Annual Report
Information Commissioner
1996-1997

The Information Commissioner of Canada
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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 1997

The Speaker
Senate
Ottawa, Ontario

Dear Speaker:

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

This report covers the period from April 1, 1996 to March 31, 1997.

Yours sincerely,

John W. Grace

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Mandate

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

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

The Act provides government institutions with 30 days to respond to access requests. Extended time may be claimed if there are many records to examine, other government agencies to be consulted or third parties to be notified. The requester must be notified of these extensions within the initial 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 use the Act;
- they have run into any other problem using the Act.

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

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

How to make an access to Information Request

- Decide which government institution may hold the information you want.
- Your request must be in writing, either in a letter or on an Access to Information request form available from all government offices.
- Your request must be accompanied by a $5 application fee payable to the Receiver General of Canada.
- Make every attempt to be as specific as possible. This may produce faster results and control any fees that may ensue.
- Provide your name, complete address, your telephone number and the date of your request.
- Indicate whether you wish to view the records or receive copies of them.
- If you feel that there are good reasons why any fees beyond the $5 application fee should be waived, ask for a fee waiver and give your reasons.
- Send your request to the Access to Information and Privacy office of the institution from which you are seeking information.
- The responsible department has 30 days to respond to your request. If you have not received a response within that time, or if you are not satisfied with the response by the government institution concerned, you may file a complaint with the Information Commissioner of Canada within one year of the date the department received your written request and application fee.

How to file a complaint with the Information Commissioner of Canada

- Send a written, detailed account of your complaint against the responsible institution to the Information Commissioner. There is no fee for making a complaint.
- Your complaint will be acknowledged and an investigator will be assigned to look into your complaint.
- An investigation will be undertaken by the assigned investigator.

- Once you have received the commissioner's finding, you may apply to the Federal Court for a review of the department's decision to deny you access to the requested information, whether or not the commissioner has supported your complaint.

Year in Review

The final report to Parliament of an outgoing information commissioner, as this one is, faces more than the usual danger of single-issue myopia from a zealot for a professional cause. The temptation to turn a swan song into a diatribe of self-justification, an orgy of nostalgic retrospection or a claim to gifts of prophecy must be sternly resisted: there will be no self-justification or self-indulgence; no revisionist history writing.

Yet going quietly into that dark night without either a bang or a whimper would be uncharacteristic of the tone or content of the six reports which have gone before. It would also be unfair to Parliament which has a right to expect that a seven-year perspective would generate some useful lessons.

In fact, those lessons are remarkably the same as those reported each year, namely, the *Access to Information Act* has the basics right; the balance between the virtues of openness and any government's need to keep some secrets has been properly struck. But for the persistent problem of delay (of which there will be more in the coming pages), the Act is working, not perfectly, but working. Critics who deny that are wrong, perhaps even wilfully blind.

A good law could be strengthened with some tinkering around the edges, (though the 53 recommendations for change put forward four years ago may seem like something more than tinkering). Yet neither individually nor cumulatively do those suggested changes touch the essentials. What would improve this law above all else is a stronger institutional will, expressed at highest levels of government, to make the *Access to Information Act* measure up to the great ideals held for it by its creators. With such an unequivocal public commitment to openness, these reports, including this one, would be much less a dreary catalogue of timorous secrecy and delay; they would be much less dominated by descriptions of official wrong-doing and examples of evasions of responsibility and accountability.

Some commenters believe that the last decade of the 20th century is in danger of being recorded by historians as a decade of ethical malaise in public life. If that judgment is true, the paradox is that in Canada a law intended (among other things) to increase and enhance public confidence in government by opening it up to scrutiny has demonstrated the frailties of some persons in positions of power.

Yet that revelation should be far from being depressing. This lesson, brought home in part courtesy of access to information, is enormously liberating. It reinforces the truth that faith in governors should never be blind. An access law makes possible an informed faith. By stripping away the veil of secrecy, excesses of power are less likely to flourish.

Like competitive markets, democracies are unable to deliver their promised benefits in the absence of informed constituents or consumers with some knowledge of their options. Specialized (and expensive) commissions of inquiry come and go — some prematurely. But in Canada, since 1983, the *Access to Information Act* is a permanent promise of a more or less open window, giving Canadians an uninterrupted glimpse inside government. It is an indispensable, if sometimes imperfect, means of

ensuring that government is as transparent as is reasonably possible and prudent.

Governing in a Fishbowl

Two governments have lived in the fishbowl created by access rights. Neither was comfortable and perhaps none will ever be. The first government tested the elasticity of the law's permissible — and usually sensible — exemptions. It argued, for example, that the disclosure of public opinion poll results would give separatist forces strategic advantage and prejudice the government's ability to conduct federal-provincial affairs. This effort to stretch an exemption (section 14) to cover almost all matters touching unity issues failed. The Federal Court accepted the Information Commissioner's argument that the access act's exemptions be interpreted narrowly, maximizing transparency and minimizing the opportunities for secrecy. That, now, is the law.

Though one had hopes, it was probably unrealistic to expect a sea change in attitudes towards access merely because a government changed. General elections do not transform encrusted, defensive, bureaucratic habits.

Nor does the greatest proliferation of information in human history. Though overwhelming, even suffocating in its quantity, the democratization of information transmission does not guarantee the accessibility of particularly sensitive information citizens should have in order to judge better the actions of their governors.

On days when the noble principles of the *Access to Information Act* seem to be losing to the forces of expediency, the title and sub-title of Jean-François Revel's pessimistic, provocative book come to mind: *The Flight from Truth; the Reign of Deceit in the Information Age*.

Revel writes that "the withholding of truth, which is falsehood in its elementary form" is directed, "first of all against public opinion." Why? Because, as Simon Bolivar observed, "The first and foremost of all forces is public opinion."

More than a century after Bolivar, and from another continent in the southern hemisphere, comes a startling re-affirmation of Bolivar's truth and an antidote to Revel's gloom. Brought together earlier this year by *Time* magazine, a panel of world leaders explored the impact of the new information technology upon the art and practice of government. One of the speakers, Thabo Mbeki, who is considered to be the heir apparent to Nelson Mandela in South Africa, acknowledged that access to information will change the way leaders deal with their people: "Before you had the politician as a professional, an expert who mediated understanding of events." Now instant access, unfiltered through either government or press, "reduces the mystique that surrounds a politician." It is easier to govern, he continued, "if the population is ignorant."

At the same conference, the new Secretary-General of the United Nations, Kofi Annan, took the point about access to information a step further: "If you are into control, it's frightening," he said, adding, "This thing cannot stop."

If it can't be stopped in the long term, the old discomfort with openness delays the new epoch of much greater transparency in governance. It will do so until a new generation of politicians and public officials raised in, and comfortable with, an access regime takes over. Until then, the penchant for secrecy survives, mutating to various forms. Example: instead of resorting as much to over-broad application of exemptions — an attempt which doesn't work — access is now more often denied by unnecessary delay. Another technique, if brazen new boasts are true, is not writing things down. For all anyone knows, the bizarre reluctance to tell Canadians about what conflict-of-interest guidelines apply to Cabinet Ministers may very well be a creative amalgamation of both techniques.

A widespread perception that access requesters are stonewalled and sensitive records shredded has penetrated the public consciousness so deeply that it has become grist for political satire. That notion, despite its kernel of truth, is highly exaggerated and unfair. But it is exploited by cartoonists, and the notorious muck-raking magazine *Frank* ran a comic strip showing one government official saying to another:

> "Ahem, Lavoie, while 'Fat Chance' may seem an amusing and sufficient reply to a request — most of us in the department's access and privacy office prefer, 'in light of this, an extension of up to 90 days is required beyond the 30 day statutory limit'."

All very undignified — and unfair — to land in *Frank*; but *Frank*, *This Hour has 22 Minutes* and the *Royal Canadian Air Farce* may do more to promote reform than all the annual tut-tutting by an information commissioner put together. The public recognizes that abuses of power occur behind the veil of secrecy.

Access Delayed is Access Denied

Delay in responding to access to information requests is now at crisis proportions. Given the clear and mandatory obligations placed on government to provide timely 30-day responses, the flouting of Parliament's will in some institutions is a festering, silent scandal. At the department of National Defence, for example, only 29 per cent of access requests received last year were answered in a timely manner — and the reason is clearly not the lack of resources. (More of ND later.) A recent review at Health Canada showed that more than 80 per cent of all answers were delayed. An informal survey this year of five major departments of government showed that from 44 per cent to 74 per cent of access requests are not answered within the required time.

Delay is especially acute when requests are deemed to be "sensitive" by Ministers and their officials. Consequently, the widespread disclosure of requester identities to Ministers and senior officials is of special concern to the commissioner. The Privy Council Office has set a laudable example to others in this regard. In the fall of 1996, PCO adopted the policy that the identities of requesters would not be disclosed to any official outside the access to information coordinator's office. It is to be hoped that this change will help speed up service.

Though the problem of delay is pervasive, its dimensions have been a well-guarded secret because Treasury Board does not collect the statistics which would show the true state of affairs. Official

Ottawa has not heeded the wise exhortation of Henry Kissinger four decades ago. Referring to the challenge posed to government by the U.S. access law, he said that if information is to be released eventually, better for government to do it immediately and spend energy on managing, rather than blocking, release.

As to the "don't-write-it-down school," any effort to run government without creating records would be humorous if it were not so dangerously juvenile. Though it is impossible to quantify its seriousness (and its extent is probably exaggerated by critics of access), any such evasion of access poses a threat not only to the right of access, but to the archival and historical interests of the country. Left without written precedents and decisions, other officials are deprived of the benefit of their predecessor's wisdom — or folly.

The misguided effort to avoid scrutiny by not making records is driven by ignorance of the law's broad exemptive provisions. The fact is what needs to be protected for the sake of good government can be protected. If the first 13 years of the Act have taught anything, it is that. Ask the RCMP, ask CSIS, ask Revenue Canada or the Department of Finance. The Access Act does not cripple their effectiveness — or that of any institution. If it may sometimes embarrass, that is the fault of fallible human beings, not the law.

Tactics of delay and doing away with records are most likely to be the last desperate weapons used in an inevitable losing battle against the rigors of openness and transparency. In the end, the right to know will prevail, though the battle to protect the victory will always go on.

The Up Side

The words "Somalia", "Bosnia", "Pearson Airport", "Airbus", "tainted blood" conjure up in the public mind, rightly or wrongly, lapses in ethical behaviour. The access to information issues involved in these matters have given the access law the highest profile, inside and outside of government, it has received since its inception.

