Annual Report
Information Commissioner
1995-1996

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

Subsection 2(1)
Access to Information Act

June 1996

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, 1995 to March 31, 1996.

Yours sincerely,

John W. Grace

June 1996

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

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Yours sincerely,

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Mandate

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

Passage of the Act in 1983 gave Canadians the broad legal right to information recorded in any form and controlled by most federal government institutions.

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

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

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

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

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

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

The Year in Review — Beyond the Peepholes

These reports to Parliament inescapably turn to evaluating the government's performance in meeting its obligations set forth in the *Access to Information Act*, in place now for 13 years. This report will do the same. To learn who has been good and who has been bad, read on. There are a few A's and F's but most government institutions are struggling in the grey-zone of C's.

The report-card approach has, however, a serious limitation. The danger is that it motivates government departments and agencies to do well by access mainly to avoid being mentioned unfavourably in these dispatches from the front line, rather than out of any real conviction that government openness goes to the heart of a healthy and civil society. Shared at all levels of government, that conviction will be a much more powerful motivator for openness than praise or scolding (does anyone really care?) from an information commissioner. Thus, this report turns first to the basics for a refresher course and perhaps even a little inspiration.

The reasons for freedom of information laws come glibly to anyone in this business: to make government open and therefore more accountable; to expose and deter extravagance or waste, or both; to make citizens better able to judge the performance of their governments and, thus, more informed voters; to give effect to the principle that information collected for public purposes and paid for by the people belongs to the people.

Yet those ready reasons, valid as they all are, do not go to the heart of the matter, not to the philosophical underlay upon which rests the real justification for the law. The answer to the question "Why access to information?" goes well beyond the easy reply, "To make government more open". That begs the real question: "Why should government be open?"

John Ralston Saul's, *Voltaire Bastards*, has been accurately called "a major exposé of power at the end of the 20th century." That provocative and original book may offer perhaps the most profound (certainly the most extended) argument made against "the art of the secret." While its author is unimpressed by the effectiveness of access to information laws (more about that later) in overcoming the power structure's instinctive penchant for secrecy, Mr. Saul's analysis is as compelling as it is pertinent to the role of access laws. He writes:

> "In reality we are today in the midst of a technology of pure power — power born of structure, not of dynasty or arms. The new holy trinity is organization, technology and information. The new priest is the technocrat — the man who understands the organization, makes use of the technology and controls access to the information . . . ."

Mr. Saul comes again to his theme of the new priests (he calls them "systems men") in his more recent Massey Lectures on CBC radio published this year under the title, *The Unconscious Civilization*:

> "Knowledge is one of the currencies of systems men just as it was for the courtiers in the halls of Versailles. They require a position in the structure that provides some ability to deny access to others and gain access for themselves. Then they require currency or chips. That is information."

Max Weber made the same point, if less vividly, 50 years ago when he observed that every bureaucracy tries to increase the superiority of the professionally informed by keeping their knowledge and intentions secret.

In the marketplace, the information man (and woman) can play his (her) own information power games with rules, if there are any at all, subject only to the Darwinian law of survival of the fittest. Information power games in or by governments are with government-gathered and taxpayer-paid-for information. The volume of such information has risen exponentially as governments, in response to perceived demands of citizens, have greatly extended their reach and activities.

Governments have become the custodians of information which can profoundly affect for better or worse the lives of individual citizens or the quality of a whole society. That is why access to government-held information by right, not merely by grace and favour, has become essential to a healthy society. No society can be truly democratic if its citizens must be satisfied with the information fed to them by their leaders.

It is now a tautology to say that alienation and cynicism lie dangerously close to the surface of the body politic. What is not so obvious perhaps is the insight of Australia's ombudsman, who plays an oversight role in the administration of his country's access to information law. He wrote in a recent report: "The greater the access we have to information, the greater will be the responsiveness of our governments to community needs, wants, ideas and creativity." The other side of this equation is, of course, the greater the restrictions on access, the greater and more dangerous are the feelings of powerlessness and alienation.

In her fascinating book, *Secrets*, *On the ethics of concealment and revelation*, Sissela Bok, provides the insight that at the very time the state grows more complex, handles more information and must cope with "interlocking problems of finance, foreign policy and defense [for Canada add 'national unity'] administrators come into increasing conflict with those who argue that, in being deprived of information, they are also effectively deprived of genuine participation."

There is almost no disagreement among political scientists and other academics

that the guarantee of public access to government documents is indispensable in the long run for any democratic society. Ms. Bok writes:

> "When such a guarantee of public access is enforced, it changes the public's view of what it has a right to expect . . . and works against the inevitable tendency of government secrecy to spread and invite abusers; and it provides an avenue for publicity that is more than mere public relations."

The irony is that the case for open government needs to be made at all in a century when democratic governments have never been more ascendant and in places where the common man, by virtue of almost universal education and the glorification of the power of the people, is anything but common. This is not, after all, 17th century England and the world of the divine right of monarchs, such as James I, who is said to have once warned the Speaker of the House of Commons that "none shall presume to meddle with anything concerning our government or deep matters of state."

Today we are all presumers, all meddlers. Today access to information laws are being adopted around the world — sometimes in the most surprising places. Delegations from many countries have in the past few years called upon the Office of the Information Commissioner seeking advice on the access laws being planned by their governments. (On a bad day at the office, one is tempted to warn them against the folly!) Love it or hate it, however, access to information is not going away.

It would be politically impossible for any government to repeal its freedom of information law, to take governance into those back rooms again. No one in Canada is talking about doing that. The Canadian law's most severe critics in government suggest that requesters should be subjected to constraints, such as higher charges (as is happening in Ontario) or that access requests be rejected on the grounds of being frivolous and vexatious. Such temptations should continue to be resisted by the federal government and by Parliament.

They were not resisted in Ontario where requesters of information (even their own personal information) are faced with a new, much higher fee schedule and the elimination of all free search time. As the Ontario access commissioner pointed out, a requester could pay the initial application fee for an access request, a fee for a search for records which results in a denial of records, and then a fee to challenge the denial. The ultimate indignity is being forced to pay $25 in order to launch a complaint and have the government judged wrong in denying the information in the first place. However attractive the user-pay principle is in hard economic times, it has the potential of severely limiting the right of access.

Once more with feeling: taxpayers as a whole pay for the collecting of information, which the government needed for its own purposes. The government is the custodian, not the owner of the information. Yes, taxpayers as a whole

should not pay all the incremental costs of servicing multiple access requests involving elaborate search of great numbers of records. But the existing law provides for fair charges in such cases. However defensible user-pay may be for some government services, it simply cannot be fully adopted for access requests. To do so would make it impossible for all but the rich to exercise the rights Parliament gave Canadians 13 years ago in the *Access to Information Act*. The most telling tribute to the access law's power and importance is the continuing discomfort some public servants claim to experience at having to live with the law. When government officials say that taxpayers will be better off if those troublesome access requesters are brought under control, motives should at least be questioned.

It is highly doubtful that any effort to make the law more government-friendly will go beyond the muttering stage. Nor should it. The Minister of Justice, after all, has promised to strengthen the Access Act, not weaken it. The Minister's (and the government's) crowded legislative agenda has not yet made it possible to make good his commitment to bring the law into the information age. Nothing suggests however, that he or the government are about to go the other way. Placing petty conditions on access requesters sends out precisely the wrong message about open government without even a redeeming benefit of significant savings to the national treasury.

By far the most serious criticism that can be brought against freedom of information laws is not their cost but the charge that they are ineffectual. John Ralston Saul was invoked earlier as a perceptive ally against the practitioners of the "art of the secret." He argues no one could have imagined, at the beginning of responsible government, "that a system in which selected information was consciously kept back by those in power could gradually become a system in which only selected information was released."

Not that there are many real secrets today: Very few bits of information then or now can damage the state, Mr. Saul believes. From what he has seen of so-called secret records in some six years in a privileged insider's position, the Information Commissioner can agree. According to Mr. Saul, however, the art of the secret is not about the secret, but of protecting the advantages of elites; about secrecy as a tool of power. So successful have the elites been, Mr. Saul concludes, that "Access to information laws amount to little more than legislative manoeuvres that open or close peepholes."

If Mr. Saul's judgment is right, then these laws are not worth the money they cost. But he is not right. Mere peepholes they are not; the government elite doesn't succeed in Canada in keeping power through keeping secrets. Ask the public servants who grapple with thousands of tough requests each year. Ask the requesters who obtain routinely departmental audits or polling results or expense claims or the myriad of records which, without access to information, would never see the light of day.

Each and every day, in newspapers, on radio and television, we see and hear

evidence of the power and effectiveness of the access law. This year we learned, courtesy of the *Access to Information Act*, about a 10 per cent pay increase to the deputy governors of the Bank of Canada (rescinded after public outcry); about golf trips to Florida for military generals (cancelled after public exposure); about contracting practices at Natural Resources Canada ($90 million in contracts awarded without competition and, in one office, 17 per cent of contracts awarded to friends, relatives and common-law spouses); about poor controls at the Atlantic Canada Opportunities Agency (a number of grants or loans totalling some $100 million dollars to businesses which failed). Take note ye skeptics who say the right to know is costing the taxpayer too much!

It is not simply a matter of ferreting out waste or fiscal abuse. There were also inside glimpses of policy issues. Courtesy of the *Access to Information Act*, Canadians learned that the government was not being entirely forthright when it turned down calls for a public inquiry into the Air India disaster in order to preserve the integrity of continuing police investigations. As it turns out, as early as 1991, officials were telling the Solicitor General that a public inquiry would not interfere with the RCMP's stalled investigation. Did the government exaggerate the failing health of the Canada Pension Plan? Documents released under the access law seemed to show that there are some positive signs such as declining disability claims.

The public also learned about the background of trade threats which preceded the $1.8-billion purchase by Canada of Airbus aircraft in 1988. And we learned some of the background concerning how the Justice department handled allegations of impropriety arising from the Airbus purchase: memos showed that officials tried to keep their Minister insolated from the affair. It was also courtesy of the *Access to Information Act* that the debate about whether Canada should have a foreign spy agency came out in the open. A secret study on this subject was disclosed by the Security Intelligence Review Committee and prompted healthy public comment.

A *Vancouver Sun* reporter used the access law to obtain information from Foreign Affairs about exports to China of military equipment. The stories prompted the government to review its policy of promoting such sales and earned the Information Commissioner a note of thanks for having played a role in making the access law work. "Your efforts," wrote the reporter, "helped my newspaper bring forth information of interest to Canadians. They are more well-informed today about government policies regarding the export of weapons and defence materials to the People's Republic of China than they otherwise would have been. They should also be grateful for the work of your office." The credit, of course, goes to the access law itself.

Disclosures under the access law may even prompt journalists to say positive things about government. Recently, a columnist for the *Ottawa Citizen* wrote a piece entitled: "*Mounties Deal with Disney Not So Goofy After all*." He finally (after waiting seven months!) received details of the product-licensing contract between the RCMP and Disney. As a result, he withdrew previous suggestions that the

deal with Disney was a sell-out of a Canadian icon to an American one.

Most striking during the year was the litany of news stories about the unacceptable behaviour of Canadian servicemen in Somalia and the damage control efforts by National Defence headquarters. It is fair to say that the creation of the Somalia Commission of Inquiry was due to the revelations made as a result of persistent efforts by journalists having the *Access to Information Act* in their arsenal of research weapons. Ironic, indeed, that during the year the Commission of Inquiry moved to block media access to information (see case 17/96).

Back to Mr. Saul, an informed observer of access to information laws. (He must be informed: he read at least one of these reports, quoting approvingly the comment that openness in government was "an alien culture.") But he is dead wrong in his understanding of the principle of Canada's Access Act when he writes that "these laws merely confirm the principle that everything is secret unless specifically stated otherwise." The truth is precisely the opposite: the onus is plainly upon the government to demonstrate why a record cannot be released, either in whole or in part. Individuals do not have to prove their case for the release of government-held information any more than they need to say why they want the information. Unless the government can demonstrate before an information commissioner or a court a right to withhold a record, it must be released. That's the law. The assumption of this remarkable law is that information belongs to the people. In the British system, that's revolutionary.

Why does any country with common law and common sense and human rights need such a law? The profound answer is sometimes lost in squabbles which arise over whether this record or that record should be released. The answer is simply that citizens need primary documents (not press releases, not bland, pre-digested official statements) if they are to exercise their full potential as an informed people.

All these years into the access to information era, these truths, should be held, as Americans like to say, to be self-evident. Yet no matter how ringing their rhetoric about being open (particularly before an election or in opposition) in difficult times or with difficult issues (the very time the public wants candour) governments are the most tempted to deny information.

The right to know conferred by the *Access to Information Act* has proved to be a remarkably empowering — that indispensable new word — right. It is an increasingly effective means both of keeping Canadians better informed of what their governments are up to and government more accountable between elections. What has happened is nothing less than a shifting of power, modest though it may be, from the state to the individual.

John Ralston Saul has not caught up with this phenomena, nor have many political scientists. But most Canadian politicians and public servants know something of the impact of access to information as a new reality in governance. For the first

time in the mandate of the present Information Commissioner, he has been forced to conduct inquiries into worrisome reports that records were destroyed or altered in order to frustrate access to information requesters. (The results of these inquiries are discussed later.) Not, of course, a pleasing development; but it is a back-handed tribute to the effectiveness of access. If officials are uncomfortable with the law, it must be having some bite. No one ever said that openness in government comes without a struggle.

"Tension is incessant in most societies over the legitimacy and extent of government secrecy." The Canadian experience confirms these words of Sissela Bok. But if an access to information law falls inevitably short of perfection for both requesters and the custodians of information, the issues of access and secrecy are out into the open where they belong. Those on each side are forced to defend their positions before public opinion. Out of the tension should come better balanced judgments, perhaps even wisdom.

Yes, the awareness that government decisions and records are open to public scrutiny has penetrated to all levels of the federal public sector. The tension is sometimes palpable and the discipline may be healthy. But real success for access to information comes from a widely shared and profoundly held belief that the best government will be open government. No research results in Canada — or anywhere else — demonstrate with anything like statistical certitude that a freedom of information law or an access to information commissioner's office make government more open and Canadians better informed. The evidence of these annual reports is merely anecdotal. Degrees of openness will always be essentially unquantifiable.

But if governments and public servants take to their minds and hearts the profound answer to the question: "Why should government be open?", no statistics (and, greatest blessing of all, no information commissioner) will be necessary. The art of the secret may finally have been lost.

Feet of Clay

It was, some will recall, the sorry scandal called Watergate which provided the impetus for the strengthening of the *Freedom of Information Act* in the United States. Records were tampered with and destroyed, lies were told and journalists were made the enemy — all this done by the most senior public officials in that country engaged in self-serving cover-up. The U.S. legislation was greatly influential in the design of the Canadian right-to-know law passed in 1983. In Canada, it was the efforts of persons from all points on the political spectrum, men as diverse as Barry Mather, Ged Baldwin, Donald Rowat, Eugene Forsey, Joe Clark and Pierre Trudeau, which gave us our law. It was not born of outrage due to scandal, but conviction that the governance of a democratic society must be transparent to the citizens.

Sad it is then, after some 13 years of living with the access law, to report that a few ugly efforts have surfaced to thwart the right of access to government records through record destruction, tampering and cover-up. Three serious incidents were investigated during the reporting year by the commissioner's office.

Transport Canada

In one case, a senior manager of Transport Canada ordered her officials to destroy all copies of an audit report into a refurbishing project. The order was given to ensure that the report (critical of senior managers) was suppressed and, the commissioner concluded, in circumstances indicating that the senior manager knew an access to information request had been made or was imminent. Despite efforts to make the report disappear, the commissioner's investigator found a copy of the report in the hands of a manager who believed the order to destroy it to be wrong. It was disclosed to the requester. The commissioner asked the department to educate its managers about their legal obligations to refrain from any action which would undermine the rights contained in the *Access to Information Act*. The department agreed to do so in July of 1995. As of March 1996, the promised action had not been taken. (A summary of this case is found under case 02-96).

National Defence

The second case, which received wide media attention, involved National Defence. A journalist, alleging that records had been altered before being released to him under the access law, asked the commissioner to investigate. The investigation demonstrated that the journalist's allegations were true. Not only had the records been altered before release; orders were subsequently given to destroy

the originals. The wrong-doing might never have come to light but for a few courageous employees who delayed in obeying certain orders and reported the misconduct to superiors.

As of this writing, it remains to be seen whether or how the wrong-doers will be held to account. The sanctions imposed should give a clear message to other officials that the right of access is not trivial nor should it be trampled upon with impunity. It is also important, to salute those courageous men and women who stood up to be counted, who refused to take the easy road of simply going along with a cover-up. They are this year's heroes of access to information. (A summary of this case is found under case 17-96.)

Health Canada

During the proceedings of the Commission of Inquiry into Canada's Blood Supply headed by Justice Horace Krever, evidence was given that recordings (and transcripts) of meetings of the Canadian Blood Committee had been destroyed in the late 1980's. There were allegations that the destruction had been ordered to prevent interested persons (such as journalists and those who had been infected with HIV from contaminated blood products) from obtaining the records under the *Access to Information Act*. The Information Commissioner, after consultation with Mr. Justice Krever and Health Canada (whose officials welcomed the investigation), initiated a complaint on his own motion against the department for the purpose of finding what really happened.

Alas, as of this writing, the investigation, which was almost completed, was brought to a halt by a legal challenge launched by a former official of the Canadian Blood Committee. The official, who was under subpoena to give evidence in this investigation, has asked the court to determine whether the Information Commissioner has jurisdiction to investigate this matter. The commissioner is vigorously defending his jurisdiction before the Federal Court.

Penalties and Protections

However out of step the idea may be with this commissioner's preferred approach, the time has come to consider amending the Access Act to provide penalties for flagrant violations of this statute. A law which earns a reputation for being toothless soon finds itself being eviscerated, if not ignored. Though the access law has not yet fallen on such hard times, this handful of cases is disturbing evidence that some strong medicine is required.

These instances of records destruction may or may not be isolated. Fortunately, there are many ethical employees whose vigilance, more than any commissioner's office, serves to protect our rights. It is time for the government to provide legal protection for those who do have the courage to stand up for what is right. We give dangerous mixed signals to public officials if we urge them to act ethically

but don't protect them when they do. If we are to nurture public officials who "walk the talk", whistle-blowing protections are needed.

