Annual Report
Information Commissioner
1992-1993

The Information Commissioner of Canada
112 Kent Street, 3rd Floor
Ottawa, Ontario
K1A 1H3

(613) 995-2410
1-800-267-0441 (toll-free)
Fax (613) 995-1501

Cat. No. IP20-1/1993
ISBN 0-662-59747-8

"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

The Honourable Guy Charbonneau
The Speaker
Senate
Ottawa, Ontario

June 1993

Dear Mr. Charbonneau:

I have the honour to submit my annual report to Parliament.
This report covers the period from April 1, 1992 to March 31, 1993.

Yours sincerely,

John W. Grace

The Honourable John A. Fraser, PC, QC, MP
The Speaker
House of Commons
Ottawa, Ontario

June 1993

Dear Mr. Fraser:

I have the honour to submit my annual report to Parliament.
This report covers the period from April 1, 1992 to March 31, 1993.

Yours sincerely,

John W. Grace

Table of Contents

Mandate

The Information Commissioner is a special ombudsman approved 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 1983 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. However, the requester must be notified of these extensions within the initial timeframe.

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 under the Act;
- they have run into any other problem using the Act.

The commissioner is independent of government and 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, however, 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.

An Address to Parliament

The formal addressee of this report, submitted as it is each year to the Speakers of the House of Commons and the Senate, is of course Parliament. To Parliament itself, not to the government of the day, is the accounting made as to how fares freedom of information in Canada.

By making Parliament this commissioner's master, the legislators who passed it showed how important they considered the *Access to Information Act*. Only four federal watchdogs have a direct line to Parliament. Other reviewers report to the government through a particular ministry; their route to Parliament is circuitous. This reviewer is Parliament's eyes on the *Access to Information Act*.

All this being dutifully acknowledged, the fact is that Parliament has been more a nominal than the effective addressee of these reports. The government is the real object of the exercise. The slings and arrows, even some praise, are aimed at government departments, their performances tested against the rigorous standards for openness required by law.

The more avid readers of these words, if there is such a thing as an avid reader of a legal requirement, will be found first of all in the tight little access to information community within government: access co-ordinators who will want to know, before their bosses do, if and how their institutions are mentioned in dispatches from the front. Opposition members of Parliament will be more interested than government members in the grades the government receives.

Reporters will look (as they do in reports of other government watchdogs, such as the Auditor General) for any castigations of the government to report. (They are rarely disappointed.) Then there are the Act's knowledgeable, battle-hardened professional users from business and the media. Other regular readers comprise a hard core of academic access specialists and a diverse band of access groupies with the good sense of preferring the attractions of access to information over, say, rock bands.

This year's report begins a little differently by putting Parliament's own performance under scrutiny for the first time. It is designed to catch the attention of MPs and Senators both in government and on opposition benches.

The last two Parliaments have been the first to live totally with an access to information regime. The government has been assessed every year. Next year's report will look back over the history of the first decade of the access law, whose tenth anniversary falls on July 1, 1993. Now it seemed time for a look at Parliament itself, at how it has supported its own legislation.

Not that the government will be spared some customary (and deserved) grouching. But by now it is possible to be confident enough about the irreversibility of the impact of access to information on government to shorten, as much as conscience will allow, the usual catalogue of castigations, nitpicking and hectoring. Playing the common scold is not only an unattractive and uncongenial role; by repetition it becomes unproductive.

For an uncommon scold read Mr. Justice Francis Muldoon's recent denunciation of "that mind-set of defensive fearfulness, even in the Privy Council Office" which "can produce non-disclosures of material which are simply silly, such as the blanking out of this applicant's own name on the records disclosed to him" (Rubin v. the Clerk of the Privy Council, Federal Court nos. T-2651-90, T-1587-91, T1391-92).

The steady opening up of the old closed culture of the Canadian public service is taking place, whatever the recidivism rate, because public servants want to obey the law and they are coming to understand the law better each year. Conversion to the principles of access, not repetition of horror stories, titillating though they may be to critics of government, is the secret of the slow sea-change to openness.

In the larger scheme of things it is not a commissioner's office nor a multitude of judicial, quasi-judicial and administrative review or oversight bodies which holds government to account. It will be citizens who have armed themselves, as James Madison said, "with the power knowledge gives". An Information Commissioner should maintain a becoming modesty about what his office can accomplish.

No, the power is in the law, which makes Parliament's close attention so important. Even Parliament may not have itself realized what it wrought when the *Access to Information Act* came into effect on July 1, 1983. Parliament thereby gave the citizen probably the single most important instrument, after the ballot, for accountability in a democracy. The right of the public to see most government records shifts the balance of power from government to citizens.

In places without freedom of information (and only a dozen countries have access laws), governments disclose only what they choose and when they choose. In Canada, most governments now have the burden of justifying secrecy. The presumption is in favour of openness, a presumption re-enforced by a unanimous decision of the appeal division of the Federal Court. In that 1989 decision, Mr. Justice Darrel Heald wrote: "the general rule is disclosure, the exception is exemptions and the onus of proving the entitlement to the benefit of the exception rests upon those who claim it" (Rubin v. Canada Mortgage and Housing Corporation (1988), [1989] 1 F.C. 265 (C.A.). The potential impact of that shift of onus, which is the heart of an access to information regime, can hardly be overstated.

Parliament should know that the government has had to be reminded again by the Federal Court in this past year of that shift of onus, (see p.__), something it may be tired of hearing only from the Information Commissioner. (The Information Commissioner et al, v. the Prime Minister, Federal Court Nos. T-1418-92, T-1867-92, T-1524-92, T-1390-92, [unreported]).

The access law has attained a maturity which transcends the vagaries of political whim. It is a law which cuts across and goes beyond party politics. It should appeal as much to the conservative as to the liberal or the social democrat. The *Access to Information Act* is ideologically neutral, without party coloration.

Conservatives who worry about the state growing too powerful should applaud the empowerment (that indispensable, trendy word) of the individual by information rights; liberals and socialists (in Parliament and elsewhere) will welcome the sharing of the government's information better to challenge those in authority and effect changes in society.

In February, the British House of Commons gave second reading (the vote was 168-2) to a private member's (Labour) Right to Know bill. Though the bill may not achieve final passage this time around, it was supported by all parties in a brilliant debate which saw the British Commons at its best. A few direct quotes from that debate may inspire Canada's Parliament to rene its interest in access to information and better appreciate its possibilities.

A Cabinet minister, William Waldergrave, speaking for the government, made this perhaps surprising admission:

> "I am rather easily persuaded that the balance is not right in Britain. We keep too many secrets. We make secrets of matters that should not be secret. That, incidently, makes it more difficult to keep real secrets when it is legitimate to do so."

That, incidently, is something which any Canadian official still cherishing old secretive ways, should take to heart. Here's another shrewd observation, which Canadian experience confirms, by the same speaker:

> "Whatever we do in legislation, nothing ultimately changes unless the culture of organizations genuinely changes. It is always possible to find a way around rules if those working within them really want to."

Another Conservative Member of Parliament, Richard Shepherd, urged his party to accept the bill. He argued:

> "Unless we know what the governments are doing, how can we judge them and how can they be held accountable? How can we as Parliament or as a public society discuss intelligently and reasonably the objective and purposes of public policy? We cannot. If information is open and available, surely the quality of the decisions will be better."

Sir Humphrey, permanent secretary to the Right Honourable James Hacker, had, of course, to be brought into the debate. In the first "Yes Minister" program, Sir Humphrey gave this advise:

> "Open government is a contradiction in terms. You can have openness. Or you can have government. You can't have both."

The Right to Know bill, as its sponsor Labour MP Mark Fisher said, "seeks to prove Sir Humphrey wrong". Canada's *Access to Information Act*, for all the justified criticism of it, has already done that.

Parliament's report card

A current fad in management theory is bottom-up evaluation. The assumption is that bosses will become better bosses by knowing how their employees see their supervisors' strengths and weaknesses. Questionnaires are filled out -- with, of course, a promise of anonymity -- and managers are rated by their underlings. The enlightened modern boss will never admit that he does not welcome this most democratic of appraisals.

How will Parliament take a bottom-up evaluation by one of its underlings, the Information Commissioner of Canada? Though it may seem like biting the hand that feeds, or even a little impertinent, the idea of passing out a report card on Parliament's performance does not require a large dose of chutzpah. This is the last report to the 34th Parliament. That fact makes an honest appraisal timely for looking both backwards and forward, and something short of self-immolation.

What any Parliament needs to be reminded right off is that access to information rights are at least as important to a Member of Parliament as they are to an ordinary citizen. Historians have observed that until the twentieth century and the introduction of the first Official Secrets Act in Britain, members of the British Parliament expected all information available to the state to be available to themselves. Though that might not always have been so, it was the presumption. No British or Canadian MP today will so presume!

The power of Parliament to compel ministers (the government) to lay papers before the House has been all but lost in the expansion of the role of governments with their dutiful Parliamentary majorities. Governments over the years grew less and less accustomed to sharing information either with citizens or their representatives.

For "governments" read the whole public service managerial class. This new magistracy, as it has been called, is comprised not only of public servants as usually defined, but of appointed persons, whose agencies are arm's length from government for such noble reasons as keeping partisan politics out of decision-making. These little fiefdoms and principalities are not only independent; in large measure, they are unaccountable.

Then there is the power of the experts. Again, members of Parliament are as much at the mercy of unchallenged experts as members of the public. Parliament's decision-making will be improved if the advice of experts is made accountable by being exposed to the scrutiny of other experts -- and common sense. (Would the mad plans for Mirabel airport have survived if the experts had not such easy sway?)

Used more effectively by MPs and Senators, the *Access to Information Act* can return power to Parliament from government. The long -- and essentially undemocratic -- tendency, can be reversed. Parliament has available an instrument to recover long-lost rights. Neither MPs nor Senators should think it somehow beneath their status -- a denigration of their privileges -- to use that instrument for obtaining government information.

Some Canadian members of Parliament -- too few -- do take advantage of the Act, either to obtain information for themselves or on behalf of constituents. The results may sometimes be discouraging. Records may be withheld or delayed whether the requestor is a Member of Parliament or a member of the public. Yet the chances of obtaining information under the *Access to Information Act* are immeasurably greater than in Question Period. Both questions and answers in the House and in the Senate are more likely to be used to score political points than serious attempts to ask for and give information.

The chances are also greater that a request made under the access Act will yield better results than a written question placed on the Order paper. Written questions produce, if anything, the briefest of answers, not documents, and speedy replies are rare.

Members of Parliament sometimes speak, with a sense of loss, of the old days when their roles seemed to be more exalted and Parliament itself seemed to have more power. Political scientists can better say whether this is more nostalgia than reality. An Information Commissioner can say that members of Parliament, by using the *Access to Information Act* routinely and frequently, can force government to share information and reclaim an historic right.

It would be gratifying -- and perhaps self-serving -- to be able to demonstrate that members of Parliament were in fact exploiting the possibilities of the access Act to make themselves better informed and more effective inside and outside the House of Commons. Precisely such a claim for an access to information regime was made during the debate in the British House of Commons of the Right to Know bill. Mark Fisher argued, rightly, that the public is bored "by assertion and counter-assertion, the 'yah-boo, sucks' of politics and the lack of detailed, serious debate." He believed that "freedom of information will mean less prejudice battering against prejudice", that the credibility of politicians and the political process will be considerably improved. High hopes!

How splendid to be able to report that the level of Canadian parliamentary debates and the reputation of politicians have both risen as a result of Canada's *Access to Information Act*! Alas, no such claim can be made.

No statistics are kept on the number of Canadian Members of Parliament who apply for information under the Act. Their applications are not distinguished, nor should they be, from those of the general public. A remarkably few members have been complainants to the commissioner's office. The paucity of MPs complaints cannot be read as a sign that members' information needs are served better than anyone else's. Realism says it is a symptom of the paucity of MPs who use the Act.

In its research role for MPs, the Library of Parliament has made formal requests for information under the legislation. On at least one occasion, the library's researcher initiated a complaint after being refused information by a government institution. Parliamentarians are not entitled to special privileges under the Act, nor, again, should they be. The point simply is, however, that MPs can put the Act and the commissioner's office to work in their service --either directly or through the parliamentary library.

A combination of unfamiliarity with the process and impatience over slow results probably accounts for the low level of parliamentary usage. There should be no false expectations among MPs. Requests sometimes draw blanks. The Act does not produce information for tomorrow's question period or this week's debate. Parliamentary applicants under the Act, like good journalists plotting their requests, must anticipate what information could be useful and plan well ahead of need. The access process does continue to require too much time, though, as noted elsewhere in this report, improvements are being recorded. But the pay-off in information can be rich.

Whatever the reasons, MPs are not exploiting the law's potential. By any measure, members of Parliament fail the use-it or-lose-it test, and so do other Canadians. More of this later.

Where are the champions?

The *Access to Information Act* lacks visible champions of openness in Parliament. It matters not whether parliamentary access advocates come from either government or opposition benches. Preferably, they should come from both sides of the House and in particular from members of the Justice and Solicitor General Committee. The Information Commissioner is a voice from the outside. Parliament should have some inside voices preaching for and defending access rights.

Where was Parliament when the Information Commissioner was urging the government to release the results of its public opinion polling on constitution reform? Where were the questions in the House?

It was not as if Parliament was unaware of the issue; it was brought directly to the attentions of members and senators in the last two of these reports. Yet the government felt no pressure from Parliament to do the right thing. Had there been such pressure, an expensive court case could well have been avoided.

A note to members of the next Parliament: anyone looking to be identified with a good issue should consider freedom of information. Any such champions will quickly receive attention.

Advise and consent

Next test: How has Parliament responded to the advise it has received about the *Access to*

Information Act?

The government of the day, not Parliament, prepares the legislative menu. Parliamentary committees and commissioners recommend; the government decides what is acted upon. The Information Commissioner is realistic about the limitations upon Parliament to act as Parliament. Parliament is not a substitute for the executive and the review power of parliament is constitutionally difficult.