The public now knows, as never before, that government records should not be altered or destroyed when they are the subject of an access request. Public servants at all levels know, as never before, that fiddling with or destroying records can bring heavy cost to their careers, even if the law at present contains no explicit sanctions for such deeds. Thus, out of the national notoriety, out of the sadness and disillusionment of these incidents, some good has come: the public's right to know has been enormously strengthened; the importance of an access law has been dramatically affirmed.

If there are still influential voices expressing in private councils nostalgia for a return to the old days when governments could spoon-out information in carefully managed doses and hide embarrassment, such nostalgia has a better chance of being defeated by a new political reality: today for any government going back to the "good old days" would be political hara-kiri. Masquerading this nostalgia as indignation against the perceived excessive costs of an access regime no longer works as a credible disguise.

The highly-publicized government misadventures with access are also their own rebuttal of the argument that access to information is excessively costly for taxpayers and too burdensome for government departments.

Let's expose these myths.

Myth number one: The law is too expensive

In times of fiscal restraint, the argument goes, spending money and time on answering requests for information is a wasteful use of precious resources. Here special hostility is reserved for those who make many requests or those who use information acquired under access to embarrass government — especially for commercial purposes. Amend the Access Act, some are saying, to make it more costly to file an access request or to make a complaint to the commissioner's office.

Even Prime Minister Chrétien revealed himself as seriously misinformed about the magnitude of the volume of access requests. Responding to a question in the House of Commons, the Prime Minister said that "every day hundreds and even thousands of information requests are made by journalists, academics and Members of Parliament. It costs millions of dollars for the public service to find the related documents." The hyperbole is patent.

Journalists, academics and Members of Parliament simply do not make hundreds, much less thousands, of requests "every day." From all sources, the government (comprising more than 150 institutions) receives on average fewer than 40 access requests per day. Not an avalanche, only a trickle. Canadians display in this area their usual penchant for restraint. The Prime Minister is victim of what he has heard from some officials: a prevailing exaggeration of the true dimensions of the access challenge to government.

In this report last year, the myth that the law is too expensive was addressed in some detail. That debunking will not be repeated here. Yet it is important to make this observation: Public officials continue to resist any effort to quantify savings to the taxpayer as a result of the right of access to government records. The benefits of this law, in fact, are tangible and profound.

Courtesy of the right to know, there is greater responsibility, honesty, frugality, integrity, better advice, and more selfless decision-making. Every exposure, as a result of an access request, of abuse of power, excessive perks and privilege or just plain silliness, serves the public purse and the public interest. The modest cost of administering access rights (the most inflated government figures put it at approximately $7 million per annum) is by any honest measure a bargain. Access to government-held information by right, not merely by grace and favour, has become in an age of agnosticism, essential to a healthy democracy.

Myth number two: The law is being abused

A small handful of officials appear to have become spooked, certainly outraged, by a small handful

(perhaps three or four) of prolific requesters, the so-called bulk users, the "professional" requesters. Ripples of reaction against them have spread, giving rise to calls for barriers to use of the law — barriers such as higher fees, longer response deadlines, opportunity to refuse requests from persons perceived to be frivolous and vexatious, classes of records (such as records related to national unity) removed from the right of access. The challenge faced by the right to know, as it prepares to enter the 21st century, is the attack of the bean-counters.

Parliament never intended, it is often said, that the Access Act should spawn a business. Whether or not that be so (and why not? one may rightly ask), there is no justification for penalizing all requesters through higher fees because of these few.

Rather than raise fees for everyone, give the government the legal tools to manage bulk requests properly. Allow more flexible time-extension requirements and the discretion to ensure that heavy demands made by some requesters do not deprive others of their right to timely responses.

Armed with these tools (subject to monitoring by the Information Commissioner), tools which face squarely legitimate concern about clearly vexatious use of the law, even the existing $5 application fee would no longer be necessary. A token amount, it was put in place not to raise revenue, but to deter frivolous and irresponsible users.

Little wonder that, in an environment where a few senior officials have shown little respect for the right of access, a few public servants down in the ranks have crossed the line into bald-faced wrongdoing. Here, of course, the recent scandals of destroyed and altered records (one described in detail later in this report) come to mind.

Maintaining Perspective

When this Information Commissioner took office, in 1990, he told an audience of access officials:

> "Unpopular as the *Access to Information Act* may be in some institutions, public servants at all levels have not set a deliberate course to thwart the legislation. I have too much respect for the integrity and probity of public servants to believe that they would set out in a calculated way to defy the law of the land."

Seven years of experience now makes it clear that such a generalization was naive. Alas, a few — a very few — public officials have connived to thwart the right of access; two such blatant incidents were reported here last year, one at Transport Canada and one at National Defence. The current reporting year revealed the destruction, by officers of Health Canada, of records relevant to the tainted blood tragedy (see page 66).

The access law has proved itself toothless to respond in any punitive way beyond exposing the wrongdoing. While exposure is far from being entirely ineffective, some penalty provisions in the access law are overdue. Nothing should focus the mind of any would-be record destroyer more than one conviction or one penalty levied upon a public official for such behaviour.

All this unavoidable emphasis on sin and damnation should be kept in perspective. Thousands of conscientious public officials, the great majority, have the self-confidence and moral fibre to respect the public's right to know. Day in and day out, the majority of access requests are processed professionally and competently with great integrity by dedicated access officials throughout government. That is why, despite some shortcomings in the law and the lingering enclaves of resentment against openness, this commissioner ends his mandate as he began it: with a strong faith in the commitment of public officials to openness in government.

Another important perspective: the state of access rights at the federal level is, let it be said without hesitation, far from terminal. There are only headaches, no malignant tumours. Our law is working better than its American counterpart. An access requester to the FBI, for example, will find some 15,000 requesters ahead of him or her and, in the end, most of what was sought will be exempted. It is reported that the FBI continues to refuse disclosure of Jimmy Hoffa's file, using the "ongoing investigation" exemption!

If the access law were not working with some large measure of efficiency and effectiveness in Canada, there would not be the hostility shown towards it in some quarters of officialdom. Every day, in the print and electronic media, in the House of Commons, in court rooms, classrooms and boardrooms — information is made available and used which would never have seen the light of day if not for the *Access to Information Act*.

In this past year a Minister of the Crown was held to account for an infraction of the code of conduct for Ministers. In the days before the access law, no journalist would ever have laid hands on the letter showing that the Minister communicated improperly with a quasi-judicial tribunal. No, the public good is measured not by juicier scandals but by more meaningful accountability.

This past year, a detailed examination of abuse of power and privilege in the military was published in *Tarnished Brass: Crime and Corruption in the Canadian Military*, a widely read and well received book. In the past, such allegations would have been dismissed as hearsay, unsupportable grumblings of the disgruntled. Perhaps libel-chill would have kept the book from being published. As a result of a systematic, intelligent (and to ND, irksome) use of the *Access to Information Act*, much of the book was based on original records, source documents and signed invoices. That is why it was taken so seriously. The authors offered an acknowledgement to the *Access to Information Act*.

Gaffs into Gifts

The generally positive story about the gradual withering away of the old culture of secrecy is stained by the corporate behaviour of the department of National Defence (ND). ND offered a case study of how not to administer access rights. If anything could go wrong at ND, it seemed to go wrong. A separate chapter of this report is devoted to the problems in that department.

Problems, however, can be turned into gifts in disguise, bringing, as they often do, opportunities for improvements. From the unfortunate experience at ND, the Information Commissioner has developed a

number of suggestions for all departments designed to help make the right to know more meaningful. Those suggestions are set out at page 21.

Of course, there is a continuing need to strengthen the recognition in departments that the role of access to information and privacy (ATIP) coordinator demands a particulary high level of ethical awareness and independence from departmental interference. Treasury Board's own survey of access coordinators found that many of them "had problems balancing their loyalty to government with the public's right to know." Some coordinators even feared "becoming targets of the shoot-the-messenger syndrome," a situation prompting Treasury Board to take the position that coordinators need a direct line to the most senior levels of their institutions.

It is essential that Ministers and Deputy Ministers recognize the unique role played by their coordinators and provide them with support and protection. Alas, that is not always the case. Access coordinators who insist that the law's obligations be discharged faithfully are sometimes given the clear message from above that they are not good team players. That is to value loyalty to the organization more highly than obedience to the access law, an ultimately disastrous inversion of values for both an institution and the law. The time may even have come to give ATIP coordinators independence from their institutions in much the same manner as independence is now accorded departmental lawyers. (The Information Commissioner intends, in the near future, to issue a paper concerning the role of access coordinators in order to stimulate discussion and foster awareness of the difficult yet vital role they play in the access system.)

Yet even when the access law is amended to perfection, the true promise of the right to know will be realized only with the unconditional support of members of the government, cabinet and the senior public service.

That support is most likely to be forthcoming when members of the public and their elected representatives insist that the old antagonistic attitudes towards the right to know will not be tolerated. Here there is growing hope. Special thanks are due to the many Members of Parliament from all parties who have, by means of private member bills and public pronouncements, made efforts to strengthen the access law and the resolve of governments to co-exist comfortably with it.

Document Tampering and Record Destruction

RTQ's Part II:

Last reporting year allegations of document tampering or destruction at Transport Canada and National Defence (ND) (in order to thwart the right of access) were investigated and proved to be well-founded.

During this reporting year, the investigation into the earlier ND incident (involving the alteration of responses to queries — "RTQs") was reopened as a result of new evidence which came to light at the Somalia Commission of Inquiry. In particular, the investigation was to determine whether the then Chief of the Defence Staff played any part in approving the scheme to provide altered records in response to an access to information request.

The results of that reopened investigation were reported to the Minister of Defence on November 6, 1996. The investigation concluded that General Jean Boyle did not play any role in approving the release of altered records in response to a formal request. The observations, findings and recommendations of the original investigation (which were set out in last year's report) were confirmed in their entirety.

Health Canada — Canadian Blood Committee

In this reporting year, the commissioner completed and issued his report on an investigation into the circumstances surrounding the destruction, in 1989, of audiotapes and verbatim transcripts of all preceding meetings of the Canadian Blood Committee (CBC). (The full text, less appendices, of that report is found at pages 66-75.)

The commissioner concluded that the destruction was ordered and carried out so that the records could not become subject to the right of access. The decision to destroy the records, the commissioner concluded, was motivated by concern about potential litigation and liability issues associated with tainted blood products.

Most serious to the commissioner was his finding that the then Executive Director of the CBC, who had custody and control of the records, knew, or ought to have known, that there was a pending access to information request for the records and, hence, that destruction was improper.

The commissioner criticized the then senior officer of Health Canada responsible for administering the access to information law. He concluded that this official failed to provide appropriate guidance and leadership to the then Executive Director of the CBC who had sought advice on how best to insulate Red Cross records from the access law.

