Annual Report
Information Commissioner
1997-1998

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

Subsection 2(1)
Access to Information Act

April 1998

The Honourable Gildas Molgat
The Speaker
Senate
Ottawa, Ontario

Dear Mr. Molgat:

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

This report covers the period from April 1, 1997 to March 31, 1998.

Yours sincerely,

John W. Grace

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

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Mandate

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

Passage of the Act in 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. The requester must be notified of these extensions within the initial time frame.

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

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

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

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

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

solution has proved impossible.

First, the last last word

Twice during the reporting year the government proposed and Parliament was disposed to extend the term of this Information Commissioner. The obvious honour and vote of confidence was tempered by a nagging doubt: Is it healthy (for the public's right to know) when the country's information watchdog is so warmly embraced by our governors?

It is true that support for this commissioner came unanimously not only from the government side but, as it should, from all parties in Parliament. Therein, of course, lies the honour. When it comes, however, to ethics, integrity and accountability in government—values all served by the *Access to Information Act*—much turns on appearances. Information commissioners should worry when they are too much liked in influential circles.

Having submitted an end-of-term report last year, this unexpected extra year offers the rare opportunity for a postscript. The length of this one does not fulfil the promise of brevity implicit in a PS. Perhaps it makes up for that in candor and even spontaneity, those other virtues of a last, last word.

A culture of secrecy still flourishes in too many high places even after 15 years of life under the *Access to Information Act*. Too many public officials cling to the old proprietorial notion that they, and not the *Access to Information Act*, should determine what and when information should be dispensed to the unwashed public. If bold boasts are to be believed, some have taken to adopting the motto attributed to an old New York Democratic boss: "Never write if you can speak; never speak if you can nod; never nod if you can wink."

Of course the access law needs strengthening and updating after 15 years, though it has survived that time as a good law with sound fundamentals. But if some of its architects' high hopes were unrealistic and unrealized, the fault lies not in the stars, not in the law: It must be placed at the feet of governments and public servants who have chosen to whine about the rigors of access rather than embrace its noble goals; chosen not to trust the public with information which taxes have paid for. The insult is equal only to the intellectual arrogance of it all. The commitment, by word and deed, to the principle of accountability through transparency has been too often, faltering and weak-kneed.

Openness and ethics

It should not be a surprise that some of those who wield power also recoil from the accountability which transparency brings. Over and over again, we learn the lesson, even in the most vibrant democracies, that a few public officials seek private advantage from their positions of trust. Almost without fail, selfish motives are masqueraded in the garments of "public interest."

Even in this country, which Canadians like to believe is one of the most enlightened and mature of democracies, with a public service of undoubtedly high standards, even here some politicians and public officials get caught with their ethics or their guard down. The most singular example

this year was that of the former head of the Canada Labour Board fired for expense account excesses. This sorry episode came courtesy of the access law without which the story might never have been written nor corrective action taken.

Ethical conduct cannot be enforced; conduct can only be scrutinized. Any society aspiring to be free, just and civil must depend upon and nurture a wide array of methods for exposing, and imposing sanctions on, ethical failures. Thus is the need for a free and skeptical press, irksome and even irresponsible as it can be; thus the need for a fiercely independent judiciary; a professional public service and an informed, engaged citizenry.

In one way or another, all the checks and balances designed to limit abuses of government power are dependent upon there being access by outsiders to governments' insider information.

Yes, webs of intrigue are more easily woven in the dark; greed, misdeeds and honest mistakes are more easily hidden. A public service which holds tight to a culture of secrecy is a public service ripe for abuse.

This link between ethical behaviour and openness may help explain why only some 15 countries in the world have been brave or self-confident enough to have given their citizens the legal right of access to government records. Even Great Britain, the mother of Parliamentary democracies, is only now preparing to pull back the pervasive curtain of official secrecy which has for so long been such an unflattering identifying mark of the British ruling class, and which was so easily and innocently exported to Canada. The motives were not evil. It was simply thought that governments and senior public servants knew best. Trust us.

Even in those countries with freedom of information laws which were often born of outrage over scandal, as in the United States after Watergate, or of promises made while a party was in opposition--those laws are under rear-guard attack. Some senior public officials in Canada openly agree with what Sir Humphrey in *Yes, Minister* told his Prime Minister: "You can have good government or you can have open government. But Prime Minister, you can't have both."

We all laughed at Sir Humphrey, as we should. But when influential public officials express nostalgia for the good old days when official information could be doled out in carefully controlled doses, it is a sign that the culture of openness too often remains an alien culture.

Not that governments don't want to give citizens information or that our governors and bureaucrats are all evil connivers. Much more likely, when information is withheld or delayed, it is because it serves not always disinterested purposes to control the context and the timing of what is given. The current pejorative term is "spinning." Yet sometimes timing is as important as the information itself.

The right to know what government is up to will always be a fragile right, just as it will always be essential to an informed citizenry. One need only recall the document-tampering scandal at National Defence or the records destruction fiasco at the Canadian Blood Committee to know how easily the right of access can be undermined. In the still unchartered territories of public ethics and freedom of information, it often takes scandal to remind officials of their obligations

and citizens of the importance of the rights they have.

It has now become somewhat fashionable in senior government circles to be thinking about and pronouncing upon public service ethics. That is devoutly to be encouraged. On the Canadian federal scene, a committee of highly respected public servants recently completed a thoughtful, comprehensive report on the subject.

En passant, it is worth noting that in Canada, no explicit, written, ethical code of conduct binds federal public servants. They are bound, of course, to obey the laws of the land and to comply with conflict-of-interest rules. There is, however, a code of ethics for ministers of the Crown.

Strange as it may seem, the Prime Minister has decided that the code of ethics for ministers will not be made public. Canadians are not entitled to know the standards of behaviour to which Cabinet members are held accountable. The Prime Minister considers that he is accountable for the ethical behaviour of his ministers and that the matter of ethics is best kept a private affair between himself and his Cabinet. Perhaps there may be some wisdom in that.

But in this commissioner's view—and this casts no aspersions on the motives or integrity of the Prime Minister—keeping this code of ethics secret is an unhealthy choice in a democracy. It is even bad politics. Moreover, and with great respect for Canada's ethics counsellor, it is unwise for a country with the good sense and courage to have an ethics watchdog, not to have that person visibly independent of government.

The perception of an ethics commissioner reporting directly to and only to the Prime Minister, and giving private advice with respect to a secret set of rules is all wrong. In the absence of the attributes of independence and openness, ethics monitoring takes on the appearance of political damage control. Unfair as the perception may be, it encourages more cynicism in a public already too cynical of politicians.

But back to the matter of a renewed interest in public service ethics: two cautionary notes.

First, the public service approaches the subject of ethical behaviour from a conviction that the overwhelming majority of public officials are fine, honourable persons who behave ethically. Most of them are and do. But too much comfort should not be taken in that conviction. The task of raising ethical standards in public life should not be approached by minimizing the problem, as if it were about dealing with only the few bad apples. It is much more complicated than that.

The easy, traditional, few-bad-apples assumption is a recipe for complacency. After 15 years of experience in the testing fields of enforcing the *Access to Information Act* and the *Privacy Act* it is clear to this commissioner that we have, yes, the ethically admirable in large number; we also have too many "ethically challenged" persons willing to flout the letter and the spirit of these laws.

Public servants who would be profoundly insulted to be considered anything but law-abiding and highly ethical, sometimes have had no hesitation in playing fast and loose with access (or privacy) rights: destroying an embarrassing memo to file, conducting only the most cursory of searches for records, inflating fees to deter a requester, delaying the response until the

staleness of the information blunts any potential damage or embarrassment and by simply refusing to keep proper records.

How tempting it is for public officials to resist airing ethical dirty laundry. Rather than calling in the police or other law enforcement bodies to investigate allegations of wrongdoing, the avenue of choice is the quiet way: early retirement and a golden handshake, a reassignment or, not infrequently, even a promotion to other duties. Much less embarrassing all around; protects reputations and, probably, prevents ugly lawsuits. The federal task force report on Public Service Values and Ethics endorses the "quiet way" in these words: "In most cases, no purpose is served, and much damage can be done, by public hangings."

No one is urging public hangings. But citizens should be shown that their government officials enjoy no immunity from the consequences of unethical or illegal acts. Far from serving no purpose, appropriate sanctions (there are now no penalties for those who break the access law) would reduce the pervading cynicism towards public officials and enhance respect for those who uphold high ethical standards. All this is in addition to being a powerful deterrent against law-breaking.

The second reason why even well-motivated exercises to improve public ethics may be ineffective is the over-emphasis upon, even the subversion of, the honourable word "loyalty." In a recent article in *The New Yorker*, Henry Louis Gates, Jr. writes of loyalty: "Its natural context is a social world of reciprocal dependencies: lords and vassals, lieges and subjects." Loyalty, let there be no mincing of words, is often interpreted as a code word for "those who go along, get along." It can be contorted by the self-serving into an admonition to public officials not to exhibit moral courage; not to criticize or speak up; not to report misdeeds for fear of being disloyal—the unforgivable corporate sin.

No ethics improvement exercise in any organization can succeed when the message, however wrongly taken, is "don't rock the boat" or that the "disloyal" don't get ahead. Yet precisely such a message is sent when "loyalty" is given equal billing with integrity, impartiality, fairness, equity, professionalism and merit in catalogues of essential public service values.

Here's a revolutionary recommendation. Drop loyalty completely as a value and replace it with "obedience to law." Encourage public officials to put their obligation to the rule of law above personal fealty. Is that not what the public expects above all of their officials? Establish a work environment where ethical behaviour is rewarded. Ensure that the careers of whistle-blowers are not ruined. Penalize wrongdoers. Perhaps more important and relevant to this report: Embrace a culture of openness which doesn't shrink from exposing the inner workings of governments, warts and all.

A duty is owed to the next generation of public officials—the young university graduates now making their career choices—to encourage them, plead with them, to take up the challenge of public life, either in politics or public service. They should be told not to abandon the ideal that power can be exercised in the public interest. Despite the professionally gloomy reports of information commissioners, this one included, each new generation of managers perceptibly improves the ability of government to be open. We should dare to think of a time, perhaps by the

end of the term in office of the next Information Commissioner, that the notion of penalties for breaches of the Access Act will seem outrageous to contemplate.

Until that time there is need for ethical guidance, especially for those involved in the processing of access to information requests. In particular, departmental access to information coordinators (the professionals charged with responding to requests) should have the guidance of a professional code of conduct. Justice Canada, Treasury Board Secretariat, the Office of the Information Commissioner, users of the access law and coordinators' own representatives should take on the task of developing such a code. At the very least, the following matters deserve attention in such a code:

- **A statement of primary duty**: Make clear the coordinators' primary duty to respect the letter and spirit of the law and to discharge this primary duty with honesty, impartiality, objectivity, integrity and courage.

- **A statement concerning conflicts of interest**: Require coordinators to avoid any situations of actual or apparent bias against a requester, the department or the commissioner's office.

- **A statement of ethical duty**: Bind coordinators to refrain from, and promptly report, any instance by others of possible illegal conduct or wrongdoing including: unauthorized record alteration, destruction, or suppression; failure to keep proper records; failure to treat response deadlines in good faith; unjustified inflation of fees and misleading or obstructing the Information Commissioner.

- **A statement of service quality**: Establish a coordinator's duty to be conscientious, diligent, efficient and professional in dealing with applicants, departmental officials and the Information Commissioner.

- **A statement of obligation**: Oblige coordinators not to abdicate their decision-making responsibilities to more senior officials. If more senior officials wish to usurp the coordinator's function, the coordinator's obligation is to insist that a new delegation order be promulgated which reflects the reality of the decision-making structure.

- **A statement of confidentiality**: Impose upon coordinators a strict duty to keep confidential the identities of applicants except:
  i) to the extent required for the proper processing of the application, ii) with the consent of the applicant, iii) if otherwise permitted by the *Privacy Act*. As well, make it incumbent upon coordinators to keep confidential any information provided to them by the requester concerning the reason for the request, the intended use of the information and any other matter the coordinator need not disclose in order to respond to the request.

- **A statement concerning recourse and support**: Acknowledge the professional risk to coordinators associated with respecting the preceeding elements of a code of conduct. The government and the Information Commissioner should establish procedures whereby coordinators may seek independent advice, support, assistance and protection

as required in the discharge of their responsibilities. No coordinator should be penalized in any way for availing himself or herself of approved avenues of independent recourse.

- **A statement concerning accountability**: Make the coordinator accountable for failure to comply with the code of conduct. Make Heads and Deputy Heads of institutions accountable for any interference with a coordinator's efforts to comply with the code of conduct.

This last element, the accountability of leadership as well as coordinators, will be the linchpin to the effectiveness of any code of conduct.

