February 28, 2005

Via Courier
Via Fax

Paul Zed, M.P., Chair
House of Commons Subcommittee on
Public Safety and National Security
Room 647, 180 Wellington Street
Ottawa, Ontario K1A OA6

Dear Mr. Zed:

I welcome the opportunity to join other Canadian Information and Privacy Commissioners and Ombuds in assisting the Subcommittee in its critical endeavour.

As the Information and Privacy Commissioner of Ontario, I provide comment on legislative and program developments that affect transparency in government as well as the personal privacy of Ontarians. The *Anti-Terrorism Act* (*ATA)* introduced profound changes in Canadian law. Further changes have followed. While I continue to acknowledge the need to protect public safety, I believe that certain developments needlessly undermine the access and privacy rights of Canadians across the country.

My comments and recommendations are tied to three broad themes: 1) the case for additional oversight, 2) state surveillance and 3) government secrecy.

The Case for Additional Oversight

Canada is a modern democracy committed to the rule of law. The fight against terrorism is, of course, a valid cause; nonetheless, all who participate in such causes are vulnerable to error and excess. In order to ensure that derogations of fundamental rights and liberties remain limited and proportional, democracies today must provide for fair, effective, and independent oversight of the activities of law enforcement and intelligence agencies.

By a New Independent Agency

Since 2001, law enforcement and intelligence agencies, including the Royal Canadian Mounted Police (RCMP), the Canadian Security Establishment (CSE), and the Canadian

Border Service Agency (CBSA), have been granted new and unprecedented national security powers. Their budgets have grown. By comparison, independent oversight has shrunk dramatically. Neither the RCMP nor the CBSA benefit from an ongoing independent audit. CBSA officers are not subject to an independent complaints regime. The Security Intelligence Review Committee (SIRC), the agency that audits the Canadian Security Intelligence Service (CSIS), operates on a restricted budget, as does the CSE Commissioner whose responsibilities are set to expand under the *Public Safety Act*.

In my view, it is crucial that there be a rebalancing. Accordingly, I support calls for the creation of an independent, arm's-length audit agency mandated to report annually to Parliament on the propriety of all anti-terrorism and national security intelligence activities. Oversight should also be provided in respect of the use of the "security certificate" provisions under the *Immigration and Refugee Protection Act.*

The new agency could provide a fuller report to a new bipartisan Parliamentary intelligence oversight committee, should such a body be established. The agency would provide the Minister of Public Safety and Emergency Preparedness with an unedited report. It would be desirable if the agency were permitted to publicly declare that, in its view, the Minister had unreasonably sought out redactions.

Parliament would need to determine whether the agency would work alongside or encompass the functions of SIRC and the CSE Commissioner. In any case, all such oversight commissioners should be nominated by an all-party committee of the House of Commons and appointed by the Governor-in-Council with sufficient security of tenure to ensure independence.

By Parliament

When Bill C-36 was first introduced, I was very concerned that it was not subject to a sunset clause. To its credit, the government of the day and Parliament passed amendments that "sun-setted" investigative hearing and preventative detention powers.

I still firmly believe that we must take additional steps to ensure that Parliament will continue to carefully consider the demonstrated effectiveness and continued necessity of the wide-ranging powers afforded to law enforcement and intelligence agencies under anti-terrorism legislation. At a minimum, I believe that further periodic Parliamentary reviews are needed.

However, even mandatory review does not provide sufficient guarantee of an appropriate response thereafter. I urge the Subcommittee to be very mindful that a further sunset provision may be required in order to ensure that measures brought in to arm the country in a "war on terror" do not linger unnecessarily to the detriment of our cherished rights and freedoms. Subjecting the broad definition of "terrorist activity" to a sunset clause might be a limited but effective way to provide the discipline so vital to our common interests in both security and freedom.

State Surveillance

The rule of law also requires that intrusive powers be subject to rigorous judicial and Parliamentary oversight.

Wiretapping

The *Anti-Terrorism Act* exacerbated an anomaly in the laws governing wiretap surveillance. In order to deploy an investigative method as intrusive as wiretapping, CSIS has long been required to first convince a federal court judge that other less intrusive investigative methods are likely to prove inadequate. In my view, reasoning applicable to national security investigations should be no less applicable to anti-terrorist investigations.

