ENFORCEMENT: PROCESS AND PRACTICE

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2) the process for establishing the model and the cost, such as the appointment process, the length of the term and the tenure, and the number of cases and complaints processed.

3) Finally, we looked at the practicalities of the model and the benefits (or obstacles) for the users, for example the costs and timeliness.

In the name of transparency, I want to tell you upfront that I prefer the third model that will be discussed . . . the one in which there is an intermediate body, such as a Commission or Commissioner with the power to order and sanction.

Ok, having said that . . . the first model that I mention provides for appeals directly to the judiciary. This model is used in places such as South Africa and the federal United States. When a request for information is denied, the solicitor must appeal to the federal court in the US case or the High Court in the South African case. The main benefits of such a model are that the courts have the power to order the release of information if inappropriately denied and that they determine the matter *de novo*. In other words, though they may give deference to the agency that has made the initial decision, they address the case as if it is the first determination.

However, there are a number of disadvantages to this model. As discussed above, the main principles for the enforcement model must be that it is timely, affordable, and accessible. For most citizens, the courts are neither accessible nor affordable. For success in this model, the information requestor may need to hire an attorney or advocate and pay the many court costs. Although the United States Freedom of Information Act provides that these cases should take precedence on the court calendar, it can still take many months or years to hear the cases, thus making moot the need for the information. The cost, the time it takes, the difficulty for citizens in accessing the courts . . . all having a chilling effect on the utilization of this enforcement mechanism. There is also the costs for the government and the burden on the court system. In a recent in case in South Africa that went to the High CourSo Iyime it

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the good will of the agency to follow recommendation, or at least the fear of public animosity when annual compliance reports are released.

In Canada where this model is used at the federal level, it was desirable to create a body that was both informal and non-adversarial. The limited power commissions provide for a more speedy resolution, they are often free to the person submitting the appeal, cost less for the government, and they are specialist as they focus only on the access to information law. In Hungary in 2001, the Information Commissioner received 828 petitions for investigation and took an average of only 52.6 days to fully process the cases. In New York State the Commission received 648 written advisory opinions and 4,829 telephone inquiries. The budget for this Commission is only $300,000 US.

Over time, however, even an enforcement body vested with these more limited powers may become increasingly formalistic, contentious and slow. Moreover, without some power to order or sanction inappropriate denials, the enforcement body may be ignored or as the Canadian Information Commissioner in his 2000 report stated, he may find himself in the “unprecedented position of seeking ways to encourage public officials to obey mandatory legal obligations.” Moreover, in a major review conducted in 2002 of the Canadian Access to Information Act, the task force found that “giving the Commissioner power to make binding recommendations may well provide more incentive to departments to respect the negotiated undertaking to respond within a certain time-frame . . . it is more rules-based and less ad hoc . .. this results in a consistent body of judhe C