Too lean to be mean

One of the year's most positive access to information stories occurred close to home. It is the human story of the handful (31 in all) of overworked men and women who comprise the office of the Information Commissioner. Over the past eight years, these individuals have risen to the challenge of handling a 300 per cent increase in the number of complaints against government. During the same period, the offices' non-salary financial resources have been cut by 60 per cent.

Successive budget cuts have placed enormous strain upon this small, dedicated office. The office is itself becoming a troubling source of delay in the system. On average, it now takes 4.16 months to complete an investigation of a complaint. This figure is well off the three-month service quality target suggested by the Standing Committee on Justice and Solicitor General in 1987 which, for a precious time a couple of years ago, was tantalizingly close to being realized.

Not only is the wait too long for the Information Commissioner's findings, the quality of those findings could be in peril.

Item: The office's ability to travel to regional offices of government institutions in order to inspect original records in original files is virtually non-existent. Only in the most unusual of cases can the office afford to send investigators to see for themselves whether government institutions have completed a proper search for records and provided all relevant records for inspection.

Item: Through court actions against the commissioner, the government drains further the office's resources. No matter that none have been successful, the costs of defending them is significant.

The Treasury Board has, to date, rebuffed the suggestion that this office's legal expenses in such cases should be reimbursed.

Parliament should watch carefully to ensure that the effectiveness of the Information Commissioner is not compromised by the strangulation of resources.

Left in Britain's dust

These reports have usually resisted temptations to compare Canada's *Access to Information Act* with similar legislation in other countries. Not only are such comparisons mostly irrelevant, if not invidious, the Canadian statute has been rightly seen as being in the forefront of enlightened

right-to-know laws. Over the years delegations from abroad have come to the Information Commissioner's office to learn the sometimes arcane arts of access at first hand. Parliament has reason to be proud of what it created some 15 years ago.

Parliament should know this year, however, that Canada's once brave, state-of-the-art *Access to Information Act* is being left behind by Britain, of all countries, the mother not only of parliaments but the culture of bureaucratic secrecy. To be by-passed by some recent provincial access regimes in Canada is one thing. But by the nation that raised secrecy to an art form, that produced *Yes Minister* and Sir Humphrey's law? That is the cruellest cut of all.

It was flattering that the Cabinet Minister responsible for the British labour government's blueprint for a freedom of information law, David Clark, made Canada and the Information Commissioner's office his first port of call. But he has left Canada trailing in the dust.

What he has drafted, represents nothing other than a breathtaking transformation in the relationship between the government and the governed. If Canada's senior bureaucracy continues to think of itself as harassed or burdened by the demands of even a modestly more open government, it should count itself veritably cosseted compared to what's ahead for its British counterparts.

- In Britain an information commissioner will have the powers to compel government institutions to release information; in Canada the commissioner is an ombudsman who may only recommend release.

- In Britain even information which is not written down will be accessible to requesters. Thus, not even the bureaucratic mind will be a safe haven from an access request! Since only "records" are accessible in Canada, public servants with no respect for the spirit of the Access Act are known to evade the law by refusing to record potentially embarrassing information.

- In Britain the sweep of the proposed Act is remarkably wide, covering all government departments, all crown corporations and even private sector organizations which carry out duties on behalf of government. In Canada the range of institutions covered by the Federal Access Act is narrower: most large crown corporations, the Canadian Broadcasting Corporation, Canada Post and newly privatized entities, such as Nav Can (air traffic control), are excluded.

- In Britain only information capable of causing "substantial damage" may be withheld under the proposed new law. That is a much more stringent test for the government to meet than what applies in Canada where it is enough to demonstrate that disclosure would cause simple "harm."

- In Britain, unlike Canada, cabinet confidences will not be excluded from the right of access nor will they be kept under a mandatory blanket.

One need not agree with all the proposals in the British White paper. Order power given a

commissioner, for example, may be unwise, leading more to conflict and excessively legalistic approaches than to more openness. Proposed fee charges could be excessive. The point is, however, that the Blair government's blueprint is a "radical" approach to access to information which as Mr. Clark writes, would "transform this country from one of the most closed democracies to one of the most open."

So in Britain the Sir Humphreys are in retreat. They have been faced down by the seemingly implacable determination of Prime Minister Blair who writes in the White Paper's preface, that his country's "traditional culture of secrecy will only be broken down by giving people in the United Kingdom the legal right to know."

All this makes all the more disappointing the lack of any comparable message forthcoming from Ottawa. No Canadian Prime Minister has exhorted publicly his ministers and officials to embrace openness.

Parliament should be reminded again that in the 15 years the *Access to Information Act* has been in force it has remained pristinely untouched: not a single amendment has been made to reflect either the experience gained over these years or the impact of the information revolution. The recommendations for changes, put to the government and Parliament in the 1993-94 volume of these reports appear to have been respectfully interred.

The result is a distinctly antique Act. But when the staid British bureaucracy is about to accept, perhaps kicking and screaming, an enlightened model for open government imposed by a vigorous, young administration, is it too much for Canadians to expect that their government can at least keep pace?

An information commissioner has a professional duty to cry havoc. But the former minister of Justice, Allan Rock, did promise to strengthen the *Access to Information Act*. In 1987, the House of Commons Justice Committee unanimously recommended a blueprint for change. The Information Commissioner presented his blueprint for change in 1994. Bureaucrats have studied the issue and somewhere in the bureaucracy are their proposals. In recent years no less than five members of Parliament put forward their recommendations in the form of private members' bills. One of these, in the name of John Bryden, is extraordinarily comprehensive and thoughtful. What does the government wait for?

It is difficult to avoid the temptation of wondering whether the reason for hesitation is that the government has no heart for a stronger, more effective access to information law. Yet it was a previous Liberal government which brought forth the access law; it is the present Liberal government which wore its commitment to transparency as a badge of honour. It is time to walk the talk.

But the Courts don't wait

A bright spot on the access front during 1997-98 was the strong endorsement of access rights in judgments of the Federal Court and the Supreme Court of Canada.

Of particular significance was the Federal Court's ruling that government has an obligation to

answer all access requests regardless of the perceived motives of the requesters. Similarly, the commissioner must investigate all complaints even if the government seeks to block him from so doing on the grounds that the complaints are made for an improper purpose. In other words, the Federal Court has told government institutions to stop whining about the burden of access requests and investigations and get on with it.

As a result of another Federal Court decision, it is now established law that of two possible interpretations of any of the access law's exemptions, the interpretation which offers the greatest amount of openness must be adopted. Gone are the days when timorous public officials may apply the law in an overly cautious manner.

The Supreme Court of Canada is saying that the *Access to Information Act* serves a vital role in preserving a healthy democracy in helping to make government more accountable by being more transparent. The Court made this point in overruling the government's decision not to disclose information about the working hours of public servants. Because of the importance it gives to the value of accountability, the Court rejected the government's argument that the privacy of public servants should take precedence.

Parliament made it clear, and the Supreme Court has reinforced, the fact that public officials should not expect the same level of privacy protection as do private citizens. Because they administer public funds and can wield enormous power over the lives of Canadians, public officials will now find it more difficult to hide behind self-serving assertions of privacy.

These court decisions are dealt with in greater detail in a following section of this report.

Getting the message, finally

As described in these reports year after year, the problem of delay in answering access requests is pervasive, serious and chronic. To a large extent, the problem has been hidden below radar detection because the government does not collect and report the damning statistics to Parliament, though the Access Act says it should.

For his part, the Information Commissioner can only monitor and report his own statistics on the number of complaints of delay. Departments chastised by him, on the basis of high numbers of complaints, have defended themselves by comparing the number of complaints with the total number of requests they had received. Using this comparison, the magnitude of the delay problem always looked manageable, if not insignificant. After all, only about 10 per cent of requests become complaints. Perhaps Canadians are really not complainers.

Last year the Information Commissioner decided to get to the heart of the matter: to find out exactly how often departments met deadlines, complaint or no complaint. The results of a study of six departments established that the extent of non-compliance with the law was alarming. The departments studied last year were Privy Council Office, National Defence, Revenue Canada, Citizenship and Immigration, Foreign Affairs and International Trade and Canadian Heritage. From 44 per cent to 74 per cent of requests received by those departments were not answered within statutory deadlines. These new reviews were in line with an earlier review at Health Canada which showed a systemic problem of delay.

Those results shared with the departments had a sobering and motivating effect. It attracted the attention of senior management and engendered a flurry of activity designed to diagnose the reasons for the poor performance and find solutions.

The Privy Council Office and Revenue Canada undertook internal audits of their access to information processing systems. The commissioner's office worked closely with those internal reviews. The commissioner conducted his own independent audit in National Defence. In all the departments studied last year, procedures have been changed or augmented and additional resources have been allocated.

These initiatives are too fresh to have resulted yet in an improvement in either the ratio of late answers to requests received or the duration of the period of tardiness. The task is not complete by any measure. Yet, there is reason to expect that, by next year, these departments will show fewer complaints of delay, fewer late responses and shorter periods of delay when there are delays.

Here is why:

Privy Council Office (PCO)

1. The Clerk of the Privy Council has become personally involved in solving the delay problem at PCO. The Clerk now receives a weekly report on the status of all access requests. Late requests are discussed with her senior management at a weekly meeting. Senior managers are held accountable for delays in their areas.

2. The approval process is being streamlined to involve as few people as possible. Some of those previously in the approval chain (such as communications) will be given notice, for information only, of upcoming disclosures. Consideration is being given to abandoning sequential approvals for a regular approval meeting where all the relevant officials are in attendance.

3. A full-time counsel has been hired to review proposed section 69 (cabinet confidences) exclusions.

4. A truncated approval process has been adopted when no exemptions are applied or when the exemptions are mandatory.

5. Orientation, training and procedural material is in preparation for all officials involved in processing access requests.

Observation: PCO's leadership to the rest of government in this area is vital. To this point, PCO has been one of the worst offenders when it comes to missing response deadlines. A serious change of attitude and process, such as described above, is an enormously positive signal. The commissioner will watch the results of the PCO experiment and work cooperatively and constructively with PCO in its effort to make the Prime Minister's department the exemplar it should be of how to administer the *Access to Information Act*.

National Defence (ND)

It is especially heartening to report that ND, too, has taken the problem of delay by the horns and is making a good faith effort to wrestle it to the ground. The commissioner's audit, reported here last year, showed that there were a myriad of issues to be faced by ND in order to solve delays. The historic culture of secrecy ("loose lips sink ships"), a siege mentality when it comes to criticism from the outside, a complex and cumbersome approval process, widespread ignorance of the law among employees, poor communication with requesters, strained resources and inadequate monitoring and reporting of performance—all these factors have been faced up to by ND. Here are some highlights of the corrective steps ND is taking:

1. A training, education and sensitization program has been developed and given widely within the department. The sessions are directed to individuals involved in processing access requests or who are undergoing career and developmental training. ND intends to include access (and privacy) training in the Officer Professional Development Program, which is a prerequisite to promotion to major.

2. A working group on access to information has been created. It comprises representatives from the offices of the Minister, Deputy Minister, Judge Advocate General, Chief Public Affairs and other areas as required. This group, chaired by the Assistant Deputy Minister (finance), is charged with ensuring that all necessary steps are taken to bring the department into compliance with response times. In particular, this group effectively does away with the previous, sequential (and lengthy) approval process. All those whose approval is required now come together at the same time.

3. Concrete steps have been taken to make information public informally, without the need for an access request. For example, all information disclosed as a result of access requests is summarized on the Internet and the full text is available in the National Capital public reading rooms. On request, such information will be sent to regional ND sites for viewing at no charge or mailed for a fee of 20 cents per page.

   The feasibility is being studied of placing other frequently requested records, such as call-ups, Challenger flight manifests and significant incident reports, on the Internet. Electronic versions of court martial transcripts are now available in ND's public reading rooms.

4. Additional staff has been assigned to work on reducing ND's backlog of unanswered requests. Steps are being taken to reduce the number of privacy requests for personal files and evaluations by making such records routinely available. This will liberate significant resources to handle access to information requests in a timely fashion.

5. Significant improvements have been made in the collection of statistics and the production of weekly reports for use by senior managers to monitor performance in meeting response times.

6. ND has created a policy and training section whose mandate includes dealing with frequent requesters. Through better communication with such requesters, the department expects to be able to understand better and, hence, meet the information needs of requesters. It hopes also to build trust and, thus, reduce the number of complaints to the commissioner.

7. By end of 1998, ND's goal is to reduce the number of overdue requests by 50 per cent.

Revenue Canada

During the reporting year Revenue Canada decided that it could no longer ignore its poor response- time performance. On average, it takes Revenue Canada in excess of 200 days to answer an access request (the law stipulates 30 days!). An internal audit was undertaken to diagnose the problem and suggest remedies. The Information Commissioner was consulted in the process.

The diagnoses indicated that, on average, it requires program areas 64 days to gather and do a preliminary review of requested records. Yet, the greatest delay occurred when the records were returned to the access to information coordinator's office for final processing. There it takes, on average, 102 days to complete the response. An additional 40 days, on average, is required to obtain internal approvals.

