In Memoriam

R. Peter Gillis
1947—1999

A public servant who served the values of openness and privacy with distinction

Annual Report
Information Commissioner
1998-1999

“The self shines in space through knowing.”

— The Upanishads —

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"The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exemptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government."

Subsection 2(1)
Access to Information Act

June 1999

The Honourable Gildas Molgat
The Speaker
Senate
Ottawa, Ontario
K1A 0A4

Dear Mr. Molgat:

I have the honour to submit my annual report to Parliament.

This report covers the period from April 1, 1998 to March 31, 1999.

Yours sincerely,

Hon. John M. Reid, P.C.

June 1999

The Honourable Gilbert Parent, MP
The Speaker
House of Commons
Ottawa, Ontario

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Mandate

The Information Commissioner is an ombudsman appointed by Parliament to investigate complaints that the government has denied rights under the *Access to Information Act*—Canada's freedom of information legislation.

Passage of the Act in 1993 gave Canadians the broad legal right to information recorded in any form and controlled by most federal government institutions.

The Act provides government institutions with 30 days to respond to access requests. Extended time may be claimed if there are many records to examine, other government agencies to be consulted or third parties to be notified. The requester must be notified of these extensions within the initial time frame.

Of course, access rights are not absolute. They are subject to specific and limited exemptions, balancing freedom of information against individual privacy, commercial confidentiality, national security and the frank communications needed for effective policy-making.

Such exemptions permit government agencies to withhold material, often prompting disputes between applicants and departments. Dissatisfied applicants may turn to the Information Commissioner who investigates applicants' complaints that:

- they have been denied requested information;
- they have been asked to pay too much for copied information;
- the department's extension of more than 30 days to provide information is unreasonable;
- the material was not in the official language of choice or the time for translation was unreasonable;
- they have a problem with the Info Source guide or periodic bulletins which are issued to help the public use the Act;
- they have run into any other problem using the Act.

The commissioner has strong investigative powers. These are real incentives to government institutions to adhere to the Act and respect applicants' rights.

Since he is an ombudsman, the commissioner may not order a complaint resolved in a particular way. Thus he relies on persuasion to solve disputes, asking for a Federal Court review only if he believes an individual has been improperly denied access and a negotiated solution has proved impossible.

First impressions

A new information commissioner's first annual report to Parliament is a golden opportunity for looking forward, making predictions and setting goals. The past (at least before July 1st of 1998, when this commissioner took office) was on someone else's watch; the next seven years are this commissioner's responsibility and preoccupation.

A tribute well-earned

Yet, the only fitting way to begin this term of office is to look back long enough to pay tribute to the former information commissioner, Dr. John W. Grace. For seven years from 1983 to 1990, Dr. Grace was Canada's privacy commissioner. Thereafter, from 1990 to 1998 he led the effort to make government more open, as information commissioner. In a fundamental way, those two roles, especially in his capable hands, were complementary. Both rights—the right to know and the right to privacy—shift power in a very real sense from the state to the individual citizen. Each right is enriched through respect for the other.

By his own admission, presiding over the *Access to Information Act* was, by far, the greater challenge. Public officials have an instinctive affinity for the right of privacy (especially their own!) which does not exist when it comes to openness. With the consummate skills only the most seasoned of parents possess (six children in his case), John Grace guided the access law through its troubled adolescence and into its young adulthood.

Canadians owe John Grace a debt of gratitude for his unwavering resolve to make public officials obey, if not embrace, Parliament's instruction to reduce secrecy in government. He made it a virtue to resolve cases outside the courtroom. Yet, Dr. Grace's successful court cases—one against former prime minister Brian Mulroney (to force disclosure of unity polls)—showed that there was an iron fist in his velvet glove. Even his parting public polemic—urging the government not to proceed with its plan to replace him with a public service insider—reminded parliamentarians, the government and the public that John Grace's service to Canada was more than a job, it was a passionate calling. And all of this, John Grace accomplished with wisdom, civility, wit and charm—all aptly captured in the word "grace."

Hallmark of independence

The process of appointing a new information commissioner showed how determined parliamentarians are to have a fiercely independent information commissioner. They made it clear that the government's first nominee, a long-time senior bureaucrat, did not have sufficient distance from government to satisfy the requirement of independence. To the first nominee's credit, she was

sensitive to the concerns of parliamentarians and voluntarily withdrew her name.

Further, members of both houses of Parliament insisted on having the opportunity to put questions to this commissioner before voting on his appointment. This pre-appointment scrutiny, a first for the House of Commons and Senate, was a healthy development in the appointment process for officers of Parliament (information commissioner, privacy commissioner, commissioner of official languages, chief electoral officer and the auditor general). There may be arguments against such a process for other appointees, but it seems eminently well-suited for officers of Parliament.

For this new Information Commissioner, who took up his duties on the 1st of July, 1999, the 15th anniversary of the Proclamation of the *Access to Information Act*, the new role comes as an unexpected career bonus. Along with Jedd Baldwin, MP (Progressive Conservative from Peace River), the new Information Commissioner was, as a Liberal MP, one of the promoters of the idea of access to information in the early 1970s. He had the privilege of authoring parts of the Access Act. The approval of his nomination by both Houses of Parliament gives him a unique opportunity to continue the work he started almost three decades ago.

On this issue of independence of the Information Commissioner, it is necessary to open a parenthesis. The cabinet minister in whose portfolio the Information Commissioner falls is the Minister of Justice. This relationship is unfortunate. It undermines both the actual and apparent independence of the commissioner. After all, the Minister of Justice is also the adversary in all litigation undertaken by the Information Commissioner. At this writing, the Minister is also party to litigation seeking to limit the scope of the commissioner's jurisdiction. One must bear in mind, too, that the Minister of Justice is the legal adviser to all departments against whom complaints to the Information Commissioner are made by the public.

This is not the kind of relationship where the Minister should have, as she does, control over the submission to Treasury Board of the Information Commissioner's requests for resources. However careful the Minister may be not to interfere, as long as there is the possibility of holding the Information Commissioner's resources to ransom, the appearance of independence is undermined.

Because of this potential for improper interference, it is time for the Office of the Information Commissioner to be moved out of the Justice portfolio. There are other more comfortable "homes" for it, which do not find themselves, on any regular basis, in an adversarial position vis-à-vis the commissioner. Either the Deputy Prime Minister or the Government House Leader or, perhaps, the President of the Treasury Board—the Minister responsible for the Access Act—could take the responsibility of being the cabinet member in whose

portfolio the Office of the Information Commissioner falls. This proposal has been made to the government and it is under consideration.

Modernizing the access law

This issue of the independence of the Information Commissioner is but one of many which needs to be addressed in a thorough review of the *Access to Information Act*. Since the law's passage in 1983, there has been a sea change in the information technology and government organization environments in which the law operates. As early as 1986, the Justice Committee reviewed the operation of the access law and unanimously recommended wholesale changes to strengthen it and keep it current with technological changes. No government since has had the motivation to implement the suggested changes and address, through law, the persistence of a culture of secrecy in the federal bureaucracy.

Frustration over weaknesses in the law has recently spilled over into Members of Parliament, from all stripes in the House of Commons. They have become frequent users of the *Access to Information Act* as a more efficient means than the order paper for accessing government information. As a result, they, too, have been on the receiving end of the delays associated with endless handwringing, media line preparations and briefing notes to ministers. Members also are experiencing excessive secrecy due to the knee-jerk tendency of public officials to believe that, if any opposition MP wants a record, it must be damaging somehow to the minister or government.

From this frustration has grown a bumper crop of private members' bills (see pages 41-42 for details) proposing to strengthen the law—proposing to expand its coverage to more institutions such as crown corporations and to Parliament itself; proposing to restrict the scope of the law's exemptions which allow government to justify secrecy; proposing to create new offences for interfering with rights set out in the law; proposing to broaden the whole thrust of the law starting with a change of name from the *Access to Information Act* to the *Open Government Act*.

One private member's bill survived the procedural gauntlet in the House of Commons—where few such bills survive—and in the Senate, and has been proclaimed into law. The new provision, proposed by Ms. Colleen Beaumier, the MP for West-Mississauga, makes it an offence for anyone to destroy, alter, falsify or conceal a record with the intent to deny a right under the *Access to Information Act*. As well, it is an offence for anyone to propose, counsel or cause any other person to destroy, alter, falsify or conceal a record with the same intent. The maximum penalty upon conviction is a term of imprisonment of two years, a fine of ten thousand dollars or both.

The passage of Madam Beaumier's bill has sent a powerful message to public officials, elected and non-elected alike. Parliamentarians and their constituents cherish the right to know given them by the access law and will not tolerate any public

official who takes actions designed to thwart that right.

But this one change, important as it certainly is, is not enough. A comprehensive, public process for reform of the access law is overdue. And one of this commissioner's top priorities is to convince Parliament and the government to commence a public review of the *Access to Information Act* by a parliamentary committee.

The Office of the Information Commissioner is ready to assist in any non-partisan way with the reform process. In 1993-94, the former information commissioner put forward comprehensive proposals for change. These were supplemented in 1995-96 by detailed recommendations for reform of cabinet secrecy rules. (A consolidation of the Information Commissioner's proposals is found at Appendix I to this report). As well, many of the unanimous recommendations for change made by the Justice Committee in 1986 (after its review of the first three years of the law's operation) remain compelling. The bureaucracy, too, has examined the access law from every angle; it too, is ready to contribute to a public review of the *Access to Information Act*.

Parliamentarians and Canadians instinctively know the truth of the position recently articulated by the Supreme Court of Canada: the access law is an indispensable tool for ensuring an accountable government and a healthy democracy. Parliamentarians and Canadians instinctively know that governments distrust openness and the tools which force openness upon them. Parliamentarians and Canadians instinctively know that they, not governments, bear the burden of keeping the right of access strong and up-to-date.

Parliamentarians urged reform in 1986, but left the timing to successive Ministers of Justice. They all promised reform but none delivered. It is past due for parliamentarians and Canadians to insist, with passion and volume, that a strong right to know be part of our collective survival kit for the new millennium.

From the sublime to the ridiculous: delays

The great promise of the *Access to Information Act* was that the long-cherished culture in the public service—of "doing" governance in secrecy—would be changed. The promise has not been realized. The paternalistic belief by many public officials that they know best, what and when to disclose to citizens, remains strong. At the very highest levels of the bureaucracy, the official line on ethics for public servants stresses their "servant" role (i.e. being unseen, unheard, obedient, unaccountable) rather than their "public" role (being accountable, professional, obedient to the law and the public interest). The notion of ministerial accountability is, too often, taken to mean that the public should not know what public servants do or advise their ministers to do.

And one must ask whether this notion is really one of deference to elected

authority, or does it have a more self-serving purpose? Are public servants really concerned about preserving a relationship of candour with ministers or is their concern that the quality and nature of their advice will come under critical scrutiny?

The *Access to Information Act* has been successful in forcing public servants to disclose more information—but it has not changed the closed culture. And the clear evidence of the durability of the old ways is the system-wide crisis of delay in answering access requests. These delays illustrate the capacity of the public service (through design, incompetence or both) to thwart the clearly expressed will of Parliament.

Departmental report cards

In virtually all previous annual reports of the Information Commissioner, the problem of delay has been dealt with because delay complaints have been growing as a percentage of overall complaints. Now, delay complainants account for almost 50 per cent of all complaints. Yet, to a large extent, the problem has been hidden below radar detection because the Treasury Board does not collect and report the damning statistics to Parliament, though the Access Act says it should.

In the face of that paucity of data, the Office of the Information Commissioner conducted studies in 1996 into the performance of six departments: Citizenship and Immigration Canada (C&I), Foreign Affairs and International Trade (FAIT), Health Canada (HC), National Defence (ND), Privy Council Office (PCO) and Revenue Canada (RC).

In the 1996-97 Annual Report, the bad news was reported. In the 1997-98 Annual Report, the remedial initiatives taken by these departments were reported.

This year, after over a year to correct the problems, the statistics are in and these departments get their grades. From 35 to 85 per cent of requests received by those departments were not answered within statutory deadlines.

The grading approach

Parliament made it clear in the access law, that timeliness of responses was as important as the responses themselves. Subsection 10(3) of the Act deems a late response to be a refusal to give access. Consequently, the Information Commissioner has adopted, as the measure of performance, the percentage of access requests which have become "deemed refusals" under subsection 10(3). This standard is both objective and generous to departments. It is generous because it does not insist, as it could, that the measure of performance be the percentage of requests which are not answered within the 30-day statutory deadline. Rather, it only counts cases which have missed either the 30-day deadline or any extended deadline properly claimed by the departments. The extension provisions are generous and limited only by the requirement of "reasonableness."

The grading scheme, then, is as follows:

% of requests in deemed refusal	Status	Grade
0-5	Full compliance	A
5-10	Substantial compliance	B
10-15	Borderline compliance	C
15-20	Substandard compliance	D
20+	Red alert	F

Here, then, are the report card grade results. (Highlights of the performance reviews can be found at pages 70 to 94 of this report.)

Department	Grade	Request to deemed-refusal ratio
C&I	F	1764:864=48.9%
FAIT	F	252:88=34.9%
HC	F	645:330=51.2%
ND	F	629:438=69.6%
PCO	F	144:65=45.1%
RC	F	320::274=85.6%

Lessons

What are we to make of this record? There are a number of lessons. First, the crisis of delay in the system persists. Treasury Board has direct responsibility for the health of the access system. Its leadership is required to fix a system for which the President of the Treasury Board is made responsible by law. Start collecting the statistics which are necessary to monitor the health of the system and start leading the remedial efforts.

Second, the problem of delay can be fixed at modest cost when departments assign the appropriate priority to the problem, streamline their approval processes and give meaningful delegations of decision-making authority to the departmental access to information coordinator. Of those departments that receive large numbers of complex requests for sensitive records, many are able to respond in a timely manner. Even amongst those departments which have been poor performers, the problems have not proven to be insurmountable. Mention should be made of the success being achieved by Revenue Canada. It has taken its delay problem in hand by fundamentally re-engineering how it handles requests. As a result, it is clearly on the road to substantial compliance. RC is becoming the model of how to properly administer the access law, instead of being an example of a poor performer. Congratulations!

Third, and most important, we learn the lesson that, when it comes to response deadlines, the law needs teeth. There is a need for legal consequences when the right of access is undermined by means of delay. Delay is as grave a threat to the right of access as is document tampering or record destruction. Parliament has addressed the latter problem; it must now address the former. There are a number of "incentives" to be considered:

- remove the right to levy fees for late responses
- remove the right to invoke discretionary exemptions on late responses
- withhold performance bonuses from deputy heads of problem departments.

Step up or step aside

The various deputy ministers and ministers, who have presided over the non-compliant departments since 1983, bear the direct responsibility for the poor performance. As a result of an absence of proper attention to process and resource issues, the right which Parliament gave to Canadians—timely access to government-held information—has been thwarted.

But others, too, are responsible. Three government departments, which have leadership roles in ensuring that government is open and accountable, must shoulder their share of the blame. They are: Justice Canada, Treasury Board Secretariat (TBS) and the Privy Council Office (PCO). Last, but not least, Parliament, too, bears a share of blame for largely neglecting its oversight role for the past 16 years.

Privy Council Office (PCO)

The Prime Minister's department set a poor example by insisting from the beginning that the access system be sufficiently slow to enable PCO to continue to manage releases in a way most favourable to the government of the day. All politically sensitive requests require consultation with PCO before they are answered. One former clerk of PCO specifically directed that all information requesters be made to apply formally under the Act for even the most routine records. And PCO directed all departments to cease the long-standing practice of sharing information with the Information Commissioner during his investigations of complaints concerning Cabinet Confidences. Finally, PCO too often fails to respect the response deadlines when answering the requests it receives from the public.

Contrast this with the approach taken by the Clinton White House. Faced with a crisis of delay in answering freedom of information requests, President Clinton directed all federal government departments and agencies to adopt a radical change of attitude, clear up the backlog of requests, answer new requests promptly and find reasons to disclose information rather than the reverse. President Clinton said:

> "I am writing to call your attention to a subject that is of great importance to the American Public and to all Federal departments and agencies—the administration of the *Freedom of Information Act*, as

> amended (the Act). The Act is a vital part of the participatory system of government. I am committed to enhancing its effectiveness in my Administration. . . . Federal departments and agencies should handle requests for information in a customer friendly manner. The use of the Act by ordinary citizens is not complicated nor should it be. The existence of unnecessary bureaucratic hurdles has no place in its implementation. . . . This is an appropriate time for all agencies to take a fresh look at their administration of the Act, to reduce backlogs of *Freedom of Information Act* requests, and to conform agency practice to the new litigation guidance issued by the Attorney General."

No Canadian prime minister or clerk of the Privy Council has spoken out in support of a spirit of openness in administering the Access Act; none has decried and addressed the problem of delay.

Justice

Justice Canada, too, has a vital role in the good administration of the access law. The Minister of Justice is responsible for: 1) maintaining a broad overview of the application of the Act in relation to the intention of the government and the expectations of the public; 2) advising the President of the Treasury Board on any administrative questions giving rise to broad policy issues; 3) providing legal interpretation and advice respecting the provisions and operation of the Act; 4) gathering case and precedent information for use in the provision of legal interpretation and advice; and 5) coordinating the preparation of the government for any parliamentary reviews of the provisions and operations of the Act.

Justice has the most pervasive influence on how the access law is interpreted. Depending on its attitude and approach, the Act's exemptions will be applied restrictively or expansively. Yet no minister of Justice has shown leadership in transforming the culture of secrecy which pervades the public service. Justice Canada has never issued a public reminder to government institutions that the Act must be liberally interpreted so as to maximize the amount of disclosure. It fell to the courts to make that pronouncement. No minister of Justice has issued a reminder to officials that the response times are mandatory and that consistent failure to comply constitutes lawbreaking which will not be tolerated. Rather, Justice has fought efforts by the commissioner to enforce response times and Justice has argued before the courts that there should be no legal consequences for government institutions when response deadlines are ignored.

Contrast this with the approach taken by the Attorney-General of the United States. First, Ms. Reno joined President Clinton in issuing the directive of 1993 mentioned above. In 1995, she followed up by instituting work performance standards for all employees of her department having any involvement in the processing of freedom of information requests. These performance standards—against which employees are evaluated for purposes of pay and

promotion—place specific emphasis on the timeliness of work. Again, in 1997, Janet Reno wrote to all US federal agencies to remind them of the administration's fundamental commitment to open government and the maximum possible disclosure under the *Freedom of Information Act*.

Justice Canada has chosen to adopt the role of secrecy enforcer. Not only is that entirely contrary to the express will of Parliament, it explains why, as mentioned previously, Justice Canada should have no fiscal control over the Office of the Information Commissioner.

Treasury Board Secretariat

Finally, the Treasury Board Secretariat holds the lead central agency role in the administration of the *Access to Information Act*. The President of the Treasury Board is the Minister designated by Order-in-Council under the Act, to be responsible for ensuring that the government-wide approach to administering the law is consistent, professional, efficient and properly monitored to ensure accountability to Parliament.

This role was given to Treasury Board because of its responsibility under the *Financial Administration Act* for all matters relating to administrative policy in the Public Service of Canada. The *Access to Information Act* goes further and specifically requires the President of the Treasury Board to do the following:

1) prepare and distribute guidelines governing the operation of the Act;
2) prescribe all forms required under the Act;
3) prescribe what information is to be included in reports to Parliament on the administration of the Act;
4) keep under review the manner in which government records are maintained and managed to ensure compliance with the Act;
5) publish, at least once a year, an index of Government Programs and Government Information holdings, in sufficient detail to facilitate the exercise of the right of access; and
6) publish, at least twice a year, bulletins which update the index and which provide to the public other useful information relating to the operation of this Act.

As an integral part of these responsibilities, the Treasury Board Secretariat prepares a consolidated annual report to Parliament on the administration of the Act across government. Finally, it is the Treasury Board Secretariat's role to provide advice to access coordinators and other officials on any aspect of the administration of the Act and the policies developed by Treasury Board thereunder.

When it comes to the problem of delay in the system, Treasury Board has abdicated its responsibility. Not once, in the Act's 16 years, has Treasury Board formally acknowledged, let alone addressed, the problem of delay. Worse yet, it has consistently refused to collect statistics which would show the state of health of the access system.

In a recent letter to the Information Commissioner, the Secretary to the Treasury Board responded to the Commissioner's expressions of concern about delay in the system, in the following terms:

> "I should point out that over a period of time where departmental resources have been, at best, static, there has been a significant growth in both the volume and complexity of requests for information. Notwithstanding these difficult financial pressures, departments continue to meet the majority of requests within the time frames specified by the Act. Moreover, some of the requests, for example those to support private research projects, could never be fulfilled within the time allowed. Departments are also responding to frivolous and vexatious requests, and to a growing number of private sector professional requesters who make numerous and voluminous demands."

The Secretary is simply wrong (or has information which he is not sharing) on several counts. There has not been a significant growth in the number of access requests. Treasury Board's statistics show that the number of access requests received have remained relatively stable. If there is any trend, it is slightly downward. Over the past four years for which Treasury Board's statistics are available, requests received are as follows:

1994-95 — 12,861
1995-96 — 13,124
1996-97 — 12,476
1997-98 — 12,206

As for the complexity of requests, Treasury Board collects no statistics on this subject. In any event, complexity should not make meeting deadlines more difficult if the Act's extension provisions are properly utilized.

The Treasury Board also misunderstands the magnitude of the delay problem. Since the Act's passage in 1983, the highest percentage of request answered in 30 days was achieved in 1991-92; it was 67.8 per cent. Before and after that date, the performance has been dismal. For example in the most recent four-year period for which Treasury Board statistics are available, the percentage of requests answered within 30 days is as follows:

1994-95 — 53.6 %
1995-96 — 50.1 %
1996-97 — 48.0 %
1997-98 — 50.7 %

Especially troubling are the anecdotal, uninformed and defensive justifications for the poor performance, which even Treasury Board perpetuates. There is the argument, for example, that some requests (to support private research projects) "could never be fulfilled within the time allowed." As a matter of fact, the access law does not require departments to do "research"— it only requires them to "search" for requested records. Departments are under no obligation to create records (except reasonable electronic records) to respond to researchers' questions. Moreover, if processing a request involves extensive search through

large volumes of records, the time for response may be legally extended—and there is no limit to the amount of extra time which can be claimed if it is reasonably necessary to answer the request.

Finally, the old myth persists that the law is being abused by frivolous and vexatious requesters and by commercial users. In fact, there are, at most, a half-dozen commercial users. They obtain government information (after enduring lengthy delays and paying all required fees) to which they add value (such as indexing or analysis) and resell. There is nothing improper in this practice nor any evidence that these users place undue strain on the system. When commercial users are successful at reselling government information, it is not a loss to the taxpayer—to the contrary. These information businesses pay taxes and they help government institutions realize the commercial potential of their information holdings.

As for so-called frivolous and vexatious requesters—there are, happily, none in the system. No case is known to the Office of the Information Commissioner of an access requester whose purpose in making use of the Act is to attack, punish or interfere with the administration of any government institution. And let there be no doubt that the Information Commissioner would be the strongest opponent of any such abuse of the Act.