The commissioner suggested that officials of Health Canada be given appropriate education and written guidance designed to make them better aware of the requirements of the access law in order to make less likely a reoccurrence of this regrettable incident.

Most importantly, the commissioner recommended that steps be taken to assure effective central control over the department's record holdings, a common file classification system, improved monitoring of branch record-keeping systems and central control over destruction of departmental records for valid house-keeping purposes. At present, the department's records management practices do not enable the department to properly discharge its responsibilities under the access law.

Finally, because of the link between the destruction of the records and the tainted blood tragedy, the commissioner recommended that his report and all records held by Health Canada related to the destruction of the CBC records, be sent to the Krever Commission of Inquiry for its consideration.

The Minister of Health responded to the commissioner's report in a timely and constructive manner. He agreed to implement all of the commissioner's recommendations and he took the additional step of referring the matter to the RCMP for assessment as to whether a criminal investigation is warranted. The RCMP has initiated a criminal investigation into this incident.

Need for Sanctions

These lamentable incidents of wilful actions taken by public officials for the purpose of suppressing information have been a wake-up call. As recommended in last year's annual report, there should be a specific offence in the access act for acts or omissions intended to thwart the rights set out in the law. Moreover, those who commit this offence should be subject to greater sanctions than exposure of wrong-doing. At a minimum, the offence should carry a penalty of up to five years in prison. Such a penalty is in line with that imposed in section 122 of the Criminal Code for breach of trust by a public officer. The stakes are too high for a slap on the wrist.

National Defence and Murphy's Law

When it comes to administering the *Access to Information Act*, ND last year offered a unique case study of Murphy's Law in action. If it could go wrong, it did go wrong. Between the Information Commissioner and the Somalia Commission of Inquiry, Canadians were given a sad lesson in what public officials are capable of doing to undermine the public's right to know:

- altering records before release to an access requester without informing the requester of the changes and without invoking any exemptions under the Act;
- destroying some original records so that the alterations would not be found out;
- grossly inflating the number of hours spent on searching for and reviewing records requested under the access law;
- giving access requests the narrowest possible interpretation so that, by slavish adherence to the letter of law, the spirit of the law was violated;
- dispersing records ordinarily held in one location to many locations throughout the department, thus making it more expensive for access requesters;
- taking pains not to write things down or doing so on "stick-on" notes which can be easily removed if there is an access request;
- refraining from taking minutes of meetings because of concerns about possible access requests;
- conducting inadequate searches for records requested under the access law;
- senior level involvement in monitoring the access requests made by selected requesters;
- disclosure widely within the institution and, on occasion, outside, of the identities of access requesters;
- ignoring response deadlines to suit the convenience of senior officials, to facilitate lengthy sign-off processes and to enable media response lines to be developed;
- employees treating their own computer files as private property and, hence, not covered by the access law;
- following a philosophy in censoring responses to access requests which states: when in doubt about the likely consequences from disclosure, keep it secret — a philosophy specifically rejected by the Federal Court;

- publicly attacking the motives of an access requester who used the access law to find skeletons in the ND closet;

- taking legal action (unsuccessful) to muzzle the Information Commissioner's criticisms of the department; and

- delaying responses to requests for so long that some requesters lost their right to complain to the Information Commissioner, a right which must be exercised within one year of the date the request was made.

ND obviously gets a failing grade for its performance in the administration of the *Access to Information Act*. In order to get back to a passing grade, let alone the honour role where it once proudly stood, the first change must be that of attitude, an end to the strong and pervasive belief in ND (including the Canadian Forces (CF)) that the department is under siege by malicious and irresponsible users of the access law.

By any objective measure, this belief was and is false. Worse, it was counterproductive to compliance with the access law. The department's volume of requests is in the normal range as compared with other large departments. Despite that, some officials at all levels were unable to adopt a professional blindness to the identities of access requesters.

Whether the requester be a media representative who has peppered the department with many requests and negative stories, or a former employee who makes surgical strikes for records documenting the spending of generals, or a parent who wants to know why his or her soldier son was killed on duty, or a student seeking innocuous information for a term paper--all are entitled under law to receive the same respectful, prompt, and forthcoming service. None should be the subject of reports to senior management or the Judge Advocate General or public affairs; none should be treated as the enemy. For the Minister and the department's senior officials, then, the first order of business is a change of attitude throughout ND/CF and the best way to start is by means of their example.

The frontal attack made during this reporting year by ND upon the Office of the Information Commissioner is only another symptom of the deep malaise. For the first time in the history of the access law, the Attorney General, acting on behalf of ND and its ATIP coordinator, asked the Federal Court to prohibit the Information Commissioner from reporting to a complainant the results of an investigation into a complaint he had made against ND.

ND argued that public disclosure of the commissioner's report would cause irreparable harm to the reputations of the department, the minister, the deputy minister and the coordinator. The finding so objectionable to ND was that the department's coordinator should cease involvement in the processing of requests made by a certain requester. Since the coordinator might be a witness in a wrongful dismissal action taken by the requester against ND, the commissioner had concluded that there was a reasonable apprehension of possible bias against the requester by the coordinator.

The Court dismissed the government's request for an injunction, saying that it raised no serious issue — that it was, in essence, a frivolous action. The commissioner's report was made to the complainant. Yet the Minister of Defence of the time refused to remove the coordinator from the situation of apprehended bias — a situation which persists to this writing. The department has been unwilling to recognize the obligation on its coordinator (who holds the full delegation of the Minister's authority under the access law) to be, and be seen to be, fair and impartial in the discharge of her duties. This intransigence is a major impediment to bringing the department into compliance with the requirements of the Act.

The second area where change is essential is in respecting the response-time requirements contained in the Act. Delay is at epidemic proportions at ND. Seventy-one per cent of all requests receive late answers, this despite the fact that the response times contained in the law are mandatory: a defiance of the law of breathtaking proportions for which no one has been held to account.

In order to provide constructive assistance (and something more than indignation, however, righteous) to the department in solving its delay problem, the Information Commissioner undertook a detailed examination of the delay problem. A summary of the results of that study follows.

Delays and National Defence

Section 7 of the *Access to Information Act* (the Act) requires government institutions to answer requests made under the Act within 30 days. Reasonable extensions may be claimed provided the reasons for extensions are in accordance with section 9 of the Act.

Over the past several years, an increasing number of complaints against ND have been made to the Information Commissioner alleging failure to respect the Act's mandatory response time obligations. Moreover, an increasing proportion of these complaints has been found substantiated by the commissioner and it has been increasingly difficult to resolve delays systemically.

The magnitude of the problem seemed to make it difficult for ND to offer and meet reasonable commitments to answer already delayed requests. Requests were in a longer period of "deemed refusal" at ND than in other large government institutions. When it appeared that the problem was persisting, despite repeated assurances by senior officials of ND that the law would be respected, the commissioner decided that a more thorough investigation was necessary.

Since the beginning of 1993-94 there has been a growing backlog of unanswered requests. Fifty-two unanswered requests were brought forward from 1992-93 into 1993-94. 343 unanswered requests were brought forward into 1996-97. During 1993-94, 495 requests were received and this figure has grown to approximately 1,100 for the 1996-97 year: more than a 100 per cent increase over the period.

In 1993-94, 10 formal delay complaints against ND were investigated by the Information Commissioner. Of these 90 per cent were found in favour of the complainant. By 1995-96 this figure had grown to 285 of which 98 per cent were found in favour of the complainant. Yet even these figures

do not reveal the total picture. They represent only cases in which the requester has complained. The full picture becomes clear only when the total number of deemed refusals is established. Since 1993-94 the number of unjustified delays or deemed refusals in the department has grown from 195 to 617 in 1995-96: a growth from 42 per cent to 71 per cent of completed requests over the period. By any reasonable measure, a problem of serious magnitude and in need of immediate, aggressive remedy.

A traditional culture within ND/CF of secrecy and suspicion of those seeking information, on the one hand, and an external cynicism about the commitment to openness on the part of the military, on the other, combined to create a difficult atmosphere within which ND and CF must provide service to the public under the access law. The internal culture of secrecy expresses itself in lengthy sign-off and concurrence procedures which contributes to delay. As well, it contributes to the view, in offices of primary interest (OPI), that the processing of access requests is not a core function and may, thus, be given low priority. Consequently, the search for, and preliminary review of, requested records in OPIs is a source of delay.

These delays fuel the cynicism and suspicion on the part of requesters, which results in more formal requests to the department and more complaints to the Office of the Information Commissioner. From 1993-94 to 1995-96 the number of complaints upheld by the Information Commissioner increased more than eight-fold, of which 77 per cent related to delays. These complaints became additional workload for ND and the cycle of delays leading to even more workload and, hence, more delays, is perpetuated.

Yet there are hopeful signs that the worst is past. Support for the importance of respecting the timeframes in the access law is now found among some at senior levels, though this attitude has not permeated the institution. Increased training, education and sensitization are required to effect cultural change.

The commissioner suggested several initiatives to help ND reduce its workload. For example, more encouragement of informal access and routine disclosure should be explored. As well, the current level of privacy requests, in excess of 17,000 a year, indicates a need to follow the practice of every other institution and adopt routine informal access to personnel files, a move which would result in significant resource savings. Better communication with frequent requesters could reduce the volume of requests and complaints.

Though in terms of volume of access requests, ND is at a normal range as compared with other large departments, when the volume of complaints and back-logged cases are added to the incoming workload, ND's access officers carry a caseload in excess of the level considered effective in other comparable departments. An immediate increase in resources is required if the backlog and complaint load is to be reduced. Once that is accomplished, existing resource levels or lower should enable ND to cope easily with the ordinary intake of new requests.

The report notes a difference of opinion between the Office of the Information Commissioner and ND over the appropriate manner in which delay complaints should be resolved. ND is prepared to offer "best efforts" dates by which an already delayed response will be answered. It is not prepared to offer, and respect, "commitments" to respond by a reasonable date. It is the latter approach which the

Information Commissioner insists upon since an open-ended offer to answer within a "best efforts" timeframe lacks the certainty appropriate to the legal obligation to make timely answers. A resolution of this issue will help to avoid future Federal Court cases concerning delay.

By the year's end the Minister of Defence gave positive assurances of his commitment to openness and to correcting the department's deficiencies in administering the *Access to Information Act*. With perseverance and goodwill on all sides, there can be a positive ND story next year.

Tips

An information commissioner's finger-pointing risks losing credibility if there are not also constructive suggestions. What follow are some "helpful hints" — to all access coordinators — drawn from the experience of investigating complaints when things go wrong and from discussions with access coordinators in institutions with a reputation for excellence in administering the access law.

Delays in responding to access requests have an insidious effect on departments. They lead to distrust on the part of requesters and this distrust leads to more requests and more complaints to the commissioner. Of course, the result is even more work for the department and a blow to the organization's morale due to the frustration of having too much work and too little appreciation.