The Province of Alberta is the only jurisdiction in Canada to recognize a close relationship between freedom of information and whistle-blowing. The Alberta *Freedom of Information and Protection of Privacy Act* authorizes public officials to disclose any information to the Information Commissioner (even information the employee is ordinarily required to keep confidential) if the employee, acting in good faith, considers the information should be made public. Any employee making such a disclosure is not liable to prosecution under any Act unless the employee acted in bad faith. Moreover, the Alberta law makes it an offence for any adverse employment action to be taken against an employee who disclosed information to the commissioner. A fine of up to $10,000 may be levied if adverse employment action is taken.

The Alberta law points in the right direction. Consider also employees who take any good faith action to ensure respect for the access law. Whether that be failure to obey orders to destroy records, failure to agree to cover up the existence of records, informing the commissioner or other suitable authority of wrongdoing, or removing records from government premises to prevent improper destruction, they too should be protected by law from retaliation.

Delays

Again this year, delays — chronic delays — plague the system. The problem seems to worsen with each year. The law of course says requests must be answered within 30 days (unless an extension is justifiable). Many public officials appear to have decided, in days of dwindling resources, to amend the law to a "do-your-best" deadline. A passage from a letter written to the commissioner by a Deputy Minister who had failed to meet response deadlines illustrates this point:

> "I regret that the Department was not able to meet the September 15 deadline for releasing the requested information to (the requester). As you know this date was negotiated in good faith and was overtaken by events . . . . This has meant that a greater number of the Branch's resources from an already shrinking base have had to be deployed in these areas.
>
> ". . . The present climate is, as you know, such that doing more with less means that we will all be pulled in competing directions and frequently faced with difficult choices and compromises."

There it is in a nutshell: the view that public officials can somehow exempt themselves from the obligation Parliament imposed to give timely responses. This notion that other departmental priorities, especially the need to service the Minister, take precedence over the edicts of the law is not uncommon.

Departments where delays have become particularly troubling are National Defence, Citizenship & Immigration, Revenue Canada, Correctional Services Canada and Health Canada. It is not unusual for delays to be so long at National Defence that more than a year passes between the time of the request and the answer. Such delay not only is an effective denial of the right of access, it is a denial of the right of complaint to the Information Commissioner about exemptions. Under the law, complaints must be made within one year from the date of the request. How can a person complain about exemptions if no answer has been forthcoming?

In this reporting year, the commissioner was forced, for the first time, to ask the Federal Court to order a department (National Defence) to answer requests well over a year old. Believing perhaps that the best defence is a good offence, National Defence filed papers highly critical of the requester and accusing the Information Commissioner of being frivolous and vexatious in taking the department to court. The court did not agree and ordered the case to proceed. National Defence responded by appealing the ruling — delay, piled upon delay.

There is simply no good reason why the largest department of government cannot

handle a relatively modest workload of access requests, consisting in 1994-95 of 759 requests. By contrast, Public Works and Government Services received 1,523 requests in the same period and handled them in a timely manner with relatively little difficulty. In fact, five departments receive more requests than does National Defence and handle them with fewer resources. National Defence's problems are not external; they are internal.

The most disturbing cause of delay in many departments is a cumbersome approval process. Records are often located, reviewed, severed if necessary and prepared for release well within the statutory time requirements only to be long delayed in the internal approval process. Many senior officials apparently believe that the integrity of the approval process is more important than the right to a timely response.

This attitude is most inexcusable when it is found within ministers' offices. In the office of the Solicitor General, it is not unusual for proposed answers to access requests to languish unattended in the minister's office for months past the lawful due date. The Solicitor General's political staff seemed to be under the impression that it was somehow justifiable to hold up these answers to suit their own and their minister's convenience.

During this year, an already unacceptable problem was made worse. Orders were given to the Royal Canadian Mounted Police, Canadian Security Intelligence Service, National Parole Board, Correctional Service Canada and the ministry secretariat to send more access requests to the Minister's office for approval and to provide more detailed analysis and media response lines. The Minister's office was simply biting off more than it could chew — as the Information Commissioner's office was quick to point out.

As of this writing, there is some rethinking and promises have been made to ensure that the approach does not result in denial of legal rights to timely responses. The solution is clear and uncomplicated. The Solicitor General should direct that, if he (or his staff) cannot deal with a proposed response by the response deadline, the department should proceed with the release. That approach works in most ministers' offices.

Most departments have accepted the Information Commissioner's urging to waive or refund fees when response times have not been met. This year a conspicuous exception is Agriculture Canada. A requester dutifully paid all fees when asked by the department. The department failed to meet extended times for response and revised response times negotiated with the Information Commissioner. After *two years* had passed a complete response was still not given! The commissioner asked Agriculture Canada at least to refund the fees. An unrepentant department declined and reiterated the refrain, becoming more popular, to the effect that when we do our best (even if that is not in compliance with the law) we will insist on charging fees. This case, and this attitude, it is to be hoped, will be an abberation.

Delay remains the tactic of choice for dealing with politically sensitive requests which cannot lawfully be refused. Difficult times are the test for the effectiveness of and commitment to access rights. This year, the government did not always pass the test. In the run-up to the 1995 Quebec Referendum, the Privy Council Office and Heritage Canada ignored, in some cases, the access law's response times. Respecting them would mean releasing records about federal funding to "NO" side forces before the referendum date. After intervention by the Information Commission, Heritage Canada relented and gave its answer shortly before the referendum. PCO steadfastly refused to disclose until the very day of the referendum. The irony is that, while neglecting its own obligation to answer, the government was accusing the other side of excessive secrecy.

Under the Conservative government of Brian Mulroney, some will recall that it took a court order to remind the Prime Minister and his department that public opinion polls could not be kept secret to spite the other side. To its credit, the present government learned the lesson of polls; they are now routinely released. Yet there lingers the belief that the access law may be disobeyed for politically strategic reasons.

Here, too, there is a silver lining to the cloud of delay. More members of Parliament than ever before are using the access law to assist them in obtaining information from government. The two main opposition parties do not have the informal avenues by which to obtain information that were available to the old, mainstream parties when they were in opposition. It did not take the Bloc and Reform parties long to learn that question period and the order paper are poor means for obtaining full disclosure of primary records about issues. The *Access to Information Act* has become an important tool for improving parliamentary democracy.

Yet MPs too have been subjected to delay and secrecy — and they are complaining. Consider this exchange in the House of Commons:

Mr. Michel Bellehumeur (Berthier-Montcalm, B.Q.):

> "Mr. Speaker, my question is for the Prime Minister. Two days ago in this House, the Prime Minister stated, and I quote: 'Information can be sought under the A*ccess to Information Act*. Any citizen can request information from government departments.' After inviting the official Opposition to use the *Access to Information Act*, how does the Prime Minister explain the fact that, in the past seven months, the Privy Council has systematically turned down every single request submitted by the official Opposition under the *Access to Information Act*?"

Right Hon. Jean Chrétien (Prime Minister, Lib.):

> "Mr. Speaker, the Privy Council receives requests, as provided for in the Act. Some documents cannot be released under the Act, under the regulations. This Act was passed by Parliament. Internal communications

between ministers, in any government, are not made available to people from outside. That is normal. The Privy Council is, however, instructed to release what must be released under the Act."

Mr. Michel Bellehumeur:

"Mr. Speaker, again, the government has a perfect score: 17 out of 17 requests for information have been turned down. Not a bad average."

(*Hansard*, October 5, 1995, p. 15294)

What, then, is the silver lining? It is that Parliamentarians, albeit mostly those in opposition ranks, are taking a direct interest in the access law; they are directly experiencing its strengths and weaknesses. As a result, calls for reform of the law have a greater priority than in past years.

In previous reports, recommendations for changes in the law to address the problem of delay have been advanced. Unpleasant consequences should be felt by departments which fail to give good service. First, they should lose the right to collect fees in such cases. Second, government institutions should only be empowered to invoke the act's mandatory exemptions if they fail to invoke others within legislated time frames. Finally, and this is a new recommendation made in response to a worsening delay situation, the one-year period from the date of a request within which a complaint to the commissioner must be filed, should be more flexible. Discretion should be given to the Information Commissioner to extend the one-year period in cases where the behaviour of a department or agency contributed to the inability to file the complaint within the year.

In this reporting year, the commissioner was forced to refuse to investigate a complaint against National Defence made by a journalist who waited more than a year for an answer to his access request. Indeed, the commissioner had to bring the Minister of Defence to Federal Court to obtain an answer. When the answer came, exemptions were invoked to withhold some of the requested records. The journalist felt, rightly, that he had been deprived of his right to complain about the exemptions by the misbehaviour of National Defence. The Federal Court has been asked to determine whether the journalist has any remedy in this unhappy circumstance.

One cannot leave the subject of delays without referring to the reality of dwindling resources. Whatever be this commissioner's view that departments have a mandatory obligation to respect response deadlines, the fact is that some departments simply do not have the resources to deal with the vicious circle of more delays and hence more delay complaint investigations. More and more we hear the refrain that departmental employees can't get on with answering access requests because they are meeting with and responding to investigations from the commissioner's office. The problem of delays in departments soon becomes a problem of delay in the commissioner's office where individuals have to wait,

again, to obtain their rights. The unfortunate upshot of this is more formality — or, at least, the prospect of more formality — unannounced searches, summonses, taking evidence under oath and the like.

This commissioner is committed to an informal approach to investigations. Experience has shown that it is simply more effective. Informality facilitates finding solutions; formality fosters rigidity and litigation. But it takes time and goodwill on both sides to make informality work — time and goodwill are dwindling along with resources. The result, regrettably, may be more costly for the system in the long term than any savings realized now.

Fees

Hand in hand with the attitude that delays are justifiable in times of restraint goes the view that access requesters should be paying higher fees. This view finds favour among some senior officials. It is a nice question if that view is grounded in a philosophical belief in user-pay or a mean-spirited reaction to a law which many find irksome. Neither reason is justifiable (for reasons to follow), but the desire to deter access requests through higher fees is particularly objectionable.

The fact is that the access law is used relatively infrequently by Canadians. Since the coming into force of the act in 1983, some 93,000 requests have been submitted (up to 1995) — less than 10,000 requests per year on average. (In 1995, 12,861 requests were filed.) These numbers are well below the experience of other jurisdictions and well below what the government itself predicted when the access law was first introduced. The 1977 Green Paper projected an estimated 70,000 formal requests each year. It took a full decade to reach the number projected for one year. Canadians have been responsible users of the law; with only one or two exceptions, departments have not been swamped with requests. By any objective measure, there has not been a single instance of a consistently frivolous and vexatious requester. Officials who are pushing for extra powers to deal with this mythical requester — more of that later — will be hard-pressed to produce any supporting evidence to make their case.

Despite having greatly over-estimated the number of access requests, governments have consistently overstated the costs to the taxpayer of administering the access law. One government statistic which seems to have been pulled out of thin air is that it cost $75 million to administer the law between 1983 and 1995. That works out to some $830 per request. To arrive at this figure, government institutions attribute all the salary costs of those involved in the administration of the access law, though most do other duties. Moreover, a portion of the time spent by line officers reviewing records is also charged against access. Yet their salaries would have to be paid whether or not there was an access law. Many departments put in place overly cumbersome approval processes, engage in hand-wringing over requests of any significance and develop detailed media response lines for Ministers before requests are answered. These costs are attributed to those troublesome requesters. In fact, departments are often the authors of their own misfortunes.

Fear of making a mistake, of embarrassing a colleague or a minister, drives costs up needlessly. In departments where record-keeping (and hence retrieval) is badly managed, additional time and effort are required to respond to access requests. But this is not the fault of the access law: It is the result of bad records management. More than a decade after the law has been in force, all departments should by now have worked out the bugs in records retrieval

systems.

By way of example, consider the Bank of Canada, following faithfully, Treasury Board's guidelines for calculating costs. From January to December 1995, the bank received 29 requests. One was abandoned by the applicant, four could not be processed due to lack of specificity and one was treated informally. Thus, a total of 23 formal requests were handled by the bank in 1995.

Yet the bank reports its costs at $78,313. That puts the cost-per-request at $3,405. If that is true, something is terribly wrong at the bank. Of course, the figure is not correct. The 1.3 individuals whose salary was attributed to administering the access law surely had other duties. Handling 29 requests should not be a full-time job. Such accounting simply does not give a fair picture of the true cost of administering the access law. The bank is not alone: This kind of error is repeated across government and results in a significant exaggeration of the costs of access.

Consider: Government collects a $5 fee for each request and is entitled to collect 20 cents per page for photocopying and $10 per hour for time spent on search and preparation of requested records. Yet, the government reports that, on average, it collects $13.53 per requests ($5 of which is the initial application fee). If it costs $830 per request, a great deal of searching for records and preparation must be required; the volume of records to be photocopied and released must be large.

But where are the fees? In fact, government collects only a small portion of the fees to which it is entitled. Inflating the costs and depressing the revenues (through neglect) results in an entirely distorted basis for the development of a valid fee policy. The facts simply do not support the cost figures which governments have been producing over the years.

By nice turn of fate, however, overstating the costs of access provides the single strongest argument against moving to a cost-recovery access system. Using the government's own figures, on average, a requester would have to pay $830 per request! The very idea is unthinkable: It would amount to a virtual prohibition on requesting government records. If there is a debate on this, it will no longer be whether or not to move to cost recovery, but, simply, whether or how much to increase fees.

If the government appears determined to raise fees, it must be asked: To what end? Is the goal simply to ask users to make a greater contribution to the associated costs? If so, then care must be taken to also weigh the benefits associated with use of the law. Many of these, such as greater responsibility, honesty and frugality on the part of public officials are not easily quantifiable, nor can the value of a more informed citizenry be measured; yet the benefits are direct and tangible. Even by inflated official figures, the cost of administering access rights is a bargain.

Of most concern to senior officials are the so-called bulk-users. But rather than penalize all requesters, far better to give government the legal tools to manage bulk requests properly, such as more flexible time-extension requirements and the right to refuse to provide service to a requester whose use of the law is clearly abusive. Armed with these tools (which would be subject to monitoring by the Information Commissioner), departments would be able to address their concerns about clearly vexatious use of the law without the need to penalize all users through higher fees. In exchange for these carefully controlled additional powers, the Information Commissioner recommended to Parliament (Annual Report 1993-94) that the $5 application fee be abolished.

Charges for search and preparation should also be fundamentally reconsidered. At present, such fees bear no relation to the number of pages of records disclosed to requesters. A requester may pay the application fee and fees for search and preparation only to be told that all the records are exemptible and none will be disclosed. Moreover, the current fee system rewards poor records management and retrieval processes. The more time taken, the greater the fees which may be charged. To compound the weaknesses of the present fee regime is the need to track and record time spent by various officials in order to calculate fees which, after all that, are often waived.

There are more sensible alternatives. In a recent joint report, the Australian Law Reform Commission and Administrative Review Committee proposed a system of fees based on the number of pages of records disclosed. A scale of fees, it was recommended, should be set by the Information Commissioner "on the basis of a realistic assessment of the average number of hours a competent administrator in an agency with efficient record management system would spend on search and retrieval. It should not take into account decision-making time. The scale should fix a charge for a specific number of pages rather than for each individual page."

Such an approach has merit for the Canadian government. It would serve to encourage good records management practices across government and might in fact encourage the release of more records.

The *Access to Information Act* in the Courts

A fundamental principle of the access legislation is that decisions on the 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 must first complain to the Information Commissioner. If they remain 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 1,530 complaints and of those, as of the date of this report, 13 applications had been filed in the Federal Court: In marketing terms, a customer satisfaction rate of 99 per cent. It is perhaps more relevant in measuring the effectiveness of the office to note that of the 83 court applications filed by requesters since 1990, only in eight cases did the court order disclosure of more information than had been recommended by the Information Commissioner.

Case Management of Access Litigation in the Federal Court

The major responsibility for the management of access to information cases falls on the Trial Division of the Federal Court of Canada. In December, 1993, the Associate Chief Justice of the Federal Court issued a practice direction to govern procedure in such cases. This practice direction is designed, under Federal Court rules 327.1 and 327.2, to ensure that all review applications in access (and privacy) cases will be heard and determined "without delay and in a summary way." Mr. Justice Denault, in Information Commissioner of Canada v. The Minister of National Defence (T-2732-95), wrote:

> "It is clear from the text of this Direction that the Associate Chief Justice felt it desirable, in the best interests of justice, that specific directions be issued to establish a strict procedural timetable [in each case] in order to ensure the expeditious hearing of an application for review under these statutes."

As noted in previous reports, the Federal Court has been remarkably successful in the reduction of its backlog of access cases. Credit is due to the dedication of their registry officials and the pragmatic simplicity of the practice direction. Under the direction, each access case is to be heard within six months and all inactive cases are to be disposed of forthwith. According to the direction, all procedural difficulties (number of parties, access to confidential affidavits and other material, and procedural timetable) are dealt with at the beginning of the litigation.

Let the facts speak for themselves. Chart 1 shows the number of applications received and disposed of for the years 1983-1995. Productivity has improved markedly. The number of applications filed by third parties to block the release of information also has been reduced considerably. The use of the Federal Court as a delaying tactic in access cases is, with rare exceptions, a thing of the past.

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	79	89
1994	34	41	80
1995	33	45	68

The Commissioner in the Federal Court

Through hard work and good will on both sides, most complaints to this office are resolved through mediation. Resort to the courts is, for an ombudsman, an admission of failure. Yet mutually satisfactory resolutions are not always possible. During this reporting year, the commissioner filed five new applications bringing to six the total number of cases filed by the commissioner which were before the Federal Court. During the year, three of these cases were disposed of or withdrawn. The details are as follows:

Information Commissioner v. Public Works Canada (T-426-95):

The commissioner contested the department's refusal to disclose names of former Members of Parliament who are receiving pensions due them after their parliamentary careers (see Annual Report 1994-95 pp. 22-23 for more details). The commissioner has taken the position that even though this is personal information, subsection 19(2) of the *Access to Information Act* requires it to be disclosed since the names are determinable from public sources and many of the MPs have consented to disclosure. He also argues that, for reasons of accountability, an overriding public interest in the disclosure of this information outweighs (MPs, after all, set their own pensions) any apparent invasion of privacy. The case is scheduled for hearing on May 13 and will be reported here next year.

Information Commissioner v. Atlantic Canada Opportunities Agency (T-690-95):

In this case (see Annual Report 1994-95, p. 23 for more details), the commissioner came to the conclusion that the Agency was not authorized to withhold, under the authority of paragraph 20(1)(*b*), the actual number of jobs created by firms which had received financial support form ACOA. Although ACOA had promised confidentiality to these firms, the commissioner argued that secrecy was not authorized pursuant to the law. The case was heard by Madam Justice McGillis in Moncton, New Brunswick on February 14. In her judgment, Justice McGillis decided that ACOA had discharged its burden of establishing by preponderance of evidence that the exemption claimed was justified. Justice McGillis found that the withheld information met the tests for secrecy because it was commercial information, confidential by nature, provided to ACOA under a valid promise of confidentiality and consistently kept confidential by the third parties. The commissioner has appealed the decision to the Federal Court of Appeal.