Crisis in information management

Treasury Board's failings do not end with the apparent lack of awareness of the nature and magnitude of the delay problem. Treasury Board has also failed to fulfil its legal obligation with respect to the most essential underpinning of an access to records regime—good information management in the government of Canada. Paragraph 70(1(a) of the *Access to Information Act* states:

> "... the designated Minister shall cause to be kept under review the manner in which records under the control of government institutions are maintained and managed to ensure compliance with the provisions of this Act and the regulations relating to access to records."

In the late 1980s, Treasury Board promulgated its policy on the management of government information holdings. A principle purpose of this policy was to ensure that the government's records would be retained and indexed in a manner which would facilitate the right of access. That was good work but it was only the blueprint and it never went into full execution. In the intervening years, the records management function in most government institutions has been seriously degraded. At the very time when government is transforming itself from a paper and central computing environment to decentralized LAN, WAN, PC and laptop environment, it has lost much

of its capacity to manage its information resources.

In a large majority of cases investigated by the Office of the Information Commissioner, the adequacy and completeness of the search is at issue. Departments are no longer able to determine with any reliability whether or not they hold records on particular topics and, if they do, where to locate them and how to retrieve them. Officers move and their diskettes and hard drives are disposed of (or taken with them). Electronic records are not routinely transferred to and stored in a central records memory system. There are no rules in force regarding the archiving of e-mail or voice-mail records. Old-technology electronic records are not readily accessible with current technologies. The spectacle we all recall of closing down the operation of Canada's military for a day to search for records relevant to the Somalia Commission of Inquiry (the so-called ND Easter egg hunt), taught a troubling lesson. For most large departments to find all records on a particular subject (which they must do in response to access requests)—almost all other activities would have to cease.

For example, at Health Canada, a requester sought all records concerning the bovine growth hormone rBST (see also pages 49 to 54). The requester was not satisfied that all relevant records had been located and complained to the Information Commissioner. In his report of the results, the issue of records management was addressed as follows:

> "Based on our cursory review of how records are generated, indexed, filed, stored and disposed of in BVD (Bureau of Veterinary Drugs), it is impossible for us to say, with any certainty, that all records relevant to your request have been located and processed. Put simply, there is no reliable way to determine which records are held by the department on a topic, where they are held and, if they cannot be located, whether they have been properly archived or destroyed."

That comment can be made of most government institutions subject to the access law. And yet, the designated minister whose job it is to monitor records management in order to ensure compliance with the access law has been deafeningly silent. Treasury Board does not know the scope of the problem, the reasons for it, nor has it proposed policy and resource directions for reform. There is no more egregious failing in the entire access system than this. The abysmal state of records management in the federal government puts at risk not only our right to know, but our national interest in a full historical record of public functions.

Shoot the messenger

If Treasury Board's failure to ensure good information management is its most egregious shortcoming, its failure to nurture and support the access to information coordinators across government is the Board's saddest legacy to date. The Board is well aware that these individuals are required by law to buck the

institutional cultures within which they work. It is their job to deliver to Canadians a timely right of access, subject only to limited and specific exemptions. Their supervisors, on the other hand, have quite different priorities—to manage sensitive issues to the best advantage of ministers and the government of the day. In the early days of the access law, all the forces of government were brought to bear on coordinators to force them to serve secrecy by applying exemptions in the broadest possible manner. The courts finally put an end to that practice. The next strategy was to avoid openness by delaying access responses as long as possible. Coordinators are not rewarded for doing well what the Act requires of them.

Treasury Board is well aware of this unfortunate reality. In 1988, it studied the problems faced by coordinators and it found they were underpaid and undervalued. Coordinators were and are victims of the shoot-the-messenger syndrome. Yet, the designated minister did not take steps to ensure that the coordinators were properly classified and treated within their home institutions. Rather, the Board chose to become an informal sounding board for coordinators (it held sporadic meetings with coordinators). The designated minister left it entirely to each institution to decide how it would classify, pay and treat its access coordinators. The coordinators got the message, loud and clear, that the designated minister would not stand up for those who experience hostile working conditions in their home institutions.

Only last year, the former information commissioner recommended that a code of professional conduct for coordinators be developed which would place obligations on ministers and deputy ministers to support coordinators in their difficult roles. Again, this year, the Information Commissioner offered to work with officials of Treasury Board to propose such a code which would be promulgated and monitored by the designated minister. As of this writing, the designated minister has not responded to these suggestions.

Parliament's role

In the *Access to Information Act* (subsection 75(2)), Parliament gave itself an important, ongoing role in monitoring the efficacy of the law. First, it required Parliament to designate a committee to undertake a comprehensive review of the provisions and operations of the Act within three years of the Act's passage. It also required this committee to report the results of its review and its recommendations for change to Parliament. (This review was carried out and the resulting, unanimous report was issued in 1986. The report is titled: Open and Shut: Enhancing the Right to Know and the Right to Privacy.) It should be noted that one of the review's recommendations was that there be a second comprehensive review to commence no later than 1989. No subsequent review has taken place.
In the Access Act (subsection 75(1)), Parliament also required itself to designate a committee to review, on a permanent basis, the administration of

the Act. The committee so designated is the House Standing Committee on Justice and Solicitor General. Firstly, Parliament required the Speakers of the House and Senate to table, in those chambers, the annual reports of the Information Commissioners. The Act also requires those annual reports to be referred to the designated committee to assist it in keeping the administration of the Act under review (see section 40).

Alas, after Parliament completed the three-year review in 1986, its interest waned in discharging the mandatory duties it imposed on itself. Not once, in 16 years, has the designated committee held a hearing to consider the annual report of the Information Commissioner. In fact, it has only called upon the Information Commissioner to appear during consideration of the Justice estimates. The estimates process occurs well in advance (between 31 March and 31 May) of the tabling of the commissioner's annual report which cannot be prepared until after March 31st, the end of the commissioner's fiscal year. The logistics of production, including translation, mean that the annual report cannot be ready before early June, just before Parliament's traditional summer recess.

This lack of interest by the designated committee in fulfilling its legal obligations gives it little moral authority to criticize government departments for failing in theirs. Former commissioner Grace opined in one annual report that his reports received such scant attention by Parliament that they might as well be sent by rocket to the moon as tabled in Parliament.

If the Justice Committee does not have the will or time to fulfil its statutory obligations under the Access Act, the job should be given to another committee. Since the Information Commissioner's reporting relationship is to both the House and Senate, this may be the time to assign the responsibility to a joint House-Senate Committee.

At the very least, the designated committee should set aside a day or two each fall during which the Information Commissioner could speak about his annual report and inform the committee about the state of health of the access system. This time period would also enable the committee to hear from the central agencies and individual institutions that have special responsibilities or shortcomings under the Act.

Investigations

In the reporting year, 1,670 complaints were made to the commissioner against government institutions (see Table 1), 49.5 per cent of all completed complaints being of delay (see Table 2). Last year, by comparison, 43.1 per cent of complaints concerned delay. It is clear that there remains a system-wide, chronic problem of non-compliance with the Act's response deadlines. Solving this problem remains the office's first priority.

Resolutions of complaints were achieved in the vast majority of cases (98.1 per cent of cases, to be precise). Table 2 indicates that 1,351 investigations were completed. In 18 cases it proved impossible to find a resolution. All will be brought before the Federal Court for resolution.

As seen from Table 3, the overall turnaround time for complaint investigations was reduced to 3.99 months from the previous year's 4.16 months. This improvement should not obscure the fact that the turnaround time is not acceptable; it does not meet the three-month period recommended by the Standing Committee on Justice and the Solicitor General in 1987. As well, Table 1 reminds us that the backlog of incomplete investigations continues to grow. Last year, it was 423, this reporting year 742 complaints. If resources for additional investigators are not forthcoming from government, Canadians risk being deprived of an effective avenue of redress for abuses of access rights.

During the year, the office conducted a thorough review of its resource needs in cooperation with Treasury Board. This so-called A-base review resulted in a submission to the Board for additional resources. At this writing, no decision has been taken by Treasury Board ministers.

The five institutions subject of the most complaints in 1998-99 are:

- Health Canada 336
- National Defence 289
- Indian and Northern Affairs Canada 158
- Revenue Canada 131
- Citizenship and Immigration Canada 110

Of course, the number of complaints does not, in itself, give a very meaningful measure of a department's performance. Many of these complaints concern delayed responses. For the most part, these departments apply exemptions professionally and with restraint.

At pages 70-94, the delay problems being experienced by Health Canada, National Defence, Revenue Canada and Citizenship and Immigration Canada are reviewed. The high number of complaints against Indian and Northern Affairs Canada does not

appear to be indicative of a systemic problem.

Investigative formality

During the reporting year, seven subpoenas were issued: two to heads of government institutions, two to deputy heads of institutions, one to a minister's executive assistant and two for the production of records. In two cases, the subpoena's were "friendly" in the sense that they were requested by the person to whom they were addressed in order to ensure that certain privileges were not lost when records or evidence was provided to the Information Commissioner.

The subpoenas issued to two deputy ministers and a minister's executive assistant were occasioned by the direct involvement of these individuals, in causing, exacerbating or failing to remedy serious cases of delay. They were compelled to testify under oath and on the record concerning the reasons for the delays, their own responsibility and accountability for the delays, the remedies they proposed for the future and the reasons for secrecy in the specific cases. In each case involving delay, the access requests at issue were answered on the date the officials appeared to give evidence.

As mentioned in previous annual reports, it has been made clear that there will be zero tolerance for situations of chronic delay. Of particular concern are situation where answers to access requests are delayed for long periods in order to ensure that communications materials and briefings for ministers are developed before the answer is given. When such situations occur, the Information Commissioner will expect ministers and deputy ministers to justify themselves directly and not through the buffer of intermediaries.

Table 1

STATUS OF COMPLAINTS

	April 1, 1997 to Mar. 31, 1998	April 1, 1998 to Mar. 31, 1999
Pending from previous year	397	423
Opened during the year	1405	1670
Completed during the year	1379	1351
Pending at year-end	423	742

Table 2

COMPLAINT FINDINGS

April 1, 1998 to Mar. 31, 1999

			FINDING			
Category	**Resolved**	**Not Resolved**	**Not Substantiated**	**Discon-tinued**	**TOTAL**	**%**
Refusal to disclose	267	3	215	41	526	38.9
Delay (deemed refusal)	551	15	84	19	669	49.5
Time extension	44	-	24	3	71	5.3
Fees	27	-	13	5	45	3.3
Language	-	-	-	-	-	-
Publications	-	-	-	-	-	-
Miscellaneous	20	-	18	2	40	3.0
TOTAL	909	18	354	70	1,351	100%
100%	67.3	1.3	26.2	5.2		

Table 3 **TURNAROUND TIME (MONTHS)**						
CATEGORY	**96.04.01 - 97.03.31**		**97.04.01 - 98.03.31**		**98.04.01 - 99.03.31**	
	Months	Cases	Months	Cases	Months	Cases
Refusal to Disclose	7.39	641	6.23	576	5.86	526
Delay (deemed Refusal)	2.79	675	2.19	594	2.50	669
Time extension	3.31	75	3.05	93	2.80	71
Fees	7.28	51	5.81	64	5.69	45
Language	9.07	1	8.04	3	-	-
Publications	-	-	-	-	-	-
Miscellaneous	4.46	54	3.36	49	4.54	40
Overall	5.00	1,497	4.16	1,379	3.99	1,351

Table 4
COMPLAINT FINDINGS
(by government institution)
April 1, 1998 to March 31, 1999

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Substantiated	Discontinued	TOTAL
Agriculture and Agri-Food Canada	16	-	1	-	17
Atlantic Canada Opportunities Agency	2	-	-	1	3
Business Development Bank of Canada	-	-	-	1	1
Canada Information Office	7	-	-	-	7
Canada Mortgage & Housing Corporation	1	-	2	-	3
Canada Ports Corporation	5	-	3	-	8
Canadian Environmental Assessment Agency	1	-	-	-	1
Canadian Film Development Corporation	2	-	1	-	3
Canadian Food Inspection Agency	1	-	-	-	1
Canadian Heritage	7	-	8	1	16
Canadian International Development Agency	6	-	12	1	19
Canadian Radio-Television & Telecommunications Commission	2	-	-	1	3
Canadian Security Intelligence Service	5	-	7	-	12
Canadian Space Agency	2	-	-	-	2
Citizenship & Immigration Canada	76	-	32	22	130
Correctional Service Canada	21	-	9	-	30
Environment Canada	13	-	5	2	20
Farm Credit Corporation Canada	1	-	-	-	1
Finance Canada	25	-	4	-	29
Fisheries and Oceans Canada	24	-	12	2	38
Foreign Affairs and International Trade	36	-	19	2	57
Freshwater Fish Marketing Corporation	1	-	-	-	1
Health Canada	47	-	16	2	65
Human Resources Development Canada	30	-	4	3	37
Immigration and Refugee Board	4	-	2	-	6
Indian and Northern Affairs Canada	73	-	70	-	143
Industry Canada	24	1	14	2	41
Jacques Cartier & Champlain Bridges Incorporated	-	1	-	-	1
Justice Canada	21	-	13	-	34
National Archives of Canada	7	-	8	-	15

Table 4

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
National Capital Commission	1	-	1	-	2
National Defence	193	15	34	3	245
National Film Board	1	-	1	-	2
National Parole Board	1	-	1	-	2
Natural Resources Canada	4	-	1	-	5
Natural Sciences and Engineering Research Council of Canada	-	-	1	-	1
Northwest Territories Water Board	1	-	-	-	1
Privy Council Office	45	-	2	2	49
Public Service Commission	3	-	-	1	4
Public Works and Government Services Canada	27	-	3	4	34
RCMP Public Complaints Commission	3	-	-	1	4
Revenue Canada	88	-	22	14	124
Royal Canadian Mounted Police	15	1	22	1	39
Security Intelligence Review Committee	6	-	-	-	6
Solicitor General Canada	6	-	2	-	8
Standards Council of Canada	-	-	2	-	2
Transport Canada	43	-	10	4	57
Transportation Safety Board	-	-	2	-	2
Treasury Board Secretariat	11	-	2	-	13
Veterans Affairs Canada	1	-	6	-	7
TOTAL	909	18	354	70	1,351

Table 5

GEOGRAPHIC DISTRIBUTION OF COMPLAINTS
(by location of complainant)

April 1, 1998 to March 31, 1999

	Rec'd	Closed
Outside Canada	8	11
Newfoundland	35	38
Prince Edward Island	2	2
Nova Scotia	44	44
New Brunswick	131	126
Quebec	101	93
National Capital Region	916	608
Ontario	211	217
Manitoba	35	26
Saskatchewan	8	7
Alberta	35	30
British Columbia	141	143
Yukon	1	2
Northwest Territories	2	4
Total	1,670	1,351

The *Access to Information Act* in the Courts

A. The Role of the Federal Court

A fundamental principle of the *Access to Information Act*, set forth in section 2, is that decisions on disclosure of government information should be reviewed independently of government. The commissioner's office and the Federal Court of Canada are the two levels of independent review provided by the law.

Requesters dissatisfied with responses received from government to their access requests first must complain to the Information Commissioner. If they are dissatisfied with the results of his investigation, they have the right to ask the Federal Court to review the department's response. If the Information Commissioner is dissatisfied with a department's response to his recommendations, he has the right, with the requester's consent, to ask the Federal Court to review the matter. This year the Information Commissioner filed 13 new applications for review.

I. Case management of access litigation in the Federal Court

The major responsibility for the management of access to information cases falls on the Trial Division of the Federal Court of Canada. In section 45 of the Act, Parliament directed the Federal Court to deal with these cases expeditiously. From December 1993 to April 1998, reviews under the access law were subject to a specific case management program designed to ensure that applications for review in access (and privacy) cases would be heard within six months and all inactive cases would be dismissed forthwith. The case management requirements were set out in a Practice Direction issued by the Associate Chief Justice of the Federal Court. Due to the pragmatic simplicity of the Practice Direction, the Federal Court had been remarkably successful in the reduction of the backlog of its access cases.

On February 1998, the Federal Court adopted new rules of practice which came into force on April 25, 1998. Under the new rules, access litigation generally follows the judicial review framework, unless a party applies for case management under Rule 54 and/or 384.

Under Rule 304(1)(c), applicants are required to serve the Information Commissioner with a copy of the application for review under the Act. Service upon the Information Commissioner enables the commissioner to determine in a timely manner whether his intervention is required before the Court. A review of the Court caseload in access litigation shows that this new rule may not be well understood by litigants or enforced by the Court Registry. Less than 40 per cent of the new applications for review filed by third

parties since April 25, 1998, have been served upon the commissioner. In other cases, applicants erroneously name the Information Commissioner as a party respondent in their applications before the Court. The Information Commissioner may choose to intervene in an access case but is not a proper party respondent in any application for review under the Act.

The main problem area under the new rules is that case management is not automatic. One of the parties must apply for it. Regrettably, very few applicants apply, as is their right, for case management of their proceedings under Rule 54 and/or 384. In some reviews under the *Access to Information Act* – specifically, section 44 reviews – there is no incentive for either of the parties (the government or the 3rd party) to seek to have the cases disposed of expeditiously.

As well, the new rules do not take into account the unique dynamics of access litigation. For example, as a result of section 48 of the *Access to Information Act*, the burden of proof is on the respondent. It follows that, in section 41 and 42 applications for review, applicants are entitled to file reply evidence to the government evidence. The new rules, however, are designed on the assumption that the burden of proof rests on the applicant. The new rules do not allow access litigation applicants an automatic right to file reply evidence. Also, the general rules treat confidentiality issues as exceptional matters whereas, in access litigation, the need to file information in confidence arises in every case. Finally, in access cases, there are special, statutory notice and standing provisions which are not taken into account by the Federal Court rules relating to judicial review.

Case management, thus, is essential in all access litigation in order to ensure that these preliminary matters (timing of intervention or appearance of requesters, third party and the commissioner; motion to file confidential material, and appropriate directions with respect to procedural timetable) are dealt with at the beginning of the litigation process and are disposed of fairly, expeditiously and efficiently.

It is troubling that, this year alone, the Attorney General of Canada opposed case management in 10 cases brought by the Information Commissioner. The Attorney General submitted that there was no need for case management in access litigation, that the Information Commissioner's request for case management was premature, that the general rules applicable to judicial review were appropriate to deal with any procedural issues related to access litigation. The Attorney General also argued that case management was time consuming and expensive. On the positive side, these submissions were rejected by the Federal Court (Trial Division) and orders were issued to manage the procedure and timetable in each of these cases.

Chart 1 shows the number of applications received and disposed of for the years 1983-1999.

CHART 1			
YEAR	**FILES OPENED**	**FILES CLOSED**	**BACKLOG**
1983	2	0	2
1984	13	6	9
1985	31	12	28
1986	55	14	69
1987	30	39	60
1988	67	62	64
1989	36	30	70
1990	57	34	93
1991	45	24	114
1992[*]	59	60	113
1993	54	79	89
1994	34	41	80
1995	33	45	68
1996	32	39	61
1997	37	46	52
1998	77	23	106

[*] In 1992-1993, the Information Commissioner took the initiative in systematically intervening in section 44 applications for review (third party opposing disclosure) to move them along. This initiative resulted in a higher number of cases being disposed of but was insufficient to reduce the backlog.

These numbers show that, under the new rules, where case management is optional, the volume of applications for review has doubled in 1998. The court's backlog has also doubled and its productivity deteriorated by 50 per cent as compared with 1997. The commissioner urges the Associate Chief Justice to examine whether a Practice Direction should be reintroduced to properly manage access litigation cases.

B. The Commissioner in the Courts

I. Cases completed - commissioner as applicant

Information Commissioner of Canada* v. *President of Atlantic Canada Opportunities
(T-1008-98) Trial Division

Background
A Nova Scotia environmentalist wanted to know how much public money went into a Cape Breton golf course. He made an access to information request to the Atlantic Canada Opportunities Agency (ACOA) for its records on the topic. He received only 14 pages of records which showed that ACOA had contributed just under a million dollars to the golf course. The requester was surprised by the small number of records; there was no application or business plan or economic analysis.

As it turned out, such records did exist, but ACOA argued that they were not under its control. Rather, the records were alleged to be under the control of the Economic Cape Breton Corporation (ECBC). ECBC, an organization not subject to the access law, is ACOA's agent for funding projects in Cape Breton.
The commissioner concluded that ACOA must be considered to have control of the records by virtue of the agency relationship with ECBC and he recommended that ACOA process all records under the access law. ACOA refused and the Information Commissioner asked the Federal Court to order disclosure. [For a more complete discussion of the issues and investigative results, see pages 54-56 of the 1997-98 Annual Report.]

Disposition
On July 21, 1998, Madam Justice Reed of the Federal Court, Trial Division, allowed the Information Commissioner's application for review, directing that ACOA disclose to the requester the records or portions thereof which do not fall within any of the exemptions from disclosure found in the *Access to Information Act*. She provided ACOA with time limits within which it was required to disclose such records. Further, Madam Justice Reed authorized the Information Commissioner to bring the matter back to the Federal Court if he was not satisfied with the manner in which the exemptions were applied by ACOA. ACOA disclosed the requested records in accordance with the order and the Information Commissioner's views. It should be noted that the Court did not have to rule on the issue of control because ACOA conceded this issue before Madam Justice Reed, by voluntarily taking physical possession of the records from ECBC.

Information Commissioner of Canada* v. *President of Atlantic Canada Opportunities
(T-1007-98) Trial Division

Background
In another case involving the Atlantic Canada Opportunities Agency (ACOA), the Information Commissioner made an application on

May 15, 1998, pursuant to paragraph 42(1)(a) of the *Access to Information Act*, for a review of the refusal by the President of ACOA to release information regarding the Stewiacke golf course/Mastadon theme park project in Nova Scotia.

ACOA had relied on paragraph 21(1)(b) to justify its refusal to release records which it considered to have been supplied to ACOA in confidence by Tee Rex Adventure Golf Limited. However, during the investigation, it was learned that the owner of the company had publicly disclosed some of the information, which ACOA refused to disclose, during a published interview with a Halifax Chronicle Herald reporter. Even after this evidence was brought to ACOA's attention, it stood by its refusal to release any of the requested records. The Information Commissioner concluded that the complaint was well-founded and recommended that certain records and portions of records be disclosed.

ACOA indicated that it would not follow the Information Commissioner's recommendation, stating that even though a third party had chosen to put information about his business into the hands of the media, this did not give ACOA authority to disclose that same information from its records. The commissioner asked the Federal Court to review the matter.

Disposition

On July 2, 1998, Madam Justice McGillis issued a case management order providing directions as to how the case should be conducted. In October of 1998, ACOA decided not to proceed to trial. It released the records in question pursuant to the Information Commissioner's recommendation. With the release of these records, the case was discontinued on November 4, 1998.

