Annual Report
Information Commissioner
1993-1994

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. IP20-1/1994
ISBN 0-662-61228-0

"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 Roméo LeBlanc, PC
The Speaker
Senate
Ottawa, Ontario

June 1994

Dear Mr. LeBlanc:

I have the honour to submit my annual report to Parliament.
This report covers the period from April 1, 1993 to March 31, 1994.

Yours sincerely,

John W. Grace

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

June 1994

Dear Mr. Parent:

I have the honour to submit my annual report to Parliament.
This report covers the period from April 1, 1993 to March 31, 1994.

Yours sincerely,

John W. Grace

Table of Contents

Mandate

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

Passage of the Act in 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.

Towards A Better Law

Between the idea
And the reality
Between the motion
And the act
Falls the shadow

— The Hollow Men, T.S. Eliot

Ten Years and Counting

This reporting year, 1993-94, marks the 10th anniversary of the *Access to Information Act*. Though a decade is not long in the life of a law, its 10th year was a milestone, as it was for the country. The same reporting year saw the end of the 34th Parliament, a general election, and the defeat of the party — the only party, until now, which has had the "pleasure", more or less, of governing in the open.

The relationship between the government of Brian Mulroney and the access law was anything but comfortable. It got off the rails almost from the start. The then Prime Minister was personally wounded when records of what appeared to some as extravagant travel costs were released. As is often the case, other ministers, too, cooled towards that which the Prime Minister saw fit to disparage, at least in private.

The chill was made more frigid by a letter which came to be known as the "check with Fred" letter. It was sent by the Clerk of the Privy Council to two deputy ministers instructing them to consult with the Prime Minister's Office before releasing information relating to the Prime Minister. In no time at all, it seemed, the government lost patience with the access legislation.

This antagonism had an unfortunate, trickle-down effect. By order-in-council, governmental responsibilities for the Act are split between the Justice department and the Treasury Board. As a result, the Minister of Justice has the mandate to propose changes to the legislation as well as to provide legal advice to departments covered by the Act. The President of the Treasury Board has authority for day-to-day administration of the legislation across government institutions, issuing policies covering the Act's interpretation and implementation, as well as broader information policies. Add to this already diffused responsibility, the Privy Council Office (the Prime Minister's department) which decides what is, or is not, a Cabinet confidence and exercises a pervasive influence by demonstrating its attitude towards the legislation.

All of which to say that there was and is a lack of clarity and focus in ministerial leadership which has slowed progress on information policy issues and, in its worst guise, served to signal to an already reluctant and nervous bureaucracy — access challenges old ways — that openness was not the order of the day.

Such an unfortunate signal undermined one of the Act's most important provisions: subsection 2(2). That provision says that the Act is intended to complement, not replace, other ways of providing

information to the public. The amendment was added at the committee stage. All parties urged that the Act become a powerful impetus and new standard for encouraging government to embrace openness beyond the sometimes narrow provisions of the law and release a wide range of information informally rather than waiting for the filing of a request.

Alas, guided by often hostile ministers and a foot-dragging bureaucracy, some departments began to manage exemptions rather than promote openness. Access to some information previously routinely available was shut down, ostensibly to protect the privacy of individuals or private corporations. Politicians and bureaucrats looked to the access law with its, at times, legalistic, ponderous approach, as the baseline for responding to the public. One ploy, used in the Privy Council Office and elsewhere, when dealing with a troublesome client was to force the individual to make a formal request and to draw out the process as long as possible.

In the late 1980's, the resulting foot-dragging led to a legal shooting war in court with Canada's first Information Commissioner. Some 45 cases were taken to the Federal Court. As a result, respect for the law diminished in all quarters. To this day, some officials have no hesitation in admitting, even advocating, that important matters simply be not written down or preserved. Too often, the influential voices of the Justice department and the PCO are raised in support of what the Act can keep secret, not what should be made accessible. Indeed, in 1992, the present Information Commissioner had to sue Prime Minister Mulroney in order to compel disclosure of public opinion poll results.

Another early victim of government timidity in facing up to the rigors of openness was a public education program which might have better informed the public of its new access rights. This task was to be Treasury Board's. The government decided, however, that it could not be undertaken because the risk was too great. Horror of horrors, the campaign might be successful! More Canadians might use the Act to the greater irritation or embarrassment of members of the government.

The first decade has shown that a government bent on secrecy can certainly diminish the effectiveness of the access law. But it has also shown that, in the end, an intransigent government can only put off, not prevent, disclosure. Moreover, there is a political price to be paid by a government which does not respect the public's right to know.

This report comes not, however, to bury Caesar but to throw a challenge to a new government: Have the self-confidence to be scrutinized and the fortitude to be forthright. No government can safely or successfully ignore the truism that an accountable government is an open government. That conviction, to Canada's great credit — only a dozen countries have access legislation — has the backing of law.

This report also comes to say that the *Access to Information Act* is irreversibly, relentlessly, and indispensably, transforming the old, closed, bureaucratic culture. The Act's many highly visible achievements far outweigh the disappointments.

A day seldom goes by without stories in the news media, courtesy of the access law, providing the public with information which otherwise would have never seen the light of that day. A sampling: the Prime Minister, in putting a prison in his riding, has overruled the advice of corrections officials; health officials have concerns about the safety of breast implants; there are revealing federal audits of meat packing plants, airlines and prisons; the military is confronting shortcomings in the Canadian Airborne Regiment; and ministers and public officials are renovating their offices at public expense.

But the record of the law is not measured simply by the number and importance of stories in newspapers or on television based upon information obtained under the Act. The media accounts for

only 10 per cent of all formal access requests. Over the years, businesses filed 55 per cent of all requests; the general public about 25 per cent. In total, some 100,000 formal requests were made during the law's first decade. Some 10,000 access requests a year make the government enormously more accountable to, of all things, the public.

The Economist voiced its view recently that the British public service (which was, after all, the great Canadian model) has been dedicated to the concept of public service as an abstraction, not a reality. In failing to put this abstraction "into service to the individual citizens", *The Economist* concluded the public service has grown "notoriously ponderous and customer-unfriendly ... run for the convenience, first and foremost, of civil servants themselves." It is no coincidence that Britain is still without a freedom of information regime. In Canada, our law is helping to change that old culture. Public service life in Canada is now a little uncomfortable at times, a little less cozy for the Sir Humphrey's of the world because of access to information. Yet openness provides the incentive to make service to the public a real priority.

The Case for Reform

Though the governments and bureaucrats have some way to go before openness becomes second nature, the old culture is a-changing. In fact, the greatest challenge today comes not from the residual twitches of dying old ways but from the rapid and dramatic advances in information technology. Ten years ago, government records were primarily paper records. That is rapidly changing, of course, and therein lies the new challenge. The access law has some catching up to do if our access rights are to remain vibrant into the next century.

When government records were primarily paper records — billions of them scattered in thousands of file rooms across the country — most of them were of scant value to anyone but government officials. For practical reasons, the data in paper files could not readily be inventoried, classified, massaged, updated and transmitted. The advances in information technologies have changed all that. The uses to which data can be put today are limited only by the inventiveness of the programmers.

In computerized form, the government's information holdings have real value to others. Information has become "tradeable data" and that fact, together with cash-pressed governments' search for new revenue, has generated a new threat to the right of access. The danger is that price will become a new barrier to access.

Until now, the right of access has not been significantly limited by one's ability to pay. The $5 application fee is certainly not prohibitive; nor, usually, are the photocopy charges (20 cents per page) and search and preparation time fees ($10 per hour after the first five free hours). As well, fees are often waived and complaints of high fees can be laid before the Information Commissioner. Many, if not most, requesters under the access law pay no fees beyond the initial $5. Treasury Board estimates that the average amount of total fees paid per request is $12.

Here's the new catch. The government maintains that every data base treated as "tradeable data" and made available for purchase either directly by government or through third parties via licensing arrangements is no longer subject to the access law. By virtue of subsection 68(a), which states that the law does not apply to "published material or material available for purchase by the public", vast amounts of information may be put beyond the reach of the *Access to Information Act*.

Here, there are no controls, except market controls, on what the government may charge for the

information. Let it be recalled that for most government information, the market is a monopoly market buttressed by Crown copyright. All the conditions are present for the extraction of monopoly profits from those interested in government information. For the same reasons that monopoly local telephone service, cable television, gas and hydro require regulatory supervision, our national stockpile of information cries out for preservation and protection in the public interest.

In the absence of controls, the egalitarian thrust of our access law could be undermined. Access to government information should not become dependent on ability to pay or technological know-how. As the Commissioner has been urging for three years, now is the time to prevent creating a society of information haves and have-nots — a society of information lords and peasants.

This 10-year anniversary report, then, looks to the future rather than attempts a more conventional retrospective of the first decade. (Decade-enders are 10 times more boring than year-enders.) But this is not a "futures" study whose usefulness depends upon guessing right about the great unknowable: the market for the gee-whiz technology summed up by the lazy, tedious, stupefyingly vague cliche, "information highway".
Remember Telidon?

Measure by Measure

What follows here is the result of applying the experience and the lessons of the Act's first decade: a series of specific recommendations for a renewed (not re-invented) *Access to Information Act* for the next decade. The result is not as exciting as musings on what has already been called the "information superhypeway". But as a result of this report being relentlessly and perhaps boringly specific, Parliament and the government might be more tempted to take on the task in the knowledge that the real work has largely been done.

The last parliamentary review of the legislation was undertaken in 1985 and 1986 by the House of Commons Standing Committee on Justice and Solicitor General. The resulting unanimous report, *Open and Shut: Enhancing the Right to Know and the Right to Privacy* made a large number of useful suggestions for both legislative and policy amendments. In its response, *Access and Privacy: The Steps Ahead*, the government of the day chose not to proceed with any proposed amendments, preferring instead administrative policy solutions, with an overwhelming emphasis on privacy issues.

Some seven years later, most of the sensible recommendations for change recommended by the committee still cry for inclusion in an amended access law. But the passage of time has brought a host of new challenges to our access rights. The earlier modest recommendations no longer suffice.

While that Act has served well in enshrining the right to know, it has also come to express a single-request, often confrontational approach to providing information — an approach which is too slow and cumbersome for an information society. The legal advances made by the legislation should, of course, be preserved as the ultimate guarantee of information access for the citizen. But, those principles should now be buttressed by new measures that acknowledge the broader importance and role of federal government information in Canadian society.

The principal plea of this *Annual Report* is that the *Access to Information Act* be reformed to include those measures. Reform should be undertaken as an important part of the revitalization of the political process and the renewal of Canadian democracy. To that end, it is recommended that a parliamentary committee be mandated to study and to propose amendments to the *Access to Information Act*. **(recommendation 1)**

This report also makes a plea for government leadership in support of the value of openness. In particular, the Prime Minister should give specific written direction to his ministers and senior officials that public access to government information is not to be unreasonably delayed or denied. The clear direction should be: Find a way to release information, not a way to withhold it. It is especially important that the Minister of Justice and the Clerk of the Privy Council, by example, put an end to the obfuscation and obstruction which has been seen at the top for too long. **(recommendation 2)**

It is time too, for the Prime Minister to name a single minister, preferably the President of the Treasury Board, to be responsible for the *Access to Information Act* — all of it, its administration and policy. **(recommendation 3)**

To make the bureaucracy reflect the new leadership, it would make sense to sever the Information Law section of the Department of Justice from its present department (and from its inherent conflict-of-interest) and merge it with the Information, Communications and Security Policy Division of the Treasury Board Secretariat. This expanded unit would provide a locus of real leadership on information policy to public officials and practical advice to the community of access co-ordinators. Most

important, this unit would be a much-needed counterweight to the powerful, yet heavily legalistic, influence which Justice, in its legal advisory role, exerts over all departments.
(recommendation 4)

Government information as a national resource

The great lesson to be drawn from the access law's first decade is clear: to enhance open and accountable government in the next century, the *Access to Information Act* must become more than the mechanism by which individual access requests are made and answered. To accomplish this, three essential principles should be enshrined in law. These are:

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

2. Government should be obliged to help the public gain access to its national information resource.

3. Government information should be readily accessible to all without unreasonable barriers of cost, time, format or rules of secrecy. **(recommendation 5)**

Broadening the access law in these three ways would make Canada's national information policy compatible with the public's right to know. To reflect this important goal, an appropriate new name for the Act would be the *National Information Act*, *Open Government Act*, or the *Freedom of Information Act*.
(recommendation 6)

Creating the records; their care and safekeeping

To accept the notion that government information is a national resource is to acknowledge its value. To acknowledge its value is to see the need to ensure its creation and to safeguard it.

Implementing the first principle calls for new, clear and comprehensive rules for the creation and safekeeping of information. These rules would rebuke the disdainful practice of some officials who discourage the creation and safekeeping of important records in order to avoid the rigors of openness.

The *Archives Act* should be amended specifically to impose the duty to create such records as are necessary to document, adequately and properly, government's functions, policies, decisions, procedures, and transactions. A duty to create records has been imposed on the United States federal government by the *Federal Records Act*. **(recommendation 7)**

New applications of technology — E-mail and computer conferencing — allow data to be quickly created, transmitted, processed and analyzed. They also allow for easy disposal of information. The *Archives Act* requires that government records be preserved. It should also include explicit provisions for the retention of computer communications, including E-mail, once the information has been created. While it is unlikely that all such messages are important enough to be kept for the public record, decisions about preservation or destruction should be made by archivists, the guardians of our collective memory. **(recommendation 8)**

The need to keep, at least for a time, all messages on these systems stems directly from the notion of open and accountable government. To give the official who created or received a message unfettered

choice about its destruction would clearly jeopardize accountability. The Iran-Contra scandal provided a lesson. E-mail messages retained on a backup file that had been created to protect against power surges ultimately confirmed and informed the public about U.S. arms sales to Iran and the diversion of funds to the Nicaraguan Contras.

Among important records not now kept are discretely held copies of documents released under the access law. That should change. All government institutions should be required to maintain a public register containing all records which have been released under the access law. Why should subsequent requesters have to wait unnecessarily, and pay again, for information which someone has already received? **(recommendation 9)**

Creating pathways to information

The national information resource is vast; so vast that without a navigation system it will be of little use to the public. Open and accountable government requires public pathways to information and more. It requires that government actively disseminate some information. There should be an obligation on government to release routinely information which describes institutional organizations, activities, programs, meetings, systems of information holdings and which inform the public how to gain access to these information resources. This obligation to disseminate should extend also to all information which will assist the public in exercising its rights and obligations, as well as understanding those of government. **(recommendation 10)**
(recommendation 11)

This recommendation is not earth-shattering. In 1988, the *Government Communications Policy* was approved by Treasury Board. It spells out departments' duty to provide accurate, complete, timely, relevant and understandable information about government policies, programs and services. It charges departments with disseminating information, including data bases, without reference to the *Access to Information Act*.

Unfortunately, the policy is internally inconsistent. A caution in cost is a powerful countervail. The policy enters this caveat to the responsibility to inform:

> "the provision of information is costly and should be undertaken only where there is a clear duty to inform the public or where the user is willing to pay for it. The full cost of providing information to serve proprietary interests of individuals should not be borne by the public at large."

Public officials have not been moved to tell the public even a small portion of what they know. In any case, the positive obligation on government to disseminate information to the public should be enshrined in law, alongside measures to ensure that pricing does not become a barrier to access.

Eliminating barriers to access

Price barriers

To eliminate a developing price barrier, the existing distinction between records which can be purchased, to which there is now no right of access, and other records to which the Act applies, should be modified. In particular, subsection 68(a) should be amended to ensure that only information which is reasonably priced and reasonably accessible to the public is excluded from the access law. Such a change would prevent the establishment of distribution arrangements that interfere with the availability of

government information on a timely and equitable basis. As well, it would ensure that fees and royalties for government information are reasonable. **(recommendation 12)**

Of course, a call for reasonable fees is platitudinous and begs the question: what level of fees is reasonable for access under the Act and for information disseminated outside the Act?

At their current levels and as currently administered, fees for requests under the Act seem designed to accomplish one purpose — and one purpose only: to discourage frivolous or abusive access requests. The fee system is not designed to generate revenue for governments or even as a means of recovering the costs of processing access requests. That is not an acceptable premise on which to build a right of access.

Rather, it should be made explicit in the Act, as it is in the Ontario and British Columbia Acts, that departments may refuse to respond to frivolous or abusive requests — subject to an appeal to the Information Commissioner. Better to face this issue head on than penalize all requesters through the fee system. To avoid the real risk that this provision could be used by departments as a delaying tactic, when the Commissioner reviews a complaint that a department refused access on that basis, the Commissioner's ruling should be binding and final. **(recommendation 13) (recommendation 14)**

Once that change has been made, there is no longer any compelling argument for retaining the $5 application fee. The only approved charges should be market-rate reproduction costs (i.e., for paper copies, diskette tapes, audio/video tapes or copies in any other format) and the present $10 per hour search and preparation charge. In the spirit of openness, it would seem reasonable to retain a period of free search time whether that be the five hours or some shorter period.

While there have been recurring rumblings over the years about the government's intention to raise access charges, it is simply wrong for government to seek to generate more revenues from the administration of the access law. The annual cost of administration is some $20 million by a generous estimate. That is a bargain for such an essential tool of public accountability. The law pays for itself in more professional, ethical and careful behaviour on the part of public officials who must now conduct public business in the open. Excessive fees discourage use of the law and, in the long run, that is too high a cost.