What causes delays in the first place? The principal reasons are these:

- Cumbersome approval processes with many sign-offs required and with no coordination to ensure that the approvals are necessary and completed in a timely fashion.
- Inadequate resources in the access coordinator's office or in the operational units to handle the volume of requests.
- Poorly managed consultations with other departments and with third parties.
- Poor records management which makes record identification and retrieval difficult and time consuming.
- Absence of clear support from senior management for meeting timeframes.
- Insufficient knowledge of and training in the requirements of the *Access to Information Act*.

There appears to be no correlation between the number of requests received by a department and the magnitude of the delay problem. In other words, some of the departments receiving the largest number of requests (such as PWGSC and NA) are able to answer most requests within legislated response times, while some departments receiving relatively few requests (such as PCO and FAIT) are not. It should be of some comfort to departments to realize that, since volume is not the major cause of delay, the problem is amenable to solution.

Our tips, then, for administering the access law in an efficient and effective manner are as follows:

Process

- Develop a tracking system for access requests that is also a management information system. Know the status and location of requests. Be able to determine when an activity is due for completion in order to follow up before the activity becomes overdue.

- Develop categories for requests, e.g., routine and complex, and assign a request to a category when it is received. The purpose of developing categories is to reduce the normal processing and approval requirements for the more routine transactions. For example, older records many not require the same scrutiny as current records. Records that are confidential due to the requirements of another statute may elicit a priority response to the requester.

- When requests are not answered within the statutory time frames, consider the following to reduce future delays: Routinely consult each requester making the request to discuss its content so that only clarified requests are sent to program areas. Confirm the timeframe and scope of the access request with the requester.

- Develop a processing schedule for access requests that lists the activities (such as search, review, approval, preparation) and maximum time allocated to each activity. Communicate the schedule to program areas. With each request, provide the program area with the date that an activity is due for completion, e.g., complete the search for records by (date). Follow-up with the program area before an activity becomes overdue.

- Prepare a similar processing schedule for consultations with other departments and with third parties. Monitor carefully the progress of such consultations and, if answers are not received within a reasonable time, proceed to answer the request without further delay.

- If a large number of access requests are received within a short time, develop a proposal and action plan to address the problem before a chronic backlog occurs. The plan is critical if temporary services are needed. As an alternative to temporary services, personnel from the program area dealing with the access request may be able to assist in the processing.

- With training, the program area itself may be able to provide the "first cut" at what information might be subject to an exemption from disclosure.

- When voluminous records have been requested, make releases on the instalment plan as the request is processed. This may entail a little extra time for the department, but feedback from the requester on the information disclosed may avoid processing records of no interest to the requester.

- In responding to requests dealing with files containing forms or repetitious records, templates may be developed, thus reducing the amount of information that must be reviewed each time an access request is received for a similar file or record.

Customer Service

- Develop a policy for documents that can be routinely released due to 1) the nature of the record (public records); 2) previous decisions made under the Act or 3) decisions made to exercise a discretionary exemption.

- Consider releasing record(s) via the program area when records can be routinely released outside of the *Access to Information Act*.

- Determine if a previous access request was for essentially the same information and, if so, inform the requester. The release of the information from the previous request, although not identical to the latest request, may in fact satisfy the requester.

- Keep in close touch with requesters who may be prepared to help out by narrowing the scope of their requests, by prioritizing records or by agreeing to extend the time allowed for a response to the access request.

- For access requests covering a large volume of records, releasing records as they are processed will assist the department if a case for a time extension is presented to the requester.

- Develop a good working relationship with staff in program areas of the department or agency. Make sure that they know their responsibilities, provide feedback on issues and decisions in their program area and provide training or written procedures on their role in the process. Consider holding periodic meetings (or electronic exchanges) with appropriate staff to discuss current access to information issues in a department or agency.

- Conduct post-mortems with program areas after complaint investigations are completed. Doing so may reduce future work because the same issue may not have to be resolved again.

- For frequent requesters, determine if information technology can provide efficiencies in the access request service. Can money be taken "on account" by the department for the application fee for future access requests? The requester can then fax or use the internet to make an access request.

- Assess whether it is possible to disclose records that are in electronic form to the requester via the internet?

- Consider if a client survey could identify ways to improve customer service. The client survey can obtain information from requesters and from departmental program staff. With an annual plan, the results may identify broad strategic directions for improvements in the coordinator's office for two or three years.

Accountability

- Develop an annual plan that identifies the fiscal year's access to information objectives. The

plan should include details on expected access requests, training and education of departmental staff. The plan will identify both human and financial resources. Measure the results periodically and report these to management on a regular basis.

- Develop a regular management report on the status of pending and completed access requests and complaints.

- Review the current delegation for decision-making under the *Access to Information Act* in order to eliminate unnecessary levels of approval. Consider, as a minimum, delegating all administrative decisions under the Act to the Access to Information Coordinator. Where the coordinator does not have administrative or other delegated authority, ensure that the coordinator has direct access to the individual(s) delegated to make decisions under the Act.

- Develop internal procedural guidelines for applying provisions of the Act. Always have written administrative procedures for processing access requests and complaints. In addition, all steps in the processing of a request should be thoroughly documented: Who was consulted and when? What decisions were taken and why?

Leadership by Access Coordinators

- Become the primary agent for promoting the effective implementation of the *Access to Information Act* within your institution.

- Avoid even the appearance of favouritism or bias towards any requester.

- Adopt a strategic plan to manage the administration of the *Access to Information Act* within your department. A plan serves as a long-term guide of where operations are headed. The plan is useful in determining what and where future investments in time and resources will be made.

- Conduct an annual management assessment and analysis of the requests processed during the year. Determine if information was routinely disclosed to requesters through the access request procedure. If so, is it possible to modify the department's information management process to make the information routinely and informally available. The annual management assessment may also identify gaps in service, such as delays in responding to access requests. Such information can be used for improvements for the following year.

- Build trust and confidence in your department or agency for your role as the representative of the *Access to Information Act*. Know your department's programs, educate departmental staff on the Act and be seen as a problem solver. When changes in the interpretation of the Act affect how an access request will be answered, inform departmental staff.

- Develop a departmental policy for requests that can be fast-tracked. The policy for fast-tracking an access request can take into account circumstances when a requester has a

deadline to meet, when there is a public interest in responding quickly to the request, when the request is routine or the record is easily identified.

- When dealing with discretionary exemptions, encourage officials to routinely assess even long-standing preferences for secrecy. What is taken for granted may not necessarily be justified. Keep the department focused on openness unless there is a clear and demonstrable need for secrecy.

- If a department has a publication for employees, initiate a regular column for access-to-information news and events.

Leadership by Senior Management

- Reinforce the department's respect for the access law by insisting that it be taken as seriously as any other lawful obligation.

- Minimize the required layers of approval and ensure that those in the approval chain know of and are held to the turnaround time necessary for a timely response. For example, it is not ordinarily necessary for public affairs to be included in the approval chain. Should a media line be necessary, it should be done concurrently with the approval process. Most important, senior management should empower the access coordinator to proceed with a response if sign-offs are not given in the required time.

- Ensure that the access office has sufficient resources to enable it to handle the ordinary workload in a timely manner. As a rule of thumb, an ATIP office's annual workload should not exceed approximately 100 completed requests per analyst. Of course, this fluctuates depending on the complexity of the requests and the volume of records involved.

- In consultation with Treasury Board, ensure that the department has a plan for responding to unanticipated surges in requests.

- Ensure that the department's records management practices assist the department in meeting its obligations under the access law.

- Deputy Ministers should make it clear to their senior officials that answering access requests is to be considered part of the core function of all operational units.

- Deputy Ministers should set a quality of service standard for meeting timeframes; managers should be evaluated on meeting that standard.

- Deputy Ministers should receive periodic reports showing the number, program area and percentage of requests which have not been answered within statutory deadlines.

The *Access to Information Act* in the Courts

A fundamental principle of the access legislation, stated in section 2 of the Act, 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 1,497 complaints and of those, as of the date of this report, 10 applications had been filed in the Federal Court: In marketing terms, a customer satisfaction rate of 99.34 per cent. It is perhaps more relevant in measuring the effectiveness of the office to note that of the 92 court applications filed by requesters since 1990 only in 12 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."

As noted in previous reports, credit is due to the dedication of the court's registry officials and the pragmatic simplicity of the practice direction for the success in reducing the backlog of access cases. Under the direction, each access case is to be heard within six months and all inactive cases are to be disposed of forthwith.

All procedural difficulties (number of parties, intervention by requesters and third parties, access to confidential affidavits and other material, and procedural timetable) are dealt with at the beginning of the litigation at a hearing on directions held 30 days after an application for review is filed before Federal Court. The Trial Division of the Federal Court has now become the one and only institution in the access to information system which cannot be faulted for undue delays.

Let the facts speak for themselves. Chart 1 shows the number of applications received and disposed of for the years 1983-1996. 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
1996	32	33	67

The Comprehensive Revision of the Federal Court Rules - Special Rules for Access Litigation

There is however some reason for concern that the successes achieved may be in jeopardy.

The Federal Court Rules Committee is contemplating the possibility of homogenizing the procedures currently applicable to Judicial Review applications under the 1600 Rules and to the Statutory Appeals under the 1300 Rules with a view to having all federal administrative law reviews, appeals and proceedings governed by the same rules. In particular, the Rules Committee now considers revised rules with respect to judicial review of administrative action to be more appropriate to access litigation than special rules such as are contained in the Practice Direction. The committee's view in this regard appears to be in conflict with the wish of Parliament as expressed in section 45 of the Access Act.

There is a serious danger in ensnaring the review of denials of access into rules substantially similar to the rules currently applicable to extraordinary remedies and remedies to be obtained on application under sections 18 to 18.4 of the *Federal Court Act* (Part V.I of the *Federal Court Rules*).

Although there are some analogies to be made, the dynamic of access litigation is substantially different from the judicial review application regime in the following ways:

1. Access litigation is a review *de novo* by the Federal Court of decisions to disclose or to refuse access taken by a Minister of the Crown. [s. 41, 42, 44]

2. The party resisting disclosure has the statutory burden of establishing by preponderance of evidence that any exemption claimed is justified in fact and law. [s. 48]

3. There is no requirement for judicial deference to the expertise of any minister with respect to decisions taken under the Access legislation.

4. The Access Act provides for specific statutory provisions with respect to standing and intervention issues, rules of evidence and rules of confidentiality with respect to the information in issue. [s. 34, 35, 36, 47, 62, 64]

5. The Information Commissioner does not issue decisions. His reports contain only recommendations which are not binding upon anyone. Further, it is the "decision" taken by the Minister to refuse access and not the "recommendation" of the Information Commissioner which is subject to application for review under the Act.