Routine Surveillance

As the above suggests, Parliament has generally insisted that intrusive surveillance be subject to prior judicial authorization. Warrant-less surveillance has been the exception, while ongoing surveillance of the general public is unprecedented. And yet today, Canadians face the rapid evolution of systems of routine surveillance.

In my view, privacy and access rights and the critical safeguards needed to protect them have not been provided for in the following areas: Canada Custom's API/PNR traveller database program and the government's development of traveller watch lists and "No Fly" lists.

To date, these programs have not been adequately codified in a statute debated before the House of Commons. It is critical that this Subcommittee press the Government of Canada to ensure that all such developments be subject to full Parliamentary supervision.

In this regard, I urge Parliamentarians to ensure that all travel surveillance programs, including Customs, CSIS, and RCMP passenger data-matching programs, are confined to purposes specifically related to terrorism and transportation security. It is equally critical that Parliament ensure that any "watch list" criteria are reasonable and proportionate. Moreover, individuals who believe that they may be on a list should have a clear statutory right to request access and correction of their personal information, as well as a fast and fair means by which they can appeal their designation on any list.

Government Secrecy

Finally, democracies depend on both a free press and an informed citizenry to secure an open and just society. An open and adversarial justice system is critical.

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As an adjudicative tribunal authorized to issue binding orders that provide for or preclude the disclosure of information, I realize that a vigorous right of access to information must be balanced alongside the appropriate protection of privacy and confidentiality. The need for *balance* does not lessen in the face of legitimate concerns about national security. Transparency and openness in government, values essential to a free and democratic society, must remain in the scales even when some greater priority requires their temporary and limited restriction. Indeed, in this era, our duty is to ensure that these values suffer no greater sacrifice than is absolutely necessary. Regrettably, several features of the *Anti-Terrorism Act* needlessly derogate from these values.

Secret Hearings

Anti-Terrorism Act amendments to the *Canada Evidence Act* (*CEA*) violate the open courts principle. It is my belief that even if it is *sometimes* necessary to hold hearings in private, it is perilous to *require* that *all* national-security related hearings be held *in camera* and *secretly,* subject only to the discretion of government. Such hearings should be exceptional, at the discretion of the judiciary, and held in private only to the extent necessary to protect the disclosure of the information in dispute.

The Test for Non-Disclosure

I am also concerned that government is now entitled to keep information secret merely because it has been "obtained in confidence from, or in relation to, a foreign entity", or because it is *related* to "national defence or national security". Under this test, misdeeds, errors, and embarrassments "related" to national security could be shielded behind an Attorney General's section 38.12 certificate.

In my view, the Subcommittee should revisit the balance struck prior to the enactment of the *Anti-Terrorism Act.* Only when the risk of an appreciable injury to national security or national defence outweighs the public interest in disclosure should an exception to the rule against secrecy be permitted, and then, only by a judge. Even at that, information that can be severed and disclosed should be provided quickly. It also seems reasonable to suggest that Canada's capacity to appropriately obtain confidential information from its allies could be well protected under properly defined national security or defence grounds.

Secret Evidence

Building on *Immigration and Refugee Protection Act* (*IRPA)* procedures devised to determine whether non-citizens may be detained and deported as security threats, the *Anti-Terrorism Act* allows the Government of Canada to deregister charities and list individuals and organizations as terrorist "entities" on the basis of secret evidence. While the government cannot be expected to reveal information to suspected terrorists that might, for example, expose its "human sources" to harm, the secret evidence provisions do not, in my view, adequately accommodate either an impugned person's or the public's interest in fairness and transparency. Drawing on my office's access to information expertise in judicial review proceedings involving sensitive materials, I recommend a security-sensitive model using "special counsel".

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Special Counsel

Upon a sworn undertaking not to disclose the information to *anyone* and that counsel has not nor will act for the party seeking it in any related capacity, special counsel should be permitted full access to the confidential record and be granted standing at all *in camera* hearings. In this manner, special counsel could vigorously challenge both the substance of the accusations and the extent of non-disclosure, the court would have the benefit of hearing full argument from all sides, and the public interest in reasonable transparency, the protection of privacy, and fairness would be enhanced. In deference to legitimate concerns about national security and defence, it might be reasonable for a judge to insist that special counsel be security-cleared.