Yet, some users of the access law are professional information brokers. They make large numbers of requests for large numbers of records, then resell the information for profit. A separate way of dealing with these commercial requesters is justifiable. When requests are from information brokers, government should be allowed to levy fees that approximate the actual cost of producing the information. **(recommendation 16)**

Even in these cases, however, price should not become an unreasonable barrier, either by wrongly defining requesters as commercial clients or by setting fees too high.

The decision to treat a request as a commercial request should be subject to review by the Information Commissioner. So, too, fees to be charged to a commercial requester should be reviewable. In these situations, to guard against delaying tactics, the Commissioner's decision should be binding and final. **(recommendation 17)**

The Standing Committee in 1987 made an extensive recommendation to incorporate fee waivers into the Act. The governments of Ontario and British Columbia have dealt with fee waiver specifically in their legislation. The committee's criteria are sensible. They suggest that departments be required to

consider whether:

- there will be a benefit to a population group of some size, which is distinct from the benefit to the applicant;

- there can be an objectively reasonable judgment by the applicant as to the academic or public policy value of the particular subject of the research in question;

- the information released meaningfully contributes to public development or understanding of the subject at issue;

- the information has already been made public, either in a reading room or by means of publication;

- the applicant can make some showing that the research effort is most likely to be disseminated to the public and that the applicant has the qualifications and ability to disseminate the information. The mere representation that someone is a researcher or plans to write a book should be insufficient to meet this latter criterion.

The *Government Communications Policy* also sets out useful waiver criteria:

"Institutions should reduce or waive fees and charges to users where there is a clear duty to inform the public, i.e., when the information:

- is needed by individuals to make use of a service or program for which they may be eligible;

- is required for public understanding of a major new priority, law, policy, program, or service;

- explains the rights, entitlements and obligations of individuals;

- informs the public about dangers to health, safety or the environment."

The Ontario legislation adds another wrinkle. It asks departments to consider "whether the payment will cause a financial hardship for the person requesting the record".

All this to say that what appeared novel and difficult to prescribe in law in 1982 is now run-of-the-mill and should be incorporated into the access law. **(recommendation 18)**

Finally on the issue of fees, it is important to note that the current fees in the regulations for computer-related charges do not reflect current realities. They provide:

7(1) Subject to subsection 11(6) of the Act, a person who makes a request for access to a record shall pay

> (a) an application fee of $5 at the time the request is made; and (b) where applicable, a fee for reproduction of the record or part thereof to be calculated in the following manner:
>
> (vi) for magnetic tape-to-tape duplication, $25 per 731.5m reel.
>
> (3) Where the record requested pursuant to subsection (1) is produced from a machine

readable record, the head of the government institution may, in addition to any other fees, require payment for the cost of production and programming calculated in the following manner:

(a) $16.50 per minute for the cost of the central processor and all locally attached devices; and

(b) $5 per person per quarter hour for time spent on programming a computer.

The idea that producing a report from a database is tantamount to programming a computer is outdated. Current technology, available at a modest cost, can easily produce a variety of reports from a single database.

Little or no programming is required to store a Word textfile as a WordPerfect file. Similarly, a per-minute charge for central processor time, while relevant in offices which still use mainframe computers, is much less relevant in the many government offices which have converted to local area networks. Charging for central processing time was reasonable when processing capacity was a scarce resource. Mainframe computers were very costly to purchase. Charging for processing time was one way to amortize their cost. The same reasoning does not apply to much less costly personal computers.

Government offices have converted from host computers to networked computers because of the price and performance advantages of microprocessor technology. The advantages are expected to continue. Price/performance ratio measures the cost per million instructions per second (MIPS). The cost per MIPS for a single workstation is expected to decline by 83.33 per cent between 1992 and 1995; price/performance ratio for a mainframe computer is expected to drop by only 42.9 per cent.

Better performance capabilities and lower costs of PC-based networked computing means that the real machine time cost is next to nothing. While a charge of $16.50 for each minute of central processor time may be appropriate for mainframe computing, it can hardly be justified for networked personal computers.

Personal computers are standard office equipment that allow public servants to perform a number of tasks more efficiently. In the past, an access to information request might have been filled by a clerk who first searched for the file's catalogue number, then retrieved the file from its filing cabinet and finally photocopied the document. Today, clerks can look up files on their personal computers, retrieve files on their screens and immediately copy them onto disks or print them without leaving their desks. There is no charge for use of catalogues or filing cabinets; only a clerk's time is billable. In the same light, there should be no charges for PC-based searching other than the levy for staff time. The regulations of the Act should be amended to exclude PC-based processing from the central processing fee. **(recommendation 19)**

A second pricing issue involves fees to be charged for such new ways of distributing information as CD-ROMs and computer printouts. These media are not covered by the current fee schedule. The fee schedule clearly intends to limit the cost to the requester to the cost of compiling and reproducing the information. The same pricing philosophy should be maintained for new media formats.

The delay barrier

The problem of chronic delays throughout the access system has caused deep cynicism about the Act's practical value. What real benefit is a right of access unless information is given in a timely fashion? As noted in previous annual reports, the problem of delays has been attacked with some success. But unacceptable delays continue and the Commissioner's office will continue to make reducing delays its

first priority.

Most surprising — and dismaying — about the whole delay problem is that the Act already contains one of the most liberal extension-of-time provisions found in any freedom of information statute. The basic 30-day response period may be extended "for a reasonable period of time, given the circumstances" (i.e., there is no pre-set limit) if the request is for a large number of records and meeting the 30-day goal would unreasonably interfere with a department's operations. In addition, an extension with no pre-set limit may be claimed if consultations, which can't reasonably be completed within 30 days, are necessary. Finally, an extension may be claimed to give notice to third parties whose interests may be affected by a request. There simply is no basis to the oft-heard cry that the time frames are unrealistically short or set without concern for shrinking departmental resources.

All of these legitimate opportunities to claim extensions are available if they are invoked within the initial 30-day response period and notice is given to requesters of their right of complaint. Despite this generous extension scheme, many requests are not answered within the lawful timeframes. It is as if government has decided that the right to a timely response is not an important right and can be ignored with impunity. If the delay problem is to be adequately addressed, public officials should be disabused of this unacceptable notion.

One remedy is to ensure that when a department's response falls into deemed refusal (i.e., failure to meet lawful deadlines) there are real consequences. One consequence might be loss of the right to collect fees (including application fees and any search, preparation, and photocopying charges). This sanction, admittedly, would be largely symbolic because large fees are seldom collected from requesters. But it is a start. There is no reason why requesters should pay anything for poor service. **(recommendation 20)**

Perhaps a more mind-focusing sanction would be to prohibit government from relying upon the Act's exemption provisions to refuse access if the department is in a deemed refusal situation. Exceptions to this prohibition would be justifiable in the case of sections 13, 17, 19 and 20 which protect confidential foreign or provincial records, personal safety and privacy and trade secrets or other confidences entrusted to government by third parties. **(recommendation 21)**

The format barrier

Computer and database technologies and structures raise a fundamental question: Can computer-stored information be thought of at all in terms of discrete records? While the title of the *Access to Information Act* refers to information, the purposive section of the Act sets out a distinct limitation on its scope:

> "2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information <u>in records</u> under the control of a government institution..."

The Act in section 2 defines a record as: "...any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof."

As database technology evolves, the parallels with paper records become ever more remote. Databases have come to resemble pools of information rather than collections of discrete documents. A

record may result from the synthesis of information retrieved from several files — information conjured up only to dissolve again on command. As such, a specific record may not be created until a request is made and the software associated with the database compiles the information. But to exclude such information from the scope of the Act would be inconsistent with its purpose.

The right of access to records set out in section 4 of the Act, should be amended to offer a right of access to "recorded information." Whenever the terms record appears in the Act, including in the definition section, the term recorded information should be substituted. To add clarity to the definition of recorded information, the present definition should be expanded to include E-mail, computer conferencing and other computer-driven communications. **(recommendation 22)**

Acknowledging that government information is recorded in many forms, the right of access should include a right to receive information in the format most useful to the requester. While paper copy remains the most accessible and commonly-used format, other formats should be available whenever they exist or can be created with a reasonable amount of effort and at reasonable cost.

The *Access to Information Act* and regulations give little guidance on the matter of the format in which information is to be released. The Act does allow a requester to ask for information in either of the official languages. It also gives visually impaired individuals the right to information in alternate formats — in large print, braille or in audio-cassette. Regulations set the price of diskette copies as well as for the alternate formats. The Act and regulations do not, however, mention the conversion of data from one format into another, for example, from dBase into another database format, from WordPerfect to another word processing format, or from a printer's tape to stripped-down ASCII text.

If requesters are asked to pay for these conversions (which can often be done simply and automatically) will subsequent requesters have to pay again? Or will a department, having accomplished the conversion once, be required to maintain the data in the converted format for future requests? Would documents printed on demand from an electronic record be held in anticipation of a future request? No regulations are in place to govern on-line or remote access to electronic information.

The Act should be amended to give a requester the right to request information in a particular format. Departments should be allowed to deny the request on reasonable grounds, but any refusal should be subject to review by the Information Commissioner. **(recommendation 23) (recommendation 24)**

The exemption barrier

Some critics of the access law have received attention by arguing that the Act is more about secrecy than openness because of its multitude of exemptions. The current exemptions are the result of a careful balancing of a variety of interests achieved while the Act was being drafted and debated in Parliament between 1979 and 1982. While this is far from making the Act a secrecy act, there is no doubt that some of the so-called secrecy rules have proved in practice to be unnecessarily broad and inflexible. Some changes are required to reduce barriers to access and to ensure that those pessimistic characterizations of the law do not become pervasive.

A brief explanation of what now exists: Some exemptions are discretionary while others are mandatory; some include an injury test, others do not. If a record, or part of a record, comes within a specified exemption, then a government institution may be justified, or in some cases be required, to withhold all or part of the information.

A government institution is required to tell requesters, in general terms, the statutory ground for refusing a record or what the ground would be if the record existed. Currently, an institution is not required to confirm whether a particular record in fact exists, since such disclosure may, in and of itself, give valuable exemptible information. An institution must sever exemptible portions of records and provide access to the rest.

So much for what exists. Exemptions are difficult creatures to draft. It is even more difficult to obtain a consensus on what they should be. Thus, it is with some trepidation that changes are suggested. Nevertheless, after a decade of experience, it is clear that some change is overdue to ensure that the law's purpose is better served.

Discretion and Injury

The Standing Committee on Justice and Solicitor General made only one general recommendation concerning exemptions:

> "That subject to the following specific proposals, each exemption contained in the *Access to Information Act* be redrafted so as to contain an injury test and to be discretionary in nature. Only the exemption in respect of Cabinet records should be relieved of the statutory onus of demonstrating that significant injury to a stated interest would result from disclosure. Otherwise, the government institution may withhold records ... only `if disclosure could reasonably be expected to be significantly injurious` to a stated interest." **(recommendation 25)**

With the exception of section 19 (the personal privacy exemption) and, possibly, section 13 (the confidences of other governments exemption), the committee's recommendation is a sensible way to promote more open and accountable government. It does not seem necessary, however, to put an onus on government to demonstrate significant injury from disclosure.

In similar legislation, the governments of Ontario, Quebec and British Columbia do not attempt to qualify the degree of injury that must be reasonably expected to occur. It is preferable to allow the seriousness of the injury to be one of the factors taken into account when discretion is exercised to invoke an exemption.

As for the personal privacy exemption, making it discretionary and subject to an injury test would radically alter the current balance between the *Access to Information Act* and the *Privacy Act*. That would be a mistake. Section 19 of the access Act is a mandatory, class exemption for the simple reason that it was Parliament's intent to make any public disclosure of personal information subject to the regime of the *Privacy Act*. The section does permit the head of an institution some discretion, but it is coincident with the privacy law. Admittedly, this is a different approach to that taken elsewhere.

In the United States, release of personal information under the *Freedom of Information Act* is subject to a test to determine whether disclosure would constitute a "clearly unwarranted invasion of privacy". In Ontario, access and privacy provisions are combined in a single statute which permits disclosure of personal information when there is no "unjustified invasion of personal privacy". British Columbia has a similar structure, but its test is an "unreasonable invasion of personal privacy".

It is far from clear that these are better approaches to balancing the right to privacy with the right to know what government is up to. To embrace such an approach, legislation must set out what is, and is not, an invasion of personal privacy, under whatever test is established. Further, both Ontario's and British Columbia's law require that individuals be notified when a public body intends to release a record

that an official has reason to believe contains exemptible personal information. While the process is fair, it is onerous and bureaucratic. It is also bound to result in delays. On the whole, such a regime is unlikely to be an improvement over the current federal practice and may, in fact, weaken existing protection of personal privacy.

The need for an exemption to protect information obtained in confidence from other governments is understandable. Through the access Act's section 13, mandatory protection is given to information provided to the federal government by foreign, provincial or municipal governments. Each government should be responsible for controlling and releasing its own information. The courtesy needs to be extended to the subdivisions of foreign states (e.g., an American state) and perhaps to self-governing native bands. The Standing Committee recommended extending other nations the protection to confidential exchanges from provinces or states. **(recommendation 26)**

That being said, it is also fair to say that attitudes to openness internationally and in the Canadian federal-provincial arena have changed substantially in recent years. The Clinton administration has indicated that it would like to declassify a large amount of old information in foreign relations, the military and intelligence. The U.S. administration might also be supportive of a less onerous "in confidence" protection. All this to say that no one has really looked for a long time at the potential to loosen the strings.

An analogy can be drawn to the reform of the security classifications and personnel vetting system. For years, the system seemed hopelessly bogged down in international standards and conventions. In the face of some intelligent questioning, however, many of the obstacles turned out to be mythical. A fair degree of international consensus for change emerged. While it may be premature to jump into a discretionary, injury test exemption for information given in confidence from international organizations and foreign states, it is time to study the implications of such a move. It may, in fact, be quite practical. **(recommendation 27)**

On the provincial front, no study is necessary. Freedom of information legislation in Ontario and British Columbia already has discretionary exemptions for records relating to "intergovernmental relations", exemptions which verge on injury tests (i.e., "could reasonably be expected to reveal a confidence"). An amendment to section 13 should grant a discretionary, injury-based exemption to provincial, municipal, and self-governing native band information. A time limit of perhaps 15 years should apply to all such confidences unless the information relates to law enforcement or security and intelligence matters, or is subject to extensive and active international agreements and arrangements. A public interest override should apply to this exemption.
(recommendation 28)

As a salve to governments that oppose proposed releases of information, the parliamentary committee recommended a complicated appeal procedure, including resort to the Information Commissioner and the Federal Court. This process seems impractical, if not counter to international protocol. Federal government institutions which control the information should be able to sort out release mechanisms as readily as they can justify a refusal to disclose information when they choose to exercise their discretionary power.

Public interest override

The Standing Committee also discussed another innovation from the *Ontario Freedom of Information and Protection of Privacy Act*, which was then in draft form. It reads:

> "Despite any other provision of this Act, a head shall, as soon as practical, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public."

The absence in the federal Act of a general public interest override is a serious omission which should be corrected. Again, with the exception of the personal privacy exemption, the Act should require government to disclose, with or without a request, any information in which the public interest in disclosure outweighs any of the interests protected by the exemptions. Such a requirement has been included in the British Columbia access and privacy legislation. **(recommendation 29)**

Here again, the section 19 (personal privacy) exemption already has, by reference to the *Privacy Act*, a specifically designed public interest override. Sub-paragraph 8(2)(m)(i) of the *Privacy Act* authorizes the government to disclose personal information without consent when the public interest in disclosure "clearly outweighs" any invasion of privacy that would result. It is entirely appropriate that this high level of protection for personal privacy be maintained.

Polling

Access to polling and survey information became a *cause célèbre* during the years of the Mulroney government. That government used public opinion research widely, centralizing controls on polling in the Co-ordinator of Public Opinion Research (CPOR), situated in the then Department of Supply and Services, but reporting directly to the Chairman of the Cabinet Committee on Communications. Statistics Canada lost sole authority to approve the collection of information according to the "rule of 10" policy of the mid-1960s. That policy required that approval be sought for any collection of information from 10 or more respondents.

At the drafting stage of the *Access to Information Act*, consideration was given to polling data provisions. The practice in Ontario of tabling all polls in the legislation within six-months of their completion had appeal. Underlying such routine releases is the principle which still drives the issue. At their heart, poll results and survey data are, of course, the opinions of citizens about issues. Though the data have been analyzed, it remains public opinion obtained, and paid for, by government with public funds.

The Ontario model was rejected in Ottawa in the naive belief that few, if any, exemptions would be used to keep such polls secret. Some consideration was given to keeping a public list of polls being conducted or completed. The thought was never transformed to action.

The CPOR Group centralized control over polling and public opinion research. Polling projects were only fitfully recorded in the Central Registry of Information Collection which was maintained until last year by Statistics Canada. Growing interest in polling soon translated into access requests for poll results. At the outset, the polling data was released routinely because, as committee members had surmised, no valid exemptions were found to apply. This caused some consternation among the government's polling experts, particularly as the big issues of free trade and constitutional reform loomed.

