CHAPTER 3

EXEMPTIONS AND CABINET CONFIDENCES: SAYING NO

Perhaps the most crucial part of any access to information or data protection statute is the series of exceptions to the rule of openness or privacy protection which it contains. A series of exemptions protects a variety of interests, both governmental and non-governmental. If either a record or personal information—or part thereof—comes within a specific exemption, then the government will be justified—or in some cases required—to refuse disclosure of all or part of the information sought. The government institution, however, must cite the statutory ground in the *Access to Information Act* or *Privacy Act* upon which the exemption is based or would be based if the record existed. At present, the department or agency is not required to confirm whether a particular record or specific personal information actually exists, since disclosure of its existence or non-existence may be the exact thing that needs to be withheld. Each government institution must "sever" exempted portions of records and provide access to the rest—solely, however, under the *Access to Information Act*.

Exemptions are very difficult to draft; however, the precise terms used in the statute are crucial in determining how open the government must be. The Department of Justice has clearly set out the drafting issue:

> The exemptions are based on either an "injury test" or "class test." Some exemptions are discretionary, while others are mandatory. Exemptions which incorporate an "injury test" take into consideration whether the disclosure of certain information could reasonably be expected to be injurious to a specified interest. Information relating to activities essential to the national interest, the security of persons or their commercial affairs are examples. "Class exemptions" refer to a situation in which a category of records is exemptable because it is deemed that an injury could reasonably be expected to arise if they were disclosed. An example of this is information obtained in confidence from the government of a province or an institution thereof.
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> Discretionary exemptions allow the head of a government institution to decide whether the exemption needs to be invoked. Mandatory exemptions provide no discretion to the head of the government institution, and must be invoked.
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> ... The confidences of the Queen's Privy Council for Canada [in practical terms, the Cabinet] that have been in existence less than twenty years are excluded from the provisions of the Act by virtue of section 69. Unlike the decision to apply an exemption, the decision to exclude records, pursuant to section 69 is not subject to review by the Information Commissioner or the Federal Court, and neither the Information Commissioner nor the Federal Court has the authority to examine such documents.[1]

The Information Commissioner has reported that some records are being withheld under mandatory exemptions where no harm would arise from their release.[2] In an important court decision,[3] Associate Chief Justice Jerome was called upon to consider the application of a discretionary exemption in the *Access to Information Act*. The court held that once it determined that a record came within the class of records referred to in this particular discretionary exemption [sec. 21(1)], the right of the applicant to disclosure is subject to the discretion of the government institution. Moreover, the court decided that in such circumstances, it will not review the exercise of discretion by the government institution, once it had determined that the record indeed falls within the exempt class of records. It was irrelevant that the Information Commissioner in that case had reviewed the record and was arguing for its disclosure—presumably trying to persuade the government institution that no injury would result from its release.

The Committee is very concerned about a situation in which harmless records are being withheld under statutes designed to promote disclosure. It is likewise concerned about the existence of mandatory exemptions in the two Acts, under which government officials "shall" maintain secrecy—even though no discernible injury might result from the disclosure of particular records. Accordingly,