Practical suggestions for improvement are now under consideration by the Deputy Minister. As of this writing, changes have not been implemented; progress will be monitored and reported on in next year's report.

Canadian Heritage

Canadian Heritage skipped the "study the problem" phase and took immediate action to solve its delay woes. Decision-making was delegated to the Assitant Deputy Minister (corporate) and the approval process was streamlined. A weekly status report, showing overdue requests, is provided to the Deputy Minister and ADMs. The deputy follows up with the relevant ADM to hasten the response. Weekly meetings are held with the minister's staff to identify and keep to a minimum the number of responses which must go to the minister for approval before being issued.

As a result of these initiatives the problem of delay has been all but eliminated. With rare exception, the department meets its response-time obligations. A Canada medal for Canadian Heritage!

Citizenship and Immigration (C&I)

During the reporting year, C&I showed its determination to comply with response deadlines. A major review was conducted of its request-handling processes. Here are the results:

1. Prior to the review, requests were handled sequentially. After the review, a fast track was introduced for routine requests. A position of general manager of operations was

established to control the process. In the first month of operation of the two-track process, the responses given were double the number received—a most encouraging sign.

2. Training has been expanded for staff in operational areas as well as in the access to information office.

3. Plans are in development for more informal release of information and dissemination by the Internet. This approach is being considered for bulk, commercial requests of a recurring nature.

Observation: There is not, as yet, a routine involvement by the Deputy Minister or senior management of the department in monitoring response-time performance. No regular statistical reports are provided and no regular meetings are held to monitor progress. Currently, senior management is involved only on an ad hoc basis. Regular and active involvement by senior management has been the key to success in other departments.

Health Canada

Delay remains a serious problem in Health Canada. In his audit conducted in 1994, the Information Commissioner found that 80 per cent of all requests received at Health Canada were not answered within deadline. In the three years since, the situation has worsened.

Recently, however, there have been positive signs. The Deputy Minister has informed the commissioner that the department is considering making more information, for example, frequently requested product monographs, routinely public without the need of an access request. The department is also planning to place more information on computer bulletin boards.

The department has allocated $150,000 for each of the next two fiscal years for a project to eliminate the backlog of unanswered access requests.

Observation: Long-term success at Health Canada in meeting response deadlines will require a reorganization of its request-processing procedures, a commitment of additional permanent resources and close senior-level monitoring of performance.

Foreign Affairs and International Trade (FAIT)

It was not possible to assess whether FAIT's response-time performance had improved over 1996-97. Due to computer difficulties, the department was not able to produce reliable statistics. During the coming year, the commissioner's office will continue to work with FAIT to assess, diagnose and correct its problem of delay.

Investigations

In the reporting year, 1,405 complaints were made to the commissioner against government institutions (see Table 1), 43.1 per cent of all completed complaints being of delay (see Table 2). Last year, by comparison, 45.1 per cent of complaints concerned delay. The modest improvement, while welcome, is not cause for celebration. There remains a system-wide, chronic problem of non-compliance with the Act's response deadlines. Solving this problem remains the office's first priority.

Resolutions of complaints were achieved in the vast majority of cases (99.8 per cent of cases, to be precise). Table 2 indicates that 1,379 investigations were completed. In only three cases did it prove impossible to find a resolution. Two of those cases were complaints against the Atlantic Canada Opportunities Agency, one case was against Industry Canada. All three will be brought before the Federal Court for resolution.

As seen from Table 3, the overall turnaround time for complaint investigations was reduced to 4.16 months from the previous year's 5 months. This improvement should not obscure the fact that the turnaround time is not acceptable; it does not meet the three-month period recommended by the Standing Committee on Justice and the Solicitor General in 1987. As well, Table 1 reminds us that the backlog of incomplete investigations continues to grow. Last year, it was 397, this reporting year 423 complaints. If resources for additional investigators are not forthcoming from government, Canadians risk being deprived of an effective avenue of redress for abuses of access rights.

The five institutions most complained against in 1997-98 are:

- National Defence
- Citizenship and Immigration
- Revenue Canada
- Finance Canada
- Foreign Affairs and International Trade

The top five last year were:

- National Defence
- Revenue Canada
- Citizenship and Immigration
- Immigration and Refugee Board
- Health Canada

Those which dropped from the list (Immigration and Refugee Board and Health Canada) do not yet deserve honourable mention for their improved performance. At both institutions, the problem of delay remains under review.

Of course, the number of complaints does not, in itself, give a very meaningful measure of a department's performance. One must consider the percentage of substantiated complaints. Those percentages are:

- National Defence 73%
- Citizenship & Immigration 87%
- Revenue Canada 83%
- Finance Canada 87%
- Foreign Affairs and International Trade 61%

This office will work closely with departments in the coming year to assist them in their efforts to solve the problem common to them all, an inability to meet consistently response deadlines.

Informal Disclosure

One method of increasing informal disclosure (and seeking to reduce formal requests) is by putting all records disclosed in response to access requests in reading rooms and on web sites. If this approach is chosen, here are some rules of thumb:

1. Give the formal requester (who has paid fees and endured the wait) a reasonable period of exclusive use before putting the records in the public domain.

2. Do not place such records in the public domain without assessing the mandatory exemption provisions. The formal requester may have had the necessary consents under sections 13, 16(3), 19 or 20. However, the scope of those consents may not cover disclosure to the public.

3. Subsequent formal requests for records which have been placed in the public domain must be processed if the public records were severed under the Act's exemption provisions. Passage of time or other changes in circumstances may mean that additional material can be released.

4. The placing of records in reading rooms will not in itself mean that the records are excluded from the right of access under section 68 of the Act. Reading rooms may not be widely accessible, the information may not be sufficiently well indexed to be useable by a requester, exemptions may have been originally applied and the record may not be available in reasonable formats.

Reading Rooms and Manuals

Section 71 of the *Access to Information Act* requires government institutions to provide a reading room facility at headquarters and in regional offices (where reasonably practicable) where the public may inspect manuals used by employees in the course of their duties.

It goes without saying that the manuals in reading rooms must be manuals in current use. It does not fulfil the law's obligation if the manuals in reading rooms are not kept reasonably up to

date.

During the year, it has come to the commissioner's attention that the reading room versions of manuals are not kept current in some departments. Case in point is Revenue Canada where public manuals had not been brought up to date for several years.

Revenue Canada determined that 86 manuals comprising some 18,517 pages are in current use by its employees. The task of reviewing the current versions of the manuals to determine which portions must be exempted before being placed in reading rooms, was undertaken by a team of 22 reviewers from headquarters, Prince Edward Island and Manitoba. These reviewers were first trained by the department's access and privacy office in the proper application of the Act's exemptions. The project was managed and coordinated by consultants from Consulting and Audit Canada with expertise in access, privacy, and project management.

Revenue Canada made a commitment to the Information Commissioner to complete this significant project in a timely manner. The department's Business Returns and Payments Processing directorate delivered on that commitment and deserves recognition for its efforts.

This example should motivate other departments to ensure that they come into compliance with section 71. In the coming year, the Information Commissioner intends to review selected institutions to determine whether up-to-date manuals are available to the public.

Fee Waiver Guidelines

Subsection 11(6) of the *Access to Information Act* authorizes government institutions to waive or refund fees which are otherwise chargeable under the Act. The Act is silent as to the considerations which should guide institutions in exercising this discretion.

Treasury Board has suggested some guidance in the following terms:

"The decision to waive, reduce or refund fees should be made on a case-by-case basis by assessing:

- whether the information is normally made available without a charge;

- the degree to which a general public benefit is obtained through the release of the information.

It should be noted that the circumstances of the requester and the requester's reasons for seeking information may be taken into consideration in a fee waiver decision, even though these are not proper factors to consider in deciding whether or not to grant access." (*Treasury Board Manual*, Access to Information, Chap. 2-5, pp 3-4.)

In fact, there is no uniformity in fee waiver policies across government. Some institutions have no written policy. And in some, the policy is brutally straightforward: There will be no fee waivers!

The Standing Committee on Justice and Solicitor General, in its 1987 report, suggested criteria for fee waivers. Ontario and British Columbia have incorporated fee waiver criteria in their freedom of information laws. The *Government Communications Policy* also sets out useful fee waiver criteria. What appeared novel and difficult to prescribe when the access law came into force in 1983 is now run-of-the-mill.

All departments should have, by now, written policies governing fee waivers and refunds. Secret sets of rules (or, worse, no rules) to guide waiver decisions send all the wrong signals in an access to information regime. The best way for departments to demonstrate that they don't play favourites is to develop clear policies and publish them. The commissioner's office will follow up this matter with selected departments in the coming year.

Table 1

STATUS OF COMPLAINTS

	April 1, 1996 to Mar. 31, 1997	April 1, 1997 to Mar. 31, 1998
Pending from previous year	512	397
Opened during the year	1,382	1,405
Completed during the year	1,497	1,379
Pending at year end	397	423

Table 2

COMPLAINT FINDINGS

April 1, 1997 to March 31, 1998

FINDING

Category	Resolved	Not Resolved	Not Substantiated	Discon-tinued	TOTAL	%
		24				

Refusal to disclose	311	3	239	23	576	41.8

Delay (deemed refusal)	547	-	25	22	594	43.1

Time extension	62	-	27	4	93	6.7

Fees	31	-	25	8	64	4.6

Language	-	-	3	-	3	0.2

Publications	-	-	-	-	-	-

Miscellaneous	18	-	28	3	49	3.6
		31				

TOTAL	969	3	347	60	1,379	100 %
		32				

100%	70.3	0.2	25.1	4.4

Table 3

TURNAROUND TIME (MONTHS)

CATEGORY	95.04.01 - 96.03.31		96.04.01 - 97.03.31		97.04.01 - 98.03.31	
	Months	Cases	Months	Cases	Months	Cases
Refusal to disclose	6.26	471	7.39	641	6.23	576
Delay (deemed refusal)	2.54	843	2.79	675	2.19	594
Time extension	2.40	116	3.31	75	3.05	93
Fees	5.58	57	7.28	51	5.81	64
Language	3.48	1	9.07	1	8.04	3
Publications	-	-	-	-	-	-
Miscellaneous	5.76	42	4.46	54	3.36	49
Overall	3.88	1,530	5.00	1,497	4.16	1,379

Table 4

COMPLAINT FINDINGS

(by government institution)

April 1, 1997 to March 31, 1998

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Agriculture and Agri-Food Canada	1	-	5	-	6
Atlantic Canada Opportunities Agency	14	2	1	1	18
Atlantic Pilotage Authority	-	-	1	-	1
Atomic Energy Control Board	2	-	1	-	3
Bank of Canada	8	-	-	-	8
Canada Information Office	2	-	-	-	2
Canada Mortgage & Housing Corporation	2	-	1	-	3
Canada Ports Corporation	-	-	2	-	2
Canadian Commercial Corporation	-	-	1	-	1
Canadian Heritage	17	-	11	3	31
Canadian International Development Agency	2	-	-	-	2
Canadian Museum of Nature	1	-	-	-	1
Canadian Radio-Television & Telecommunications Commission	1	-	2	-	3
Canadian Security Intelligence Service	3	-	4	-	7
Canadian Space Agency	5	-	-	-	5
Citizenship & Immigration Canada	181	-	14	12	207
Correctional Service Canada	35	-	9	1	45
Defence Construction (1951) Limited	1	-	1	-	2
Environment Canada	7	-	5	-	12
Federal Office of Regional Development (Quebec)	1	-	-	-	1
Finance Canada	60	-	9	-	69
Fisheries and Oceans Canada	37	-	19	3	59
Foreign Affairs and International Trade	39	-	22	3	64
Freshwater Fish Marketing Corporation	1	-	2	-	3
Health Canada	36	-	8	3	47
Historic Sites and Monuments Board	-	-	-	1	1

Table 4 (Cont'd)					
GOVERNMENT INSTITUTION	**Resolved**	**Not Resolved**	**Not Sub-stantiated**	**Discon-tinued**	**TOTAL**
Human Resources Development Canada	14	-	8	1	23
Immigration and Refugee Board	13	-	2	-	15
Indian and Northern Affairs Canada	28	-	21	-	49
Industry Canada	22	1	12	1	36
Justice Canada	28	-	22	-	50
National Archives of Canada	7	-	9	-	16
National Defence	190	-	58	12	260
National Parole Board	1	-	-	-	1
National Research Council Canada	3	-	1	-	4
Natural Resources Canada	4	-	1	2	7
Natural Sciences and Engineering Research Council	-	-	1	-	1
Office of the Superintendent of Financial Institutions	1	-	-	-	1
Privy Council Office	23	-	14	8	45
Public Service Commission	4	-	1	-	5
Public Service Staff Relations Board	1	-	1	-	2
Public Works and Government Services Canada	27	-	12	5	44
RCMP Public Complaints Commission	1	-	-	-	1
Revenue Canada	69	-	13	1	83
Royal Canadian Mint	1	-	-	-	1
Royal Canadian Mounted Police	16	-	22	2	40
Security Intelligence Review Committee	5	-	2	-	7
Solicitor General Canada	10	-	1	-	11
Statistics Canada	-	-	2	-	2
Transport Canada	26	-	21	-	47
Transportation Safety Board	1	-	-	-	1
Treasury Board Secretariat	17	-	3	1	21
Veterans Affairs Canada	1	-	2	-	3
TOTAL	969	3	347	60	1,379

Table 5

GEOGRAPHIC DISTRIBUTION OF COMPLAINTS
(by location of complainant)

April 1, 1997 to March 31, 1998

	Rec'd	Closed
Outside Canada	21	19
Newfoundland	25	19
Prince Edward	1	3
Nova Scotia	51	58
New Brun wick	14	21
Que	200	212
Natio R	689	640
Ontar	182	166
Manitoba	24	28
Saskatchew	12	15
Alberta	32	46
British Columbia	147	134
Yukon	2	1
Northwest Territories	5	17
TOTAL	1405	1379

A: The Role of the Federal Court

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

Requesters dissatisfied with responses received from government to their access requests first must complain to the Information Commissioner. If they are dissatisfied with the results of his investigation, they have the right to ask the Federal Court to review the department's response. This reporting year the commissioner's office investigated 1,379 complaints and of those, as of the date of this report, 12 applications had been filed in the Federal Court by requesters.