But the Information Commissioner reports to parliament for a purpose: to tell opposition as well as government members of Parliament, opposition as well as government Senators, what he thinks they should know about the government's performance *vis-à-vis* the access Act.

Yet, it must be said, so far as parliamentary reaction goes, these reports might as well be put in a space ship to Mars. They have never, to this commissioner's best knowledge, even prompted a question to the government in either the Commons or the Senate. Have they been so irrelevant or boring?

Part of the problem may be that, when the Information Commissioner makes his appearance at the time of the estimates review before the Standing Committee on Justice and Solicitor General, his report to Parliament is stale, almost a year old. That is ancient history in political time. The committee is under great time pressure and has never felt compelled to take up the commissioner's annual reports in anything approaching a systematic way.

Suggestion: The commissioner's appearance before the committee should be scheduled at the earliest possible time following publication of the annual report.

Crown copyright

A case was made last year that the concept of Crown copyright is anachronistic. It was argued that it has not been consistently asserted since Confederation and is in danger of becoming an impediment to the democratization and dissemination of access to information, particularly in a new age of electronic databases. Parliament was asked to give a direction that Crown copyright be abandoned. No such direction has followed.

Still slipping away

In last year's report, the commissioner pointed out that section 24 of the act is a mandatory exemption which requires the government to refuse to disclose records containing information protected from disclosure by any of the statutes listed in schedule II. He suggested that the government's practice of adding statutes to schedule II was eroding the principle of access created by the Act because it increased the amount of information that could not be disclosed.

The commissioner was also concerned that the process used to effect these changes was not by direct amendments to the access Act. They were treated much like minor housekeeping amendments, tagged on to other bills. There as no debate; no discussion of the effects or the need for this type of an amendment. There was no consultation with the commissioner's office.

Last year's report also noted that the government had ignored the recommendation of the Justice and Solicitor General Committee in 1986 that section 24 and schedule II be repealed and replaced with new provisions to protect the special interests contained in the *Income Tax Act*, the *Statistics Act* and the

Corporations and Labour Returns Act. In fact, parliament continued to enact new statutes containing provisions which would further restrict disclosures.

Last year four government bills containing five confidentiality provisions for addition to schedule II were on the Order Paper. One, the *Energy Efficiency Act*, was proclaimed in force on January 1, 1993. The other three (Bills C-13, C-45 and C-62) remained on the Order Paper but were joined by Bill C-112 which was introduced to make the modifications to the *Excise Tax Act*. Because of the seriousness with which the commissioner viewed these proposed changes, he expressed his concerns about C-112 in a letter to the Chairman of the Finance Committee of the House of Commons.

From a report-card perspective, the performance is getting worse. The access Act started in 1983 with 33 statutes in schedule II. That number had increased to 38 by the time of the Justice committee report in 1986. By the end of 1992-93, 42 statutes containing 59 provisions limiting disclosure were listed in schedule II. Since four government bills were on the Order Paper listing another five confidentiality provisions, there could be 46 statutes containing 64 confidentiality provisions.

There is no information so sensitive that the *Access to Information Act* and its exemptions can't be trusted to protect it. The Act is extraordinarily well drafted. The commissioner's office has yet to see a legitimate interest that couldn't be protected by one or more of the existing exemptions. Yet more statutes are adopted which weaken the *Access to Information Act*. Parliament is taking away what Parliament gave. Worse, it doesn't even seem to have noticed.

Still polls apart

In his last two annual reports the Information Commissioner urged that the results of government public opinion polls be routinely released. The government was deaf to the argument that the public has a right to know what the people are telling government about their own opinions through publicly-financed polls. The commissioner believed that he had no other option but to take the Prime Minister, as head of the Privy Council Office to court to force lawful behaviour. The Federal Court of Canada confirmed the commissioner's view that the polls should be released. The case is more fully discussed on p. 27.

But the aftermath of the court case is even more troubling. Although the precise polling records ordered released by the court are now public, the government refused for many months to release any other requested polls on constitutional matters. At this report's year end (March 31), it had still not honoured its lawful obligation to give requestors any answer -- even a "No"! There was, however, an indication that saner heads may yet prevail.

While the government, on its own performance, has not yet come around to accepting the principle that polls should be public and should be released in a timely manner, one member of Parliament, a government member at that, introduced a private member's bill requiring the disclosure, within 60 days, of all polls paid for with public funds. At least, someone in Parliament was listening.

Making it easier

Parliament has now acted to improve access rights of the visually impaired. This right to obtain records in alternate formats was urged by the Information Commissioner and the Canadian Human Rights Commission.

Strengthening the law

Parliament's reaction (or lack of it) to the recommendations in the report of the Standing Committee on Justice and Solicitor General needs also to be recalled here. The report, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, was the result of the statutory three-year review of the *Access to Information Act* (and the *Privacy Act*) provided for in the original legislation.

The government's response to the unanimous, all-party report was published in the document, *The Steps Ahead*. While most of the recommendations dealing with the *Privacy Act* were adopted in principle (though not all implemented), those pertaining to the *Access to Information Act* were politely "talked out", to stretch the parliamentary euphemism.

No recommendation was more important in this commissioner's view than that his office be given an explicit mandate to educate the public concerning its access to information rights. Without the mandate, the guardians of the purse strings -- Treasury Board ministers -- are reluctant to provide funds to the commissioner for this purpose. Why make trouble for themselves?

But, surely, the widespread exercise of rights is the litmus test of the vigour of a democracy! The most up-to-date statistics, for 1991-92, show that 10,376 requests for records were made to government institutions, almost 1,000 fewer than the previous year.

The optimistic reading of this trend is that the government is releasing more information informally, that there is less need to resort to formal applications. Alas, no evidence supports such optimism.

How few Canadian requests? One small department of the state government of New York (Department of Environmental Conservation) in that same year, received as many access requests as did all Canadian federal departments combined. There is, obviously, much yet to be done to make the access law itself accessible to Canadians.

Yes, Parliaments can only dispose after governments propose -- but that cannot be a recipe for parliamentary lethargy. The late Ged Baldwin would not take "No" for an answer and it was from his determination that the access law came into being. The *Access to Information Act* awaits another parliamentary champion!

Two-in-one

The government's decision that the Offices of the Information and Privacy Commissioners become fully merged was an event of importance in the life of the Information Commissioner's office. The government made its intention known in a budgetary announcement in February of 1992 and the matter was discussed in last year's annual report. Yet the means to implement the merger have not been brought before Parliament. The merger remains in limbo, though the government continues to support the idea.

The state of uncertainty has meant that long-range planning is not possible. Most troubling, the uncertainty has been destructive of good lines of communication between the commissioners, their clients, their counterparts in other jurisdictions and the public officials with whom they deal, many of whom believe that the merger has in fact been accomplished.

This commissioner entreats the government and Parliament to resolve the matter -- either by abandoning

the merger idea or by proceeding quickly with it. Anything less is a disservice to the effective protection of the access and privacy rights of Canadians.

Who pays the piper?

A final consideration for Parliament (at the danger of seeming merely self-serving): Is it wise to have the government decide upon the level of funding to be given to Parliament's servant, the Information Commissioner? This is not a complaint about receiving insufficient funds. It is simply to say that with each budget-cutting exercise, it becomes more difficult to be an effective watchdog.

No, the government cannot be accused of singling out the commissioner's office for fiscal retribution. His office has suffered cutbacks in good company. That is just the point. There has been no recognition of the office's special relationship to Parliament. No one from the Treasury Board asks if Parliament's work can be carried on effectively after an across-the-board cut. No one in government considers the implications of budget decisions on the offices's independence.

This commissioner welcomes tough budgetary controls and recognizes the need for reducing government spending. He should be accountable for taxpayers' money. He should be able to demonstrate that it is well spent in the cause of access rights.

But being so accountable to the government of the day, rather than Parliament, could be if it came to a crunch, a dangerous arrangement. The commissioner joins the good company of the Chief Justice of Canada in worrying about the readiness of the government to treat independent offices as though they were merely another government department for budget purposes. The Information and Privacy Commissioner in Ontario advances and defends his budget directly before a legislative committee. That model has much to commend it.

Back to you, Parliament.

Electronic Democracy

How will it compute?

If the past year demonstrated anything about the sharing of information at the stroke of the key, not the turn of the pages, it showed that technology, public servants and the public are moving much more rapidly than are legislators.

Those who debated the *Access to Information Act* -- the law is a mere 10 years in place -- could not have predicted the extent to which governments would want to do business electronically. Wholly paper-free networks that allow public servants to share information, kiosks (like advanced instant banking machines) that offer services to the public, or high-speed electronic highways that deliver volumes of government data to scientists, researchers and businesses, are no longer the musings of futurists.

EDI (Electronic Data Interchange) is a fashionable acronym around Ottawa these days. Canada' Comptroller General announced: "My personal goal is to have a paperless environment by the end of the decade for our internal administrative processes -- that is finance, personnel, purchasing and administration. I also would like to see major progress on a paperless process to collect our significant tax revenue."

The Government of Canada will make use of much of such wizardry shortly -- within months for some aspects of existing technology. (The Info/California kiosk spoken of in this report last year is a prototype for federal government kiosks in gestation. By the time the California model went on display in Ottawa, it was already a has-been.)

Though 10 years -- or more -- may pass before the information technology (IT) revolution reaches its dénouement and all the highways are built, many ways for the public to do business with government via keyboards and screens, not paper and pens are already in place.

Revenue Canada, for example, estimated that a million Canadians this year would make use of the RC-Tax's E-File (even the language is new-made) program to file their returns. One of the ways Employment and Immigration Canada is trying to link employers and jobless Canadians is through electronic want ads. Firms competing for government contracts are dialling up a computerized open bidding system for lists of goods and services.

Data banks are also helping to enforce the laws, provincial and federal. Some 2,000 police forces are linked to the RCMP's Police Information Centre which can deliver the goods to the cruiser car. Data banks related to Canada Pension Plan contributions, records of employment and SIN registration are also made available to provincial authorities for the enforcement of family support payments.

As obsolete as a 64K personal computer is the notion that electronic information is merely data stored on a disk or held in memory. Electronic signals will soon be travelling both sides of the street -- from citizen to government, from government to citizen (corporate or otherwise). And the street looks more and more like a roundabout. (Not incidentally, government spending on information technology last year qualified IT as one of the few growth areas in government.)

In his two previous annual reports, the commissioner saw the need to bring access to information into the electronic age. He has recognized for some time that electronic access presents both problems and opportunities, but properly done "offers an exciting new dynamic dimension to information sharing, even to democracy".

The *Access to Information Act* nods at the existence of electronic information and suggests a right of access far wider than many in government might find comfortable. The merit of necessity lies in the drive to recover the costs of gathering information and of disseminating it. The dictum: Let those who benefit pay! has its appeal.

The access law, however, is founded on sound principles not to be ignored:

- government information should be available to the public
- exceptions should be limited and specific
- decisions on the disclosure should be reviewed independently
- the cost of access should not be a barrier

As to offering guidance and direction to the inward and outward flow of electronic data, we will need a good set of traffic lights; what we have are only directional arrows to the highway.

It is not too early to begin the debate that could lead to new legislation, perhaps a new federal information act. Some obvious questions: How best to define public rights to electronic information? Will this national resource be shared widely or be narrowly mined under the inhibiting and still potent presence of the curiosity called Crown Copyright? What could constitute a national electronic reference system? Should market forces or government licensing decide who first gets to see what? How can we reasonably price information for business, for research, for private consumption, for better citizenship? If the questions are obvious, even easy, the answers are anything but simple.

The existing Act provides experience but, unfortunately, it is no answer to these new questions. We know from experience what makes little or no sense. It makes no sense, for example, to have access and pricing policies that mean taxpayers underwrite one individual's information search to the tune of $1.2 million. (Revenue Canada had one such applicant.) It doesn't make sense to have pricing policies that mean electronic publishers pay a price below what is required for the government to recover the costs of making the information available.

What then should be charged? How to ensure equity? How to identify the full extent of information available -- or records that could be created? What should be the role of the private sector in information delivery? Can the public interest be reconciled with the bottom line? The list of issues goes on.

Government information can be viewed as a national resource of various strata -- the government phone book at the surface and the specialized databases buried deep. (There are now, apparently, discussions inside government which could lead to thinking of government information as a hierarchy, not an open pit.)

By this way of thinking, user fees might range from nothing at all for surface treasures to whatever the market will bear for the rarest.

The discussions are none too early; the raw data in the $20 government phone book for the national capital region already costs $2,500 to purchase from the government in disk form -- much less to purchase from a licensed supplier. And if disk form should become the only form, what then of the good access principle that the cost of access should not be a barrier? We should not risk the creation of an information aristocracy with information lords and peasants.

The notion of strata of information is in keeping with government's current policy which distinguishes information that fulfils the "duty to inform" from information available for purchase. There is nothing sinister or threatening in itself in the desire for economic return on government information. Budgets are tight. Information is valuable. Markets exist. Markets should not be artificially created, however, by building new barriers to access to information.

We need to consider the Western wheat farmer who wants detailed information on crop insurance legislation, the parents of a chronically-ill child in Toronto who want access to the data banks of Health and Welfare Canada, the Halifax businessman who needs to know the details of a Revenue Canada information bulletin. These citizens have financed the gathering of information through their taxes. There is a strong argument to suggest that it belongs to them at a nominal charge -- an argument which finds support in the access Act.

The *Access to Information Act* does not have as its starting point information in government files. Its starting point is the individual who files a request. The Act is, as public servants are now wont to say, client-driven. It places little onus on the individual applicant, and a great deal of onus on the government institution to prove, for example, that there is good and specific reason not to release information. It makes no distinction whatever on the use to which the information will be put. That is why the fees are the same for the many people who file for information once in a lifetime and the few who have built businesses on the Act.

One way out of the dilemma may be heresy to freedom of information purists and irksome to those who like to have, as a starting point in policy formation, only the government's interests at heart -- administrative and financial. That way could be to identify not only strata of information delivered electronically, but also distinctions among information users. A fee or lack of fee could be based on an information user's apparent needs. In that way, citizens would not be informationally disenfranchised. Nor would enormous amounts of valuable information be released for the benefit of only a very few people.