These sensitive polls were an essential part of the government's policy-making and strategy-setting processes. The government took a stand on constitutional polls, refusing access to several requesters and ignoring the Information Commissioner's findings that secrecy was unlawful. As a result, the

Information Commissioner and several requesters took the Prime Minister to Federal Court. The government contended that the section 14 (injury to federal-provincial affairs) exemption could be applied to the polls.

In its decision, the court observed that some exemptions might apply to some polling data. It did not find, however, constitutional polling data among them. The current legal view is that it may be technically possible to justify secrecy for polls, but in practice, it would be very difficult for the government to discharge the burden of proof of injury which the court has placed on it.

The new government is examining the process of administering polling contracts as it looks broadly at government ethics. This commissioner hopes that the government will make a political virtue of what is now a legal imperative and announce a no-strings policy to release all its public opinion polling information in a timely fashion without the necessity of a formal access application. Any weasling bureaucratic caveats would send all the wrong signals about a new government's commitment to openness. The handling of polls has become the litmus test.

A number of approaches are possible. The preferable one is to set out in the access law that results of public opinion research are accessible to the public and do not qualify for exemption. Change need not await legislative amendment. The government needs simply to decide that polling and survey data will not be subject to exemptions under the Act and that government institutions will maintain a public listing of such data, a list updated no less frequently than every two months.
(recommendation 30)

Is the minister's office out-of-bounds?

A matter raised in last year's annual report remains an unresolved issue of importance which ought to be clarified in an amended law: Are records beyond the purview of the access Act simply because they are held physically in ministers' offices? Last year the Minister of Justice took the position that they were. He balked when the Information Commissioner wanted to review such records during an investigation to determine whether secrecy was justifiable. The minister had a change of heart after the Commissioner reported to Parliament that the minister risked being compelled to co-operate with the Commissioner's investigation by force of law.

Yet the change of heart appeared only half-hearted. To date the view persists among Justice officials that the Commissioner will only be allowed as a courtesy to investigate records held in the minister's office. They hold firm the view that the access law does not apply to records held in ministers' offices.

That Justice department view flies squarely in the face of the Act's plain words designating each minister head of his or her department for the purpose of the access law. Justice officials apparently would have their department and all other departments headed by the deputy ministers. That is simply wrong. The whole scheme and purpose of the access law could be thwarted if the right of access and the Commissioner's powers were somehow dependent upon the geography of a department's records.

Of course, some information in a minister's office will and should be beyond the reach of the access Act — records of personal or constituency affairs, for example. Yet, it must be the content of records, not physical location, which determines what information is accessible and what is not. By Justice fiat, if its position remains unchallenged, records in the north-east corner of the third floor of the Justice headquarters building—the minister's office—are out-of-bounds. Will the entire floor or building be designated tomorrow as the minister's office?

The Justice department's idiosyncratic opinion has long since been discredited by the Quebec Court of Appeal (André Montminy *v*. *Commission d'accès à l'information* [1986] CAI 217) in its interpretation of whether the Quebec access law applied to records held by ministers. Nevertheless, it is recommended that the law be amended to remove any doubt that ministers' offices are, in fact, included in the term "government institution" and subject to the access law. **(recommendation 31)**

Section 14: Federal-Provincial Affairs

There is a long-standing recommendation, going back to the original drafting of the Act and repeated in *Open and Shut*, that the word "affairs" be replaced by the word "negotiations". This change would serve to narrow the exemption without damaging the interest involved. It should be supported. **(recommendation 32)**

Section 15: International Affairs and National Defence

There have been ongoing complaints from requesters about ways in which this complicated exemption is invoked. The standing committee put it best in *Open and Shut*:

> "After a broadly worded injury test, nine classes of information which may be withheld are listed. Arguably, 'any information' found in the broad classes listed, whether or not it would be injurious if released, must be withheld. The Information Commissioner has interpreted this section as requiring the department or agency to establish that the records withheld are not only of the kind or similar in kind to those enumerated in the subsequent paragraphs, but also that the Department must provide some evidence as to the kind of injury that could reasonably be expected if the record in question were released. On the other hand, the Department of Justice has asserted that one of the specific heads listed in the paragraphs need not be applied to information before the exemption can be claimed, as long as the specific injury test is met."

The committee worried that, as currently interpreted, the section did not adequately link injury to the nine classes or illustrations. The committee's concern remains valid and its recommendation deserves fresh endorsation, namely, section 15 of the Act be amended to clarify that the classes of information listed are merely illustrations of possible injuries. The overriding issue should remain whether there is a reasonable expectation of injury to an identified interest of the state.
(recommendation 33)

Section 16: Law Enforcement

The recommendation has already been made in this report that an injury test be included in all elements of section 16. In effect, this would mean a repeal of paragraphs 16(1)(a) and (b), since all such information would be covered by 16(1)(c) if an injury test were to be introduced. **(recommendation 34)**

There can be no justification for secrecy unless a reasonable expectation of injury to an important interest can be demonstrated. This axiom applies to enforcement and intelligence as to any other area.

A decade of experience with the law has shown no compelling reason why such interests should get a 20-year grace period during which secrecy may be maintained without any need to demonstrate an injury from disclosure. This view will be controversial within the law enforcement community, as was the original provision. Though professional nervousness may be understandable, the fears are as groundless now as they were then. The recommended changes will bring the federal Act into line with

the law enforcement provisions in Ontario's and British Columbia's legislation.

Section 17: Safety of individuals

In 10 years the government has rarely used the threat to the safety of individuals as a reason for refusing access. It exists largely for cases dealing with offenders' records. Nevertheless, it would be useful to address a potential area of controversy by making explicit that this exemption also applies if disclosure could reasonably be expected to pose a threat to an individual's mental or physical health. The British Columbia law goes this extra step and so should the federal law. **(recommendation 35)**

Section 18: Economic interests of Canada

Section 18 deals with a potpourri of issues. It is for the government, however, the rough equivalent of section 20: protection of economic and technical information. The provision should be amended in parallel with section 20 regarding the release of the results of product and environmental testing. This was the recommendation of the Standing Committee. As well, the term "substantial value" in paragraph 18(a), relating to trade secrets and financial, commercial, scientific and technical information should be modified and narrowed by the term "monetary".

The issue of protecting "confidential business" information for the government's Special Operating Agencies (SOAs) has also arisen. Several of these entities are being asked to compete with the private sector without the protection other companies enjoy under section 20 — third party information. Adjusting section 18 is much preferable to excluding SOAs from the legislation. Several of them have informally requested exclusion. **(recommendation 36)**

The exemption should also be reviewed in light of the dawning awareness that government databases have value in the marketplace. The monetary value of information could be a basis for refusing to disclose government information under subsection 18(a). A recent complaint to the Information Commissioner illustrates the problem.

Canada Mortgage and Housing Corporation (CMHC) refused a request for information it had gathered, arguing that the information had substantial value and, thus, was exempt under section 18. The requester was told that the information he wanted was available from Statistics Canada in a priced publication. The requester wanted the raw data collected by CMHC, however, not the refined product sold to the public.

At issue is the question of access to raw data which does not have substantial economic value but contributes to an end product offered for sale. The issue raised by the complaint was not resolved because the individual withdrew his complaint saying he no longer needed the information.

To avoid similar problems, section 18 should be amended to ensure that government databases are not removed from the right of access.

Section 19: Personal information

As discussed earlier, this report recommends no major changes to section 19. Any temptation to add an "unwarranted invasion of privacy" test should be resisted. Such a test would create a large, bureaucratic notification process with no perceptible improvement in the current balance between the rights of access and privacy. Indeed, such a change may be seen as attempting to undermine privacy protection at a time when public concern in this area is rising.

Section 20: Confidential business information

Section 20 of the Act protects certain kinds of information furnished to a government institution by a third party. A third party may be an individual, a group or an organization. In practice, it is most often a corporation. Generally, section 20 protects trade secrets, confidential financial and technical information; information which, if released, would likely have an adverse impact on a business or interfere with contractual negotiations. Section 20 is one of the most used, abused and litigated exemptions under the *Access to Information Act*. Many of the Act's delay problems concern requests for business information.

Along with section 19 (the personal privacy exemption), the third-party protection is used more often than any other exemption to refuse disclosure of records. It also shares with section 19 the distinction of being the primary reason why some information available before the law's passage is no longer available. In the case of section 20, however, (and unlike section 19), greater secrecy has no justification.

This Commissioner has seen thousands of government-held records relating to private businesses. Real secrets are rare. Sounding the alarm of competitive disadvantage has become as reflexive in some quarters as blinking. Concern for the public interest in the transparency of government's dealings with private businesses has been almost abandoned by government officials.

New rules of the road are needed to govern the right to know more about government dealings with the private sector. First, the law should tell firms choosing to bid for government contracts that the bid details, and details of the final contract, are public for the asking. Access to such records is essential if this facet of government is to be transparent; if the public is to have confidence that taxpayer dollars are being well-spent. As matters now stand, only partial glimpses are possible. There is partial disclosure of winning bids, none at all of losing bids. Contract prices are released without details. That is not good enough. Section 20 should be amended to put more accountability in the government contracting process. **(recommendation 37)**

Government holds a vast array of information about private businesses, information unrelated to government contracts. Ours is a highly regulated society. In many fields — agriculture, health, communications, environment, fisheries, native affairs, regional development — information from private sector firms figures prominently in government files. With government downsizing and privatization, more and more matters affecting the public interest are dealt with by the private sector. Government officials and private firms should not be able to agree among themselves to keep information secret. Yet, paragraph 20(1)(b) comes perilously close to giving authority for just such a cozy arrangement. It requires government to keep secret:

> "financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party"

The provision should be abolished. Paragraph 20(1)(c), as it now stands, is fully adequate to ensure that any legitimate business need for secrecy is served. It requires government to keep secret:

> "information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party".

It is questionable whether paragraph 20(1)(a) (regarding trade secrets) is needed in the light of paragraph 20(1)(c). Any information which would qualify for secrecy as a trade secret would certainly qualify for secrecy under 20(1)(c).

A particularly unsatisfactory aspect of section 20 is the public interest override contained in subsection 20(6). While it is essential that there be a public interest override — we must know about unsafe airplanes, unhealthy medications and dangerous products, whatever the consequences to their makers — it does not make sense to limit the override to matters of "public health, public safety or the protection of the environment".

A case which illustrates the unacceptable limits of the override was reported in the commissioner's annual report two years ago. A request was made to Health and Welfare Canada for records which showed the results of clinical tests of the efficacy of a cold sore product. The tests showed that, although the product was not dangerous in any way, it had no apparent beneficial effect. Disclosure of the results would have detrimental effect on the product's manufacturers. But the public interest was also clear. The product, while government approved for sale, was of highly dubious value. Unfortunately, the public interest in this case did not relate to health, public safety or the protection of the environment and the law did not provide an override on the company's economic interests.

The earlier recommendation that all exemptions be subject to a general public interest override would remedy this problem. Even if a general override is not accepted by Parliament, the override now contained in subsection 20(6) should be broadened.

Not only is the present Act overly cautious in extending secrecy protection to private businesses, it puts in place an unwieldy procedural apparatus which creates many of the most egregious problems of delay under the Act.

Unacceptable delays are the result of the mandatory requirement that government institutions give direct notice to and consult with third parties before records may be released. Similar requirements are imposed on the Information Commissioner if he proposes to recommend disclosure. Often there are many third parties (in one current case there are 126,000 of them) and the direct notice and consultation requirement is simply impractical. Faced with those situations, departments are tempted to take the path of least resistance. They simply refuse to disclose the information and pass the dissatisfied requester over to the Information Commissioner, along with all the notice and consultation headaches.

The Standing Committee made several recommendations to improve the situation. One would allow other forms of notice — public notice or advertisement — whenever substituted notice is likely to be effective, practical and less costly than direct notice. That recommendation is eminently sensible and should be part of the federal legislation.

There is a pressing need for change in light of the Quebec Superior Court's recent ruling against an attempt by the Quebec Access and Privacy Commissioner to use alternate forms of notification. The court said that unless the statute specifically authorizes alternate notice procedures the Commissioner must directly notify all third parties. The decision is under appeal.

Section 21: Advice and recommendations

The advice and recommendations exemption, together with the exclusion of Cabinet confidences, ranks as the most controversial clause in the *Access to Information Act*. From early debate to this day,

critics have attacked its broad language which can be made to cover — and remove from access — wide swaths of government information. The Standing Committee voiced its opinion that the exemption "has the greatest potential for routine misuse". The government seemed to agree, taking pains in its policy guidance to admonish caution and to build in the injury test omitted from the legislation.

The question then: How best to reform section 21? The Standing Committee recommended that it contain an injury test that would acknowledge the need for candour in the decision-making process — a measure consistent with the Treasury Board's Secretariat's policy. The committee went on to advocate another clarification. The exemption would only apply to policy advice and minutes at the political level of decision-making, not factual information used in the routine decision-making process. Finally, the committee recommended reducing time limitation in the current exemption from 20 to 10 years. It seems an appropriate time to protect material used in a decision-making process. **(recommendation 38)**

The committee's recommendations here are more than a good start. Yet reform needs to go further. An amended section should emulate the laws of Ontario and British Columbia. Each has a long list of types of information *not* covered by the exemption — factual material, public opinion polls, statistical surveys, economic forecasts, environmental impact statements and reports of internal task forces.

There should also be an attempt to define the term "advice" in the sensible, balanced way currently set out in the Treasury Board policy manual.

The exemption should be clearly limited to communications to and from public servants, ministerial staff and ministers. As well, the provision should be made subject to a public interest override. In sum, these changes will better define what information can be protected to preserve government's need to conduct some deliberations in private.

Finally, paragraph 21(1)(d) should be amended. As it now stands, this exemption allows public servants to refuse to disclose plans devised but never approved. As the British Columbia legislation now allows, rejected plans should be as open to public scrutiny as plans which are brought into effect.

Section 23: Solicitor-client privilege

It has become obvious during the last 10 years that the application and interpretation of section 23 by the government (read: Justice department) is unsatisfactory. Most legal opinions, however stale, general or uncontroversial, are jealously kept secret. In the spirit of openness, the government's vast storehouse of legal opinions on every conceivable subject should be made available to interested members of the public.

Tax dollars paid for these opinions and, unless an injury to the conduct of government affairs could reasonably be said to result from disclosure, legal opinions should be disclosed. These opinions are to lawyers what advance tax rulings are to accountants and should be equally accessible. Instead, the Justice department resists and even tries to find ways to make it difficult for the more enlightened government departments to waive solicitor-client privilege. **(recommendation 39)**

As noted in last year's annual report, the Justice department has advanced the idea that individual ministers have no authority to waive this privilege since it is the collectivity i.e., the Crown, which is the client. Although the department has not yet determined who may waive the privilege, it clearly prefers the idea that Justice knows best. And so it wants to be in the enviable position of keeping entirely secret the bulk of the records under its control. As Saturday Night Live's church lady would say: "How

convenient!"

Insulating the Justice department from the Act in this way was never contemplated by Parliament. The solicitor-client privilege exemption is, like all others, available to the head of each institution, not merely the department of Justice, and the discretionary power to invoke it lies with each head. Thus, it is clear that if one minister, who possesses the records, does not wish to rely on the privilege, the Justice minister has no authority to overrule.

If the requested record is under the control of the Minister of Justice, he or she must determine whether the head of the department wishes to rely on privilege. If the head wishes to waive privilege, the Minister of Justice should have no choice but to disclose.

In the *Access to Information Act*, all decision-making authority and obligations are vested in the individual heads of government institutions. By grasping at a straw, by claiming that the Crown is an entity which can take decisions under the legislation, the Justice department attempts to impose its writ upon territory beyond its legal reach.

One final matter on section 23. The Act is unequivocal that section 23 is subject to section 25, that, if possible, any information in a record which does not qualify for solicitor-client privilege must be released. Section 25 is the so-called severance requirement. Nevertheless, the Justice department has decreed that severance will not be applied because if any jot or tittle is disclosed from a record containing privileged material, the privileged portions may somehow be stripped of their privilege. Although no court has interpreted the Act in this fashion, and although the view seems contrary to the plain words of section 25, Justice struggles valiantly to perpetuate the hegemony of the solicitor-client privilege.

For this reason, section 23 should be amended to spell out that the application of severance to a record under the authority of section 25 does not result in loss of privilege on other portions of the record. It will also be necessary to make clear that discretion to waive solicitor-client privilege lies with the head of the client government department, not the Minister of Justice.

These clarifications along with the earlier recommendation that this exemption be made subject to an injury test and a public interest override will bring one of the most carefully guarded bastions of reflexive secrecy into line with the principles of open government.

Section 24: Statutory prohibitions

In several previous annual reports, Parliament has been kept abreast of the continuing back door erosion of the right of access. More and more statutes have built-in secrecy provisions, many of these being listed, by Order-in-Council in Schedule II of the *Access to Information Act*. Once that listing takes place, subsection 24(1) of the access law makes it mandatory to refuse to disclose information. The section reads:

> "The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II."