I. Case Management of Access Litigation in the Federal Court

The major responsibility for the management of access to information cases falls on the Trial Division of the Federal Court of Canada. At section 45 of the Act, Parliament directed the Federal Court to deal with these cases expeditiously. In December 1993, the Associate Chief Justice of the Federal Court issued a direction to govern procedure in such cases. This practice direction was designed to ensure that applications in access (and privacy) cases would be heard within six months and inactive cases would be dismissed.

To ensure a harmonious litigation process, all procedural difficulties (number of parties, timing of motions to intervene by requesters and third parties, timing of motions to file confidential affidavits and other material, timing of motions to have access to confidential material, and timing of motions for procedural timetables) are dealt with at the beginning of the litigation during a hearing on directions held 30 days after an application for review is filed before Federal Court. The Trial Division of the Federal Court, as a result, has now become the only institutional part of the access to information system which cannot be faulted for undue delays.

As noted in previous reports, credit for the success in reducing the backlog of access cases in the court is due to the dedication of the court's registry officials and the pragmatic simplicity of the practice direction.

Let the facts speak for themselves. Chart 1 shows the number of applications received and disposedof for the years 1983-1997. Productivity has improved markedly. The number of applications filed by third parties to block the release of information also has been reduced considerably.

Chart 1			
YEAR	FILES OPENED	FILES CLOSED	BACKLOG
1983	2	0	2
1984	13	6	9
1985	31	12	28
1986	55	14	69
1987	30	39	60
1988	67	63	64
1989	36	30	70
1990	57	34	93
1991	45	24	114
1992*	59	60	113
1993	54	78	89
1994	34	43	80
1995	33	45	68
1996	32	38	62
1997	36	37	61

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

II. Problem Cases

The use of the Federal Court as a delaying tactic in access cases is, by and large, a thing of the past. The following are the rare exceptions which demonstrate why the court ought not to rely entirely on government institutions and third parties to manage the progress of section 44 applications.

Royal Aviation Inc.* v. *Transport Canada and Minister of Transport for Canada
(T-1040-95)

In May 1995, Royal Aviation applied to the court under section 44 of the Act to block release of

information requested under the access law. The question put to the court was whether Transport Canada had erred in deciding that the requested information was not exempt from disclosure under the *Access to Information Act*. The hearing was to take place in the Trial Division on October 21, 1997, but on that day, at the request of the third party, the court adjourned the case *sine die*. The court has not issued reasons for this order. Since then, no action has been taken in the case and release is being indefinitely delayed.

Novartis Pharmaceuticals Canada Inc.* v. *Minister of National Health and Welfare
(T-1402-97)

Novartis made an application to the court on June 26, 1997 pursuant to section 44 of the Act for review of a decision of Health and Welfare Canada to disclose certain records concerning Novartis. A hearing for directions was set for July 28, 1997, then postponed to September 29, 1997. However, the applicant managed to avoid the hearing for directions by requesting an adjournment *sine die*. The applicant is asking for time to settle the case with the government institution. Nothing has taken place in this case since August 8, 1997 and no order for directions has been issued. Again, delay serves only the third party.

Novartis Pharmaceuticals Canada Inc.* v. *Minister of National Health and Welfare
(T-1798-97)

In this case, Novartis made an application to the court on August 19, 1997 pursuant to section 44 of the Act for review of a decision of Health and Welfare Canada to disclose certain records in response to another access request. The hearing for directions was set for September 29, 1997. The applicant again managed to avoid the hearing for directions by requesting an adjournment *sine die*. Here, too, the applicant is asking for time to permit a settlement with the department. There has been no progress in this case since; the third-party's interests are served to the detriment of the access requester.

Boehringer Ingelheim (Canada) Ltd.* v. *Minister of National Health and Welfare
(T-2257-97)

On October 20, 1997, Boehringer made an application to the court pursuant to section 44 of the Act for review of a decision of Health and Welfare Canada to disclose certain records concerning Boehringer. The hearing for directions was set for November 17, 1997. On November 14, 1997, the applicant asked that his motion for directions be adjourned *sine die* to permit a settlement with the department. There has been no settlement and this case has not moved forward at all since it was first filed with the court.

III. New Federal Court Rules

On September 20, 1997, the Federal Court Rules Committee published its proposed new rules in the *Canada Gazette*. The court proposed that all review proceedings before the Federal Court would follow a model applicable to extraordinary remedies (mandamus, certiorari, prohibition, quo warranto, declaratory judgment) to be obtained on application under section 18 to 18.4 of the

Federal Court Act. The proposal constituted a major departure from the current practice. It provided for a five-step process:

Step 1: An application is filed setting a precise statement of the relief sought and the grounds intended to be argued.

Step 2: Within 60 days after the application, the applicant files supporting affidavits and memorandum.

Step 3: Thirty days after step 2, the respondent files affidavits and memorandum in response.

Step 4: Within 20 days after step 3, cross-examination of affidavits.

Step 5: The applicant requests a date for hearing of the matter.

The Information Commissioner made representations against the adoption of these draft rules. The proposed model would not be appropriate for access and privacy litigation. For example, an access requester wishing to challenge a government decision to deny access to records would have been required to file supporting affidavits and memorandum before knowing the evidence relied upon by the government (which has the burden of evidence) and before having commenced the cross-examination of the affidavits.

The Rules Committee was sensitive to the concerns expressed by the Information Commissioner and others. It departed from its proposal by choosing to have applications follow, for the most part, the existing judicial review framework. By so doing, the above-described disadvantage to access requesters was addressed.

The new Federal Court Rules were adopted on February 18, 1998 and came into force on April 25, 1998.

While the new rules correct many of the problems inherent in the initial proposal, there is still a problem area—timeframes. A number of motions (most of them inevitable in access cases) must be expeditiously dealt with: motion to intervene by requesters and third parties, motion to file confidential affidavit and other material, motion to have access to confidential material and motion for leave to file reply affidavit evidence. The new rules generally allow the parties to manage timing of their cases. As the four cases described above show, this can be a recipe for needless delay and disruption.

It would appear that, even under the new rules, there is an important role for the practice direction. How best to integrate the court's existing practice direction in access cases (which does establish a time frame for preliminary issues) with the new rules? The Information Commissioner has submitted his views in this regard to the Chief Justice, the Acting Associate Chief Justice and the Chairperson of the Rules Committee.

B: The Commissioner in the Courts

I. Cases heard

Information Commissioner of Canada v. *Chairperson of the Immigration and Refugee Board*

(T-908-97 and T-911-97)

In the fall of 1995, the *Vancouver Sun* reported that Immigration and Refugee Board (IRB) members had asked refugee claimants to undress in order to reveal their scars. Because refugee hearings are held behind closed doors, the board was concerned that one of its own employees might have leaked a distorted account of this information to the newspaper. The board decided to hire an outside consultant to interview employees in the hope of finding the source of the story. The consultant promised to keep her interview notes to herself and give the board and the union only her final report. The report and, later, the notes were given, however, to the IRB management. Nothing was given to representatives of the union.

An employee and the union sought the report and notes under the access law. The chairperson of the board withheld the notes and parts of the report on the basis that disclosing them would break the consultant's promise and harm labour relations along with the board's ability to conduct similar investigations in the future. She refused to follow the Information Commissioner's recommendation that the report and portions of the notes be disclosed to the requesters.

The main issue for the court was whether the report and notes contained information which, if released, could reasonably be expected to be harmful to the conduct of lawful investigations within the meaning of paragraph 16(1)(c) of the Act. During the deliberative period of reserved judgment, the court of Appeal handed down its decision in *Rubin* v. *Canada (Minister of Transport)*.

In that case, the court of Appeal decided that paragraph 16(1)(c) could not protect information unless its disclosure would harm an ongoing or imminent investigation. This provision, therefore, cannot be relied upon to preserve unspecific, future investigations from injury. The lower court was bound by this decision. As a result, the report was ordered to be released and the notes referred back to the IRB for severing to protect personal information about individuals other than the requesters.

This decision is particularly noteworthy because of its clear direction that the right of access cannot be undermined by broad promises of confidentiality given by public officials.

II. The Commissioner as Respondent

The Attorney General of Canada and Bonnie Petzinger v. Information Commissioner of Canada and Michel Drapeau
(T-1928-96)

As discussed in last year's report (pages 34 and 35) the Attorney General of Canada, the Department of National Defence and the department's access coordinator asked the Federal Court to enjoin the Information Commissioner from reporting to the complainant, Colonel Michel Drapeau, the results of an investigation into his complaint made against ND. Mr. Justice McKeown of the Federal Court dismissed the request for an injunction as being frivolous and ordered ND to pay Colonel Drapeau's costs on a solicitor-client basis as a punitive sanction.

Despite the decision of Mr. Justice McKeown, the Attorney General of Canada, ND and its access coordinator persisted. They asked the Federal Court:

1. to prohibit the Information Commissioner from reporting the results of his investigation to Parliament;
2. to quash the commissioner's report;
3. to declare that the complaint against ND was frivolous and vexatious and made for improper purposes.

The Information Commissioner asked the court to strike out the entire matter.

Mr. Justice MacKay agreed with the Information Commissioner that the government's action should be struck out. He concluded that the government's legal attack had no reasonable prospect of success. Again, the court awarded the complainant, Colonel Michel Drapeau, his costs on a solicitor-client basis.

In his decision, Justice MacKay made it clear that the motives of requesters and complainants under the access law are irrelevant. Government institutions have an obligation to process access requests and the commissioner has a duty to investigate complaints. There is no legal justification for refusing service (or giving a poorer quality of service) to access requesters who the government considers to be frivolous, vexatious or acting in bad faith.

The court also concluded that it would not question or interfere with a recommendation made by the Information Commissioner unless it could be shown to be clearly unreasonable or unless minimal standards of fairness had not been met. In the court's opinion, the commissioner meets the required level of fairness if he gives the notices and opportunities to make representations which are required by sections 32, 35 and 37 of the *Access to Information Act*.

Finally, the court supported the commissioner's contention that, even on an application for judicial review, the challenging party is not entitled to have access to the commissioner's investigative records. The confidentiality of the investigative process must be respected.

Bonnie Petzinger* v. *Information Commissioner of Canada and Michel Drapeau
(A-692-97, A-693-97, A-726-97 and A-911-97)

The Attorney General of Canada and National Defence (ND) decided not to pursue further, by way of appeal, Mr. Justice MacKay's decision (discussed above) to strike out the government's case against the Information Commissioner. This was not to be, however, the end of the saga. ND's access coordinator appealed the decision of Mr. Justice MacKay in her own name. As a result, public funds will continue to be expended on both sides in order to pursue and defend an action which two courts have now found to be frivolous and with no possibility of success.

The outcome of this appeal will be reported in next year's annual report.

III. Cases of Interest in the Courts

In the Supreme Court

Michael A. Dagg* v. *Minister of Finance and Privacy Commissioner of Canada and Public Service Alliance of Canada
(File No. 24786)

For the second time, the Supreme Court of Canada has heard a case related to the *Access to Information Act* (*Clerk of the Privy Council v. Rubin* was the first case heard). This case was brought to court by Mr. Michael Dagg who first filed a request with the Department of Finance for copies of after-hours sign-in logs. Mr. Dagg intended to present this information to the union anticipating that the union would find it helpful in the collective bargaining process. The Department of Finance disclosed the relevant logs but deleted the employees' names, identification numbers and signatures on the ground that this information constituted personal information under section 19 of the *Access to Information Act* and was thus exempted from disclosure.