In simple terms, distinctions could be made among those who **need to know** information, everyone who has a **right to know** and those who simply **want to know** what lies in a data bank. No individual or corporation should ever pay anything for information required to meet an obligation to government. Information many strata away from the government phone book should sill be provided at no charge when the government requires a citizen or a corporation to live with a law or regulation.

Nor should there be anything but a nominal charge for any information that would allow anyone to function better as an informed citizen -- statutes, budget papers, excerpts from *Hansard*. The right-to-know could burrow very deep when citizens or watchdogs seek to keep government accountable. Special consideration should be given, as the access Act now does, to information that has strong public interest in the defence of public health and the environment.

Higher fees for information could be well-justified in other circumstances. Individuals or corporations may want to know for commercial competitive reasons. Or they may want to know for the sole

purpose of repackaging and distributing the government's database.

Too cumbersome? Too likely to place control in an uncontrollable bureaucracy? The alternative is to give access and benefit to those who rush to the new rich deposits and nothing to the citizens whose taxes laid down the ore. That also has its pitfalls. We may not find a perfect solution but we need to look hard for a good one.

Yesterday's predictions of the impact of the microchip on work, on government, on society have been very wide of the mark. We no more have the paperless office than we have the cashless society or the workerless factory. Computers have proven to be useful tools, not social revolutionaries. New technologies sometimes fail to take hold because there is still plenty of life left in the old techniques.

It may be that few still yearn to chisel messages in rock, but words on paper have survived many metamorphoses! For many, the touch of books has more appeal than the glare of a screen. With some confidence, it can be predicted that an Information Commissioner will be urged to publish a report on paper for many years, probably many decades, to come.

IBM has estimated that 95 per cent of information in business enterprises is still in paper form. The U.S. pentagon recently declared war on paper, for the good reason, according to one report, that typical U.S. navy cruiser puts to sea with no less than 26 tonnes of manuals for its weapons systems -- enough to affect the performance of the vessel. Paper remains the primary record format in the government of Canada, a safe enough conclusion even without weighing the manuals on Canadian ships!

The integrity of the law as it stands needs to be preserved through the decade (or much more) that paper and computer screen are bound to co-exist. The law should serve readers of all media. Marshall McLuhan's dictum should not be misinterpreted by allowing the medium to become the message. Most important, the principles of the Act should survive technology.

Access to a portion of raw data should not be denied simply because it has been sold for use in a value-added information product. Records maintenance is another new concern. As the government's most senior public servants begin to share an electronic network, the question arises: Should everything passing across the Senior Executive Network as well as every other E-mail and bulletin board service in government be stored? Probably not.

But as information dances like light through the network, who will care for storage of what clearly should survive? Which access to information co-ordinator in which agency will process an access request? Will there be a trackable record of a transaction at a kiosk if an applicant looks for one years later? There is an obligation in moving to new technology to ensure that today's dazzle does not become tomorrow's drizzle. Treasury Board please note.

Yes, we have to plan for the EDI future, but we have to nurture the tools, such as the access law, which reduce the perils as we move into that paperless age -- which may be longer in coming than some believe. Recommendations for clearer legal roadmap into the informatics future will be the commissioner's project for next year's annual report.

But what needs no debate or study is the imperative that there be governmental culture of openness. As Arthur Kroeger, dean emeritus of deputy ministers astutely observed: "Modern communications in the Information Age have undermined hierarchies everywhere, and have created new expectations on the part of the public that they will have a much greater say in governmental decisions than has historically been the case." What is required, he said, is "a new openness by officials in their daily work."

Delays

As promised in last year's annual report, the commissioner's first priority in 1992-93 was to address the problem of delays throughout the access system. During the commissioner's appearance before the Standing Committee on Justice and Solicitor General, it became clear that members of the committee also considered that the problem of delays merited the commissioner's careful attention.

Starting at home

The first line of attack was to ensure that the commissioner's own office was not part of the problem. In the previous reporting year it took, on average, 6.89 months to complete an investigation. Complaints involving disputed exemptions required on average 8.95 months, delays 2.13 months and fees 2.45 months. These numbers represented an improvement over the year before. Yet, the times were too long.

It is satisfying, if still no reason for smugness, to report that efforts to improve the timeliness of complaint investigations have, again this year, met with success (see p. __). The overall average turnaround time is 3.89 months. Investigations of disputed exemptions took on average 5.58 months; delays 1.86 months and fees 1.79.

Especially worth of note is that this improvement was possible without the need to adopt a more formal style with departments. There were no summonses; no evidence was taken under oath; there were no formal hearings.

With rare exceptions (more of that later), public officials throughout government showed sensitivity to the commissioner's goal of completing his investigations as quickly as possible without compromising their thoroughness.

Credit is also due to this office's complaint investigators. Despite an overall staff reduction over the past two years, service to the public improved. That service remains the first commandment.

Perhaps the most rewarding fact is that of 400 cases in which there was some fault on the part of a government institution, resolutions were achieved in 96 per cent of cases without the need for the commissioner to intervene personally with a formal finding against the department. In other words, investigators not only reviewed disputed records and determined the reasons for and circumstances surrounding the denial, they also negotiated corrective action by departmental officials to ensure that the complainants' access rights were accorded. This is the way an ombudsman's office should look.

The Information Commissioner has not forgotten that, in the report of its review of the access law in 1986, the House of Commons Justice Committee urged that three months be the target turnaround time for exemptions complaint investigations. In the coming year, every effort will be made to achieve that target. The commissioner must alert Parliament, however, to the fact that significant further productivity improvements may require a modest rise in stall levels.

But some bad news. There has been surprising difficulty in investigating complaints against the Department of Justice and the Privy Council Office. Perhaps in itself that should not be surprising.

Those institutions, by their very nature, are custodians of some of the most sensitive information in government. Perhaps there has simply been a run of unusually difficult cases. Officials of these departments sometimes seem to assume, however, that they can and should dictate the nature and speed of the commissioner's investigations; determine unilaterally what information is relevant to an investigation and when it will be produced. With that attitude, some investigations have dragged on interminably. While the commissioner intends to proceed informally, it would be regrettable if it became necessary to be forced into a confrontational, legalistic position.

Having to make this point at all is discouraging. The Prime Minister's department and the Minister of Justice's department are most influentially placed to give good example by nurturing access rights and respecting in letter and spirit the obligations set out in the law. Unfortunately, bad examples have been set by the taking of refuge in a maze of quibbles and layers of excuses. Yes, the cases may be tough. But the test of the commitment to openness is precisely how hard cases are handled. Easy cases are no test at all.

Government Institutions

Cynicism about the access law draws its fuel, by-and-large, from the perception that long delays in obtaining access to records in a chronic problem.

In 1990-91, 44.5 per cent of all requests made under the Act were not responded to within the statutory 30 days; 18.1 per cent took between 30 and 60 days and 26.4 per cent took more than 60 days.

The most recent Treasury Board figures for 1991-92 show improvement -- for which there of course was (and remains) much room. In that year, 39.4 per cent of requests were no answered within the 30-day period -- 60.6 per cent were answered within that period. Of those that took longer, 20.9 per cent took between 30-60 days and 18.5 per cent took more than 60 days. The trend line is not dramatically improved, but it continues in the right direction. Cynicism has less to feed upon.

During the reporting year, the commissioner established a response time investigations unit -- how's that for a good grey bureaucratic title! -- to keep up the pressure for continued improvement. This unit was given a three-point mandate:

- to monitor all notices from departments sent in compliance with section 9(2) of the Act. This requirement is to inform the commissioner that responses to access requests will be delayed for more than 30 days beyond the standard 30-day response period;

- to conduct all investigations of complaints alleging unlawful delays, time extensions, fees and miscellaneous complaints;

- to plan and conduct reviews of the practises and procedures used by departments to process access requests.

During 1992-93, the commissioner received 372 notices under the section 9(2) provision. The top five institutions in terms of extensions beyond 30 days for which notices were received by the commissioner's office were:

- the Department of Supply and Services
- the Department of National Defence
- the Privy Council Office
- the Department of Agriculture, and
- the Department of Health and Welfare

Monitoring to date indicates that, for the most part, departments had reasonable justification for extending the response-time deadline. The need to consult with businesses which may be affected by disclosure accounted for most of the extensions. In other cases, large volumes of records or temporary staff shortages were the reasons. That being said, departments tend to be overly cautious by claiming an extension longer than reasonably necessary. Playing it safe usually means playing it slow.

Reviews of these notices will intensify in the coming year. As well, steps are being taken to determine why the number of extension notices received seems far fewer than one would expect.

Treasury Board figures for 1991-92 indicate that 18.5 per cent of all requests (10,376) were responded to only after the lapse of 60 or more days. Assuming a similar percentage for 1992-93, it would seem, therefore, that the commissioner should have received some 1,920 notices. Less than 400 were received! There may be a simple answer to the disparity: some institutions may not be claiming extensions; they may simply be responding late. If so, any such "culprits" will be sought out and remedial action recommended. Those who are simply not obeying the legal requirement to give extension notices to the commissioner will be reminded of their obligation.

The special unit investigated complaints (including delay extensions, fees and miscellaneous) and on average completed the investigations in 2.04 months. That is an improvement over last year's figure of 3.24 months, even though the unit was not established until autumn, '92.

The unit's work is not completed when a wrongful delay is found to have occurred. That's just the beginning. The investigators also work with departmental staff to elicit an answer for the requestor as soon as possible. Only when the answer has been given, a firm commitment is made or when it is clear that only court action will prompt an answer do the investigators close their file.

During the year, the response time investigations unit developed a method to review the efficacy and efficiency of the procedures used by departments to process access requests. With the cooperation of Transport Canada, the unit conducted its first review in that department. The review examined all documented procedures and practices and statistical records of processing times. Interviews were held with officials at all levels. The results of that review will be reported in next year's annual report.

Meanwhile, it can be reported that the commissioner's office and Transport Canada quickly discovered that they shared a common goal: to improve service to the public. In the coming year, more reviews will be undertaken and, undoubtedly, in the same cooperative spirit. Institutions are encouraged to inquire of the commissioner's office to learn more about the review methodology and how it might be helpful to them.

Delays in the Federal Court

In his 1991-92 annual report, the commissioner gave the results of his office's study into the length of time taken by the Federal Court to process access to information cases. The study demonstrated that the court needed special rules to help it manage access cases in a timely fashion. It also demonstrated that the Department of Justice, with undoubtedly more pressing priorities, was not vigorous in its conduct of access litigation.

Finally, the study confirmed that the largest delay problem in the Federal Court under the *Access to Information Act* concerns so-called "section 44" cases. These are cases in which the government decides a requestor is entitled to records but a third part, (most frequently a corporation) alleging that it will be harmed, asks the court to block the release.

In response to this legal limbo, the commissioner undertook two initiatives. The first was to propose special rules for the Federal Court to consider using in access cases. The second was to become directly involved in the old section 44 cases before the court in order to hasten them along.

Special rules

The proposed special rules were presented to the Federal Court's Rules Committee last year and reported in the last annual report. The result is a bad news-good news story, to use the oversimplified dichotomy. The bad news is that the Federal Court is not now inclined to adopt the proposed special rules for access cases, preferring instead to embark upon a more general long-term review of all its procedural rules.

The commissioner realizes that the court has many more preoccupations than access cases. He also recognizes that it may be preferable for the court, in the long term, to rationalize its general rules rather than proliferate sets of special rules. Yet it is somewhat disappointing to see the court give scant weight to the legislative direction contained in section 45:

> "An application made under section 41, 42, or 44 shall be hear and determined in a summary way in accordance with any special rules made in respect of such applications pursuant to section 46 of the Federal Court Act."

There are indications that the court's review of its rules will be completed expeditiously. To give impetus to that hope, the court might note a recent report of the Administrative Law Section of the Canadian Bar Association about delays in the courts. It urged the Federal Court to adopt rules in specific areas of litigation, such as cases under the *Access to Information Act*, the *Privacy Act* and the *Official Language Act*. The report states: "The Federal Court should be urged to take action now and not wait until global review of the Federal Court rules is undertaken" (Report of Administrative Lw Section on the Report of Canadian Judicial Council: Report on Delays in the Courts, January 29, 1993).

The good news is that the Associate Chief Justice of the Federal Court has declared his intention to fashion from the present court rules (the so-called 1600 rules) an expedited procedure for most access cases. The court recognizes, then, that access delayed is access denied and intends to address the delay problem in both the short term and the long term. The court is clearly aware of the problem, and that is the necessary beginning of reform.

Giving section 44 cases a nudge

During the past year the commissioner's office made a concerted effort to cajole, persuade, prod and nudge parties to the section 44 cases (i.e., businesses seeking to block information release) to bring the matters to resolution. (At the beginning of the reporting year, 73 such cases were before the court and 36 new cases were filed in 1992-93.)

It is a pleasure to report there has been a reduction in the backlog due mostly, not to be immodest about it, to this office's efforts. There is now only one remaining section 44 case which predates 1990. The commissioner's office was instrumental in securing the resolution of seven of these pre-1990 cases (enabling the records to be released) and the commissioner has formally intervened in the one remaining case asking the court to impose a procedure which would see it resolved quickly.

The commissioner's office negotiated the closure of four other cases which concerned food inspection reports -- an issue settled by the Federal Court of Appeal in 1988. The office was a catalyst in the withdrawal of 22 cases dealing with pharmaceutical product monographs. This was also an issue on which the Federal Court of Appeal has ruled, though more recently, only last year (see p.__).

A further 15 cases before the Federal Court deal with the question of disclosure of reports of adverse drug reaction and new drug submissions made by pharmaceutical companies to Health and Welfare Canada. The commissioner's office has formally intervened in three of these cases in order to bring them (and the others which raise the same issue) to a timely resolution.

This process of seeking to solve this problem of long-delayed section 44 cases has been an eye-opener. It confirmed that the Justice department had in fact taken a passive role, allowing cases to languish undefended for years. Its philosophy seems to be that unless the individual who requested the records becomes actively involved and presses the case, the Justice department is justified in inaction.