Information Commissioner v. The Minister of Transport (T-1032-95):

An individual requested information relating to subsidized parking provided to government employees at Canada Place in Edmonton, including their names and the nature of all parking benefits received. The Minister of Transport withheld the information on privacy grounds under section 19 of the Act.

The commissioner took the position that the information in dispute may be personal information for some purposes under the *Privacy Act* but not for the purposes of section 19 of the *Access to Information Act*. He based his view on paragraph 3(k) of the *Privacy Act* which excludes from the definition of personal information, information relating to discretionary benefits of a financial nature. The commissioner also argued that, for reasons of accountability, disclosure would be in the public interest and such disclosure would clearly outweigh any invasion of privacy.

The case was withdrawn when the department agreed to disclose additional information about the nature of the benefits being received and the requester agreed that this additional information was all he required. The names of individuals were not disclosed.

While this case was resolved, it does not settle the general issue of whether the names of public servants receiving parking benefits must be disclosed to the public under the *Access to Information Act*.

Information Commissioner v. Minister of National Revenue (T-956-95):

The requester asked for the names and addresses of importers of certain products during specific periods of time. The department located computer records which contain the requested information about some 123,000 importers. It withheld all the records on the grounds that they contained commercial information which had been filed in confidence or, in the alternative, was of the type which, if disclosed, could cause harm to the third parties. It argued that all the information fell within paragraphs 20(1)(b) and (c) of the Act and must be kept secret.

The commissioner was of the view that the department had no reasonable basis for concluding that these provisions of the law were applicable. National Revenue had not consulted with importers prior to invoking the exemptions and it refused so to do when requested by the commissioner. The commissioner upheld the complaint and made application to the Federal Court for review of the matter. Before the case could be heard, the commissioner discovered that, without prior consultation or prior notice, an amendment had been added to Schedule II of the *Access to Information Act* rendering future requests for this type of information subject to a mandatory exemption under section 24. The commissioner concluded that no public interest would be served in continuing the litigation. Public funds and the time of the court would be wasted. The requester agreed

with the commissioner's decision to discontinue the action. The case has been withdrawn.

Information Commissioner v. Minister of National Defence (T-2732-95):

This matter was an application for an order directing National Defence (ND) to complete its processing of two access requests and to justify before the court its deemed refusal to disclose any unprocessed portions of the requested records.

The requester had filed his requests with ND on August 2 and 31, 1994. In response, the department claimed a time extension until January 5, 1995 in order to process the requests. The commissioner investigated the requester's complaint of delay and, during the course of that investigation, ND, on its own initiative, promised to complete its processing of the requests by February 15, 1995. When the department failed to meet even that deadline, the commissioner, after consulting with the requester, agreed to a further delay until August 24, 1995. When the department again failed to meet that deadline, the commissioner made a formal recommendation to ND that the processing of the files be completed by December 13, 1995. The department did not complete its processing by the recommended date and the commissioner filed an application for review on December 22 with a request for directions returnable before the court on January 16, 1996. Not until January 12, (four days before the date set for the hearing of the request for directions) did the department complete the processing of these requests. On January 31, 1996, Mr. Justice Denault issued directions to establish a strict procedural timetable in order to ensure the expeditious hearing of this matter. The case was made ready for hearing on March 15, 1996 and the date set for hearing is September 23, 1996.

A number of issues in this case are before the court for the first time. For example:

- What are the consequences of a deemed refusal to disclose requested records which results from delay?

- May a government institution rely on exemptions claimed after the termination of the commissioner's investigation of a deemed refusal, but before the hearing of an application for review?

- What are the consequences of a deemed refusal on the one-year time limit within which complaints about exemptions must be made to the commissioner?

Information Commissioner v. Minister of National Defence (T-199-96)

This case was another application for an order directing ND to complete processing of access requests and to justify to the court its deemed refusal to

disclose portions of the relevant records.

The requester, a reporter, had filed three requests with ND: two on January 9, 1995 and one on March 22, 1995. The department failed to comply with the Act in not giving written notice to the requester within the prescribed statutory time limits as to whether or not access would be given to each record requested. The commissioner investigated the complaint of delay and, during the course of that investigation, ND, on its own initiative, promised formally to the commissioner to complete the processing of the requests by September 8 and 22, respectively. When the department still failed to meet those deadlines, the commissioner self-initiated complaints on December 7 and recommended to the department that it complete its processing of the files by December 28 and 29. When the department failed to follow that recommendation, the commissioner filed this application on January 24. Despite these further delays, it was not until February 9, 1996 that the department completed processing these requests.

Although this case raised the same legal issues as in the previous case in Federal Court File T-2732-95, there are significant differences. On March 26, 1996, ND agreed to file an attestation from the Clerk of the Privy Council certifying, in writing, that the disputed information constituted Cabinet confidences. The effect of this certificate is to bar disclosure of the disputed information even to the court. The Federal Court is not empowered to go behind this certificate and inspect the confidence or review the decision to object to its production before the court. From the Information Commissioner's perspective, this effectively ended his case.

The case may not be over, however, for the requester, who is also a party to the action. Upon receiving a final reply from ND, the requester complained on February 15, 1996, to the Information Commissioner about exemptions applied by ND. The commissioner determined that he had no jurisdiction to investigate the complaint. According to section 31 of the Act, complaints must be made within one year of the date of the request. It will be up to the requester, therefore, to seek a remedy from the court for the loss of the right to complain to the Information Commissioner which was caused by ND's lengthy delay.

Cases of Interest in the Courts

Each application that goes to court under the *Access to Information Act* is, of course, important to the parties involved. The following are highlights from the decisions issued by the court in the 1995-96 fiscal year which the commissioner's office considered to be significant for the administration of the Act.

Clerk of the Privy Council v. Rubin (F.C.A. 245-93):

In last year's report (p. 27), it was noted that for the first time the Supreme Court of Canada would be hearing a case related to the *Access to Information Act*. The court unanimously dismissed the appeal, holding that it agreed with the decision of the Court of Appeal.

The issue in the case was whether communications between the Prime Minister's Office and the commissioner's office, during the investigation of a complaint, could be disclosed under the Act. As a consequence of this decision, it is now clear that the confidentiality of the representations made to the commissioner during the investigation of a complaint must be preserved except in the limited instances prescribed in the Act. As provided for in subsection 35(2), however, the Information Commissioner retains the right to make representations made by one party available to any of the other parties to an investigation.

Dagg v. Minister of Finance (F.C.A. 675-93):

During the reporting year, the Supreme Court granted leave to Michael Dagg to appeal this case. It will be the Supreme Court's second occasion to consider an issue arising under the *Access to Information Act*.

Mr. Dagg had requested copies of the after-hours sign-in sheets at the Department of Finance for specific weekends. The department considered this to be personal information and withheld most of the requested information under section 19 of the access act. After investigating a complaint on the exemptions, the commissioner upheld the department's decision. In the Trial Division of the Federal Court, Mr. Justice Cullen ordered the disclosure of the names, identification numbers and signatures of the public servants involved. The decision was reversed by the Court of Appeal. In making its decision, the court found that the *Access to Information* and the *Privacy Acts* should be read together since section 19 of the access act incorporates, by reference, certain provisions of the *Privacy Act*. Both acts should be read and construed harmoniously with each other and neither act should be given pre-eminence.

When considering whether conditions in subsection 19(2) had been met, the

Court of Appeal held that there was insufficient evidence to substantiate that the information was either publicly available or that disclosure would be in the public interest. The Supreme Court has not yet scheduled a date for the matter to be heard.

Northern Cruiser Company Ltd. v. Her Majesty the Queen (F.C.A. 1039-91):

The issue was whether the Trial Judge, in ordering clauses of an agreement between the applicant and Her Majesty be disclosed, was correct in determining that members of the public should not be denied information (as to the legal right retained by Her Majesty to terminate a contract involving the expenditure of public funds for the provisions of a public service). The suggestion was that ministers would be more likely to exercise such rights in a different way if the existence of those rights were no longer secret from the public. The Court of Appeal concluded that the trial judge was correct and dismissed the appeal.

Dale Wells v. Minister of Transport (T-1315-91):

In this case, the requester was advised by Transport Canada that his access request would be granted but, before disclosing the records, the department determined that a review of the content of the records would be necessary. Following that review, section 23 — the solicitor-client privilege exemption — was claimed with respect to certain documents. The issue here was whether a decision to release documents may be revised by a department prior to the release of the records and whether the solicitor-client privilege applied to those records.

In ruling that the department had the authority to revise its decision to disclose, Associate Chief Justice Jerome said that to hold otherwise would be to foreclose any reconsideration of a decision to release documents to the public and bind the Minister at every step of an access request once a decision to disclose was made or intimated by lower level government employees.

On the issue of solicitor-client privilege, the Court confirmed that the onus is on a government department to establish that the information was communicated to or by a government lawyer in order to provide senior department officials with advice on the legal ramifications of proposed departmental actions. It must be demonstrated that the information given was and is confidential and there must have been confidentiality both at the time it was communicated and since.

Canadian Jewish Congress v. Minister of Employment and Immigration (T-1284-92):

The Canadian Jewish Congress applied for and was refused access to records relating to the immigration status of Vladimir Sokolov on the grounds that they

contained personal information and must be exempted from disclosure under subsection 19(1) of the Act. Based on assurances from the department that none of the information in the records had been made public and that they constituted all records relevant to the request, the commissioner's office upheld the exemptions. The Congress then applied to the Federal Court. During the course of those proceedings, additional records were discovered and exempted by the department under section 23 (solicitor-client privilege) and subsection 19(1) (personal information).

As well, the department conceded that it had erred in the exercise of discretion under 19(2)(b) since some of the information in the records had previously been made public. As a consequence, the judge ordered that the department review the records and exercise its discretion (as to whether to disclose those records) properly. The Canadian Jewish Congress appealed the decision but, later, withdrew the appeal.

The decision in this case raises the issue of whether subsection 19(2) is directory or permissive. It is also important because it raises two other questions: whether the severance principle in section 25 of the Act applies to records subject to solicitor-client privilege and whether the duty to exercise discretion is different in the case of solicitor-client privilege. The Information Commissioner would have sought leave to appear, if the appeal had proceeded, to contest certain elements of this decision.

Dale Wells v. Minister of Transport (T-2021-91):

In this case, the requester (a private citizen) had asked the Minister of Transport to release the Minimum Equipment List (MEL) of a particular aircraft. The department refused on the ground that to do so would cause it to be in breach of its obligations to hold the information in confidence as required by 20(1)(*b*) of the Act. The requester complained on the ground that the document was a manual which, pursuant to 5(1)(*c*), must be made available to the public. The commissioner investigated and supported the department. The court, in dismissing the application, also supported the department. On the issue of what is a manual, the court accepted the interpretation of the commissioner who had found that a manual is any set of directives, instructions, guidelines or procedures used by employees in administering or carrying out any operational programs or activities of a government institution. It was the intent of this provision of the Act, the commissioner said, to allow the public to have access to the manuals when they are being used by departmental employees to interpret legislation that affects the public.

The *Access to Information Act* and Cabinet confidences: A proposal for reform of Section 69

The *Access to Information Act* has been Canada's major legislative response to redressing the balance of official secrecy, elitism and non-accountable government. It established a "right to know", set standards for what the government could protect from access and fastened on a Westminster-style government — a system of review of refusals of access which is independent of government. An important part of the judgment of the effectiveness of access rights, however, is the completeness and pervasiveness of these across all types of records and institutions. On this front, the *Access to Information Act* is much behind the times.

Cabinet confidences that have been in existence less than 20 years are generally excluded from the coverage of the *Access to Information Act*. Subsection 69(1) provides that the Act does not apply to confidences of the Queen's Privy Council for Canada, including:

- memoranda prepared for the purpose of presenting proposals or recommendations to Council;
- discussion papers prepared for the purpose of presenting background explanations, analyses of problems or policy options to Council for consideration in making its decisions;
- agenda of Council or records recording deliberations or decisions of Council;
- records used for or reflecting communications or discussions between Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- records, the purpose of which, is to brief Ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions between ministers, as described above;
- draft legislation; and
- records that contain information about the contents of any record within the class of records referred to in all of the above.

The fact that Cabinet confidences are excluded from the *Access to Information Act* means that the access rights do not apply to these types of records and there can be no review by the commissioner or the Federal Court of decisions to deny request for such records when the exclusion is invoked.

The only exceptions to this general rule are:

- Cabinet confidences in existence for more than 20 years are subject to the provisions of the Act. (It should be noted that this does not mean they will be released to an applicant if another exemption under the access legislation applies.) (Paragraph 69(3)(*a*)); and

Discussion papers:

- if the decisions to which the discussion papers relate have been made public; or,

- where the decisions have not been made public, if fours years have passed since the decisions were made (paragraph 69(3)(*b*)).

The decision to exclude Cabinet confidences from the coverage of the *Access to Information Act* was made at the eleventh hour (June, 1982 as a parliamentary session was closing). A nervous Trudeau government sought to protect the essential processes of Cabinet and parliamentary government while proceeding with access legislation. The conversion of the strong mandatory class exemption for Cabinet confidences that had been originally drafted into an outright exclusion from the coverage of the act served, however, as a lightening rod for criticism which brought the legislation into disrepute in some quarters even before it was proclaimed in July, 1983.

Dubbed the "Mack Truck" clause by opposition and media alike, the exclusion of Cabinet confidences was seen as evidence that the Liberals, then long in power and apparently with many secrets to keep, had brought forth an ineffective access act. A symbol of government secrecy had been born.

Three years later, during a mandatory parliamentary review of the *Access to Information Act*, little had changed. Despite prudent administration of the exclusion through the Privy Council Office (PCO) to maintain a fairly limited interpretation of what actually qualified as a Cabinet confidence, the Standing Committee on Justice and Solicitor General which was undertaking the review heard more testimony on the need to reform this provision than on any other issue. (House of Commons, Canada, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, Report of the Standing Committee on Justice and Solicitor General on the Review of the *Access to Information Act* and the *Privacy Act*, (Ottawa, 1986-87).) The committee found many compelling reasons for protecting "Cabinet confidentiality" but went on to state in a unanimous report:

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

The Mulroney government, in response to the Standing Committee report, did not agree to amend the exclusion of Cabinet confidences, despite the number of briefs recommending reform, the unanimous call from committee members and the suggestion from then Justice Minister John Crosbie that:

> "I think that, in the past, too much information was said to be covered by the principle of Cabinet confidence . . . . A lot of information previously classified as Cabinet confidence can and should be made available."

Now, a decade later, there are rumblings that the government is considering reform of the legislation. There is little doubt that, if this occurs, there will be a great deal of pressure to reform the treatment of Cabinet confidences. At a minimum, the government will likely be moved to amend section 69 to reflect a more accurate representation of the current Cabinet papers system (this point is discussed in detail below).

An approach which excludes Cabinet confidences, criticized in 1982 and demonstrated not to be the direction other jurisdictions were adopting in 1986-87, appears absolutely shop worn in 1996. Most provincial freedom of information laws have chosen to include a mandatory exception for Cabinet confidences, rather than exclude them from the coverage of their respective acts. In these jurisdictions, thus, claims that records contain Cabinet confidences are independently reviewable. The result has not had any significant impact on the effectiveness of the collective decision-making of these Cabinets. This reality will support the calls for similar reform at the federal level.

The administration of Cabinet confidences in relation to the *Access to Information Act* is carried out under a policy established by the Privy Council Office and issued, with other Access to Information and Privacy (ATIP) policy, by the Treasury Board Secretariat. This policy makes it clear that neither the access rights nor the review procedures of the *Access to Information Act* apply to Cabinet confidences. It then goes on to establish the need, in policy not law, for government institutions to respond to requests from individuals that may involve Cabinet confidences and establishes a mechanism, under the coordination of PCO, for reviewing records to determine if all or part of a record contains Cabinet confidences.

Whenever it is determined by PCO that all or part of a record contains Cabinet confidences, access to the information is refused to an individual on the basis that the record is excluded under section 69 of the *Access to Information Act*. No

appeal is possible from this decision, except that the commissioner may seek a certificate from the Clerk of the Privy Council confirming that the record or a specific part is certified to be a Cabinet confidence. This minor, procedural check on the system was established by the first Information Commissioner, Inger Hansen, under the authority of section 36.3(1) of the *Canada Evidence Act*. Such certificates are similar to Australian practices under that country's *Freedom of Information Act*, where a minister or secretary of a department may issue a certificate that certain records meet particular exemption criteria. It must be stressed, however, that, in Australia, such certificates are reviewable by an independent authority.

The Cabinet confidences policy stresses that, with two exceptions, no discretionary power is provided to an individual minister or government institution to make a confidence accessible to the public. The power to grant access is available only to the Cabinet or to the Prime Minister. This extends to former governments where access is governed through former prime ministers and ministers. The minister or ministers involved may authorize the disclosure of records:

- used or reflecting communications or discussions between Ministers on matters relating to the making of government decisions or the formulation of government policy (paragraph 69(1)(*d*)), or

- briefing notes related to the above (paragraph 69(1)(*e*)).

In practice, however, this is done rarely and in close cooperation with PCO.

The policy also establishes the principle of severability for those records described in paragraph 69(1)(*g*) of the Act, which involves records that only contain information about the contents of Cabinet confidences. If the reference to a confidence can reasonably be severed from the record in which it is found, then the policy permits this to be done in order to allow the rest of the document to become subject to the Act.

Current Cabinet papers system

As indicated earlier, the current Cabinet papers system does not completely parallel the types of documents described in section 69 of the *Access to Information Act*. This is troubling when exemption or, in this case, exclusion criteria, are based on definite types of documents rather than being designed to protect a particular interest or broad classes of records.

The largest discrepancy occurs with "discussion papers." The current Cabinet papers system does not call for discussion papers. A memorandum to Cabinet is now more streamlined and comprehensive. Its structure is generally as follows:

- a set of Ministerial recommendations which are relatively short in

nature (one to three pages), and include an issue description, a rationale, and recommendations;

- a section on problems and strategies relating to the issue which defines why a particular option has been recommended;
- a section on political considerations;
- a section on departmental considerations which deals with issues raised by other departments during consultation of the memorandum at the bureaucratic level;
- a section on communications issues and a strategy or plan for addressing these;
- background and analysis of the issues involved, and consideration of options for reform; and
- annexes and appendices which provide more detail on particular matters.