Mr. Dagg unsuccessfully sought a review by the Minister of this decision and filed a complaint with the Information Commissioner, arguing that the deleted information should be disclosed by virtue of exceptions related to personal information in paragraph 3(j) of the *Privacy Act* ("personal information" is defined in section 3 of the *Privacy Act*). The Information Commissioner concluded that the information at issue did not fall within the 3(j) exception and was, thus, properly exempted from disclosure. Mr. Dagg asked the Federal Court, Trial Division, to review the Minister's decision. The court found the information not to be personal (because it fell within paragraph 3(j)) and ordered its disclosure. This decision was, however, reversed by the Federal Court of Appeal.

Mr. Dagg appealed to the Supreme Court of Canada. The appeal was allowed by a majority of five judges (four judges dissenting). The court concluded that the names on the sign-in logs are *prima facie* "personal information" for the purposes of section 3 of the *Privacy Act*. However, it found that this information relates to the positions or functions of public officials and, hence, it may not be withheld from disclosure. The court concluded that both the opening words of

paragraph 3(j) of the *Privacy Act* (information that relates to the position or functions) and the specific provisions of subparagraph 3(j)(iii) (responsibilities of the position) are sufficiently broad to encompass the information sought by the appellant.

It was also decided that where it has been shown that a record is *prima facie* personal information, the government retains the burden of establishing that a record does not fall within one of the exceptions set out in paragraph 3(j) of the *Privacy Act*. Therefore, Mr. Dagg had no onus to establish that the information requested was not personal information under paragraph 3(j) of the *Privacy Act*.

Finally, the majority concluded that the Minister erred in placing upon Mr. Dagg the burden of demonstrating that the public interest in disclosure clearly outweighed any privacy interest (8(2)(m)(i) of the *Privacy Act*). Had the court found that the information was personal information, it would have referred the matter back to the Minister for reconsideration on the public interest issue without the imposition of any onus on the appellant.

In the Federal Court

Hydro-Québec **v. National Energy Board and Mouvement au Courant and The Grand Council of the Crees (of Quebec) and the Cree Regional Authority**
(T-2109-96**)**

A request was made to the National Energy Board by the Mouvement au Courant for a copy of two contracts involving Hydro-Québec. The access request made by the Mouvement au Courant was not expressly formulated as a request for access under the *Access to Information Act* (the letter in question did not refer to the Act, the request was not filed on the usual form and the Mouvement au Courant was not required to pay the usual administrative fees). The court found, however, that nothing in the *National Energy Board Act* or in the *Access to Information Act* itself prevented the National Energy Board from deciding on its own to deal with this access request pursuant to the provisions of the *Access to Information Act*.

The court therefore ruled that, despite the various deficiencies in complying with certain requirements of the *Access to Information Act*, both the board and Hydro-Québec had nonetheless complied with the substance and objective of the consultation process provided for by sections 27, 28 and 44 of the Act. Accordingly, Hydro-Québec was allowed to proceed under section 44 of the Act to have the National Energy Board's decision reviewed.

Chief Carol McBride, on behalf of the Timiskaming Indian Band v. *Her Majesty the Queen, as represented by the Minister of Indian and Northern Affairs Canada and the Attorney General of Canada*

(T-1685-94)

In this case, the chief of the Indian band applied for review of the decision of the Minister of Indian and Northern Affairs to provide access to land records of her band under the *Access to Information Act*. At issue was whether all or part of the information which the Minister proposed to disclose ought to be disclosed. The applicant's principal argument was that the Minister could not release the information without the express consent of the chief of the Indian band because the Crown holds a fiduciary duty not to disclose documents arising from the Crown's dealing with Indian land which it holds in trust. The court did not comment on the existence or extent of a fiduciary relationship in this particular case for it found that the case turned more on the issue of confidentiality (the confidentiality provisions in paragraphs 20(1)(b), (c) or (d)).

As to the issue of whether the information was confidential, the court found that there was no presumption of confidentiality because the information regarding land transfers had to be reported to the department. The applicant's mere expectation that the communications would remain confidential when submitted to the department was not enough. The test to be met was an objective, not a purely subjective one. The department had not treated the information as confidential, and had provided no assurances that it would not be disclosed.

Since the information could not be considered confidential, the court dismissed the applicant's argument with respect to paragraph 20(1)(b). The court also dismissed the applicant's argument with respect to paragraphs 20(1)(c) or (d) as the applicant did not establish a "reasonable expectation of probable harm" from the release of the information.

Tolmie v. *Canada (Attorney General)*

(T-754-96)

The requester in this case requested access to the Revised Statutes of Canada in the software format used by the Department of Justice. The department refused but within months the statutes became accessible via Internet and CD-ROM. The Information Commissioner agreed with the department. The court ruled that since the statutes were available for purchase by the public in both paper and electronic formats, they were excluded from the right of access by virtue of paragraph 68(a) of the *Access to Information Act*.

Hutton v. *Canada (Minister of Natural Resources)*

(T-2185-96)

A huge explosion at an American fertilizer plant in 1994 caused deaths, injuries and damage. It also sparked a lawsuit against the company. In this connection, the company hired a Canadian government research laboratory to conduct a confidential study. The Minister of Natural Resources, defending the economic interests of Canada and the company, turned down a request for access to the study.

Taking into account the laboratory's increasing reliance on revenue from research for the private sector and the ability of competitors to provide the same services confidentially, the court found it reasonable to expect that disclosing the study could harm the laboratory's competitive position. In a climate of fiscal restraint, the court ruled, protecting the laboratory's competitive position was an important public policy concern and it was appropriate for the Minister to use the discretion under paragraph 18(b) of the Act to withhold the study.

The court also considered the issue of third-party information. Unable to identify any information in the study as having been supplied by the company, the court concluded that paragraph 20(1)(b) of the Act did not apply. However, the court held that paragraphs 20(1)(c) and (d) did apply because, in light of the massive damage claims facing the company, it was reasonable to expect that disclosing the study could cause the company material financial loss, harm to its competitive position, or interference with out-of-court settlement negotiations.

Rubin* v. *Canada (Minister of Transport)
(A-70-96)

This case arose as a result of refusal by the Minister of Transport to release a report on the worst airline disaster in Canadian history, the 1991 Nationair DC-8 crash in Saudi Arabia which killed 263 people. According to the Minister, the effectiveness of the department's safety review procedure depended on the candid cooperation of airlines and their employees; exposing a report to public view would have a "chilling effect" on their willingness to participate in future safety reviews.

The question for the Court of Appeal was how to interpret paragraph 16(1)(c) of the Act, which gives the Minister the discretion to exempt information from disclosure if it could reasonably be expected to be harmful to the conduct of lawful investigations. This exemption was open to two interpretations: a narrow one, protecting only a current or impending investigation against potential harm from information disclosure; and a broad one, shielding an entire investigative process from such harm, including latent effects on future investigations. Bearing in mind that the purpose of the Act was to broaden public access to government-controlled information, the court chose to read the exemption narrowly.

The court found support for its choice in the French wording, the grammatical tense, the modern interpretation rule, and the fact that a broad construction would render other provisions of the Act redundant. The court stressed the importance of public scrutiny to the regulation of the aeronautics industry, but observed that if (though the evidence was to the contrary) a "chilling effect" were substantiated, other means were available to Parliament to make future reports confidential. Accordingly, the court ordered the Minister to release the report.

Proposed legislative changes

Here are some highlights of the year's proposals for legislative change affecting access to information:

I. Government bills affecting the Right of Access

Bills C-66 and C-19

Bill C-66 (introduced by Labour Minister Gagliano on November 4, 1996) proposed, among other amendments to the *Canada Labour Code*, to elaborate on the immunity of arbitrators and conciliators from being required to give evidence in other proceedings. The amendment stated that regardless of the provisions of any other Act, no notes, draft reasons or draft reports were to be disclosed without the writer's consent. Not having been consulted in advance, the Information Commissioner did not take note of the change until the Bill had passed the Commons and while it was before the Senate. He was concerned that the amendment was in conflict with the principle that exceptions to the right of access to information should be limited and specific (section 2 of the Act) and with the establishment of a right of access to information "notwithstanding any other Act" (section 4 of the Act). The Information Commissioner appeared before the Senate Standing Committee on Social Affairs and Science and Technology on April 24, 1997 to express his concerns. Bill C-66 died on the Order Paper when Parliament was dissolved on April 27, 1997.

Bill C-19 (introduced by Labour Minister MacAuley on November 6, 1997) revived Bill C-66, with some changes. The amendment in question now specifies that the immunity extends only to notes, draft arbitration decisions and draft conciliation reports; the idea of prevailing over other Acts has been dropped. The revised wording addresses the Information Commissioner's concerns. The Bill passed second reading and was referred to the House of Commons Standing Committee on Human Resources Development and the Status of Persons with Disabilities on March 17, 1998.

II. Private Members' bills to reform the *Access to Information Act*

Bill C-208

Bill C-208 was introduced by Colleen Beaumier, Liberal, Brampton West-Mississauga, on September 26, 1997. It calls for fines of up to $10,000 and jail terms of up to five years for anyone who tries to deny a right of access to information by destroying, falsifying or failing to keep records. The Bill was debated at second reading in the House of Commons on December 5, 1997 and February 12, 1998.

Bill C-216

Bill C-216 was introduced by Myron Thompson, Reform, Wild Rose, on September 29, 1997. It proposes to make all Crown corporations subject to the Act. The Bill was debated at second reading in the House of Commons on December 1, 1997 and March 13, 1998.

Bills C-217 and C-253

Bill C-217 was introduced by Bob Mills, Reform, Red Deer, on September 29, 1997. It would have required the results of any public opinion poll commissioned by a federal department or other federal body to be tabled in Parliament. The Bill was debated at second reading and dropped from the Order Paper on October 31, 1997. However, the proposal was brought back before Parliament in the form of Bill C-253 introduced by Inky Mark, Reform, Dauphin-Swan River, on October 22, 1997.

Bill C-264

Bill C-264 was introduced by John Bryden, Liberal, Wentworth-Burlington, on October 23, 1997. It offers a comprehensive reform of the Act. The Bill draws on recommendations for reform made by the Justice Committee in 1986, the Information Commissioner in 1994 and the author's extensive experience using the access law for his own research purposes.

Bill C-286

Bill C-286 was introduced by Michel Bellehumeur, Bloc Québécois, Berthier-Montcalm, on November 24, 1997. It addresses a number of issues discussed by the Information Commissioner in previous annual reports with respect to destruction and falsification of records, non-compliance with time limits for responding to access requests, and access to Cabinet confidences.

When ministers leave (01-98)

Background

A former employee of the Department of National Defence (ND) made an access request for records associated with a study entitled *La Défense au Québec*. Having read the report during his employment, the requester was certain of its existence. The department conducted a search, however, and responded by saying that it could find no such record. The reason given for the failure to find the document was that it had been prepared for a former minister of National Defence, and ND believed all copies were destroyed when a new minister was appointed.

The applicant was not satisfied with the department's response and complained to the Information Commissioner. He believed that because it had been distributed to ND officials there must still be copies of the study in existence.

Legal issue

What constitutes a thorough search, and was one conducted in this case? These questions were central to the investigation. The complicating factor was the department's contention that records could not be accounted for due to a change of minister.

During the investigation additional searches were undertaken in various offices which might have been involved with the study. A copy was located and disclosed to the requester. The investigation confirmed, however, that the procedures are inadequate to ensure that records held in the Minister's office are properly retained when there is a change of minister.

Lessons learned

Records held in ministers' offices are often destroyed or otherwise disposed of with a change of ministers. The practice undermines the right of access when not done in careful accordance with requirements set down by the National Archivist. Officials in ministers' offices are not adequately informed that records subject to the right of access must be left behind or properly transferred to the Archivist when a minister moves. It is not uncommon for ministers to take a proprietorial approach to records held in their offices. In fact, many records held in ministers' offices do not belong to ministers and should be left behind.

It is entirely improper for records held throughout a department to be destroyed simply because they are copies of records generated by or for a minister who has been replaced.

When to translate (1)
(02-98)

Background

The *Nunavit Land Claims Act* (1993) recognizes the right of the Inuit to hunt bowhead whales in the Nunavit settlement area and allows for the harvest of one whale per year, subject to conservation. In 1996, the Inuit hunted bowhead whales for the first time in 25 years, and regional officials of the Department of Fisheries & Oceans (F&O) made a videotape from a boat not involved in the hunt. Several Inuit observers were also on F&O's boat and some of the audio on the tape was conversation in the Inuktotuk language.

In response to a request for a copy of the videotape, the department disclosed an edited version. It withheld as personal information some video portions and the entire audio under subsection 19(1) of the Access Act. This resulted in a complaint to the Information Commissioner.

Legal issues

The first issue was whether or not audio and video portions of the tape were properly withheld under subsection 19(1).