With respect, as the lawyers say, that is not good enough. Even the third-party applicants were astonished by the government's inaction. In one case a Montreal lawyer for a firm which had filed a section 44 application was approached to withdraw the matter. She was surprised to learn that there was anyone interested in her long-dormant file. She had not heard a word from the court or the defendant (the government) in the three years that followed the application. Nevertheless, she as most co-operative in approaching her client to reconsider the need to proceed with the application.

The story has an even stranger twist. Once the commissioner's counsel began to inquire into the matter, he discovered that the requestor had actually abandoned his request some three years earlier. The Justice department had been notified, but made no effort to inform the court or the third party, nor did it move to have the court case discontinued. That case too, then, will now be resolved.

In another case, our approach to the solicitor of a third party applicant resulted in its agreement to the withdraw the application in less than four weeks. This success came as refreshing news to the original requestor of the records who had, as an intervener, waited in frustration for four years for the Federal Court to dispose of the application.

Encouraged by the success of these efforts to secure speedy resolution of section 44 applications, the commissioner proposes to continue them for another year. The commissioner's office has three objectives:

- to have all section 44 applications made during 1990 resolved by decision or discontinuance;

- to press for speedy resolution of some 25 cases filed since 1990 which concern the disclosure of air carrier inspection reports; and

- to seek speedy resolution of seven cases concerning the disclosure of information about the "fixed link" between Prince Edward Island and the mainland.

Legal Issues

One might have assumed that, since the *Access to Information Act* has been in force for almost 10 years, all the juicy legal issues would have been long solved. This past year proved the error of that assumption.

Here are some basic questions which gave rise to disputes: whether departments can remove from records information judged to be not relevant to the request; whether client departments can waive solicitor-client privilege or whether the privilege resides in the Crown; whether the commissioner can be prevented from seeing records held in minister's offices; whether the Privy Council Office (PCO) can refuse to disclose old public opinion polls on rounds of injury to federal-provincial relations and whether leaked records become accessible under the Act.

Solicitor-client privilege

In one case, the Justice department received an access request for legal opinions it had provided to a now defunct board (the Canadian Aviation Safety Board). It consulted the board's successor, the Transportation Safety Board (TSB) which decided, in the interests of openness, to waive the privilege.

On hearing this news, the Justice department decided that it knew best: the client couldn't waive the privilege since the Crown is the true client. By this logic, which to a non-lawyer seems tortured, the department maintains that solicitor-client privilege rests with the Crown's solicitor rather than the client institution.

Yet this does not end the saga. The Justice department made very effort (in the end successful) to have the TSB withdraw its waiver of privilege. What was all this manoeuvring about? Letters from the former deputy minister of Justice to the former chairman of the Canadian Aviation Safety Board related to an opinion as to the respective legal powers of the defunct Board's chairman and members. Hardly the stuff of state secrets!

The commissioner considered the complaint well-founded and recommended disclosure. The Department of Justice rejected the recommendation because it said it could not go against the wishes of the client! A catch-22 if ever there was! On the strength of renewed assurances, however, that the board in the end freely and voluntarily wished to maintain the privilege, the commissioner decided not to take the matter to court.

The elusive test of relevance

When requested information is found in a record or a file containing other information, what are the ground rules? Should non-requested information be excised word by word, line by line? Or should everything be made available as a bonus to the requestor?

The *Access to Information Act* offers no clear guidance. Nor did the courts until August 1991. In a case involving the Minister of National Defence and the Secretary of State for External Affairs, X v. The

Minister of National Defence et al., (Federal Court No. T-28986-84), the Federal Court commented: "The fact that information is not directly related to an access request is not a basis for exemption under the Act."

Then came a complaint from a newspaper that a request for *all documents* showing expenses related to a prime ministerial trip to Calgary had been met with an inadequate response. Records of travel to Calgary in April 1991 were received, but portions related to another destination on the itinerary had been expunged and marked "not relevant".

The investigation focused the minds of officials in the Privy Council in Office, the Department of Justice and the Treasury Board Secretariat which is responsible for administration of the Act. PCO agreed that a second look was required. In the end, it released information it had originally characterized as non-relevant and deleted.

The Information Commissioner concluded that relevance is only a test to be used in identifying which records fall within the scope of a request. Thereafter, the obligation is to release all information in the records except that which is subject to the Act's exemptive provisions.

A Treasury Board guideline to departments and agencies issued in December helped further in clearing up the confusion. The guideline suggests a reasonable measure of expunging take place since a release of a large volume of non-relevant information usually means time and money to the government department and to the requestor. All those photocopying charges. All that paper. The guideline suggests, sensibly, that in such cases the department discuss the matter with the person who made the request to avoid needless expense. In all cases, it suggests that the requestors be informed when they receive only part of a large document and be given the option of asking for all of it.

These reasonable measures, if followed, could lead to far fewer disputes over relevancy or the cost of processing a request. The commissioner will keep a careful eye on the issue. The matter of relevancy may not yet be irrelevant.

The sanctity of minister's offices

In three instances during the reporting year, the Department of Justice refused to allow the commissioner to review records which he considers relevant to investigations. The reason given was that the records were in the minister's departmental office, not under the department's own control and hence, out of bounds. The department argues that the minister is not part of the department, that the department consists of the deputy minister and all those below him on the organization chart. It is from that perspective that the Justice department concludes that records under the control of the minister's office are not under the control of the department. Since only the department is covered by the access law, goes the argument, neither requestors nor the commissioner have any right to see records held in the office of the Minister of Justice.

In the commissioner's view, since Parliament has made ministers responsible for the administration of the access law by virtue of being heads of departments, the Minister of the Department of Justice, as its head, cannot be considered immune from investigation by the commissioner.

The commissioner agrees that some records held in minister's offices are not accessible to requestors under the access Act. However, for ministers to decide what is or is not accessible without permitting the commissioner to independently review such decisions is entirely contrary to the purpose of the

access law.

As of this writing, the minister responsible for access law policy stands in some danger of being the first minister who has to be legally compelled to co-operate with the commissioner's investigations.

Polls

Soon after the demise of the Meech Lake accord, the government of Canada, in its continuing effort to solve constitutional problems, conducted extensive opinion polling. The results were considered to be of such high strategic significance that the government refused to disclose them on the grounds that to do so could reasonably be expected to injure its ability to conduct federal-provincial affairs. This exemption is contained in section 14 of the Act.

After all efforts to persuade the government to change its mind had failed, the commissioner -- for the first time in his nine years as an ombudsman -- sought the aid of the Federal Court. The court was asked to order the release of all but portions of 74 pages out of a total of some 700 pages of records. The commissioner concluded that the section 14 test could not be met except from some material on those 74 pages. Two of the requestors also jointed in the action urging the court to order all the records released.

Mr. Justice Marshall Rothstein ordered that all the records -- including those on the 74 pages -- be released. He concluded that the government's fear of possible injury to federal-provincial relations was entirely speculative. He said: "An overly cautious approach (by the government) based on something less than a reasonable expectation of probable harm is not consistent with the Act."

What is especially instructive for all departments is the direction the court gave concerning the burden which must be discharged in order to invoke properly an injury-test exemption such as section 13. For each withheld record, the court found, the government is required to establish the nature and extent of the injury. It also must show that, if disclosure is made, injuries are more reasonably expected to occur than not and that there is a direct causal link between the disclosure and the occurrence of the probable injuries.

The larger question, at least for the commissioner, remains open: Was it worth going to court? As a practical matter, the judicial process proved a poor tool to hold government accountable for failure to respect access rights. Despite an early hearing, the court took so long to render its decision (14 weeks) that the referendum had occurred and the government had in fact already disclosed all the records before the order was issued.

No member of the government or senior public official was called to account for the decision to deny wrongly access to records. At the time of the hearing, the government's only witnesses were a brewing company executive (he had formerly been director of communications at the Privy Council Office) and a university professor retained for his expertise in the media treatment of political issues. These were not the people who decided to stonewall on the release of polls until after the referendum.

Finally, the shortcomings of court action have been evident in the days since the decision. While the precise polls dealt with by the court were released, other polls -- some 4,000 to 5,000 pages of them -- remained secret for many months. The government simply chose to operate as though the court had never spoken, telling the requestors and the commissioner in effect to go through the whole court process again to get results! As indicated earlier, while such action many yet not be necessary, it

reinforces this commissioner's resolve to work even harder to make the ombuds-process work and his conviction that resorting to the courts to solve problems can be an expensive failure.

When the ship of state springs a leak

Occasionally, a record which the government has a right to keep secret finds its way into the public domain by unauthorized means. Once a leak occurs, does the government then lose the right to cloak the leaked matter in secrecy for the future?

An example will illustrate: A journalist came into possession of a document which appeared to be an intelligence assessment emanating from the Intelligence Advisory Committee (IAC). (An interdepartmental committee chaired by the Privy Council Office, the IAC is charged with providing to government a co-ordinated intelligence product and its work is a closely held secret.)

The journalist formally applied under the access law to obtain lawfully, a copy of the record which had come to him by informal channels. His request was denied; several exemption provisions of the access Act being relied upon to justify non-disclosure.

The Privy Council Office's argument was essentially this: a leak should not be in any way legitimized; even the simple acknowledgement that the leaked copy was, in fact, authentic, should be avoided. Certainly, according to PCO, to release formally a leaked record or any related information would only encourage unauthorized disclosures. PCO urged the commissioner to consider only whether an exemption in the access law authorized secrecy and to ignore the fact that there was a leak.

The other side of the argument is, perhaps, the common sense view: What use is there in concluding that information which is not in fact a secret is in law a secret? A colourful expression of this view can be found in the decision of Mr. Justice Muldoon in the Federal Court case of Ken Rubin v. The Clerk of the Privy Council, March 25, 1993 (Federal Courts Nos. T-2651-90, T-1587-91 and T-1391-92).

> "If, for example, information is publicly available as is provided in paragraph 19(2)(b) of the information access law, then the 'bird, has flown the 'coop' and the head of a government institution may, and should with good grace, disclose it. The institution head may, and should, disclose even specific monetary remuneration, because it is already in the public domain and it appears silly to refuse to disclose it."

The Information Commissioner concluded that the leaked document was not publicly available in any authorized manner and that PCO was not being silly in this case in refusing to disclose the requested record. He put it this way:

> "I cannot support the argument that inadvertent disclosure removes the right of an institution to invoke exemptions, especially when doing that would confirm the authenticity of any leaked document."

The conclusion in this IAC minutes case, however, ends only part of the debate. While a leak cannot automatically erase a record's secrecy protection, it may make it difficult for an institution to defend successfully an injury test exemption. Another example, unresolved at this writing, will illustrate the dilemma.

A journalist informally asked PCO if he could see the minutes of a Cabinet meeting which took place in

the early seventies. An official of the PCO reviewed the documents and created a censored version suitable for public consumption. Another official of PCO gave the requestor the wrong copy -- instead of the highly-censored version, he received the uncensored version. An article on the Cabinet discussion (which concerned ways to counter the separatist threat in Quebec) appeared in the *Globe and Mail*.

The journalist subsequently applied for the background paper which the Cabinet had discussed on that day. He also made a formal request for the Cabinet minutes which he had been given informally. To his surprise, he received a highly-censored version of both documents. He complained.

During the complaint investigation, PCO agreed to release formally to the journalist the version of the minutes he had earlier been given. Relying on section 14 (injury to federal-provincial affairs), however, it maintained secrecy on the background document.

The issue here differs from the issue in the IAC minutes case.

Having put the Cabinet minutes into the public domain, even if by inadvertence, without causing injury to federal-provincial affairs, how can the government make a reasonable case that disclosure of the background discussion document could result in that injury?

Although a release of information may not be authorized, it cannot be ignored when the government relies upon an injury test exemption to justify contained secrecy for the information. The outcome to this case will be reported in the next annual report.

The commissioner in court

The commissioner was in the Federal Court on six other matters during the past year. As previously noted in the section on delays, the office intervened in three section 44 cases in order to press the court and the parties to pursue an expeditious timetable.

In Wells v. The Minister of Transport and the Information Commissioner (Federal Court Nos. T-1729-92 and T-2160-92) the requestor, who was denied access and whose complaint was not supported by the commissioner, exercised his right to seek judicial review. Rather than challenging only the departmental decision to deny access, as is the usual case, the requestor also asked the court to review the commissioner's finding.

Since the commissioner only makes recommendations -- he cannot order the records released under any circumstances -- the court has been asked to strike out the portion of the action which names the commissioner.

There were hearings on October 13, 1992 and January 8, 1993 respectively and the decisions have been reserved.

In the other case, the commissioner's office made representations to the Federal Court of Appeal in the matter of Bland v. National Capital Commission et al. At trial, (1988), 20 F.T.R. 236 (T.D.), the National Capital Commission and the Privacy Commissioner had been ordered to pay the costs of the requestor (Mary Bland) and the Information Commissioner (who had challenged the NCC's decision to withhold records on NCC residential properties). In fact, the trial court had set the costs at a punitive level.

The Information Commissioner argued to the Court of Appeal that punitive costs were not warranted in this case, all parties having acted in good faith despite their differing views on the merits. The Court of Appeal agreed (Federal Court No. A-568-91) and also held that, as a matter of principle, no costs should be ordered against a commissioner (either access or privacy) who intervenes in the public interest.

Other litigation under the *Access to Information Act* where the commissioner was not a party or intervener

Cyanamid Canada v. Minister of National Health and Welfare (Federal Court of Appeal No. A-294-92)

In this case, a pharmaceutical company, Cyanamid Canada, applied under section 44 of the Act for an order prohibiting the Minister of National Health and Welfare from disclosing product monographs of certain drugs it manufactures.

At the Trial Division, the appellant argued without success that the requested information consisted of trade secrets; that the information was confidential information submitted to the government on a confidential basis and treated consistently in a confidential manner by Cyanamid; and that the disclosure of the information could reasonably be expected to prejudice the competitive position of the company.