II. Cases in progress - commissioner as applicant

Information Commissioner of Canada* v. *Minister of Industry (T-650-98) Trial Division

In 1995, Industry Canada called for applications for radio spectrum licences to provide wireless communication services. After evaluating applications, Industry Canada awarded two licences. One of the companies, which did not receive a licence, TeleZone Corp., asked under the access law for copies of all records relating to the assessment criteria and analysis that gave rise to the final decision. In response, some records were disclosed but others were withheld as being "advice or recommendations" or "deliberations" under the exemptions set out in paragraphs 21(1)(a) and (b) of the *Access to Information Act*. As well, some information was withheld under section 20, to protect the confidential information of other applicants.

TeleZone complained to the commissioner who concluded, after investigating the matter, that the corporation had a right to know what were the rules of the game in the awarding of the licences and, most of all, whether the rules were changed

along the way. The commissioner viewed the guidelines and weighting factors used in the evaluation process as analytical tools, which do not implicitly or explicitly disclose advice, recommendations or deliberative information. As well, the commissioner determined that TeleZone had a right to see the records showing how its application had been evaluated.

The Minister of Industry refused to accept the commissioner's recommendation. With TeleZone's consent, on April 9, 1998, the commissioner asked the Federal Court to review the minister's refusal. The main issues in the Information Commissioner's application for review relate to the disclosure of the evaluation criteria and weighting used in the licensing process.

On April 9, 1998 TeleZone also filed its own application for review in file T-648-98. In its application, TeleZone seeks disclosure of all relevant requested records. On May 28, 1998, the Court ordered that the conduct of the proceedings and the hearing of the applications for review in both files be heard at the same time and that the evidence adduced in each of the respective application applied to the other application.

When made aware of these applications in Court, third parties (companies involved in the licensing process: Rogers Cantel Inc., Microcell Telecommunications Inc., Microcell Connexions Inc. and Clearnet PCS Inc.), filed notices of appearance.

These applications are now progressing in compliance with a case management timetable directed by the Court. The outcome will be reported in next year's report.

Information Commissioner of Canada* v. *Minister of National Defence
(T-252-99, T-254-99, T-255-99, T-256-99, T-257-99, T-258-99, T-259-99, T-260-99 et
T-261-99) Trial Division

Colonel (ret'd) Michel Drapeau requested access to various records from the Department of National Defence on August 7, 1998. As the department failed to respond to the access requests by the statutory deadlines, the requester complained about the deemed refusals to the Information Commissioner.

After having investigated the matter, the Information Commissioner concluded that the complaints were well-founded given that the department failed, without lawful justification, to respond to the access requests within the timeframe specified in the Act. In each file, the Information Commissioner recommended that the department give full reasons, in accordance with the Act, to the requester on or before the date to which the department had committed to the Information Commissioner or by January 15, 1999, whichever was the earliest.

Although the department accepted to follow the Information Commissioner's recommendations, it

did not respond to the access requests by the January 15, 1999 deadline. With the consent of the requester, the Information Commissioner therefore applied to the Federal Court (Trial Division) for a review of the matter in each file.

On March 18, 1999, the Trial Division ordered that these proceedings be specially managed under Rules 384 and 385 of the Federal Court Rules (1998) and issued orders for directions with appropriate timetable in each of these cases, even though the Attorney General of Canada, on behalf of the Minister of National Defence, vigorously objected to the Information Commissioner's request for case management of these cases.

Information Commissioner of Canada* v. *Minister of Industry Canada and Patrick McIntyre (T-394-99) Trial Division

In this case, the requester requested information pertaining to Direct-To-Home (DTH) and Direct Broadcast Satellite (DBS) services. Some records were released to the requester while others were withheld under various exemptions under the Act.

The requester made a complaint to the Information Commissioner with respect to the decision of the department to exempt from disclosure numerous records. During the course of the investigation, the Information Commissioner reported his preliminary view to the Deputy Minister of Industry, that withholding evaluation criteria and weighting percentages used by the department when examining the proposals submitted by private companies seeking the awarding of orbital slots for DBS services, was not justified by paragraph 21(1)(a) of the Act.

In response to the Information Commissioner, Industry Canada indicated its willingness to disclose the evaluation criteria. However, Industry Canada indicated its intention to maintain the exemption of the weighting percentages.

After having carefully reviewed the representations of the department and of the complainant, the Information Commissioner found that the percentage weightings do not properly qualify for exemption from the right of access under paragraph 21(1)(a), as these weightings do not constitute ''advice'' or ''recommendations''. Rather, found the Information Commissioner, they constitute the contextual framework within which the Minister expected recommendations to be made concerning the relative merits of the applications. Moreover, the Information Commissioner did not agree with the department's contention that disclosure of the weightings would cause applicants to ''skew their proposal to reflect what they believe the department would wish to hear rather than what they really want to do''. The department's formal, published call for applications went to some lengths to explain the department's expectations, including language, which indicates relative importance of some evaluation criteria. The Information Commissioner did not accept the view that the quality of applications will be

improved if applicants are left to guess at what the government wants.

With the consent of the requester, the Information Commissioner therefore applied to the Federal Court (Trial Division) for a review of the decision of Industry Canada. By filing a notice of appearance as a party under subsection 42(2) of the Act, the requester, Patrick McIntyre, indicated that he was appearing as a party in this application for review.

On April 26, 1999, the Trial Division gave directions with respect to the conduct of this case under Rule 54 of the Federal Court Rules (1998), even though once again the Attorney General of Canada, on behalf of the Minister of Industry Canada, vigorously objected to the Information Commissioner's request for directions with respect to the procedure to be followed by the parties. This is a clear indication by the Court that directions may be issued in proceedings under the *Access to Information Act* to secure just, most expeditious and least expensive determination of each access to information case, and is consistent with the procedural continuity and the consolidation of the benefit and the expertise of the Federal Court in the case management of access litigation since 1993.

Information Commissioner of Canada v. *Minister of National Defence*

(A-785-96) Court of Appeal

In 1996, the issue of delay in answering access requests at National Defence (ND) was brought before the trial division of the Federal Court by the Information Commissioner to seek its aid in compelling ND to respond to a specific access request. The details of this case are reported in the 1996-97 Annual Report. In that case ND not only failed to respect the Act's response deadlines, but also failed to respect several alternate deadlines negotiated with the commissioner. In the end, the answer was so long in coming (some 16 months) that the requester even lost his right to complain to the Information Commissioner about the exemptions invoked by ND in its response.

The case raised a number of issues:

(i) the consequences of a department's failure to respond to access requests by the statutory deadlines (this is referred to in the Act as a "deemed refusal");
(ii) whether a government institution can rely on exemptions which are claimed after the conclusion of the commissioner's investigation of a deemed refusal, but before the hearing of an application for review; and
(iii) what are the consequences when a delay by a department exceeds the one-year time limit within

which complaints about exemptions must be made to the commissioner.

ND answered the request before trial and felt that this should end the matter. The Information Commissioner urged the Court to proceed to assess the appropriateness of the exemption which ND had applied. The commissioner reminded the Court that the complainant's time had run out for making a complaint about the exemptions.

The Federal Court, Trial Division, agreed that the delay in responding was excessive, and ordered costs to be paid by ND. Yet, it dismissed the Information Commissioner's application. The Court viewed the commissioner's application for review as premature as he had not investigated the merits of the exemptions. The commissioner appealed this decision in order to clarify both his jurisdiction to investigate exemptions after the one-year complaint period has expired, and the consequences to departments which fail to respect response deadlines. This case is set to be heard on April 13 and 14, 1999 and the outcome of the appeal will therefore be reported in next year's report.

Information Commissioner of Canada v. *President of the Atlantic Canada Opportunities Agency*
(A-292-96) Court of Appeal

In this case (see the 1994-95 Annual Report, p. 23 and the 1995-96 Annual Report, p. 22 for more details), the Information Commissioner recommended that the President of ACOA disclose the actual number of jobs created by the companies which received funding from ACOA under a program designed to encourage small and medium-sized enterprises in Atlantic Canada. ACOA refused to follow the recommendation on the basis that the information had been provided in confidence by the companies. The Information Commissioner asked the Federal Court to review the matter.

On March 18, 1996, Madam Justice McGillis dismissed the Information Commissioner's application. The Information Commissioner then applied to the Federal Court of Appeal, arguing that the trial judge erred in finding that the President of ACOA was justified in withholding the information under paragraph 20(1)(b) of the *Access to Information Act*. It was also argued that Madam Justice McGillis erred in deciding that there was no need to apply section 25 which requires the severance and disclosure of information that does not fall within an exemption from disclosure under the Access Act. The Court of Appeal has not set a date for hearing this matter. The outcome will be reported in next year's report.

Information Commissioner of Canada v. *Minister of the Environment*

In this case, the requester requested from Environment Canada discussion papers considered by Cabinet in its decision to submit legislation to Parliament with respect to a ban over the use of MMT, an octane enhancer used in motor vehicle fuels. On the basis of advice from the Privy Council Office (PCO), Environment Canada denied access to these documents and based its refusal on the ground that no discussion papers exist. The documents, in PCO's view, are memoranda used to present proposals to Privy Council or records used to brief ministers of the Crown in relation to matters before the Privy Council.

The dispute lies in the fact that memoranda and briefing records are excluded from the *Access to Information Act,* whereas discussion papers become subject to the Act as soon as the decisions to which they relate are made public or, if such decisions are not made public, four years after the decision is made.

The Information Commissioner took the view that PCO cannot expand the scope of Cabinet secrecy merely by ceasing to call records "discussion papers." He argued that what is now contained in the analysis section of a memorandum to cabinet (MC) is what used to be contained in the discussion papers. He recommended, thus, that Environment Canada disclose the analysis section of any MC dealing with the government's decision to ban MMT in Canada.

The Minister declined to follow the commissioner's recommendation and the commissioner has sought consent from the requester to ask the Federal Court to review PCO's refusal. Any progress in the matter will be reported in next year's annual report.

III. Cases in progress - commissioner as respondent in the Court of Appeal

Bonnie Petzinger v. *Information Commissioner of Canada and Colonel (ret'd) Drapeau and Attorney General of Canada* (A-911-97) Court of Appeal

National Defence's access coordinator Bonnie Petzinger found herself out of time to appeal Mr. Justice MacKay's order finding that the confidentiality of the Information Commissioner's investigative process must be preserved. Thus, neither she nor the Attorney General of Canada were given access to the commissioner's confidential investigative records. (See the 1997-1998 Annual Report, p. 34 for the background of this case.) Ms. Petzinger failed to provide the Court with her affidavit evidence to explain and justify the delay. Madam Justice McGillis denied Ms. Petzinger's request for an extension of time to appeal that decision. The Court of Appeal agreed that Madam Justice McGillis properly exercised her power to do so and dismissed Ms. Petzinger's appeal.

Bonnie Petzinger* v. *Information Commissioner of Canada and Colonel (ret'd) Michel Drapeau and Attorney General of Canada
(A-692-97, A-693-97 and A-728-97) Court of Appeal

The preceding case was not the end of the saga. National Defence's access coordinator, with the financial support of National Defence, appealed the other orders of Mr. Justice MacKay: namely his order striking out the entire case as having no reasonable prospect of success and denying Ms. Petzinger the right to amend the type of relief she was asking the Court to grant. (See the 1997-98 Annual Report, pages 33-35, for the background of this case.) In his reasons, the Trial judge stated that there was no evidence that Ms. Petzinger's rights had been affected by the Information Commissioner's report and recommendation; the commissioner's investigative process had been lawful; and Bonnie Petzinger should not have attacked the merits of the recommendation as she only had the right to question whether the investigation was lawful. The Attorney General of Canada did not appeal any of Mr. Justice MacKay's orders but has decided to remain a party to the action. The case is ready for hearing but has not been scheduled for hearing as yet, thus the outcome will be reported in next year's report.

C. Court Cases Not Involving the Information Commissioner

Glaxo Wellcome PLC* v. *Minister of National Revenue
(A-908-97 and A-909-97) Court of Appeal

Section 2 of the *Access to Information Act* provides that the purpose of the Act is to extend the present laws of Canada to provide the right of access to information in records. It provides that the Act is intended to complement and not replace existing procedures for access to government information and that the Act is not it intended to limit in any way access to the type of government information that is normally available to the general public.

In this case, Statistics Canada reports revealed that a drug (ranitidine hydrochloride, also known under the trademark as ZANTAC) for which the appellant, Glaxo Wellcome PLC, a large pharmaceutical company held a patent, was being imported into Canada by other companies. Glaxo Wellcome PLC considered that these importers were in contravention of its rights under section 42 of the *Patent Act*. In order to ascertain the extent of the violations, Glaxo Wellcome PLC made access requests to the Minister of National Revenue to obtain information regarding the sale, importation or exportation of the drug in question. The Minister of National Revenue refused to disclose the

information on the basis of subsection 24(1) of the *Access to Information Act* which provides that records subject to section 107 of the *Customs Act* shall be exempted from disclosure under the *Access to Information Act*.

The appellant chose not to complain to the Information Commissioner but instead made an application for disclosure to the minister pursuant to paragraph 108(1)(b) of the *Customs Act* which requires information gathered in the administration of the *Customs Act* to be kept confidential and only revealed in limited circumstances. The request was again denied by the Minister of National Revenue.

Glaxo Wellcome PLC then brought an application for judicial review before the Federal Court for an order allowing Glaxo Wellcome PLC to examine the Minister of National Revenue for discovery on the ground that it suffered substantial financial loss and that discovery was the only reasonable means of identifying the infringing parties. The Trial Division Judge rejected the application for judicial review, but the Court of Appeal reversed the decision and ordered disclosure by the Minister of National Revenue of the names of the infringing importers in 1995, 1996 and 1997.

The Court concluded that the doctrine of equitable bill of discovery, which is a form of pre-action discovery, permitted courts to use their equitable jurisdiction to order that a person against whom the applicant has no cause of action, submit to discovery. The Court followed the English case of Norwich Pharmaceutical Co. v. Commissioners of Customs and Excise, [1974] A.C. 133. To obtain an order for a bill of discovery from the Court, a party must satisfy four conditions:

1. The person bringing the application for the equitable bill of discovery must have an actual claim against the alleged wrong-doers;
2. they must share some type of relationship with the person to be discovered;
3. the person from whom discovery is sought should be the only practical source of information; and
4. if providing this information would harm the person to be discovered, the party bringing the application must compensate the person to be discovered from resulting harm by paying all of its expenses.

The Court balanced the public interest in seeing that justice be done against the importers' confidentiality interests and found that the importers would not have a high expectation of confidentiality regarding the information they provide to customs officers given the exceptions to confidentiality provided in section 108 of the *Customs Act*. The names of the importers were likely to pass through other hands before reaching those of the customs officers.

Finally, the Court turned its attention to examining whether the Common Law Crown prerogative to claim immunity from discovery overrides

the exceptional equitable remedy of a bill of discovery. The Court decided that the Minister of Revenue should not be allowed to escape discovery by invoking the Crown prerogative of immunity from discovery.

Leave to appeal to the Supreme Court of Canada by the Minister of National Revenue was denied on December 10, 1998 (Supreme Court file 26834).

Canadian Broadcasting Corporation* v. *National Capital Commission
(T-2200-97) Trial Division

Canadian Broadcasting Corporation (CBC) applied under section 44 of the Access Act for a review of the National Capital Commission's decision to disclose an agreement between it and the CBC relating to the production and television broadcast of the Canada Day 1996 and 1997 shows. The CBC claimed that the agreement should not be disclosed, pursuant to paragraphs 20(1)(c) and (d) as disclosure would result in a reasonable expectation of probable harm to its competitive position and its contractual or other negotiations.

Mr. Justice Teitlebaum denied the application. He found that the CBC had failed to demonstrate a reasonable expectation of probable harm to the CBC if the agreement were to be disclosed. He noted that the CBC did not provide tangible evidence concerning the effect on its actual contractual negotiations. The affidavit submitted by the CBC contained mere affirmations and only speculation as to harm rather than any evidence demonstrating a reasonable expectation of probable harm to the CBC if the requested information were to be made public.

OCCAM Marine Technologies Ltd.* v. *National Research Council
(T-146-98) Trial Division

This was an application under section 44 of the Access Act by OCCAM, an incorporated research and development company, to review the decision of the National Research Council (NRC) not to release the entire minutes of funding meetings where proposals made by other corporations had been considered. The NRC withheld portions of these records pursuant to paragraphs 20(1)(b) and (c) of the *Access to Information Act*. These provisions protect commercial information supplied in confidence or information the disclosure of which might create a reasonable expectation of probable harm to third-party competitive interests. During the Information Commissioner's investigation of OCCAM's complaint, some additional information was disclosed. On that basis, the commissioner considered the matter resolved. OCCAM disagreed and went to the Federal Court.

Mr. Justice MacKay dismissed OCCAM's application for review. He found that the criteria required by paragraph 20(1)(b) of the *Access to Information Act* had been fulfilled as the severed information "includes the name of the third party, a project name, technical information about the project, costs, an assessment and

funding for the project [and it] ...is provided by a third party under assurance it will be maintained as confidential." Mr. Justice MacKay emphasized the fact that every company applying for funding was informed of the confidentiality policy with respect to information supplied in the application documents.

Sinclair Stevens* v. *Prime Minister of Canada
(T-2419-93 and A-263-97) Trial Division and Court of Appeal

Pursuant to an access request from Sinclair Stevens, the Privy Council Office (PCO) severed and released the financial portions of lawyers accounts relating to the Commission of Inquiry into Allegations of Conflict of Interest concerning the Honourable Sinclair M. Stevens ("The Parker Commission"). PCO withheld the narrative portion of the accounts concerning the services rendered. Mr. Stevens complained to the Information Commissioner who agreed with PCO. In the Information Commissioner's view, the narrative portion of the accounts qualify for solicitor-client privilege. Mr. Stevens was not satisfied and, as is his right, he then applied under section 41 of *Access to Information Act* for a review of PCO's refusal to disclose the narrative portions of these accounts.

The application was dismissed by Mr. Justice Rothstein on February 26, 1997, on the ground that the material was properly protected by solicitor-client privilege and there had been no express nor implied waiver of such privilege. The fact that the Parker Commission submitted its accounts to PCO for payment could not be construed as a waiver of privilege over the accounts. The Court also held that the severance and disclosure of some portion of a solicitor-client record does not result in the loss of privilege on the entire record. Mr. Stevens appealed to the Federal Court of Appeal. In its decision, the Court dismissed, the appeal and upheld the trial judge's decision that the withheld information was properly exempted under section 23 of the Access Act.

***Desjardins, Ducharme, Stein, Monast* v. *Minister of Finance* Canada**
(T-912-98) Trial Division

In this case, a person made an access request to Finance Canada, for records showing how much was paid to Mr. André Joli-Coeur, the Amicus Curiae designated by the Supreme Court of Canada in the hearing of the Reference re Secession of Quebec. Finance Canada held relevant records because the Amicus Curiae had submitted his billing accounts to a specified third party, the law firm of Desjardins, Ducharme, Stein, Monast, who had analysed the accounts and submitted certificates of accuracy to the department. Finance Canada decided to disclose the records and notified the Amicus Curiae's accountant who asked the Federal Court to order the department not to disclose the requested information.

At issue was whether the department could disclose the disputed information and more specifically,

whether the information in dispute was under the "control" of the department under subsection 4(1) of the Act. The applicant argued that the disputed information was under the "control" of the Supreme Court, which is not a government institution subject to the Act.

The Court concluded that the requested records were under the control of a government institution, the Department of Finance, and not the Supreme Court. The payment of the bills was clearly the responsibility of the department. The Court further noted that section 23 of the Act was not of any help to the applicant as the relationship between Mr. Joli-Coeur and the Supreme Court could not be considered a solicitor-client relationship under section 23 of the Act. Furthermore, the Court found that, even if section 23 did apply, only the details of the work done by Mr. Joli-Coeur would be considered confidential and not the billing amounts.

Grimard* v. *Canadian Human Rights Commission
(A-642-94) Court of Appeal

This was an appeal from a decision of the Trial Division upholding the decision of the Canadian Human Rights Commission to exempt information from disclosure. The appellant was denied access to the text of an agreement reached by two parties to proceedings before the Canadian Human Rights Commission (CHRC). The CHRC refused to disclose the agreement as being personal information pursuant to section 19 of the *Access to Information Act*. The Information Commissioner supported the CHRC's decision. The Court of Appeal agreed with the trial judge and the Information Commissioner and dismissed the appeal. It found that the information was personal and the individual to whom the agreement related had not consented to its disclosure.

Hoogers and Steinhoff* v. *Minister of Communications
(T-2587-93, T-265-94, T-595-95) Trial Division

The applicants requested information from the archival records of the Canadian Security Intelligence Service and the Royal Canadian Mounted Police about the Canadian Union of Postal Workers. Approximately 2000 pages of information were not disclosed pursuant to subsections 13(1), 15(1), 16(1) and 19(1) of the Act.

The applicants filed complaints with the Information Commissioner. The Information Commissioner investigated the complaints and negotiated the disclosure of additional information. He reported that the information, which continued to be withheld from the applicants, was properly exempted under the specified sections of the Act. The requesters were dissatisfied with the result and asked the Federal Court to review the matter.

The Court reviewed the documents and was not prepared to order the release of further documents. The

Court did find as had the Information Commissioner, that in some cases, paragraph 16(1)(c) exemptions were not properly applied but, in each instance, the individual record or part thereof was exempt under a different exemption. The Court was guided as to paragraph 16(1)(c) by the Court of Appeal's decision in *Rubin* v. *Minister of Transport*. That case concluded that, when considering an exemption under paragraph 16(1)(c), the Court must ensure that the injury claimed relates to a particular ongoing or imminent investigation and not to some possible future investigation.

D. Legislative Changes

I. Subsection 67.1—An offence with respect to interfering with the right of access under the Act

In response to a recommendation made to Parliament by the Information Commissioner in 1997 (see the 1996-1997 Annual Report, p. 13) a member of Parliament, Ms. Colleen Beaumier, (Liberal, Brampton West-Mississauga), introduced Bill C-208 on September 26, 1997. The Bill was passed by the House of Commons of Canada on November 16, 1998 and by the Senate on March 16, 1999. Bill C-208 received royal sanction on March 25, 1999. It calls for fines of up to $10,000 and jail terms of up to two years for anyone interfering with the right of access to information by destroying, falsifying or concealing a record or directing any person to do so. Subsection 67.1 of the Act reads as follows:

67.1 (1) No person shall, with intent to deny a right of access under this Act.

(a) destroy, mutilate or alter a record;
(b) falsify a record or make a false record;
(c) conceal a record; or
(d) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (a) to (c).

(2) Every person who contravenes subsection (1) is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding $10,000 or to both; or
(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding $5,000 or to both.

II. New government institutions

During 1998, a number of government institutions were renamed, created or abolished. Therefore, new government institutions became subject to the *Access to Information Act* while others were struck out. The following modifications were made to Schedule I of the *Access to Information Act*.

Schedule I
"Office of the Interim Commissioner of Nunavut" is added under the

heading "Other Government Institutions" (1993, c. 28, section 78 (Sch. III, section 1), in force November 27, 1997).