The department withheld the entire audio dialogue and close-up footage of the faces of Inuits who participated in the hunt. The Information Commissioner did not consider that the department had followed the principle of minimizing what is to be kept secret, as required by section 25 of the access law. At the commissioner's suggestion, F&O agreed to prepare a written transcript of the English audible dialogue, withholding only the names of identifiable individuals and remarks containing personal information. The transcript showed, beside each statement, the minute and second when the dialogue occurred in the tape. This satisfied the commissioner's concerns.

The second issue concerned the translation of the dialogue. Was the department under an obligation to have the audio portion of the tape translated from Inuit to English?

Under paragraph 12(2)(b) of the Act, the head of an institution has the discretion to have a translation prepared if the department believes it in the public interest to do so. In this instance, the ATIP officer called three different translation offices, including government translation services. Because the estimates received were in excess of $4,000, F&O refused to pay for the translation and informed the requester of the cost. The requester also found the amount prohibitive and refused to pay.

The Information Commissioner asked several consultants to verify the estimated costs. He was informed that F&O's estimate may have been conservative. Costs could have been as high as $5,000. This amount could not be recoverable under the law's fee regulations.

Taking into account the cost of translation and the content of the video, the commissioner found it not in the public interest to cause the translation to be made. There was no evidence to show that a translation of the Inuit audio would enable the public to better understand or evaluate the

conduct of the bowhead whale hunt.

Lessons learned

Every request for translation of a record must be examined on a case-by-case basis. If the translation cost is high, some demonstrable public interest should be served by translation. This is not to say that the information will not be disclosed in such situations—it will. The cost of the translation, however, will have to be borne by the requester, not the taxpayer.

When to translate (2) (03-98)

Background

A member of the Gull Bay Indian Band made an access request to Indian and Northern Affairs Canada (INAC) relating to aboriginal funding arrangements (AFA). In its response, INAC provided a record, portions of which were in English, others in French. The complainant felt that, if a totally English version was not available, one should be prepared to respond to his request.

Said the complainant: "I seek relief as prescribed by s.12(2)(a)(b) *Access to Information Act*. Should a complete English language translation be unavailable, I request a verbatim translation be prepared. I believe the subject matter 'to be in the public interest' on the following grounds:

- "Federal transfer payments exceeding $6.2 billion for aboriginal-directed expenditures, the lack of accountability for these funds has sparked public outcry including rebukes by the Office of the Auditor General;

- "The quality and number of contributors on the report is indicative of the importance of this issue within INAC;

- "Unlike other Canadians, the federal government relations with aboriginal peoples entail fiduciary obligations."

Prior to filing a complaint, the requester did not request a translation from INAC.

Legal issue

Is the department under an obligation to translate information which exists only in the French language into English?

The governing provision of the access law is section 12 which stipulates that, if a requester asks to be given access to records in a particular official language, a copy in the requested language shall be given "within a reasonable period of time if the head of the government institution that has control of the record considers it to be the public interest to cause a translation to be prepared."

The commissioner took the view that the provision should not be read narrowly. He did not

agree that the right to obtain a translation had been nullified by the fact that the requester did not stipulate his choice of language at the time of his request. The commissioner also considered the public interest issue raised by the complainant.

He noted that it is INAC's policy to translate all reports intended for public distribution. However, the record in issue was never intended for distribution. It was a background document which was used to create the final report. Thus, at the time, INAC extracted what was needed from the background record for incorporation in the final report. Only the final report was translated.

The commissioner also took into account the age of the record; it was four years old when requested. Those portions of the background report which were considered part of INAC's official AFA policy of the day were published and made widely available in both official languages to the public and to the requester. The report had become dated at the time of the request and no longer reflects the department's current policy on AFA. Finally, the commissioner took into account the cost of the translation.

Taking all these factors into account, the commissioner concluded that adequate information in English had already been made public. The public interest in the transparency of INAC's policies had been served without the necessity of undertaking additional, expensive translation. The commissioner concluded that the complaint was not substantiated.

Lessons learned

A complaint about the language of records received under the Act should not be refused merely because the complainant has not indicated a language preference at the time of the request. Whenever a request for translation is made, departments should consider whether there is a valid public interest justifying the translation. Facts to be taken into account include: the age of the records, whether similar information is already public in the other language and the cost of the translation.

Should parents know? (04-98)

Background

A father filed a request with the Department of Foreign Affairs and International Trade (FAIT) for copies of his children's passport application forms. Information about the children was withheld under subsection 19(1) of the Act, a provision to protect their personal privacy. The father could not understand FAIT's position since he had signed the children's passport forms as required and had full knowledge of their content.

For its part, FAIT argued that the father did not have a right of access because the children were in the legal custody of their mother.

Legal issue

The case raises two legal issues: Does a non-custodial parent have a right of access to personal information about his or her children? May an exemption be applied to withhold

information known to the requester?

On the first issue, the commissioner took into account the fact that the children were too young to consent to the father having access to their records. He also took into account paragraph 10(a) of the *Privacy Regulations* which allows a minor's rights (under the *Privacy Act*) to be exercised by a person authorized by law to administer the minor's affairs. Based on these considerations, the commissioner concluded that in this case only the custodial parent, the mother, could consent to the disclosure of the children's information to the father.

On issue two, the commissioner concluded that the father's prior knowledge of the content did not impair the department's ability to rely on section 19 of the access law. Unless the information was in the public domain or authorized for disclosure by the *Privacy Act*, the Information Commissioner concluded that it should be withheld from the father.

For these reasons, FAIT's decision was upheld.

Lessons learned

When separated parents seek access under the access law to personal information about their minor children, departments should refuse disclosure unless (1) the custodial parent consents, (2) the information is public or (3) subsection 8(2) of the *Privacy Act* authorizes disclosure. Prior knowledge of the content of the record does not prevent the department from invoking the section 19 exemption.

'Top secret' documents don't top the law (05-98)

Background

This case involves an access request to Citizenship & Immigration Canada (C&I) for information about the Minister's consideration of amendments to the *Citizenship Act* that would effect the status of children born in Canada to parents of non-citizens or immigrants. On two separate occasions, C&I informed the requester that it had no responsive records. Yet the requester knew changes were at least being considered, based on statements made public by the Minister and the department.

The investigation of the requester's complaint determined—with help from the requester—that the department did possess a report on the subject. C&I did not produce this information in response to the request because, having classified it as "Top Secret," C&I was of the opinion that it was not subject to the *Access to Information Act*.

Legal issue

The question raised in this case is: Are records classified as confidential, secret, top secret or otherwise, immune from the right of access? The commissioner took the view that classified records are clearly not immune from the right of access. Accordingly, unless a record, whatever its classification, can be protected under an exemptive provision of the *Access to Information*

Act, departments are required to provide access.

The commissioner found that C&I contravened the Act by failing to produce or even acknowledge the existence of the record. In response, the department processed the record under the Act and, with exemptions, it was disclosed to the requester.

Lessons learned

The *Access to Information Act* takes precedence over all other statutes. If a record is to be withheld from disclosure, authority must be found in the access law. Disclosure may not be denied merely because of a record's security classification, however sensitive that classification may be. In no case may an official suppress and refuse to process a record for disclosure merely because of the record's classification.

Control: broadly interpreted (06-98)

Background

On November 6, 1995, David Dingwall, the Minister then responsible for Canada Post Corporation (CPC), launched the Canada Post Mandate Review and announced the appointment of George Radwanski as its chairperson. The mandate of the review was to consider financial and policy issues designed to provide cost-effective and quality postal services to the public. The chairperson was supported by an advisory committee comprised of public officials and a secretariat which received inquiries and submissions by Canadians regarding the mandate review.

During the course of its work, the Review commissioned an independent assessment of labour-management practices at Canada Post by George V. Orser, a former deputy secretary of the Staff Relation Branch at the Treasury Board Secretariat. This report was submitted to the Chairman on July 12, 1996 under the title, *Canada Post Mandate Review: Comments on Labour Relations and Compensation*. Gordon Ritchie, a former deputy chief negotiator of the Canada-U.S. Free Trade Agreement, produced another report for the review entitled, *Canada Post: Assessment of Financial Position*, dated June 14, 1996.

On July 31, 1996 the report of the Review entitled, *The Future of Canada Post Corporation*, was submitted by the Chairman to the Minister responsible for Canada Post Corporation. The studies were cited on pages 96 and 97 of the Review's final report. The report, was made public on October 8, 1996, but the Orser and Ritchie assessments were not.

In the Fall of 1996, the Canadian Union of Postal Workers (CUPW) made unsuccessful informal requests to the Chairman of the Review to obtain the Orser and Ritchie studies. CUPW then made a formal request under the *Access to Information Act* to Public Works and Government Services Canada (PWGSC) to obtain the records. In February of 1997, PWGSC told the requester that "the records sought are not under the control of Public Works and Government Services Canada and therefore the department is not authorised to grant access to the

documents. Although Canada Post Corporation (CPC) is not subject to the *Access to Information Act*, you may wish to submit a request to CPC." The union complained to the Information Commissioner about this response. CUPW also asked CPC to voluntarily disclose the Orser and Ritchie studies.

Legal issue

This case raised the following issue: Are records relating to the so-called Radwanski review of Canada Post under the control of Canada Post (and, thus, not subject to the access law) or are they under the control of PWGSC (which is subject to the right of access)? In deciding this issue, the commissioner took into account the following facts. Canada Post and PWGSC share the same minister. Canada Post and PWGSC are parties to an agreement whereby PWGSC provided the funding and support for the review. Staff of PWGSC was assigned to assist the minister responsible for Canada Post in fulfilling her duties, including those specifically related to the Canada Post Mandate Review. Consultants' fees were paid for by PWGSC as well as the cost for office space, office furnishings and administrative support services. The records at issue were submitted by the consultants to staff at PWGSC and were in the physical possession of PWGSC at the time the request was made under the *Access to Information Act*. Canada Post had no legal authority over the records such as the power to authorize their destruction or direct how they were to be used.

The commissioner concluded that the facts of this case supported the view that the requested records were under the control of PWGSC.

In coming to this view of the facts, the Information Commissioner was guided by the decision of the Federal Court of Appeal in *Canada Post Corporation* v. *Minister of Public Works*, [1995] 2 FC 110.

Speaking for the majority, Justice Létourneau said:

"It is not in the power of this Court to cut down the broad meaning of the word "control" as there is nothing in the Act which indicates that the word should not be given its broad meaning. On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the Act to government information." (p.128)

Consequently, taking a broad view of the term "control" and taking into account Parliament's intention to give the requester a meaningful right of access, the commissioner concluded that the Orser and Ritchie reports were under the control of PWGSC and were, hence, accessible under the A*ccess to Information Act*.

During the course of the commissioner's investigation, Canada Post voluntarily provided a copy of the records to the union. On that basis, the commissioner discontinued his investigation. In doing so, however, he made it clear to PWGSC that the law did not support its refusal to disclose the records under the *Access to Information Act.*

Lessons learned

It is not always easy to determine which entity has "control" over a record. If a government

institution subject to the access law has possession of a record in any of its offices, control is presumed. If a record is not in the possession of such an institution, the institution may, nevertheless, retain control for the purposes of the access law. Control will be retained if the record is held elsewhere on the institution's behalf or if the record has been physically transferred elsewhere as part of a scheme to undermine the right of access.

That "tasty Tobin tonic" (07-98)

Background

In the so-called "Turbot War" between Canada and Spain, Canada detained the Spanish vessel *Estai*. During this incident, video footage was taken from the fisheries patrol vessel *Leonard J. Cowley* as the fisheries patrol vessel *Cape Roger* fired .50 calibre warning shots across the bow of the *Estai*.

Shortly after the incident, officials of Fisheries and Oceans Canada (F&O) made a second video tape. It was a compilation of footage from the previously described tapes and included F&O video of the RCMP boarding team retrieving the *Estai's* nets and Minister Brian Tobin's press statements. As well, the compilation video contained related clips from commercial broadcasts. A humorous music track was added. The video was intended for in-house use in F&O as a morale booster for a job well done. The tape was titled: "A Few Teaspoons of that Tasty Tobin Tonic."

A journalist got wind of the tape's existence and made a request for it under the *Access to Information Act*. After much dithering by F&O, parts of the tape were disclosed while others were withheld. For example, F&O did not want to disclose the footage of the firing across the bow. The department argued, on the advice of the Department of Foreign Affairs, that disclosure would inflame already strained diplomatic relations between Canada and Spain (and its European community partners). This, in F&O's view, would be "injurious to the conduct (by Canada) of international affairs" and, hence, secrecy was authorized by subsection 15(1) of the *Access to Information Act*.

The journalist, on the other hand, argued that the tapes deal with matters of public record, many of the segments had been aired commercially and that disclosure of previous videos of F&O enforcement actions had not given rise to any injury.