The Federal Court, Trial Division, found that since the information contained in the product monographs was publicly available, it cannot be said to be confidential. Similarly, the court said, it is by no means certain that disclosure of information already publicly available would prejudice the competitive position of Cyanamid. The Federal Court of Appeal confirmed the decision of the Trial Division as follows:

> "Rights of secrecy and confidentiality fell away with the release of the product monograph; any injury, prejudice or advantage surely must flow from that release itself. I cannot see that appellant has established any basis under paragraphs 20(1)(a), (b) or (c) for interfering with the order of the Trial Division."

The Cyanomid decision reaffirms as the Act's purpose the giving of greater access to government records and requiring any necessary exceptions to be specific and limited.

X v. The Minister of National Defence (Federal Court No. T-2648-90)

Mr. X (his legal name) had asked the Department of National Defence (DND) for "the key and records pertaining to the keys used in the German communications between Germany and Latin America in 1941 and 1942." That request was turned down on the grounds that disclosure would be harmful to the conduct of Canada's international relations.

Mr. X applied to the Federal Court for a review of DND's decision not to disclose the requested information. In the reasons for his decision, Mr. Justice Barry Strayer found that it would be quite unreasonable to conclude that the information contained in the wartime documents could reveal anything pertinent to the conduct of Canada's international relations or its peacetime national defence more than 50 years later.

Changed circumstances and the passage of time are factors which must be taken into consideration in determining whether exemptions may apply. The decision also re-affirms two other important principles of the Act: public access to government information ought not to be frustrated by the courts except

upon the clearest grounds so that doubt ought to be resolved in favour of disclosure; and, the burden of persuasion must rest upon the party resisting disclosure, whether that party is a private corporation, a citizen, or the government.

Ken Rubin v. The Clerk of the Privy Council (Federal Court No. T-2922-91). (Now under appeal A-245-93 (March 30, 1993).)

The issue here was whether communications between a government institution and the Information Commissioner made during the course of an investigation were accessible under the Act after the investigation was completed. The government institution, citing section 35, refused to disclose the documents on the grounds that the investigations of the Information Commissioner are conduced in private. It also relied on section 16 on the grounds that disclosure of the requested information could reasonably be expected to cause prejudice to the commissioner's future investigations.

In his decision, Mr. Justice Rothstein recognized that since the Information Commissioner has no power to order disclosure, he should have significant persuasive power to encourage voluntary resolutions of requests.

He also recognized that parties must have confidence that the Information Commissioner will not divulge the information given to him. In spite of these observations, Mr. Justice Rothstein indicated that, while section 35 protects representations made to the Information Commissioner during the course of his investigation, the wording of section 35 was not broad enough to require confidentiality after the conclusion of the commissioner's investigation.

Justice Rothstein also indicated that paragraph 16(1)(c) had no application since it only applied to particular investigations and not in respect of the investigative process of the Information Commissioner.

Ken Rubin v. The Clerk of the Privy Council, (Federal Court Nos. T-2651-90, T-1587-91, T-1391-92)

This decision involved the issue of whether the exact per diem rates of governor-in-council appointees, specifically that of Alan Gotlieb when he was Chairman of the Canada Council, could be released. In holding that non-monetary or non-salary remuneration could be disclosed, the court held that specific salary or the specific per diem rate could not. It is only salary ranges that Parliament has authorized for disclosure, notwithstanding that there was a discretionary element to the amount of the payment. The court further held that there was no overriding public interest in the disclosure of the specific amount of the salary established within the range.

Complaints

The following tables provide a statistical overview of the government departments and agencies against which complaints were filed (table 4); types of complaints and disposition of complaints (table 2); the investigative caseload (table 1); turn-around time (table 3) and the geographic distribution of complaints (table 5).

The institutions most frequently named by complainant were:

Institution	**Number of Complaints**
Transport Canada	135
Immigration and Refugee Board	74
Privy Council Office	49
Royal Canadian Mounted Police	30
Canadian Security Intelligence Service	28

Much the same order of rank remains when the disposition of complaints is considered. However, the number of complaints found to be not-substantiated against Transport Canada was high (66) whereas in the case of the Immigration and Refugee Board, only 12 were not-substantiated.

A few words of explanation of categories of complaint findings:

- resolved (The complaint was resolved to the satisfaction of the commissioner as a result of remedial action by the government institution.)
- not resolved (There was a breach of the Act, but no remedy was possible or the institution decided not to implement the commissioner's recommendations.)
- not substantiated (There was no breach of the Act.)
- discontinued (The complaint was withdrawn or abandoned by the complainant.)
- well-founded (The commissioner made a recommendation to the head of an institution under section 37 of the Act or considered court action.)

While the year ended with a slight increase in the number of cases pending -- from 232 to 239 -- the caseload at the commissioner's office increased by some 82 complaints more than the number that had been filed the previous year. The new caseload increased from 645 to 727. In the 12-month period, more investigations were completed (a 7.6 per cent increase), despite a reduction in the size of the investigative staff. The number of complaints pending showed an increase of seven cases. The real story is of increased productivity.

Code of professional conduct

During the year the commissioner's office developed a code of professional conduct for those who conduct investigations. The following will be of interest to complainants, access to information co-ordinators and departmental or agency staff.

In conducting investigations, investigators must be fair, accurate in their reporting, objective and impartial in the performance of their duties. Consequently they must:

- conduct their investigative interviews in a non-intimidating manner and environment, allowing the per(s) being interviewed a full opportunity to respond to questions and to explain the department's position;
- record and report accurately with equal emphasis all the events and circumstances, both pro and con, pertinent to the complaint under investigation;
- endeavour not to be influenced either negatively, or positively, by a person's manner or attitude when reporting an investigation;
- not discuss, reveal, or make available any information to anyone not authorized to know the information. As well, the investigator will take necessary steps to protect the confidentiality of such information;
- be prepared to discuss cases and exemptions at the staff level to the full extent possible without comprising their ability to investigate complaints;
- emphasize co-operation, discussion and negotiation. Never leave a department guessing as to what remedial action will be satisfactory.
- ensure that there are no surprises, no adverse findings or notice of court action before senior officials have been consulted and every effort is made to resolve the dispute; and
- make every effort to be consistent in their approach.

Table 1

STATUS OF COMPLAINTS

(comparison of last and current fiscals)

	April 1, 1991 to March 31, 1992	April 1, 1992 to March 31, 1993
Pending from previous year	*256	232
Opened during the year	645	727
Completed during the year	*669	720
Pending at year-end	232	239

* Statistics previously reported for this period include 208 complaints filed and later discontinued by one complainant against a single department. These have been excluded for comparison purposes here since the inclusion would distort figures.

Table 2

COMPLAINT FINDINGS

April 1, 1992 to March 31, 1993

	FINDING					
CATEGORY	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL	%
Refusal to disclose	200	*11	157	8	376	52.2
Delay (deemed refusal)	116	-	12	7	135	18.8
Time extension	31	-	40	2	73	10.1
Fees	9	-	23	3	35	4.9
Language	-	-	-	-	-	-
Publications	-	-	1	-	1	0.1
Miscellaneous	32	-	64	4	100	13.9
TOTAL	388	11	297	24	720	100 %
100%	53.9	1.5	41.3	3.3		

*The 11 not resolved required court action.

Table 3

TURN AROUND TIME (MONTHS)

(comparison of last and current fiscals)

CATEGORY	*April 1/91 to March 31/92	April 1/92 to March 31/93
Refusal to disclose	8.95	5.58
Delay (deemed refusal)	2.13	1.86
Time extension	3.11	1.64
Fees	2.45	1.79
Language	-	-
Publications	-	1.81
Miscellaneous	6.83	3.00
Overall	6.89	3.89

* Excludes 208 complaints filed and later discontinued by one complainant against a single department. These have been excluded for comparison purposes here since the inclusion would distort figures.

Table 4

COMPLAINT FINDINGS
(by government institution)

April 1, 1992 to March 31, 1993

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Agriculture Canada	4	0	13	2	19
Atlantic Canada Opportunities Agency	2	0	0	1	3
Atlantic Pilotage Authority	1	0	0	0	1
Bank of Canada	0	0	2	0	2
Canada Council	0	0	1	0	1
Canada Deposit Insurance Corporation	1	0	0	0	1
Canada Ports Corporation	1	0	1	0	2
Canada Mortgage and Housing Corporation	0	0	1	0	1
Canadian Advisory Council on the Status of Women	0	0	1	0	1
Canadian Film Development Corporation	2	0	0	0	2
Canadian International Dev. Agency	5	0	2	0	7
Canadian Saltfish Corporation	1	0	0	0	1
Canadian Security Intelligence Service	14	0	13	0	27
Canadian Security Intelligence Service, Office of the Inspector General	7	0	1	0	8
Communications	8	0	2	2	12
Consumer and Corporate Affairs	2	0	6	0	8
Correctional Service Canada	1	0	1	0	2
Employment and Immigration	11	0	11	0	22
Energy, Mines and Resources	1	0	2	0	3
Environment Canada	9	0	7	1	17
External Affairs	13	0	7	0	20
Federal Provincial Relations Office	1	0	0	0	1
Finance	16	0	3	0	19
Fisheries and Oceans	6	0	8	0	14
Health and Welfare	14	0	7	0	21
Immigration and Refugee Board	62	0	10	2	74
Indian Affairs and Northern Development	9	0	11	1	21

Table 4

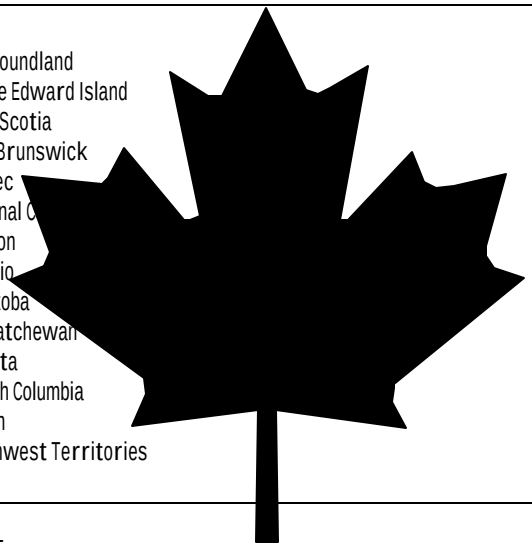
GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Industry, Science and Technology	0	0	4	1	5
Investment Canada	0	0	1	0	1
Justice	8	1	13	2	24
Labour	0	0	2	0	2
National Archives of Canada	9	0	4	0	13
National Capital Commission	5	0	0	0	5
National Defence	20	0	10	1	31
National Gallery of Canada	1	0	0	0	1
National Research Council	1	0	0	0	1
Pensions Appeal Board	0	0	1	0	1
Privy Council Office	27	10	10	2	49
Public Service Commission	2	0	0	0	2
Public Service Staff Relations Board	0	0	1	0	1
Public Works	4	0	2	0	6
Revenue Canada - Customs and Excise	8	0	10	1	19
Revenue Canada - Taxation	10	0	8	2	20
Royal Canadian Mint	0	0	2	0	2
Royal Canadian Mounted Police	10	0	20	0	30
Royal Canadian Mounted Police Public Complaints	1	0	1	0	2
Secretary of State	0	0	7	0	7
Security Intelligence Review Committee	2	0	4	0	6
Social Sciences & Humanities Research	1	0	0	0	1
Solicitor General	3	0	4	0	7
Superintendent of Financial Inst's, Office of	0	0	1	0	1
Supply and Services	11	0	12	1	24
Transport Canada	69	0	63	3	135
Transportation Safety Board	1	0	2	0	3
Treasury Board Secretariat	2	0	4	1	7
Veterans Affairs, Department of	2	0	0	0	2
Western Economic Diversification	0	0	1	0	1
Outside Mandate	0	0	0	1	1
TOTAL	388	11	297	24	720

Table 5

GEOGRAPHIC DISTRIBUTION OF COMPLAINTS (by location of complainant)

Closed: April 1, 1992 to March 31, 1993

Outside Canada	1
Newfoundland	31
Prince Edward Island	11
Nova Scotia	8
New Brunswick	3
Quebec	121
National C Region	199
Ontario	95
Manitoba	13
Saskatchewan	13
Alberta	147
British Columbia	72
Yukon	1
Northwest Territories	5
TOTAL	720



Case Summaries

With undue delay

On occasion the systemic problem of delays in response to applicants' requests for information reaches an unconscionable level. The departments of the Solicitor General, Finance, and the Environment this time 'round displayed so little regard for the Act's 30-day time limit, or a reasonable period of extension, that they deserve special mention.

Eight requests for information submitted by one applicant to two agencies under the control of the Solicitor General -- CSIS and the office of the Inspector General of CSIS -- received what can only be described as worst-case treatment. Two of the requests were more than a year stale, six others had languished almost as long, when the applicant complained to the Information Commissioner in August.

The investigation showed that the problem lay not with the Access to Information and Privacy (ATIP) offices but senior management in the Solicitor General's office. In late summer we found that the files had been stuck, awaiting approval, in the deputy minister's office since the spring. Another three months passed before they were released on the intervention of the commissioner's Director of Complaint Investigations.

"Senior officials of the Solicitor General's department seemed paralysed by indecision," the commissioner wrote to the applicant in November. "For a department to take more than a year to give an answer of any kind to an access request is unacceptable by any standard. Parliament made explicit the principle that access delayed is access denied."

In the Department of Finance, it was not department officials but minister's staff who stalled on a timely release. Again, a single applicant who had made four requests -- one as far back as the prior December -- lost patience with the delay when he complained to the commissioner in May. Again, the ATIP office of the department felt powerless. The minister's staff had been sitting on files they received from March 9 to April 29.

The commissioner's Director of Complaint Investigations slated a meeting with senior department officials and minister's staff. Before the meeting was held, records were released in response to one request. Replies were sent on the others days after the meeting.

Recurring delays caused by the minister's office at the Department of Finance were aired in this report last year. It is gratifying to report that the number of complaints against the department has diminished this page year. Still, there's clearly some blockage.