6. By statute, the commissioner is required to conduct his proceedings in secret and no party (including any government institution) is entitled as of right to obtain full disclosure of the evidence gathered by the commissioner or to be present during or have access to the representations made to the commissioner by others. This requirement does not exist for other tribunals ordinarily subject to the court's 1600 and 1300 rules.

7. Parliament has directed the court to take all measures necessary to protect the confidentiality process provided under the Act. [s. 47]

8. Parliament has directed the court to order disclosure of requested records when the party resisting disclosure has not discharged his burden. [s. 49, 50]

9. Parliament has adopted a unique regime with respect to costs to be awarded in each case. [s. 53]

10. The commissioner or any person acting on his behalf is not a competent or compellable witness and any information gathered by the commissioner cannot be disclosed or used in any criminal or civil proceedings other than under the Access Act. [s. 65]

The Commissioner in the Federal Court

Again this reporting year, through hard work and good will on both sides, the overwhelming majority of complaints to this office were resolved without resort to the courts. The commissioner filed four new applications for Federal Court review, bringing to seven the total number of cases filed by the commissioner and pending before the Trial Division of the Federal Court. Three of the seven cases were filed because of the refusal by the Department of National Defence (ND) to answer access requests. They represent the first time this commissioner has had to seek the aid of the Federal Court to force a government institution to answer requests. During the year, two of these cases were disposed by judgment with costs awarded to the commissioner in both cases; four were withdrawn upon disclosure by the government of the records in issue and the last was withdrawn once the withheld information was certified as Cabinet Confidences by the Clerk of the Privy Council.

The commissioner also was the subject of legal challenges during the year. His investigations or reports were attacked by way of judicial review three times by the Minister of National Defence and once by an individual who had been called to testify as a witness during an investigation. The Minister of National Defence sought to prevent an investigation from proceeding into a complaint of bias in the processing of access requests and, when that failed, he sought to prevent the commissioner from reporting the results of the investigation to the complainant. That, too, failed as being, in the court's view, a frivolous action by ND. ND continues with a case against the commissioner in Federal Court seeking to quash the appropriateness of recommendations made by the Information Commissioner to the Minister of National Defence. The details are as follows:

I. Cases heard

Information Commissioner of Canada v. Minister of National Defence of Canada and Michael McAuliffe and the Commission of Inquiry into the Deployment of Canadian Forces to Somalia

(T-907-96);

and,

Information Commissioner of Canada v. Minister of National Defence of Canada and the Commission of Inquiry into the Deployment of Canadian Forces to Somalia

(T-1267-96, Teiltelbaum, J., July 4, 1996)

These proceedings arose as a result of a request made by the Somalia Commission of Inquiry to ND urging ND to refuse to disclose Somalia-related records under the *Access to Information Act*. The Commission of Inquiry told ND that it could be injurious to its inquiry if there were premature disclosures of information under the access law. ND agreed and refused access to such records. Upon complaint, the commissioner disagreed and recommended disclosure. When ND refused, the Information Commissioner took the matter to Federal Court.

In both proceedings, the primary issue was what type of participation would the court grant to the Somalia Commission of Inquiry which sought leave to intervene. The Act provided the requester, a CBC journalist, with the right to intervene with full party status. The Somalia Commission also requested full party status, a request supported by the Attorney General of Canada but opposed by the Information Commissioner and the requester.

In the result, the Somalia Commission was granted intervenor status with limited rights. The court noted that the procedure to be followed in access and privacy litigation was governed by Federal Court Rules and by the Associate Chief Justice Practice Direction in access and privacy litigation. The Somalia Commission was granted the following rights:

(i) to be served with all materials filed and to be filed;

(ii) to cross-examine deponents of public and confidential affidavits filed by the applicant or the requester insofar as it does not repeat or duplicate the respondent's position;

(iii) to file a memorandum of points of argument; and

(iv) to participate in the argument of the review application.

The Information Commissioner discontinued his application for review after disclosure by the Minister of National Defence, prior to the hearing, of all the requested records in issue to the journalist.

Information Commissioner of Canada v. Minister of Public Works and Government Services of Canada and Matthew McCreery
(T-426-95, Richard, J., Sept. 23, 1996, under appeal A-828-96)

In this case, the court agreed with the Information Commissioner and found that the Minister erred in his decision to refuse access. It ordered the Minister to disclose all names of former members of the House of Commons receiving pension benefits under the *Members of Parliament Retiring Allowances Act* as of September 1, 1993, with costs in favour of the Information Commissioner.

The court found that the names of former Members of Parliament (MPs) in receipt of a pension is personal information which may *prima facie* be exempted from disclosure pursuant to subsection 19(1) of the Act. However, much of the information is also publicly available or its release had been consented to, pursuant to paragraphs 19(2)(a) and (b) of the Act, and therefore the Minister had no residual discretion to refuse its release. Moreover, the court concluded that the information ought to have been disclosed, since the public interest in disclosure outweighed the unsupported claim of any serious invasion of privacy, pursuant to paragraph 19(2)(c) of the Act and sub-paragraph 8(2)(m)(i) of the *Privacy Act*. Of particular interest was the court's conclusion that the Minister's legal advice had been based on an improper principle and, hence, had been unduly biased towards secrecy. Mr. Justice Richard stated:

> "The Access Act requires the Minister to balance the competing interests. He did not do so in this case. Giving the 'benefit of the doubt' does not evince a weighing of the competing interests. The fact that the requested information deals with persons does not itself suffice to make the privacy interest paramount. What the memorandum indicates is that the Minister never addressed his mind to weighing the competing interests; rather, the Minister accepted, without question, the legal advice submitted to him." (T-426-95, page 17.)

This finding will be instructive for the Justice department and beneficial to government in general which, for too long, has been abiding by the now discredited idea that if there is any doubt, it should be resolved in favour of secrecy.

The requester raised the additional issue concerning the amount of benefits paid to each pension recipient. The court concluded that it had no jurisdiction to consider this issue because of limitations on the requester's standing before the court. The requester is appealing the decision of the Trial Division.

Information Commissioner of Canada v. Minister of National Defence and Michel Drapeau

(T-2732-95, Dubé, J., October 4, 1996, under appeal A-785-96)

The issue of delay in answering access requests at ND was brought before the court by the Information Commissioner to seek its aid in compelling ND to respond to a specific access request. The Information Commissioner took the position that Parliament, by adopting the *Access to Information Act*, directed government institutions to respond to access requests in a timely manner. The Information Commissioner applied to the Federal Court when ND not only failed to respect the Act's response deadlines, but also failed to respond to several deadlines negotiated with the commissioner. In the end, the answer was so long in coming (some 16 months) that the requester even lost his right to complain to the Information Commissioner about the exemptions invoked by ND in its response.

The case raised a number of issues:

1. What are the consequences of a department's failure to respond to access requests by the statutory deadlines (a state of affairs the Act refers to as a "deemed refusal")?

2. May a government institution rely on exemptions which are claimed after the conclusion of the commissioner's investigation of a deemed refusal, but before the hearing of an application for review?

3. What are the consequences when a delay by a department exceeds the one-year time limit within which complaints about exemptions must be made to the commissioner?

On October 4, 1996, the court, in an unusual decision, dismissed the application of the Information Commissioner but ordered costs against the Minister of National Defence. The court concluded that the delay by ND was excessive but did not agree with the Information Commissioner's contention that there were certain consequences as a result of the delay. In particular, the court did not agree that there was any restriction, as a result of delay, on ND's ability to apply exemptions. As well, the court did not agree with the Information Commissioner's contention that, if exemptions were allowed, the court should review their appropriateness without the further delay which would be caused by sending the matter back to the Information Commissioner for investigation.

The decision did not refer to the Information Commissioner's contention that he had no jurisdiction to investigate the exemptions, since the one-year time-period for a complaint had expired. In the court's view, the commissioner's application for review was premature as he had not investigated the merit of the exemptions. This must be done before asking the court to review exemptions. In essence, then, the court found that the commissioner had been too patient with ND. He should have been more aggressive in challenging ND's delayed response and the validity of exemptions applied.

The commissioner is appealing this decision (A-785-96) in order to clarify both his jurisdiction to investigate exemptions after the one-year complaint period has expired, and the consequences to

departments which fail to respect response deadlines. Nevertheless, the commissioner accepts the court's direction to be more aggressive in responding to situations of delay.

II. Cases Settled Prior to Hearing

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

This case also raised the same issue about the efficiency of the process set up by Parliament to respond to access requests in a timely fashion under the *Access to Information Act*. The Information Commissioner applied to the Federal Court to compel the Minister of National Defence to disclose portions of some documents claimed to be Cabinet Confidences for which no official certification had been provided.

The Application for Review was discontinued when the Clerk of the Queen's Privy Council for Canada and Secretary to the Cabinet certified to the Court pursuant to subsection 39(1) of the *Canada Evidence Act*, R.S.C. 1985, C-5, that the passages contained in the withheld documents in issue were Cabinet Confidences. They were therefore excluded pursuant to section 69 of *the Access to Information Act*.

As the Information Commissioner and the Federal Court do not have jurisdiction to examine records certified as Cabinet Confidences by the Clerk of the Queen's Privy Council, the case was withdrawn.

The Information of Canada v. Superintendent of Financial Institutions, and in his capacity as Provisional Liquidator of Confederation Life Insurance Company and Canadian Life and Health Insurance Compensation Corporation (T-876-96)

A request was made for all correspondence between John Palmer, the Superintendent of Financial Institutions (in his capacity as Provisional Liquidator of the Confederation Life Insurance Company (CLIC)), and former members of the Board of Directors of Confederation Life Insurance Company for a certain period of time. The Superintendent refused to provide any documents, arguing that the federal access law did not apply to him in his role as a court-appointed provisional liquidator under the *Winding-up Act* (R.S.C. 1985, c. W-11). The Information Commissioner concluded that the requested records, if they existed, were under the control of the Superintendent of Financial Institutions and, thus, subject to the *Access to Information Act*.

The Information Commissioner applied to the Federal Court for a review of the matter. The Superintendent then applied to the Ontario Court (General Division) arguing that the Ontario Court's

jurisdiction under the *Winding-up Act* took precedence over the *Access to Information Act*. The Ontario Court dismissed this argument and referred the matter to the Federal Court.

Applications for leave to intervene were made by the Canadian Life and Health Insurance Compensation Corporation and by Peat Marwick Thorne Inc. as agent of John Palmer, the Superintendent of Financial Institutions, in his capacity as the Provisional Liquidator of the CLIC. At a hearing held before Mr. Justice Muldoon on May 16, 1996, the court directed the Superintendent to file, in confidence, all correspondence between John Palmer and any former CLIC Board members.