The "Analysis and Background" section largely replaces the old discussion paper process. Its value in shedding light on the overall policy options that are open to ministers in their collective decision-making process have been recognized by the Order in Council of January 1, 1986. The Auditor General was given access to analysis and background material in a memorandum to Cabinet after a decision has been taken.

This procedure was put in place by the Mulroney government as a compromise solution to the suit of the Auditor General to obtain access to Cabinet documents of the Trudeau government. These documents related to acquisitions made by PetroCanada. They were sought to help the Auditor General decide whether there was a sound financial basis for the deals.

The Auditor General now can have access to any analysis or background material in a memorandum to Cabinet or Treasury Board submission if he believes he needs the information to audit effectively the results of the decision, or to account to Parliament whether government obtained value for money spent as a result of the decision.

It should be noted that the Cabinet paper system is controlled by PCO while Treasury Board submissions were controlled by the Treasury Board Secretariat. In the case of PCO, a coloured paper system is used, no copying of Cabinet papers is permitted and the papers must be returned to PCO after a particular meeting or discussion has taken place. Cabinet papers are classified "secret" while most Treasury Board submissions are designated "protected."

It should be noted, too, that the current section 69 does not recognize public or special interest consultations conducted before a decision is made at Cabinet or one of its committees. Consultation is common on draft legislation and regulations. The current policy sets out no process for dealing with requests for Cabinet confidences, which may have been the subject of consultation. This gives rise to inequitable access; some parties are provided with the record (during consultations) and others are denied it when they request it under the Access Act.

There is a need to find balance between public interests of openness and government accountability on the one side, and a government's requirement on the other, to protect confidentiality in the Cabinet process. That confidentiality permits free and frank discussion of matters of state behind closed doors. A comparative study of access legislation in other jurisdictions and the federal experience in Canada, leads to the following recommendations for reform (the complete study will be issued separately):

(a) Exemption or exclusion

The current federal approach to exclude Cabinet confidences from access legislation is out of step with other jurisdictions. A decade ago, the Standing Committee unanimously agreed it was time to replace the exclusion with an exemption. It also recommended that Cabinet confidences be brought under the independent review provisions of the Access Law. These recommendations should now be acted upon.

Recommendation #1: That the current exclusion for Cabinet confidences in section 69 of the *Access to Information Act* be replaced by an exemption for Cabinet confidences, thus making these records subject to the access and independent review provisions of this act.

(b) Mandatory or discretionary exemption

Most FOI legislation and proposals relating to the subject of Cabinet confidences view the vital nature of Cabinet confidentiality in a parliamentary form of government as meriting a strong mandatory exemption. The Standing Committee in its report, *Open and Shut*, suggested that the exemption for Cabinet confidences be discretionary. It is understandable that governments will be hesitant to weaken, to any significant degree, the protections for Cabinet confidences. If there is any likelihood of some change, the move to a mandatory exemption has more chance of acceptance. That would appear to be the lesson from provincial jurisdictions.

Recommendation #2: That any exemption dealing with Cabinet confidences be mandatory.

(c) Injury test

The inclusion of an injury test would not, understandably, be acceptable to government. Having to convince an impartial officer (such as the Information Commissioner or the court) that disclosure would cause injury would put the government in an unprecedented situation of explaining political aspects of Cabinet deliberations to judicial officers. The chances of reform are remote if the recommendation is to include an injury test.

Recommendation #3: That any exemption dealing with Cabinet confidences not include an injury test.

(d) Nature of class test

If the exemption is not based on an injury test, then it must be based on a class test. The crucial question: what should be the nature of that class test? The current exclusion is based on the concept of protection of confidences of the Queen's Privy Council for Canada, which are then partially defined in the Act and policy as being comprised of various types of records and information within records. The policy goes further to define some records or parts of records (e.g., public summaries of Cabinet decisions and records not prepared solely for use by Cabinet but attached to Cabinet records) as not being confidences. There is no description of the essential interest which the exclusion is intended to serve and, hence, the exclusion is open-ended.

With the exception of the federal legislation in Australia, this approach has not been followed in other jurisdictions. The preferred approach is to focus more clearly on the purpose of the exemption, the protection of the substance of deliberations of Cabinet, as the basis of the test. The phrase "would reveal the substance of deliberations of the Cabinet" is sometimes accompanied by a non-inclusive list of generic types of records or information which would qualify for the exemption. This latter approach has some considerable merit:

- it focuses the exemption and narrows it to the specific interest which requires protection. It eliminates the need for lengthy definitions of types of records which may qualify for the exemption and illustrations of exceptions to general rules. In other words, it is simpler, yet protects the vast majority of records, currently defined in the PCO policy on *Release of confidences of the Queen's Privy Council for Canada*, after its various exceptions are taken into account;

- it is more generic in character. As a result, would not suffer damage if PCO decides to alter the Cabinet papers process and the nature and types of records which are created;

- it does eliminate the need for government institutions to review and to sever from documents all simple references to Cabinet processes (e.g., RD numbers and TB numbers as is now the case). Such disparate references would only have to be removed when they actually revealed the *substance* of Cabinet deliberations.

Recommendation #4: That the test for a Cabinet confidences exemption be that the disclosure of a record would reveal the substance of deliberations of Cabinet.

(e) Definition of Cabinet

All current and proposed exemptions and exclusions for Cabinet confidences extend to the Cabinet and all its committees, formal and "ad hoc." Thus, there is no need to alter the scope of the parts of Cabinet which may have records prepared for them, submitted to them or have records created on their behalf which would qualify as Cabinet confidences and merit protection.

Recommendation #5: That the current definition of the term "Council" in the *Access to Information Act*, which includes the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet, remain as in the current Act.

(f) Coverage of exemption

The current federal exclusion is more restrictive than any exemption found in provincial laws. The major differences in practice centre on access to background explanations and analyses after a decision has been made and on the reduced time limit for the application of the Cabinet confidences exemption.

The focus of any newly drafted exemption should be on records which are generated, or received by Cabinet members and officials while taking part in the collective process of making government decisions or formulating government policy. Generally, this includes:

- agendas, formal and informal minutes of Cabinet and Cabinet committees and records of decision;

- Cabinet memoranda or submissions (including drafts) and supporting materials;

- draft legislation and regulations;

- communications among ministers relating to matters before Cabinet or which are to be brought before Cabinet (including draft documents);

- memoranda by Cabinet officials for the purpose of providing advice to Cabinet (including draft documents);

- briefing materials prepared for Ministers to allow them to take part in Cabinet discussions (including draft documents); and

- any records which contain information about the contents of the above categories, the disclosure of which would reveal the substances of the deliberations of Cabinet or one of its committees.

Examples should be included of types of records which "would reveal the substance of deliberations of Cabinet or one of its committees." The list, of course, should not be exhaustive so that the provision will be flexible in the face of future changes in the Cabinet papers system.

Recommendation #6: That the exemption provision for Cabinet confidences provide a non-inclusive, illustrative list of generic types of records which would qualify for protection.

Recommendation #7: That the list of examples be structured as follows:

(i) an agenda, minute or other record of the deliberations or decisions of Council or its committees;

(ii) a record containing policy options or recommendations submitted, or prepared for submission, to Council or its committees;

(iii) a record used for or reflecting communications or discussions among Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(iv) a record prepared for the purpose of briefing a Minister of the Crown in relation to matters that are before, or are proposed to be brought, before council or that are the subject of communications or discussions referred to in (c) above;

(v) draft legislation regulations; and

(vi) records that contain information about the contents of any record within the class of record referred to in paragraphs (a) to (e) if the information will reveal the substance of the deliberations of Council.

(g) Splitting the protection of Cabinet confidences

The Australian *FOI Act* distinguishes between Cabinet and Executive Council documents and

- draft Cabinet submissions; and
- briefing material to a Minister concerning a Cabinet submission.

These documents are treated under the exemption for internal working documents (clause 36) which determines whether a record can be considered, in whole or in part, to consist of advice and recommendations and whether access is contrary to a public interest. This means that a government institution has discretion to decide whether such information should be released.

The Standing Committee thought there was duplication in the protection of memoranda which present recommendations to Cabinet and for briefing materials used to prepare Ministers for Cabinet meetings. It found that the discretionary exemption for advice and recommendation in section 21 of the *Access to Information Act* provides adequate protection for the deliberative portions of these types of records.

While, at first glance, this may seem to be the case, it is also necessary to keep in mind the special nature of the protection necessary for the collective decision-making process of government. Other legislatures in Canada, when considering the nature of this protection, have seen fit to split the treatment of Cabinet confidences into two domains, one mandatory and the other discretionary. This does not mean that the advice and recommendations exemption will not come into play when a record does not or ceases to qualify as a Cabinet confidence. The splitting of the treatment of Cabinet confidences would appear, however, to complicate decision-making around an already difficult exemption. Any use of discretion should be applied in the exception criteria for a Cabinet confidences exemption.

Recommendation #8: That the basis for exempting records or parts of records relating to Cabinet confidences be dealt within one exemption and not split between a Cabinet confidences provision and section 21, advice and recommendations.

(h) Exceptions to Cabinet confidences exemption

There are a number of exceptions to the Cabinet confidences exemption recognized in the access laws of other jurisdictions and in various proposals for legislative amendment. These are considered below and recommendations made about each.

(i) Time limits

Because of the class nature of all protection for Cabinet confidences, all other access statutes, except the Australian *FOI Act*, include a limit governing the period of time during which all or part of a record can be considered a Cabinet

confidence. The original standard was 20 years (federal and Ontario). The federal Standing Committee recommended that the limit be reduced to 15 years, the length of time of three Parliaments. This standard has now been adopted in British Columbia and Alberta.

Recommendation #9: That the time limit for all or part of a record to be considered a Cabinet confidence be reduced from 20 to 15 years.

(j) Background explanations and analysis

Early draft federal legislation and other considerations of appropriate protection for Cabinet confidences have suggested that background explanations and analysis presented to Cabinet should generally be accessible. Indeed, this is now a common feature of access legislation in many jurisdictions. Certainly, even the current federal policy governing the release of Cabinet confidence records indicates that background material that was not prepared for the purposes of a Cabinet submission but simply attached to it should not be excluded from the coverage of the *Access to Information Act*.

However, the proposition goes beyond this type of record to cover other background explanations and analysis prepared for Cabinet. After Cabinet has made a decision with respect to a particular matter, than this type of information loses much of its sensitivity and should not be considered as a Cabinet confidence. Ontario law provides that a record that does not contain policy options or recommendations, and does contain background explanations and analyses of problems submitted, or prepared for submission, to the Executive Council or its committees is not considered a Cabinet confidence after the decision is made and implemented. In British Columbia and Alberta, information in a record, the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision, is not considered a Cabinet confidence if:

- the decision has been made public;
- the decision has been implemented or
- five or more years have passed since the decision was made or considered.

This exception for background explanations and analyses is considered crucial in opening up the information which forms the general basis on which Cabinet acted without exposing its deliberations. It is viewed as important to promoting improved government accountability and helping to assure that officials provide to Cabinet the best information on which to base decisions — since this, after all, will be open to review and comment.

The overwhelming acceptance in other jurisdictions that post-decisional background explanations and analyses be excluded from Cabinet confidence exemptions, makes it crucial that this matter be considered as part of any

reform of the federal access law.

Recommendation #10: That any Cabinet confidences exemption include an exception for background explanation and analyses as follows:

The Cabinet confidences provision does not apply to information in a record not containing policy options or recommendations but which does contain background explanations or analyses of problems submitted, or prepared for submission, to Council or its committees for their consideration in making a decision if:

(i) the decision has been made public;
(ii) the decision has been implemented or
(iii) four years or more have passed since the decision was made or considered.

The standard of four years is chosen since it is already in the federal access act in relation to the release of discussion papers, which the background and analysis section of Cabinet memoranda now largely replaces.

Recommendation #11: That any Cabinet confidences exemption except from its coverage any record or part of a record attached to a Cabinet submission containing background explanations or analyses which were not brought into existence for the purpose of submission for consideration by Cabinet or one of its committees.

(k) Summary of decision

All governments summarize Cabinet decisions in order to communicate these to the public or allow government institutions to implement the directions of Cabinet. Not all such summaries are made available to the public in press releases or other similar public documents. Thus, there is a need to recognize that such summaries are not considered Cabinet confidences once they are severed from other information which may reveal the substances of deliberations of Cabinet or one of its committees. Such summaries (e.g., Treasury Board circulars implementing decisions relating a new policy or budget reduction) should be routinely available to the public.

Recommendation #12: That any exemption for Cabinet confidences include an exception for summaries of Cabinet decisions exclusive of any information which would reveal the substance of deliberations of Cabinet or one of its committees.

(l) Cabinet as appeal body

From time to time, Cabinet or a Cabinet committee (e.g., Treasury Board) may serve as an appeal body, under a specific Act. It can be argued that, in such instances, the record of the decision, but not the advice and recommendations supporting it, should be publicly available. Often such decisions are

communicated to the public. But there needs to be a general rule that such decisions are not to be treated as Cabinet confidences. Such a provision is made in both the British Columbia and Alberta FOI legislation.

Recommendation #13: That any exemption for Cabinet confidences include an exception for information in a record of decision made by Cabinet or one of its committees on an appeal under an Act of Parliament.

(m) Disclosure with consent of Cabinet

There is a convention that the Prime Minister and former prime ministers control access to the Cabinet confidences of his or her administration. Ministers and former ministers control records relating to the making of government decisions or policy. The current federal policy provides discretion to the Cabinet or the Prime Minister to make a Cabinet confidence accessible to the public. The ministers concerned have discretion to disclose records used for, or reflecting communications or discussions regarding the making of government decisions or formulating of government policy.

In Ontario, paragraph 12(2)(*b*) recognizes that the Executive Council may lift the designation of Cabinet confidence from a record which has been prepared under its auspices. This consent is not a regular or normal practice. The Information and Privacy Commissioner of that province has recommended its use in cases where proposals or draft legislation or regulations have been released to some parties for consultation but access has been denied others because the records fall within the Cabinet confidences exemption. The commissioner believes that this inequality of access can be rectified through the consent of the Executive Council. Other issues may arise where a Cabinet may wish to consent to the release of information qualifying as a confidence. The same requirements may occur for a minister or several ministers who have communicated over a government decision or formulation of policy. Since Cabinet, prime ministerial or ministerial consent does meet the current convention for the release of Cabinet confidences, it would seem appropriate to include a paragraph in the exceptions part of any proposed Cabinet confidences exemption which recognizes the process.

Recommendation #14: That any exemption for Cabinet confidences include an exception that it does not apply to any record where the Cabinet for which, or in respect of which, the record has been prepared consents to access being given.

(n) Disclosure in the public interest

Disclosure in the public interest is a large and important access to information issue in and of its own right. It has become a feature of most modern access legislation in Canada and will have to be seriously considered in any reform of federal access legislation. Ontario was the first to include a more general "public

interest override" in its freedom of information legislation. This override generally states that, despite any other provision of the Act, the head of a government institution must, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so. The disclosure requirement is extended to Cabinet confidences but the public interest is restricted to a record that reveals a *grave* environmental, health or safety hazard to the public. (*Ontario Freedom of Information and Protection of Individual Privacy Act*, section 11). The Ontario legislation also provides for a specific public interest override of several of its exemption provisions but Cabinet confidences is not included among these (section 23).

British Columbia and Alberta extend the basic Ontario provision by providing for release of information in cases where there is risk of *significant* harm to the environment or to the health or safety of the public, of an affected group of people or of a person or of the applicant or if there is any other reason for which disclosure is *clearly* in the public interest. (*British Columbia Freedom of Information and Protection of Privacy Act*, section 25 and *Alberta Freedom of Information and Protection of Privacy Act*, section 31).

There are few rulings under provincial access laws relating to the release of information in the public interest. Those which do, apply to protection of the environment, public health and safety. None relate to the public interest in the disclosure of Cabinet confidences. The best that can be said is that the public interest override is not leading to a flood of Cabinet confidences being released. There is, then, some comfort for those who may see such provisions as a major threat to the confidentiality of the Cabinet decision-making processes.

At the same time, it is hard to support the non-release of information, Cabinet confidence or not, which relates to either *grave* or *significant* harm to the environment, public health or safety or the disclosure of which was otherwise *clearly* in the public interest. The tests remain quite high and information which would fall in such categories should most often be made public or communicated to affected groups or individuals without any resort to an access request.

Recommendation #15: That any exemption for Cabinet confidences be subject to a general public interest override provision, preferably a section similar to those currently contained in the British Columbia and Alberta freedom of information and protection of privacy legislation.

(o) Restrictions on examination and review of Cabinet confidences

It is common to recognize the special character of Cabinet confidences by restricting the number and level of those independent agents of Parliament who can gain access to them and examine and make orders concerning questions of public access to them. This is a wise procedure to reduce intrusions upon the overall principle of confidentiality for the deliberations of Cabinet.

The nature of any review mechanism is dependent, however, on the overall review structure under a reformed *Access to Information Act*. If it were to remain unchanged, with the commissioner carrying out an ombudsman's role for refusals of access, then the recommendations of the Standing Committee must be dealt with. The Committee recommended that the refusal of access to Cabinet confidences should not be referred to the Information Commissioner but rather should be reviewed directly by the Associate Chief Justice of the Federal Court. Such a procedure would be exceedingly confrontational and expensive, as well as place a very heavy workload on the Associate Chief Justice. There would seem to be merit in empowering the commissioner to investigate this type of refusal of access as is done in all other cases. The Information Commissioner should be bound, however, to restrict his or her delegation of powers of investigation, as is now the case for specific provisions relating to international affairs and defence under subsection 59(2) of the *Access to Information Act*. If an appeal is made to the Federal Court, it should be heard by the Associate Chief Justice as is also required under section 52 international affairs and defence.

Recommendation #16: That a provision be included in any amendment of the *Access to Information Act* which would restrict the delegation by the Information Commissioner of those charged with the review of refusals of access to Cabinet confidences to a limited number of officers or employees of the Office of the Information Commissioner and, where there is an appeal to the Federal Court, an amended Act must specify that the case will be heard by the Associate Chief Justice under the same terms as the current section 52 of the Act.

(p) Suggested exemption provision for Cabinet confidences

Recommendation #17: That an amended exemption for Cabinet confidences should be drafted as follows:

1. The head of a government institution shall refuse to disclose any record the disclosure of which could reasonably be expected to reveal the substance of deliberations of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,

(a) an agenda, minute or other record of the deliberations or decisions of Council or its committees;

(b) a record containing policy options or recommendations submitted, or prepared for submission, to Council or its committees;

(c) a record used for or reflecting communications or discussions among Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(d) a record prepared for the purpose of briefing a Minister of the Crown in

relation to matters that are before, or are proposed to be brought, before Council or that are the subject of communications or discussions referred to in (c) above;

(e) draft policy or regulations; and

(f) records that contain information about the contents of any record within the class of record referred to in paragraphs (a) to (e) if the information reveals the substance of the deliberations of Council.