In my view, it would be desirable if such security-cleared special counsel were permitted to participate fully in all *in camera* federal court hearings arising from or leading to proceedings capable of imposing a significant legal sanction. Such special counsel could be: nominated by law societies, bar associations, and community service organizations; subject to security clearance upon acceptance of a nomination; and appointed by an all-party committee of the House of Commons. An enhanced feature would be for such special counsel to serve within an arm's-length agency – an *Independent Advocates Office.* Since there should be few "security certificate" (*IRPA),* deregistration and listing (*ATA),* and section 38 *CEA* proceedings, funding of an *Independent Advocates Office* should not represent an undue financial burden.

Conclusion

In aid of your deliberations, I attach a summary of my recommendations. If I can be of any further assistance, please do not hesitate to contact my offices.

Sincerely yours,

Ann Cavoukian, Ph.D.
Commissioner

cc: The Honourable John Reid, P.C., Information Commissioner of Canada
Ms. Jennifer Stoddart, Privacy Commissioner of Canada
Senator Joyce Fairbairn, Chair, Special Committee on the *Anti-Terrorism Act*

Summary of IPC/O Recommendations

Commissioner Ann Cavoukian urges Parliamentarians to consider the following recommendations in the course of the current *Anti-Terrorism Act* review:

The Case for Additional Oversight

By a New Independent Agency

The Government of Canada should create an independent arm's-length audit agency mandated to report annually to Parliament on the propriety of all anti-terrorism and national security intelligence activities. Oversight should also be provided in respect of the use of the "security certificate" provisions under the *Immigration and Refugee Protection Act*. Such an agency could provide a fuller report to a new bipartisan Parliamentary intelligence oversight committee, should such a body be established. The agency would provide the Minister of Public Safety and Emergency Preparedness with an unedited report. It would be desirable if the agency were permitted to publicly declare that, in its view, the Minister had unreasonably sought out redactions.

Whether the agency would work alongside or encompass the functions of SIRC and the CSE Commissioner, all oversight commissioners should be nominated by an all-party committee of the House of Commons and appointed by the Governor-in-Council with sufficient security of tenure.

By Parliament

Parliament should be required to conduct further periodic reviews of anti-terrorism legislation.

The Subcommittee should consider subjecting the broad definition of "terrorist activity" to a sunset clause as a limited but effective way to ensure that measures brought in to arm the country in a "war on terror" do not linger unnecessarily to the detriment of our cherished rights and freedoms.

State Surveillance

Wiretapping

The *Criminal Code* wiretap surveillance provisions should be amended to ensure that, absent exigent circumstances, police first be required to convince a judge that other less intrusive investigative methods are likely to prove inadequate.

Routine Surveillance

All traveler surveillance programs should be subject to Parliamentary scrutiny, confined to statute and limited to purposes specifically related to terrorism and transportation security.

Any watch list or "No Fly" list criteria should be reasonable, proportionate, and set out in statute. Individuals who believe that they are on a list should have a clear statutory right to request access and correction of their personal information, as well as a fast and fair means by which they can appeal their designation on any list.

Government Secrecy

Secret Hearings

The *Canada Evidence Act* provisions dealing with national security-related hearings should be amended in accordance with the open courts principle. Secret hearings should be exceptional, at the discretion of the judiciary, and held in private only to the extent necessary to protect the disclosure of the information in dispute.

The Test for Non-Disclosure

An exception to the rule against secrecy should only be permitted, when a judge is satisfied that the risk of an appreciable injury to national security or national defence outweighs the public interest in disclosure. Even at that, information that can be severed and disclosed should be. Canada's capacity to appropriately obtain confidential information from its allies could be well protected under properly defined national security or defence grounds.

Secret Evidence and the Need for Special Counsel

Special security-cleared counsel should be mandated to participate fully in challenging both the substance of the accusations and the extent of non-disclosure in all *in camera* federal court hearings arising from or leading to proceedings capable of imposing a significant legal sanction. Such special counsel could be: nominated by law societies, bar associations, and community service organizations; subject to security clearance upon acceptance of a nomination; appointed by an all-party committee of the House of Commons; and serve within an arm's-length agency – an *Independent Advocates Office* - funded by government.