The question must be asked: Why was it necessary to put section 24 in the *Access Act*? After all, there are substantive exemptions to cover any conceivable legitimate need for secrecy. The standing committee concluded there was no such need. The fact is, section 24 allows the government to keep

information secret even when there may be no reasonable justification for secrecy. Even confidences of the Queen's Privy Council receive absolute protection for only 20 years. Yet all the provisions listed in schedule II are accorded mandatory secrecy forever. This provision is the nasty little secret of our access legislation and it has no place at all in the law.
(recommendation 40)

Section 26: Information to be published

The thinking behind the need for this exemption is sound. If the government plans to publish a record within a reasonable period of time, it may refuse access in the meantime without thwarting the principle of openness. That being said, the provision, in practice, has been used to delay access unduly. The abuse should be addressed.

First, the period of grace now stipulated in the section—90 days—is unnecessarily long. Sixty days is ample time given modern printing methods; the Act should be amended to reduce the grace period.
(recommendation 41)

Second, the provision has been relied upon as a device to buy extra time. An institution may receive a request for a record, deny the request on the basis of section 26 and, when that period expires, change its mind about publication and simply apply exemptions to the record. Section 26 should be amended to prevent such abuse by stipulating that if the record is not published within the 90 days (or 60 days as recommended) it must be released forthwith in its entirely with no portions being exempted.

Section 69: Exclusion of Cabinet confidences

Perhaps no single provision brings the *Access to Information Act* into greater disrepute than section 69 which excludes Confidences of the Queen's Privy Council for Canada from the legislation's reach. Dubbed the "Mack Truck" clause, the exclusion of confidences was immediately seen by many in the news media as the primary reason for the new Act being ineffective, however wrong that view may be. Three years later little had changed. The Standing Committee reported that it received more briefs and comments on section 69, the confidences provision, than on any other part of the legislation. The Act's undeserved reputation in some quarters as a secrecy act, not an access act, was firmly fixed.

The exclusion in section 69 covers a wide variety of documentation: memoranda to Cabinet, discussion papers, Cabinet agenda, communications between ministers on Cabinet business, briefing material, and legislation and Orders in Council. Cabinet confidences are excluded from the Act for 20 years, creating a trade in confidences of previous governments while the current one is left in peace.

The special nature of Cabinet confidences is eloquently put in the Treasury Board information and privacy policy manual:

> "The Canadian government is based on a Cabinet system. Thus, responsibility rests not in a single individual but on a committee of Ministers sitting in Cabinet.... As a result, the collective decision-making process has traditionally been protected by the rule of confidentiality which protects the principle of collective responsibility while enabling Ministers to engage in full and frank discussions necessary for the effective functioning of a Cabinet system of government."

All this is well and good. But does it merit exclusion of all Cabinet confidences from the scope of the legislation? The Standing Committee thought not. Having reviewed the various reasons for Cabinet confidentiality and finding ample reason to justify it, the committee went on to state:

> "Nevertheless, the Committee does not believe that the background materials containing factual information submitted to Cabinet should enjoy blanket exclusion from the ambit of the Acts (Privacy and Access). It is vital that subjective policy advice be severed from factual material found in Cabinet memoranda...(But) factual material should generally be available under the Act — unless, of course, it might otherwise be withheld under an exemption in the legislation."

The committee found support in the Williams Commission on Freedom of Information and Privacy in Ontario which recommended that Cabinet records be dealt with as a mandatory exemption and not as an exclusion. This position was adopted in the Ontario *Freedom of Information and Protection of Privacy Act* and emulated in other provincial legislation, notably in British Columbia. The latter jurisdiction went on to adopt a 15-year rule for moving Cabinet documents out of the mandatory exemption. It excluded from the provision:

- information in a record of a decision made by the Executive Council or any of its committees on appeal under an Act; or,

- information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if: (i) the decision has been made public, (ii) the decision has been implemented, or (iii) 5 years or more have passed since the decision was made or considered.

Any reform of the *Access to Information Act* will have to address the symbol of secrecy: Cabinet confidences. Building on the committee deliberations, the following recommendations are offered: **(recommendation 42)**

- Section 69 of the Act should be amended to convert it into an exemption;

- The current 20-year period during which Cabinet documents are excluded from the Act should be changed to 15 years. Fifteen years is the life of at least three Parliaments and is the period adopted by British Columbia;

- Paragraph 69(3) should be redrafted to cover analysis portions of Memorandum to Cabinet now made available to the Auditor General. These should be released if a decision has been made public, the decision has been implemented, or five years have passed since the decision was made or considered;

- Appeals of decisions under the Cabinet records exemption should be heard by the Associate Chief Justice of the Federal Court after review by the Information Commissioner.

The Standing Committee hoped to make the Cabinet confidence exemption more palatable to the government by restricting the appeal mechanism solely to the Associate Chief Justice of the Federal Court. Consistency, care and discretion should underpin decisions to disclose Cabinet confidences. These goals are much more likely to be achieved under a two-tiered review mechanism which includes the Information Commissioner — as in the case of all other disputes under the law. The appeal mechanism to the courts should be, however, to a senior judge.

Making all of government accessible

From the outset of debate on the *Access to Information Act*, there was disagreement on which

government institutions should be covered by the legislation. The Act includes all departments, ministries of state, organizations treated as departments (e.g., the National Archives of Canada) unless those institutions compete with the private sector firms. The institutions covered by the Act are set out in a schedule attached to the legislation.
Critics urged that all Crown corporations, especially agencies such as the CBC, Canadian National Railways, Air Canada and Petro-Canada, be covered precisely because they were at arm's length from government. There was a greater need for those institutions to be held accountable for their actions and for the public money they spent.

The Standing Committee took up this refrain in *Open and Shut*. The committee members were attracted by the notion expressed by the Ontario Commission on Freedom of Information and Individual Privacy. It had recommended that freedom of information legislation should apply "to those public institutions normally perceived by the public to be part of the institutional machinery of the ... government." The question, of course, is where to draw the line through the vague concept of "normally perceived".

The committee did make an attempt, setting out two criteria. First, it proposed that if a public institution is exclusively financed out of the consolidated revenue fund, it should be covered. Second, for institutions not financed exclusively in this way but able to raise funds through public borrowing, the major determinant should be the degree of government control.

The committee then urged that all Crown corporations and wholly-owned subsidiaries be covered. It exempted less than wholly-owned subsidiaries and mixed ventures — organizations not controlled by a majority of public funds. As practical justification for its position, the committee noted that in March 1986, the Government of Ontario expanded its freedom of information legislation to cover its Crown corporations.
Ontario has since been joined by other provinces.

The only exception adopted by the committee was the program material of the CBC which, it was agreed, (rightly) should not be subject to access legislation. The committee also recommended coverage of Parliament and its institutions and agents, but did not suggest that the offices of Senators and Members of Parliament should be subject to the access law.

Well, where does this leave us in 1994? In the wake of government privatizations of many of its institutions in the late 1980's, there are certainly fewer Crown corporations which might be subject to the Act. There is now, however, a new type of organization called a Special Operating Agency (SOA), which did not exist when the Act came into force.

These SOAs are creatures of departments and have been designated as service agencies. SOA's are not subject to the rules that govern other facets of the bureaucracy. They are instructed to focus on the needs of their clients, to compete where necessary with the private sector and try to be self-sustaining, perhaps turn a profit. They are designed to improve service to the public and reduce the costs of government. SOAs are, however, fully part of government.

The time is past due to complete the process of opening government to scrutiny. The law should be extended to cover all federal government institutions, including:

- Special Operating Agencies;

- Crown corporations and wholly-owned subsidiaries;

- any institution to which the federal government appoints a majority of governing body members;

- all officers of Parliament, including: the Offices of the Information and Privacy Commissioners, the Office of the Chief Electoral Officer, the Office of the Commissioner of Official Languages, and the Office of the Auditor-General;

- the Senate, House of Commons, Library of Parliament, but excluding the offices of Senators and Members of Parliament.

Special provisions should exclude from coverage the program material of the CBC and to provide for the handling of complaints made under the law against the Office of the Information Commissioner. (He can hardly investigate himself). **(recommendation 43)**

All of these recommendations amount to an ambitious refit of the *Access to Information Act*. They are made in the conviction that our right to know must be carefully nurtured by Parliament. The Information Commissioner stands ready to assist parliamentarians in their deliberations.

RECOMMENDATIONS

Following is a summary of recommendations in the preceding text. The Information Commissioner recommends that:

General recommendations

Parliamentary committee

1. A parliamentary committee be mandated to study and to propose amendments to the *Access to Information Act*.

Written direction

2. The Prime Minister give specific written direction to his ministers and senior officials that public access to government information is not to be unreasonably delayed or denied.

Single minister

3. The Prime Minister name a single minister, preferably the President of Treasury Board, to be responsible for the Act's administration and policy.

Single department

4. The Information Law section of the Department of Justice be severed from that department and merged with the Information, Communications and Security Policy Division of the Treasury Board Secretariat.

Essential principals

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

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

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

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

Renamed Act

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

Duty to create

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

Duty to retain

8. The *Archives Act* be amended to include explicit provisions for the retention of computer communications, including E-Mail, following their creation.

Public register

9. Government institutions be required to maintain a public register of all

records which have been released under the access Act.

Routine release	10.	Government institutions be required to release routinely all information which describes institutional organizations, activities, programs, meetings, and systems of information holdings and information which tells the public how to gain access to these information resources.
Duty to disseminate	11.	Government's duty to disseminate should also extend to all information which will assist members of the public in exercising their rights and obligations, as well as understanding those of government.

Amendments specific to the access Act

Fees

Price barrier	12.	To eliminate an access barrier of price, subsection 68 (a) of the Act be amended to ensure that only information which is reasonably priced and reasonably accessible to the public is excluded from the law.
Frivolous requests	13.	Government institutions be given the right to refuse to respond to frivolous or abusive requests.
Binding order	14.	A government institution's refusal to respond to a request be subject to an appeal to the Information Commissioner and the Commissioner's ruling be binding and final.
Fee eliminated	15.	The $5-application fee be eliminated, charges for reproduction of paper copies, diskettes and audio or video cassettes be adjusted to current market rates and a period of free search time be retained.
Commercial requesters	16.	Fees charged commercial requesters reflect the actual cost of producing the information when information is requested for brokerage purposes.
Binding order	17.	A government institution's decision to treat a request as a commercial request be subject to review by the Information Commissioner and the Commissioner's decision be binding and final.
Fee waiver policy	18.	The criteria for the waiver of fees be included in the Act.
Computer fees	19.	There should be no fees for computer processing when processing is conducted in a PC-based environment. Fees levied for CD-ROMS or other computer formats be limited to the cost of compiling and reproducing the information.

Delays

Lose fee collection	20.	Government institutions which fail to meet lawful deadlines in responding to requests lose the right to collect fees.
Lose exemption claim	21.	Government institutions which fail to meet lawful deadlines in responding to requests be prohibited from invoking exemptions with the exception of exemptions which protect other government's information, personal privacy and safety and trade secrets or other confidences entrusted to government by third parties as set out in sections 13, 17, 19 and 20 of the Act.

Definition and format

Definition of information	22.	The right of access to any government "record" be amended to offer a right of access to any "recorded information" in section 4 of the Act and elsewhere. To add clarity, the definition of recorded information be expanded to include E-mail, computer conferencing and other computer-driven communications.
Format most useful	23.	Government information be available in the format most useful to the requester whenever the format exists or can be created with a reasonable amount of effort and at reasonable cost.
Review by commissioner	24.	A government institution's refusal to provide information in the format requested be subject to review by the Information Commissioner.

Exemptions

Discretionary and injury	25.	Exemptions be discretionary in nature and contain an injury test with the exception of section 19 (the test personal privacy exemption) and possibly, section 13 (the exemption to protect confidences of other governments).
State governments	26.	The section 13 exemption be extended to information from such subdivisions of nations as U.S. state governments and perhaps to self-governing native bands.
Study extension	27.	The implications of applying a discretionary, injury-based exemption to information given in confidence from international organizations and foreign states be examined.
Other governments in Canada	28.	A discretionary, injury-based exemption apply to information from provincial and municipal governments and self-governing native bands.

Public interest override	29.	Government institutions be required to disclose any information, with or without a formal request, whenever the public interest in disclosure clearly outweighs any of the interests protected by the exemptions.
Public opinion polls	30.	Public opinion polls be accessible to the public. Polls and survey data not be subject to exemptions under the Act. Government institutions maintain a current list of polls and surveys.
Cabinet ministers' offices	31.	The access Act be amended to make clear that recorded information in offices of cabinet ministers is government information and subject to the law and its exemptions.
Federal-provincial	32.	Section 14 (the federal-provincial relations exemption) be more narrowly drawn by relations substituting "federal-provincial negotiations" for "federal-provincial affairs."
International affairs and national defence	33.	Section 15 (an exemption to protect international affairs and national defence) be amended to clarify that a reasonable expectation of injury be required o invoke the exemption. The nine classes of information listed are merely illustrative of possible injuries.
Housekeeping	34.	As a housekeeping measure, coincident with inclusion of an injury test, paragraphs 16 (1)(a) and (b) be repealed.
Personal safety	35.	Section 17 (the personal safety exemption) be extended to protect against a threat to an individual's mental or physical health.
Economic interests of government	36.	Section 18 (an exemption to protect the government's economic interests) be amended to include a health and safety override; to narrow the scope of subsection (a) by including "monetary" in the phrase "substantial value"; to grant special operating agencies rights similar to their private sector competitors; and to ensure the section can not be used to exempt data bases which serve as the raw data for information placed in the market.
Third-party information	37.	Section 20 (an exemption to protect third-party information) be amended to ensure public access to government contracts and details of bids for contracts; to abolish subsection 20 (b); to broaden the public interest override and to allow government institutions to give third parties their notice of government's intent to disclose information in such alternative to direct notice as newspaper advertisements.
Advice and recommendations	38.	Section 21 (an exemption to protect internal deliberations) be

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

Solicitor-client privilege 39. Section 23 (the solicitor-client privilege exemption) be amended to give access to Justice department legal opinions unless an injury to government operations could reasonably result from their disclosure; and to make clear that severance of some portions of a record does not result in loss of privilege on other portions of the record.

Statutory prohibition 40. The practice of skirting the law by placing more and more statutes and the information they generate under the section 24 statutory prohibition from disclosure be brought to an end by the abolition of section 24.

Information for publication 41. The grace period in which a government institution is permitted to refuse access on the grounds that the information is slated to be published be reduced from 90 days to 60 days; institutions be discouraged from using the right as a delay tactic with the additional requirement that if publication does not take place, the record must be released forthwith and without exemption of any portion.

Cabinet confidences 42. Section 69 (the exclusion of cabinet confidences) be amended to transform it to an exemption; to reduce the period of secrecy from 20 to 15 years; to make available analysis portions of memoranda to cabinet if a decision has been made public, has been implemented or five years have passed since the decision was made or considered; to have appeals of decisions under this section heard by the Associate Chief Justice of the Federal Court after review by the Information Commissioner.

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

1993-94 Year in Review

In fiscal year 1993-94, some 768 dissatisfied users of the access law made complaints to the Commissioner against the government (see table 1). The top five complained against institutions are:

Immigration and Refugee Board	- 103
Privy Council Office	- 63
National Defence	- 52
Transport Canada	- 45
Employment and Immigration	- 37

(NOTE: Table 4 shows how other government institutions fared in 1993-94 and Table 5 shows the breakdown of complaints by province of origin.)

The good news is that resolutions of complaints were achieved in the vast majority of the cases. Table 2 indicates that 733 complaint investigations were completed; 61.1 per cent of all complaints were resolved by remedial action satisfactory to the Commissioner while 34.5 per cent of complaints were considered not to be substantiated.

In three of the four cases in which the complaints were well-founded but not resolved, the Commissioner sought consent from the requesters to pursue the matters in Federal Court. Those cases and others in which the Commissioner intervened on substantive or procedural issues are discussed later in the legal matters section of this report. Court action was not pursued in one of the four cases because Parliament retroactively changed the law to validate the Revenue department's decision to keep GST registration records secret.

The statistics also reveal why the problem of delay continues to be the Commissioner's top priority. Some 30.1 per cent of all completed investigations involved complaints of delay.

A: Departmental delays

According to the latest Treasury Board statistics (1992-93) 57.5 per cent of requests were answered within 30 days, 21.1 per cent within 30 to 60 days and 21.4 per cent in excess of 60 days. When some 43 per cent of all requests are not answered within the statutory 30-day response period, it is cause for concern.

To address the problem of delays in departments, the Commissioner continued to review the response-time performance in selected institutions. The first such review was completed early in 1993-94. It was conducted at Transport Canada's invitation and with its full co-operation.

The review found a number of areas in which administrative practices required change to reduce periods of delay. Complaints of delay against Transport Canada tallied 9.5 per cent of all requests to the department in fiscal year 1992-93. By contrast, Transport Canada was found to have exceeded the statutory time limit in its response to 40.7 per cent of the requests completed last year. Clearly, many requesters did not complain when their requests were not answered in a timely fashion.

As a result of the review, the Commissioner made several recommendations. For their part, Transport

Canada officials recognized the need to improve. They developed a plan to respond to the Commissioner's recommendations and made some prompt changes. Transport Canada affirmed its commitment to service to the public under the *Access to Information Act*. Both the review and Transport Canada's plan are available on request through the department.