2. Sub-section (1) does not apply to:

(a) a record that has been in existence for 15 or more years;

(b) a record or part of a record which is a record of a decision made by Council on an appeal under an Act of Canada;

(c) a record or part of a record, which does not contain policy options or recommendations and contains background explanations or analyses of problems submitted, or prepared for submission, to Council or its committees for their consideration in making a decision if:

(i) the decision has been made public;
(ii) the decision has been implemented; or
(iii) four years or more have passed since the decision was made or considered;

(d) a record or part of a record attached to a Cabinet submission containing background explanations or analyses which were not brought into existence for the purpose of submission for consideration by Cabinet or one of its committees;

(e) a record or part of a record which contains a summary of a Cabinet decision exclusive of any information which would reveal the substance of deliberations of Council;

(f) any record or part of a record where the Cabinet for which, or in respect of which, the record has been prepared consents to access being given.

3. For purposes of subsections (1) and (2), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Case Summaries

What follows here are summaries of some of the commissioner's findings. They represent what the commissioner considers to be cases of particular interest or significance during the past year in terms of law, fact or policy. An effort has been made, again this year, to present the office's "jurisprudence" in a style which is accessible to lawyers and non-lawyers alike. Following the summaries is an index arranged to relate the cases to specific sections of the Act.

What Price the PM's Car? (01-96)

Background

A researcher working for a Senator made application to the Privy Council Office (PCO) under the access law for information about the cost of any vehicles purchased for the Prime Minister. An earlier question on this subject, placed on the order paper in the Senate, had elicited no information. PCO transferred the request to the RCMP, which has responsibility for transporting the Prime Minister.

The RCMP refused to give the requester any information. It argued that it had no relevant records and, even if it did, none would be disclosed for reasons of security. The RCMP relied upon subsection 16(2) of the access law to justify its position. That provision allows secrecy to be maintained for information "that could reasonably be expected to facilitate the commission of an offence." Moreover, unknown to the requester, the RCMP investigated him to determine if he might pose a threat to the safety of the Prime Minister.

Legal issue

Three issues were raised by this complaint: First, whether or not the RCMP held records relevant to the request; second, whether the force was overly cautious in assessing the likelihood of injury from disclosure as required by subsection 16(2) and, finally, whether the RCMP was justified in investigating the requester.

On the first issue (did records exist?), the RCMP argued that there were no records because no cars were ever purchased for the Prime Minister. The RCMP maintained that the PM uses vehicles from the RCMP's VIP fleet. Cars may be purchased for the fleet, but not for the Prime Minister.

As for the second issue, the RCMP argued that, even if relevant records existed,

subsection 16(2) of the access law would permit non-disclosure. To disclose any information about the vehicles used by the PM could pose a threat to his safety and, hence, facilitate the commission of a crime.

Finally, the RCMP maintained that its investigation of the requester was justifiable. Considering the RCMP's role in protecting the PM, it felt that someone asking about the cost of the PM's car as well as details concerning modifications to the vehicle, might have criminal intent. Although to the knowledge of the Information Commissioner's office this was the first instance of an investigation being conducted into an access requester because of a formal access request, the RCMP felt it necessary to exercise an abundance of caution for the safety of the Prime Minister.

On all issues, the Information Commissioner asked the RCMP to reconsider its actions. Concerning release, the commissioner concluded the RCMP's interpretation of the request was unduly narrow. He determined that, in fact, specific vehicles from the VIP fleet had been assigned to the Prime Minister. Indeed, two 1994 Chevrolet Caprice Classic automobiles had been purchased for specific assignment to the Prime Minister. As well, a 1992 Buick Roadmaster automobile had been acquired by the RCMP for the use of the Prime Minister's predecessor and was currently in use by the Prime Minister.

The Information Commissioner also concluded that the RCMP had been overly cautious in its interpretation of the subsection 16(2). He was not convinced that all the requested information needed to be kept secret. For example, how would it facilitate the commission of an offence for the requester to be told the make, model and base cost of the three vehicles in use by the Prime Minister? Casual observation by members of the public would reveal as much.

On the other hand, the Information Commissioner agreed that details about any modifications made to the vehicles, and the associated costs, could be kept secret. Such information could assist a would-be attacker in assessing the relative security of the vehicles and, hence, facilitate the commission of an offence against the Prime Minister. The RCMP followed the commissioner's recommendation and informed the requester of the make, model and base cost of the three vehicles used to transport the Prime Minister.

With regard to the investigation conducted by the RCMP into the requester, the Information Commissioner expressed his disagreement and concern. He noted that the information sought by the requester had been asked for by a Senator only a short time before the access request. No alarm bells were sounded by the RCMP. Moreover, the Commissioner noted that the Prime Minister himself had made something of a public issue of the kind of car he was using. "It is worrying to me", the commissioner reported to the RCMP, "to contemplate the chilling effects on access to information rights if Canadians who ask questions about the Prime Minister's expenditures face the prospect of being investigated by the RCMP." In response to these concerns, the RCMP referred the matter to the Office of the Privacy Commissioner for guidance.

Lessons learned

It is essential to a meaningful right of access that departments give a broad and generous interpretation to the wording of access requests. Splitting hairs concerning the scope of a request only serves to enhance the cynicism held by the public against public officials. If there is legitimate doubt about what records a requester wants, the proper course is to phone or write the requester and find out.

When applying exemptions that contain a "reasonable expectation of injury" test, such as subsection 16(2), an excess of caution is not justifiable simply because the feared harm (in this case, injury or death of the Prime Minister) is grave. Whether the feared injury be slight or serious the test is the same: Is there evidence showing a reasonable likelihood, at the level of a probability, that the injury will occur from disclosure? It is not acceptable to adopt an approach that says: When in doubt, keep it secret!

The right of access could be easily undermined if Canadians came to feel that they risked becoming the subject of an investigation merely by exercising the right to request records. There are safeguards, contained in the *Privacy Act*, to protect the names of access requesters from law enforcement agencies. However, law enforcement agencies themselves should take care to avoid any unreasonable temptation to invade the privacy of those individuals who make access requests for information held by the law enforcers.

Will No One Rid Me of that Troublesome Report! (02-96)

Background

A former employee of Transport Canada (TC) made an access to information request to the department for a copy of a post-audit report concerning a refurbishing project. TC responded by saying that no such report existed. The requester did not accept the response, having seen the report during his employment with the department. He alleged that the report noted poor financial control of the project and that little value was received for the significant public funds spent. Moreover, the requester alleged that the report supported concerns that the employee had expressed and for which he had been removed from his position. He wished to use it during a grievance proceeding in which he was involved.

In his complaint to the Information Commissioner, the requester alleged that a

senior official of Transport Canada had ordered the post-audit report destroyed, thus denying his right of access and limiting his ability to pursue his grievance. The department took the position that the report had been destroyed because it was inaccurate, incomplete and made unsubstantiated allegations about the conduct of certain senior officials.

The investigation uncovered a copy of the requested report despite the fact that a senior official of the department had, indeed, ordered all copies destroyed. Moreover, the investigation found that the destruction order came on the very day the formal access request was received by the department and in circumstances that led the commissioner to conclude the senior official knew the request had been made or was imminent.

Legal issue

What legal obligations are public officials under to conserve records that are the subject of an access request? That was the principle issue here.

Two pieces of legislation, the *National Archives Act* and the *Access to Information Act* bear on this case. Whether or not an access to information request has been made for a record, section 5 of the *National Archives Act* stipulates that no record is to be disposed of without the approval of the National Archivist. The senior official of TC should have taken the steps necessary to determine whether there was lawful authority under the *National Archives Act*, the *General Records Disposal Schedules*, or the *Transitory Records Policy*, for the destruction of the report at issue in this case. If not, and there was no such authority, the destruction order was unlawful.

The error was compounded when one takes into account that the official who ordered the destruction did so knowing that an access request had been made or was imminent. Taking any action designed to frustrate the rights set out in the *Access to Information Act* is unacceptable. That being said, the Act provides no specific offence or penalty for the type of behaviour that occurred.

As a result of the investigation, the commissioner recommended to the Minister of Transport that the discovered report be disclosed to the requester. As well, he recommended that all departmental managers be informed *"that no departmental record should be destroyed for any reason if there are reasonable grounds to believe that the record is relevant to an access request."* The Minister agreed to follow both recommendations.

Lessons learned

The *National Archives Act* and the *Access to Information Act* are similar in the sense that both depend upon public officials not to destroy records for improper purposes. At the same time, neither contains penalties for those who do. That is

a weakness deserving of a remedy. Nevertheless, the rules are clear. No record held by a federal government institution may be destroyed without the approval of the National Archivist. In addition, even if there is approval from the Archivist for disposal, no record may be destroyed if a request has been made for the record under the *Access to Information Act*.

Liquidating Confederation Life (03-96)

Background

The collapse of the Confederation Life Insurance Company (Confed) had a ripple effect reaching even the domain of access to information. The reason: the Superintendent of Financial Institutions was named, by the court overseeing the winding-up, to be the liquidator of Confed. Since the Office of the Superintendent of Financial Institutions (OSFI) is subject to the *Access to Information Act*, an individual made application for access to certain records exchanged between the former directors of Confed and the superintendent.

OSFI refused to provide the requester with the records on the basis that the records were not held by OSFI. When the superintendent acts as liquidator of Confed, OSFI argued, he is not wearing his "OSFI hat" and records in his control as liquidator are not, therefore, under the control of OSFI. The requester complained about this response to the Information Commissioner.

Legal issue

When the Superintendent of Financial Institutions acts as a liquidator is he doing so in his role as deputy head of OSFI or is he doing so as a private individual? If it is the former, the records held by the superintendent-as-liquidator are subject to the *Access to Information Act*; if the latter, the access law would not apply.

OSFI made two legal arguments. First, it noted that the appointment of the superintendent-as-liquidator of Confed was made pursuant to the *Winding-Up Act*. This Act is not listed in the OSFI Act as being one of the pieces of legislation, which it is the duty of the superintendent to administer. Hence, OSFI argued, the superintendent is not performing functions as deputy head of OSFI when he acts as liquidator of Confed.

The second legal argument made by OSFI was that any records held by the liquidator relating to the winding-up of Confed are under the control of the Ontario Court, which appointed the superintendent to be liquidator of Confed.

As to OSFI's first argument, the commissioner noted that, while the appointment of the liquidator was made pursuant to the *Winding-Up Act*, the superintendent's authority to offer himself as a potential liquidator of Confed is contained in the *Insurance Companies Act*. This latter Act sets out the powers and duties of the superintendent in the case of a failure of an insurance company. Moreover, the *Insurance Company Act* is listed in the OSFI Act as one of the pieces of legislation that it is the duty of the superintendent to administer.

The Information Commissioner concluded that the superintendent had been appointed liquidator of Confed not as a private individual but precisely because he is deputy head of OSFI. In fact, the OSFI Act requires the superintendent to be exclusively engaged in the duties set out in the OSFI Act. Moreover, several employees of OSFI are engaged in the day-to-day work of liquidating Confed. OSFI resources are used in the liquidation and the costs will be recoverable from the insurance industry by virtue of the OSFI Act and the *Insurance Companies Act*. The commissioner, therefore, rejected OSFI's argument that the superintendent-as-liquidator was distinct from the superintendent-as-regulator.

The commissioner also disagreed with OSFI's contention that the requested records were under the control of the Ontario Court of Justice (General Division). He noted that the court's order appointed "the Superintendent" as liquidator; it did not refer to an individual by name. Moreover, the order placed no restrictions on the liquidator's authority to grant access to records relating to the liquidation. To the contrary, the order gave the liquidator full discretion in this regard. The commissioner also noted that the *Access to Information Act* expressly takes precedence over other federal legislation, including the *Winding-Up Act*.

For these reasons, the Information Commissioner found the complaint to be well-founded and recommended that OSFI disclose the requested records unless specific exemptions contained in the access law could be justified.

OSFI refused to follow the commissioner's recommendation. The commissioner has asked the Federal Court of Canada to review the refusal by OSFI to give access to the requested records.

Lessons learned (subject, of course, to what the Court rules)

Public officials are called upon to engage in a multiplicity of activities in addition to their usual work, such as participating in international committees, heading charity drives, contributing to special task forces. Some of the records they create during these activities will be subject to the right of access, some will not.

The key question in determining whether a record is "under the control of government institutions" is this: were the records generated or obtained during the course of official duties on behalf of a government institution which is subject to the access law? The answer, in the Information Commissioner's view, will depend on factors such as: whether departmental resources are used to pursue

the activity which gave rise to the records; whether the activity giving rise to the records is related to the official's departmental duties and whether the records are accessible to other departmental officials. Generally speaking, the location where the records are held will not be determinative of the question of control. Even if an official keeps records at home or puts them into the hands of a non-governmental agent, the records will be subject to the right of access if they were generated or obtained by an official during the course of official duties on behalf of a government institution which is listed in Schedule I of the *Access to Information Act*.

Whose Videotapes Are They? (04-96)

Background

For many years an individual has been using the *Access to Information Act* to obtain records about the research funded by Environment Canada (EC) into humane alternatives to the leg-hold trap. His latest efforts were to obtain access to a number of records relating to the trap research, including videotapes made during the assessment of the performance of various trap designs. These tapes show the manner in which various traps "deal" with types of fur-bearing animals.

The trap research activities are conducted in Alberta by the Alberta Environmental Centre (AEC) and are financially supported by the Fur Institute of Canada (FIC) which is, in turn, financially supported by EC. The videotapes were not physically held by EC, but by the AEC and the FIC. Environment Canada refused to disclose the videotapes, claiming that the tapes were not under its control and, even if they were, the department argued that the tapes should remain secret to avoid injury to the fur industry. The requester, never one to give up without a fight, complained to the Information Commissioner.

Legal issues

This case raised two issues. First, did EC have sufficient control over the videotapes to make them subject to the access law? Second, could disclosure of the videotapes reasonably be expected to be injurious to Canada's fur industry?

As to the issue of control, the requester argued that EC was seeking, improperly, to avoid the access law by having the videotapes stored off-premises. He maintained that EC had a lawful right to obtain the tapes, that its officials made use of the tapes and that it paid for the research depicted on the tapes. Consequently, he argued, the tapes should be considered to be under the department's control for the purposes of the access law.

For its part, Environment Canada took a simple position — unless a record is in the physical possession of the department, it is not subject to the right of access. The department denied the allegation that the decision not to keep possession of the videotapes was taken in order to ensure that they would not be accessible under the *Access to Information Act*.

The commissioner, relying on recent Federal Court cases, rejected the department's contention that physical possession of a record by a government institution was essential before the access law could apply. In his view, the proper test is the factual issue of whether or not the record relates to the official duties of the department and is one to which the department has a right of access.

In the case of the trap research videotapes, the commissioner concluded that the department had a lawful contractual right of access to the tapes; it owned the tapes and the equipment used in making the tapes; its officials had a need to view the tapes and did so both on departmental premises and elsewhere; and the decision not to maintain possession of the tapes was based on access to information considerations.

In concluding that the trap research videotapes were under the control of EC and subject to the right of access, the commissioner observed:

> "In my respectful view, the department's contention that the ATIA only applies to records in the physical possession of a government institution is wrong. If followed, it would give public officials the authority to remove records from the right of access simply by conveying them into the possession of an entity not covered by the law. The whole purpose of the access law is to remove from public officials authority to decide by fiat the scope of the right of access."

Having so found, it then was necessary for the commissioner to consider the department's contention that paragraph 20(1)(*c*) justified non-disclosure.

As to the issue of paragraph 20(1)(*c*), EC argued that disclosure of the videotapes would jeopardize the funding that the FIC receives from the International Fur Trade Federation. It also argued that media publication of the videotapes would result in economic detriment to the fur industry. Finally, EC observed that some of the videotapes depict new traps not protected by patent. Disclosure could prejudice the inventors or manufacturers involved.

The requester disputed these assertions of possible harm. Moreover, he argued that subsections 20(2) and 20(6) of the law have the effect of requiring disclosure. To be more specific, he argued that the trap research constitutes "product or environmental testing" which subsection 20(2) says should be disclosed. The requester also argued with regard to subsection 20(6) that disclosure would be in the public interest as it relates to the protection of the

environment — a public interest which, in his view, clearly outweighs any prejudice to the fur industry.

Having carefully considered both sides, the Information Commissioner concluded that disclosure of these videotapes could reasonably be expected to result in material financial loss to the Fur Institute and all participants in Canada's fur industry. He accepted the department's view that images of dying animals, however humane the method of death, creates a hostile environment for the fur industry.

To the contention that trap research constitutes "product or environmental testing", the commissioner disagreed. He noted that there were, as yet, no approved standards for humane traps and observed that the object of the research was to develop such standards. "It seems to me" concluded the commissioner, "that an activity does not become product testing unless and until accepted standards have been developed and adopted."

The commissioner also disagreed with the requester's argument that the public interest required disclosure. He was not persuaded that there was any significant public interest to be served by disclosure of video pictures of fur-bearing animals being trapped in various types of devices. He went on to say, however, that once one or more types of traps are accepted by the government as meeting humane trap standards, there may well be a public interest in allowing the public to see how trapped animals fare in those approved devices.

In summary, then, the commissioner agreed with the requester on the issue of control, but sided with the department on the issue of the applicability of the exemption. The requester has indicated his intention to pursue the case in Federal Court.

Lessons learned

Physical possession of records by a government institution is not required for records to be subject to the right of access. If the records relate to the government institution's affairs and if the institution has a right of access to the records, they will be subject to the right of access even if held off-premises.

In applying subsection 20(2), an activity does not become testing unless standards have been developed against which to conduct tests. Until standards have been developed, the activity is in the nature of research and is not captured by subsection 20(2).

Unflattering Audit Reports (05-96)

Background

A journalist made application under the *Access to Information Act* for certain reports held by the Atlantic Canada Opportunities Agency (ACOA). ACOA is responsible for providing financial assistance to business enterprises in the Atlantic provinces. The reports included a 1992 study into failures of projects in which more than $1 million had been provided by ACOA and records relating to a comprehensive audit into ACOA's compliance function.

ACOA refused to disclose, in whole or in part, the reports, saying that they were audits yet to be finalized and premature disclosure could prejudice both the audits themselves and ACOA's future audit procedures.

This response troubled the requester for a number of reasons. First, ACOA had delayed giving any answer for an unreasonable period of time (so found by the Information Commissioner after investigation of previous complaints of delay). Second, the delay and then outright refusal, seemed part of a "pattern of bureaucratic behaviour at ACOA . . . in order to suppress potentially embarrassing material" — to use the requester's words.

