or receive information is seen as a corollary of the freedom of expression but this usually does not translate into a positive obligation on the government to provide the information.

In the United States, the U.S. Supreme Court has repeatedly noted that the United States is a government of laws and not of men,[82] reflecting a basic ideology of the rule of law. Under the U.S. *Constitution*, the U.S. Supreme Court has also been quite clear that the freedom of expression guaranteed by the *Constitution* by necessity includes the right to receive information.

In *Martin v. Struthers*,[83] for example, at issue was whether the door to door pamphleting of a Jehovah's Witness violated a municipal bylaw forbidding such activity. The appellant argued that the bylaw violated her freedom of speech guaranteed by the First Amendment. In holding that her constitutional rights were violated, Mr. Justice Black held for the court that the right of freedom of speech or expression also includes the right to receive information:

> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. *This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.* The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets.[84]
> [emphasis added]

36; and Australia: *Freedom of Information Act 1982* (Cth.). For a useful overview of freedom of information legislation around the world, see: David Banisar, "Freedom of Information and Access to Government Record Laws around the World" (May 2004). Available online: <*http://www.freedominfo.org/survey/global_survey2004.pdf*>.

[82] See, for example, *Marbury v. Madison*, 5 U.S. 137 at 163 (1803). Also see Susan Nevelow Mart, "The Right to Receive Information" (2003) 95 Law Libr. J. 2 for an overview of American cases involving the right to receive information.

[83] 319 US 141 (1943).

[84] *Ibid*. at 143.

In *Griswald v. Connecticut*,[85] a case involving the criminalization of providing information on contraception, the U.S. Supreme Court again affirmed the right to receive information:

> [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach . . . . Without those peripheral rights the specific rights would be less secure.[86]

However, both of these cases deal with improper interference by the government with a citizen's right to receive information; the cases do not automatically infer that the government has a positive obligation to provide access to information.

In a series of decisions involving requests by the press to access prisons to report on the conditions in them, American courts have refused to extend a constitutional right to "access" this sort of information since it is not a right extended to the general public and the government is not under a positive obligation to provide access to all information in its control.[87] In *Pell v. Procunier*[88] and *Saxbe v. Washington Post Co.*,[89] reporters were denied access to prisons to interview inmates because, as per the Court in *Pell*, the freedom of expression guaranteed by the Constitution prohibits the government from interfering with the press but "does not, however, require government to accord the press special access to information not shared by members of the public generally."[90]

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[85] 381 U.S. 479 (1965).
[86] *Ibid.* at 482.
[87] See Matthew D. Bunker, "Access to Government-Held Information in The Computer Age: Applying Legal Doctrine to Emerging Technology" (1993) 20 Fla. St. U. L. Rev. 543 at 550.
[88] 417 U.S. 817 (1974).
[89] 417 U.S. 843 (1974).
[90] *Supra* note 88 at 834.

Likewise, in *Houchins KQED, Inc.*,[91] a television station sought a court order to access a prison where it was alleged prisoners were being maltreated. In that case, the United States Supreme Court denied access arguing, in part, that the television station was not being denied information about prison conditions since it could obtain that information from receiving letters from inmates or interviewing recently released prisoners.[92] In denying access, the Court characterized the request to access the prison as *not* being the same as the right to receive information.[93] Furthermore, as the court reasoned, "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[94] However, Mr. Justice Stevens, with the concurrence of two other judges, dissented and ruled that the prison policy that concealed knowledge of prison conditions violated freedom of expression, and he characterized the right of the public or media to receive information about prison conditions as more than just a negative right:

> It is not sufficient, therefore, that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.[95]

In a footnote to the preceding quotation, Justice Stevens acknowledges that the right to receive or acquire information is not specifically mentioned in the Constitution but that sometimes this right must be protected by governmental action:

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[91] 438 U.S. 1 (1978).
[92] *Ibid*. at 7-8.
[93] *Ibid.* at 7.
[94] *Ibid.* at 8.
[95] *Ibid*. at 32.