In 1992-93, the Immigration Refugee Board (IRB) had the highest number of delay complaints. During this fiscal year, a review was conducted at the IRB by officials of the Information Commissioner. This, too, was undertaken with the consent and co-operation of the IRB. The review was being completed at the end of 1993-94 and will be discussed in next year's annual report.

Who's next?

The experience of this reporting year has put several other institutions on the short list as candidates for a response-time review, notably the Privy Council Office and Health Canada. During the coming year, the Commissioner's officials will arrange to conduct at least one review. As before, the goal of the review will be to find the root cause of delay problems and to recommend changes in practices and procedures.

Some statistics say more than others

Government departments and agencies have a duty to report yearly on the access Act. Each has a statutory duty to report to Parliament and an administrative duty to report to the Treasury Board Secretariat which is responsible for the Act's administration throughout government.

Those reports tell readers, among other things, the number of requests each department or agency received, the number completed, exemptions and exclusions invoked, fees collected, salary expense, time extensions granted and the time it took to complete requests. The Treasury Board Secretariat then compiles the statistics and reports to Parliament.

While a great deal of information is gathered, these reports do not provide a sufficient measure of accountability for the time departments take to answer requests. The reporting form designed by Treasury Board provides a quick and easy method of determining the number of cases delayed unreasonably beyond the 30-day time limit. It does not, however, allow readers to tally the number of cases that also fell in arrears after an extension of time had been claimed and expired. Thus, the most telling story goes untold.

Neither does this report allow Parliament or the public to know precisely how well or how badly institutions are faring in meeting time limits set out in the Act despite that being the report's *raison d'être*. The Commissioner has reason to suspect that the Act has been breached, as deadlines slipped away, many times more often than requesters filed complaints about access delayed.

Discussions with Treasury Board officials have begun on the design of a new report format that would more accurately show when institutions meet their statutory time limits. Parliamentarians, senior officials and the public deserve as clear a picture as possible. Stay tuned.

B. Delays in the Commissioner's office

As can be seen from Table 3, the overall turnaround time for complaint investigations has not improved over last year. While substantial productivity improvements have been made since 1991-92, more progress towards attaining the three-month goal

suggested by the Standing Committee on Justice and Solicitor General has stalled. Continued progress will require additional investigators.

The Information Commissioner takes pride in having a small office (some 31 persons) which is not seen by complainants as being yet another large and unapproachable bureaucracy. Moreover, he is especially reluctant to call for more resources at a time of necessary restraint in public-sector spending.

Nevertheless, the Treasury Board will be asked in the upcoming budget-setting exercise, known as the Multi-Year Operational Plan (MYOP), to provide the necessary resources to enable the Commissioner to secure the services of one or two additional investigators. This relatively small additional cost will have a significant impact on ensuring that users of the law
are well-served.

C. Delays in the Federal Court

Two types of cases can end up in the Federal Court under the *Access to Information Act*. One type is triggered by the government's refusal to disclose records to a requester. In those cases, either the Information Commissioner or the requester may ask the Federal Court to review the denial of access. The second type is triggered by the government's decision to disclose to a requester records which affect the interests of a third party. In those instances, the third party (usually a business) may ask the Federal Court to block disclosure of the requested records.

By far the greater number of Federal Court cases under the *Access to Information Act* fall into the second category. Most of the delays experienced in access to information cases in the Federal Court are these third-party cases. From time to time, such cases have languished in the Federal Court for several years. Although the few that came to trial were rarely successful for the third party, the delays constituted effective denials of access.

A very positive development can now be reported in the efforts by the Commissioner, the government, the Canadian Bar Association, and the court to address this problem of delay. On December 3, 1993, the Associate Chief Justice of the Federal Court issued a practice direction to ensure that all review applications under the access law will be heard and determined in a timely fashion.

The solution is simple: Every application for review must contain a request for direction to be dealt with by the court within 30 days after filing. Within that time, a timetable will be set and the court will give appropriate directions to be followed by the parties until a hearing.

The practice direction is buttressed by recent amendments to the Federal Court rules which give the court powers to respond to delays or inactivity by the parties. It is also applicable to applications for review filed before January 1, 1994. To date, the Federal Court has struck out on its own motion 24 applications for review.

In 1993, 55 applications for Federal Court review were made under the *Access to Information Act*. When added to the court's previous year's backlog of 109 cases, the court's caseload of access cases was 164 files. However, as a result of intervention by the Commissioner, together with the introduction of the new practice direction, 40 cases were discontinued and 37 judgments were issued — an all-time record in access litigation. The present backlog of access cases in the Federal Court is 87 files, the smallest backlog since 1989.

The Federal Court deserves congratulations for its sensitivity to the concerns about delays in access

cases and for its quick action in finding a practical solution. In the long run, it is to be hoped that the court will adopt special rules for access cases as the law contemplates. Pending the court's review of its rules (along with the Commissioner's proposals for new rules), this practice direction is an important step in the right direction.

Of course, a new process requires a period of adaptation. In this instance, Federal Court registry officers have had to become familiar with the practice direction and its implicit pro-active role for the registry in enforcement. The Commissioner is grateful to them for their professionalism in better ensuring that members of the public and legal profession understand and comply with these procedural changes.

Life before the practice direction

Since 1992, the Commissioner's office has made a concerted effort to cajole, persuade, prod, and nudge parties to third-party (section 44) cases to bring matters to resolution. For the cost of the $50 filing fee, businesses could effectively delay information disclosure for years because the Justice department simply did not defend these cases vigorously.

In fiscal year 1993-94, the Commissioner intervened to secure the speedy resolution of four section 44 cases. As a result, there are now only nine remaining section 44 cases which pre-date 1991.

At the beginning of the reporting year, 17 section 44 cases involving inspection reports of air carriers were pending before the court. The Commissioner's office was instrumental in securing the resolution of most of them and there are now only three remaining.

Unfortunately, the Commissioner's office also discovered that unreasonable administrative delays in the disclosure of information may sometimes occur even after the legal battle is over. In one case, Perimeter Airlines Ltd. v. the Minister of Transport (Federal Court No. T-2727-89), the requester, a Winnipeg journalist, received a package of information from Transport Canada in December 1993. Inside were copies of audits on Perimeter Airlines of Winnipeg — documents the reporter had sought back in October 1989 when she filed an *Access to Information* request.

Four years later, it was stale news that Perimeter Airlines Ltd. flew aircraft in the mid-1980's whose equipment or instruments malfunctioned. It was not front page news that the airline asked pilots to exceed maximum flying hours. A pilot whose flight crashed through the roof of an office in 1987 had logged 110 hours beyond flying limits for three months before the accident.

The news to the journalist, however, and then to readers of the newspaper's front page, was that Perimeter for $50 had easily blocked disclosure of audits for years — audits that transport officials said could not lawfully be kept secret.

The journalist's case was among scores of third-party cases that languished in the Federal Court where their movement was glacial. Perimeter Airlines had agreed to release the audits in March 1993 when the Commissioner's office made it known to the air carrier that it was ready to intervene.

It was expected that Transport Canada would promptly disclose the records. To the Commissioner's surprise the Justice department did not file for discontinuance of the application for review until May 21, 1993. Moreover, it was not until December of 1993 that the Justice and Transport departments actually arranged to deliver the records to the requester.

It goes without saying that disclosure should always be made promptly following dismissal of any third-

party application for review or after a discontinuance is filed with the court. Yet it seems that the government must be reminded of the obvious from time to time. The commissioner will be monitoring similar situations.

The Commissioner in Federal Court

In Wells v. the Minister of Transport and the Information Commissioner (Federal Court No. T-1729-92 and T-2l60-92) the Associate Chief Justice decided that the Commissioner's investigative process, findings and recommendations were not subject to review by the court under section 41. The court agreed with the Commissioner that the only matter that can be made subject to an application for review is the decision of a government institution to refuse disclosure of requested records to a requester.

A similar issue was raised in Cloutier v. the Prime Minister and the Information Commissioner (Federal Court No. T-25-94). Mr. Justice Rouleau allowed the Commissioner's motion to be deleted as a party-respondent to the application for review. Any review application under the Act must be made against the head of the government institution who made the decision. The Commissioner is not a potential respondent in a review
application under the Act.

In the Information Commissioner v. the Department of National Health and Welfare (Federal Court No. T-1610-93), the Commissioner made an application for review on behalf of the requester, a lawyer for the Non-Smoker's Rights Association, of the health department's refusal to disclose submissions received from the Canadian Tobacco Manufacturers Council concerning proposed amendments to the regulations governing health warnings on cigarette packages and cartons. The department decided that the council's submissions could be kept secret under the "advice and recommendations" exemption. The Commissioner did not agree that submissions from those outside government could be kept secret.

During the litigation process, the Health Minister decided to disclose the records. The Commissioner withdrew the court action.

There was a similar turn of events in the case of the Information Commissioner v. the Atlantic Pilotage Authority (Federal Court No. T-368-94 and T-369-94). In this case a professional seaman sought access to financial information and the current contract awarded by the Atlantic Pilotage Authority (APA) to one of his competitors. In another related case, the same seaman was engaged in litigation with the Atlantic Pilotage Authority and sought access to fees and expenses paid to the APA witnesses. After investigation of both matters, the Commissioner recommended full disclosure. The Commissioner took the matter to court after the Atlantic Pilotage Authority refused to follow his recommendations. During the course of litigation the head of the Atlantic Pilotage Authority changed his mind and decided to disclose the records.

Something different happened in the Peguis Indian Band v. the Minister of Indian and Northern Affairs (Federal Court No. T-1297-92) and a related case: Robert Sutherland v. the Minister of Indian and Northern Affairs (Federal Court No. T-2573-93). In these cases a member of the Indian Band asked to see a funding agreement between the minister and the Indian Band, as well as financial audits performed as a result of the agreement. On being informed by the department of this access request and that the department intended to disclose some of the records, the Peguis Band Council applied to the Federal Court to block disclosure of *all* the requested information. Unfortunately, the department did not inform the requester that he had a right of complaint to the Information Commissioner until some nine months later.

Even more surprising, when the band member complained to the Information Commissioner, the minister's officials did not co-operate with the investigation because the matter had been taken to court by the Indian Band. The Commissioner proceeded to complete the investigation, found the complaint to be justified and recommended to the minister that certain records be disclosed. The minister refused to accept the recommendation and the Commissioner, with the consent of the requester, sought and was given leave to intervene as a party to the court action. Shortly after the Information Commissioner's intervention, the Peguis Indian Band agreed to withdraw its challenge of the minister's decision to release part of the records.

Upon discontinuance, Mr. Justice Rothstein ordered costs of $1,750 to be paid by the Peguis Indian Band to the band member who had to hire a lawyer and appear before the Court of Appeal on his right to appear as a party in the case. The matter of exemptions applied by the minister was argued on February 25, 1994. Judgment was reserved.

In another court case, the Information Commissioner sought leave to intervene in a case before the Court of Appeal dealing with the phrase: "record under the control of a government institution", found in section 4 of the Act. This phrase is pivotal to the whole application of the access law since the right of access only applies to such records. In Canada Post v. the Department of Public Works and Michael Duquette (Federal Court of Appeal file no. A-371-93), the issue is whether the decision of Public Works Canada (an institution covered by the Act) to disclose some records it holds by virtue of its property management services to Canada Post (an institution not covered by the Act) is valid. It is valid if the records are under its "control", but not so if the records are under the control of Canada Post.

At trial, the court concluded that the decision of Public Works Canada was valid. Strange to say, however, at trial Public Works Canada chose not to defend its decision: It simply appeared and took no position. When it became known to the Information Commissioner that the government intended to take the same hands-off approach at the appeal level, he sought leave to intervene to advocate a broad interpretation of the term "control".

Interpretation and legal meaning to be attributed to the phrase "record under the control of a government institution" will directly affect the right of every person to be given access to government information under the Act. Those rights include the right to have government decisions reviewed independently of government, the ability of the Commissioner to carry out his mandate and the ability and jurisdiction of the Federal Court to review any decision to disclose, or to refuse to disclose, records. The progress of this proceeding will be reported next year.

Federal court decisions

During fiscal year 1993-94, the Federal Court Trial Division issued four other decisions related to *Access to Information* litigation. Three of these decisions have been appealed to the Federal Court of Appeal.

The first has already been referred to: In Canada Post v. the Department of Public Works and Michael Duquette (Federal Court No. T-2059-91; under Appeal in A-372-93), Mr. Justice Rothstein decided that any record in the material possession of a government institution is a "record under the control of a government institution" and subject to the *Access to Information Act*, without consideration to the manner in which the information in records came into the hands of the government institution.

In Canada Post v. the Department of Public Works (Federal Court No. T-284-94; under appeal in A-

607-93), Mr. Justice McKeown, came to the conclusion that the decision of a minister to disclose requested records under the *Access to Information Act* cannot be reviewed under section 18 of the *Federal Court Act*. Any application to review such decision of a minister must be made under the provisions of the *Access to Information Act* before the Federal Court.

In Keddy v. the President of Atlantic Canada Opportunities Agency (Federal Court No. T-2296-91), Mr. Justice McKay decided in August 1993 that the records at issue constituted financial and commercial confidential information properly exemptible from disclosure under paragraph 20(l)(b) of the Act. The court supported the Information Commissioner who had reached the same conclusion after investigating the requester's complaint.

In the opinion of the court, the factual considerations which justify exemption from disclosure of the consultants' reports are the following: some individuals sought financial assistance from the agency and filed confidential consultants' reports. These individuals made their applications on the agency's forms which provide that information given by these individuals will be kept confidential. The agency consistently treated the information supplied in a confidential manner. In addition, each of the consultants had expressly prohibited in writing those for whom reports had been prepared from disclosing the reports without the consultants' consent.

In Dagg v. the Minister of Finance, (Federal Court No. T-2662-91; under appeal in A-675-93), Mr. Justice Cullen concluded that names, signatures, identification numbers, hours worked and whereabouts of public employees contained on a department's after hours sign-in sheets should be disclosed. In his view, such information does not constitute "personal information" as defined by the *Privacy Act*, and, hence, does not attract privacy protection. This decision runs contrary to the conclusions reached by the Information Commissioner after investigation of the matter. He considered the privacy invasion from the disclosure to be serious. The Privacy Commissioner, too, is concerned about the implications of this decision and has obtained leave to intervene in the appeal to defend the privacy interest at stake.

In Clerk of the Privy Council v. Ken Rubin *(*Federal Court of Appeal No. A-245-93), the issue was whether correspondence and other communications between a government institution and the Information Commissioner during an investigation are accessible following an investigation's completion. The government institution, relying upon section 35 of the Act, refused to disclose the documents on the grounds that the Information Commissioner's investigations must be conducted in private. It also argued that disclosure of the requested information could reasonably be expected to cause prejudice to the Commissioner's investigations.

The Court of Appeal agreed with the argument that section 35 shields information from disclosure. The court held that the confidentiality of representations made to the Information Commissioner during an investigation of a complaint must be preserved, save in limited circumstances. In this case, the court found that the complainant had no right of access to them.