Finally, the requester felt that the public had a special interest in learning how ACOA is managing public funds. To him, the reasons ACOA gave for secrecy were entirely hollow and self-serving. Consequently, the journalist complained to the Information Commissioner about ACOA's refusal to disclose the requested reports.

Legal issue

In denying access to the requested reports, ACOA relied primarily upon section 22 of the access law. That section authorizes secrecy of any record:

> "that contains information relating to testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted if the disclosure would prejudice the use or results of particular tests or audits."

ACOA argued that the 1992 special study was part of an audit-in-progress. The agency could not, however, demonstrate the manner in which disclosure would prejudice the completion of the audit. Moreover, the investigation satisfied the commissioner that this was not an audit-in-progress but a discreet and complete study in its own right. The study was not an "audit" in the technical sense of the term. ACOA's own records referred to it as "an evaluation, as opposed to a strict audit." Consequently, the commissioner concluded that section 22 did not justify keeping the report secret and he recommended that it be disclosed. ACOA agreed.

As to the records concerning the comprehensive audit of the compliance function, ACOA was able to demonstrate that at the time of the request the audit had not been completed. By the time of the complaint investigation, however, the audit had been finished, and the final report had been disclosed. In this circumstance, ACOA was not able to show how disclosure of the background audit records would give rise to any of the injuries described in section 22. The withheld records did not reveal confidential audit techniques or methods: they simply gave supporting detail to the observations made in the final report which was released. Again, the commissioner concluded that the requirements of section 22 had not been met. ACOA followed his recommendation that the records be disclosed.

Based on the results of his investigation of these complaints and the delay complaints which proceeded them, the Information Commissioner found that there was a legitimate basis to the requester's concerns about ACOA's good faith in respecting the access law. The commissioner raised his concerns with the new President of ACOA, who has given assurances that ACOA's past poor record in meeting response deadlines and in respecting the law's purpose and spirit will be improved.

Lessons learned

Audits, by their nature, look for and report on what has gone wrong. They have, thus, great potential for embarrassment. Parliament recognized this and, in section 22, set out stringent requirements to be met before audit reports can be kept secret.

It is interesting to note that this section is unique among the access law's exemption provisions. Instead of requiring government officials to have a "reasonable expectation" that disclosure would cause injury (as do several other exemption provisions), section 22 states that secrecy of audit information is only permitted if disclosure "would prejudice the use or results of particular tests or audits." The test is entirely objective. It imposes a uniquely heavy burden of proof on the governed agency wishing to keep an audit report secret. Potential embarrassment to a government institution's managers or political masters simply doesn't make the grade.

The Courtesies of Diplomacy (06-96)

Background

A journalist asked two departments, Foreign Affairs and International Trade (FAIT) and National Defence (ND), for records of gifts given to visiting foreign dignitaries. He was interested only in gifts valued in excess of $50. One department disclosed the names of recipients but not the value of the gifts; the other gave only the values. A complaint to the Information Commissioner ensued.

The refusal to accede fully to the requests was due to fears expressed by FAIT (and shared by ND) that disclosure could be injurious to Canada's conduct of international relations. FAIT argued that disclosure would invite "invidious comparisons" which could give rise to resentments.

Legal issue

Does subsection 15(1) of the *Access to Information Act* authorize the refusal to disclose information about gifts given to foreign dignitaries by Canadian government officials? That provision authorizes secrecy for information "the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs."

In support of its (and ND's) view, FAIT asserted that Canada's traditional allies and important trading partners do not make public information about gifts to foreign dignitaries. FAIT cited several examples where seemingly minor slights or breaches of protocol became major irritants in subsequent dealings between Canada and the state or dignitary who felt insulted.

The commissioner made inquiries of several other countries to determine whether Canada, indeed, would be an anomaly if it chose to disclose the value of gifts given to foreign dignitaries. As it turns out, Canada would not. The commissioner learned that in the United States, for example, an annual list is published which includes the value of the gifts and the identities of the recipients (and donors).

The commissioner asked FAIT and ND to reconsider, taking into account what appeared to be a changing attitude in several countries (not just the U.S.) towards secrecy in this area. In particular, he asked them to take into consideration the need to ensure public accountability for the public funds paid for these gifts. Rather than imposing a blanket of secrecy over all gifts to foreign dignitaries, he asked FAIT and ND to consider each case on its merits, weighing such factors as: the maturity of our relations with the recipient jurisdiction; the length of time since the gift was given; whether or not the recipient foreign official is still in office; whether or not the gift was given at a public function and the disclosure laws in the recipient's jurisdiction.

Both FAIT and ND reconsidered and disclosed additional information. ND disclosed a description of the gifts, the identities of the recipients and a reasonable price range for the value of the gifts. For its part, FAIT chose not to disclose the names of the recipients since it had originally disclosed the exact

value of all gifts given during the requested time period. For the future, however, it agreed to consider each request on a case-by-case basis taking into account the factors referred to previously.

Perhaps most important, FAIT was particularly sensitive to the need to ensure a meaningful measure of public accountability in this area. To that end, it agreed to disclose its policy or guidelines governing the appropriate price range for gifts to foreign officials of various rank. Even when, in future, the precise value of a gift or the name of the recipient is kept secret to protect international relations, the public will know the rules that guided the expenditure.

Lessons learned

Traditions of secrecy in the diplomatic field are changing as they are in other fields. Around the word, diplomatic services are becoming more open and more accountable.

Some traditions of secrecy, as it turns out, better serve the interests of diplomats than national or public interests. That is not to say that secrecy has no place in international relations. Rather, it is a caution to be skeptical of claims that openness has no place in the business of diplomacy. The exchange of gifts as part of the conduct of international affairs is a prime example. Each request for information about such gifts should be examined on its own merits to assess, objectively, whether there is any probable likelihood of injury to Canada's conduct of international relations from disclosure.

In assessing the merits of each such request, the following factors should be considered:

- the maturity of Canada's relations with the recipient's jurisdiction;
- the length of time since the gift was given;
- whether the recipient is still in office;
- was the gift given at a public function, and
- would similar information be disclosed in the recipient's jurisdiction.

Who's calling the shots? (07-96)

Background

In early 1995 several persons, including a representative of the CBC, asked National Defence (ND) for access to records relating to the handling by ND of some matters arising from the Somalia mission: for example, a report of an

internal investigation initiated by the Vice Chief of the Defence staff of a rather unusual incident. The incident was the failure to inform adequately the Minister of National Defence of the contents of a videotape containing scenes of a "beer call" in the summer of 1994. Those depicted in the video were members of the Canadian Airborne Regiment II Commando. Apparently, the video contained scenes more seriously objectionable than the Minister had originally been led to believe.

Some nine months after receiving the requests (and after well-founded complaints of delay to the Information Commissioner) ND denied access to the requested records on the grounds that disclosure could be injurious to an ongoing investigation. The investigation in question was being conducted by the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (Somalia Inquiry). The Somalia Inquiry had been asked by ND whether it had any concerns about the disclosure and gave this reply:

> "It is the view of the commissioners that release of this information, at this time, when the events discussed in the documents are still under investigation by the commission, could reasonably be expected to be injurious to the conduct of a lawful investigation within the meaning of paragraph 16(1)(*c*) of the *Access to Information Act*."

The requesters did not accept the response they received from ND and complained to the Information Commissioner.

Legal issue

Two issues were raised by these complaints: first, did the Minister of ND (or his delegate) properly exercise the discretion given to him by paragraph 16(1)(*c*) of the *Access to Information Act*? Second, could disclosure of the requested records reasonably be expected to be injurious to conduct of the Somalia Inquiry?

On the first issue, the investigation determined that ND had applied the 16(1)(*c*) exemption because of the request to do so from the Somalia Inquiry. The Minister of ND had already approved disclosure of the records without invoking of 16(1)(*c*) and his officials explained their decision to invoke 16(1)(*c*) as being born of a desire to be, and to be seen to be, fully cooperative with the Somalia Inquiry. Consequently, the Information Commissioner concluded that the Minister of ND had made no independent judgment that disclosure of the records in issue would give rise to the injury described in paragraph 16(1)(*c*).

On the argument that disclosure would injure the Somalia Inquiry, the commissioner heard directly from the Inquiry's three commissioners. They argued that disclosure would give rise to a more adversarial climate in their proceedings, make witnesses less cooperative, cause the Inquiry to lose control over its own agenda and prejudice parties to appear before the commission. This latter concern was of special importance to the Somalia Inquiry. It was argued

that if ND disclosed the requested records, allegations could surface in the media that would take witnesses or parties to the Inquiry by surprise and which they could not (because of scheduling) respond to until later phases of the Inquiry. According to the Somalia Inquiry, this would create an impression of unfairness as the affected individuals would not only be deprived of prior disclosure, but would be without recourse to the Inquiry in order to make a timely response.

The requesters argued that the feared injuries were highly speculative and that the Somalia Inquiry could avoid them by simply disclosing the records at issue to all parties and witnesses at the same time the records are disclosed to the requesters. In other words, they maintained that the appropriate course was more openness, not more secrecy.

The CBC argued that refusal to disclose the requested records constituted an unreasonable infringement of its rights of freedom of expression and freedom of the press as guaranteed by the *Canadian Charter of Rights and Freedoms*. The CBC contended that, failing the lawful authority to enjoin the CBC from airing stories about the contents of the record, the Somalia Inquiry was attempting to accomplish the same end by another method, i.e. the request to ND to maintain secrecy of the records.

Having heard all these arguments, the Information Commissioner concluded that the test for secrecy, set out in paragraph 16(1)(*c*), had not been satisfied. He found that there was no reasonable basis for the speculative fears of harm expressed by the Somalia Inquiry. The commissioner noted that other commissions of inquiry have functioned effectively without seeking to block access to information requests. Indeed, it would appear that no other commission of inquiry had made such a request for secrecy.

As for the CBC's Charter argument, the commissioner noted the explicit statements by the Somalia Inquiry commissioners that their concern was to prevent the dissemination of media stories relating to the content of records not yet dealt with by the Inquiry.

The Information Commissioner was satisfied that the Charter would prevent the Somalia Inquiry from enjoining the CBC (or other media interest) from publishing information such as that contained in the withheld records. Consequently, the commissioner concluded that the Inquiry cannot do indirectly that which it is prevented from doing directly. Moreover, the commissioner concluded that the Somalia Inquiry had sought to block the media's access to information without regard for the available alternative measures which would be less intrusive upon the protected freedom of expression and the press. This less intrusive alternative is the timely disclosure of the records to all those who are interested, including members of the media.

The commissioner, accordingly, found the complaints to be well-founded and recommended that ND disclose the information withheld at the request of the

Somalia Inquiry.

The Minister of National Defence refused to follow the commissioners's recommendations and, with the consent of the requesters, the commissioner has commenced action in Federal Court seeking an order forcing disclosure.

Lessons learned

From time to time other institutions, governmental and others, will seek to prevail upon a department in receipt of an access request to exempt the records from the right of access. There is nothing unusual or offensive about such an occurrence. When such a request is made, however, it is incumbent upon the head of the recipient institution (or their delegate) to be satisfied personally and convinced that the record is lawfully entitled to secrecy. The *Access Act* simply does not condone or permit deference by the recipient institution to the wishes of a third party, however influential that third party may be.

Departments should be especially vigilant when a judicial or quasi-judicial body requests that records be withheld from the media. The Supreme Court of Canada has placed severe limitations on the power of such bodies to enjoin publication of information related to judicial proceedings. Such a request may be an inappropriate attempt by the body to accomplish indirectly what it is unauthorized to do directly.

Some Requesters get Better Treatment than Others (08-96)

Background

A former employee of National Defence (ND) became a regular user of the access law on two accounts. First, he sought records concerning his dismissal from ND to be used in pursuing his legal action against the department for wrongful dismissal. Second, he started a business offering to make access to information requests for others, not just to ND but to any department of interest to his clients. Neither activity made this requester popular with ND, so much so that he complained to the Information Commissioner that ND was subjecting him to discriminatory treatment when administering the access law. In particular, the complainant alleged that he was forced to view requested records at the premises of the Canadian Forces Recruiting Centre, whereas other users of the access law were permitted to consult records at the reading room located in the headquarters building.

ND argued that there were good and sufficient reasons for barring the requester

from the headquarters building and that, in any event, there was no discrimination because the reading room had been moved to the recruiting centre and no clients were viewing records in the headquarters building.

Section 71 of the *Access to Information Act* requires all government institutions to provide facilities at their headquarters (and at other offices where reasonably practical) where the public may inspect manuals used by employees in carrying out their duties. These facilities are commonly referred to as "reading rooms" and often, as in the case of ND, form part of the departmental library. Typically, these rooms are also used by persons who wish to view records they have requested under the access law. Viewing is a method for reducing the cost of photocopies by enabling the requester to determine first whether or not he or she wants copies of every page of the records in response to the access request.

Legal issue

Given that reading rooms are mandatory at the headquarters of every government institution and members of the public have a right of access to them, was ND entitled to refuse a person access to its headquarters reading room facilities? Secondly, was ND entitled to move its reading room out of the headquarters building to other premises in Ottawa?

From a plain reading of section 71, the commissioner concluded that all members of the public, including the complainant, have a right to consult departmental manuals in the headquarters reading room of ND. However, that section is silent on the use of reading room facilities for the purpose of viewing records requested under the access law. In such cases, the commissioner concluded that, if some were permitted to use the reading room at headquarters, all should be — unless a particular individual posed a threat to the security of persons or property by his or her presence at the reading room. In this case, ND could demonstrate no reasonable basis to suspect that the complainant posed such a threat.

As for the department's contention that it respected the "equal treatment" principle by sending everyone wishing to view records to the recruiting centre, the investigation confirmed that this contention was simply not true. No one, except this single complainant, had been sent to the recruiting centre to view records; all others continued to be given access to the headquarters premises. Moreover, section 71 would prevent ND from moving its reading room out of its headquarters building.

The commissioner found that ND had discriminated against this individual without justification. That conclusion was communicated to the department along with the recommendation that the individual's access to the headquarters facilities be reinstated on the same basis as all other users of the access law. The department agreed.

Lessons learned

Apart from the formal legal requirement contained in section 71 to provide a reading room for use by the public at headquarters and, if practical, at other offices, departments must accord equal treatment to all those wishing to view records. Of course, if there are legitimate reasons to suspect a person of being a threat to the security of persons or property, special treatment is appropriate.

However, it is never appropriate to discriminate against a person merely because he or she is a frequent user of the access law or because the person is also engaged in legal action against the department concerned.

Will that be Cash or Credit Card? (09-96)

Background

A complaint was received by the Information Commissioner from an individual whose requests for records had gone unanswered by Public Works and Government Services Canada (PWGSC). PWGSC had, indeed, failed to respond promptly; the requests had been mislaid and, hence, response deadlines were missed. Once the investigator intervened, the matter was reactivated and responses were sent. There was no bad faith on the department's part, the problem was one of a simple oversight inevitable in large organizations.

Worthy of Note

The investigation of these complaints afforded the Information Commissioner an opportunity to learn of a new initiative at PWGSC designed to improve service to access requesters. Effective in May of 1995, requesters may submit access requests by fax if they include a Mastercard or Visa credit card number. No longer is it necessary to send a request by mail accompanied by the requisite $5 fee. Under the new system, the request is considered to have been received on the day the fax is received (if it is a business day). The credit card service may also be used when the department provides a fee estimate. The requester need only send another fax authorizing the department to bill the additional fees to the requester's credit card.

As frequent users of the *Access to Information Act* are sometimes painfully aware, the time lost during the mailing of fee estimates by departments and in sending payment cheques by return mail can add from one week to more than a month to the time it takes to process an access request. PWGSC is the first federal

department to accept credit card payment of fees under the access law and it is to be congratulated for this positive initiative.

A Classic Catch-22 (10-96)

Background

A resident of Saskatchewan applied under the federal access law to the RCMP to obtain any records the force had about the requester. The RCMP did hold relevant records but refused to disclose them because it had gathered the information while conducting policing services for the Province of Saskatchewan. Some years ago, Saskatchewan asked the RCMP to keep confidential all records generated while policing in Saskatchewan under contract to the province.

The requester, undaunted, applied under Saskatchewan's freedom of information law for access to the same records. The Attorney General of Saskatchewan refused on the basis that the records were federal records, held by the RCMP, and not subject to the Saskatchewan law.

Faced with this catch-22, the requester complained to the Federal Information Commissioner about the RCMP's response and to the Saskatchewan Information Commissioner about the Attorney General's response. The Saskatchewan Commissioner recommended disclosure but the province refused to comply. Upon review by the provincial court, it was ruled that the information should be released.

The requester, never one to give up on a principle, continued to press for satisfaction from the RCMP. What reason could the RCMP invoke to justify keeping secret records which the individual had received from the province?

Legal issue

A provision in the *Access to Information Act* — subsection 16(3) — requires the RCMP to refuse disclosure of records generated by the RCMP during policing services for a province where the province has requested confidentiality and the federal government has agreed.

In anticipation of the coming into force of the *Access to Information Act* in 1983, all provinces policed by the RCMP requested such confidentiality and the federal government agreed.

Since that time, however, most provinces have adopted freedom of information

laws of their own. As a result, we have the anomaly that the provinces are authorized to disclose records pursuant to provincial law which the RCMP is required to keep secret under federal law. Two provinces, B.C. and N.S. corrected the anomaly by withdrawing their blanket requests for confidentiality.

The Information Commissioner asked the RCMP to point out to Saskatchewan the anomalous situation in this case and to ask for the province's permission to disclose. The RCMP agreed and obtained the province's consent. Shortly thereafter, Saskatchewan became the third province to rescind its 1983 blanket request for confidentiality of RCMP policing records.

Lessons learned

With the advent of freedom of information legislation in the provinces, subsection 16(3) of the federal access law is an anachronism. It is time for all provinces to join B.C., N.S. and Saskatchewan in rescinding the 1983 requests for confidentiality pursuant to subsection 16(3) of the federal access law. In the meantime, before invoking 16(3) to deny access to requested records, the RCMP should consult with the province concerned to obtain a case-specific consent for disclosure. Of course, giving up reliance on subsection 16(3) would not constrain the RCMP's right to invoke any other applicable exemption contained in the federal access law.

Waiting for Godot (11-96)

Background

In the summer of 1994, several persons asked Correctional Service Canada (CSC) for a copy of the internal report into the escape of a prisoner from a facility in British Columbia, who, while at large, murdered a young man. The murdered man's mother and a journalist were among those who asked to see the report. The lawful due date for a response, even taking into account an extension of time claimed by the department, was September 25, 1994. When nine months passed after that with no response, the journalist complained to the commissioner. What possible justification could there be for this delay?