And finally, Environment Canada's untimely response -- some 197 days after receipt of the request -- points to the value of trained ATIP co-ordinators. In this instance, the Federal Environmental Assessment Review office (FEARO), the group in control. The records, decided arbitrarily to handle the matter. Officials said that they wanted staff to learn the procedures.

The lesson they gave to the applicant was a sorry one. An extension of time to mid-September was granted on the request for information received in early July. By mid-october, when the applicant

complained to the Information Commissioner, no response had been sent. Nor was there any progress by late November when the commissioner's office took the uncommon measure of calling a meeting with department officials. one batch of records was released in early December, along with the mention that more had just been found. These were not released until late the next month.

As laudable as it might be for more officials to be acquainted with the method to process an access request, their learning curve should not be at the expense of the rights of an applicant. Trained ATIP co-ordinators should be involved until the lessons are learned.

A human face to the task

From time to time, a case so moving arrives at the commissioner's office that the law's limitations appear inhumane. Justice may be blind, but we could scarcely look away when the Vancouver mother of a murder victim filed her complaint.

The mother wanted the RCMP to give her pictures of her daughter taken during the investigation of the unsolved crime. She wanted them for safekeeping. She wanted to show them to family members too young at the time of the tragedy to be exposed to them. One in particular showed her daughter's face. She wore a peaceful expression.

The RCMP replied that the *Access to Information Act* does not permit the formal release of information gathered by the police force while performing services for a province or a municipality. The police force had no choice in interpreting the law.

Nor did our office. No matter how tragic the case, or appealing the argument, the office must uphold the law passed by Parliament. Parliamentarians did not have in mind the pleadings of a mother of a murder victim when they passed legislation.

The woman was offered sincere condolences -- and a little more. Through discussions with the police force, the assurance was given that the pictures would remain on file for at least 20 years. If a suspected assailant comes to trial, they will be there. If an investigation into another crime, or a surprise confession results in new charges, the evidence surrounding the murder years earlier will still be on file.

No human action can ever compensate for the loss of a child. But compassionate acts can offer a measure of comfort. The limits of law can be obeyed without absolutely constraining the deeds of the heart.

In the public interest

The Act enshrines the principle that records should not be disclosed if to do so would harm a private business. But there is an exception to the rule -- that the public interest can outweigh any harm that may be done to a business is a powerful tenet of the *Access to Information Act*. When public health, public safety or protection of the environment are at stake, the law holds that business interests can take second place. Government institutions can decide to give applicants the information furnished by businesses to government. (In turn, businesses can appeal to the Federal Court to have it withheld.)

The weighing of interests is seldom easy. Care must be taken to do the least harm. In last year's report, a case was raised which cast doubt on the strength of the public interest override. Happily, in that

instance government officials elected to affirm public health, not corporate welfare.

The case concerned a request for records submitted to Health and Welfare Canada to demonstrate the efficacy of a lip balm sold as a cold sore remedy. The records were given by the manufacturer to obtain approval under the *Food and Drug Act*. While there was no evidence of a health threat, some medical authorities believed that the product did nothing to heal cold Sores. The commissioner held that there is a public interest in determining whether a health care product is "snake oil".

The health department balked, however, arguing that records need not be disclosed because adverse medical opinion of the product's key ingredient was based on similar products which were no longer sold. The commissioner found the argument to be perplexing, even alarming. If adverse information was withheld, wouldn't there be harm to consumers' ability to make informed choices about health care?

In the end, the department reconsidered its stand and agreed to release all the records the commissioner believed could be released under the Act.

In another health department case, however, the public interest override was not compelling and confidential information was denied. Still, the Australian woman who made the request got some information from the file.

In this instance, no evidence was advanced that it was in the public interest to disclose drug test results that accompanied a submission for approval of a new drug. The drug company, however, firmly argued that release of any aspects of its submission could harm its competitive position in Canada and elsewhere. This the commissioner found difficult to swallow as a portion of the results had been previously published.

Through mediation from the commissioner's office, a bibliography to the product monograph which cited published studies was released to the applicant. The decision upheld the important principle that clearly public, information can be distinguished from data that remains confidential in the absence of evidence of harm to the public.

Public servants, private lives

As elsewhere, 1992 was not a good year for the private lives of public officials in Canada. Curiosity-seekers did not find any satiating cellular telephone chat between federal officials, no star-crossed lovers, no family skeletons out for a stroll. Still, the zeal to search and expose, if not destroy, was evident in complaints of access to information requests denied by the federal government.

Complainants -- most often journalists -- wanted to know whose children and spouses held government-issue diplomatic passports. They wanted to know how much taxpayers spent to move a senior official from city to city. They wanted to know which deputy minister and other senior officials had a preference for a Buick Regal and which drove a Chevrolet Caprice, partially at taxpayers' expense (automobiles are a taxable benefit).

The latter, it could be argued, was a query that did not cross the boundaries of good sense or good taste. When a car goes along with an office and title, the bill payers (the public) have a good deal of entitlement. The Information Commissioner's office successfully challenged (see p. __) an effort to withhold that sort of information.

The right-to-know argument took on a decided want-to-know cast, however, in another hunt. The applicant asked for a full list of the family members of officials, other private citizens and senior-most officials granted special passports to conduct government business or to lend a supportive hand. One spouse had once been seen using the passport to skirt long customs lines on return from vacation.

The infringement of privacy -- let alone the potential for abuse of the list -- could not be outweighed by any compelling public interest in passports. If well-used, the passports would cost taxpayers nothing. They would speed official travel across foreign borders and ease access to government buildings, officials and conference halls in foreign lands.

The contention that privacy might be set aside because the red passport amounted to "a discretionary benefit of a financial nature" -- an escape clause that Parliament wisely provided -- simply couldn't stand up. More time, not more money, was the boon of the passport. What's more, in 36 years, the Department of External Affairs had never refused a request to issue a passport to a qualified person. So much for discretionary power!

Parliament has made clear in the access and privacy Acts that the privacy rights of public officials, both elected and appointed, are lesser than the privacy rights of other individuals. There's no evidence, however, that Parliament intended to put in the public domain every aspect of the working lives of public employees.

Any misguided zeal which treads carelessly over the reasonable, legislated rights of public officials is unlikely to receive a sympathetic hearing from the Information Commissioner. The legitimate privacy of public officials should be protected. There is a public interest, after all, in keeping persons of honor and integrity in public life.

Money matters

Like politics and religion, money matters can bring people together or can polarize people in conflict. The commissioner's office hears most often from those in the latter state -- from persons unhappy about a fee charged for government information or from people who believe that they should pay nothing at all, that their fee should legally, reasonably, reasonably waived.

Regulations under the *Access to Information Act* are generous to applicants. They permit departments to charge the most modest of fees.

A $5 application fee buys five hours of public servants' time to search for information and prepare it for release. If more time is needed, even the hours spent by the most senior official cannot be charged back to the applicant at any rate higher than $10 an hour. ($19,500 for a year's worth of work!)

Freedom of information advocates argue that this is how things should be. Taxpayers pay for information to be gathered. They should not pay large amounts for its release. Case by case, record by record, the argument is virtually irrefutable.

Government departments are much less persuaded when they see millions of dollars worth of information flow out the doorway to a single applicant. Revenue Canada is among the chagrined. The department has estimated that more than 400,000 pages of information given to a Montreal tax lawyer under access law has cost the taxpayer $1.1 million more than the lawyer paid for it.

The lawyer who produces a monthly newsletter is not the only person to mine government files under present law. When a few profit at the expense of the taxpayer from the low-cost fee structure, is it the fee structure that is in error? The issue is complex. Readers of last year's report may recall, a proposed solution: value-added, specialized mass information should be marketed. The thought has sunk in, though the deed's still undone.

In the meantime, the commissioner's office, departments and users of the law continue to struggle. It is encouraging that some institutions, such as the National Archives of Canada, have established firm and reasonable policies. (see p. __) It is discouraging that others continue to use outlandish fee estimates. They become an expression of polarization and conflict.

The Department of National Defence (DND) earned the dubious distinction as the most bullish fee estimator, citing one applicant an amount of $15,000; another an estimated $440,000 tab. Its heftiest advance bill to an Ottawa journalist was in excess of $1 million. The journalist asked for information behind the decisions to reduce the strength of Canada's armed forces, increase reserve troops, slash the number of troops in Europe and redeploy much of the navy to Canada's east and west coasts. The department also claimed a 330-day extension to meet the requests.

The office's persuasive investigator was able to mediate. The department agreed to help the journalist narrow the request and reduce the cost. The journalist maintained he asked for that assistance right off, but the department refused. This unhappy saga in which common sense and co-operation flew out the window was, one hopes, the last, in a series of such tactical errors on access law.

On the opposite tack, the Department of Agriculture reasonably found that a request for a fee waiver did not meet the department's criteria, yet turned around and rebated almost half the fee. The applicant asked for a $700 waiver on the grounds that he planned to make public the information he sought on a plant virus that infects potatoes. True enough, there is great economic interest in the health of potatoes in Prince Edward Island where he lived and worked. The department concluded, however, that the virus posed no threat to human health, public safety or the environment.

The complaint investigation found that, while the department's position was reasonable, the policy was somewhat narrow. The gesture to reduce the fee by half was gracious.

Finally, one agency's effort to save someone a small fee resulted in inordinate effort for the RCMP, the commissioner's office and an inordinate cost to the taxpayer.

The police force received two identical requests for information -- one under the *Privacy Act*, the other under the *Access to Information Act*. As no fee is charged for personal information under privacy law, RCMP officials returned the $5 application fee for the access to information request and went ahead under the *Privacy Act*.

The applicant had no objection. He also saved copying charges payable under the access law, but not under its privacy counterpart. He had no objection until he received his records, found portions removed and complained to the Privacy Commissioner. That complaint still pending, he complained to the Information Commissioner that his rights were denied under access to information. He wanted to go to Federal Court, an avenue not open to him until the Privacy Commissioner ruled on his complaint.

For the sake of $5 and photocopying charges 11 months were loge. So too was the time of RCMP officers and investigators in the offices of both the Privacy and Information Commissioners.

Although the singularly odd case may be seldom repeated, it speaks to the persistent need to explain fee policies and their implications to applicants. When the potential for conflict and polarization exists as it does over money matters, the soundest of policies poorly communicated is little better than no policy.

Calculating the true costs of an access to information regime is enormously difficult. Since figures are so unreliable, they should all be taken with the proverbial grain of. Governments opposing or chafing under access legislation have a vested interest in inflating costs. Supporters of access rights, including access to information commissioners, may tend to underestimate real costs.

The imponderables are so numerous that decent cases can be made for high or low figures. It is all but impossible, for example, to aggregate with any accuracy the Act's cost in public service salaries. Relatively few public servants work fulltime in access to information, though many public servants, at all levels, with many other responsibilities devote part of their time to access issues.

For most departments, access to information costs represent an insignificant portion of their budget, receiving as they do remarkably few requests. Of 157 federal institutions covered by the *Access to Information Act* in 1991-92, five received half of all formal requests (Supply and Services Canada, National Archives of Canada, Revenue Canada Taxation, Health and Welfare Canada, and External Affairs and International Trade Canada). Ten departments account for 67.2 per cent of total requests, now running at some 10,000 annually. For these biggies, administering the Act may pinch, especially in days of budget cutting. As a percentage of large budgets, however, access is small beans.

Cost calculations should also take into account off-setting benefits to the treasury as a result of making information public. The mere existence of the legislation with its possibility of embarrassing exposures promotes fiscal sobriety and not only in expense accounts.

On the other side of the costs coin are offsetting revenues recovered from requestors, the $5 application fee and the charges imposed for search time beyond the first free five hours. The *Access to Information Act* is not, nor will it be, a profit centre for government. With the notable exception of collecting taxes, governments are remarkably inept at collecting money for services rendered. Experience in Canada and elsewhere is similar: money recovered from access to information fees represents less than one per cent of total costs of administering requests.

That being so, the obvious question must be asked: is it worth charging fees at all for requesting information? No charges are levied, after all, on persons who complain to the Information Commissioner when their requests for information are turned down, or they receive a tardy response. Free complaint investigations may be the biggest bargain in government, particularly for frequent complainants.

Do not read this as a suggestion that complainants should pay costs, if only when their complaints prove not well-founded. The prospect of costs would be intimidating. Persons with legitimate reason to fight delays or wrongful denials of information would be frightened away from complaining least they lose their case. The anomaly, however, is worth noting: fees for long searches when the cause could be bad records management; no charge for long expensive complaint investigations.

In theory, the taxpayer who doesn't use the Act shouldn't subsidize those who do. Why shouldn't business users of the Act, by far the largest category of users (40.1 per cent) pay something close to the real cost of processing their requests? For most business users, costs would be a legitimate tax deduction; user pay is an honourable and increasingly tempting policy for cash-strapped governments.

But there are large, if unquantifiable, offsetting benefits for all taxpayers in opening up government and casting light where there had been only shadows. The media claims, with some justification, that in throwing light they serve the public interest. Yet the media are business, often big business. Should General Motors be charged and not Southam News?

The whole matter of costs leads nowhere except to uncertainty and contradiction. One principle, however, must be asserted and sturdily defended: costs should never be used as a deterrent to access to information.

Where there's a Will . . .

When a journalist asked the Department of National Defence for reports of investigations into the February, 1991 drowning deaths of two Canadian Forces seamen an unusual problem emerged and a creative solution was found.

The tragic mishap occurred while Master Sean William Hynes and Sub-Lieutenant Corey Wells were checking the hull of an American ship docked in the Portuguese Maderia Islands far off the northwest coast of Africa. The American vessel, USS Pharris, and a Canadian vessel were part of a North Atlantic Treaty organization group exercise.

Standing NATO agreements prohibit member countries from releasing records without the permission of all nations concerned. The prompt response by the defence department to the journalist's request was to claim all information subject to a mandatory exemption in the access Act. The law requires officials to refuse to disclose anything given in confidence by a foreign state or an international organization.