Table 1

STATUS OF COMPLAINTS

	April 1, 1992 to Mar. 31, 1993	**April 1, 1993 to Mar. 31, 1994**

Pending from previous year	232	241
Opened during the year	729	768
Completed during the year	720	733
Pending at year-end	241	276

Table 2

COMPLAINT FINDINGS

April 1, 1993 to March 31, 1994

	FINDING					
CATEGORY	**Resolved**	**Not Resolved**	**Not Sub-stantiated**	**Discon-tinued**	**TOTAL**	**%**
Refusal to disclose	202	4	163	9	378	51.6
Delay (deemed refusal)	180	-	28	13	221	30.1
Time extension	18	-	20	-	38	5.2
Fees	20	-	17	4	41	5.6
Language	-	-	1	-	1	.1
Publications	-	-	-	-	-	-
Miscellaneous	28	-	24	2	54	7.4
TOTAL	448	4	253	28	733	100 %
100%	61.1	0.6	34.5	3.8		

Table 3

TURN AROUND TIME (MONTHS)

CATEGORY	91.04.01 - 92.03.31*		92.04.01 - 93.03.31		93.04.01 - 94.03.31	
	Months	Cases	Months	Cases	Months	Cases
Refusal to disclose	8.93	427	5.58	376	5.40	378
Delay (deemed refusal)	2.13	107	1.86	135	2.18	221
Time extension	3.11	71	1.55	73	2.54	38
Fees	2.45	23	1.79	35	2.96	41
Language	-	-	-	-	3.68	1
Publications	-	-	1.81	1	-	-
Miscellaneous	6.83	41	2.60	100	3.86	54
Overall	6.87	669	3.87	720	4.03	733

* 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, 1993 to March 31, 1994

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Agriculture Canada	12	-	3	1	16
Atlantic Canada Opportunities Agency	4	-	-	-	4
Atlantic Pilotage Authority	1	2	1	-	4
Atomic Energy Control Board	2	-	1	-	3
Bank of Canada	2	-	-	-	2
Canada Council	2	-	-	-	2
Canada Labour Relations Board	1	-	-	-	1
Canada Newfoundland Offshore Petroleum Board	-	-	1	-	1
Canada Ports Corporation	1	-	1	-	2
Canada Mortgage and Housing Corporation	1	-	1	1	3
Canadian Cultural Property Export Review	4	-	1	-	5
Canadian Film Development Corporation	1	-	-	-	1
Canadian Human Rights Commission	6	-	2	-	8
Canadian International Dev. Agency	1	-	-	-	1
Canadian Radio-Television & Telecommunications	1	-	5	-	6
Canadian Security Intelligence Service	12	-	7	-	19
Communications	11	-	6	-	17
Consumer and Corporate Affairs	2	-	5	-	7
Correctional Service Canada	7	-	5	-	12
Employment and Immigration	23	-	11	3	37
Energy, Mines and Resources	4	-	-	-	4
Environment Canada	15	-	9	2	26
External Affairs	16	-	8	-	24
Federal Office of Regional Development (Quebec)	-	-	1	-	1
Federal Provincial Relations Office	10	-	-	-	10
Finance	12	-	4	-	16
Fisheries and Oceans	13	-	4	2	19
Forestry	1	-	-	-	1

Table 4

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Grain Transportation Agency Administrator	-	-	1	-	1
Health and Welfare	11	1	3	3	18
Immigration and Refugee Board	57	-	41	5	103
Indian Affairs and Northern Development	9	-	3	1	13
Industry, Science and Technology	5	-	12	2	19
Justice	10	-	4	-	14
Labour Canada	1	-	-	-	1
National Archives of Canada	5	-	17	-	22
National Capital Commission	2	-	1	-	3
National Defence	31	-	20	1	52
National Film Board	2	-	-	-	2
National Parole Board	-	-	1	-	1
National Research Council	-	-	1	-	1
National Transportation Agency	1	-	-	-	1
Office of the Superintendent of Financial Institutions	1	-	-	-	1
Patented Medicine Prices Review Board	-	-	1	-	1
Privy Council Office	53	-	8	2	63
Public Service Commission	1	-	-	-	1
Public Works	12	-	1	1	14
Revenue Canada - Customs & Excise	19	1	5	2	27
Revenue Canada, Taxation	4	-	6	-	10
Royal Canadian Mint	1	-	1	-	2
Royal Canadian Mounted Police	1	-	15	-	16
Secretary of State	11	-	8	-	19
Security Intelligence Review Committee	1	-	3	-	4
Solicitor General	2	-	-	-	2
Supply and Services	10	-	7	1	18
Transport Canada	32	-	12	1	45
Transportation Safety Board	-	-	2	-	2
Treasury Board Secretariat	1	-	-	-	1
Western Economic Diversification	-	-	4	-	4
TOTAL	448	4	253	28	733

Table 5

GEOGRAPHIC DISTRIBUTION OF COMPLAINTS (by location of complainant)

Closed: April 1, 1993 to March 31, 1994

Outside Canada	15
Newfoundland	23
Prince Edward Isl	-
Nova Scotia	29
New Brunsw	5
Quebe	166
Nationa	196
Reg	
Ontario	121
Manitoba	11
Saskatchewan	9
Alberta	70
British Columbia	78
Yukon	-
Northwest Territories	10
TOTAL	733

Case Summaries

Delayed departure
(01-94)

When a Newfoundland man asked the Department of National Defence (DND) for correspondence with the Quebec government about military flight training at CFB Goose Bay, the delay he encountered was unconscionable.

He filed his request in mid-February, 1992, then heard nothing at all for seven months. The first word from the department was disappointing. It wanted another six months to search for the letters and consult with the Quebec government. It also wanted $2,000 in fees and a customary advance. At that point it stopped all work on the case.

The man found it not only disconcerting, but surprising. "The department has been involved in a federal environmental assessment review of the training since 1986," he wrote in early October. "One would think that DND would be eager to keep the requested documents easily accessible so that they would satisfy the needs of public communication, ongoing discussions with the Quebec government, as well as the needs of the environmental assessment review panel."

A month later, the matter of fees was resolved. The man agreed that the search be narrowed to one location and the department agreed to reduce the fee estimate from $2,000 to $300. It began work on the case in mid-November when it received the deposit.

Still more delays were to come. The 30-day estimated time to retrieve all the letters stretched into 2 1/2 months. The department had several explanations: it gave more attention to other requests filed by the man; the division was short-staffed; one key official was unexpectedly absent for personal reasons.

Then DND officials needed time to consult with Quebec officials — a further month and a half—and to get their minister's approval to release the letters. Another 29 days passed before the minister gave his nod. The letters were released in late April, 1993.

Although the man had agreed to narrow the search, 161 days had elapsed from start to finish — just a few days short of the 180 days estimated to search widely for the correspondence.

The Information Commissioner pointed out that the Defence Department took an inordinate time right from the start. By law, the department was obligated to reply after 30 days, even if only to give notice of a reasonable extension of time for a search.

The Commissioner also concluded that a 180-day time extension was excessive. To make matters worse it arrived six months late. To top it all off was a one-month delay in waiting for the minister's signature.

All of this was unacceptable and it earned the department a place on the Commissioner's short list of departments in line for review by the Commissioner's office.

A vignette of errors

(02-94)

It is always unfortunate when errors in communication deprive people of rights. Such was the case in the Department of Fisheries and Oceans when a frequent user of the *Access to Information Act* filed one of his many requests for polls or surveys conducted after March, 1993 to the time of his request in mid-May.

Access to Information and Privacy (ATIP) officials in the department quickly got in touch with the Communications Directorate where public opinion sampling is contracted out to professional pollsters. In June, an official of the directorate told ATIP officials that of the two polls requested, one had already been released to the man in British Columbia and the second had not been completed by the time his request was filed with the department. Consequently, an ATIP official told the requester in late June that the information he wanted was not in the control of the department on the day he had asked for it.

The man knew better. He had been given only a copy of the first poll's questionnaire, and had in hand only a portion of its results. He wanted them all and complained to the Information Commissioner that the department in fact had poll data it claimed not to have.

The confusion required some unravelling. The investigation showed that the communications department was wrong when it said the man had the first poll results. Had everyone checked facts and spelled out more clearly which polls were available, which portions of polls had been sent and which were unavailable, the man would have had no complaint.

As it turned out, the web was unravelled. In August, the man received some information and learned where he could obtain more.

At the end of the day the Information Commissioner concluded that department had not intended to deny anyone's rights. Rather, errors were born of miscommunication and inexperience.

On wearing two hats
(03-94)

The access law allows government agencies to refuse to release advice given departments or cabinet ministers. The rule does not apply, however, when that advice comes from consultants.

It does not allow, in the Information Commissioner's judgment, for departments to define who is, or is not, a consultant as they wish. Consulting is not in the eye of the beholder.

A case illustrating this position arose late in 1992 when a journalist asked for a copy of the report by Judge Rene Marin on the Ports Canada police. Early in 1993, the Canada Ports Corporation gave its reply — a severely expunged copy, minus, among other information, the judge's conclusions and recommendations.

Canada Ports Corporation held to the view that Judge Marin, although not its employee, was not a consultant. He was an ex-officio member of the corporation and sat on its Canada Ports Police Committee.

Nevertheless, the judge was paid $60,000 for his work, a fact revealed to the journalist. How was he

paid? When an investigation began, the question was asked. As it turned out, he was paid as a consultant. The corporation quickly agreed to abandon all exemptions it had claimed for advice given to government.

Although some who work for government may wear one or more hats, as the case amply illustrates, the headgear that counts is the hat that is paid for.

Historical footnotes
(04-94)

When an historian asked for information about Communist Party of Canada activities in Toronto during the 1930's, he received an unusual response. Officials at the Canadian Security Intelligence Service (CSIS) reviewed 2,291 pages of records and sent 1,798 — most with information in part expunged. He complained to the Information Commissioner that more than 20 per cent of the records had been completely withheld. He also wanted to know what lay beneath the ribbons of dark ink.

An investigator looked at each exemption separately; found that some were improperly claimed and persuaded CSIS officials to disclose some 200 pages with new information. The unusual aspect of the intelligence service's reply soon came to light. Officials said some pages had been withheld in their entirety on the assumption that the historian did not want to receive it. That sort of judgment call is out of bounds to the *Access to Information Act*.

Although the historian had said in the past that to reduce photocopying costs he did not want to receive copies of letterheads, signature blocks or other similar material, he was not given a choice in the matter this time. To resolve the situation, CSIS agreed to give him sample pages of information the investigator found improperly deleted. The historian wanted the rest. All information could be useful in his work.

The case serves to illustrate the point that value, like beauty, is in the eye of the beholder. Government officials take liberties if they guess whether information is useless and should not be sent to people who file requests.

Control and wild horses
(05-94)

An Alberta woman asked the Department of National Defence (DND) for tapes of meetings of a citizen's advisory committee — a group formed when Canadian Forces Base Suffield received complaints that wild horses roaming the base damaged the local environment.

The tapes were in the possession of a consultant hired by the Base Commander to work with the committee, record its concerns and submit its recommendations. When the department received the request, it replied that it had no control over the tapes and, as a result, they were not accessible under the access Act.

A complaint to the Information Commissioner and an investigation found that, although the department gave the consultant blank tapes and eventually had an employee transcribe them, it had only a copy of the transcribed meeting minutes. It did not have the tapes. But could it be said that DND had control of the tapes, although not possession of them?

The investigation confirmed that the department hired the consultant, but it was clear from the contract and a statement of work that the committee, not DND, directed her work. Although DND paid the consultant and supplied equipment to the committee, it asked in return only that the department receive a copy of the meeting minutes and recommendations aimed at solving the wild horse problem.

Not only did the department not have possession of the tapes, it had no apparent legal rights over them. As a result, DND was correct in its statement that it did not have control of the records requested.

The case served to illustrate how difficult it can be to determine whether or not information is subject to the access law.

The less formal the better
(06-94)

When a Stoney Creek, Ontario man tried to discover the identity of companies importing a substantial amount of tubing and valves into Canada, his attempt through the *Access to Information Act* launched a torrent of correspondence and a lengthy investigation.

The customs and excise division of Revenue Canada held the view that release of information supplied it by importers in 1990 might harm the importers' business. As a result, they would be reluctant in future to volunteer information to the department. As it had in the past on requests about imports, Revenue Canada applied subsection 20 (1) of the Act to withhold the importers' identities. The provision clearly states that departments must protect records that contain confidential commercial information given to them by third parties, or information the release of which might reasonably be expected to harm a third-party's competitive position.

After waiting almost six months, the requester received a computer-created list that showed only two columns. In one were 735 separate dollar amounts; in the other, the province to which the products were destined. Next he complained to the Information Commissioner whose investigative staff saw that a sweeping application of paragraph 20 (1) (b) to each of more than 700 corporations was the reason the requested names and addresses had been withheld.

Meetings were held, written exchanges took place between the Information Commissioner's staff and Revenue Canada officials. At length — some 18 months after receiving the request — the department sent a notice to each of the importers. Did they have well-founded objections that might give substance to the exemptions the department had cited?

A few company officials responded angrily, believing it to be entirely unfair that their corporate information might be revealed. The lion's share of the companies either had no objection or didn't respond at all to Revenue Canada's letter. Those corporate names and addresses were released. After more discussions and another round of notices, more names were released by the department. The final tally: 502 of 735 names were released, but fully 2 1/2 years after they were first requested.

The true irony of the piece emerged at its conclusion. On the advice of the access to information and privacy co-ordinator's office for Customs and Excise at Revenue Canada, the man got what he wanted by going elsewhere. As it turned out, the department of Industry, Science and Technology readily supplied the information on major importers of tubing and valves. The informal request, in the end, furnished more useful information than the long access-to-information struggle.

The alternate route is not available to everyone. The industry department does not automatically provide information to everyone who simply asks for it, without question.

The case clearly points out the need to reconcile the formal access rights guaranteed everyone by law, the stand taken by Revenue Canada and the occasional availability of the industry department's information.

Inspecting inspectors' minutes
(07-94)

An Ontario man, both a part-owner and a creditor of a firm that fell into bankruptcy, filed an access to information request to the former Department of Consumer and Corporate Affairs. Could he view the minutes in departmental files of meetings of inspectors elected by creditors to advise and direct the court-appointed trustee?

Mindful that the *Access to Information Act* does not allow disclosure of confidential financial information given to government unless the person who provides it gives consent (section 20), department officials called the trustee. Although the minutes were dubbed a record of inspectors' meetings, the minutes were kept by the trustee who attended, along with inspectors who represented all creditors and lawyers who represented other parties to the bankruptcy. The trustee did not consent to release of the minutes. As it happened, the inspectors had passed a motion that the minutes be kept confidential.

The man filed a complaint with the Information Commissioner, and it raised the question whether inspectors had authority to pass the resolution. The March 1993 complaint prompted meetings and calls between the commissioner's office, department officials, the trustee and the complainant. In the end, as is often the case, the legal question went unresolved in favor of a practical solution.

In this instance, the inspectors agreed that the minutes need not be confidential. The trustee agreed to release the information and the department removed its objection. The case was closed within a matter of months.

Weighing public interest
(08-94)

The access law gives a strong measure of protection to the secrets or confidences that companies give the government voluntarily or as required by law. It also entrenches the public interest by giving officials the right to disclose confidential or sensitive business information if public health, public safety or environmental protection is at risk. How to determine this public interest override? How best to weigh corporate interests against the public's?

In the mind of a journalist who complained to the Information Commissioner, public interest is absolute. There should be no need to consult with the companies.

He complained when his request for audit reports on 21 meat-packing companies was delayed by officials at Agriculture Canada. They had correctly taken note of section 20 of the *Access to*

Information Act which prohibits disclosure of confidential, competitive or other sensitive material that could harm a business *unless* an overriding public interest exists.

Meat inspection is a service to safeguard public health, the journalist's argument went. It is not a service to benefit meat-packers. Therefore, only public interest should govern the question to release, or not to release, inspectors' reports.

The law clearly says government officials *must* refuse to release third-party information unless public interest *outweighs* any financial loss, competitive harm or interference with a contract or negotiations. Neither is absolute. Both must be put on the scale.

To make even a modest effort to weigh interests, officials must hear the views of the people who might be harmed. The journalist presented the case for public interest. Officials were correct to let packers have their say.

Of the 21 companies, a dozen didn't reply to Agriculture Canada officials, three agreed to release of information and six had objections. The department informed them that it favoured release and one firm promptly filed for a review in Federal Court.

Although he could not agree with the journalist that the department's consultations were unnecessary, the Commissioner found the exercise illuminating. The only fair and reasonable way to balance public interest and corporate loss is to do some measure of fact-finding, including facts from corporations.

Seek and ye shall find
(09-94)

An Ontario woman who lost a portion of her memory in an accident in the late 1960s brought an unusual and touching case to the Information Commissioner.

When memories returned several decades later, she began to try to trace long-lost colleagues in the Royal Canadian Air Force (RCAF). She used listings in a magazine read by former service personnel to no avail. She recalled one name and thought that if she reached that woman, other friendships could also be traced and revisited.

Her search for government documents began in the National Archives of Canada where records of persons who have served in the military are kept long after their release from duty. There she was told that staff workload is heavy and attention is paid first to inquiries that help former service people directly, either financially or socially.

On the advice of an access to information official at the archives, she next turned to the Department of National Defence. There she filed an access to information request. Within days she was told the department could do nothing. It sent all personnel records to the archives five years following anyone's release from the military.

Disappointed and irritated by the tone of the letter and being bounced back to whence she came, the woman complained to the Information Commissioner.

The investigator assigned to the case found that the defence department had searched for records in its

automated personnel index, but the index began in 1973. No helpful information was located. Next the investigator approached an access to information officer at the archives' Personnel Records Centre. A sympathetic officer went out of his way to find the name and the address of the former colleague. Still a problem remained.

The information could not be released without breaching the other woman's privacy rights guaranteed in the *Privacy Act.* A solution was found. The Ontario woman sent a letter to archives officials who mailed it on. In a letter of gratitude, the woman told the Information Commissioner that she had been able to get in touch with her former RCAF colleague.

Overseas scanning
(10-94)

A man asked the External Affairs department for files on his wife's disappearance in Central America. Within days he received 30 letters and memos between officials in Ottawa and their overseas counterparts. Still, he believed there was more information and complained to the Information Commissioner.

At the outset the department claimed that everything it had on the matter was disclosed, albeit with some deletions in keeping with the law. When an investigator looked closely, however, he found evidence that another file might exist in a foreign office.

Reluctantly, officials telexed several overseas missions. When they heard nothing, they made the assumption that the missions had nothing to report. The Commissioner's staff again prodded. A department official telephoned Guatemala. More information was found and sent to the man.

In the end, the additional files were not difficult to locate. If the will had been there from the outset, 10 months would not have passed between request and reply. Department officials have a duty to gather information, even if the search must include offices far beyond Ottawa. Like truth, information that is partial, is a good deal less valuable than when it is whole.

That distant feeling
(11-94)

When a Nova Scotia man asked a government office in Halifax for information, he received everything he requested. The manner in which it was presented, however, caused him to doubt that the response was complete. He complained to the Information Commissioner.

At issue were records of long distance calls made from a telephone in the Halifax office of Supply and Services Canada during three months of 1992. The listings were sent. Several pages were blanked out entirely, others had portions obliterated. There was no explanation.