As it turned out, CSC officials had reviewed the report, censored it where necessary, and passed their recommendation for disclosure to the Solicitor General by October 19, 1994 — only one month past the lawful response deadline. The file simply sat, waiting on the convenience of the minister and his officials, until June of 1995 when the Information Commissioner intervened.

Legal issue

The issue here is whether there was any justification for a delay of nine months in answering an access to information request. Of course, there was none. The relevant records were readily identifiable and the review was uncomplicated. The problem was that CSC officials were, apparently, powerless to move the file through the approval process in the office of the Solicitor General. That office seemed to feel that the convenience of the Minister took precedence over the rights contained in the access law.

The commissioner let it be known that such an attitude, and such a poor record of service (this was not the first case of delay in the minister's office) was unacceptable. He insisted that a protocol be established ensuring that the minister's office would give timely attention to access requests and, if not, that answers could be given without waiting for the minister's approval. The department agreed to solve this problem for the future.

Lessons learned

It is perfectly legitimate and understandable for a minister and his political staff to insist on being kept abreast of imminent disclosures under the access law. If a minister's office is part of the approval process for an access request, however, it is bound to respect the deadlines set out in the law. The law does not stop in its application at the door to the minister's office! Ministers should ensure that procedures are in place to give them a reasonable opportunity to review proposed responses and that there is a clear delegation of authority to others if the minister cannot deal with the matter within statutory time frames. The problem illustrated by this case is not unique to CSC.

Good Intentions Gone Awry (12-96)

Background

A criminologist complained to the Information Commissioner when the National Parole Board (NPB) refused his request for a Board's decision about an inmate. The decision was held in the NPB's registry of decisions, a registry established pursuant to the *Corrections and Conditional Release Act* of 1992.

The Board justified its refusal to disclose on the fact that the criminologist was acting on behalf of an inmate who was not the subject of the decision. The NPB said that it did not provide copies of decisions to inmates or their

representatives. This practice was adopted from a fear that if the Board's decisions got into the hands of other inmates, the inmate could be exposed to harassment and physical violence.

Legal issue

This complaint raised the issue of whether or not parole decisions are "personal information" requiring protection under Subsection 19(1) of the access law. It was not difficult to conclude that parole decisions contain information about identifiable individuals. Yet that conclusion did not automatically mean that the information qualified for secrecy. Subsection 19(2) must also be considered. It states:

> "The head of a government institution may disclose any record requested under this Act that contains personal information if: (*a*) the individual to whom it relates consents to the disclosure; (*b*) the information is publicly available; or (*c*) the disclosure is in accordance with section 8 of the *Privacy Act*."

In this case, paragraph 19(2)(*c*) was relevant because of a provision in the *Corrections and Conditional Release Act*, which specifically authorizes public disclosure of parole decisions. Since paragraph 8(2)(*b*) of the *Privacy Act* authorizes disclosure without consent of personal information "for any purpose in accordance with any Act of Parliament", the commissioner concluded that paragraph 19(2)(*c*) of the access law was triggered in this case. Secrecy was not justifiable, he found.

In recommending disclosure, the commissioner took into account admissions made by NPB officials that requesters would be given access even if they represented inmates, as long as they didn't divulge any association with an inmate. The NPB makes no independent verification whether there is a relationship between a requester and an inmate. The system, in fact, offered little protection to inmates and encouraged requesters to be less than forthright. The honest requester suffered.

The NPB agreed to disclose the requested decisions to the requester.

Lessons learned

Decisions in the NPB's registry are not automatically exemptible from the right of access simply because they contain personal information. Paragraph 19(2)(*c*) of the *Access to Information Act* authorizes disclosure unless some other exemption provisions can be justified. Whenever the privacy exemption is invoked (subsection 19(1)), care should be taken to consider the exceptions to the privacy exemption which are set out in subsection 19(2).

As for policies that discriminate between types of requesters, they will seldom (perhaps never) be justifiable for a very practical reason. The requester who is not entitled to receive the information (for whatever well-intentioned reason) can simply have someone else make the request and no one will be the wiser. In the end, the intended purpose of the discrimination will not be achieved; on the other hand, requesters will be encouraged to be less than forthright.

The Ends Don't Justify the Means (13-96)

Background

Representatives of the Bloc Québécois have made more use of the *Access to Information Act* than have members of previous Opposition parties.

In March, May and June of 1995 a representative of the leader of the Opposition submitted requests to the Privy Council Office (PCO) and to the department of Canadian Heritage. The requests sought information related to the issue of national unity including expenditures made by the government relating to unity.

When these departments failed to respond within the deadlines established in the law the requester complained to the Information Commissioner. The complaints alleged that the departments had failed in their obligation to give access to the records or to properly deny the request. Shortly after the complaints were filed, a referendum on the future of Quebec in Canada was set by the government of Quebec for October 30, 1995.

Officials in the concerned departments then took the position that, from an abundance of caution, responses should be further delayed until after October 30.

Legal issue

In these cases there was a straightforward legal issue: Did the government respect lawful response deadlines? On this the answer is also straightforward — it did not.

There was, however, also a less straightforward issue: Did the government's concerns about the motives of the Bloc in seeking this information (especially with the impending referendum) justify its plan to further delay answers until after the referendum? On this issue, the commissioner brought his concerns about the perceived foot-dragging to the attention of the departments concerned. He took the position that, in the absence of legitimate reasons to believe that the

requested information could be withheld from access under the law's exemption provisions, the records should be disclosed. An answer, either a yes or no, was required without waiting for the referendum date.

The departments agreed to respond before the referendum date. Canadian Heritage was true to its word; the PCO lost its resolve (or regained it, depending on one's perspective) and did not provide a complete response until the day of the referendum.

Lessons learned

No provision of law allows a government institution to perpetuate delays for strategic purposes, no matter how valid those purposes may seem. If there is legitimate reason to fear some injury from disclosure — and there well may be — the proper course is to invoke one or more of the law's exemptions and refuse to disclose. If no exemption can be legitimately invoked, however, continued foot-dragging is not a legal option: the records must be disclosed.

That being said, there is no effective means to censure departments using delay for strategic purposes. The available route of invoking the aid of the Federal Court is itself too time consuming to be of practical value in such cases. The only practical course open to the Information Commissioner is to bring this problem to the attention of Parliament and the public and to continue encouraging senior officials to respect their lawful obligations.

Are Medals and Awards a Private Matter? (14-96)

Background

For many years, historical researchers had obtained from the National Archives (NA) information about medals and decorations awarded during wartime. The researchers were surprised and frustrated when the Archives decided no longer to disclose such information. NA changed its mind in order to follow the approach taken by the departments of National Defence and Veterans Affairs. These latter departments believed that the identities of persons who receive medals, decorations and awards must be protected for privacy reasons. The Archives felt obliged to follow the lead of these departments since the records on this subject which it held originated with them.

Eleven complaints against NA, from three researchers, were received by the Information Commissioner.

Legal issue

These cases raised the issue whether section 19 of the *Access to Information Act* requires NA to keep secret information about medals, decorations and awards which individuals received for wartime service. The Archives argued that such information was "personal information" as defined in section 3 of the *Privacy Act* and was, therefore, protected from disclosure to others by subsection 19(1).

The complainants argued that the Archives had failed to take into account the provisions of paragraph 19(2)(*b*) which states that information that is publicly available may not be withheld under subsection 19(1).

The investigation by the commissioner determined that a great deal of information about decorations and medals exists in the public domain. All World War I records, for example, are considered open records by the Archives and access to them is granted on request. As well, decorations and medals awarded for gallantry, valour, long service and other exceptional merit are published in the *Canada Gazette*, the Chancellery at Government House and in publications, prepared by National Defence, listing modern-day recipients. Lists of campaign medal recipients, on the other hand, were not found in public sources.

The commissioner also took into account the fact that war medals and decorations are, by their very nature, intended to be a public display of the tribute paid to the recipient by the Crown. The awards ceremonies are public, the medals are intended for wearing in public and the record of the event, including a recital of the facts on which the award was based, is published. In short, most campaign medals are no different from medals for gallantry in the sense that both are intended to be a public commendation.

Both Veterans Affairs and the Archives agreed that there was no justification in keeping secret information about wartime medals and decorations. Consequently, the information was released to the three researchers and the Archives undertook to coordinate a common policy on disclosure of such records among the other departments involved in this issue.

Lessons learned

Not all information about identifiable individuals may be withheld from others who request access to it. For example, as in this case, privacy rights give way when the information is otherwise publicly available. It is not always easy to determine whether or not requested information is in the public domain. Departments do not always have the resources or the inclination to do the research necessary to answer this question. Requesters, too, bear a burden to assist department's in determining what is already public in other sources; requesters, can help their own cause by doing their own homework. As for departments, they should always be open to leads which may help show that personal information is already public

elsewhere.

When Cases are Settled Out of Court (15-96)

Background

A situation of alleged harassment resulted in settlements being offered to two individuals by the department of Agriculture. Since the department of Justice acted as Agriculture's counsel in the matter, one of those who received a settlement applied to Justice for a copy of the terms of the other person's settlement.

Though Justice disclosed most of the requested information, it refused to disclose the dollar amount of the settlement. Justice relied on subsection 19(1) of the *Access to Information Act* to justify its refusal, claiming that the settlement amount constituted "personal information" about the other person which should be protected on privacy grounds.

The requester did not accept Justice's position and complained to the Information Commissioner.

Legal issue

The legal issue here can be stated simply. Is a financial settlement reached between the Crown and an individual a discretionary benefit of a financial nature? If so (because of the wording of paragraph 3(l) of the *Privacy Act*), the exact nature of the benefit and the name of the individual receiving it must be disclosed. If not, then subsection 19(1) of the access law requires the information to be kept confidential.

The complainant argued that the settlement payment was entirely discretionary on the part of the government. It was not obliged to pay a settlement. In support of this view, the complainant noted that, in the past, the amount and nature of such settlements had been considered as "ex gratia" payments by the Crown and the information was published in the *Public Accounts of Canada* along with the recipients names and the exact amounts of the settlements.

For its part, Justice held the view that a settlement was not discretionary or "ex gratia." Settlement, it argued, is made to discharge or avoid a potential liability. Justice expressed the view that settlements such as this (to resolve a situation of alleged harassment) are not the type of financial benefit contemplated by paragraph 3(l) of the *Privacy Act*. These settlements are not in the nature of

largesse conferred upon individuals who have no legal claim. It is the latter type of "gift" which is captured by paragraph 3(l) in order to prevent abuse of the public purse.

The commissioner concluded that settlements of legal disputes against the Crown do not constitute discretionary benefits of a financial nature and, hence, details about them may be kept secret pursuant to subsection 19(2) of the access law. In such cases, the commissioner found, the context of potential legal liability removes such payments from the category of purely discretionary payments.

Lessons learned

Details about gifts by government to individuals cannot be kept secret for privacy reasons. Public accountability, the law says, is a higher value in such cases. However, amounts paid by government to individuals to settle claims against the Crown are not mere gifts. There is a context of potential liability. In such cases, privacy has a higher value under the law than does public accountability.

Marketing Government Records (16-96)

Background

A businessman applied to the Justice department for access to a computer-readable version of the *Revised Statutes of Canada*. The request was refused on the grounds that the department was planning to make the information available in CD-ROM format. Disclosure of the information to the requester, the department argued, would jeopardize its plans to sell the information and, thus, prejudice a competitive position of a government institution as described in paragraph 18(b) of the *Access to Information Act*.

The requester complained to the Information Commissioner, pointing out that the *Revised Statutes of Canada* were already in the public domain in print form. He argued, thus, that 18(b) could not be applied to keep secret information which was already public. During the investigation, the Justice department invoked an additional exemption, paragraph 68(a). It argued that, since the print version of the revised statutes was published and available for purchase by the public, the access law did not apply to such information regardless of format.

Before the investigation had been completed, a CD-ROM version was made available for sale through the Canada Communications Group (at $250 per copy) and the revised statues were made available on the Internet.

Legal Issues

The first issue in this case is whether government may refuse to disclose requested records for the reason that the government intends to sell the information. Paragraph 18(b) authorizes government institutions to refuse to disclose any record that contains:

> "information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution."

The commissioner concluded that, at the time of the request, Justice Canada was actively pursuing the project to market the *Revised Statutes of Canada* on CD-ROM. Moreover, he was satisfied that premature disclosure of the information would prejudice the department's competitive position vis-a-vis a number of private sector firms specializing in providing access to databases of a legal nature. Thus, at the time of the request, paragraph 18(b) of the law justified non-disclosure. (Whether a government should be in the publishing business is, of course, a separate matter.)

After the request was answered, and during the complaint investigation, Justice made the electronic version of the statutes publicly available in two ways. First, it contracted with Canada Communications Group to sell the CD-ROM version for $250. Second, it made the revised statutes available on the Internet. That action raised the second issue in this case: Does section 68 of the law operate to exclude the machine readable version of the statutes from the coverage of the access law?

Paragraph 68(a) stipulates that the access law does not apply to "published material or material available for purchase by the public." The commissioner concluded that this provision was applicable in this case because the information is publicly available in two forms and at a reasonable price. Consequently, paragraph 18(b) justified non-disclosure of the requested records at the time of the request and paragraph 68(a) continues to justify non-disclosure.

Lessons learned

A government institution may refuse access to requested records when it plans to market the information commercially. The plans should be concrete and specific at the time of the request. Paragraph 18(b) may not be relied upon to justify appropriating from requesters their ideas for commercial reuse or resale of government information. Once information has been made widely available by government, assuming the price is not unreasonable, paragraph 68(a) excludes the information from the coverage of the access law.

Somalia Case — Complainant Made it a Public Issue (17-96)

Other than through case summaries contained here each year, the commissioner does not make his findings public. In this case, the complainant, a journalist, gave consent to have the finding in this case made public verbatim. Hence, the format of this case summary differs from the others.

The Commissioner's reported as follows:

File 3100-7480/001

By letter dated January 20, 1994, you requested copies of all documents given as responses to queries dated between May 15, 1993 and January 16, 1994. The department received your request on January 24, 1994 and responded to you on May 16. In its response, ND provided you with a number of records and invoked subsections 15(1), 19(1) and paragraphs 16(1)(c) and 21(1)(a) & (d) of the Act to justify withholding some portions.

On June 10, 1994, you complained to me about the exemptions applied to one page of the records. As a result of our investigation, more information was disclosed to you by ND and I concluded on July 4, 1994, that your complaint was resolved.

By facsimile transmission dated October 16, 1995, you alleged that the records provided to you in response to your request of January 20, 1994 had been wrongfully altered prior to release. You asked me to investigate. My findings in this matter are as follows:

1. The records provided to you by ND in response to your request of January 24, 1994 under the *Access to Information Act* were altered versions of the RTQs which you had requested.

2. The alterations consisted of deleting the following sections: file name, originator, prepared by, consultation, distribution, comments, background and sign-off page. Alteration was achieved by blocking and deleting on a micro-computer and then closing the remaining portions to give the appearance of a complete, unaltered record.

3. The alterations were, in my view, significant.

4. The alterations were not the result of error, inadvertence, oversight or ignorance of the law. Rather, these alterations were made deliberately

and they thwarted your lawful rights of access to the original versions.

5. More than one officer within the area known as Director General Public Affairs (DGPA) directly participated in the decision to alter the requested records. I have informed the Minister of Defence of the names of those who I believe took decisions and actions which denied you your lawful rights.

6. National Defence's response of May 16, 1994 to your access request was not the first occasion on which altered records had been provided to you by the department. Previously, in response to an informal request directed by you to DGPA for these same RTQs, altered versions were provided to you. The alterations were the same as those described earlier in paragraph two.

7. The decision to provide altered records in response to your informal request was, in my view, a result of ignorance of the law. Officials of DGPA considered it permissible to provide you with only those portions of the RTQs containing the information that would have been provided over the phone to a person asking a question on the subject covered by the RTQ.

8. Officials of DGPA did not then (and still do not) believe that the provision of altered records in response to an informal request constitutes wrongdoing. I disagree. If a government institution chooses to honour an informal request for access to records, then, either the original records without alteration should be provided or any alterations or deletions should be clearly identifiable on the face of the record. If the government institution does not wish to disclose the records in original form, the informal requester should, in my view, be told that altered records are being provided and that the originals may be requested formally under the access law. Unless the requester is so informed, the provision of altered records in response to an informal request is antithetical to the spirit of the access law, if not unprofessional or, even, unethical.

9. When your subsequent formal request under the access law was received by ND, officials of DGPA considered whether or not they should provide the original RTQs and explain why they differed from the altered versions provided to you informally. A decision was made not to be forthright with you.

10. The deception might never have come to light because officials of DGPA gave clear and direct orders to destroy all original versions of the RTQs. I have informed the Minister of Defence as to the identity of the officers who, in my view, gave this order.

11. The order to destroy the original records was not completely carried

out. Some duplicates were destroyed as were a few originals. The complete destruction of the original RTQs was thwarted by a number of vigilant, courageous and honourable employees of ND, both military and civilian, who delayed in obeying certain orders or reported concerns about the orders to superior officers. I have identified these individuals in my report to the Minister of Defence.

12. Certain senior officials and departmental ATI staff bear no blame in this matter, in my view, even though they played some part in the sign-off process leading to the release of altered records to you. Their names, too, I have included in my report to the Minister of Defence.

Recommendations

As a result of the foregoing findings, I have recommended to the Minister of Defence that the following actions be taken:

1. Those who deliberately undermined your lawful right of access to records be called to account;

2. Those who brought this wrongdoing to light and acted to ensure the preservation of original records be protected from adverse effects on their careers; and

3. Written directions be issued to all employees of ND (civilian and military) as to their obligations with respect to requests (formal and informal) for access to records held by the department.

File 3100-7481/001

On June 13, 1994, National Defence received your request for copies of all RTQs between the dates of January 17, 1994 and June 7, 1994. The department responded on June 23, advising you that the use of RTQs had ceased in January 1994 as a result of major restructuring within DGPA and the introduction of several new initiatives. You were also provided a list of reasons why RTQs were no longer deemed necessary.

On October 16, 1995, you complained to me alleging that the response was false. My findings in this matter are as follows:

1. The response given by National Defence to your request of June 13, 1994, was false. In fact, RTQs were produced in ND until mid-1994.

2. The false response was not the result of error, inadvertence, oversight or ignorance of the law. Rather, this false response had its genesis in an effort to thwart your lawful right of access to the requested records.

3. More than one officer of DGPA directly participated in the decision to provide you with a false response. I have informed the Minister of Defence of the names of these individuals.