As it turned out, when the journalist complained to the Information Commissioner a way was found to release information while respecting the NATO Standing Agreements and Canadian law.

The investigation quickly determined that three, not two, investigations had been held into the accident. One was ordered by the commanding officer of HMCS Margaree on which the Canadians served. Another was conducted by a NATO Combined Board of Inquiry put in place by the Atlantic Supreme Allied Commander. The board included officers of Canadian, U.S. and Portuguese forces. The third summary investigation was ordered by the Commander of the Fifth Canadian Destroyer Squadron and carried out concurrently with the NATO inquiry. The procedure gave Canadian investigators access to USS Pharris personnel written statements and oral testimony.

When consent for release of the NATO records was not given, the investigation turned to the Canadian investigation ordered by the HMCS Margaree's commander. It was an all-Canadian inquiry. No statements had been taken or discussions held with non-Canadian members of the NATO Naval Force.

The department agreed to release the bulk of the Canadian report, minus its personal information. The commissioner's office also learned that the department had given the divers' relatives letters that summarized findings of the three inquiries and a chronology of events. The journalist was given the same information. He was grateful.

A congratulatory note arrived at the commissioner's office. "Without the Information Commissioner, some of the facts about the unfortunate deaths would have remained hidden forever," it read.

Slow and narrow

Environment Canada was asked for information on Canada's failure to ratify the Basel Convention, an international agreement on the movement of toxic waste. At first it appeared that the response might be mammoth. There were three years of documents. In the interests of costs, the request was narrowed to correspondence to and from the deputy minister. The response: none existed.

That response might have troubled most requestors. In this instance, the thorn went deeper because the woman who filed the request knew that letters existed. She suggested dates on which some were sent. Another department confirmed her information by locating correspondence with its minister.

Setting aside collective memory failure as a possible explanation for the department's response, the woman complained to the Information Commissioner that she suspected something far worse was up.

The investigation confirmed that correspondence could be located. It was quickly found, although the slow process of release had to be undergone from the start before the applicant received her records. The department's explanation for missing the records the first time 'round: the six letters were placed in files headed "waste disposal" and none used the term Basel Convention.

When a request is made narrow in the interests of both parties, the search should never be so narrow as to avoid locating germane information. The problems that could be created in confining a search to a very few key words is bound to grow worse when information is stored and accessed electronically. The good habit of broad searches must be acquired.

Sometimes a silver lining

on occasion, the disregard for access law is so blatant that it can startle people in the very institution in which it occurs. One such unfortunate incident came to light when an appeal was made to the commissioner's office of a refusal to release information from the Immigration and Refugee Board (IRB).

The silver lining to this dark case was its ability to focus the attention of a new IRB chairman. It helped persuade the chairman to review access to information practises at the refugee board. The review produced excellent results.

The case at hand concerns the taped proceedings of a seminar conducted by the IRB for its members in Toronto. A law professor, a commissioner of the Law Reform Commission and a judge of the Federal Court of Canada addressed the session on decision-making. When a request was made for the tapes, they were refused.

The remarks by a lawyer and a law reform commissioner were subject to solicitor-client privilege, the board argued. The judge's remarks were judged to contain advice and were, therefore, made totally exempt. The most startling aspect of the decision-making process on the access request came to light during the investigation by the commissioner's office. The decision to refuse any release was made in the abstract. No one had bothered to listen to any of the tapes.

The investigation concluded that no solicitor-client privilege existed between the law professor and the audience or between the law reform commissioner and the audience. Even if there had been, the

presence of the third speaker and the moderator, a judge of the Federal Appeal Court, disturbed the existence of a privileged forum.

The judge's comments did indeed contain some advice to members. The access Act, however, required that the board sever it and release what it could.

The new chairman of the IRB expressed regret at the manner in which the request was handled and ordered immediate release of the tapes and a transcript. From a position of apparent indifference to the law, the board under its new chairman demonstrated new regard for the law's requirements and its spirit.

What's past is prologue

As in past years, journalists used the Act to get information on the government's fleet of cars used by cabinet ministers, deputy ministers and some governor-in-council appointees.

After some foot-dragging -- some 39 days after the 30-day response deadline -- the Department of Supply and Services released details of the car models, their cost and dates of purchase. It held back the names of the men and women who were given use of the vehicles. It invoked a section of the Act which allows officials to refuse to release information if the disclosure could reasonably be expected to threaten individual safety.

The department had talked over the matter with officials of the Treasury Board Secretariat. The officials had passed on the concern of the Royal Canadian Mounted Police about the security of a few ministers and deputy ministers.

When a journalist complained to the Information Commissioner that his request was denied, an investigation was launched. The journalist could have been happy with a match between car models and the names of officials -- the specific car for each official wasn't necessary. The department readily admitted that information similar to what was requested had been released in previous years. In fact, it had been published in Hansard in June 1991.

The departmental co-ordinator of information requests agreed there was no valid grounds for withholding the names and promised an expeditious release. It was clear that several Cabinet ministers and deputy ministers had reserved parking spaces in full public view -- seemingly unconcerned of the safety issue in identifying their cars.

As it turned out, the release was not speedy. Within days, the department asked for time to correct and verify newly discovered inaccuracies in the records. Next, it wanted time to create a new record. Release dates came and went. After considerable prodding, the information was released -- not too little, but too late in the commissioner's view. The departmental co-ordinator and staff was most co-operative, but decisions elsewhere impeded the process.

On the bright side, a small precedent has been upheld; perhaps what's past will be prologue to future requests.

The wrong message

An author who wanted a copy of an agreement-in-principle between the federal government and the Woodland Cree Band of northern Alberta was faced with a needlessly long delay. More than a year passed from the day the Department of Indian and Northern Affairs received his request and the day it released the document.

The author complained in the news media that informal attempts to obtain information from the department had failed utterly. He spoke of his appeal to the commissioner's office. The message he received from start to finish was invariably the wrong one -- denial, delay, delay. The delay need not have been so lengthy. A complete and accurate submission by the department to the legal branch of the Privy Council office (PCO) might have reduced it considerably.

PCO officials were consulted because the department took the position that the agreement-in-principle was a Cabinet confidence and therefore excluded from release under the Act. On the face of it, the assertion seemed to defy common sense. The federal government was not the only party to the agreement; Cabinet was not the sole owner of the information.

Nevertheless, the PCO legal branch later maintained that the information given to it by the department led to the recommendation it be excluded from access under the Act.

The commissioner's office argued that the agreement was drafted by several parties -- Indian-band representatives, Alberta government officials and federal authorities. The document was in the hands of several organizations outside the federal government. What's more, the department had made public part of its contents months before the author made the request. The very public disclosure was in a news release.

The department was persuaded to pro vide the PCO legal branch with this additional information. As a result, PCO withdrew its advice to withhold the agreement. More delay could not be avoided. The department had a duty to tell other parties to the agreement of the request for disclosure and to hear their objections.

In the end, the author received the information, less a few words legitimately exempted. Unfortunately, he also received the wrong message that the access Act method of research is as quick as a snail.

Not all or nothing

The Department of National Defence (DND) took an all-or-nothing approach to a journalist's request for a Board of Inquiry report into the October 30, 1991 crash of a C-130 Hercules aircraft that killed five people near Alert.

Although it was known that the board had filed a report -- the commander of Canadian Forces Base Edmonton said he had received it -- the department refused the request. The refusal was based on the fact that the investigation was not complete.

To make matters worse, three months after the Ottawa journalist made the request, the department held a news conference in Winnipeg and disclosed significant portions of the report. Still, DND refused to release it.

The investigation showed that senior officers in the department were given a substantially complete

version of the inquiry's findings within a month of the fatal accident near the radar station. The department's access officials (access co-ordinators are sometimes the last to know!) were misinformed on the reports status. When an investigator challenged the department, the document was promptly produced.

Our review showed that much of the report could be disclosed without infringement on the privacy of individuals. It was also possible to sever information that could reasonably be characterized as advice or recommendations -- and legitimately exempt it from disclosure under the Act.

The commissioner concluded, and the department agreed, that it does not matter whether a report is the last word or simply the middle word on an issue. A department has an obligation to apply the law to any record that is requested and can be identified. If not all information can be disclosed, then the duty is to separate what can from what can't.

One positive outcome: the department revised its long-held position of refusing to sever and disclose Board of Inquiry information that can be released.

Both public and private

Documents often contain both public and personal information. The challenge is to remove information that would invade individuals' privacy before releasing the rest of a document.

Such a challenge was involved when a journalist requested reports of all accidents in Newfoundland waters in 1989 and 1990. The Atlantic Pilotage Authority which receives the reports turned down the request. It cited the *Privacy Act* and the need for consent of any ship's pilot who made a report.

The investigation showed that while the reports contain some personal information -- names of the crew members, ships officers and others who may be witnesses to an accident-much of the document had little or nothing to do with privacy. Weather and sea conditions, attitude of the vessel, circumstances of the accident -- these details might tell much of the story.

The Information Commissioner reminded the pilotage authority that the *Access to Information Act* not only permits, but requires that information that Can't be released be severed from information that can. In this instance, the names of the pilots and their opinions as employees of the authority could not be protected by the privacy legislation. However, the names of others on the vessels need not be disclosed.

With a new and better appreciation of the range and limits of the law, the Pilotage Authority released enough information to satisfy the journalist and withheld information to protect privacy.

Our mistake

In last year's annual report, the Bank of Canada stood wrongly accused of failing to tell Canadians -- via the government's information index, *Info Source* -- that access requests to the bank varied from the norm. For such requests, the cheque to cover the $5 application fee should be payable to the Bank of Canada not the Receiver General of Canada.

Most departments and agencies direct their payments to the Receiver General. The bank is the

exception because it has its own account.

As it turns out, the bank did not have its wires crossed. The commissioner's office did. The bank had taken steps in good time to ensure that the information guide clearly states that the bank receives payment. Our apologies.

The complaint which brought the matter to the commissioner's attention hastened corrective action all-round. The access application form, directing all application fees to be paid to the Receiver General was to be revised. The commissioner's new information brochure has the correct information. Soon we'll all get it right.

Who owns what?

The Canadian International Development Agency (CIDA) hired a consultant to conduct a strategic management review. The consultant delivered four interim reports. When told by CIDA that a request had been made under the access Act, the consultant strongly objected to their disclosure. The access law holds that government departments or agencies cannot keep secret a consultant's report in the way that they can if advice is given by public servants .

The investigation raised several points for debate. When, for example, is a report a report? Does the law apply when a consultant's task ends and the last word is delivered in a final report? Or does the law mean that something delivered en route to that destination must also be disclosed?

If it can be agreed that interim reports qualify, another issue emerges. Who owns them? Does the intellectual property belong to the creator? Or, by passing thoughts on to a government agency in an interim report, does the Crown gain full ownership? The issue is valid because the law also protects third parties from the release of information that might harm them. But can a consultant be such a third party? Can disclosure of how a study is done harm future business? Or do consultants expect too much to be paid to provide information and then claim to own it?

In this instance, CIDA took the position that four interim reports should be kept secret. The Information Commissioner's office thought otherwise. It held the opinion that no exemption was valid on a third-party basis. It disagreed with the view that interim reports deserved different treatment from consultants' final reports. The commissioner received submissions and recommended release of all four reports.

During the investigation the final report was released. In the end, CIDA also accepted the commissioner's recommendation and released the four documents. The agency, however, did not fully accept the arguments behind the recommendation. It is unlikely the last time the issues will be debated.

Polls will be polls

A newspaper reporter filed a request for yet another poll on a sensitive issue attitudes in the armed forces towards homosexuality and employment of homosexual men and women by the Department of National Defence. The department refused on the grounds that the poll was conducted not to establish a new policy, but to fight in Federal Court.

The policy against hiring or promoting homosexuals was being challenged by former soldiers in five

lawsuits under the Charter of Rights and Freedoms. To respond to that challenge, the department said it required and acquired the poll which was subject to solicitor-client privilege.

Nonsense, said the journalist, who found references to the poll in a newspaper story. A Member of Parliament, Svend Robinson, called the department's refusal an abuse of the information law. When the government is the client in a solicitor-client relationship, "obviously the client is in a position to say: Yes, the public is entitled to have access to this information," he observed.

The investigation was made more difficult than need be because information was held by two different divisions of the defence department. There was no co-ordination by the department's access division. At the outset, the department maintained only 40 pages of five documents were relevant. In the end, 800 pages were subject to the review.

As it happened, the claim for solicitor-client privilege vanished for much of the material when it was released to lawyers who represented the soldiers. The journalist later received all that had been placed in the legally public domain.

A reasonable policy

The National Archives received a request for service records of a soldier who was killed in action in 1945. The request was made by the soldier's nephew who was interested in learning of his uncle's duties in the Canadian Armed Forces and the circumstances of his death.

The records were found. The nephew was informed that a $39 fee would be charged for copying the complete military personnel file. It contained 195 pages .

The nephew complained to the Information Commissioner that a fee waiver should be applied when relatives seek the records of servicemen who sacrificed their lives for their country. The National Archives does waive fees when a request comes from members of the immediate family of deceased members of the armed forces. Aunts, uncles, nieces and nephews are not among them.

The Information Commissioner found that the Archive's policy was reasonable. Waived fees are born by all taxpayers. Parliament has instructed government departments and agencies to consider recovering costs by imposing modest fees.

A flawed filibuster

Canada's access law allows institutions of government to take time to search out large numbers of records or to consult other departments or groups outside government that might be affected by release of information. In such instances, extensions beyond the 30 day deadline for response to a request are not only legitimate, they are just and reasonable .

The legal loop in the timeline should never be used, however, to mount a filibuster against a timely release. Yet that is what the Immigration and Refugee Board (IRB) appears to have done when it received a request for a transcript or tapes of a workshop held in February, 1990 as well as for the names of those who attended.

The board promptly claimed a 60-day extension beyond the 30-day statutory limit. Then it failed to

meet it. Some 112 days after the request was received, the board told the applicant that no information existed, at least none that it could find after checking with IRB offices in Toronto and in Montreal where education committee members work.