> . . ."[t]he protection of the *Bill of Rights* goes beyond the specific guarantees to protect from . . . abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful . . . . The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers . . . ." It would be an even more barren marketplace that had willing buyers and sellers and no meaningful information to exchange.[96]

In the European Union, Article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* provides for a right to receive information:

> Article 10 – Freedom of expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The "right to receive information" component of Article 10 has been interpreted in a number of cases, and although the right has been interpreted broadly it has not yet been interpreted so as to impose a positive obligation on governments to collect and disseminate information on its own initiative. An example of a broad interpretation of the right where there has been a purported restriction on information imposed by government was in *Open Door Counseling Ltd. v. Ireland*.[97] That case, like *Griswald*, involved the

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[96] *Ibid*.
[97] *Open Door Counseling Ltd. & Dublin Well Woman Centre Ltd. v. Ireland*, App. Nos. 14234/88 & 14235/88, 15 Eur. H.R. Rep. 244 (1992). This case is discussed by Hoffman, *supra* note 74 at 5.

attempt by companies to provide abortion counseling services to pregnant women (in Ireland) to travel abroad to get abortion (since abortions were illegal in Ireland). In that case, the Supreme Court of Ireland issued an injunction against the companies, who appealed to the Commission. In determining that the injunction was invalid and violated Article 10, the Commission held that "the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman's health and well-being" and that "[l]imitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society."[98]

In *Leander v. Sweden*,[99] even though Sweden has perhaps the broadest adoption in the European Union of a constitutional right to access public documents dating back hundreds of years,[100] the Swedish government opposed the request by Mr. Leander to access the security file held by the government on him when information in that file was used to deny him a position in a museum on a naval base. His action against the Swedish government before the European Court of Human Rights was also dismissed on a number of grounds, with the Court ruling on the freedom to receive information argument that Article 10 did not impose an obligation on the government to release documents to an

[98] *Ibid.* at 266.
[99] (1987) 9 E.H.R.R. 433.
[100] See Inger Osterdahl, "Openness v. Secrecy: Public Access to Documents in Sweden and the European Union" (1998) 23 Eur. L. Rev. 336. Chapter 2, Article 1 of the Swedish *Constitution* guarantees freedom of information, including "the freedom to obtain and receive information and otherwise acquaint oneself with the utterances of others.

individual but acted as a limitation on the government from restricting a person from receiving information that others are trying to impart:

> The Court observes that the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.
>
> There has thus been no interference with Mr. Leander's freedom to receive information, as protected by Article 10.[101]

Likewise, in *Gaskin v. United Kingdom*,[102] the European Court of Human Rights limited the scope of the right to receive information. In that case, the applicant was a foster child who, upon attaining the age of majority, alleged that he was mistreated as a foster child and that he wanted to review details of his care and treatment from the records held by the Liverpool City Council regarding his various placements. After litigation with the Council, the Council agreed to make information from his files available to him but only where the various contributors to that information consented to the disclosure. Not all of the contributors consented, so the applicant brought his claim before the European Court of Human Rights, which, however, followed *Leander* to rule that the right to receive information was not violated in these circumstances:

> The Court holds, as it did in *Leander v. Sweden*, that 'the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him.' Also in the circumstances of this case, Article 10 does not embody an obligation on the State concerned to impart the information in question to the individual.[103]

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[101] *Supra* note 99 at 456-57.
[102] (1990) 12 E.H.R.R. 36.
[103] *Ibid*. at 51.