The Information Commissioner discontinued his application for review when John Palmer filed affidavits which established that, after careful research, no records relevant to the request were found within the Office of the Superintendent of Financial Institutions or under its control or in possession or under the control of John Palmer, as a Superintendent of Financial Institutions or as the Provisional Liquidator of CLIC.

The Information Commissioner of Canada v. Minister of Public Works and Government Services
(T-1791-96)

In this case the requester had asked for records about persons collecting federal government pensions. The Minister of Public Works and Government Services refused to follow the commissioner's recommendations for disclosure of the names and pension benefits received by federally-appointed judges, Lieutenant Governors and other individuals collecting pensions under the *Diplomatic Service (Special) Superannuation Act*, R.S.C. 1985, D-2. The application for review was discontinued when the Minister of Public Works and Government Services decided to follow the Information Commissioner's recommendations and to disclose requested records in accordance with the decision of Mr. Justice Richard of September 23, 1996 in the MPs pension case (see *Supra*, T-426-95).

III. The Commissioner as Respondent

The Attorney General of Canada and Bonnie Petzinger v. The Information Commissioner of Canada
(T-743-96)

The Attorney General of Canada and the Access Coordinator of National Defence applied for judicial review to quash a subpoena issued by the Deputy Information Commissioner. Under section 36 of the Act the access coordinator of ND was compelled to appear and testify about a complaint alleging she was in conflict of interest.

The applicants discontinued their application for judicial review, and the matter was settled informally. The subpoena was withdrawn when the access coordinator agreed to appear and give testimony.

Denise Leclerc v. Information Commissioner of Canada
(T-752-96)

The applicant asked the Federal Court to quash a subpoena issued by the Information Commissioner's delegate under section 36 of the Act. The subpoena compelled Dr. Leclerc to appear and testify about circumstances surrounding the Canadian Blood Committee's decision to destroy audio tapes and transcripts of its meetings. The applicant challenged the Information Commissioner's jurisdiction to conduct an inquiry into an institution which she alleged was not subject to the access law and his authority to compel her to testify on this matter. The applicant discontinued the application for judicial review after a prolonged period of legal argument. She did give evidence and testimony.

Attorney General of Canada and Bonnie Petzinger v. Information Commissioner of Canada and Michael Drapeau
(T-1928-96, McKeown, J., Sept. 30, 1996)

The Information Commissioner conducted an investigation about a complaint against National Defence alleging conflict of interest on the part of ND's Access to Information Coordinator. The commissioner dismissed the allegation of actual conflict of interest. However, he found that there was a reasonable apprehension of bias given that the access coordinator was a potential witness against the complainant in a pending wrongful dismissal action while, at the same time, she made decisions upon delegation of power from the Minister of National Defence concerning access requests made by the complainant.

Before the commissioner could inform the complainant of his findings, the Attorney General of Canada on behalf of the Minister of National Defence and the access coordinator, filed an application pursuant to section 18 of the *Federal Court Act* to obtain an injunction prohibiting the commissioner from reporting to Parliament, and to the former employee, the results of his investigation. The Attorney General alleged that release of the report would nullify the application for judicial review to quash the report and would also cause wrongful and irreparable harm to the credibility of the access to information process, the department of National Defence and the reputation of its Minister, Deputy Minister and Access to Information Coordinator.

The court dismissed the application for interlocutory injunction. It applied the three-part test for an injunction set out by the Supreme Court of Canada in *Metropolitan Stores v. Manitoba Food and Commercial Workers*, [1987] 1 S.C.R. 110; there must be a serious issue to be tried, irreparable harm to the applicants and a balance of inconvenience in favour of the applicants. The court concluded that none of these conditions were met in this matter.

The court noted further that the commissioner's report did not cause damage to anyone's reputation. It furthermore ordered ND to pay the requester's costs on a solicitor-client basis as a punitive sanction. The Information Commissioner did not ask for costs.

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

Despite the decision of Mr. J. McKeown on September 30, 1996 (referred to above) which dismissed the Applicant's Motion for interlocutory injunction, the Attorney General of Canada persisted in the attempt to obtain an order to prohibit the Information Commissioner from reporting to Parliament (the applicants later abandoned the request for this relief during the hearing before Federal Court on October 24-25, 1996) and to quash the Information Commissioner's report to the complainant. As well, the Attorney General of Canada sought a declaration against the complainant that his complaint to the Information Commissioner was frivolous and vexatious and made to the Information Commissioner for illicit and improper purposes.

The Information Commissioner moved to strike out the Attorney General's application for judicial review and a number of preliminary motions were brought before the court and heard by Mr. Justice McKay on October 24 and 25, 1996. The motions are:

1. a motion by the Information Commissioner for an order striking out or dismissing the applicants' application for judicial review;

   The Information Commissioner took the position that a judicial review is a procedure where the court may review the lawfulness of a decision taken, not the appropriateness of recommendations made by the Information Commissioner to the Head of a government institution under the *Access to Information Act*.

2. a motion by the Information Commissioner which objects to the filing of any confidential material gathered during the Information Commissioner's investigation;

   The Information Commissioner argued that the Attorney General of Canada may not, in a judicial review proceeding, seek access to confidential material to which he is prohibited from becoming privy under the *Access to Information Act*.

3. a motion by the requester for an order striking out or dismissing the Attorney General's application for declaratory relief against him with costs on solicitor-client basis;

4. a motion by the Attorney General of Canada and the access coordinator for leave to amend their application for review and for leave to file further affidavit evidence.

   Mr Justice McKay reserved his decision in the matter and, as of this writing, it has not been rendered. The results will be reported here next year.

IV. Cases of Interest in the Courts

Many cases under the access law go to court without the involvement, either as a party or intervenor, of the Information Commissioner. When the commissioner agrees with the answer given by the government, it is still open to a dissatisfied requester to take the matter to court. Also, when the government has decided to release information, third parties who feel their interests might be harmed by the disclosure have a right to ask the Federal Court to block disclosure. In all such cases, the commissioner is not ordinarily involved. What follows are summaries of a few selected cases.

Swagger Construction Ltd. v. Canada (Minister of Public Works and Government Services)
(T-1273-94)

Swagger Construction Ltd. was awarded a contract to construct a land border facility at Huntingdon, British Columbia. The department of Public Works and Government Services later received a request to release records relating to the project. Swagger Construction took the position that the disclosure of the information would result in economic loss, prejudice or interference as described in paragraphs 20(1)(c) and (d) of the Act. The court concluded that, since the contract had been completed, release of the information could not give rise to a reasonable probability of financial or competitive prejudice to Swagger Construction. The application was therefore dismissed and the records were disclosed.

Wells v. Canada (Minister of Transport)
(T-775-92, T-1728-92, T-1938-92)

The applicant, Mr. Wells, sought access to several documents relating to various air carriers. He was refused access to some of the documents on the basis that the information was confidential, submitted to the government on a confidential basis, treated consistently in a confidential manner by a company and that disclosure of the information could reasonably be expected to prejudice the competitive position of the company (subsection 20(1)). The Federal Court, Trial Division, found that the information in question was confidential and, even though an aircraft had been sold since the documents in question were prepared, its disclosure would be injurious to the company's financial position and this economic harm would outweigh any benefit to the public.

Some other documents were exempted from disclosure because they contained information protected by solicitor-client privilege (section 23) and/or contained advice or recommendations developed by or for a government institution or a Minister (subsection 21(1)(a)). Having reviewed the documents, the court was satisfied that access to the documents was properly denied on this basis.

Access to more documents was denied as being personal information (subsection 19(1)) or an account of consultations or deliberations involving officers or employees of a government institution, a minister or the staff of a minister (subsection 21(1)(b)). The court found that the department had not provided sufficient evidence to support the exemptions. The matter was returned to the department to either

provide the necessary evidence in support of its position or to otherwise release the information.

Tridel Corporation v. Canada Mortgage and Housing Corp. (T-847-91)

The Canada Mortgage and Housing Corporation (CMHC) proposed to release a document to the Canadian Broadcasting Corporation in response to an access request. As the record was a special audit citing the results of an investigation of information within CMHC control and the methods allegedly used by the Tridel Corporation to influence housing development decisions, CMHC notified Tridel about its intention to disclose. Tridel Corporation challenged the release of the document in Federal Court, pursuant to section 44(1) of the Act.

The court agreed with the decision of CMHC to disclose the requested documents. It found that Tridel Corporation did not qualify as an "identifiable individual" and could not, therefore, take advantage of the personal information exemption under section 19 of the Act; that the information was not "confidential" nor had it been "treated in a confidential manner" by the applicants; that there was no cogent evidence of probable harm from the release of the document pursuant to subsection 20(1)(c) of the Act; and that the disclosure of the information could not reasonably be expected to interfere with Tridel Corporation's contractual or other negotiations pursuant to subsection 20(1)(d).

Finally, the court found it did not have jurisdiction to consider Tridel Corporation's argument that other organizations mentioned in the document should have been served notice of CMHC's intention to disclose the document. The disputed records were ordered disclosed.

Pride Beverages Ltd. v. Canada (Minister of Agriculture) (T-1555-95)

The department of Agriculture and Agri-food sent a notice to advise Pride Beverages of its intent to disclose records that contained information about the inspection and testing of juices, including the results of tests about adulterated juices. Although Pride Beverages objected to the disclosure, the department concluded that the justification provided was not sufficient to withhold the requested information. Paragraph 20(2) of the Act prohibits the refusal to disclose the results of product testing carried out by or on behalf of a government institution.

While reviewing the procedure followed by the department, the court concluded that the department had not provided Pride Beverages with a sufficient description of the records when it sought its representations. The department had sent a copy of most of the documents to Pride Beverages after it had made its submissions. The court noted that, while the department did not have to provide the third party with a full copy of the record, it had to provide a reasonable description of the content of each and every document sought to be disclosed. The court therefore set aside the decision of the department to disclose some of the information requested but upheld the department's decision to disclose the remainder.

Steinhoff v. Canada (Minister of Communications)
(T-595-95, T-265-94 and T-2587-93)

In this case, the requester (Mr. Steinhoff) asked the court to review the department's refusal to disclose records — a refusal supported by the Information Commissioner. As a preliminary matter, counsel for Mr. Steinhoff asked the court to permit him to have access, on a confidential basis, to the undisclosed documents in order to effectively argue the case. The court held, however, that there is an absolute prohibition against disclosure to counsel when, as in this case, paragraphs 13(1) and 15(1) are invoked as the basis for denial. When other exemptions are relied upon, the court held, disclosure to counsel must be assessed on a case-by-case basis. Counsel may have sufficient basis to argue the merits if he or she knows the section of the Act under which confidentiality is claimed and is given some idea of why the government considers disclosure to be necessary.