"Economic Development Agency of Canada for the Regions of Quebec" under the heading "Other Government Institutions" replaces "Federal Office of Regional Development – Quebec" (SOR/98-120, Can. Gaz., Part II, in force February 23, 1998).

"Millennium Bureau of Canada" is added under the heading "Other Government Institutions" (SOR/98-149, Can. Gaz., Part II, in force March 12, 1998).

"Canadian Human Rights Tribunal" under the heading "Other Government Institutions" replaces "Human Rights Tribunal Panel" (1998, c. 9, ss. 35 and 36, in force June 30, 1998).

"Canada Ports Corporation" is struck out under the heading "Other Government Institutions" (1998, c. 10, section 159(1), in force January 1, 1999).

"Great Lakes Pilotage Authority" under the heading "Other Government Institutions" replaces "Great Lakes Pilotage Authority, Inc." (1998, c. 10, ss. 159(2) and 161, in force October 1, 1998).

"The St-Lawrence Seaway Authority" is struck out under the heading "Other Government Institutions" (1998, c. 10, section 160, in force December 1, 1998).

The following agencies are added under the heading "Other Government Institutions" (1998, c. 10, section 162, in force January 1, 1999):

"Fraser River Port Authority,"
"Halifax Port Authority,"
"Hamilton Port Authority,"
"Montreal Port Authority,"
"Nanaimo Port Authority,"
"North Fraser Port Authority,"
"Port Alberni Port Authority,"
"Prince Rupert Port Authority,"
"Quebec Port Authority,"
"Saguenay Port Authority,"
"Saint John Port Authority,"
"Sept-Iles" Port Authority,"
"St. John's Port Authority,"
"Thunder Bay Port Authority,"
"Toronto Port of Authority,"
"Trois-Rivières Port Authority,"
"Vancouver Port Authority,"
"Windsor Port Authority."

"The Leadership Network" is added under the heading "Other Government Institutions" (SOR/98-320, Can. Gaz., Part II, in force June 3, 1998).

"The Federal Bridge Corporation Limited" is added under the heading "Other Government institutions" (SOR/98-566, Can. Gaz., Part II, in force December 1, 1998).

The following agencies are added under the heading “Other Government Institutions” (1998, c. 25, section 160(1), in force December 22, 1998):

Gwich’in Land Use Planning Board
Gwich’in Land and Water Board
Mackenzie Valley Environmental Impact Review Board
Sahtu Land and Water Board
Sahtu Land Use Planning Board

“Canada Industrial Relations Board” under the heading “Other Government Institutions” replaces “Canada Labour Relations Board.” (1998, c. 26, ss. 70 and 71, in force January 1, 1999).

III. New secrecy provisions

During 1998, the government adopted more statutory prohibitions against disclosure of government records by adding the following provisions to Schedule II of the *Access to Information Act*. These new prohibitions are:

Schedule II

“*Department of Human Resources Development Act*” and a corresponding reference in respect of that Act to “section 33.5” are added (1998, c. 21, section 73, in force June 18, 1998).

“*Mackenzie Valley Resource Management Act*” and a corresponding reference in respect of that Act to “paragraph 30(1)(b)” are added (1998, c. 25, section 161, in force December 22, 1998).

IV. Private members’ bills to reform the *Access to Information Act*

Bill C-216

Bill C-216 was introduced by Myron Thompson, (Reform, Wild Rose), on September 29, 1997. It proposes to make all Crown corporations subject to the Act. The bill was debated at second reading in the Commons on December 1, 1997 and March 13, 1998. However, a motion for second reading was negatived on April 28, 1998.

Bills C-217 and C-253

Bill C-217 was introduced by Bob Mills, (Reform, Red Deer), on September 29, 1997. It would have required the results of any public opinion poll commissioned by a federal department or other federal body to be tabled in Parliament. The bill was debated at second reading and dropped from the Order Paper on October 31, 1997. However, the proposal was brought back before Parliament in the form of Bill C-253 introduced by Inky Mark, (Reform Dauphin-Swan River), on October 22, 1997. Bill C-253 has not progressed since then.

Bill C-264

Bill C-264 was introduced by John Bryden, (Liberal, Wentworth-Burlington), on October 23, 1997 and reprinted pursuant to an order made on June 11, 1998. It contains a comprehensive reform of the Act. The Bill draws on recommendations for reform made by the Justice Committee in 1986, the Information

Commissioner in 1994 and the author's extensive experience using the access law for his own research purposes. Except for the revision of the Bill in June 1998, the Bill has not progressed since its first reading on October 23, 1997.

Bill C-286

Bill C-286 introduced by Michel Bellehumeur, (Bloc Québécois, Berthier-Montcalm), on November 24, 1997. It addresses a number of issues discussed by the Information Commissioner in previous annual reports with respect to destruction and falsification of records, non-compliance with time limits for responding to access requests, and access to confidences of the Privy Council. The Bill has not progressed since its first reading.

Case summaries

Pan-Pan-Pan
(01-99)

Background

On September 2, 1998, Swiss Air Flight 111 crashed 30 miles south-west of Halifax, tragically killing all passengers and crew members. Prior to the crash, between 00:58:16 and 01:25:49 (Zulu time) the crew of flight 111 was in communication with air traffic controllers in Moncton, New Brunswick and Halifax, Nova Scotia. Those conversations were audio recorded by NAVCAN, (the recently privatized supplier of air traffic control services in Canada).

Since the disaster occurred in Canadian territory, the Canadian Transportation Accident Investigation and Safety Board (TSB) had jurisdiction over the investigation. Part of the evidence it required NAVCAN to provide, was the recording of the air traffic control communications with flight 111. During the investigation, TSB made public a verbatim transcript of the recordings, but refused to disclose the recordings themselves.

A representative of the CTV program "W-Five" applied to the TSB under the *Access to Information Act* to obtain access to the audio recording. The request was denied on four grounds. First, the TSB argued that disclosure would be injurious to the conduct of the investigation; it relied on the exemption set out in paragraph 16(1)(c) for this purpose. Second, TSB argued that disclosure would be an unwarranted invasion of privacy and invoked subsection 19(1) to support this position. Third, TSB argued that the tapes contain technical information of a confidential nature supplied to it by NAVCAN. It pointed to paragraph 20(1)(b) to justify this reason for non-disclosure. Finally, TSB argued that disclosure of the tape could reasonably be expected to result in material loss or prejudice to NAVCAN, relying on paragraph 20(1)(c) to support this reason for secrecy.

Representations were made to the commissioner by the requester, TSB, NAVCAN and the Canadian Air Traffic Control Association.

Legal Issues:

Paragraph 16(1)(c):

It fell to the TSB to demonstrate that disclosure of this recording could reasonably be expected to be injurious to its investigation into the crash of flight 111. The requester argued that the transcript had already been disclosed and that the air traffic control tapes had been disclosed by TSB in previous crash investigations. TSB, on the other hand, argued that it had engaged specialists to analyse subtle matters on the tapes such as breathing rates, voice stress indicators and so forth. TSB felt that disclosure would fuel further speculation in the

media about events preceding the crash which speculation would divert the attention and energies of the TSB from its investigative work. TSB also argued that such tapes had been disclosed previously only in cases where there was no loss of life and where the investigations were relatively straightforward.

The Information Commissioner concluded that TSB failed to show evidence that disclosure could reasonably be expected to injure the investigation. He pointed out that the TSB has all the power and authority to conduct its investigation in the manner it sees fit. Even if disclosure were to engender speculation, there is no reason such speculation should interfere with the TSB's investigation priorities. If media concerns were to interfere with investigation priorities that, in the commissioner's view, would be the Board's fault and not the fault of the disclosure of the audio recording.

Additionally, the commissioner concluded, based on his review of the withheld tape, that disclosure would be unlikely to contribute to any more speculation than already has occurred as a result of unauthorized disclosure elsewhere of a purported summary of the content of Swiss Air Flight 111 cockpit voice recordings. For these reasons, the commissioner found that paragraph 16(1)(c) did not justify the refusal to disclose.

Paragraph 20(1)(b):

This provision requires government institutions to refuse to disclose "financial, commercial, scientific or technical information" which is confidential in nature and which was supplied to government by a third party - NAVCAN had supplied these tapes to the TSB and argued strenuously that they contain confidential technical information which should not be disclosed.

The commissioner disagreed. He pointed out that the content of the tapes had already been disclosed. What were left, therefore, were the voices of the aircrew and controllers. Voices, the commissioner concluded, do not constitute "technical" information as argued by NAVCAN. He concluded that NAVCAN and the TSB were attempting to make a privacy argument in the context of a provision aimed at protecting the confidential commercial information of third parties. He found, therefore that paragraph 20(1)(b) did not justify the decision to refuse to disclose the audio recordings.

Paragraph 20(1)(c):

TSB and NAVCAN also argued that disclosure would be injurious to NAVCAN's competitive position and would cause NAVCAN material loss. However, neither party provided any evidence to show the nature of the injury they feared nor to show the nexus between disclosure of the audio recording and any such injury. In its written and oral representations, NAVCAN chose not to address the paragraph 20(1)(c) exemption.

Consequently, the commissioner concluded that TSB had not discharged its burden of demonstrating the applicability of the

exemption; he found that paragraph 20(1)(c) does not justify the refusal in this case.

Subsection 19(1):
This provision requires government institutions to refuse to disclose personal information about others except in those circumstances set out in subsection 19(2). Consequently, in assessing the applicability of this exemption it is first necessary to determine whether the withheld information is "personal" and, second, whether its disclosure is nevertheless authorized by subsection 19(2). This latter provision authorizes disclosure of personal information 1) with consent of the person to whom it relates, 2) if the information is already public and 3) if there is a public interest in disclosure which clearly outweighs any invasion of privacy which might result.

The determination of whether the audio tapes constitute "personal information" is guided by section 3 of the *Privacy Act*. The latter provision defines "personal information" as any information about an identifiable individual. The commissioner concluded that the voice, tonal and emotive characteristics on the tape constitute information about individuals who could be identified by their voices. Disclosure would also link the content of the already released transcripts to identifiable individuals. Thus, he found that the audio recordings do constitute "personal information" for the purpose of subsection 19(1) of the Act.

Next, the commissioner determined that there was no consent from the individuals concerned for disclosure of their personal information. The issue of whether the information was already public was less straightforward. The air traffic control communications were transmitted over open frequency radio waves. They were available to other aircraft and to individuals who might have been monitoring the frequency. Despite this, the commissioner concluded that the communications are not, in fact, available to the public. While they could have been intercepted, they were not. And even if they have been, dissemination of intercepted radio communication is an offence, by virtue of the *Radio Communication Act*.

Third, the commissioner considered whether there was an overriding public interest in disclosure. He observed that any invasion of privacy which might occur would be minor in nature. The content of the communications are publicly known, the identities of the pilots of flight 111 are publicly know and, especially in the Moncton area, it is likely that many people know which air traffic controllers handled Swiss Air Flight 111.

Yet, the commissioner also expressed the view that the public interest in disclosure is slight. He allowed, without deciding, that there may be a public interest in disclosure greater than mere curiosity—however, he found that it would not clearly outweigh even the modest invasions of privacy which could result.

The commissioner pointed to the fact that the TSB had already disclosed the transcript of the air traffic communications and that it would make a public report of the results of its investigation at the end of the investigation. These elements, the commissioner found, are sufficient to satisfy the public interest in the efficacy of the air traffic control, air safety and accident investigation processes in Canada. Consequently, the commissioner found that paragraph 19(1) of the Act justifies the decision of the TSB to refuse to disclose the audio recording of the air traffic control communications with Swiss Air Flight 111. The complaint was dismissed.

Lessons Learned

The first lesson is somewhat tangential to the specifics of the case. It is that, by privatizing public functions (in this case, air traffic control), there are implications for the public's right of access. NAVCAN's functions were formerly provided by public servant employees of Transport Canada. When they were public servants, it would not have been possible for Transport Canada to refuse to disclose the names of the air traffic controllers who worked Swiss Air Flight 111. By virtue of paragraph 3(j) of the *Privacy Act*, information about the duties and functions of public servants cannot be withheld as "personal information."

All that changed when NAVCAN took over the air traffic control business and when the government decided not to make NAVCAN subject to *Access to Information Act*. The air traffic controllers are not employees of an institution to which the Act applies and, hence, they have privacy rights which they did not have as employees of Transport Canada.

The second lesson is that the injury test exemptions (in this case 16(1)(c) and 20(1)(c)) impose a heavy burden of proof on those asserting the protection. Mere speculation that injury is likely to result from disclosure, is insufficient. So, too, are assertions that such information is secret in other jurisdictions. The test is objective, not subjective, and requires concrete evidence showing the nature of the expected injury and the nexus between disclosure and the injury.

Finally, this case stands for the proposition that even when potential invasions of privacy from disclosure are slight, secrecy will be justified unless the public interest in disclosure is clear and compelling. It will be especially difficult to justify an invasion of privacy when steps have been taken to serve the public interest through other related disclosures of information. In this case, the TSB's disclosure of the verbatim transcript and its obligation to report the results of the investigation satisfied any public interest there might be in the disclosure of the Swiss Air Flight 111 air traffic communications.

The NCC tapes
(02-99)

Background

A researcher with a special interest in the work of the NCC had, since 1983, made periodic access to information requests for "meeting minute records." In response to those requests, the NCC had disclosed, subject to exemptions, the official, written minutes of NCC meetings. The NCC also had audio recordings of its meetings but these recordings were not processed in response to the researcher's access requests. Moreover, no one at the NCC ever informed the requester that such tapes existed or asked the requester if he intended his request to cover audio tapes.

The researcher learned of the existence of tapes when recordings of portions of NCC meetings were introduced before the Federal Court of Canada in a proceeding concerning the NCC's decision to approve the third lane of the Champlain Bridge across the Ottawa River.

Once he learned of the existence of tapes, the researcher made a new request for all tapes of previous NCC meetings. The NCC responded by disclosing transcripts of some recent tapes and informing the requester that most tapes had been erased in the ordinary course of records disposal. As well, the NCC informed the requester that it would no longer audio record its meetings, except for certain portions of advisory committee meetings where decisions are taken.

The requester complained to the Information Commissioner. He objected to the NCC's decision to cease creating tapes and he alleged that the NCC's destruction of previous tapes was improper. Finally, the requester complained that he should have been told, from the outset, that the NCC held audio tapes of its meetings.

Legal Issues

Was the NCC under an obligation to inform the requester of the existence of audio tapes of its meetings? Was the NCC authorized to erase tapes of previous meetings? Was the NCC acting properly when it decided to cease taping its meetings? These questions were all raised by the complaint.

i) Duty to Inform

With respect to the obligation to inform, the NCC argued that it replied properly to the researcher's requests. The NCC had provided meeting minutes and the requester accepted those minutes without asking for any other related records. For his part, the requester argued that no one ever told him the tapes existed; if they had, he would have clarified his wish to have access to them.

The commissioner found that the wording of the researcher's access requests over the years was broad enough to include the audio tapes. At the very least, the scope of the request was sufficiently flexible that the NCC should have clarified the scope of the request with the requester. Of course, the researcher should have been

informed of the existence of the audio tapes so that he could make an informed decision about the scope of the request. While there was no evidence of bad faith on the part of NCC, the commissioner recommended that, in future, the NCC give a liberal interpretation to access requests. He also recommended that, in cases of doubt, there should be communications with the requester to clarify the scope of the request. These communications should invoke full disclosure of the types of records held by the institution which have potential relevance to the request.

ii) Duty to retain

The NCC was able to show that officials of National Archives approved of the NCC's decision to consider the meeting audio tapes to be "transitory records" which need not be retained after their intended use. The NCC argued that the tapes were made only to assist in the preparation of official minutes and that once the minutes had been approved, there was no further need of the tapes. The requester, on the other hand, argued that the minutes were so sanitized for public consumption that the only meaningful record of NCC proceedings is contained in the audio tapes. In his view, the tapes are not transitory in nature, they have clear archival value and the public has a right to have these tapes retained and made accessible under the *Access to Information Act*.

The commissioner concluded that the NCC's tape erasure policy was not improper—at least insofar as the access law is concerned. At no time did the NCC erase tapes for the purpose of thwarting the right of access. Care was taken by the NCC to develop its tape erasure policy in conformity with the records retention requirements of the *Archives Act*. The only reservation expressed by the Information Commissioner stemmed from the use of the tapes in the court proceedings concerning the Champlain Bridge. If it is the case that tapes may be useful for such a purpose, it may also be the case that they have archival value. In that regard, the commissioner recommended that, before any existing meeting tapes are erased, the NCC should ensure that the National Archivist expressly authorizes the destruction of these records.

iii) Duty to continue taping

The requester alleged that the NCC's decision to cease taping its meetings was a direct result of his access request for such tapes. Moreover, he argued that the public interest in the accountability of the public required the NCC to maintain a meaningful record of its deliberations.

For its part, the NCC argued that the decision to cease audio recording preceded the access request and was motivated by cost-cutting efforts in the NCC. The position of the person who administered the tapes was declared surplus. The NCC also insisted that its minutes and other records of the NCC's meetings, constitute a fully adequate record of its deliberations and no public interest would be served by continuing to audio record its meetings.

The commissioner took note of the fact that the *Access to Information Act* does not require public officials to create records of any kind—including audio tapes. He also concluded that there was no evidence of bad faith on NCC's part in its decision not to audio record its meetings. The commissioner emphasized his view that adequate records must be kept by public officials if the right of access is to have any meaning. However, in this case, he did not find reason to criticize the decision of the NCC to cease taping.

Lessons Learned

Access requests must be given a liberal interpretation. Where there is doubt about the scope of a request, the doubt should be resolved by communicating with the requester. Of course, the consultation with the requester must involve full disclosure of the types of records held of potential relevance to the request, so that the requester can make an informed, meaningful choice.

While it is essential to the right of access that records be kept of the activities, decisions, deliberation and considerations of public officials, there is no legal requirement to make audio recordings of meetings. However, if audio tapes are made, they should not be erased or disposed of except in accordance with disposal schedules approved by the National Archivist.

In deciding whether tapes of meetings may be destroyed or erased, the following matters should be considered:

1) Is there a current access request covering the tapes?
2) Were the tapes intended to be the official record of the meeting?
3) If minutes were made from the tapes, were the minutes destroyed?
4) Were the tapes used for administrative purposes other than to assist in the preparation of minutes?
5) Did the meeting itself concern a matter of particular national significance?

If the answer to any of these questions is "yes", audio recordings of meetings should not be destroyed or erased.

To shred or not to shred (03-99)

Background

During the reporting year, the Senate Standing Committee on Agriculture and Forestry undertook an inquiry into the safety of the bovine growth hormone Nutrilac (rBST). For almost 11 years Health Canada has been considering whether or not to approve rBST for use in Canada. Consequently, much of the Senate Standing Committee process involved assessing Health Canada processes, considering the state of scientific knowledge and interviewing Health Canada (HC) officials and scientists.

In the course of the review, the Committee was denied access to some information it requested from HC. As a result, a special assistant to one of the committee members applied under

the *Access to Information Act* for access to the withheld record as well as to the records relevant to rBST.

After receiving HC's response, which exempted portions of the records, the special assistant complained to the Information Commissioner about three matters. First, she alleged that additional records must exist. Second, she objected to the fact that HC had applied exemptions to the bulk of the records she requested. Third, she expressed concern that some records relevant to rBST may have been improperly shredded. An unnamed source had reported to the senator's office that there was an unusually high level of shredding activity in Health Canada's Bureau of Veterinary Drugs. The shredding was alleged to have occurred in the days immediately following allegations by scientists, before the Committee, that management of HC had interfered with their work.

Legal Issues

Since the requester made public the commissioner's report of the results of this investigation, the verbatim text may be made public here. It is as follows:

> I write to report the results of our investigation of your complaints made under the *Access to Information Act* (the Act) against Health Canada (HC) concerning your request for records relating to the rBST (Nutrilac) GAPS Analysis Report and Review Team meetings.
>
> You complained about three separate matters concerning your request for records relating to the drug Nutrilac (rBST). First, you complained that you had not been given access to all the records you had requested in an access request dated June 1, 1998. Second, you complained about exemptions applied by HC to the records provided to you in response to your access request. Third, you complained of possible wrongful destruction of rBST-related records. I will address each matter separately.
>
> 1. Completeness of response:
>
> You expressed particular concern about the department's failure to provide you with a copy of the audio recordings of the Gaps Analysis Review Team meetings when HC responded to your June 1 access request.
>
> The investigation has satisfied me that the audio recordings were relevant to your access request and they should have been processed and provided to you, subject to applicable exemptions. Your request was given a narrower interpretation than necessary. During the investigation, the tapes were transcribed and reviewed under the Act. The accessible portions were made available to you on December 23, 1998, when the record was placed on the Health Canada website.
>
> I hasten to add that the investigation has also satisfied me that the failure to disclose these audio tapes was not part of a deliberate cover-up or bad faith

attempt to suppress information concerning rBST. The audio tapes were identified as relevant to an access request received at HC nine days after receipt of your request. In other words, there was no general effort to conceal these audio tapes from the right of access.

In addition to the audio tapes, other records relating to rBST were also overlooked by HC in responding to your June 1 request. Some were recently located in the possession of Dr. Lambert, a scientist in the Bureau of Veterinary Drugs (BVD) and others were located elsewhere in the Food Directorate.

The investigation showed that your request was initially answered based upon a search for records concerning rBST held in the central registry of the BVD. A restricted search of that nature was inadequate given the rudimentary state of the records management system in the BVD.

These additional records are currently being reviewed for possible application of exemptions, prior to disclosure to you. I am assured that the review will be completed expeditiously. As well, HC has accepted my recommendation that you will not be charged fees for the additional disclosures.

I have also reminded HC that, consistent with the purpose clause of the Act, access requests should be given a liberal interpretation. Where there is doubt, there should be communication with the requester to clarify the scope of an access request.

Third, I have recommended that implementation of the department's records management policy be given special care and attention. Based on our cursory review of how records are generated, indexed, filed, stored and disposed of in BVD, it is impossible for us to say, with any certainty, that all records relevant to your request have been located and processed. Put simply, there is no reliable way to determine what records are held by the department on a topic, where they are held and, if they cannot be located, whether they have been properly archived or destroyed. To the extent reasonably possible, however, I am satisfied that a good faith effort has been made by HC to locate and process all records relevant to your request.

2. Appropriateness of exemptions

In the initial response to your request, some 134 pages of records were identified and processed. Portions were withheld under sections 20, 23 and 68. Given that additional records have been found and exemptions are being applied, I do not intend to make findings on this aspect of your complaint until all exemptions have been applied and reviewed by my investigator.

3. Improper records destruction

On October 28, 1998, you complained about the possibility of records being destroyed which were relevant to your access request and/or the Senate Committee on Agriculture and Forestry hearing into rBST-related issues. In particular, you alleged that an unusually high level of shredding activity occurred in the BVD on October 23, October 26 and October 27. Specific allegations were made that Dr. Lachance's secretary and Drs. Alexander and Yong had been observed making frequent trips to the shredder during these days.