Legal issue

The issue in this case was straightforward: Could it reasonably be expected that disclosure of the videotapes would prove injurious to Canada's ability to conduct its relations with Spain or other members of the European community?

On the one hand, the Information Commissioner had to take seriously the considered views of the international relations experts in F&O and FAIT who gave the opinion that such an injury was likely. On the other hand, the commissioner had to take into account the very public nature of the events depicted on the videos, the fact that the government, the department and former

minister Tobin had chosen to deal with the turbot dispute with Spain in such a public way. He had to weigh, as well, the possibility that the department's reluctance to disclose stemmed more from embarrassment at what could be perceived as gloating. He also had to take into account the passage of time since the *Estai* incident (the ship was detained in March of 1995 and the commissioner made his finding on the complaint in August of 1997).

The commissioner concluded that some of the added audio portions were editorial in nature and could inflame relations with Spain—relations that Canada had taken great diplomatic efforts to normalize. Those few portions could, in the commissioner's view, be kept secret. The commissioner also concluded, however, that the majority of the video and audio content of the tapes was factual, non-inflammatory and related to events which are part of the public record. He recommended that the majority of the content of the tapes, including the shots across the bow of the *Estai* be disclosed.

It was not a matter of questioning the good faith of the officials of F&O and FAIT who argued for secrecy. Their view that injury was "possible" simply did not, in the commissioner's view, meet the statutory test of "reasonable expectation." The commissioner was guided by the decision of the Federal Court in *Information Commissioner of Canada* v. *The Prime Minister* [1993] IF.C.427. In that decision, Justice Rothstein observed that:

"Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged." (p.479)

F&O accepted the commissioner's recommendation and disclosed the tapes with only minor severances. The requester was satisfied and the portion containing the firing across the bow of the *Estai* was shown on CBC television.

Lessons learned

All exemptions which contain a "reasonable expectation of injury" test must be invoked with care and restraint. The Courts have insisted that:

1. the expectation must be reasonably based on evidence and not surmise;

2. the evidence must support an expectation of possible injury at the level of a probability not just a possibility; and

3. there must be a clear and direct linkage between the disclosure and the expected injury.

An important element of evidence to be taken into account before invoking an injury test exemption is the effect(s), if any, of previous releases of similar information.

Public opinion polls (cont'd)
(08-98)

Background

A newspaper reporter filed an access to information request with the Privy Council Office (PCO) for two public opinion polls taken in July of 1996 on the issue of national unity. After taking some seven months before answering, the PCO notified the requester of its decision to invoke section 14 of the access law to exempt two specific poll questions and the associated responses. Section 14 of the Act provides for withholding information on the grounds that disclosure could reasonably be expected to injure the government's ability to conduct federal-provincial affairs.

In his complaint to the Information Commissioner, the journalist expressed skepticism about the legitimacy of this exemption and asked the commissioner to determine whether PCO's decision to deny access to portions of the requested records was justified.

Legal issue

This case served as yet another chapter in the long saga of the handling of access requests for national unity polls. Does section 14 authorize the refusal to disclose the results of publicly funded polls on public issues? The issue had been largely dormant since the Information Commissioner resorted to court action to force disclosure of unity polls which a Conservative government tried to keep secret. When the Liberal government of Prime Minister Chrétien took power, it implemented a policy of informal, automatic, full disclosure of polling questions and answers. Yet, in this case, old sensitivities about the unity file were raised again.

One of the two questions withheld by PCO asked respondents to rate their level of trust in certain individuals involved in the unity debate. The results were similar to a myriad of published polls. The Information Commissioner took the view that the question and responses could not, if disclosed, reasonably be expected to give rise to the harm alleged. He rejected, as had the Federal Court, the government's contention that even though other public polls contained similar information, the government's poll would be more influential. The commissioner saw no basis for distinguishing this information from the information at issue in the previously described case against the former government and, as in that case, he recommended disclosure. The government accepted the recommendation and complied.

The considerations were different, however, when it came to the second withheld question. Its content and the related responses cannot be described here because the commissioner agreed with PCO that disclosure of it could reasonably be expected to be injurious to the conduct of federal-provincial affairs. This question clearly revealed, in the commissioner's view, what is potentially a key element of the federal government's strategy should there be another Quebec referendum on separation.

The requester was informed of the result and of his right to challenge it in the Federal Court. He expressed satisfaction with the outcome.

Lessons learned

Since his appointment in July of 1990, the Information Commissioner has urged that the results of government public opinion polls be routinely and fully released. In his view, the public has the right to know what the people are telling government about their own opinions through publicly financed polls. The Federal Court has confirmed the commissioner's view that it is difficult to

justify the refusal to disclose polls.

Yet, as this case shows, it is wrong to say that poll questions may never be exempted from the right of access. There may be questions which do reveal the government's strategy and tactics in relation to a sensitive matter and it may be possible for the government to meet the difficult evidentiary burden established by the Federal Court. When it comes to polls, the general rule is against secrecy—but there are rare exceptions.

Policy on policy manuals (09-98)

Background

A lawyer submitted an access request to the Royal Canadian Mounted Police (RCMP) for a copy of the *Alberta Provincial Operational Policy Manual*. While the RCMP released some information, most was exempted under subsection 16(3) of the *Access to Information Act* which prohibits disclosure of information obtained or prepared by the RCMP while performing policing services in a province.

Legal issue

Is the content of an operational policy manual the sort of information which subsection 16(3) was designed to protect from disclosure? Having reviewed the content, the Information Commissioner concluded that the operational manual was a guide to aid the RCMP in administration rather than information obtained or prepared by the Force while performing policing services for the province.

The RCMP remained adamant about its position that even its provincial operational guidelines must be kept secret.

The commissioner decided to break the impasse by bringing the matter to the attention of the Attorney General of Alberta. The Attorney General agreed that the RCMP's interpretation was unnecessarily broad and he gave his consent for disclosure. As a result, the RCMP reconsidered its decision and released additional information to the requester.

Lessons learned

Although subsection 16(3) is a mandatory exemption, like all other exemptions it should be interpreted in a limited and specific way. The commissioner and the RCMP have agreed to refer such cases in future to the appropriate provincial Attorney General so that he or she may have the opportunity to consent to disclosure.

Control of record (10-98)

Background

A member of a citizen action group in Nova Scotia examining environmental issues, wanted to know more about how much public money went into a Cape Breton golf course and whether taxpayers received good value for their money. He made an access to information request to the Atlantic Canada Opportunities Agency (ACOA) for records relating to ACOA's funding of the Bell Bay Golf Course.

In response, he received approximately 14 pages of records which showed that ACOA had contributed just under a million dollars to the golf course. The province of Nova Scotia and another federal institution, the Economic Cape Breton Corporation (ECBC), also contributed money.

The requester was surprised that so few records were held by ACOA for a project of this size. Where was the application, the business plan or the feasibility study? He had obtained records in the past from ACOA on projects which had been denied funding, and the records usually ran to hundreds of pages. What accounted for the discrepancy? He asked the Information Commissioner to investigate.

The Information Commissioner determined that there were, indeed, many more relevant records but they were not held on ACOA premises. Rather, they were held on ECBC premises—a crown corporation not subject to the *Access to Information Act*. ACOA took the position that the records were not under its control and ECBC took the position that the requester had no right of access to records held by it.

Legal issue

Which federal entity, ECBC or ACOA, controls the records sought by the requester for the purposes of the *Access to Information Act*? To answer the question, the commissioner looked at the circumstances surrounding the creation, retention and use of the records. He discovered that there exists a written agreement between ACOA and ECBC which makes ECBC an agent for ACOA. All of ACOA's funding projects in Cape Breton are, under the agency agreement, handled by ECBC. Accordingly, the application by Bell Bay Golf Course for funding went to and was retained by ECBC. For that reason, too, the business plan and analysis records were held by ECBC as ACOA's agent.

The commissioner also took into account the facts that officials of ACOA gave evidence indicating that they expected ECBC officials to review the Bell Bay application and the ACOA officials relied on the advice given by their agents without calling for the records collected or generated by ECBC. Finally, the commissioner took note of the fact that the head of ACOA was also the head of ECBC, and that employees working for ECBC who reviewed the Bell Bay application and related records had their salaries paid by ACOA.

Consequently, the commissioner concluded that the Bell Bay golf course records held by ECBC were under the control of ACOA for the purposes of the *Access to Information Act.* He recommended to the head of ACOA that the records be disclosed. ACOA refused to follow the commissioner's recommendation and the commissioner has sought the consent of the requester to take the matter to the Federal Court. The outcome will be reported in next year's report.

Lessons learned

It is premature, of course, to draw lessons from a case in dispute which has not been resolved by the Federal Court. Suffice to say that the issue of "control" is one which must be decided on a case-by-case basis taking into account the particular circumstances in which records are collected, compiled and used. The case may yet confirm the proposition that records in hands of an agent will be deemed to be under the control of the principal.

Third-party motives (11-98)

Background

To the bidder submitting a $190,000 tender, Public Works and Government Services Canada (PWGSC) awarded a contract to provide audio-visual equipment for a National Defence (ND) facility in Kingston, Ontario.

The Request for Proposal (RFP) stipulated that the successful bidder provide projectors with a 1000 American National Standards Institute (ANSI) lumens capability: the higher the ANSI lumens, the greater the ability of the projector to provide a clear picture.

At a pre-award bidders' conference, a prospective bidder stated that only one company in the world produces a projector meeting ND's minimum lumens requirement. He asked ND to consider a change to its specification. In the discussion which followed, suppliers pointed out there could be more bids if the requirement was less stringent. But ND officials remained firm.

After the contract was awarded, one of the unsuccessful bidders called the PWGSC procurement office and asked for the model of the projector included in the successful bid. The PWGSC officer would not give the details informally and suggested the individual might want to apply for information under the *Access to Information Act*.

After the individual filed a formal request, PWGSC asked the firm which was awarded the contract if it had any objections to releasing the requested information, the normal procedure in such third-party cases. The winning bidder asked that the projector's unit price and model be withheld, saying that since it was in the middle of negotiations with the parent distributor of the projector to obtain exclusive rights to sell that company's products in Canada, disclosure could be damaging to these negotiations and to its competitive position.

PWGSC accepted the third-party's rationale for withholding the requested information. The department also supported the third party's claim that even the disclosure of the brochure/catalogue information would reveal the company's source for the projectors and monitors and, thus, affect its negotiating position for sole distribution rights.

The requester was not satisfied with the response and complained to the Information Commissioner. The complainant was convinced that, because of the third party's low bid (the amount of which — $190,000 — was disclosed to him by PWGSC), the third party could not

have met the requirement of providing projectors with the 1000 ANSI lumens capability.

Legal issue

Paragraphs 20(1)(c) and (d) are mandatory exemptions providing that a government institution shall refuse to disclose confidential financial or commercial information, the disclosure of which could be injurious to the competitive position or negotiations of a third party. Was the test met in this case?

During the investigation, in an effort to verify the third party's claim about ongoing negotiations, the Information Commissioner's office called the distributor's North American headquarters in the United States. The commissioner was told that there were no negotiations for sole distribution rights. Furthermore, he learned that the projector provided under the winning bid does not have the capability for providing the 1000 ANSI lumens, which was the integral requirement of the contract. The complainant's hunch had proved to be right.

As a result of this new information, PWGSC notified the third party that the department intended to disclose details about the projectors and monitors supplied under the terms of the contract. The information was disclosed and the complaint was recorded as resolved.

Lessons learned

If a department wishes to exempt information at the request of a third party, it has an obligation to take reasonable steps to verify the accuracy of the third party's rationale for requesting non-disclosure. If PWGSC had done so in this case, it would have learned that the protestations of harm from disclosure had no merit. In addition it would have learned that the winning bidder did not deliver the required goods!

The test for exemption set out in section 20 is an objective and onerous test. A simple assertion by the third party that injury will occur does not satisfy the test. Clear evidence is required showing the probability that the harm therein set out will result from disclosure.

At the time of this writing, it is not known whether or not PWGSC re-opened the bid process for the contract or if any action was taken against the non-compliant contractor.

Transparent bidding **(12-98)**

Background

Public Works and Government Services Canada (PWGSC) has routinely taken the position, in the past, that unit prices for goods and services should be withheld when information about winning bids was requested under the access law. The department believed that disclosure of unit prices (as opposed to overall contract value) could put third parties at a competitive disadvantage. Though this position has been supported by the Information Commissioner (and his predecessor), it has been so with growing skeptical reservation. The commissioner has urged that possible harm to the third parties be weighed against the public interest in order to make the government contracting process more transparent. The commissioner made his

concerns known in his 1993-94 Annual Report.

PWGSC this year has, to its great credit, reconsidered its position on unit prices. As a result, effective March 31, 1997, PWGSC's contracting authorities were directed to include—in all requests for proposals (RFPs) for standing offers for goods and services—a clause informing the bidders that the unit prices of the winning bid would be disclosed. A similar clause would be included in any subsequent standing offer agreements for goods and services between the department and third parties.

