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Via email: william.pentney@justice.gc.ca; yaprak.baltacioglu@tbs-sct.gc.ca; Ian.McCowan@pco-bcp.gc.ca

Mr. William F. Pentney
Deputy Minister of Justice and Deputy
Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Ms. Yaprak Baltacioglu
Secretary of the Treasury Board of Canada
90 Elgin St
Ottawa, ON K1A 0R5

Mr. Ian McCowan
Deputy Secretary to the Cabinet (Legislation
and House Planning/Machinery of Govt)
Privy Council Office
Langevin Block, 80 Wellington Street
Ottawa, ON K1A 0A3

Dear Ms. Baltacioglu and Messrs. McCowan and Pentney:

Re: Repeal or Amendment of Provisions of Bill C-59, the *Economic Action Plan 2015 Act, No. 1*, relating to Access to Information

I am writing on behalf of the National Privacy and Access Law Section of the Canadian Bar Association (the CBA Section). The CBA Section urges the Government to introduce legislation to repeal the retroactive provisions introduced by Bill C-59, the *Economic Action Plan 2015 Act, No. 1*. It also recommends that the Government take all necessary steps to eliminate the barriers in Bill C-59 that prevent the Information Commissioner from fully discharging her mandate.

The CBA is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. Our primary objectives include improvement in the law and in the administration of justice. The National Privacy and Access Law Section's mandate is to review and influence privacy and access to information law and policy.

The Supreme Court of Canada has held that the *Access to Information Act* (ATIA) is a quasi-constitutional law, in part because of the paramountcy provision in section 4(1) of ATIA. The right of access under ATIA is subject to the Act, "but notwithstanding any other Act of Parliament." An

independent Officer of Parliament, the Information Commissioner of Canada, is responsible for overseeing the conduct of government institutions, including the RCMP, in complying with the Act.

In a May 2015 report, the Information Commissioner described her concerns about certain actions by the RCMP in response to an access to information request. She was also critical of provisions of Bill C-59 enacted to oust the application of ATIA retroactively in respect of those actions. The main points are as follows:

On March 27, 2012 a complainant requested the following records from the RCMP under ATIA:

An electronic copy of: a) all records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms and are under the control of the Commissioner of Firearms; and b) all records related to the registration of firearms that are neither prohibited firearms nor restricted firearms that are under the control of each chief firearms officer. [translated]

The request added, "I would like to have access to the Firearms Registry database." [translated]

On April 13, 2012, the Information Commissioner wrote the then Minister of Public Safety and Emergency Preparedness to inform him that any records for which a request had been received under ATIA were subject to the right of access and could not be destroyed until a response had been provided under the Act and any related investigation and court proceedings were completed. The Minister responded on May 2, 2012, providing assurances that the RCMP would abide by the right of access described in section 4 of the Act.

Between October 25 and October 29, 2012, the RCMP destroyed all electronic records of non-restricted firearms, with the exception of those belonging to Quebec residents.

On January 11, 2013, the RCMP provided a response to the requester.

On February 1, 2013, the Information Commissioner received a complaint that additional records should exist and that the RCMP response was inadequate. After the Office of the Information Commissioner (OIC) investigation, the Commissioner concluded that the RCMP response was incomplete.

The Commissioner concluded that the RCMP destroyed responsive records with the knowledge that these records were subject to the right of access guaranteed by section 4(1) of ATIA. The Commissioner referred the matter to the Attorney General of Canada for possible obstruction of the right of access under section 67.1 of ATIA.

The final Report of the Information Commissioner including her facts, findings and recommendations is available at http://www.oic-ci.gc.ca/eng/registre-armes-depaules_long-gun-registry.aspx.

On May 7, 2015, the Government introduced Bill C-59, the *Economic Action Plan 2015 Act, No. 1*. It received Royal Assent on June 23, 2015. The sections of concern to the CBA Section – sections 230 and 231 – came into force on July 1, 2015. Sections 230 and 231 amend the *Ending the Long-gun Registry Act* (ELRA).

Section 29 of the ELRA authorizes the destruction of records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms. Section 230 of Bill C-59 amended section 29 of the ELRA to exclude the operation of the ATIA retroactive to October 25, 2011, the date on which the ELRA was introduced in Parliament. It ousts the application of the ATIA in several areas, in particular:

- the provisions guaranteeing the right of access (section 4)
- the right to make a complaint (section 30)
- the Commissioner's investigative powers (section 36)
- the Commissioner's power to make recommendations and report on the findings of an investigation (section 37)
- the right of requesters and the Commissioner to seek judicial review before the Federal Court (sections 41, 42 and 46).

Section 230 of Bill C-59 retroactively prevents the application of the ATIA offences of obstructing the Commissioner in the performance of her duties and functions (section 67) and obstructing the right of access, including obstruction by destroying records (section 67.1).

Section 230 requires that any request, complaint, investigation, application, judicial review, appeal or other proceeding under the ATIA in existence on or after October 25, 2011, be determined in light of the fact that the ELRA, as amended, retroactively excludes the operation of the Act. This would effectively render any action taken under the Act in relation to the Long-gun Registry void.

Section 230 provides that the ELRA retroactively supersedes any other Act of Parliament in the event of any inconsistency and that the destruction of the records shall take place despite any requirements to retain the records or copies contained in any other Act.

Finally, section 231 provides that no administrative, civil or criminal proceedings lie against the Crown for the destruction of the records related to the Long-gun Registry from the date the ELRA came into force, April 5, 2012. This section also provides that no administrative, civil or criminal proceedings lie against the Crown for any act or omission done in purported compliance with the ATIA between October 25, 2011, and the coming into force of section 231.

The CBA Section is concerned about the retroactive denial of a quasi-constitutional right of access supported by blanket immunity for all officials responsible for the destruction of records during an ongoing investigation under ATIA.

We are mindful of the Government's commitment in the Speech from the Throne that it will not interfere with the work of parliamentary officers. We are also mindful of the mandate letters of the Minister of Justice, Minister of Democratic Institutions and the President of the Treasury Board calling on them to work to enhance the openness of government. As described above, several provisions in Bill C-59 inhibit that openness and represent an unwarranted interference with the work of the Information Commissioner. These provisions should be repealed.

Yours truly,

(original signed by Eugene Oscapella for Laura W. Davison)

Laura W. Davison
Chair, CBA Privacy and Access Law Section