In view of the seriousness of these allegations, I dispatched officials immediately to commence our investigation by meeting with the Deputy Minister of Health and other senior HC officials. Those meetings took place on October 28 and were followed by others in the intervening days. At my request, all employees of HC were instructed to cease all disposal and destruction activities relating to rBST records.

To establish the facts, my investigator interviewed all BVD scientists and managers, as well as other relevant BVD office staff members to determine:

- Who was on BVD premises on October 23, 26 and/or 27;
- if anyone did shredding in BVD on those days;
- if yes, who did the shredding, and who saw them;
- what records were shredded, if any, and why;
- if the records destruction was in conformity with government information management policies;
- whether the shredding activities within BVD were higher than usual on those three days;
- whether anyone was asked to shred rBST records on behalf of someone else;
- whether anyone saw a high volume of powder residue at the shredder; and
- whether any rBST records are missing.

In addition to the interviews, officials from my office:

- Interviewed other senior managers within HC and the Health Protection Branch;
- tested the BVD shredder and inspected it, its work area and the BVD shredding bin;
- took possession of the original audio tapes and copies of all rBST records under the custody of Dr. Alexander;
- obtained copies of notes relating to the Daily Issues Management Committee meetings from individuals attending rBST-related sessions;
- obtained various listings of rBST and Monsanto-related files;
- reviewed hundreds of rBST-related records; and
- noted the physical security measures in place within BVD.

As a result, I make the following findings of fact:

1) Shredding of records did occur in the BVD during the period October 23-27, 1998.
2) The amount of shredding (59 pages) was not unusually high and none of the shredding was improper.
3) Four documents relating to rBST were shredded being:
   - A 3-4 page draft memo to the Clerk of the Senate Committee which had been printed for proof-reading purposes.
   - A 17-page copy of the October 22 Senate transcripts of the rBST hearing.
   - Two documents totalling 33 pages relating to the CODEX Committee. The documents had been printed to be reviewed and remain intact in electronic form.

4) Some 5 pages of records, unrelated to rBST, were also shredded during the same period.
5) No official of HC, at any level, has taken any deliberate step to interfere with your right of access to rBST records.

For the foregoing reasons, I find your complaint about wrongful destruction of records to be not substantiated.

In conclusion, I wish to thank you, the Deputy Minister of Health and all those who assisted my office in the conduct of this investigation, for the helpful representations provided and the respectful cooperation extended to my office.

Lessons Learned

This case demonstrated both the practical and legal problems which can occur when access requests are given an overly narrow interpretation. When the department decided that the audio recordings of the GAPs Analysis Review team meetings need not be provided so long as the GAPS Analysis Report was provided, it set an unfortunate and unnecessary train of events in motion. It earned the distrust of the requester who heard from elsewhere (as is often the case) that additional records concerning rBST exist. Legally, of course, the department also exposed itself, because the law is clear that access requests are to be given a liberal interpretation.

As for the allegations of improper record destruction, the main lesson is that not all shredding is improper. Where there is an atmosphere of discontent and distrust in any workplace, even innocuous shredding activity can be misinterpreted. Having a good understanding of government records retention and disposal requirements is essential for all employees to prevent them, even by inadvertence, from destroying a record which may have archival value or may be relevant to a current access to information request.

Perhaps the most important lesson from this case is the degree to which the right of access depends on good records management practices. If departments don't know what records they hold or where they are filed, they

cannot respond completely and efficiently to access requests. This is an area of responsibility which the Act specifically gives to the President of Treasury Board and all departments need the Board's leadership in addressing the poor state of records management in the federal government.

The shell game (04-99)

Background

In 1997, Parliament restricted the importation and interprovincial trade in a fuel additive known as Methylcyclopentadienyl Manganese Tricarbonyl (MMT). It did so by passing the *Manganese-based Fuel Additives Act*. The legislation was sponsored by the Minister of the Environment.

In the Fall of 1997, an access request was made to Environment Canada for access to:

> "Discussion papers, the purpose of which is to present background explanations, analysis of problems or policy options to the Queen's Privy Council for Canada for consideration in making decisions with respect to Methylcyclopentadienyl Manganese Tricarbonyl."

The requester wished to know what background material was provided to Cabinet upon which the decision was based to proceed with the ban on MMT. On instruction from Privy Council Office (PCO), Environment Canada denied access to the requested records in the following terms:

> "Please be advised that although discussion papers no longer form part of the Cabinet Papers System, all documents containing the requested information are excluded in accordance with paragraphs 69(1)(a) and 69(1)(e) of the *Access to Information Act*."

The requester was not satisfied with this response and complained to the Information Commissioner.

Legal Issues

When Parliament agreed to exclude Cabinet confidences from the coverage of the *Access to Information Act*, there was a quid pro quo. A particular class of Cabinet records was carved out and made subject to the Act once related Cabinet decisions were made public or four years after Cabinet decisions which were not made public had been taken. This class is described in paragraph 69(1)(b) of the Act as:

> ". . . discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions. . . ."

It is no coincidence that the wording of the access request is identical to this provision. The reason being, of course, that the requester wanted to know the basis on which the government had decided to restrict MMT.

During the investigation, the Information Commissioner learned that the Cabinet record which contains background, analyses and options relating to MMT is not called a "discussion paper"; rather it is called the "analysis section" of the Memorandum to Cabinet (MC). Indeed, in 1984, the Cabinet Papers System was changed by putting the information formerly contained in discussion papers into renamed documents. From 1984 to 1986, background, analyses and options were presented to Cabinet in the "Memo to Cabinet" section of an MC. From 1986 to present, such information, as mentioned, is found in the "analysis section" of an MC.

PCO took the position in this case that there was magic in the name "discussion paper." PCO argued that, since the "discussion paper" appellation is no longer used, the public's substantive right to have access to the kind of information which used to be contained in discussion papers, had been extinguished.

After carefully reviewing the legislative history of this provision; the drafting instructions for the Cabinet Papers System during the period immediately prior to the passage of the *Access to Information Act* to the present; the purpose section of the Act and the jurisprudence on the proper interpretation of the Act, the Information Commissioner recommended that the requested information should be disclosed. He found that a substantive right of access to a class of Cabinet records cannot be extinguished by an administrative decision to change the appellation of said class of records.

The Information Commissioner also observed that the "analysis section" of an MC is required to be "a thorough, balanced and objective analysis of the background of the issues, the factors considered in arriving at the possible options described, the options and the cost of implementing each." [1997 - Memorandum to Cabinet - A Drafter's Guide, p. vii]. As well, since January 1, 1986, PCO has agreed to allow the Auditor General to review the analysis section of any MC dealing with the expenditure of public funds. The Information Commissioner concluded that, in these circumstances, disclosure of the analysis section of MCs, in accordance with 69(3)(b) of the *Access to Information Act*, would not pose any threat to the long-standing principle in our system of government that the deliberations of Cabinet should be secret.

The Minister of the Environment and the Prime Minister refused to accept the Information Commissioner's recommendation in this case. As a result, the commissioner has sought the consent of the requester to ask the Federal Court to review the matter and order disclosure.

Lessons Learned

It is not prudent to draw definite lessons from a case, which is in dispute. However, this case will, in the end, provide a very important lesson concerning the vibrancy of the *Access to Information Act*. After a difficult struggle in committee, a

compromise was reached in 1982 to preserve some measure of public access to Cabinet confidences. That compromise was:

1) to allow the public access to the background information which was available to the Cabinet when it made decisions; and

2) to allow such access immediately after the related decision is made public or, if no public announcement is made, when four years pass after the related decision is made.

Almost immediately after the access law came into effect (on July 1, 1983), the titles of records in the Cabinet Papers System were changed—a move which PCO claims extinguished the carefully crafted right of access which Parliament had fashioned. The surprising element of this story is that no one, until this year, challenged the closure of the window into the cabinet process which Parliament had opened by adopting the ‘‘discussion paper’’ exception to cabinet confidentiality.

Nose thumbing
Case 1: National Defence (05-99)

Background

After investigating a number of complaints of delay against ND, the Information Commissioner concluded that there was no justification for the delays and recommended that responses be given by a specified date. The Deputy Minister of ND accepted the recommendation and promised to respond by that date. The Information Commissioner accepted this promise as a resolution of the complaint and closed the files. Alas, ND did not respond on the agreed date nor did it offer an alternate date.

As a result, the Information Commissioner initiated, on his own motion, new complaints into these cases and asked the Deputy Minister to make representations as to the reasons for the continuing delays and when answers would be given. The Deputy Minister was also asked to justify any exemptions or exclusions which he proposed to invoke in the responses to these requests. In his representations, the Deputy Minister refused to say when the requests would be answered and gave an astonishing explanation:

> “The remaining 15 files are in the process of being examined to determine whether they contain issues which must be brought to the attention of my Minister.”

In light of this explanation for the continuing delay and the Deputy Minister’s failure to offer a promised response date, the Information Commissioner issued subpoenas to the Deputy Minister and the Executive Assistant to the Minister, requiring them to answer questions under oath and on the record. During the 33 hours between the issuance of the subpoena and the hearing into the matter, ND issued answers to the outstanding files.
During the hearing, it was learned that ND has a senior level committee which meets twice per week and

reviews proposed responses to access requests in order to determine which ones should be brought to the Minister's attention before the answer is issued. Any proposed response which is newsworthy or politically sensitive is flagged. These responses are carefully reviewed by the department's public affairs specialists, and communication materials are prepared. A departmental officer who works directly for ND's Assistant Deputy Minister, Corporate Services also reviews all before they are routed to an exempt staff member in the Minister's office for another review.

The Minister's Executive Assistant testified that he had given an instruction to departmental officials that no response should be issued until the Minister had been briefed concerning the proposed release. According to ND's records, this process of reviewing records for the attention of the Minister can take from 4 to 10 weeks. More troubling, it also was clear from the evidence that this additional delay added no value to the responses—in other others, the "political" review is purely for the convenience of the Minister and is not necessary for the proper administration of the *Access to Information Act*.

Legal Issue

Is there any legal justification for delaying responses beyond statutory deadlines for the purpose of serving a Minister's communications needs? The commissioner concluded that ND had failed to appreciate the mandatory nature of the response deadlines contained in section 7 of the *Access to Information Act*. He observed that there is nothing improper about keeping a Minister informed of impending releases, as long as response deadlines are met. Otherwise, such activity is entirely improper. The commissioner concluded that the Minister's Executive Assistant should never have issued the instruction he did and the Deputy Minister should not have tolerated any such instruction.

The commissioner reported to the Minister of Defence that the complaints were well-founded. He recommended that the Minister issue the following instruction:

> "It is expected that those holding the delegated authority to answer access requests will exercise that authority in compliance with statutory deadlines. Reasonable efforts to ensure that the Minister's communications needs are served prior to the issuance of responses are appropriate. However, late responses to access requests shall not be further delayed in order to serve the Minister's communications needs. Furthermore, late responses shall not be further delayed in the senior approval process within the department."

The Minister agreed with the substance of the commissioner's recommendation. He issued written instructions to the Deputy Minister and Chief of Defence Staff directing that all necessary steps be taken to ensure that the response deadlines in the access law are respected. With

respect to his communications needs, the Minister said:

> "I also expect that impending releases of sensitive information will be brought to my attention in a timely manner so that I may respond to questions. This requirement, however, should not in any way contribute to delays in responding to access requests."

Lessons Learned
Ensuring compliance with mandatory response deadlines is virtually impossible if public officials adopt the view that loyalty to the Minister is a higher value than is obedience to law. National Defence has been the problem child of access to information precisely for this reason. National Defence does not have an inordinately heavy burden of access requests—it is fourth on the list after Citizenship and Immigration, National Archives and Health Canada. National Defence has one of the largest staffs to process access requests of any government institution. Yet, National Defence is chronically unable to answer the requests it receives in a timely manner. The directive given by the present Minister of Defence gives departmental officials the proper guidance: the Minister's communications needs should be met, but, not at the expense of access requesters' rights.

Nose thumbing
Case 2: Solicitor General of Canada (06-99)

Background
Within the Department of the Solicitor General is located the Office of the Inspector General (OIG). The OIG is the Solicitor General's internal watchdog over the Canadian Security Intelligence Service (CSIS). Each year, the OIG provides the Solicitor General with a report which contains observations and recommendations concerning the degree to which CSIS conducts its work in conformity with prevailing legislation and ministerial direction. These annual reports to the Solicitor General are referred to as Inspector General Certificates.

Every year, the department receives a request from a journalist seeking access to the most current certificate; this reporting year was no exception.

On July 13, 1998, the department received the request. It claimed no time extension and so, the response deadline was August 12, 1998. The requester waited patiently until February 2, 1999, when he made a complaint to the Information Commissioner. His several informal calls to the department had fallen on deaf ears.

Legal Issue
This complaint came as a disappointing surprise to the Information Commissioner, because it was not the first time the department

had been unjustifiably late in answering requests for the Inspector General certificates. The department was asked to provide a commitment to respond by a specific date—it agreed to answer the request by March 3, 1999. Alas, that date came and went with no answer being given. How tolerant should the commissioner be in such circumstances?

On March 4, 1999, a subpoena was issued to the Deputy Solicitor General of Canada requiring him to appear at the premises of the Information Commissioner on March 5, 1999, to explain the causes of the delay in this case and to justify any exemptions the department proposed to apply. The department answered the request by the time of the Deputy Solicitor General's appearance on March 5.

During the hearing, the Deputy Solicitor General's attention was drawn to a letter sent to him in 1994 by the former information commissioner, concerning delays in responding to an access request for the Inspector General's certificates. In that letter, former commissioner John Grace states:

> ". . . for the record and for your information, I should tell you that this letter closes the book on one of the worst examples of unjustified secrecy and foot-dragging we have seen during my years in this business. Since 1991, when he first requested records concerning the Inspector General of the Canadian Security Service, (the requester's) legal rights were largely ignored by officials at all levels. The convenience of public officials was given greater priority than a complainant's legal right."

The only concrete step taken by the Deputy Solicitor General, after the 1994 letter, to avoid a reoccurrence, was the establishment of a weekly report to the senior management committee (chaired by the Deputy Minister) setting out the status of access requests in progress. As a result, the slow progress of the 1998 request was well-documented and well-known to the departmental senior management. Nothing was done, however, to speed the answer along.

It also became apparent, during the hearing that nothing was done to speed up responses to other late access requests. Evidence was received showing that, of the modest number of requests received annually by the department (63), 22 (37 per cent) were not answered within deadline.

The commissioner concluded that the complaint was well-founded and asked the Solicitor General to develop a set of new procedures, delegations and policies designed to ensure that access requests are processed within deadlines. As well, the commissioner asked the Minister to develop a specific protocol governing the processing of access requests for Inspector General certificates. The Minister agreed so to do.

Lessons Learned

When recurring, expected requests cannot be answered within deadlines, it signals that there is a problem with the overall procedures, delegations

and policies governing the processing of access requests. Senior management must ensure they have an early warning system of access problems, such as weekly status updates. Even more critical, senior management must react quickly and decisively when the early warning system alerts them to a problem. When a department's senior management allows access problems to fester, they invite the Information Commissioner to intrude into their managerial domain to ensure that the problem is solved.

How was the choice made? (07-99)

Background

On November 12, 1996, the Office of the Leader of the Opposition made an access request to Industry Canada, for information about the awarding of licences for the provision of satellite television services known as Direct-to-Home (DTH) and Direct Broadcast Satellite (DBS) services. The final chapter to this long saga was written during this reporting year.

In the intervening years, in response to the request and after the intervention of the Information Commissioner, Industry Canada released more and more information. The sticking point, in the end, related to information showing the basis upon which applications were assessed. The Information Commissioner was of the view that the evaluation criteria and associated weightings should be disclosed. Industry Canada disagreed, arguing that such information constituted internal advice and recommendations to the Minister and, thus, qualifies for exemption under paragraph 21(1)(a) of the *Access to Information Act*.

[In many respects this is a companion case to one reported at pages 61-63 of the 1997-98 Annual Report, dealing with TeleZone Inc.'s application to Industry Canada for a licence to offer Personal Communications Services (PCS).]

Legal Issue

As is often the case when government decides who should win licenses, there was in this case a process by which applications were rated and compared. This process included a set of evaluation criteria, each of which was assigned specific percentage weighting. Do those evaluation criteria and weightings constitute "advice" or "recommendations"? That was the issue in this case.

Industry Canada argued that the criteria and weightings were only staff recommendations to the Minister as to how the evaluation process should be conducted. To use Industry Canada's words: "The information is pre-decisional and, given its purpose, advisory in nature." The Information Commissioner took the view that the criteria and weightings do not constitute "advice" or "recommendations", but, rather they form part of the contextual framework within which the Minister expected recommendations to be developed concerning the merits of the applications.

Industry Canada also argued that disclosure would set a bad precedent for future license-awarding processes. The department expressed the fear that disclosure of the criteria and weightings would cause applicants to skew their proposals to reflect what they believe the department would wish to hear rather than what the applicants really want to do. On this point, too, the commissioner disagreed. He expressed the view, that leaving applicants to guess at what the department expects, by way of a service proposal, would not improve the quality of applications.

As a result, the commissioner recommended that the evaluation criteria and weightings be disclosed. Industry Canada agreed to disclose the criteria, but maintained the exemption of the weightings. The commissioner was not satisfied with this outcome and, with the consent of the requester, he asked the Federal Court to review the matter and order disclosure of the weighting. The outcome of the case will be reported in next year's report.

Lessons Learned

No firm lessons can be drawn from a case which is in dispute before the court. This case does remind us, however, about the dangers of giving an overly broad interpretation to the "advice" and "recommendations" exemption. If the argument put forward by Industry Canada were to be accepted—i.e. that background work done or used to develop advice or recommendations, is itself advice or recommendations—then virtually all of what public servants do could be shielded from the right of access. It is to be hoped that the court will not permit Industry Canada to cast the net of this exemption so broadly.

License and registration, please! (08-99)

Background

An aggrieved citizen involved in civil legal proceedings against several RCMP officers made an access request for information about the officers' previous postings and public complaints filed against them. The RCMP released information about the officers' current or most recent (in the case of a retired officer) postings but withheld information concerning previous postings, pursuant to subsection 19(1), in order to protect the officers' privacy. The requester complained to the Information Commissioner.

Legal Issue

Does subsection 19(1) of the *Access to Information Act* authorize the RCMP to refuse to disclose information about the service history of its members? The answer to this issue depends on whether or not such information is "personal" as defined in section 3 of the *Privacy Act*.

The RCMP argued that information about previous postings constitutes a member's employment history. It relied on paragraph 3(b) of the *Privacy Act*, which states:

> "'personal information' means information about an identifiable individual that is recorded in any

form including, without restricting the generality of the foregoing,

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved." (Emphasis added.)

The Information Commissioner drew the RCMP's attention to paragraph 3(j) of the *Privacy Act* which states that certain information is not "personal" and, hence, does not qualify for exemption under section 19 of the *Access to Information Act*. It states:

". . . but, for the purpose of sections 7, 8 and 26 and section 19 of the *Access to Information Act* ("personal information"), does not include:

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including:

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment."

The Information Commissioner did not accept the RCMP's argument that 3(j) only requires disclosure of the member's current posting. The RCMP based its view on the fact that 3(j) uses the word "position" in the singular.

The Information Commissioner concluded that it would lead to an unreasonable result to adopt the RCMP's view. If Parliament took the trouble to ensure that employment-related information of public officials would be accessible, why would it shield historical information which is as vital to transparency and accountability as is current employment information? The enumerated examples in 3(j) clearly show, in the commissioner's view, Parliament's intention that past as well as present employment-related information should be accessible. As well, the opening words of the provision —"information about an individual who is or was an officer or employee"—makes explicit the intention that historical as well as current employment information is encompassed by the provision. Consequently, the Information

Commissioner found the complaint to be well-founded and recommended that the withheld information be disclosed. The RCMP refused to follow the recommendation and, with consent of the requester, the matter has been brought before the Federal Court for review.

Lessons Learned

The court's ruling, when it comes, will give guidance on whether information about the previous positions, duties and functions of public officials can be shielded from public scrutiny. As a matter of practice, virtually all government institutions—except the RCMP—interpret 3(j) of the *Privacy Act* as applying to previous as well as current employment information. Consequently, depending on how the court rules, there may be either a minor or a major impact on the transparency of government.

Outsiders vs. insiders (09-99)

Background

A union official, employed by the Jacques Cartier and Champlain Bridges Inc. (JCCB) made an access request for a 1997 Audit Report of JCCB's financial, information and human resources management.

The request was turned down on the basis that the audit constitutes:

1) advice and recommendations (21(1)(a));
2) an account of consultations or deliberations (21(1)(b)); and
3) personnel management and administration plans not yet in operation (21(1)(d)).

The requester was not satisfied with the response and complained to the Information Commissioner.

Legal Issue

Is it permissible to withhold a report, prepared by an outside consultant, under provisions designed to protect the internal advice-giving and deliberation process? The bridge authority argued that it was irrelevant whether or not the advice, recommendations, consultations or plans were developed by public officials or outside consultants. The Information Commissioner pointed to the clear wording of paragraph 21(2)(b) which states:

> "Subsection (1) does not apply in respect of a record that contains
>
> (b) a report prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a minister of the crown."

He concluded that, since there is no ambiguity about Parliament's clear direction—that consultant's reports cannot be exempted under paragraphs 21(1)(a)-(d)— there was no basis for the refusal to grant access. The commissioner found the complaint to be well-founded and recommended disclosure. The head of the JCCB refused to follow the recommendation.

As a result, with the consent of the requester, the Information Commissioner has asked the Federal Court to review the matter and order disclosure of the consultant's report.

Lessons Learned

The protections provided by the Act for advice, recommendations, consultations, deliberations and plans, are designed to allow public servants to serve their ministers with the candour which is often only possible in private. The protection does not extend to those who are outside the internal advisory process. This case is expected to reinforce this principle which is already clearly articulated in paragraph 21(2)(b).

Who signed the visas? (10-99)

Background

An access to information request filed with Citizenship and Immigration Canada (C&I), sought a report showing the number of FC1 selection decisions (visas granted and refused) made by visa officers in Peking and Beijing, between 1993 and 1997. The department provided lists for each year, but severed the visa officers' initials, on the basis that disclosure would reveal personal information that should be protected under subsection 19(1) of the Act.

The requester complained to the Information Commissioner, objecting to the exemptions on the basis that the individuals were all public servants.

Legal Issue

Subsection 19(1) is a mandatory provision which directs federal institutions to withhold personal information about identifiable individuals other than the requester. The legal issue in this case was to determine whether the exemptions applied by the department under subsection 19(1) had been properly invoked, particularly in view of the fact that the withheld initials were those of public employees.

The complainant argued that disclosure of the initials is authorized under subsection 3(j)(iv) of the *Privacy Act*, which excludes from the definition of personal information any "information about an individual who is or was an employee of a government institution that relates to the position or functions of the individual, including ... the name of the individual on a document prepared by the individual in the course of employment."