Finally, in *Guerra v. Italy*,[104] in a majority ruling, the European Court of Human Rights applied *Leander* in ruling that Article 10 did not apply to oblige the Italian government to provide environmental information to residents adversely affected by a local chemical factory (but the Court did rule that Article 8, dealing with the right to respect for private and family life, had been violated):

> The Court reiterates that freedom to receive information, referred to in paragraph 2 of Article 10 of the Convention, "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him." That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.[105]

In *Guerra,* however, in a concurring opinion, a number of judges ruled that Article 10 might impose a positive obligation on government to make information available, but not in this particular case:

> In [deciding that Article 10 is not applicable in this case] I have put strong emphasis on the factual situation at hand not excluding that under different circumstances the State may have a positive obligation to make available information to the public and to disseminate such information which by its nature could not otherwise come to the knowledge of the public. [106]

Additionally, Judge Jambrek, in a dissent, ruled that Article 10 could impose an obligation on a government to produce information that is in its possession and has been demanded by a member of the public who is a potential victim of an industrial hazard:

> In my view, the wording of Article 10, and the natural meaning of the words used, does not allow the inference to be drawn that a State has positive obligations to provide information, save when a person of his/her own will demands/requests information which is at the disposal of the Government at the material time.

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[104] (1998) 26 E.H.R.R. 357.
[105] *Ibid*. 382.
[106] *Ibid*. 386-87.

> I am therefore of the opinion that such a positive obligation should be considered as dependent upon the following condition: that those who are potential victims of the industrial hazard have requested that specific information, evidence, tests, etc., be made public and be communicated to them by a specific government agency. If a government did not comply with such a request, and gave no good reasons for not complying, then such a failure should be considered equivalent to an act of interference by the government, proscribed by Article 10 of the Convention.[107]

The *Guerra* decision was cited by the Ontario Divisional Court in the *Criminal Lawyers' Association* decision[108] but that Court refused to adopt in Ontario the dissenting opinion in *Guerra* that a government might be under a positive obligation to provide information in the appropriate circumstances.[109]

The foregoing examples of the right to receive information represent only a sampling of how this right has been legislated in a few democracies. As will be seen below, the right is also recognized in Canada, albeit in the same limited form of it generally being a "negative" right to stop the government from impairing the ability of a citizen to obtain information and not necessarily as a "positive" obligation to provide information.

1.4 Access to Law-Related Information in Canadian Jurisprudence

Canada is a signatory to both the *Universal Declaration of Human Rights*[110] and the *International Covenant on Civil and Political Rights.*[111] As such, Canada recognizes the right and freedom to seek, receive and impart information. Moreover, in Canada, as in the United States and elsewhere, any right to receive information or access law-related

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[107] *Ibid*. at 387-88.
[108] *Supra* note 47.
[109] *Ibid*. at ¶ 82.
[110] *Supra* note 76.
[111] *Supra* note 77.

information is a corollary of the freedom of expression guaranteed by s. 2(b) of the *Charter*. However, as mentioned above, the right to receive information in Canada is typically enforced by courts only in the context where government restrictions (in the form of statutory provisions, for example) impair access to information and not in the context of creating a positive obligation on the government to provide such information.

Re Klein and Law Society of Upper Canada,[112] for example, is a decision where an attempt through law society regulations to limit what lawyers could say to the media was seen as an improper restriction on the right of the public to receive information. At issue in that case were rules of the Law Society that restricted lawyers from fee advertising and promoting themselves in the media. On the issue of restrictions on a lawyer contacting the media, a majority of the court held that the rule creating such restriction violated the *Charter* and was of no force or effect to the extent it interfered with the right to receive information:

> In addition, the public has a constitutional right to receive information with respect to legal issues and matters pending in the courts and in relation to the profession and its practices. This right is substantially impaired by the rule in that it significantly restricts the right of the press and other media to offer – and the right of the public to receive and discuss – information of important public issues relating to the law and the operation of legal institutions.[113]

More recently, the Supreme Court of Canada in *Harper v. Canada (Attorney General)*,[114] a case involving limits on third party election advertising expenses, highlighted the importance of the right to receive information and its being the necessary corollary of the freedom of expression:

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[112] (1985) 16 D.L.R. (4th) 489 (Ont. Div. Ct.).
[113] *Ibid.* at 541.
[114] [2004] 1 S.C.R. 827.