The applicant fired back a letter requesting confirmation that a workshop had, or had not, been held and the name of the person who said no records existed. IRB officials in Ottawa tried a second time to obtain information from officials in Toronto and within days original tapes and a list of workshop participants emerged.

But the tapes that were sent could not be deciphered and were returned to Toronto for re-taping. Meanwhile, the board decided unilaterally to release only a transcript and asked the applicant for a $600 deposit for transcription. More delay of course.

The commissioner's office immediately challenged the decision to require the transcription. In the end, the tapes were given free of charge to the applicant. But much too much time had passed -- from late october, 1991 to late the following September -- for a request precisely drafted and properly placed. The filibuster was not effective.

Fishing for fishermen

When a representative of a fisherman's association wanted to fish in the files of the Department of Fisheries and Oceans, issues of personal privacy and public interest surfaced. The association wanted the names of fishermen in a region whose boats were insured by the department.

The association said that the decline of cod stocks had forced fishermen to go farther offshore where the dangers of foul weather and high seas increase. It estimated that two out of three fishermen carried no insurance with the department or private insurers. The association wanted to cast a safety net for its members but first wanted to know who carried insurance. Its purpose was humane and in the public interest. If vessels or lives were lost in an offshore disaster, the long-term pain to the fishermen's families could be lessened if insurance was carried.

The department was sympathetic with the purpose but believed that to name fishermen who carried insurance would reveal personal information and violate their privacy. It offered to send fishermen information from the association about the need for insurance.

The investigation showed there were several ways to reach fishermen -- news media, mail and the fisheries department's offer. Nor could insurance prevent a disaster, the true public interest factor. Insurance could only mitigate the consequences of disaster at sea. The public interest benefit could not outweigh the violation of privacy.

For art's sake

Legitimate public interests were pitted against one another when the National Gallery of Canada accepted a donation of 84 pieces of art. The financial press questioned the value and a request was made for the release of two appraisals. The gallery's -- and all Canadians' -- interest was in building the public collection of art at least cost through generous donations from private collectors. The federal treasury's -- and all taxpayers' -- interest was in ensuring that no donor received an overly generous tax receipt and potential saving on taxes. In the end, freedom of information won out.

The gallery was the grateful recipient of a private collection of works by the Canadian painter, James W. Morrice. It announced the donation in December 1989 and publicly placed the value of the acquisition at $15 million.

The financial press found the figure to be high and suggested its mark et value may have been only $8 million. The newspaper atones prompted a request for copies of the underlying appraisals.

The gallery refused to release the documents. At the outset, it claimed that the release would reveal information about the donor's income tax status and violate the protection of personal information provisions of the *Access to Information Act*. The complainant had, however, made no request for information about personal finances or income tax status. She wanted only the details of the two appraisals for each painting .

When the investigation was underway, the gallery staked out other grounds on which to object to the release. It suggested that the documents contained information of third parties, but later agreed that the records did not originate with the third party named. As to the disclosure of personal information of the donor or the appraisers, the investigation concluded there would be no breach of privacy if the records were released. The two appraisers who provided the valuations had been paid by the gallery and did not qualify for protection of the *Privacy Act*.

Most important, since it was the gallery that had made public the $15 million appraised value in a news release, the donor's implicit consent to the public announcement could not be refuted. In the end, the gallery accepted the commissioner's recommendations and released the appraisals, citing the public interest provision of the *Privacy Act*.

The immediate postscript to the case was another financial press story which examined the appraisals and found among other oddities that:

- Appraised values for most paintings were higher than the highest price ever paid at auction for the artist's work.

- A painting of doubtful authenticity was valued at $450,000 to $525,000. The gallery dropped it from the display collection.

- Contrary to Cultural Property Board guidelines, the appraisers were long-time friends of the donor.

- The two appraisal documents contained the same errors although they bore different dates.

The second postscript was delivered in London, England where the commissioner told an audience that work was proceeding to protect the public purse from potential inherent abuse of tax-deductible donations. "It is satisfying," he observed, "to know that our Act not only places a rather small burden on the federal treasury, but from time to time it can ease the treasury's lot."

In his own hand

The commissioner's office is always aware of the need to protect personal privacy. The access law does not allow the right-to-know to run pell mell over privacy rights. It tells government agencies and

departments that they must withhold personal information and gives guidance as to what it might be -- a medical history, an employment records an address, fingerprint or blood type. In many instances, what is personal is clearly personal.

What about handwriting? If letters were pulled from a drum, all personal details removed, the remainder sent to Australia and never returned or matched with known handwriting, would the personal script alone be a private identifier? If a nameless handwritten memo were released in a small office, would handwriting, regardless of words, be revealing?

The case of an access request for all records related to a job competition in the Department of Fisheries and Oceans raised the dilemma. There had been both written and oral tests. The department refused the information in either form.

The commissioner's office found the oral tests results posed fewer problems. Notes taken by job competition board members were first checked for personal information that would disclose the identity of the speaker. The balance of the notes were found to be releasable. The department at first objected, then agreed and released some portions, holding firm in the belief that the handwritten tests would easily expose the job candidates' identities. The commissioner's office agreed.

In many instances, handwriting can be an identifying symbol more personal and better known than a PIN or SIN number. Should the department then agree to transcribe handwriting to typewritten text? Can handwritten correspondence ever be released? Answers to these questions will depend on individual cases. No easy generalizations are possible. The irony is at the very time when word processors are proliferating, handwriting is belatedly put to the test.

Inside out

Sometimes a problem in administering the access law is the result of flawed thinking. A department can be correct in its instinct but apply the wrong section of the legislation. That was the case when Health and Welfare Canada (HWC) claimed exemption for records on a nerve agent antidotes Hl-6.

The department explained that records could not be released because the information was supplied by a third party. Its disclosure might cause financial loss to that party. The flaw was in thinking that an exemption for third parties outside the government somehow applied. The information was very much an inside affair. The investigation quickly determined that the third party was the government's own Department of National Defence.

Access legislation also provides protection for trade secrets, scientific data or other valued information that belongs to the government. HWC officials took a second look and applied the correct section of the law, then released some information. What it held back was denied properly to protect the government's economic interests or advice.

In mint condition

When the Royal Canadian Mint was asked for information on the dollar coin and commemorative quarters, the response was less than sterling. A person asked for the cost of producing the coins. The Mint replied that the records could not be released because it might be contrary to the country's economic interests.

A section of the access law defends those interests. It is not good enough, however, that departments or agencies believe information might harm them. The onus is on the department to demonstrate a reasonable likelihood.

Worse still, the investigation found that the Mint did not have the requested information although with some effort it could be extracted from existing records. The Mint had given the false impression that records existed, but were exempt.

The investigation made a difference. The Mint more than complied. It reviewed monthly billings and extracted average costs. It provided the answer in a letter.

Nothing personal

On occasion, access-to-information requestors chase one another. With businesses filing more than 6,000 requests every year, it's not surprising that business es would want to inquire about inquirers into their business.

When Health and Welfare Canada received a request for the name of the company that asked for and received information on a drug product, it refused disclosure on the grounds that personal information would be revealed. It considered the name of a company or the title of a corporate officer applying on its behalf to be personal information.

The Information Commissioner's office (and the *Privacy Act*) did not agree. The department agreed to look again at its ruling. The second look resulted in the release of the name of the corporate official who had filed the request and the corporation he represented.

Far and wide

A former employee of Revenue Canada who had his own business wanted information that the department's customs and excise staff held on his company. It wasn't his first request. Approximately 4,400 pages had been released under three prior requests under the *Access to Information Act*. Still, he believed that documents were missing. The investigation showed that he was correct.

The department provided 21 pages of new records and indicated that no customs and excise file could be located under his company's name. Information released earlier had come from the files of the company's clients.

As it turned out, overlooked files -- roughly six inches of them -- were held by a senior official in a regional office. The records were shipped to headquarters' staff who then had the task of cross-referencing documents to avoid duplication with the 4,400 pages that had been made available.

At the end of the exercise, more information was released. Much of it was correspondence between the former employee and the department. Staff in the regional office believed that no one would want to receive his own letters -- an assumption which should never be made on behalf of anyone who files an access to information request.

More troublesome still was the demonstration that department officials can overlook substantial holdings

located in a regional office unless given good direction to broaden their search. There would be no difficulty with files maintained in regional offices if the material was cross-referenced in a central registry.

The legislation takes no notice of geography. It requires that a search, whenever necessary, be cast far and wide.

Not a big secret

A request for all records in a specified file on an airline met with Transport Canada's refusal to disclose one substantive chunk of information and one item so publicly visible that refusal seemed ludicrous. When the man who filed the request learned what it was -- a safety card like the ones found in every airline seat pocket -- he declined to pursue it. The commissioner's office agreed thoroughly: The *Access to Information Act* is not to be used to obtain information already publicly available.

The substantive information concerned the names of the airline's check pilots -- the pilots who keep tabs on the flightdeck crews' skills for the airline and for the Transport department. The department argued that the information was personal and should not be released. The complaint to the commissioner's office argued that the privacy protection could not prevail because check pilot status was a discretionary benefit of a financial nature. Under the access Act, personal information clearly within that category must be released.

The investigation confirmed Transport Canada's view that to release the names of check pilots would reveal personal information. Though Transport Canada gives the airline's check pilots the responsibility to keep watch on crew skills in the flight decks, it does not give financial compensation to the sky's watchdogs.

Public Affairs

Face to face, phone to phone, fax to fax

How pleasing it would be to report that most Canadians have a good grasp of access to information law and the commissioner's role as its ombudsman. Unhappily, among the thousands who call the commissioner's office, that is not the case until they receive good, clear information.

Few callers have an inkling of what information they are entitled to under the law -- and what they are not. Many believe, falsely, that it is an arduous task to file an access to information request. One caller went so far as to check the wrong-headed advice she had received from a department official. She had been told that a trip to a lawyer was the first step in filing an application! If that were the case, then the principle of open government indeed would suffer severely. The number of law firms that also call for advice, information and copies of legislation, is in itself a worrisome sign that many more Canadians may also believe falsely that a lawyer's help is required.

Just as worrisome is the clear evidence that almost a decade after the law came into force, confusion still abounds about the commissioner's office. Each year thousands call in the hope that they have reached a government-wide information dispensary. This year there were 7,926 of those calls from across the country. The callers were referred to Reference Canada.

There is simply no evidence that a public education mandate for the commissioners office is any less needed today than five years ago.

At that time, the government pledged to amend the *Access to Information Act* to provide one. The commissioner's office has not, however, waited idly.

This year in publications, the office's consolidated version of the law stayed in strong demand among lawyers, journalists, and others. Among them were scores of government officials who wanted to educate their colleagues. Good education, both inside and outside government, can only reduce the number of misunderstandings and forestall appeals to the office. Good public affairs is preventative medicine.

For callers who want a brief "how-to" guide to using the law -- from first request to last appeal -- the office produced a simple brochure. Work also began on a guide to the rights and obligations of third parties to requests for government-held information. The commissioner's office now finds that considerable time is spent giving third parties the same information by letter or over the telephone. Good public affairs is a time-saver.

The chief message bearer, the Information Commissioner, was invited to speak to formal gatherings of Canadian ombudsmen, lawyers, bankers, academics, government information co-ordinators and university students. He appeared before the Standing Committee on Justice and Solicitor-General. He responded to journalists' requests for interviews.

Elsewhere, the great value of the commissioner's experience as arbitrator both in privacy and freedom of information matters was also recognized. Organizers of the International Seminar on Statistical Confidentiality persuaded him to travel to Dublin to speak. When it came time for British advocates of

freedom of information to meet prior to second reading of a bill before the British Parliament, the Canadian Information Commissioner was one of two international speakers. His speech was well quoted in debate in the British House of Commons and in the Canadian press.

In the interests of taking the message directly to more Canadians in the tenth year of this country's access to information law, the commissioner plans to visit each region of the country -- some large cities, some small communities -- at least once during the 12-month period.

Corporate Management

Corporate Management provides both the Information and Privacy Commissioners with financial, personnel, administrative and library services.

The offices' total resources for the 1992-93 fiscal year were $6,761,000 and 85 person-years, an increase of $70,000 and three person-years over 1991-92. Personnel costs of $5,351,077 and professional and special services expenditures of $642,835 accounted for more than 88 per cent of expenditures. The remaining $765,086 covered all other expenses.

The following are the Offices' expenditures for the period April 1, 1992 to March 31, 1993*

	Information	Privacy	Corporate Management	Total
Salaries	1,923,405	2,066,562	609,110	4,599,077
Employee Benefit Plan Contributions	306,000	342,000	104,000	752,000
Transportation and Communication	36,468	96,722	134,107	267,297
Information	26,954	69,435	2,242	98,631
Professional and Special Services	402,524	107,240	133,071	642,835
Rentals	9,275	66	12,107	21,488
Purchased Repair and Maintenance	14,758	790	25,511	41,059
Utilities, Materials and Supplies	18,887	11,762	36,841	67,490
Acquisition of Machinery and Equipment	86,709	47,680	130,192	264,581
Other Payments	2,434	1,475	671	4,580
Total	2,827,414	2,743,732	1,187,852	6,758,998

* Expenditure figures do not incorporate final year-end adjustments reflected in the office's 1992-93 Public Accounts.

Personnel

The unit provided support for restructuring both commissioners' offices and began to implement the government-wide classification simplification project. The offices approved a new policy on leave and introduced an employee assistance program.

Administration

Office accommodation was reviewed and improvements were made. In addition, new government initiatives to speed up the procurement of goods and services were put in place.

Informatics

The offices received funds to update the case management system. A local network was established and new office automation tools were introduced.

Library

The library provides interlibrary loan services, conducts manual and automated reference and research, and maintains subject-oriented media monitoring files. In addition to information on freedom of information, the right to privacy, data protection and the ombudsman function, the library has a special collection of Canadian and international ombudsmen's reports and departmental annual reports on the administration of the two Acts. The library is open to the public.

During the year, the library acquired some 560 new publications and answered 1,006 reference questions.

Organization Chart