Grand Council of the Crees (of Quebec) v. Canada (Minister of External Affairs and International Trade)
(T-1681-94, under appeal A-725-96)

The Grand Council of the Crees (of Quebec) sought a review of the decision by the department of Foreign Affairs and International Trade (FAIT) to refuse disclosure of certain records relating to Hydro-Quebec and to the proposed Great Whale River hydroelectric project. The issue was whether the information withheld from disclosure was information which was exempted from disclosure by virtue of sections 13, 14, 15, 19 and 21 of the Act.

The court reviewed the exempted information, considered the exemptions applied by the department and was satisfied that the information was properly exempted under sections 13, 14, 15 and 21 of the Act. With respect to section 13 of the Act, the court noted that once the head of a government institution has met the burden of establishing that the withheld information was obtained in confidence under subsection 13(1), the onus shifts to the party seeking disclosure to show that subsection 13(2) permits disclosure. The party seeking disclosure did not satisfy this onus in this case.

With respect to section 19 of the Act, the court was satisfied that the information being withheld under subsection 19(1) was personal information. However, the court concluded that disclosure of this personal information is permitted under paragraph 8(2)(k) of the *Privacy Act*. The matter was therefore referred back to the department for reconsideration.

Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)
(T-491-95, under appeal A-721-96)

The department of Indian and Northern Affairs received a request for the release of certain information pursuant to the Act. In response to this request, the department located two Band Council Resolutions which had originated from the Chippewas of Nawash First Nation. As the department decided to release the information to the requester, the First Nation applied to the Federal Court for a review of the department's decision. The First Nation's position was that, because of the fiduciary relationship between the First Nation and the federal government, the documents were not subject to disclosure under the Act. The applicant argued that, even if the documents were subject to the Act, the Band Council Resolutions were confidential and exempt from disclosure as "third-party" records under section 20 of the Act. Finally, the applicant argued that the First Nation should be considered a government under section 13 of the Act and, therefore, all documents should be confidential. The applicant argued that not considering the First Nation a government breached section 15 of the Charter.

The court found against the First Nation on all grounds, dismissed the application for review and awarded costs to the respondent. The records were disclosed.

Bearskin Lake Air Service v. Canada (Department of Transport)
(96-T-43)

The issue raised in this application is whether the Federal Court may extend the time limit for an application for court review, under section 44 of the Act. The court found it has no jurisdiction to waive or extend the statutory period.

Bitove Corp. v. Canada (Minister of Transport)
(T-2703-95)

Bitove Corp. asked for a review of a decision of the department of Transport to release certain records which had been requested by a competitor of Bitove Corp. The question was whether the information qualified for exemption pursuant to paragraphs 20(1)(b) and (c) of the Act. The court was satisfied that all the information had been provided to the department in confidence in the context of contractual relations between Bitove Corp. and the department. The court was further of the opinion that the information would be of great assistance to Bitove Corp.'s competitors. In these circumstances, the court was of the view that the applicant had successfully discharged the burden of establishing that the records contained the kind of information described in paragraphs 20(1)(b) and (c) of the Act. Consequently, the department of Transport was ordered not to disclose the information.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade)
(T-2366-95, under appeal A-200-97)

Foreign Affairs and International Trade decided that diplomatic notes requested under the Act by Do-Ky and exchanged between Canada and another country could not be released under section 15(1) of the Act, as the release of the documents might reasonably be expected to be injurious to Canada's

international relations. The court agreed with FAIT.

Three of the notes at issue were sent from the Canadian government to the government of the foreign state (Country D). The fourth note was sent from Country D to the Canadian government in response to one of the three notes mentioned above. The note from Country D was determined to have been obtained in confidence and was therefore originally not disclosed according to the terms of paragraph 13(1)(a) of the Act. Do-Ky submitted that the note from Country D should be released because the information in it had been made public. The court found, however, that Do-Ky had failed to establish the source of that information and whether that information was truly "public" or only within his personal knowledge.

The court further concluded that there was no evidentiary burden on the Canadian government to establish that the diplomatic note sent to Canada was not public. Furthermore, noted the court, in the case of information received from a foreign state and made public by that state, the head of the Canadian government institution called upon to apply this Act may still avail him or herself of the other provisions of the statute.

Another specific issue raised in this case was whether paragraph 15(1)(h) (information that constitutes diplomatic correspondence) refers to the sensitivity of the information contained in a document or the confidentiality of diplomatic correspondence. It was found that the government seeking to exempt diplomatic notes could reasonably do so because they were confidential diplomatic notes and not necessarily on the basis of the information contained in the notes.

The court, finally, examined whether the government had satisfied its burden of proving that the head of the institution which refused disclosure had "reasonable grounds" for doing so, as section 50 requires. The court found that FAIT had demonstrated the specific injury which could reasonably be expected to occur if these notes were released. On the basis of this evidence the trial judge was satisfied that the criteria stipulated in section 50 had been met.

The Honourable Sinclair Stevens v. The Prime Minister of Canada (The Privy Council)
(T-2419-93)

This case follows the report of a Commission of Inquiry (the Parker Commission) into allegations of conflict of interest against former conservative cabinet minister Sinclair Stevens. Mr. Stevens brought an application for judicial review in the Federal Court to quash Commissioner Parker's report on the basis of unfairness at least in part relating to the alleged involvement of commission counsel in the writing of the report. To assist him in demonstrating the involvement of counsel, Mr. Stevens made an access request to the Privy Council Office for the narrative portion of the solicitors' accounts. The request was denied. The Information Commissioner investigated the denial. He upheld the decision to deny access to details of the accounts on the basis that they qualified for solicitor-client privilege. Mr. Stevens asked the Federal Court to review the refusal.

The court found that the narrative portions expurgated by the Privy Council Office from the solicitor's account were subject to solicitor-client privilege under section 23 of the Act. It found that there had been no waiver of privilege express or implied, even if the Commission had submitted its solicitors' account to the Privy Council Office for payment. The court also added that the inadvertent release of an account and a disbursement memo did not constitute waiver of solicitor-client privilege.

Furthermore, the court ruled that the Privy Council Office, in disclosing part of the records sought (the amounts and hours as well as the details of disbursements), had not waived privilege to the whole (the full accounts including the expurgated narratives).

The judgment noted that it is necessary to consider all the circumstances in determining whether a partial disclosure constitutes an attempt to mislead so that privilege over the entire document is lost.

The court finally found that the Privy Council had not failed or erred in the exercise of discretion.

Self-Serving Delay in Releasing Report on Parolee who Committed Murder/Suicide (01-97)

Background

A tragedy occurred in Alberta in October of 1994. A parolee murdered his daughter in a garage and committed suicide by means of carbon monoxide poisoning. As a result of this incident, the Correctional Service of Canada (CSC) and the National Parole Board (NPB) conducted a joint investigation.

In March of 1995, a journalist from Alberta made a request under the *Access to Information Act* for the 100-page report of the results of the investigation. He complained to the Information Commissioner when 10 months passed with no answer.

Legal Issue

Did NPB have any legal justification for the delay? That is the simple issue at play in this as in all complaints of delay along, of course, with the complainant's desire to receive the requested records without further delay.

The request was received by NPB on March 7, 1995; the $5 application fee was not received until March 22. Ordinarily, an institution is required to answer a request within 30 days from the date the request and the fee is received. In this case, however, the department claimed (as it is entitled to) an extension of an additional 30 days beyond the original 30-day response period in order to conduct consultations with other institutions. Thus, a response became legally due on May 22, 1995 — being 60 days after the date the fee was received.

What, then, accounted for the fact that no answer was given until April 16, 1996 after the intervention of the Information Commissioner? The Chairman of the Parole Board pointed to the complexities of the case to justify the delay. He explained that both the federal and provincial governments had a role in supervising the offender and that a number of agencies were involved in the investigation of the incident. The consultation process prior to releasing the report was, thus, complex and there were lengthy vetting and approval processes within the department of the Solicitor-General, up to and including the Minister's office. All fees were waived as some recompense to the requester for the delay.

The Information Commissioner, not much impressed by the reasons for ignoring the legal rights of a

requester for some 11 months, concluded that the delay was unjustifiable.

Lessons Learned

The only justifiable reasons for delay beyond 30 days in answering an access request are clearly set out in section 9 of the access law. Those reasons include the need to search through a large volume of records, the need to conduct consultations with other government institutions and the need to notify or consult with private sector firms.

The Act does not permit government institutions to delay answers beyond legitimate extension periods in order to suit their own convenience or to enable them to extend courtesies to other governments or institutions. In this case, the NPB appeared to be more concerned with the sensitivities of the CSC, the province of Alberta and its own senior officials (including the Minister) than it was with the legal entitlements of the requester.

A particularly important lesson to be drawn from this case concerns the proper management of consultations with other institutions. CSC was at fault for most of the delay, due to tardiness in responding to the NPB's request for its views. Nevertheless, NPB is accountable because it received the request and had the lawful obligation to answer in a timely manner. What NPB should have done was give CSC a reasonable time to respond and, failing a response, proceed to answer the request in the manner it saw fit. This is the advice the Information Commissioner gives to all government institutions.

Who Receives Government Pensions? **(02-97)**

Background

Over the years, there has been continuing interest about public pensions — their amounts, their terms and conditions, to whom they are paid and who are the "double dippers." The government has always resisted disclosure on privacy grounds. In the case of pensions for Members of Parliament, the Information Commissioner sought and obtained the aid of the Federal Court in forcing disclosure of the names of former Members of Parliament (MPs) in receipt of a pension (that court case is discussed at page 32 of this report).

The case discussed here started with a complaint against Public Works and Government Services Canada (PWGSC) from an individual who wanted to know information about individuals receiving pensions under the *Diplomatic Services (Special) Superannuation Act*, the *Lieutenant Governors Superannuation Act*, the *Judges Act*, the *RCMP Superannuation Act*, the *Canadian Forces Superannuation Act* and the *Public Service Superannuation Act*.

Legal Issue

The issue was the same as in the case of MPs' pensions: should the names of pension recipients (and amounts) be made public or kept secret to protect the privacy of the recipients?

The commissioner concluded that pension information about former members of the public service, the Canadian forces and the Royal Canadian Mounted Police (RCMP) cannot be assembled from public sources. Moreover, he concluded that there was no overriding public interest in disclosing the information and, hence, invading the privacy of the recipients. He therefore upheld PWGSC's decision not to disclose the names of these pensioners and the amounts of the pensions.