In March of 1997, PWGSC sent out to interested third parties a RFP for court reporting services. Several companies expressed interest and submitted bids. Two winning bidders were selected (one for each of the regions involved) and standing offer agreements were signed in June of 1997.

In July, a competitor sought disclosure of the unit prices for these standing offer agreements. When PWGSC received the request, it consulted the two third parties and both objected strongly to the possible disclosure. After considering the third parties' representations, the department exempted the unit prices contained in the two contracts under paragraphs 20(1)(b) and (c) of the access law.

Adding to the complainant's dissatisfaction was the fact that PWGSC had included the new clauses concerning the disclosure of unit prices in an earlier standing offer agreement which her company had won. Nevertheless, although her company's unit prices were subject to disclosure, the department told her the unit prices contained in the two requested agreements were not. The requester complained to the Information Commissioner.

Legal issue

The legal issue in this case was whether the department had properly exempted the unit prices under section 20 of the *Access to Information Act*, given the change in policy which should have taken effect on March 31, 1997. Paragraphs 20(1)(b) and (c) are mandatory exemptions which provide that a government institution shall refuse to disclose confidential, financial or commercial information, or information the disclosure of which could be injurious to the competitive position of a third party.

The investigation revealed that the PWGSC procurement office had mistakenly omitted the unit-prices-will-be-disclosed clauses from the RFP and the two standing offer agreements. Officials were not aware of the directive to include the clauses at the time the two standing offers were awarded. The commissioner was satisfied that the omission of the clauses was entirely unintentional.

The commissioner was also satisfied the unit prices qualified as information described under paragraphs 20(1)(b) and (c)—the material was confidential, commercial and financial information which was not available through other sources, had been kept confidential by the third parties and the department, and would be injurious to the competitive positions of the two companies if disclosed. Furthermore, since PWGSC did not include the new clauses in the RFPs or subsequent standing offer agreements, the two winning bidders had no prior notification

that their unit prices might be disclosed.

The commissioner concluded that the unit prices listed in the standing offer agreements were properly withheld by the department under paragraphs 20(1)(b) and (c) of the Act and found the complaint to be not substantiated. The complainant was informed of the commissioner's findings, and about his recommendation that PWGSC ensure that a consistent approach be taken in future with respect to standing offer agreements.

Lessons learned

If a department feels that it is in the public interest to make public sensitive third-party information, notification should be given to the third parties before the commercial or financial information is provided to the government. If third parties do not agree with the proposed disclosure they then have the option of not submitting the information. However, if a third party agrees to submit a bid despite the advance notice, there is tacit consent to disclose and the department is free to act accordingly.

Public Works and Government Services Canada's decision to disclose unit prices under standing offers is an encouraging signal that this government department is serious about making the tendering process open, fair and accountable.

The grey area of "public interest" (13-98)

Background

A journalist requested records from Transport Canada (TC) pertaining to violations by commercial pilots of the *Aeronautics Act and Regulations*. He was interested in knowing which pilots had received penalties including compulsory counselling sessions and suspensions. TC refused the request under subsection 19(1) of the *Access to Information Act* in order to protect the privacy of the pilots.

The journalist complained to the Information Commissioner arguing that, although the pilots' names are personal information as defined by the *Privacy Act*, they should be released in the public interest. He referred to subparagraph 8(2)(m)(i) of the *Privacy Act* which states:

> "8(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed . . . (m) for any purpose where, in the opinion of the head of the institution. . . (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure . . . ."

Legal issue

Is there a public interest in disclosing the names of penalized commercial pilots and, if so, does that interest clearly outweigh any invasion of privacy that would result? This was the issue confronting the commissioner in this case.

The journalist's case was straightforward. He argued that the public interest served would be

the safety and peace of mind of passengers. He also argued that, through disclosure, the public could better judge whether appropriate action had been taken to correct any improper behaviour by pilots.

Transport Canada, on the other hand argued that the public interest in safety is properly served by checks and balances in place in the airline industry, as well as by the regulatory, investigative and enforcement role of TC. It argued that public exposure of the pilots would constitute a penalty disproportionate to any of the minor transgressions which usually give rise to administrative sanctions.

The Information Commissioner was not convinced that the public interest to be served by disclosure clearly outweighed the invasion of privacy that would result. He accepted the argument that Transport Canada's regulatory role adequately serves the public interest in airline safety without the need for the public to intrude into the privacy of pilots. Therefore, he concluded that Transport Canada was correct in its decision to keep the requested records secret.

Lessons learned

Parliament has recognized in section 19 of the access law that the right to privacy and the right to know will sometimes come into conflict. The law gives guidance on resolving those conflicts. For example, information relating to the duties and functions of identifiable public officials does not qualify for privacy protection. Personal information which is publicly available or for which there is consent for disclosure may not be withheld for privacy reasons. And where there is a clear and compelling public interest in disclosure, the public interest takes precedence over the right of privacy.

Yet, the law is silent on what constitutes "public interest." The notion must be considered on a case-by-case basis. Protection of public health and safety are clear instances of public interest and there will be others. However, when weighing them against the value of privacy, Parliament has given a second, important guide. It is contained in subparagraph 8(2)(m)(i) of the *Privacy Act* and stipulates that even when there is a public interest it must "clearly" outweigh the privacy right before it may be given precedence. Consequently, where there are ways to serve the public interest which are less intrusive than public exposure (ways such as government regulatory programs) the less intrusive option should be adopted.

What were the rules of the game? (14-98)

Background

In 1995, Industry Canada called for applications for radio spectrum to provide wireless communication services which have come to be called personal communication services or PCS. After evaluating the applications for PCS, Industry Canada awarded two licences.

One of the companies which did not receive a licence wanted to know why not. In what way was their application deficient? The firm, Telezone Corp., asked under the access law for copies of

all records relating to the assessment criteria and analysis which gave rise to the final decision. In response, some records were disclosed but most were withheld in order to protect the department's deliberative process. Telezone complained to the commissioner.

Legal issue

The principle issue in this case was whether the evaluation criteria and the weightings assigned to them constitute "advice or recommendations" or reveal internal "deliberations" under the exemptions set out in paragraphs 21(1)(a) and (b) of the *Access to Information Act*. Industry Canada argued that the criteria and weightings were an essential consideration in the formulation of recommendations to the minister. In the department's view, the integrity of future competitions for licenses would be compromised if any of the deliberative information associated with the review of applications could be obtained under the access law.

For its part, Telezone argued that the criteria and weightings were simply the rules of the game which everyone ought to know in order to play fairly. In and of themselves, argued Telezone, the criteria and weightings do not disclose advice or recommendations and they do not reveal any information about the deliberative process.

The commissioner sided with Telezone. In his view, the corporation had a right to know what were the rules of the game and, most of all, whether the rules of the game were changed along the way. The commissioner accepted Telezone's view that the guidelines and weighting factors were analytical tools which do not implicitly or explicitly disclose deliberative information, advice or recommendations.

Since the purpose of the section 21 exemption is to preserve the candour of the internal deliberative process, the commissioner concluded that it would give the exemption an overbroad reach to include within it records which are only analytical tools.

The Minister of Industry refused to accept the commissioner's recommendation. With Telezone's consent, the commissioner has asked the Federal Court to review the minister's refusal. The outcome or progress of the litigation will be reported in next year's report.

Lessons Learned

Because the case is in dispute, it would be premature to draw definitive lessons. It is the commissioner's expectation that, in the end, the case will confirm that the section 21 exemption, as all others, must be construed narrowly. While records containing explicit advice or recommendations, or containing accounts of deliberations, fall within the exemption, records which are in the nature of guides or analytical tools, do not. It is especially important in a competitive licensing process that there be sufficient transparency to demonstrate the fairness of the process. Records which set out the rules of the game—the criteria to be met and their weightings—do not meet the tests for exemption under section 21.

Index of the 1997/98 Annual Report Case Summaries

20(1)(c)	11-98	**Third party motives** (PWGSC) (Could reasonably be expected - Prejudice to the competitive position)
	12-98	**Transparent bidding** (PWGSC) (Could reasonably be expected - Prejudice to the competitive position)
20(1)(d)	11-98	**Third party motives** (PWGSC) (Could reasonably be expected - Contractual or other negociations)
21(1)(a)	14-98	**What were the rules of the Game?** (IC) (Advice or recommendations)
21(1)(b)	14-98	**What were the rules of the Game?** (IC) (Deliberations)
25	02-98	**When to translate (1)** (F&O) (Severability - Information or other information contained in the record - Can reasonably be severed)

Glossary

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

ACOA	Atlantic Canada Opportunities Agency
C&I	Citizenship & Immigration Canada
F&O	Fisheries and Oceans Canada
FAIT	Foreign Affairs and International Trade
IC	Industry Canada
INAC	Indian and Northern Affairs Canada
ND	National Defence
PCO	Privy Council Office
PWGSC	Public Works and Government Services Canada
RCMP	Royal Canadian Mounted Police
TC	Transport Canada

Corporate Management

The Offices of the Information and Privacy Commissioners share premises and administrative support services while operating independently under their separate statutory authorities. These services, provided by the Corporate Management Branch, are centralized to avoid duplication of effort and realize cost savings to the government and the Programs. The services include finance, personnel, information technology advice and support, and general administration.

The Branch has 14 employees and a budget that represents approximately 14 per cent of total 1997-98 Program expenditures.

Resource Information

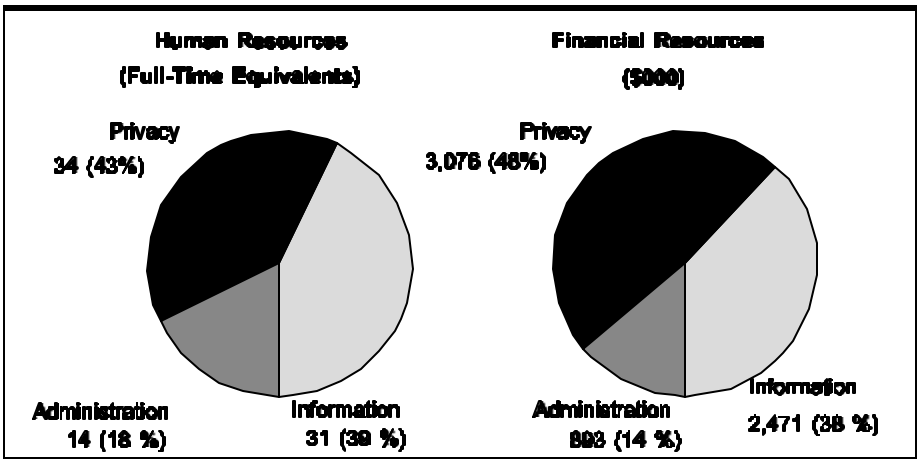
The budget of the Office of the Information Commissioner for 1997-98 was $2,534,000. Actual expenditures for the 1997-98 period were $2,470,714 of which, personnel costs of $2,152,617 and professional and special services expenditures of $181,559 accounted for more than 94 per cent of all expenditures. The remaining $136,538 covered all other expenditures including printing, travel, office equipment and supplies.

The budget of the combined Offices of the Information and Privacy Commissioners for the 1997-98 fiscal year was $6,616,000. Actual expenditures for 1997-98 were $6,440,099 of which, personnel costs of $5,308,203 and professional and special services expenditures of $695,181 accounted for more than 93 per cent of all expenditures. The remaining $436,715 covered all other expenditures including printing, travel, office equipment and supplies.

Expenditure details are reflected in Figure 1 (Resources by Organization/Activity) and Figure 2 (Details by Object of Expenditure).

Figure 1:
1997-98 Resources by Organization/Activity

Human Resources


Human Resources
(Full-Time Equivalents)
Privacy
34 (43%)
Administration
14 (18 %)
Information
31 (39 %)
Financial Resources
($000)
Privacy
3,076 (48%)
Administration
893 (14 %)
Information
2,471 (38 %)

1

Figure 2:
Details by Object of Expenditure

	Information	Privacy	Corporate Management	Total
Salaries	1,829,617	2,092,930	576,656	4,499,203
Employee Benefit Plan Contributions	323,000	378,000	108,000	809,000
Transportation and Communication	48,389	62,656	99,186	210,231
Information	24,524	36,916	2,212	63,652
Professional and Special Services	181,559	463,334	50,288	695,181
Rentals	16,359	715	15,043	32,117
Purchased Repair and Maintenance	3,110	5,898	8,113	17,121
Utilities, Materials And Supplies	26,388	12,498	29,088	67,974
Acquisition of Machinery and Equipment	17,643	22,932	4,825	45,400
Other Payments	125	95	--	220
Total	**2,470,714**	**3,075,974**	**893,411**	**6,440,099**

Note: Expenditure Figures do not incorporate final year-end adjustments reflected in the Offices' 1997-98 Public Accounts.