4. The then Associate ADM (Policy and Communications) did not knowingly attempt to mislead you. He, too, was misled. He relied upon assurances given by others that RTQs were no longer created.

5. All those involved in the response to your request were less than forthright in failing to inform you that the RTQ documents had simply been slightly reformatted and renamed Media Response Lines (MRLs). In fact, to this date, RTQs and MRLs are virtually indistinguishable.

6. The policy to change from RTQs to MRLs (never fully implemented) was adopted for a variety of reasons. Officially, at the senior levels, we were told that it was intended to improve the accuracy, specificity and timeliness of media responses. After 72 hours, the contents of an MRL were not to be given in response to a media question unless their accuracy had been verified with the responsible program officials.

Unofficially, at the operations level in DGPA, we were told the change from RTQs to MRLs was seen as a direct reaction to your request for access to RTQs. The 72-hour rule was interpreted at the working level of DGPA as a direction to destroy MRLs after 72 hours, thereby thwarting the right of access. This confusion was fuelled by the absence of any written directions to guide the implementation of the planned change.

7. In my view, before any record is destroyed by a public official, the approval of the National Archivist is required. Moreover, even if a record meets existing disposal requirements, it may not be destroyed if an access request has been made for it.

Recommendations

Based on the foregoing findings, I made the following recommendations to the Minister of Defence:

1. Those who deliberately undermined your lawful right of access to records be called to account.

2. Written directions be issued to all members of ND (civilian and military) setting out the requirements to be met before records may be destroyed.

3. All employees of ND be reminded that requests for information are to be given a generous interpretation and are not to be denied simply on the

basis of a technicality such as identifying the desired record by the incorrect title.

Comments

There is a silver lining to the cloud which these cases represent for National Defence. The wrongdoing which occurred was first brought to my attention by the Deputy Minister of Defence. Moreover, the DM and the then CDS ordered two investigations into the incidents, one by their internal auditor (review services) and one by the military police. The investigation conducted by my office was greatly assisted by the cooperation extended to us by ND personnel who conducted the two internal investigations. I have chosen not to identify to you those whom I believe to be wrongdoers in this matter. I have made that decision on the basis of legal advice that to do so could prejudice possible subsequent proceedings against them.

Since you have made something of a public issue of the role played in this matter by the current CDS, I wish to make one or two observations on this point. The investigation has satisfied me that General Boyle had no knowledge of nor was he involved in the scheme to alter documents before their disclosure to you. Similarly, I am satisfied that his assurances that no RTQs existed were made in good faith and in an honest belief that his statements were true.

Note: New evidence came to the commissioner's attention since the conclusion of this investigation. As a result, the investigation was reopened by means of a complaint against National Defence initiated by the commissioner. The results of that reopened investigation will be reported in next year's annual report.

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SECTION of ATIA	CASE No.	
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	03-96	**Liquidating Confederation Life** (OSFI) (Record under the control of a government institution)
6	01-96	**What Price the PM's Car?** (PCO) (Request for access to a record - Identify the record)
10(1)(a)	02-96	**Will No One Rid Me of that Troublesome Report!** (TC) (Record does not exist)
10(3)	11-96	**Waiting for Godot** (CSC) (Deemed refusal)
	13-96	**The Ends Don't Justify the Means** (PCO) (Deemed refusal)
11	09-96	**Will that be Cash or Credit Card?** (PWGSC) (Fees)
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16(1)(c)	07-96	**Who's calling the shots?** (ND) (Lawful investigations - Could reasonably be expected - Injurious)
16(2)	01-96	**What Price the PM's Car?** (PCO) (Facilitate the commission of an offence - Could reasonably be expected)
16(3)	10-96	**A Classic Catch-22** (RCMP) (Policing services -

Province - Agreed not to disclose)

18(b) 16-96 **Marketing Government Records** (Justice) (Economic interest of Canada - Could reasonably be expected - Prejudice the competitive position)

19(1) 15-96 **When Cases are Settled Out of Court** (Agr) (Personal information - Discretionary benefit - Financial nature - Exact nature of the benefit)

19(2) 12-96 **Good Intentions Gone Awry** (NPB) (Personal information - Where disclosure authorized - In accordance - Act of Parliament)

14-96 **Are Medals and Awards a Private Matter?** (NA) (Personal information - Where disclosure authorized - Publicly available)

20(1)(c) 04-96 **Whose Videotapes Are They?** (EC) (Could reasonably be expected - Material financial loss or gain)

20(2) 04-96 **Whose Videotapes Are They?** (EC) (Product or environment testing)

20(6) 04-96 **Whose Videotapes Are They?** (EC) (Public interest - Clearly outweighs in importance - Financial loss)

22 05-96 **Unflattering Audit Reports** (ACOA) (Testing or auditing procedures - Audits to be conducted - Would prejudice - Use - Results of particular tests)

30(1)(f) 17-96 **Somalia Case: Complainant made it a Public Issue** (ND) (Complaints - Any other matter relating to - Obtaining access to records under this Act)

68(a) 16-96 **Marketing Government Records** (Justice) (Act does not apply - Published - Available for purchase)

71 08-96 **Some Requesters get Better Treatment than Others** (ND)
(Manuals may be inspected by public - Facilities at the headquarters - Such offices of the institution - reasonably practicable.)

Glossary

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

ACOA	Atlantic Canada Opportunities Agency
AGR	Agriculture and Agri-Foods Canada
CSC	Correctional Services Canada
EC	Environment Canada
FAIT	Foreign Affairs and International Trade
JUSTICE	Justice Canada
NA	National Archives of Canada
ND	National Defence
NPB	National Parole Board
OSFI	Office of the Superintendent of Financial Institutions
PCO	Privy Council Office
PWGSC	Public Works and Government Services Canada
RCMP	Royal Canadian Mounted Police
TC	Transport Canada

Investigations and Reviews

In the reporting year, 1,712 complaints were made to the commissioner against government institutions (see Table 1). That represents a 68.5 per cent increase over the preceding fiscal year.

The good news is that resolutions of complaints were achieved in the vast majority of cases. Table 2 indicates that 1,530 complaint investigations were completed; 64.1 per cent were resolved by remedial action satisfactory to the commissioner, while 20.8 per cent were considered not substantiated. In six cases, no resolution was achieved. At the time of this writing, the commissioner took three of these cases to Federal Court.

Some 55.1 per cent of all completed investigations involved delay complaints. Addressing the problem of delay continues to remain a top priority. (See pp. __ to __ for a discussion of the problem of delays.)

As can be seen from Table 3, the overall turnaround time for complaint investigations has improved over last year. While the investigations branch also registered a 58.3 per cent increase in overall workload, it completed 59.3 per cent more cases than during the prior reporting period. Still, with the backlog of cases having risen by 55.2 per cent (see Table 1), there is cause for concern about the office's ability to conduct thorough investigations in a timely manner.

The commissioner is persevering with a small cadre of 19 investigators — despite the increase in workload. Although every effort is being made to retain the quality and timeliness of investigations, more investigators will eventually be required to maintain a reasonable level of service to the public.

Since 1992, the office experienced a 134.9 per cent increase in the number of complaints received. Happily, the government has not, as yet, decided to impose cuts on the office for 1997-98. Nevertheless, Parliament may wish to consider taking on a greater role in controlling the government's ability to withdraw unilaterally resources from an officer of Parliament.

Of the complaints completed, the five institutions complained against most often are:

National Defence	421
Finance	205
Citizenship and Immigration	159
Revenue Canada	58
Health Canada	56

A comparison with last year's top five list is instructive. Last year, Citizenship and Immigration led the list with 149 complaints against. Next in order were National Defence (114 complaints), Revenue Canada (89 complaints), Immigration and Refugee Board (54 complaints) and Transport Canada (49 complaints). The good news is that, this year, Transport Canada and the Immigration and Refugee Board are no longer amongst the top five complained-against institutions. They deserve kudos for their improved performance. Unfortunately, the performance of Health Canada and Finance deteriorated as shown by the increased numbers of complaints made against them. Health Canada's complaints were almost three times greater than 1994-95. Finance Canada experienced an alarming forty times more complaints than in the previous year.

As for Citizenship and Immigration, it is doing better. Last reporting year, it was number one on the top five list, this year it slipped to number three. Revenue Canada, too, showed improvement. While it remains on the top five list, it has dropped from number three to number four.

The most troubling bad news story is National Defence. It takes over the distinction of being the most complained against institution of the Government of Canada. Its complaints are almost four times greater than last year and, this reporting year, 86.6 per cent of the complaints against National Defence were found to have merit. There are some hopeful signs that the department is serious about improving its record. Senior Management of the department has expressed commitment to correcting the biggest problem, which is delay.

Reviews

During the reporting year, the office completed a comprehensive review of the administration of access to information requests in the department of Environment. The results were very positive. Environment Canada stands as an example of timely and consistently professional service to access requesters. The four capable members of the access unit deserve praise for their service orientation. So, too, do program managers throughout the department. They take their responsibilities under the Act seriously (unlike some other departments where access is seen as an irritant to be given low priority) and considerable emphasis is placed on meeting deadlines and on being open to the greatest extent possible. As a result, few complaints are made against Environment Canada. The commissioner's few (and relatively minor) suggestions for improvement were readily implemented by the department.

Table 1

STATUS OF COMPLAINTS

	April 1, 1994 to March 31, 1995	April 1, 1995 to March 31, 1996
Pending from previous year	274	330
Opened during the year	1,016	1,712
Completed during the year	960	1,530
Pending at year-end	330	512

Table 2

COMPLAINT FINDINGS

April 1, 1995 to March 31, 1996

	FINDING					
Category	Resolved	Not Resolved	Not Substantiated	Discon-tinued	**TOTAL**	%
Refusal to disclose	274	1	179	17	471	30.8
Delay (deemed refusal)	596	4	47	196	843	55.1
Time extension	76	-	38	2	116	7.6
Fees	18	-	33	6	57	3.7
Language	1	-	-	-	1	.1
Publications	-	-	-	-	-	-
Miscellaneous	15	1	22	4	42	2.7
TOTAL	980	6	319	225	1,530	100%
100%	64.1	0.4	20.8	14.7		

Table 3

TURN AROUND TIME (MONTHS)

CATEGORY	93.04.01 - 94.03.31		94.04.01 - 95.03.31		95.04.01 - 96.03.31	
	Months	Cases	Months	Cases	Months	Cases
Refusal to disclose	5.40	378	5.87	432	6.26	471
Delay (deemed refusal)	2.18	221	2.36	342	2.54	843
Time extension	2.54	38	3.22	68	2.40	116
Fees	2.96	41	4.36	50	5.58	57
Language	3.68	1	-	-	3.48	1
Publications	-	-	-	-	-	-
Miscellaneous	3.86	54	4.02	68	5.76	42
Overall	4.03	733	4.22	960	3.88	1,530

Table 4

COMPLAINT FINDINGS
(by government institution)
April 1, 1995 to March 31, 1996

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Agriculture and Agri-Foods Canada	21	-	7	-	28
Atlantic Canada Opportunities Agency	21	-	1	-	22
Atlantic Pilotage Authority Canada	1	-	-	-	1
Atomic Energy Control Board	1	-	1	-	2
Bank of Canada	6	-	1	-	7
Canada Council	2	-	-	-	2
Canada Mortgage & Housing Corporation	1	-	1	2	4
Canada Ports Corporation	1	-	-	1	2
Canadian Commercial Corporation	1	-	1	-	2
Canadian Heritage	22	-	5	2	29
Canadian Human Rights Commission	1	-	-	-	1
Canadian Museum of Nature	2	-	-	-	2
Canadian Radio-television & Telecommunications	-	-	1	-	1
Canadian Security Intelligence Service	6	-	4	-	10
Canadian Space Agency	3	-	-	-	3
Citizenship & Immigration	106	-	43	10	159
Correctional Service Canada	20	-	16	1	37
Defence Construction Canada	-	-	1	-	1
Environment Canada	15	-	4	-	19
Federal Business Development Bank	-	-	1	-	1
Federal Office of Regional Development (Quebec)	2	-	1	-	3
Finance	20	-	3	182	205
Fisheries and Oceans	17	-	7	-	24
Foreign Affairs and International Trade	19	-	6	4	29
Freshwater Fish Marketing Board	-	-	-	1	1
Health Canada	47	-	9	-	56
Human Resources Development Canada	14	-	8	1	23

Table 4

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Immigration and Refugee Board	15	-	13	1	29
Indian and Northern Affairs Canada	10	-	4	-	14
Industry Canada	4	-	13	1	18
Justice	6	-	9	-	15
National Archives of Canada	31	-	9	1	41
National Capital Commission	40	-	6	-	46
National Defence	359	5	53	4	421
National Parole Board	2	-	1	-	3
National Research Council of Canada	-	-	1	-	1
Natural Resources Canada	5	-	3	4	12
Office of the Superintendent of Financial Institutions	2	1	-	-	3
Privy Council Office	26	-	8	-	34
Public Service Commission	1	-	1	-	2
Public Works and Government Services Canada	26	-	15	3	44
Revenue Canada	42	-	15	1	58
Royal Canadian Mint	-	-	1	-	1
Royal Canadian Mounted Police	19	-	16	1	36
RCMP Public Complaints Commission	3	-	-	-	3
Security Intelligence Review Committee	3	-	1	-	4
Status of Women Canada	-	-	1	-	1
Social Sciences and Humanities Research Council of Canada	-	-	-	1	1
Solicitor General	2	-	-	1	3
Statistics Canada	1	-	3	-	4
Transport Canada	22	-	12	1	35
Treasury Board of Canada	7	-	9	-	16
Veterans Affairs Canada	2	-	3	1	6
Western Economic Diversification	3	-	1	-	4
Outside Mandate	-	-	-	1	1
TOTAL	980	6	319	225	1,530

Table 5

GEOGRAPHIC DISTRIBUTION OF COMPLAINTS
(by location of complainant)

April 1, 1995 to March 15, 1996

	Rec'd	Closed
Outside Canada	6	4
Newfoundland	20	16
Prince Edward Island	2	9
Nova Scotia	25	30
New Brunswick	13	11
Quebec	347	366
National Capital Region	829	716
Ontario	183	166
Manitoba	34	24
Saskatchewan	12	14
Alberta	50	45
British Columbia	179	118
Yukon	-	-
Northwest Territories	12	11
TOTAL	1,712	1,530

Public Affairs

Spreading the word

The commissioner's office continues, in times of restraint, to dispense with the services of a public information officer. It believes that its limited resources are better devoted to completing its investigations. Yet the commissioner and other officers continue to respond promptly and fully to all requests for information and advice. The best public relations, after all, is doing a job well and, in the end, that speaks for itself.

In the fall, the commissioner launched an Internet website. The address is:

http://infoweb.magi.com/~accessca/index.html

The site includes:
- What's the *Access to Information Act*?
- What's the role of Information Commissioner?
- Where can I reach the Commissioner?
- Need help using the *Access to Information Act*?

OIC Publications
- *Access to Information Act* an indexed consolidation
- Information Technology and Open Government
- The *Access to Information Act*: 10 Years On
- The *Access to Information Act*: A Critical Review

Annual Reports
- 1990-1 to 1995-6 (which can be downloaded to a PC)

Corporate Management

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

The branch is a frugal operation with only 15 staff and a budget that represents 15 per cent of the overall OIPC budget. Employees of the branch perform multi-functional tasks and, subject to modest savings through information technology, the branch has gone as far as it reasonably can to simplify and streamline service delivery.

Resource information

The Offices' combined budget for the 1995-96 fiscal year was $6,186,000, a decrease of $236,000 from 1994-95. Actual expenditures for the 1995-96 period were $6,516,792 of which, personnel costs of $5,435,439 and professional and special services expenditures of $565,170 accounted for more that 92 per cent of all expenditures. The remaining $516,183 covered all other expenditures including postage, telephone, office equipment and supplies.

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

Figure 1: 1995-96 Resources by Organization / Activity
Human Resources

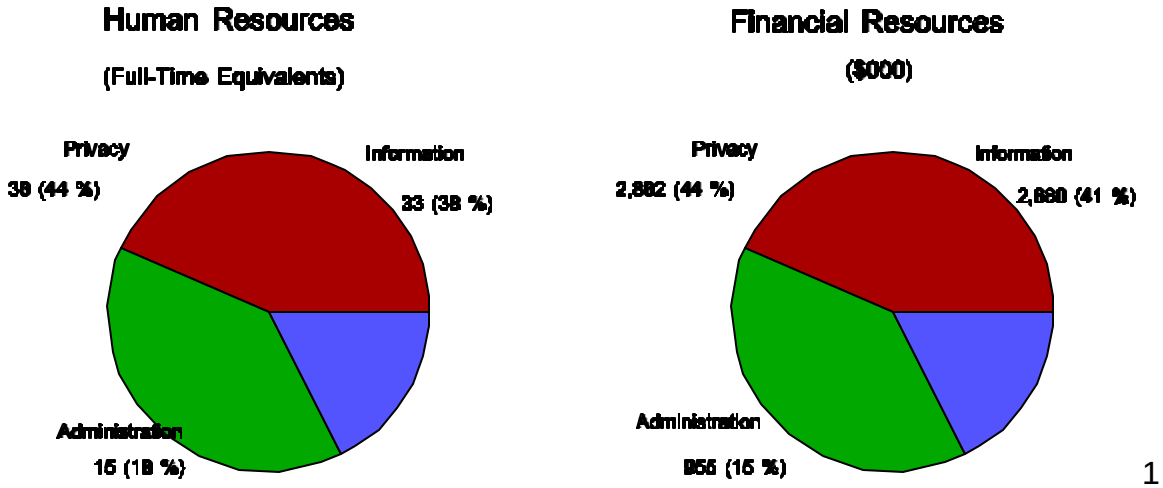

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Figure 2: Details by Object of Expenditure				
	Information	**Privacy**	**Corporate Management**	**Total**
Salaries	1,938,644	2,252,614	585,181	4,776,439
Employee Benefit Plan Contributions	262,400	307,570	89,030	659,000
Transportation and Communication	56,724	72,323	92,391	221,438
Information	27,046	46,635	5,376	79,057
Professional and Special Services	302,101	168,871	94,198	565,170
Rentals	2,352	589	13,766	16,707
Purchased Repair and Maintenance	4,695	143	8,957	13,795
Utilities, Materials And Supplies	24,350	12,864	37,752	74,966
Acquisition of Machinery and Equipment	61,328	19,375	28,429	109,132
Other Payments	576	512	-	1,088
Total	2,680,216	2,881,496	955,080	6,516,792

Note: Expenditure Figures do not incorporate final year-end adjustments reflected in the Offices' 1995-96 Public Accounts.