> The right to receive information is enshrined in both the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47. Canada is a signatory to both. American listeners enjoy the same right . . . . The words of Marshall J., dissenting, in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), at p. 775, ring as true in this country as they do in our neighbour to the south:
>
> > [T]he right to speak and hear – including the right to inform others and to be informed about public issues – are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the means indispensable to the discovery and spread of political truth.[115]

However, both Klein and Harper were cases dealing with the "negative" right, i.e., they were cases where the government had attempted to restrict access to information through, in the first case, "gagging" lawyers, and in the second case, creating rules that would have the effect of limiting what third parties could communicate to the public regarding their election platforms. In other Canadian cases involving the right to receive information in the context where it would require positive governmental action, courts have been loathe to impose positive obligations on the government. In *obiter dicta* in *Haig v. Canada*.,[116] the Supreme Court of Canada suggested that a positive obligation on the government might be required in the correct circumstances. In that decision, Graham Haig was not eligible to vote in either the provincial referendum in Québec or the federal referendum across the rest of Canada regarding possible Québec separation. His lack of eligibility to vote arose because of being in the process of moving from Ontario to Québec and being unable to satisfy the residency requirements for voting in either

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[115] *Ibid.* ¶ 18.
[116] [1993] 2 S.C.R. 995.

jurisdiction. He filed application seeking a declaration and *mandamus* that he be enumerated to vote in the referendum. The Supreme Court of Canada, on hearing the case, ruled that Haig's constitutional rights had not been violated in these circumstances:

> Both Canadian society and the courts have at all times recognized that freedom of expression is a fundamental value in Canada. This court has abundantly discussed the values underlying freedom of expression, and since those values are not in dispute here, it is not necessary to delve into them at great length. Nor is it in dispute that the activity of casting a ballot is an expressive one . . . .
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> As a starting point, I would note that case law and doctrinal writings have generally conceptualized freedom of expression in terms of negative rather than positive entitlements. In *The System of Freedom of Expression* (New York: Random House, 1970), Thomas Irwin Emerson, speaking of the United States Bill of Rights whose First Amendment provision is even more stringent than its Canadian Charter counterpart, observes at p. 627:
>
> > The traditional premises of the system [of freedom of expression] are essentially laissez-faire in character. They envisage an open marketplace of ideas, with all persons and points of view having equal access to the means of communications. In supporting this system, the First Amendment has played a largely negative role: it has operated to protect the system against interference from the government. Thus the issues have turned for the most part upon reconciling freedom of expression with other special interests that the government seeks to safeguard. *The development of legal doctrine has been primarily in the evolution of a series of negative commands*. (Emphasis added.)
>
> Like its United States First Amendment counterpart, the Canadian s. 2(*b*) Charter jurisprudence has been shaped by these same foundational premises, focusing mainly on attempts by governments to place limitations on what can be expressed. The traditional question before courts has been: to what extent can freedom of expression be justifiably limited? The answer has been that individuals can expect to be free from government action the purpose or effect of which is to deny or abridge freedom of expression, unless the restraint is one that can be justified in a free and democratic society in accordance with s. 1 of the Charter.
>
> It has not yet been decided that, in circumstances such as the present ones, a government has a constitutional obligation under s. 2(*b*) of the Charter to provide *a particular platform* to facilitate the exercise of freedom of expression. The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(*b*) prohibits gags, but does not compel the distribution of megaphones. [117]

However, as mentioned, in reviewing academic commentary on the topic, the court hinted at the possibility that, in the correct circumstances, in order to fully protect or

[117] *Ibid*. ¶ 68, 70-72.

guarantee the freedom of expression, the government may be required to act positively and that "a philosophy of non-interference may not in all circumstances guarantee the optimal functioning of the market-place of ideas"[118] since both "the resources and the very opportunities for speech may tend to be limited, whether by time, lack of money, unavailability of space, or even by our capacity to digest and process information"[119]:

> The distinctions between "freedoms" and "rights", and between positive and negative entitlements, are not always clearly made, nor are they always helpful. One must not depart from the context of the purposive approach articulated by this court . . . . *Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required.* This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, *or ensuring public access to certain kinds of information*.[120] [emphasis added]

To date, no Supreme Court of Canada decisions subsequent to *Haig* have "opened the door" (to use the metaphor from Kafka and a phrase from the Ontario Divisional Court in *Criminal Lawyers' Association*) to extending the s. 2(b) freedom of expression right into a positive obligation on the part of the government to provide information. The *Haig* decision, as well as two other recent Supreme Court of Canada decisions where freedom of expression was limited to a "negative right",[121] was cited by the applicants in *Criminal Lawyers' Association*,[122] but the Ontario Divisional Court in *Criminal Lawyers' Association* refused to apply the foregoing *obiter dicta* reasoning from *Haig* and denied

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[118] *Ibid*. ¶ 74.
[119] *Ibid*.
[120] *Ibid*. ¶ 79.
[121] *Native Women's Assn. of Canada v. R.*, [1994] 3 S.C.R. 627 (denial of funding to applicant to attend Charlottetown Conference did not violate her freedom of expression) and *Delisle c. Canada (Sous-procureur général)*, [1999] 2 S.C.R. 989 (R.C.M.P. members rights not violated in not being allowed to form an independent employee association for R.C.M.P. members). In the first case, if the Court were to impose a positive obligation, this would have required the government to fund the applicant to attend the conference in order to realize her constitutional rights. The second case goes beyond mere non-interference by the government in the applicant's right to form an employee's association but involved the active legislative policy by the government to forbid such association.
[122] *Supra* note 47.

that the government had a positive obligation to provide access to the internal police report under discussion in that case. The decision in *Criminal Lawyers' Association* appears to be under appeal; as such, this issue may be re-addressed at least one more time.

Conclusions

Access to law-related information means access to fundamentally important types of information that can greatly affect the legal rights of the average citizen. This access – to print or online materials – covers a broad range of information, including legislation, case law, government information, personal information (such as health or credit information) and secondary legal literature. Access to this sort of information is critical in a democracy that follows the rule of law since such access helps to ensure transparency in governmental action and the ability of average citizens to learn of and protect their basic legal rights. Freedom of expression and the right to receive information is recognized both at international law and by many countries throughout the world. In Canada, although there is no specific *Charter* right to access information, access to information legislation provides mechanisms for citizens to access certain government information that is often law-related, and the relatively strong enforcement of the "open courts" principle ensures that most court-related information will be relatively accessible. Canadian courts have interpreted the s. 2(b) freedom of expression right to include the right to receive and impart information, but these decisions reinforce the notion that the right to receive information, being a corollary to the s. 2(b) freedom of expression right, only prohibits undue restrictions by government on the exchange of information (i.e., it "prohibits gags") but does not impose positive obligations on government to provide information (i.e., it does not "compel the distribution of megaphones").

This is not to say, however, that in the appropriate cases, as suggested by the Supreme Court of Canada in *Haig*, that the government may be required to take active steps to ensure a meaningful exercise of freedom of expression or the right to receive information as part of the s. 2(b) *Charter* right. As suggested by the Court in *Haig*, "a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required" that might "take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information."[123] In the context of law-related information, for information such as case law or legislation, where there is an obligation or duty on the courts or governments to create such information, ensuring public access to this kind of information would certainly seem to fall within this type of s. 2(b) freedom of expression as envisioned in *Haig*. For other types of government information that falls within categories within access to information legislation where there are exceptions to disclosure (such as "government relations" or "economic interests"), courts are less likely to extend the freedom of expression right to impose an obligation for the government to disclose such information where the balancing of interests can otherwise be achieved under the applicable access to information legislation. The question of how effectively access to law-related information is realized is dealt with in the next chapter regarding complexities within the Canadian legal system and how these complexities impact access to law-related information.

[123] *Supra* note 122.