During the investigation, C&I argued that the visa officers' initials, combined with the statistics on immigration decisions, would constitute an appraisal of each employee's work. As such, C&I deemed it legitimate to withhold the employee's initials on privacy grounds. However, the investigation also revealed that some C&I officials were concerned about disclosure for another reason: disclosure might identify visa officers who have a higher approval ratio for visa applications. This could lead to

attempts to seek specific visa officers for the review of visa applications.

The commissioner did not support the withholding of the employees' initials as personal information based solely on the speculative concerns raised by C&I. He asked C&I to reconsider the matter. After consulting the Department of Justice, C&I disclosed the information.

Lessons Learned

Public officials have less privacy protection than do other individuals. Canadians have a right to know information about public officials which relates to their position or functions—a right set out in paragraph 3(j) of the *Privacy Act*. Although public officials may find it uncomfortable to be open to public scrutiny in this way, the dangers of having a faceless, unaccountable bureaucracy far outweigh the privacy invasion involved.

Who has the power? (11-99)

Background

This complaint revolves around section 73 of the Act:

> "The head of a government institution may, by order, designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the Order."

The complainant alleged that all legal instruments signed by the National Defence (ND) Access Coordinator and her staff, since October of 1996, were invalid and illegal, having been issued without proper legal delegation under section 73. In the complainant's view, ND's most recent Delegation Order under section 73 (signed by the Honourable D. Collenette on April 25, 1996) became obsolete in October of 1996. At that time, the Honourable Doug Young replaced Mr. Collenette as Minister of National Defence. Subsequently, the Honourable Art Eggleton replaced Mr. Young. Neither Mr. Young nor Mr. Eggleton had issued delegation orders at the time of the complaint.

Legal Issue

When does a delegation order, made pursuant to section 73 of the Act, become obsolete?

The Information Commissioner reviewed the *Interpretation Act* and concluded that delegations of authority do not cease to have validity when the person making the delegation no longer holds office. There is of course, a standard of reasonableness to be applied. Delegations should be reconfirmed within a reasonable period after the person who gave the delegation, ceases to hold office. Based on this view, ND officials had the authority to exercise, for a reasonable period of time, the powers, duties and functions conferred on them by a minister under the Act, even after a change of minister.

The commissioner called the department's attention to chapter 2-1,

p. 1 of the Treasury Board Guidelines on Access to Information. The guidelines urge departments to have each new minister sign a delegation order under section 73 of the Act.

Lessons Learned

Failure to have a new delegation order signed when the head of an institution changes is not fatal to the most recent delegation order. However, as a matter of good practice, new delegation orders should be signed within a reasonable period of time after the appointment of a new head of institution.

Too much taxpayer secrecy? (12-99)

Background

Revenue Canada (RC) received a request for copies of a corporation's last two years of income tax returns. RC responded by exempting the information totally, claiming that it was confidential taxpayer information protected from disclosure without proper authorization from current directors of the company, pursuant to subsection 24(1) of the *Access to Information Act*. The complainant objected to RC's denial of access, stating he was a director of the company when it was in legal existence. He provided documentary proof of this claim and argued that he should, therefore, be provided with the requested records.

The company, in this case, was incorporated in 1972 under the *Prince Edward Island (PEI) Companies Act*, dissolved by PEI in 1986 and revived by the owner in 1990. After its revival, the company obtained a license to do business in Ontario, where in 1991, it filed for bankruptcy. The trustees of the estate were discharged by the Ontario Court in 1993. In 1994, the PEI government dissolved the company again for failure to file annual returns. The company remains dissolved to this day.

Legal Issue

Does a director of a company, which has been dissolved, have the right to obtain access to the former company's tax information? Subsection 24(1) of the *Access to Information Act* states that the head of a government institution must refuse to disclose any record which contains information restricted by Schedule II of the Act. Section 241 of the *Income Tax Act* (ITA) appears in schedule II, which means that information obtained by or on behalf of RC under the ITA, cannot be disclosed under the *Access to Information Act*, unless one of the permissible disclosure provisions found in section 241 of the ITA is shown to apply.

Revenue Canada claimed that after a company has been dissolved, no one has the right to access its information. The complainant argued that as a director of the company, he should be given the requested records.

Although this position seemed to take taxpayer secrecy to an extreme, the Information Commissioner agreed with the department that the information had been properly withheld. Under subsection 241(5) of

the ITA, "an official may provide taxpayer information relating to a taxpayer, to the taxpayer, and, with the consent of the taxpayer, to any other person." No one else is entitled to see taxpayer information. Taxpayer, in this case, means the company. A corporation is a separate, legal entity, with the rights of a natural person. As directors are individuals elected/ appointed to manage the company, a current director would be given access to tax records under subsection 241(5) of the Act.

However, in the case of a dissolved company former directors no longer have any authority to act on behalf of the company. That being the case, no one can obtain the corporate taxpayer's information, whose confidentiality is protected by section 241 of the ITA. The fact of the matter is that RC had no option but to exempt the records under subsection 24(1) of the Access Act, which is a mandatory provision.

Lessons Learned

RC's obligation to protect taxpayer confidentiality is reinforced by the fact that section 241 of *the Income Tax Act* is referenced in Schedule II of the *Access to Information Act*. To a requester, especially one who was a director of the corporation, it might appear that there is no harm in disclosing records of a non-existent company. But, legally, RC is charged with protecting the confidentiality of taxpayer information. An incorporated company has the same rights as a private person. In this case, RC properly executed its responsibility towards the taxpayer.

Index of the 1998-99 annual report case summaries

Section Of ATIA	Case No.	
6	(02-99)	**The NCC Tapes** (NCC) (Request for access to record – Duty to inform of existence of records – Duty to retain records – Duty to create records)
	(03-99)	**To shred or not to shred** (HC) (Request for access to record – Completeness of response – Improper destruction of records)
10(3)	(05-99)	**Nose thumbing; Case 1: National Defence** (ND) (Delay – Deemed refusal – Involvement of minister)
	(06-99)	**Nose thumbing; Case 2: Solicitor General of Canada** (OIG) (Delay – Systemic problems)
16(1)(c)	(01-99)	**Pan-Pan-Pan** (TSB) (Lawful investigations – What is "injurious")
19(1)	(01-99)	**Pan-Pan-Pan** (TSB) (Personal information – Identifiable individual)
	(08-99)	**License and registration, please!** (RCMP) (Personal information – Public servants)
	(10-99)	**Who signed the visas?** (C&I) (Personal information – Public servants)
20(1)(b)	(01-99)	**Pan-Pan-Pan** (TSB) (Technical information – Confidential)
20(1)(c)	(01-99)	**Pan-Pan-Pan** (TSB) (Competitive position)
21(1)(a)	(07-99)	**How was the choice made?** (IC) (Advice and recommendations)
	(09-99)	**Outsiders vs. insiders** (JCCB) (Advice and recommendations)
21(1)(b)	(09-99)	**Outsiders vs. insiders** (JCCB) (Consultations and deliberations)

21(1)(d) (09-99) **Outsiders vs. insiders** (JCCB) (Personnel management and administrative plans not yet in operation)

24(1) (12-99) **Too much taxpayer secrecy?** (RC) (Statutory prohibitions against disclosure – Corporate income tax returns)

69(1)(a) (04-99) **The shell game** (PCO) (Confidences of the Queen's Privy Council)

69(1)(e) (04-99) **The shell game** (PCO) (Confidences of the Queen's Privy Council)

73 (11-99) **Who has the power?** (ND) (Delegation by the head of a government institution – Renewal of delegation upon change of Minister)

Glossary

Following is a list of department abbreviations appearing in the index:

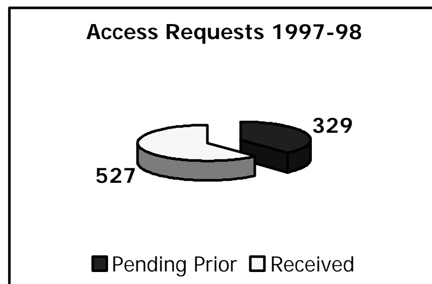
C&I	Citizenship and Immigration Canada
HC	Health Canada
IC	Industry Canada
JCCB	Jacques Cartier and Champlain Bridges Inc.
NCC	National Capital Commission
ND	National Defence
OIG	Office of the Inspector General
PCO	Privy Council Office
RC	Revenue Canada
RCMP	Royal Canadian Mounted Police
TSB	Canadian Transportation Accident Investigation and Safety Board

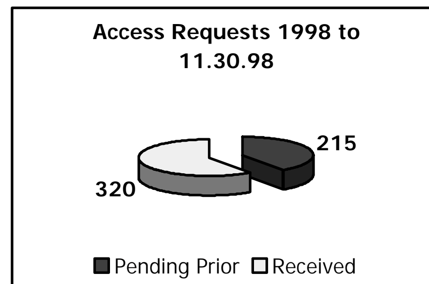
Response time—reviews

At pages 6-7 reference has been made to the reviews completed this year of the performance of six departments in meeting the law's mandatory response deadlines. Highlights of the report cards follow:

A. Revenue Canada—Statistical Information

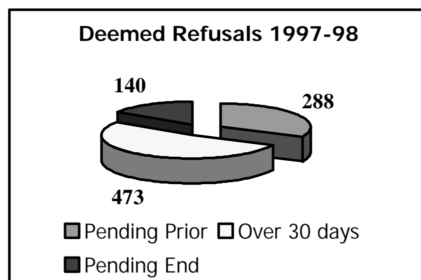
1. Requests (RC)

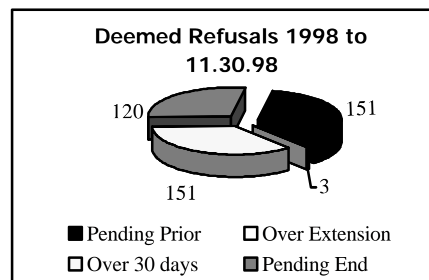




The charts above present a good visual picture of RC's significant request backlog.

Of note, Revenue Canada was listed in the 1997-98 InfoSource Bulletin as having placed sixth highest of the ten institutions receiving the most requests. In 1997-98, RC received 4.3% of all requests made during that reporting period—527 requests.





At the outset of the 1997-98 fiscal year, RC's Access to Information office had 329 unfinished requests—288 (88.5%) of which were already in a deemed-refusal situation. The 1998-99 fiscal year shows some improvement with 215 outstanding requests—140 (65.1%) in a deemed-refusal situation. Considering the fact that 527 new requests were received in the 1997-98 fiscal period—320 to November 30 this fiscal year, these

(Pending Prior) deemed refusals still amount to approximately 30 per cent of the yearly intake. Non-compliance considerations aside, this backlog is burdensome to the ATI office and must be eliminated.

The time taken to complete new requests is equally distressing:

- In 1997-98, processing times for 473 requests completed beyond the 30-day statutory limit without an extension were:
- 45 (9.5%) took an additional 1-30 days to complete
- 76 (16.1%) took between 31 to 60 additional days
- 352 (74.4%) were completed in over 90 additional days

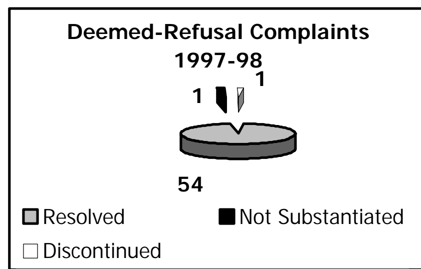
- In 1998 to November 30, 1998, additional processing times for 151 non-extended new requests were:
- 26 (17.21%) took an additional 1-30 days
- 21 (13.9%) took between 31 to 60 additional days
- 32 (21.2%) took between 31 to 90 days
- 72 (47.7%) were completed in over 90 additional days

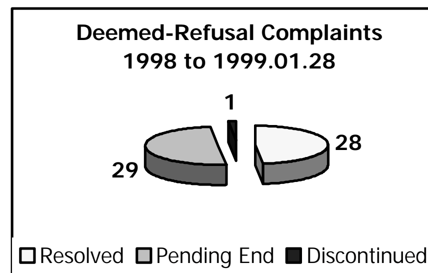
(The self-audit questionnaire did not ask RC to provide completion figures for the deemed-refusal backlog.)

- In 1997-98, RC claimed no time extensions. During the current fiscal period to November 30th, out of 5 time extensions, 3 (60%) exceeded the extension of time:
- 2 took an additional 1-30 days, and
- 1 took between 31-60 extra days.

As of November 30, 1998, 120 (37.5%) of unfinished new requests were in a deemed-refusal situation. The duration for these outstanding requests is not known.

2. Complaints—Deemed Refusals (RC)





In 1997-98, the Office of the Information Commissioner received 56 deemed-refusal complaints against RC—most (54—96.4%) were upheld (resolved).

As of January 28, 1999, the commissioner's office had received 58 complaints. On that date, of the 29 finalized complaints—again, most (28—96.6%) were upheld (resolved).

3. Recommendations (RC)

This review recommends the following:

- The access coordinator is directly responsible for ensuring compliance with the Access Act, and should take a strong leadership role in establishing a culture of compliance throughout RC. Such a role requires the unwavering support and endorsement of the Minister and the Deputy Minister.

- The coordinator should be directed by the Minister, in writing, to exercise the delegation to answer requests within deadlines whether or not the senior approval process has been completed.

- RC should start making use of extensions under section 9, and OPIs (including field offices) should be trained to identify records that would justify a valid extension. Further, OPIs should contact the ATI office without delay to indicate the request involves a large number of records, or a search through a large number of records. If the ATI office is aware of the need to extend, within the initial 30 days, a valid extension can be taken if the appropriate notice is sent on time.

- Allotted turnaround times should be tightened up, with some approval processes dropped or performed simultaneously. An information sheet, clearly showing the expected turnaround times for each stage in the access process, should be developed. This might help those not familiar with the request process to understand the tight timelines.

- OPI-specific training (and information packages), with a focus on timelines and other considerations, should be developed, and training sessions given.

- If a request is clarified or modified, the ATI unit should confirm, in writing, its understanding of the revised request—when the original wording of a request does not provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record. The date clarified becomes the effective date of the request, and the requester should be informed.

- If an extended date will not be met, the ATI office should routinely contact the requester to indicate it will be late, to provide an expected response date and of the right to complain to the Information Commissioner. This will not impact the deemed-refusal status once the extension date is missed; however, it will alleviate some of the requester's frustration and perhaps avert a complaint.

- If an outstanding request is almost one year old, the ATI office should notify the requester about

section 31, the one-year limitation on the right to complain.

- Performance contracts with operational managers should contain consequences for poor performance in processing access requests.

- Come into substantial compliance with the Act's deadlines no later than March 31 of 2000.

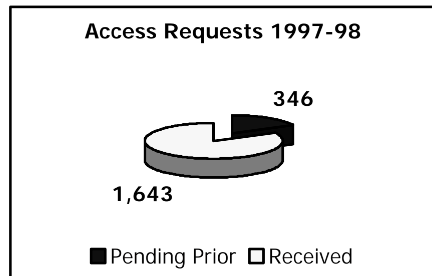
- Where possible, the ATI office should provide partial response releases for portions of records not involved in 3rd party or other consultations.

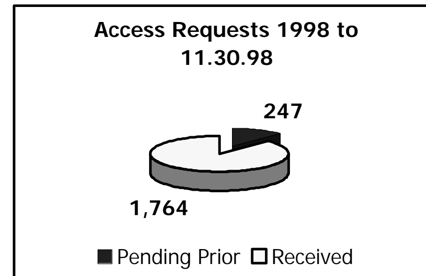
- Approach the overall delay problem by establishing milestones to reach pre-set targets for improved performance (i.e. move to a project management mode).

- ATI training should be mandatory for all new managers as part of their orientation and for all managers on a refresher basis.

B. Citizenship & Immigration Canada—Statistical Information

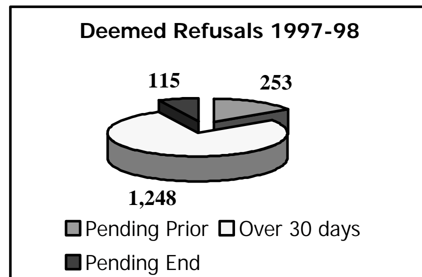
1. Requests (C&I)

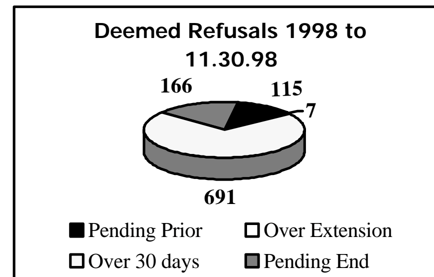




The charts above show the significance of C&I's backlog.

Of note, Citizenship & Immigration was listed in the 1997-98 *InfoSource* Bulletin as having placed first on the list of the ten institutions receiving the most requests. In 1997-98, C&I received 13.5% of all requests made during that reporting period—1,643 requests.





At the outset of the 1997-98 fiscal year, C&I's Access to Information office had 346 unfinished requests—253 (73.1%) of which were already in a deemed-refusal situation. The 1998-99 fiscal period started much the same with 247 outstanding requests—166 (67.2%) in a deemed-refusal situation. Considering the fact that 1,643 new requests were received in the 1997-98 fiscal period—1,764 to November 30th of this fiscal period, these (pending prior) deemed refusals amount to approximately 10 to 15 per cent of the yearly intake. Non-compliance considerations aside, this backlog is burdensome to the ATI office and must be eliminated.

The time taken to complete new requests is equally distressing:

- In 1997-98, processing times for 1,248 requests completed beyond the 30-day statutory limit without an extension were:

- 439 (35.1%) took between 31 to 60 additional days
- 600 (48%) took an extra 61 to 90 days
- 209 (16.7%) took more than 90 additional days

➢ In 1998 to November 30, 1998, additional processing times for 691 non-extended requests were:

- 447 (64.7%) took an additional 31-60 days
- 156 (22.6%) took between 61 to 90 additional days
- 88 (12.7%) needed more than 90 additional days

(The self-audit questionnaire did not ask C&I to provide completion figures for the deemed-refusal backlog.)

Time extensions pursuant to section 9 were consistently low in both reporting periods:

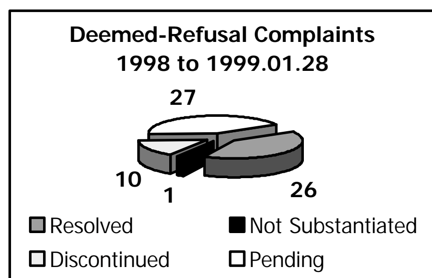
➢ In 1997-98, only one extension was applied—out of 1,643 requests received.

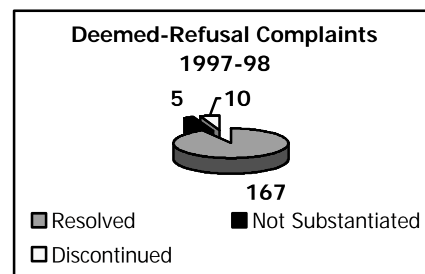
➢ In 1998 to November 30, 1998, there were 14—out of 1,764 requests received—7 bypassed the extended date:

- 1 (7%) took an additional 31 to 60 days
- 6 (42.9%) took over 90 additional days

As of November 30, 1998, 166 unfinished new requests were in a deemed-refusal situation. The duration for these outstanding requests is not known.

2. Complaints—Deemed refusals (C&I)





In 1997-98, the Office of the Information Commissioner received 182 deemed-refusal complaints against C&I—most (167—91.8%) were upheld (resolved). If all requesters where responses were late had exercised the right to complain, the commissioner's office would have received 1,501 complaints.

As of January 28, 1999, the commissioner's office has received 64 deemed-refusal complaints—out of the 37 completed complaints, most (26—70.2%) were upheld (resolved). That number (based on known statistics to November 30, 1998) could have been as high as 979 complaints.

One may only guess why more requesters are not complaining. It could be from resignation or due to good communications from the ATI office. Regardless, almost in excess of 49 per cent of all requests received by C&I this fiscal year to November 30th resulted in a deemed-refusal situation. Complaints could be much higher.

Of note, C&I's new requests are projected to be up by about 61 per cent over last year and more have been processed faster.

3. Recommendations (C&I)

In addition to the recommendations listed at pages 72 and 73 for Revenue Canada, the review recommends the following for C&I:

- ❖ Continued improvement in performance is unlikely without more upper management participation and leadership. The Deputy Minister must take a hands-on role by receiving weekly reports showing the cases in deemed refusal, where the delays are occurring and what remedial action is being taken or proposed. The Deputy Minister should take personal responsibility for approving a plan under which C&I will come into substantial compliance with the deadlines no later than March 31 of 2000.

- ❖ The delegation order now in force (December 20, 1995) empowers the Deputy Minister and Director General, Ministerial and Executive Services to exercise all of the powers of the Minister under the Act. The coordinator has delegated authority to make most decisions—with the exception of subsections 20(6) and 52(3). Senior Administrators, Public Rights have authority for: 7 to 12(3)(b), 13(2), 19(2), 20(2)&(3), 20(5), 25, 27(1) to 29(1), 37(4) to 44(2), and not for: 13(1), 14 to 19(1), 20(1), 20(6) to 24(1), 26, 32 to 37(1)(b), 52(2) to 71(2). This delegation order does not, however, make it clear who has the responsibility for decision-making under the Act. In practice, in all but the most straightforward cases, the delegation is not exercised without concurrence from the Minister and/or Deputy Minister. Unless C&I comes to rely on its coordinator to exercise the delegation without the need for such careful senior level scrutiny, meeting response deadlines will continue to be an elusive goal.

- ❖ Every effort should be made to implement the proposed database as soon as possible. The ATIP*flow* (or similar) system will likely result in better workflow processing and work sharing. The 4-5 electronic systems in other departmental locations should also be upgraded.

- ❖ Once the new system is in place, the coordinator should make use of the reporting capacity of the new database system. Statistical and timeline-monitoring reports can help identify problematic areas and facilitate reporting to senior management.

- Remove media relations from the approval chain and deal with that office in parallel.

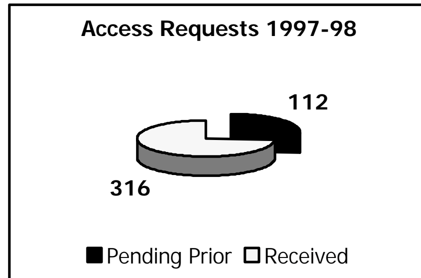
- Informal follow-up actions should be replaced with written procedures, and repercussions for missed deadlines.

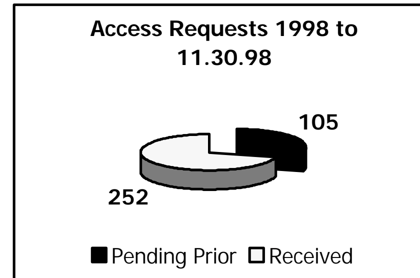
- Procedures for OPIs and obtaining information from missions abroad should be examined. If feasible, areas that receive large numbers of access requests should be trained to identify records that would justify a valid extension. An e-mail or fax, even subject to unstable technology, can be faster than the diplomatic mail service. This early contact can trigger the ATI office to send the appropriate notice on time.

- Although complete, C&*I's Access to Information and Privacy (ATIP) Training Guide* might be too cumbersome. A smaller, access-specific guide—prepared with a how-to-move-requests objective—could create greater awareness of duties and responsibilities in responding to requests.