The investigation soon showed that the numbers held back were listings of calls made on other telephone lines. As it turned out, the information was of no interest to the requester.

However, the department might have avoided the complaint altogether, if it had followed a Treasury Board Secretariat bulletin on dealing with non-relevant information.

Discuss the situation with the requester, the guideline advises, explaining that agreement to process just

the relevant section will result in savings of time and expense. In all cases, the guideline goes on, the department should indicate in the response to the requester that the information is part of a larger document which deals with other topics.

The Information Commissioner takes the view that departments should talk with requesters before deleting so-called information that is dubbed non-relevant information. Without an agreement, the department has an obligation to indicate the basis upon which even non-relevant information is withheld. One of the law's exemptions may apply. If so, it should be cited.

Lack of relevance alone is not a ground for exemption or exclusion of information from a record. The department was reminded of the proper and courteous procedure.

In this instance, a little good long-distance chat or letter before the listings were sent might have prevented the misunderstanding and a distant complaint.

Poll after poll: The end of the affair?
(12-94)

In a case already discussed in previous annual reports, the Information Commissioner turned to Federal Court when the Privy Council Office denied researchers' and journalists' requests for public opinion polls on constitutional matters. The case was heard months before the referendum on the Charlottetown agreement on the Constitution, although the court's decision came down after the vote.

The government claimed that release of the records could reasonably be expected to harm federal-provincial relations — a section 14 exemption under the access law. The court found no direct link had been made between the polls' release and harm to those delicate relations and ordered the records released. Those significant events took place in the summer and autumn of 1992.

It was disappointing and disconcerting to journalists, researchers and the Information Commissioner when the Privy Council Office continued to refuse access to poll results even after the court decision. The court's finding had done nothing to alter the penchant for secrecy. A complaint was lodged with the Information Commissioner in early December.

The Commissioner wrote the Clerk of the Privy Council and received assurances that the polls would be released. Months passed. In mid-April, action finally followed words. Some records were disclosed but the PCO clung to section 14 to keep a few pages secret — for example, among them was a graph that plotted the public's advice to Quebec's Premier should a constitutional agreement offer the province much, if not all, of what it wanted.

The odd aspect of the PCO's heel-digging was pointed out: the information it clung to in graph form had been released as narrative. There were vigorous protestations that the graphic presentation had more impact than a narrative version and would be more susceptible to misinterpretation. When the Commissioner found no merit in this and other similar straw-grasping, the PCO released the remaining records.

Whether the new government will be more open with poll results remains to be seen. The next acid test is most likely to be at the time of any referendum in Quebec on the province's future.

Dollars and sense
(13-94)

The Information Commissioner faced an unusual choice: support what some may consider a breach of investors' privacy or deny information that could bring them a small profit. Some choice!

It came about when an investigative accountant in the Ottawa area complained that the Department of Supply and Services had denied his request. He wanted the names and addresses of people who had not redeemed shares in Petro-Canada Enterprises Incorporated, a Crown corporation dissolved in 1984. He wanted to locate them and, for a fee, help them to redeem their outstanding shares.

At the outset, the government recorded some 42,000 unredeemed shares — each valued at $120.14. Officials sent letters and placed ads in newspapers. Most shares were redeemed. By the time the accountant made his request in February, 1992, there were 3,665 shares outstanding, valued at $440,313 in total.

The department refused the request on the grounds that names, addresses and financial information are personal. The *Privacy Act* clearly protects against release of such information unless a case can be made that benefit to the individuals clearly outweighs the invasion of privacy.

The Commissioner suggested to department officials that unless they were prepared to make another effort to locate owners of the outstanding shares, perhaps the accountant should be allowed to make the attempt. Department officials weighed the alternatives and, as well, asked the Privacy Commissioner for his view of the case. (He strongly disagreed with any disclosure.)

In the end, department officials decided to renew efforts to locate the shareholders. The Information Commissioner accepted that approach as preferable to release of the information. As a result, the department sent more letters to the last known addresses of the shareholders and news releases to some 100 newspapers in Canada and the United States. A balance between access to information and privacy rights was preserved.

Modest proposals
(14-94)

Firms that want to do business with government sometimes turn to the *Access to Information Act* in hopes of learning why a competitor won a contract. Departments on occasion have been inclined to view tenders sent in response to a Request for Proposals (RFP) as entirely confidential. They have also held that disclosing proposals could injure the commercial or financial interests of the firms that submitted them. As a result, they have cited section 20 of the Act to deny access.

Two requests before the Department of Transport (DOT) and an investigation by the Information Commissioner, however, showed that not all portions of all proposals need be inaccessible. When a British Columbia man asked for copies of proposals submitted in reply to two RFPs, department officials sent him a copy of his own bid on one contract and information on the Tender Register about the winner of the other. He learned the name of the firm and the amount of the winning bid.

The department withheld six other proposals, applying section 20. The investigation prompted by his complaints to the Commissioner soon found that much of the information in the withheld proposals was

derived from the tender documents given by the department to all competitors.

That being the case, those portions of the proposals were not confidential. The information was publicly available. All firms had the benefit of the same information. Nor was it reasonable to expect that disclosure of information which every firm had at an early stage in the bidding process would cause financial loss or interfere with contractual negotiations. Subsections 20 (c) and (d) of the law did not apply.

The Transport Minister agreed to the Commissioner's recommendation that the proposals be severed. He also agreed to release the full Tender Register which gave the names and bid price of all firms whose submissions qualified.

The man received something short of the full proposals. He did get information that could tell him which firms would meet the minimum requirements wanted by the department and each firm's bottom-line price. He also had a look at how competitors package their proposals to government. He did not receive, however, detailed financial information or anything that would tell him whether firms offered more than the minimum.

This case did not solve the bigger question: Should the public know more about government contracts? This Commissioner believes it should, and addresses the issue elsewhere in this report. (See page xx.)

The RCMP's blanket exemption
(15-94)

In many parts of the country where RCMP officers provide provincial and municipal police services, agreements have been struck with provincial governments to withhold information requested from the RCMP. The agreements made sense at a time when many provinces had no freedom of information (FOI) law in place. To give citizens access rights to information held by officers of a federal agency who provide a service on behalf of a provincial government, when no other provincial service was open to such scrutiny, did seem incongruous.

Now most provinces have FOI laws; some are setting aside the roadblocks to RCMP records. Among them: the governments of British Columbia and Nova Scotia. The step should be applauded.

Unfortunately, an old agreement was not revoked in time to help a British Columbia woman gain access to some of the records she wanted concerning her son's death in a car crash. She filed her request in early January, 1993 and within days she was told of the exemption the RCMP must apply in light of subsection 16 (3) of the *Access to Information Act* which cites those agreements. There was no discretion. In March she complained to the Information Commissioner.

The investigator soon learned that the British Columbia government had informed the RCMP that it wanted to rescind the agreement — a logical development in light of provincial access rights slated to be put into place in B.C. that autumn. Since the agreement was still in force, the RCMP was right to refuse the woman's request. However, the Commissioner informed the woman of the imminent change and that she might get some records at a later date.

Rescinding these blanket confidentiality agreements is a healthy step. Other provinces should follow the British Columbia and Nova Scotia example.

Who's minding the shop?
(16-94)

Any reorganization of government holds potential to cause problems for people who expect, and deserve, prompt delivery of information — or service — from public servants. When duties are shuffled from one department to another, officials may be uncertain for a time about lines of authority. That time should be brief.

It certainly wasn't last year when a request for information was tied up, not in one, but in two forays into government restructuring. The request filed in March, 1993 came from a journalist who wanted information on the extent and nature in Canada of activities of Hong Kong-based secret societies known as Triads believed to be involved in crime.

He filed his request to Employment and Immigration Canada. It was there that public security aspects of immigrant selection were handled. Weeks later, after talking with a department official, he decided to narrow his request and asked only for information on file the previous year. He was promised a reply within the statutory 30-day period. By early May, there was still no answer.

The first hint of a real problem came in mid-July when the journalist was told that records were still not available. He was reminded of his right to complain to the Information Commissioner, which he did, but not promptly. When nothing had arrived three months later he lodged his complaint. An observer of politics and bureaucracies, the journalist quipped that he had surmised that a recent government overhaul was designed to improve service — not kill it.

What had transpired, the investigation discovered, was not only a question of official reluctance to make public the records. On June 25, the government of the day had made public its plans to have fewer ministries, to merge some and add duties to others. The Solicitor General was to be responsible for immigration policy under a new department of public security.

It was a firm intention, it was a firm announcement, but by late September when the information was ready, no one knew for certain who had the authority to sign its release. The complaint came only days before the October 25 election that changed the complexion of a great many things, including the plan to move portions of the immigration department to the new department of public security. The newly-elected government cancelled the move.

This second mini-restructuring left the matter of legal signing authority in more doubt. In the end, the new Minister of Citizenship and Immigration signed off the records. The date? It was November 29, some seven months after the request had been filed.

The longest period of delay had taken place in the department when officials haggled over whether information was to be released or withheld. The injury was compounded, however, by the lack of a clear designation of signing authority during times of transition. In future, care must be taken by senior officials to remember that administrative reorganizations do not take precedence over legal rights.

A staggeringly slow PCO
(17-94)

Affairs of the day and the business of government can tempt public servants to set aside one person's request for information. Perhaps it was with that thought in mind that Parliamentarians placed in law a 30-day deadline for first response and specific requirements for extended deadlines. Some government departments obey the law better than others. One that showed disregard for some time was the Privy Council Office (PCO).

An Ottawa man wanted to view several files from the 1970s McDonald Commission of Inquiry into the RCMP. He first applied for the records in December, 1991 and 30 days later received a reply that three months would be needed to talk with officials in other departments.

More than a month later those talks began with officials in the departments of Justice and National Defence, an investigation into the dawdling later showed. The views of those officials were received by mid-March, then little was done on the case for five months.

In early December, 1992 the man also lost his right to complain to the Information Commissioner. (Parliament placed a one-year time limit on the exercise of that right.) He started all over again. He applied to the PCO for the same information. Some 30 days later he received the reply that two months would be needed to talk with officials in other departments.

This time around, PCO also thought to consult with Mr. Justice D.C. McDonald, chairman of the commission of inquiry, the Department of External Affairs and again with the Justice Department. Its extended due date was in early April, 1993. By June, nothing had been released; the man turned to the Information Commissioner. He was understandably concerned that the prolonged consultations had not taken place after he made his first request.

PCO officials begged off with explanations that the matter was complicated and their workload heavy; the reply from Mr. Justice McDonald prompted another close look at the files. It took many phone calls and a meeting between the Commissioner's officials and PCO officials to prod the department.

At length, in mid-November the files were released; the Commissioner said that almost two years to respond to an access request was unacceptable by any standard. The PCO, too, was added to the Commissioner's short list of government institutions tagged for an early audit by the Commissioner's staff.

Where there's smoke . . .
(18-94)

Non-smoking advocates wanted to learn what tobacco manufacturers had told Health and Welfare Canada in response to a public call for comments about proposed tough warning labels on cigarette packages.

The department objected to opening to scrutiny the representations received from groups on both sides of the debate over more forceful warning labels under the *Tobacco Products Control Act*. To justify secrecy, the department cited paragraph 21 (1)(a) of the *Access to Information Act* which gives departments the discretion to refuse access to records providing advice to a department or a cabinet minister. Health officials feared that disclosure would hurt future discussions with lobby groups.

When the Information Commissioner received a complaint, he persuaded health officials to ask all

groups that had commented on the proposed warning labels whether they would agree to release their opinions. Most had no objection. Among them: Physicians for a Smoke-Free Canada, the Canadian Council on Smoking and Health and Imperial Tobacco Limited.

Their views were released to the Non-Smokers' Rights Association advocate. Two opinions from the Canadian Tobacco Manufacturers Council, however, stayed secret. The department held firm that the council's submission was advice to the government. It contended that paragraph 21 (1)(a) of the access Act could apply whether that advice came from public servants or any member of the public.

The Information Commissioner opposed the department's position that advice received from non-governmental sources could be kept secret. He wrote: "We believe that the application of (Sec. 21) is limited to serving the principle of ministerial accountability by protecting for 20 years the *internal* policy and planning processes of government institutions."

When the department was unmoved, the Commissioner took the matter to Federal Court on behalf of the requester to force disclosure. The case was set to be heard in Ottawa in early September. In late August, the department released the submissions.

Waiting for Godot
(19-94)

Journalists who are driven by the next nightly newscast or next daily newspaper are not schooled to be patient. A competitors' bite may nip at their heels and there is often the fear that a story will vanish. An Ottawa journalist complained to the Information Commissioner when the information he wanted for his story failed to appear. First it was thought to be in a ship's container, then it was thought to be sitting in quarantine.

The journalist wanted all records about the detention by Canadian Armed Forces of prisoners in Somalia. He asked for them in early July and complained a month later when the Department of National Defence (DND) said it required 60 days to produce the records which were en route from Somalia by ship. The journalist correctly surmised that some records did exist in this country and wanted to see them while waiting for the remainder.

DND officials said they believed they had none, but the Information Commissioner's investigator helped direct them to a few pages by locating a reference in departmental documents. The department was asked to consider preparing those records while the remainder sat in quarantine. The department declined; there were very few records and those were thought to be subject to an exemption.

By late September the quarantine had expired. Agriculture Canada enforced it to prevent any insect infestation. When the containers were opened, DND officials said they could find no more documents. The wait had been for nothing.

The Information Commissioner found, however, that DND officials had acted in good faith. They believed that a search through a large volume of records would be involved. In the end, the little they found in the DND Headquarters building in Ottawa was exempt under paragraph 16(1)(a) which protects information gathered during lawful investigations.

A pre-emptive strike?
(20-94)

When an Ottawa lawyer received an estimate from the Department of National Defence (DND) of fees to be charged for his information request, he was dismayed. Was a fee estimate of $1,690 to search and prepare the documents a pre-emptive weapon to dissuade requesters? He thought so and complained to the Information Commissioner.

At issue were the fees for the records of an audit and later investigation of the facilities management directorate at the defence department's headquarters. The lawyer's request for the records was filed in late June. Within weeks, DND officials replied with the estimate and a request for advance payment of $845. Of the total charge, an estimated $1,000 would be needed to cover the costs of excising portions of documents that could not be released and another $640 would be needed to prepare audio tapes.

An investigator confirmed that there was a huge volume of documents — some 3,327 pages — and 32 hours of audio tapes. It soon was apparent that some of those pages were transcripts of tapes. The information was there in duplicate, although the lawyer had not been told he would be paying for it twice. When he learned, he said the tapes would not be necessary. The fee estimate was reduced by $640.

The Commissioner concluded that a fee of $1,050 was reasonable and fair. Some 2,400 pages would be prepared for release, a task involving blanking out personal information and other data that required exemption. It was, at a minimum, a 100-hour task.

Fees should not be a deterrent to access requests, the Commissioner wrote. But taxpayers as a whole should not be paying too much of the costs for the benefit of one individual.

Exploring exceptions to exemptions
(21-94)

A Montreal man hoped to view documents sent to the Department of External Affairs by the United Nations Human Rights Committee in Geneva. In October, 1991 he asked for the records surrounding the UN committee's request for a stay of extradition from Canada of two persons. The department denied him the information, invoking paragraph 13(1)(b) of the *Access to Information Act* which exempts confidential information received from an international organization.

Within months he complained to the Office of the Information Commissioner. It soon became apparent that a number of issues faced the commissioner's investigator. Did the UN committee qualify as an international organization under the access Act? Yes, it did. Was the information transmitted from the committee to the department confidential? Certainly. The need for confidentiality of submissions made to it did not disappear with the passage of time.

The most contentious issue, however, was whether the External Affairs department considered the caveat in subsection 13 (2) of the Act which allows the release of confidential information if an international organization consents to disclosure? No, the department declined to seek that consent from the UN committee. It argued that even to make the suggestion to the committee would harm future dealings with the international organization.

The Commissioner's office spoke directly to officials of the committee in Geneva, then concluded that the access to information request could be properly refused.

A question of candour
(22-94)

A journalist's request for the report of a Department of National Defence (DND) board of inquiry raised a sensitive issue for the department and the Information Commissioner.

The DND inquiry was called following an incident at the Royal Military College in Kingston, Ontario. The department released a report so gutted that the nature of the incident remained secret. In fact, a death had occurred.

Puzzled by the heavily expunged export, the journalist complained to the Commissioner's office. An investigation showed that much of the report had been deleted to protect personal information exempt under section 19 of the *Access to Information Act*. Those deletions were not only reasonable, but mandatory under the law.

Significant portions were also deleted, however, under the guise of a discretionary exemption, subparagraph 16 (1)(c)(ii). It protects the identity of confidential sources of information in investigations. The Commissioner's office and the Defence Department had gone that route before.

The department held the view that disclosure of details given a board of inquiry would tend to deter witnesses before other boards. They would show less candour, the argument went.

The Commissioner's office, on the other hand, believed the exemption was reasonable only if it were accompanied by evidence that release of the specific information was likely to cause injury. No evidence was presented. To apply the exemption without meeting the injury test was a misapplication.

In fact, the same argument had been made in an early case concerning board of inquiry records. As a result, the department had promised to exercise restraint in applying the exemption to protect confidential sources.