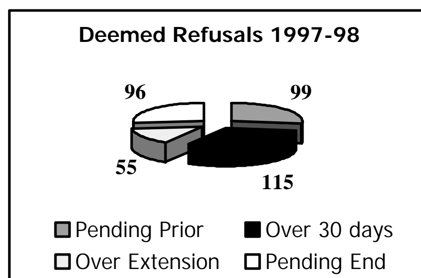
C. Foreign Affairs & International Trade—Statistical Information

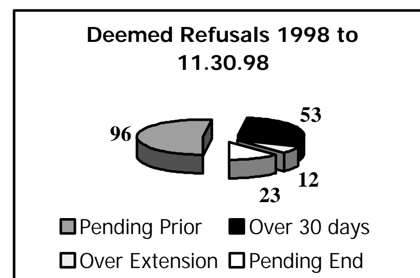
1. Requests (FAIT)





The charts above present a good visual picture of FAIT's significant request backlog.





At the outset of the 1997-98 fiscal year, FAIT's Access to Information office had 112 unfinished requests—99 (88.4%) already in a deemed-refusal situation. The 1998-99 fiscal started much the same with 105 outstanding requests—96 (91.4%) in a deemed-refusal situation. Considering the fact that 316 new requests were received in the 1997-98 fiscal year—252 to November 30 this fiscal year, these (Pending Prior) deemed refusals amount to approximately 1/3 of the yearly intake. Non-compliance considerations aside, this backlog is burdensome to the ATI office and must be eliminated.

The time taken to complete new requests is equally distressing:

➢ In 1997-98, processing times for 115 requests completed beyond the 30-day statutory limit—without an extension were:

- 46 (40%) took an additional 1-30 days to complete,
- 30 (26%) took between 31 to 90 days, and
- 39 (33.9%) were completed in over 90 days.

- In 1998 to November 30, 1998, additional processing times for 53 non-extended new requests were:
  - 31 (58.5%) took an additional 1-30 days to complete
  - 15 (28.3%) took between 31 to 90 days, and
  - 7 (13.2%) were completed in over 90 days

(The self-audit questionnaire did not ask FAIT to provide completion figures for the deemed-refusal backlog.)

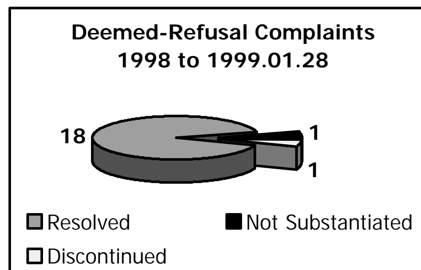
For extensions taken and not met, the breakdowns are similar:

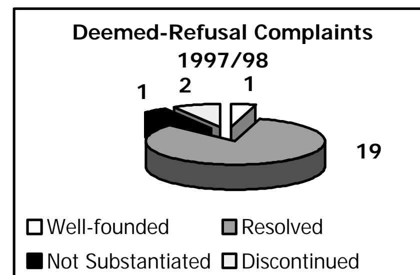
- In 1997-98, 55 (69.6%) exceeded the extension of time:
  - 4 (7.3%) took an additional 1-30 days
  - 20 (36.4%) took 31-90 more days, and
  - 31 (56.4%) required more than 90 additional days

- For the current fiscal (to November 30) of the 19 time extensions:
  - 12 (63.2%) exceeded the extension
  - 8 (66.7%) took an additional 1-30 days, and
  - 4 (33.3%) required 31-90 more days

As of November 30, 1998, 23 (9.1%) of unfinished new requests were in a deemed-refusal situation. The duration for these outstanding requests is not known.

2. Complaints—Deemed Refusals (FAIT)





In 1997-98, the Office of the Information Commissioner received 23 deemed-refusal complaints against FAIT—most (20—86.9%) were upheld (resolved). If all requesters where responses were late had exercised the right to complain, the commissioner's office would have received 365 complaints.

As of January 28, 1999, the commissioner's office has received 20 complaints—again, most (18—90%) were upheld (resolved). That number (based on known statistics to November 30, 1998) could have been as high as 184 complaints. By the end of the fiscal, the overall picture may well be worse than last year.
FAIT's ATI Coordinator also pointed out that FAIT's new requests are up by 25% over last year and many have

been processed faster. It is too early to say, however, that the statistics demonstrate overall improved performance by FAIT.

3. Recommendations (FAIT)
Before offering specific recommendations to assist FAIT in improving its performance grade, the department's leadership deserves credit for recognizing and facing up to its performance shortcomings. The corrective action, to date, has been cautious and more is required—but there is good faith and reason for optimism. The Deputy Minister's recent decision that FAIT's senior management will take the lead in addressing the delay problem and bring FAIT into compliance with the *Access to Information Act* is a very positive development.

In addition to the recommendations listed at pages 72 and 73 for Revenue Canada, the review recommends the following for FAIT:

- ❖ The delegation order now in force (March 11, 1998) empowers the Deputy Minister of Foreign Affairs, the Deputy Minister of International Trade, the Director General, Executive Services Bureau and the Access Coordinator to exercise all of the powers of the Minister under the Act. It does not, however, make it clear who has the responsibility for decision-making under the Act. In practice, in all but the most straightforward cases, the responsibility seems to be a collective one. It should be made explicit where the responsibility for decision-making under the Act lies.

- ❖ Correspondence from the coordinator to OPIs should be rewritten in a more authoritative voice. The OPI involvement in the access request process is an obligation, not an option, and communications should not give the impression that compliance is discretionary.

- ❖ Covering memoranda to OPIs should require that the ATI office be contacted as early in the review as possible if conditions exist (such as large volume of records or need for consultations) which would allow the coordinator to claim a time extension.

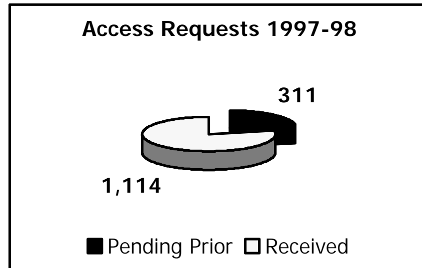
- ❖ The coordinator should use the ATIP*flow* system's reporting capabilities to monitor OPI turnaround times. Problematic areas should be reported to senior management.

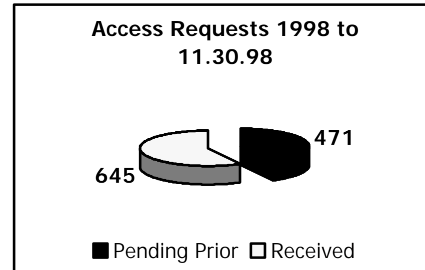
- ❖ Procedures for obtaining information from missions abroad should be examined. If feasible, areas that receive large numbers of access requests should be trained to identify records that would justify a valid extension. An e-mail or fax, even subject to unstable technology, can be faster than the diplomatic mail service.

- ❖ Remove media relations from the approval chain and deal with that office in parallel.

D. Health Canada—Statistical Information

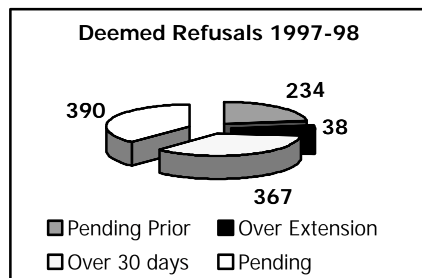
1. Requests (HC)

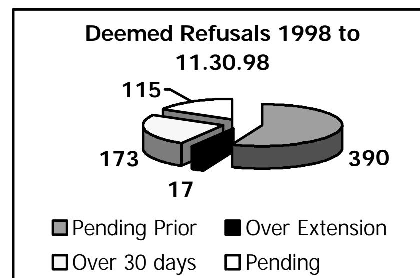




The charts above show the significance of HC's backlog.

Of note, Health Canada was listed in the 1997-98 *InfoSource* Bulletin as having placed third highest of the ten institutions receiving the most requests. In 1997-98, HC received 9.1% of all requests made during that reporting period—1,114 requests.





At the outset of the 1997-98 fiscal year, HC's Access to Information office had 311 unfinished requests—234 (75.2%) of which were already in a deemed-refusal situation. The 1998-99 fiscal year started much the same with 471 outstanding requests—390 (82.8%) in a deemed-refusal situation. Considering the fact that 1,114 new requests were received in the 1997-98 fiscal year—645 to November 30 this fiscal year, these (Pending Prior) deemed refusals amount to approximately 1/4 of the yearly intake. Non-compliance considerations aside, this backlog is burdensome to the ATI office and must be eliminated.

The time taken to complete requests is equally distressing:

➢ In 1997-98, processing times for 367 requests completed beyond the 30-day statutory limit—without an extension were:
- 178 (48.6%) took 1-30 additional days
- 82 (22.3%) took an additional 31 to 60 days

- 35 (9.5%) took an extra 61 to 90 days
- 72 (19.6%) took more than 90 additional days

➢ In 1998 to November 30, 1998, additional processing times for 173 non-extended requests were:
- 117 (67.6%) took 1-30 additional days
- 30 (17.4%) took an additional 31-60 days
- 14 (8.1%) took between 61 to 90 additional days
- 12 6.9%) needed more than 90 additional days

(The self-audit questionnaire did not ask HC to provide completion figures for the deemed-refusal backlog.)

Time extensions pursuant to section 9 were consistently low in both reporting periods:

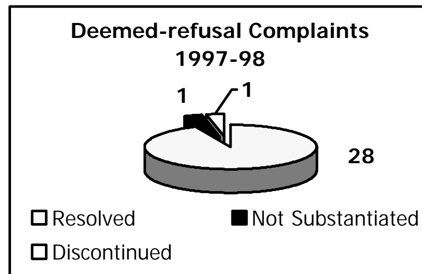
➢ In 1997-98, only 44 extensions were applied out of 1,114 new requests received—38 bypassed the extended date:
- 10 (26.3%) took 1-30 additional days
- 6 (15.8%) an additional 31 to 60 days
- 4 (10.5%) 61-90 additional days
- 18 (47.4%) took over 90 additional days

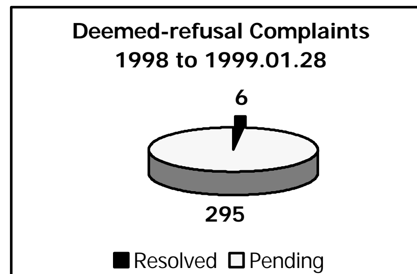
➢ In 1998 to November 30, 1998, there were 18 time extensions out of 645 new requests received—17 bypassed the extended date:
- 5 (29.4%) took 1-30 additional days
- 4 (23.5%) an additional 31 to 60 days
- 5 (29.4%) 61-90 additional days
- 3 (17.7%) took over 90 additional days

In June of 1998, overdue requests peaked with 390. Since then, as the coordinator pointed out, there has since been a steady decline. He calls this a "hopeful trend" and expects the decline will continue.

As of November 30, 1998, 140 unfinished new requests were in a deemed-refusal situation. The duration for these outstanding requests is not known.

2. Complaints—Deemed Refusals (HC)





In 1997-98, the Office of the Information Commissioner received 30 deemed-refusal complaints against HC—most (28—93.3%) were upheld (resolved). If all requesters where responses were late had exercised the right to complain, the commissioner's office would have received 1,029 complaints.

As of January 28, 1999, the commissioner's office had received 32 deemed-refusal complaints and initiated 269—out of the 6 complaints completed all were upheld (resolved). The number of complaints (based on known statistics to November 30, 1998) could have been as high as 720.

3. Recommendations (HC)

In August of 1998, Probus consulting and Audit Services submitted to HC a report entitled: Report of the Review of the Access to Information Process—Therapeutics Products Programme, Health Canada. That study made many sensible recommendations for solving HC's ATI problems. The Office of the Information Commissioner endorses (with some modifications) recommendations 1-5, 10-14, and 16-19 of that study.

However, experience in other institutions shows that it is unusual for an ATIP group, with decision-making authority, to be located within the operational area which receives the bulk of access requests. While there is, in HC's case an obvious need for scientific expertise, there is also an arguably greater need for objectivity in reviewing records for possible exemptions. The tests for exemption are objective and arguments for secrecy should be readily apparent even to non-experts—if not, chances are the exemptions are being applied in an overbroad fashion. HC must avoid entrenching its past tendencies to administer the access to information law in a way most hospitable to third-party firm's.

- HC's senior management should retain an organizational conflict interest specialist to work with the ATI Coordinator, and an appropriate official from TPP—attended by a senior official of HC's management—to resolve differences, and to clarify and define the roles and inter-unit relations of the ATI Unit and TPP's ATI Unit. (From Probus Recommendation 3, 4 & 5.)

- The ATI coordinator, while soliciting input from TPP, should take the lead in defining and documenting ATI request processing, clearly defining the roles of each unit at every step. (From Probus Recommendation 1.)

- The ATI Coordinator should develop, in consultation with TPP, a framework of policies and standard operating procedures for the ATI process at HC. (From Probus Recommendation 2.)

- HC should adopt a policy of openness regarding the rationale for its position when negotiating severances with third parties. (From Probus Recommendation 10.)

- Using the TPP'S ATI Unit's third-party guide as a base, the ATI Coordinator should produce a guide suitable for wide distribution to third parties. This guide should also be approved by Legal Services. (From Probus Recommendation 11.)

- TPP'S ATI Unit should make the clarification of all requests with the requester a standard step where there is a possibility that clarification will allow faster processing. (From Probus Recommendation 12.)

- Under the guidance of the coordinator, TPP's ATI Unit should charge fees in accordance with the ATI Act. (From Probus Recommendation 13.)

- Under the guidance and supervision of the coordinator, TPP's ATI Unit should, when the backlog is reduced, claim appropriate extensions. (From Probus Recommendation 14.)

- TPP'S ATI Unit should eliminate the review by the senior reviewer (TPP, ATI Unit) of the information selected by the 1st reviewer as requiring third-party notification. (From Probus Recommendation 16.)
- The coordinator should set up a database within TPP'S ATI Unit. This system, for internal use, would include ATI precedents and legal opinions, and could be used for rapid communications to third parties and to justify positions. Preferably, this need can be met with the new computer system. (From Probus Recommendation 17.)

- TPP'S ATI Unit should make more use of electronic and CD-ROM databases in order to more quickly identify information in the public domain. (From Probus Recommendation 18.)

- TPP'S ATI Unit should maintain its Internet access and its access to General Query Language for TPP databases. (From Probus Recommendation 19.)

- Selected staff of the TPP'S ATI Unit should be provided with Internet search courses in order to speed up information searches. (From Probus Recommendation 20.)

- TPP'S ATI Unit should be provided with electronic (read-only) access to bureau LANs in order to speed up the processing of product monograph requests. (From Probus Recommendation 21.)

- TPP should appoint a Head of TPP'S ATI Unit or relocate two of the current Corporate, ATI Unit's assistant coordinators to TPP's ATI Unit. This could provide a link between the ATI Coordinator and TPP, and would give that unit

ready access to persons with delegated authority, which could hasten some procedural steps. These assistant coordinators should continue to report directly to the ATI Coordinator as should the Head of TPP's ATI Unit. (From Probus Recommendation 22.)

- The coordinator should oversee the development of training materials and procedures for training new staff in TPP'S ATI Unit. (From Probus Recommendation 23.)

- TPP'S ATI Unit should adopt a team-based approach to processing its ATI requests. However, the team approach does not work well in some other institutions and it should be carefully evaluated. (From Probus Recommendation 24.)

- TPP should require each Bureau to appoint a senior officer, preferably reporting to the Director, to oversee the identification and remittance of all Bureau files in response to TPP ATI Unit's requests. (From Probus Recommendation 25.)

- The coordinator, in conjunction with TPP'S ATI Unit, should prepare a short description of the responsibilities of the TPP's Bureau ATI Contacts. (From Probus Recommendation 26.)

- The DG, TPP should communicate to all TPP staff to remind them of the need to provide all relevant information to TPP'S ATI Unit in a timely fashion in response to ATI requests through TPP Bureau ATI Contacts. (From Probus Recommendation 27.)

- TPP should continue to increase the volume of information made available outside the ATI process. (From Probus Recommendation 28.)

- The coordinator should ensure that the new computer tracking system will generate the work statistics reports required by TPP's ATI Unit, in a suitable format designed to eliminate manual generation of work statistics. (From Probus Recommendation 29.)

What follows are recommendations not drawn from the Probus report, and in addition to the recommendations listed at pages 72 and 73 for Revenue Canada, the review recommends the following for HC:

- Health Canada should come into immediate compliance with the third-party consultation timeframes set out in sections 27 and 28 of *the Access to Information Act*.

- The delegation order now in force (April 5, 1995) gives routine administrative responsibilities to the position of Assistant Access to Information Coordinator; authority for most exemptions to the Access to Information Coordinator, and authority over

some exemptions—sections 14, 15, & 21—to the Director General, Health Policy & Information Directorate. The DM has a few vested responsibilities—e.g. subsection 20(6). It does not, however, make it clear who has the responsibility for decision-making under the Act. In practice, in all but the most straightforward cases, the responsibility seems to be a collective one. It should be made explicit where the responsibility for decision-making under the Act lies.

- TPP's new procedures and guidelines should be given to the ATI Unit. These can be reviewed, and perhaps used as a base to write processing procedures pertaining to all ATI areas. Clear instructions should be include the appropriate use of subsection 9(1). All ATI staff should be fully knowledgeable about the treatment of requests, especially those that involve a large number of records, or a search through a large number of records. Detailed third-party procedures should be established and followed.

- Caution should be taken to ensure that procedures do not fast-track routine or "easy" requests to the detriment of the more complex and/or difficult requests.

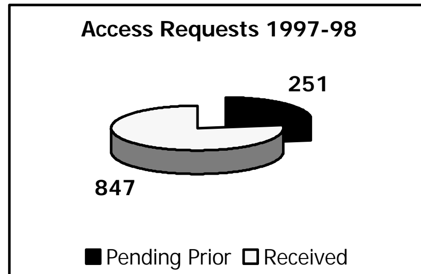
- The coordinator should use the ATIP*flow* system's reporting capabilities to monitor OPI turnaround times. Problematic areas should be reported to senior management.

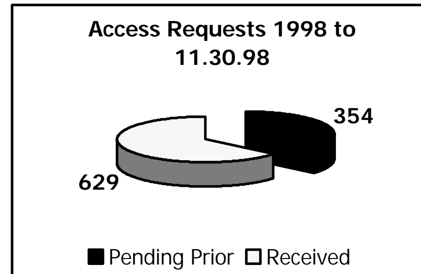
- Remove Public Affairs from the approval chain and deal with that office in parallel.

- Give the ATI Coordinator a specific budget for which he is responsible and accountable.

E. National Defence—Statistical Information

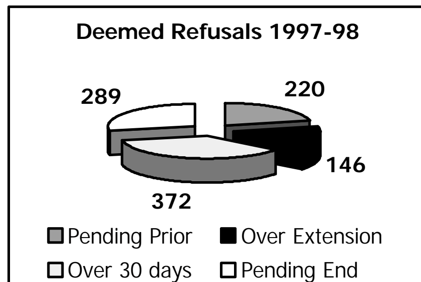
1. Requests (ND)

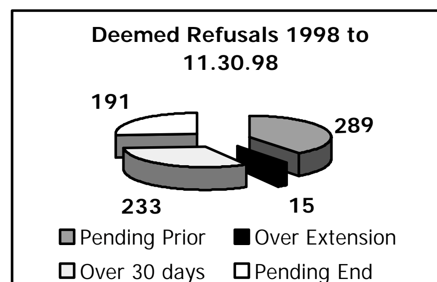




The charts above show the significance of ND's backlog.

Of note, National Defence was listed in the 1997-98 *InfoSource* Bulletin as having placed fourth highest of the ten institutions receiving the most requests. In 1997-98, ND received 7.1% of all access to information requests made to government during that reporting period.





At the outset of the 1997-98 fiscal year, ND's Access to Information office had 251 unfinished requests—220 (87.6%) already in a deemed-refusal situation. The 1998-99 fiscal period started much the same with 354 outstanding requests—289 (81.6%) in a deemed-refusal situation. Considering the fact that 847 new requests were received in the 1997-98 fiscal period—629 to November 30 this fiscal period, these (Pending Prior) deemed refusals amount to approximately 1/4 of the yearly intake. Non-compliance considerations aside, this backlog is burdensome to the ATI office and must be eliminated.

The time taken to complete requests is equally distressing:

➢ In 1997-98, processing times for 372 requests completed beyond the 30-day statutory limit—without an extension:

- 136 (36.6%) took between 1 to 30 additional days
- 76 (20.4%) took between 31 to 60 days

- 160 (43.0%) took more than 90 additional days

➢ In 1998 to November 30, 1998, additional processing times for 303 non-extended requests:
- 95 (31.4%) took between 1 to 30 additional days
- 55 (18.2%) an additional 31-60 days
- 153 (50.5%) needed more than 90 additional days

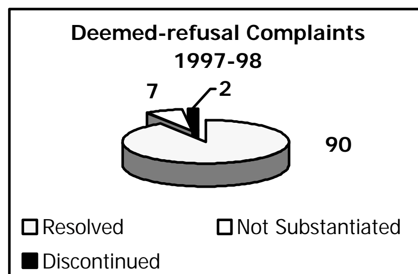
(The self-audit questionnaire did not ask ND to provide completion figures for the deemed-refusal backlog.)

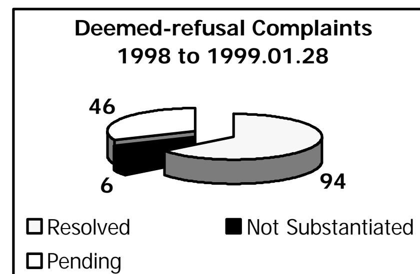
➢ In 1997-98, 206 time extensions pursuant to section 9 were applied—out of 847 requests received—146 (70.9%) bypassed the extended date:
- 42 (28.8%) took an additional 1 to 30 days
- 27 (18.5%) took an additional 31 to 60 days
- 11 (7.5%) took an additional 61 to 90 days
- 64 (43.8%) took over 90 additional days.

➢ In 1998 to November 30, 1998, there were 95 time extensions applied pursuant to section 9—out of 629 requests received—60 (63.2%) bypassed the extended date:
- 5 (8.3%) took an additional 1 to 30 days
- 3 (5%) took an additional 31 to 60 days
- 1 (1.6%) needed 61 to 90 additional days
- 4 (6.7%) took over 90 additional days
- 47 (78.3%) were still outstanding at the time the statistics were collected; the duration is not known.

As of November 30, 1998, 75 unfinished new requests were in a deemed-refusal situation. The duration for these outstanding requests is not known.

2. Complaints—Deemed Refusals (ND)





In 1997-98, the Office of the Information Commissioner received 99 deemed-refusal complaints against

ND—most (90—90.9%) were upheld (resolved). If all requesters where responses were late had exercised the right to complain, the commissioner's office would have received 1,027 complaints.