Early efforts to negotiate with the department failed. Officials who invoked the exemption stuck to their guns. Up the ranks, the department was reminded of its earlier undertaking. It reconsidered, honoured its commitment and released some information that had been expunged.

While much remained secret to protect personal privacy, the department's long-standing policy to blot out the identity of witnesses before boards of inquiry was successfully challenged.

Who's asking?
(23-94)

Personal information in the hands of government is rightly protected under section 19 of the *Access to Information Act*. As a result, departments prepare records for release by deleting all personal data. The need for the protection evaporates, however, when the personal information is about the person who has filed the request.

A complaint to the Information Commissioner illustrates the point. A Quebec man asked the Department of Communications for information about a neighbour's complaint of his use of an amateur radio. The department replied by deleting from the records it released any information that would identify the amateur radio operator.

That would be dandy if the access request had been made by anyone else. But if the requested personal information is about the requester, then the privacy exemption does not apply.

On reflection, the department concurred and released the personal data. In most instances, the identity of the requester should be of no consequence to the department. In this case and other similar instances, departmental access to information and privacy co-ordinators need to pause and ask: Who's asking?

Public servants, private lives
(24-94)

A woman who wanted the records of telephone calls placed from several phones in a government office, and the department's response, clarified an aspect of the matter of privacy on the telecommunications network.

She asked for records of calls made from 1990 through 1992 through the Government Telecommunications Agency's (GTA's) intercity calling service. In return, the Department of Fisheries and Oceans provided the dates, duration, and the communities that received the calls. Department officials deleted, however, the specific telephone numbers at the other end of the lines, citing the need to protect privacy of both parties.

The woman complained to the Information Commissioner who then had the task of determining whether disclosure of more details of the records would be an unwarranted invasion of privacy? The Commissioner agreed with the department and the Government Telecommunications Agency that people who use government telecommunications have a right not to be monitored. Unless both the callers and persons at the other end of the line could give consent to relinquishing their privacy, the number called should not be revealed. Nor was it plausible that consent could be given because far too many calls had been placed and received.

The Commissioner was not able to support the complaint. He believes that public officials are entitled to a significant measure of privacy protection, especially from forays into their phone records.

The sum of the parts
(25-94)

The maxim that the whole is greater than the sum of the parts hold true for computer-stored data. A case supporting that fact emerged in a dispute between a Richmond, B.C. man and Canada Mortgage and Housing Corporation (CMHC).

The man asked for information about the number of rental units in apartment buildings in Vancouver. He wanted only the number of units, not the rent paid for each. The Crown corporation refused, invoking subsection 18(a) of the *Access to Information Act* which allows departments to exempt information considered of substantial commercial value to the government.

As it happened, CMHC paid enumerators to visit apartment owners and record their data in return for a promise of confidentiality. Then it gathered up enumerators' reports and produced a computer print-out it called the Universe Listing of the Rental Market Survey. Listings for each community were assembled annually and a nation-wide look at housing was published as *Canadian Housing Statistics*. It sold for $10.

Had the man been able to find the information he wanted in the publication, he might well have paid the purchase price rather than send $5 with his access request and wait many months. But the breakdown he wanted was not in the compendium. He complained to the Information Commissioner. In other parts of the country, the data was made public by municipalities, he contended. It was not yet available in Vancouver. Of course, anyone given the time could visit each block and count apartments listed in lobbies.

The Crown corporation contended that the data it paid for had considerable value, both monetarily through the sale of its publications and as a means to maintain CHMC's good reputation in the housing industry. The investigation concluded that while the *Canadian Housing Statistics* data may have substantial value, the Universe Listing computer print-out did not. It was not for sale, but it did contain the information requested.

An intriguing debate between the Crown corporation and the Commissioner's office was underway when the complaint was withdrawn. The man had gathered information on his own and found several other sources.

The questions remain. Does data gathered by government have substantive value by virtue of being saleable when combined with other information? And if so, do requesters lose their right to obtain access under the access law? These important questions are addressed elsewhere in this report. (See page xx).

What price computing?
(26-94)

A decade ago, when a fee was set at $16.50 a minute ($990 an hour) for time on computers to compile information requested under the *Access to Information Act*, large mainframe computers were used most often in government offices. The rate seemed reasonable for expensive equipment that departments often time-shared or leased.

Times changed; so did technology. Government realized its work could be done on less costly personal computers attached to a LAN — a local area network. The purchase, operation and maintenance costs were much lower than for mainframe computers, although data processing and the printing of documents was slower. Many departments converted to use of the less costly equipment. The fee for computer time was unaltered.

The fee issue came into focus when a frequent user of the access law received a $500 fee estimate from the Finance Department. He had asked for a list of ministerial memoranda from January, 1992 to the following January. The department suggested the request would tie up the network's central processing unit (CPU) for 30 minutes — a $495 bill — and require some 15 minutes of programming time, for which it would charge another $5. Not surprisingly, the man complained to the Information

Commissioner.

The department held to its opinion that the charge was correct, based on the Act's regulation 7(3). It also considered the practical matter that the 30-minute extraction of data from computer memory would completely tie up the central processing unit. No other business could be conducted on it.

It paid no heed to the Treasury Board guideline that states: "under no circumstances should a requester be charged a fee which is higher than the actual and direct costs of producing the record(s) requested". In other words, access to information requests are not to be profit generating.

When yesterday's fee is charged for today's technology, departments are most likely breaching that guideline. The per-minute fee is inordinately high relative to capital costs of current technology. The current systems are slower relative to mainframe computers. A steady flow of requests filled for a fee of $990 hourly might well finance a department's computer system. When the Finance Department heard these other arguments, it reconsidered and decided not to levy a fee for use of the central processing unit. It still wanted $5, however, to meet costs of computer programming.

The computer time fee was also an issue when an official of the Library of Parliament asked the Atlantic Canada Opportunities Agency for records of contracts and was told it would cost $565. Of that amount, $495 was again to pay for 30 minutes time on a central processing unit. The remainder was for computer programming and photocopying of documents.

The official complained to the Information Commissioner. The agency reconsidered and reduced that portion of the fee from $495 to $25. It also eliminated the photocopying fee. (It had planned to hold on to the computer printed version and to send photocopies to the requester). In the end the fee estimate was reduced from $565 to $85.

The cases clearly point out the need to revise the regulation on fees that technology has made obsolete. To charge fees for use of a LAN as if it were a mainframe computer is akin to charging Europe-bound economy air travellers the rate of passage on a Trans-Atlantic passenger ship.

Index of the 1993/94 Annual Report Case Summaries

19	22-94	**A question of candour** (ND) (Personal information)
	13-94	**Dollars and sense** (SCC) (Personal information - Name - Address - Financial transactions - Public interest - Clearly outweighs - invasion of privacy)
	24-94	**Public servants, private lives** (F&O) (Personal information - Identifying number - Other particular assigned to the individual)
	23-94	**Who's asking** (EIC) (Personal information - To whom the information relates)
20(1)(b)	07-94	**Inspecting inspectors' minutes** (CCAC) (Financial information - Confidential)
	14-94	**Modest proposals** (TC) (Financial information - Commercial information - Confidential)
	06-94	**The less formal the better** (RC-CE) (Commercial information - Confidential)
20(1)(c)	14-94	**Modest proposals** (TC) (Could reasonably be expected - Material financial loss - Prejudice the competitive position)
	06-94	**The less formal the better** (RC-CE) (Could reasonably be expected - Material loss or gain)
20(1)(d)	14-94	**Modest proposals** (TC) (Could reasonably be expected - Contractual or other negotiations)
20(6)	08-94	**Weighing public interest** (Agr) (Public interest - Clearly outweighs in importance - Financial loss - Prejudice to - Competitive position)
21	03-94	**On wearing two hats** (CPortsC) (Advice or recommendations - Consultant)
	18-94	**Where there's smoke** (HWC) (Advice or recommendations - Officer or employee)
31	17-94	**A staggeringly slow PCO** (PCO) (Written complaint - made within one year)

Glossary

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

ACOA Atlantic Canada Opportunities Agency
Agr Agriculture Canada
CCAC Consumer and Corporate Affairs
CMHC Canada Mortgage and Housing Corporation
CPorts C Canada Ports Corporation
CSIS Canadian Security Intelligence Service
EAITC External Affairs and International Trade Canada
EIC Employment and Immigration Canada
Fin Finance Canada, Department of
F&O Fisheries and Oceans
HWC Health and Welfare Canada
ND National Defence
PCO Privy Council Office
RC-CE Revenue Canada - Customs and Excise
RCMP Royal Canadian Mounted Police
SSC Supply and Services Canada
TC Transport Canada

Public Affairs

Something old, something new

There was a natural inclination on the part of some Canadians to look to the 10th anniversary of the *Access to Information* as a time to reflect and weigh its merits.

In the weeks surrounding July 1, 1993, news pages and editorial pages across the nation sprouted commentary on the law's early promise and wobbly progress. If the reviews from journalists, whose colleagues had joined the lobby for freedom of information in the 1970s and 1980s, was largely faint praise, it was not wholly uncomplimentary.

Among Canadians who have used the Act repeatedly, one who dubbed it more "a protective device for government than a tool to enlighten people" had no apparent difficulty in writing at length in the *Globe and Mail* the next day of important information "that were it not for the Act, would never have been made public." Can one really have it both ways?

The Information Commissioner's office contributed to this brief turn of public attention to the law. An article that told readers of the law's birth, then benign neglect by Parliamentarians, among other groups of Canadians, appeared on pages opposite editorial pages in several newspapers.

Not so fleeting was the interest shown by organizations who gather large audiences, notably Canadian Clubs, in several parts of the country. They wanted the Information Commissioner to tell them the lessons of the first decade. A speaking tour was begun in the fall of 1993 and will resume this autumn.

Closer to home, the Information Commissioner, as the Act's standard bearer, spoke to journalists, lawyers, university students, and a large congregation of access community professionals and academics.

Longer shelf-life is more likely to be granted a short history of the first decade prepared by a graduate student guided by the Commissioner's office. It may be of most use to students and others who often want information about the remarkable law. It is available on request.

A short history of the first decade prepared by a graduate student, guided by the Commissioner's office, is likely to have a substantial shelf-life. It may be of most use to students and others who often want information about the remarkable law. It will be available on request.

The turn of the ballot box brought to Parliament Hill a crop of Parliamentarians, two-thirds of whom had no reason to know, any more than most Canadians, about the *Access to Information Act*. Among their staff members, those green on the Hill, also wanted and needed to know what the law might do for their offices and their constituents. Many proved eager to learn.

Members of Cabinet, MPs on other front benches and rookie backbenchers from all parties replied

warmly to the Information Commissioner's introductory letter and a following bundle of information on use of the law. Scores asked for duplicates for their constituency offices. The new kids on the block also lined up on three occasions to hear representatives of the Commissioner's office walk through the basics of access to information requests and responses. Meanwhile, journalists in western Canada asked for, and received, the same information hand-delivered by the Commissioner's representative.

Whether these bright, new-found sparks of interest in Canada's rare and valuable law ignite little fires remains to be seen. Like the law itself, they hold considerable promise.

Other views

During the access Act's 10th year, the Information Commissioner's office wrote to, or spoke with, Canadians who hold memories of the law's birth, often by virtue of their influence on it. The office also spoke with many who hold views on its development. When asked to put their thoughts in writing, here's what some replied:

> *"Transparency in government is an objective I was seeking long before I entered the arena. I remember saying so in a Manifesto that a few of us issued in Montreal back in 1964. I remember taking a first step as Prime Minister when I caused the 30-year secrecy rule for the Archives to be lowered to 20."*
>
> — Pierre Elliott Trudeau

> *"No democracy works without open government and an informed electorate. Most governments are reluctant to come clean. During the past ten years in Canada, our Information Commissioners have been effective persuaders."*
>
> — John N. Turner

> *"Despite the scheme's weaknesses and lukewarm support by successive governments, it was a giant step forward simply by establishing the general principle that the public has a right of access to administrative documents and information."*
>
> — Donald C. Rowat
> Professor Emeritus
> Carleton University
> Ottawa

"For all its promise, the Act has changed precious little. Far too much effort is spent shielding information, not disclosing it. Far too many bureaucrats see their job as serving their executive or political masters, not the public. Far too few Canadians avail themselves of the law, principally because they do not know it exists or are intimidated by it.

Government views our right to know as its right to say no.

Unless the public policy to have an access law is reinforced with a public policy to inform Canadians of its vast potential, I fear for its future."

— Kirk Lapointe
Chief of Bureau
The Canadian Press, Ottawa

"I have never been under any illusion that the federal Access Act was a perfect vehicle for access. I've taken the position that by testing and using it eventually more people would see its limits and demand a better deal.

I had hundreds of successful applications that have resulted in front-page stories and obtained information that has benefited individuals and helped rectify problems groups were having.

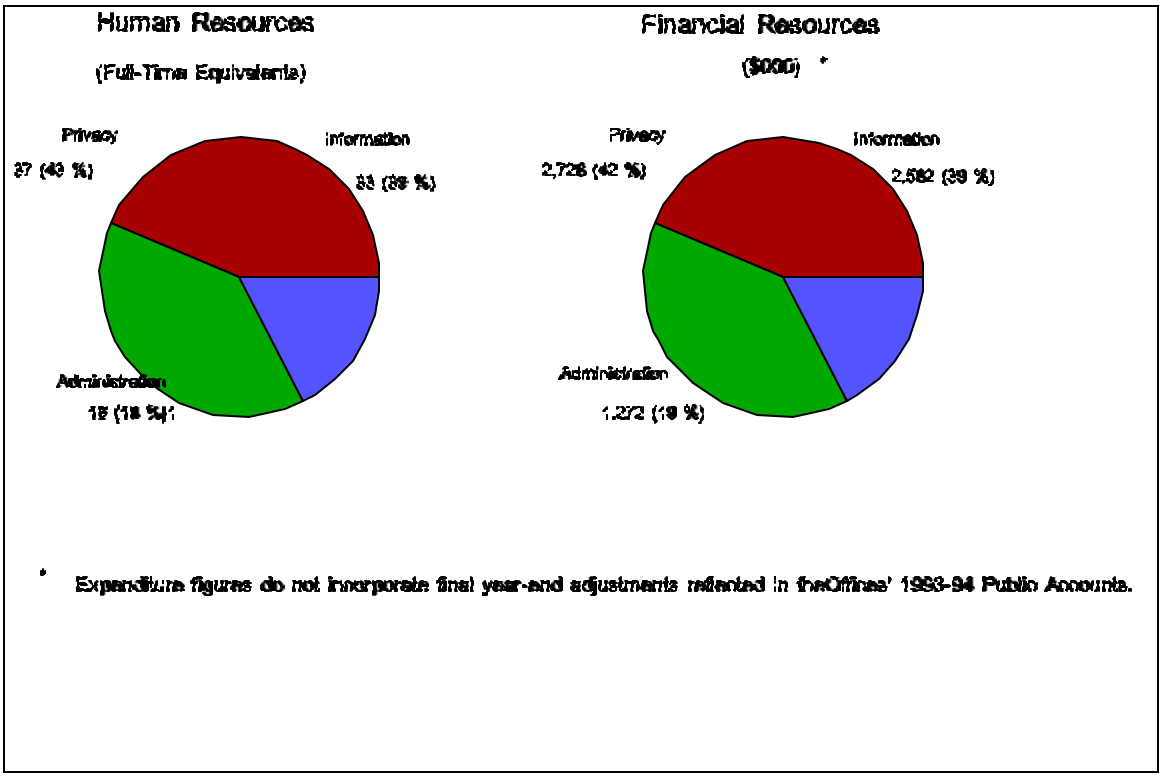
I've made access requests where I have uncovered data on unsafe toys, poorly rated meat-packing plants, the militarization of space, reuse in hospitals of one-time use medical equipment, doctored orange juice and on the lighter side, concern by the military of their image given too many obese personnel on the payroll."

— Ken Rubin
Public Interest Researcher

Corporate Management

Corporate Management provides administrative support services to both the Information and Privacy Commissioners. The services (finance, personnel, information technology, library and general administration) are centralized to avoid duplication of effort and to reduce costs.

The Offices' combined budget for the 1993-94 fiscal year was $6,819,000, an increase of $58,000 over 1992-93. Actual expenditures for the same period were $6,582,000 of which, personnel costs of $5,230,000 and professional and special services expenditures of $565,000 accounted for more than 88 per cent of all expenditures. The remaining $787,000 covered all other expenditures including postage, telephone, office equipment and supplies. Human and financial resources by program are reflected in the following chart.



The Offices approved new policies on Official Languages and Deployment. The personnel unit continued its support of the Commissioners' plans to implement government-wide measures to simplify employment classifications and legislative reforms under the *Public Service Reform Act* (Bill C-26).

A number of security-related renovations were completed during the year. A new, secure reception area and a specially-designed computer room for the local area network file servers were constructed. In addition, a more effective assets control system was developed and implemented.

The Offices are using a recently-introduced computer network of Microsoft Windows based tools and case management systems to support access to information and privacy investigations.

During the year, the library acquired 547 new publications and answered 1,246 reference questions. 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 ombudsman's reports and departmental annual reports on the administration of the two Acts. The library is open to the public.