As of January 28, 1999, the commissioner's office has received 146 complaints—out of the 100 completed complaints, 94 (94%) again most were upheld (resolved). The number of complaints (based on known statistics to November 30, 1998) could have been as high as 718.

3. Recommendations (ND)

ND, despite its best efforts, seems to have stalled near the starting gate in its ability to solve its delay problem. The reason, in our view, is its unwillingness to fully adopt the "coordinator-as-decider" model for answering access requests. It is preoccupied with maintaining a senior approval process designed to ensure that information disclosures are "managed" at all levels, including the Minister's office. This institutional need is given priority over the legal rights of requesters.

ND must take the leap to a much more structured process, where OPIs gather, review and recommend severances in a timely manner, the ATIP group conducts consultations and applies exemptions, and all communications needs and reviews are handled in parallel and do not adversely affect response dates. Until the senior levels at ND take themselves out of the access-processing business, ND will not come into compliance with this law.

Against this general background, in addition to the recommendations listed at pages 72 and 73 for Revenue Canada, the review recommends the following for ND:

- ❖ The coordinator is directly responsible for ensuring compliance with the Access Act, and should take a strong leadership role in establishing a culture of compliance throughout RC. Such a role requires the unwavering support and endorsement of the Minister and the Deputy Minister.

- ❖ The delegation order now in force (April 5, 1995) empowers the coordinator, or in her absence the person holding the position of Staff Officer, DAIP 3-6 and the Assistant Deputy Minister (Finance and Corporate Services) to exercise all of the powers and perform the duties and function of the Minister under the Access to Information and Privacy Acts. It does not, however, make it clear who has the responsibility for decision-making under the Act. In practice, in all but the most straightforward cases, the responsibility seems to be a collective one. It should be made explicit where the responsibility for decision-making under the Act lies. Moreover, the delegated decider must be directed to exercise the delegation in accordance with the Act.

- ❖ Once the new tracking system is in place, the coordinator should make use of the reporting

capacity. Statistical and timeline-monitoring reports can help identify problematic areas.

- Cyclical, newsworthy issues can cause significant surges in the number and complexity of requests received by ND's ATI office. ND's priorities during military situations are, understandably, "The Safety of CF personnel and the integrity of military operations." However, access to information requirements cannot be dismissed. Therefore, consideration should be given to setting up an additional ATIP team, which can be trained to deal with major issue surges. Hiring consultants for this purpose is impractical because the expertise simply is not available. During periods of normal workflow, this team can deal with broad scope requests and/or assist with training.

- When extensions are necessary, 10 to 20 per cent of notices are not being sent within the initial 30 days. The ATI office should strive to provide all extension notices within the specified time limit. Copies of all such notices must be sent to the Office of the Information Commissioner.

- Third-party notices should be routinely sent as soon as the need arises. The third-party times set out in section 28, currently not observed in 10 to 30 per cent of all cases, should be followed.

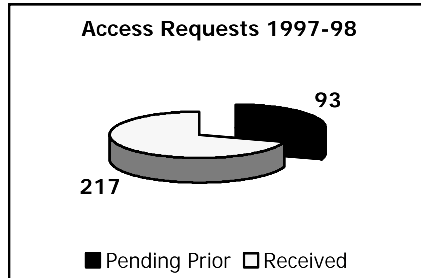
- Remove Public Affairs, ADM's Liaison Officer, DM's office and Minister's office from the approval chain and deal with them in parallel.

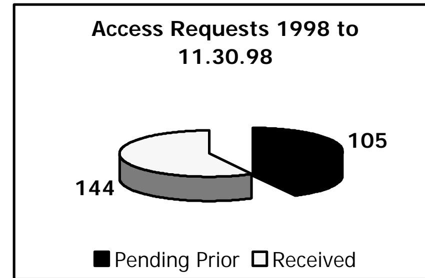
- Remove all steps in the approval chain that do not add value to the response.

- The practice of holding-up responses until the Minister's communications needs have been served should cease.

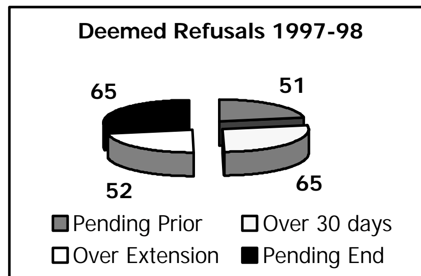
F. Privy Council Office—Statistical Information

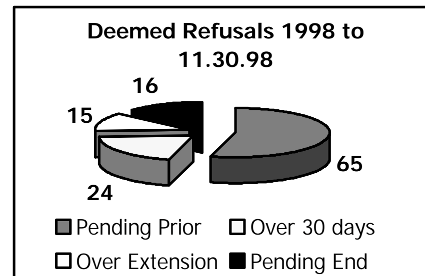
1. Requests (PCO)





The charts above present a good visual picture of PCO's significant request backlog.





At the outset of the 1997-98 fiscal year, the PCO's Access to Information Office had 93 unfinished requests—51 (54.8%) were already in a deemed-refusal situation. The 1998-99 fiscal year started much the same with 105 outstanding requests—65 (61.9%) in a deemed-refusal situation. Considering the fact that 217 new requests were received in the 1997-98 fiscal year—144 to November 30 this fiscal year, these (Pending Prior) deemed refusals amount to approximately 1/3 of the yearly intake. Non-compliance considerations aside, this backlog is burdensome to the ATI office and must be eliminated.

The time taken to complete new requests is equally distressing:

➢ In 1997-98, processing times for 65 requests completed beyond the 30-day statutory limit—without an extension were:

- 16 (24.6%) took an additional 1-30 days
- 7 (10.8%) took between 31 to 60 additional days
- 5 (7.7%) took between 31 to 90 days
- 37 (56.9%) were completed in over 90 additional days

- In 1998 to November 30, 1998, additional processing times for 24 non-extended new requests were:
- 14 (58.3%) took an additional 1-30 days
- 5 (20.8%) took between 31 to 60 additional days
- 2 (8.4%) took between 31 to 90 days
- 3 (12.5%) were completed in over 90 additional days

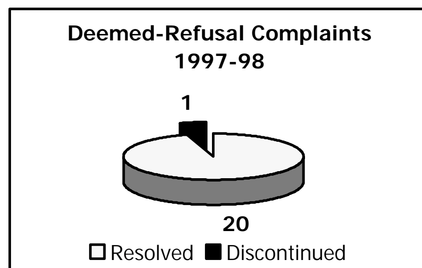
(The self-audit questionnaire did not ask PCO to provide completion figures for the deemed-refusal backlog.)

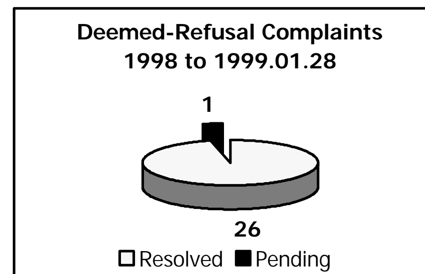
- For extensions taken and not met, the breakdowns are similar. In 1997-98, of the 60 time extensions, 52 (86. 7%) exceeded the extension of time
- 5 (9.6%) took an additional 1-30 days
- 1 (1.9%) took 31-60 additional days
- 6 (11.6%) took 61-90 additional days
- 40 (76.9%) required more than 90 additional days

- For the current fiscal period (to November 30) of 49 time extensions—28 (57.1%) were still outstanding when the statistics were provided, and 15 (30.6%) exceeded the extension of time:
- 7 (46.7%) took an additional 1-30 days
- 3 (20%) took 31-60 additional days
- 3 (20%) took 31-60 additional days
- 2 (13.3%) required more than 90 additional days

As of November 30, 1998, 16 (11%) of unfinished new requests were in a deemed-refusal situation; seven of these outstanding requests are from the 1997-98 fiscal period. The duration for these outstanding requests is not known.

2. Complaints—Deemed refusals (PCO)





In 1997-98, the Office of the Information Commissioner received 21 deemed-refusal complaints against the PCO—most (20—95.2%) were upheld (resolved). If all requesters where responses were late had exercised the right to complain, the commissioner's office would have received 233 complaints.

As of January 28, 1999, the commissioner's office had received 29 complaints—again, of the 21 completed most (20—95.2%) were upheld (resolved). That number (based on known statistics to November 30, 1998) could have been as high as 120 complaints. By the end of the fiscal year, it is predicted that the overall number of complaints received will be higher than last year.

3. Recommendations (PCO)

Since 1996-97, when almost 96 per cent of all access requests received by PCO were not answered within deadline, PCO's performance has improved. In 1997-98, 53.9 per cent were late and in 1998-99, 45.1 per cent were late. It should also be noted that the duration of the delays has dropped dramatically. The trend is in the right direction but the progress towards full, or even substantial, compliance seems stalled.

It is our view that PCO must break through a psychological barrier in order to complete the job. The psychological barrier is PCO's reluctance to adopt the "coordinator as decider" approach which is taken in all the successful departments.

PCO's preference, to invest its senior-level operational managers with decision-making authority in access matters, reflects, in our view, its institutional fear of losing control over the disclosure of its information. To achieve success in meeting timeframes, it will need to confer on its access coordinator a full delegation of decision-making authority and allow a full-time access professional to fully administer the legislation within PCO.

In addition to the recommendations listed at pages 72 and 73 for Revenue Canada, the review recommends the following for PCO:

- ❖ The delegation order now in force (October 23, 1996) and the procedures thereunder are needlessly complex and diffused. The delegation should be to a single official, preferably the coordinator, whose full-time job it is to fully administer the access law, invoke all exemptions and answer all requests. Moreover, the delegated official should be instructed in writing by the Prime Minister, to answer requests within deadlines whether or not the senior approval process has been completed.
- ❖ Consistent with more delegated authority, the coordinator should be classified at a more senior level and placed closer to the Clerk in the PCO hierarchy.
- ❖ OPIs should undertake the first reviews of requested records and provide the records to ATIP with suggested severances.
- ❖ Covering memoranda to OPIs should require immediate contact with the ATI office if the request involves a large number of records, or a search through a large number of records. The OPI might not be aware that this could indicate a valid reason for an extension—but only if the ATI

office is notified and can send the appropriate notice on time.

- Since specification information for new computer tracking system to be established in the ATI office has not been provided, we cannot assess the capabilities. For information purposes, we are listing the features of the ATIP*flow* System from MPR & Associates. PCO's new system should match the benefits of the ATIP*flow* program:

    - Is year 2000 compliant.
    - Calculates due dates, days allowed and the number of days taken.
    - The automated correspondence feature transparently extracts and merges information into word-processing software.
    - Confidential text marking ensures requester confidentiality when uploading to CAIR.
    - Electronic case history.
    - Search options on applicant, full text, OPI, actions, etc.
    - Standard reports include: active requests, status, and workload reports including the last action, progress report, on-time trends, BF by officer, annual statistical report and more.
    - Allows extensive trend analysis.
    - Captures annual report statistics automatically as the request is processed.

- Paper processes should be automated as much as possible.

- Departmental policies and procedures are outdated and need to be updated.

Corporate Management

The Information and Privacy Commissioners share premises and corporate services while operating independently under their separate statutory authorities. These shared services—finance, personnel, information technology and general administration—are centralized in Corporate Management Branch to avoid duplication of effort and to save money for both government and the programs. The branch is a frugal operation with a staff of 14 (who perform multi-functional tasks) and a budget representing 19 per cent of total program expenditures.

Resource Information

Although management continually pursues innovative approaches to delivery of their programs, without adversely affecting business line objectives, the offices can barely manage their programs in an efficient and effective way because of its reduced resource base from year to year. Operating budget reductions to date have hampered business line ability to provide a quality level of service.

Mindful of the offices' resource and workload crisis, the Treasury Board Ministers, at their April 1998 meeting, noted the commissioners' inability to operate efficiently and provide quality service with their current resources. They and the commissioners agreed to a full review, within the 1998-99 fiscal period, of the offices' resource base (an A-base review). The resulting report analysis and recommendations are currently being assessed by Treasury Board Secretariat officials with a view to implementation during 1999-2000. It is the commissioners' hope that the review, based on a careful assessment of the offices' resource base, standards of service and program delivery, will resolve the financial crisis and IT infrastructure needs.

The offices' combined budget for the 1998-99 fiscal year was $8,128,000. Actual expenditures for 1998-99 were $8,084,150 of which, personnel costs of $6,201,525 and professional and special services expenditures of $1,010,179 accounted for more that 89 per cent of all expenditures. The remaining $872,446 covered all other expenditures including postage, telephone, office equipment and supplies.

Expenditure details are reflected in Figure 1 (resources by organization/activity) and Figure 2, (details by object of expenditure).

Figure 1:
1998-99 Resources by Organization/Activity
Human Resources

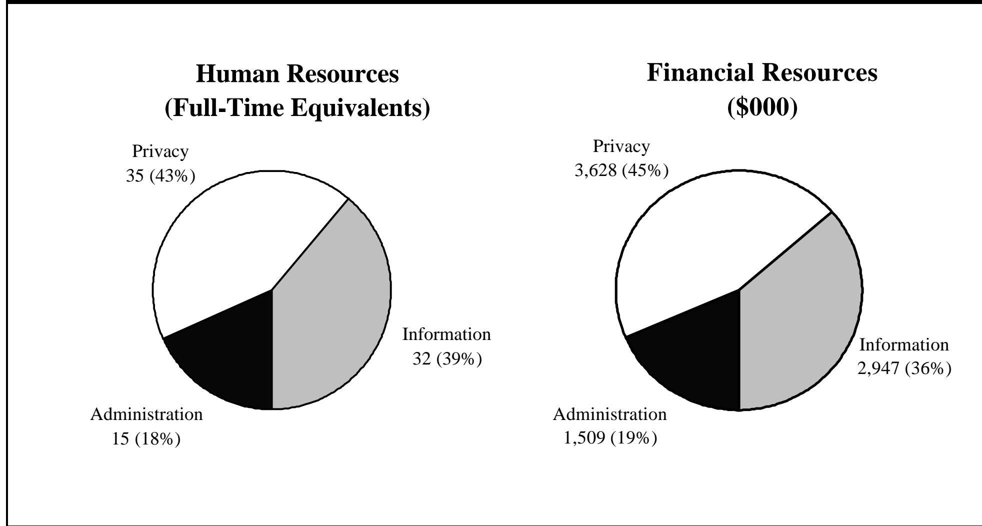


Figure 2:
Details by Object of Expenditure

	Information	Privacy	Corporate Management	Total
Salaries	2,204,412	2,238,122	705,991	5,148,525
Employee Benefit Plan Contributions	421,000	491,500	140,500	1,053,000
Transportation and Communication	37,351	73,844	105,408	216,603
Information	19,330	43,567	3,907	66,804
Professional and Special Services	207,104	696,583	115,492	1,019,179
Rentals	4,593	5,415	19,402	29,410
Purchased Repair and Maintenance	738	1,995	27,989	30,722
Utilities, Materials And Supplies	24,521	18,428	39,693	82,642
Acquisition of Machinery and Equipment	27,758	58,847	350,287	436,892
Other Payments	224	106	43	373
Total	**2,947,031**	**3,628,407**	**1,508,712**	**8,084,150**

Note: Expenditure figures do not incorporate final year-end adjustments reflected in the offices' 1998-99 Public Accounts.

Appendix 1—Proposed Amendments

Following is a summary of recommendations for legislative changes which are supported by the Office of the Information Commissioner:

General:

Essential principles

1. Three essential principles be enshrined in the access law. They are:

a) Government information should be generated, preserved and administered as a national resource.

b) Government should be obliged to help the public gain access to our national resource.

c) Government information should be readily accessible to all without unreasonable barriers of cost, time, format or rules of secrecy.

Renamed

2. An amended *Access to Information Act* be more appropriately named the *National Information Act*, the *Open Government Act* or the *Freedom of Information Act*.

Duty to create

3. The *Archives Act* be amended to affirm government officials' duty to create such records as are necessary to document, adequately and properly, government's functions, policies, decisions, procedures and transactions.

Duty to retain

4. The *Archives Act* be amended to include explicit provisions for the retention of computer communications, including e-mail, following their creation.

Public register

5. Government institutions be required to maintain a public register of all records which have been released under the Access Act.

Routine release

6. Government institutions be required to release routinely all information which describes institutional organizations, activities, programs, meetings, and systems of information holdings and information which tells the public how to gain access to these information resources.

Duty to disseminate

7. Government's duty to disseminate should also extend to all information which will assist members of the public in exercising their rights and obligations, as well as understanding those of government.

Public education

8. The Information Commissioner be given a mandate to inform the public about their access rights.

Fees

Fees / Price

9. To eliminate an access barrier of price, subsection 68(a) of the Act be amended to ensure that only information which is reasonably priced and reasonably accessible to the public is excluded from the law.

Frivolous requests

10. Government institutions be given the right to refuse to respond to frivolous or abusive requests.

Binding order

11. A government institution's refusal to respond to a request be subject to an appeal to the Information Commissioner and the commissioner's ruling be binding and final.

Fee eliminated

12. The $5-application fee be eliminated, charges for reproduction of paper copies, diskettes and audio or video cassettes be adjusted to current market rates and a period of free search time be retained.

Commercial requesters

13. Fees charged commercial requesters reflect the actual cost of producing the information when information is requested for brokerage purposes.

Binding order

14. A government institution's decision to treat a request as a commercial request be subject to review by the Information Commissioner and the commissioner's decision be binding and final.

Fee waiver policy

15. The criteria for the waiver of fees be included in the Act.

Computer fees

16. There should be no fees for computer processing, when processing is conducted in a PC-based environment. Fees levied for CD-ROMS or other computer formats be limited to the cost of compiling and reproducing the information.

Delays

Lose fee collection

17. Government institutions which fail to meet lawful deadlines in responding to requests lose the right to collect fees.

Lose exemption claim

18. Government institutions which fail to meet lawful deadlines in responding to requests be prohibited from invoking exemptions with the exception of exemptions which protect other governments' information, personal privacy and safety and trade secrets or other confidences entrusted to government by third parties as set out in sections 13, 17, 19 and 20 of the Act.

Definition and format

Definition of information

19. The right of access to any government "record" be amended to offer a right of access to any "recorded information" in section 4 of

the Act and elsewhere. To add clarity, the definition of recorded information be expanded to include e-mail, computer conferencing and other computer-driven communications.

Format most useful

20. Government information be available in the format most useful to the requester whenever the format exists or can be created with a reasonable amount of effort and at reasonable cost.

Review by commissioner

21. A government institution's refusal to provide information in the format requested be subject to review by the Information Commissioner.

Exemptions

Discretionary and injury

22. Exemptions be discretionary in nature and contain an injury test with the exception of section 19 (the test personal privacy exemption) and, possibly, section 13 (the exemption to protect confidences of other governments).

State governments

23. The section 13 exemption be extended to information from such governments subdivisions of nations as U.S. state governments and perhaps to self-governing native bands.

International organizations and foreign states

24. The implications of applying a discretionary, injury-based exemption to information given in confidence from international organizations and foreign states be examined.

Other governments in Canada

25. A discretionary, injury-based exemption apply to information from provincial and municipal governments and self-governing native bands.

Public interest override

26. Government institutions be required to disclose any information, with or without a formal request, whenever the public interest in disclosure clearly outweighs any of the interests protected by the exemptions.

Public opinion polls

27. Public opinion polls be accessible to the public. Polls and survey data not be subject to exemptions under the Act. Government institutions maintain a current list of polls and surveys.

Cabinet ministers' offices

28. The Access Act be amended to make clear that recorded information in offices of Cabinet ministers is government information and subject to the law and its exemptions.

Federal-provincial relations

29. Section 14 (the federal-provincial relations exemption) be more narrowly drawn by substituting "federal-provincial negotiations" for "federal-provincial affairs."

International affairs and national defence

30. Section 15 (an exemption to protect international affairs and national defence) be amended to

clarify that a reasonable expectation of injury be required to invoke the exemption. The nine classes of information listed are merely illustrative of possible injuries.

Housekeeping

31. As a housekeeping measure, coincident with inclusion of an injury test, paragraphs 16(1)(a) and (b) be repealed.

Personal safety

32. Section 17 (the personal safety exemption) be extended to protect against a threat to an individual's mental or physical health.

Economic interests of government

33. Section 18 (an exemption to protect the government's economic interests) be amended to include a health and safety override; to narrow the scope of paragraph (a) by including "monetary" in the phrase "substantial value"; to grant special operating agencies rights similar to their private sector competitors; and to ensure the section cannot be used to exempt data bases which serve as the raw data for information placed in the market.

Third-party information

34. Section 20 (an exemption to protect third-party information) be amended to ensure public access to government contracts and details of bids for contracts; to abolish paragraph 20 (b); to broaden the public interest override contained in subsection 20(6) and to allow government institutions to give third parties their notice of government's intent to disclose information in indirect ways as newspaper advertisements.

Advice and recommendations

35. Section 21 (an exemption to protect internal deliberations) be amended to include an injury test; to protect only policy advice and minutes at the senior level, not factual information used in routine decision-making; to reduce the current time limitation from 20 to 10 years; to specify types of information not covered by the exemption; to clearly limit the terms "advice" and "recommendations"; to make plans devised but never approved open to the public.

Solicitor-client privilege

36. Section 23 (the solicitor-client privilege exemption) be amended to give access to Justice Department legal opinions unless an injury to government operations could reasonably result from their disclosure; and to make clear that severance of some portions of a record does not result in loss of privilege on other portions of the record.

Statutory prohibition

37. The practice of skirting the law by placing more and more statutes and the information they generate under the section 24 statutory prohibition from disclosure be brought to an end by the abolition of section 24.

Information for publication

38. The grace period in which a government institution is permitted to refuse access on the grounds that the information is slated to be published,

be reduced from 90 days to 60 days; institutions be discouraged from using the right as a delay tactic with the additional requirement that if publication does not take place, the record must be released forthwith and without exemption of any portion.

Exclusions

Published material

39. Section 68 (exclusion of published material) be amended to exclude only material which is reasonably prices and available in reasonable formats.

Cabinet confidences

40. Section 69 (the exclusion of Cabinet confidences) be amended to transform it to an exemption; to reduce the period of secrecy from 20 to 15 years; to make available analysis portions of memoranda to Cabinet if a decision has been made public, has been implemented or five years have passed since the decision was made or considered; to have appeals of decisions under this section heard by the Associate Chief Justice of the Federal Court after review by the Information Commissioner. (See also separate study on Cabinet Confidences published by the Office of the Information Commissioner in 1996, entitled: *The Access to Information Act and Cabinet Confidences: A Discussion of New Approaches*.)

Complaints

One-year limit

41. Discretion be given to the Information Commissioner to waive the one-year limit within which complaints must be made.

Penalties

42. Acts or omissions intended to thwart the right of access should be subject to penalty in the same manner as is any other breach of trust.

Extension of Act

43. The Access Act be extended to all federal government institutions including Special Operating Agencies, Crown corporations and wholly-owned subsidiaries; any institution to which the federal government appoints a majority of governing body members; the Senate, House of Commons, Library of Parliament and all officers of Parliament.