The commissioner formed the same conclusion with respect to those receiving pensions under the *Diplomatic Services (Special) Superannuation Act*. Since only 13 individuals receive pensions under this Act, however, the commissioner asked PWGSC to seek consent for disclosure from these individuals. Three consented, six refused and four did not respond. Once the information was disclosed for which there was consent, the commissioner upheld PWGSC's decision to withhold the rest.

When it came to former lieutenant governors and judges receiving a pension, the commissioner concluded that the names and amount of benefits received should be disclosed. The distinction in these cases was the fact that the names and years of service of former lieutenant governors and judges are a matter of public record. When taken with the fact that their salaries and calculation formulae for pensions are also a matter of public record, the commissioner concluded that there was no privacy interest to be served by keeping the requested information confidential. In these instances, then, the commissioner asked PWGSC to disclose the information.

On September 23, 1996, the Federal Court issued its decision in the MPs' pension case (reported at page 32) and set out principles which guided the resolution of this case. The court upheld the approach taken by the Information Commissioner, namely, even personal information about pension recipients should be disclosed if it can be determined from public sources, if there is consent for disclosure or if the public interest in disclosure clearly outweighs the privacy interest.

Lessons Learned

When applying the subsection 19(1) (personal privacy) exemption, the government institution should consider the provisions of subsection 19(2). That provision provides that personal information is to be disclosed if there is consent for disclosure, the information is publicly available or if disclosure is permitted by section 8 of the *Privacy Act*. If any one or more of these conditions apply, the information may not be withheld.

Finally, when making difficult judgments between public and private interests, an important factor to be considered is whether disclosure would improve the accountability of government for the expenditure of public funds, both in the immediate case and in future similar cases.

When a Public Inquiry Asks for Secrecy
(03-97)

Background

Canadians are now well-acquainted with the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, referred to as the Somalia Commission of Inquiry (SCOI). Very few will know of the behind-the-scenes skirmishes among SCOI, the Department of National Defence (ND) and the Information Commissioner about what records about the Somalia affair should be accessible under the *Access to Information Act*.

Immediately after media stories first told of possible murders in Somalia at the hands of members of the Canadian Forces, journalists and others began making requests under the access law for pertinent ND records — records such as significant incident reports, military police reports, communications logs, war diaries, intelligence reports, briefing notes and medical reports. These requests flooded into ND even before the SCOI was established. (ND's response was simply not to answer.)

Once the inquiry was established, ND denied access to all the requested records on the ground that disclosure might disrupt the orderly unfolding of the work of the SCOI. That decision was countered almost immediately by the SCOI at a tripartite meeting involving ND, SCOI and the office of the Information Commissioner. SCOI informed ND that it would not support ND's view that disclosure of information by ND in response to access requests would be injurious to the work of the SCOI. Without the support of SCOI, ND's approach was not sustainable.

As a result, ND finally answered several early requests for MP reports by disclosing the records.

Disclosure of these reports to journalists, among others, resulted in many media stories. Several lawyers representing parties before the SCOI then expressed concern that matters were now public to which their clients might not have an opportunity to respond until later phases of the inquiry. Some counsel before SCOI urged the inquiry to ensure that the public did not gain access to any ND records until the inquiry was ready to deal with the corresponding issues in public sessions.

On the basis of these concerns, SCOI reversed its position and asked ND to cease releasing any information under the *Access to information Act*. In legal terms, it asked ND to invoke paragraph 16(1)(c) of the access law which states that the Minister of Defence may refuse to disclose any information the disclosure of which could reasonably be expected to be injurious to the conduct of a lawful investigation. The "investigation" in this case was the work of the SCOI.

ND obliged and several requesters complained to the Information Commissioner about this new development.

Legal Issue

It fell, then, to the Information Commissioner to investigate the claim by SCOI that disclosure of Somalia-related records by ND in response to access requests would probably have a detrimental effect on the conduct of the public inquiry. Thus, while members of the SCOI were investigating ND and interviewing its senior officers, the Information Commissioner was interviewing members of the inquiry and other senior officials. There was at least a minor paradox in assessing the need for "secrecy" in order to conduct a "public" inquiry.

The details of the Information Commissioner's investigation and his view that secrecy by ND was not needed to ensure a proper inquiry by SCOI are reported in last year's Annual Report (pp. 54-56). It was also reported there that the Minister of Defence refused to follow the commissioner's recommendation for disclosure and that the commissioner had referred the matter to the Federal Court.

The saga continued in this reporting year. Prior to the hearing by the Federal Court, the records at issue were made public by SCOI and, hence, the case became moot. It was then withdrawn by the Information Commissioner and renewed negotiations were commenced among SCOI, ND and the commissioner to avoid a repetition. Those discussions bore some fruit and the use of 16(1)(c) by ND to refuse disclosure diminished.

It did not, however, completely disappear until the government moved to cut short the work of the SCOI. At that point, SCOI had another change of heart, apparently recognizing that the secrecy it had asked for was counterproductive to a full public understanding of some of the issues. The inquiry could no longer hope to address these matters given its truncated life. SCOI wrote to ND reverting to its original position: no requests for access to ND records should be denied on the basis that disclosure could impede the inquiry's work. To its credit, ND moved with dispatch to disclose all of the records which it had been keeping secret at the request of SCOI.

Lessons Learned

The most troubling lesson to be drawn from this strange saga of flip-flops is that even those charged with shining the light of day on a problem can succumb to the seduction of arguments for secrecy.

SCOI has been the only public inquiry in the history of the access law to ask a department of government to say "no" to access requesters. There was no such request to Health Canada, for example, by the Krever Commission of Inquiry into tainted blood, nor did the inquiry into the abuse of prisoners at Kingston prison for women ask Correctional Service Canada to refuse access to its records.

The head of a government department should take a special interest in any case where a public inquiry or quasi-judicial tribunal asks his or her department to keep secret information which has been requested under the access law. The law does not permit the head to defer to the judgment of another body that injury will occur from disclosure. That determination must be independently arrived at by the

head of the institution which has received the access request.

Moreover, the Supreme Court of Canada has placed severe restrictions on the power of any tribunal to enjoin the publication of information relating to proceedings before tribunals. A department should not collaborate with a tribunal in denying information that would otherwise be available. Even commissions of inquiry may not do indirectly that which they are prevented from doing directly. They should not proceed as if the *Access to Information Act* does not exist.

Missing the Mark
(04-97)

Background

One of the little known yet important committees of government is the Intelligence Advisory Committee (IAC) chaired by an official of the Privy Council Office (PCO) known as the coordinator of Security and Intelligence for the government of Canada. This committee, as the name implies, received intelligence "product" from a number of sources (such as CSIS, CSF, C&I, FAIT and foreign sources); it coordinates this product and makes it known in appropriate ways within government.

An intelligence officer working within one of the organizations represented on the committee was struck by a report emanating from the IAC which entirely missed the mark. The analysis it conducted and the prognostication it made was shown, by subsequent events, to be completely wrong. The intelligence officer wanted to receive a copy of the IAC record under the access law so that he could, without breaching any security law, hang it on his wall as a reminder that intelligence officers need to be humble because they are fallible. Though the subject of the report was an event in world affairs of great public interest, it had nothing to do with the covert world one usually associates with the intelligence community.

Nevertheless, this request set off alarm bells. The request was denied for the reason that the records contained information obtained in confidence from one or more foreign intelligence agencies (paragraph 13(1)(a)) and that disclosure could be injurious to the conduct of international affairs (subsection 15(1)). The government feared that our sources of foreign intelligence might dry up if Canada were seen to be a "leaky ship" in the intelligence area.

Legal Issue

The applicability of the two exemptions invoked was complicated by the fact that PCO did not know with certainty what information in the requested record had been supplied by a foreign intelligence agency. Indeed, PCO could not say with certainty that any had been. It could only say that it was most likely that some of the analysis and conclusions were based on foreign-supplied information.

On the other hand, the Information Commissioner's investigation showed that the factual content of the record was available from public sources such as the *New York Times* and *The Economist*. The commissioner also pointed out that other allied intelligence agencies had misjudged events in the same way as had Canada.

It was the commissioner's finding that PCO could not rely on paragraph 13(1)(a) to justify secrecy because there was no proof that the record "contains information that was obtained in confidence from the government of a foreign state or an institution thereof." Moreover, the commissioner found that, having failed to show that the record had anything but open-source content, it could not justify the paragraph 15(1) exemption.

It could not reasonably be expected, the commissioner concluded, that disclosure of this report would put at risk the conduct of Canada's international affairs. In particular, the commissioner rejected PCO's argument that release of any information from the IAC, however innocuous, or regardless if based on open-sources, would be detrimental to our relations with our allied intelligence agencies. The Commissioner argued that accepting the PCO's position would be to fashion a new, class exemption covering all reports emanating from the IAC. That would not meet with the requirement of section 2 of the law which stipulates "exemptions to the right of access should be limited and specific."

PCO agreed, as a result, to follow the commissioner's recommendation that the record be disclosed.

Lessons Learned

This case serves to remind departments who wish to protect foreign supplied information that they would be well-advised to document their files so that it can be shown later what information was provided and which foreign government or agency supplied it. When intelligence reports are based on open-source information, there is a heavier burden on the department desiring secrecy to demonstrate the injury from disclosure.

Slipping through the Cracks **(05-97)**

Background

Almost every year, there is a report here about an anomaly arising from the fact that the RCMP conducts policing services for some provinces. At the time the access law was passed, all these provinces entered into agreements with the federal government that provincial information held by the RCMP would be withheld if requested under the *Access to Information Act*. Section 16(3) makes it mandatory for the RCMP to refuse disclosure of any requested information if it was collected while the RCMP was conducting policing services for a province and if a confidentiality agreement is in place.

This state of affairs is particularly awkward and troubling now that most provinces have access to information laws of their own. Technically, the information is RCMP information and cannot be requested under provincial law. If a request is made under the federal access law, however, it must be refused. This class of records [provincial policing records] falls through the cracks of both federal and provincial access laws.

This year there was yet another example of this unfortunate anomaly. A requester asked the RCMP for a copy of it's own operations manual, including references to the conduct of operations in Alberta. The RCMP complied, withholding some portions for security reasons and withholding the entire chapter on provincial policing pursuant to subsection 16(3) of the access law.

Legal Issue

The issue in this case was whether a portion of a manual written by the RCMP for use by its members could be considered as a record qualifying for exemption under subsection 16(3).

The RCMP pointed out that the section uses the phrase "obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province." In its view, its own manual was "prepared" while engaged in contract policing for Alberta.

For his part, the commissioner pointed to the second requirement in the provision to the effect that there must also be an agreement on the part of the federal government "not to disclose such information." As it happens, the agreement between Alberta and the RCMP used the phrase "collected or obtained." In this circumstance, the commissioner concluded that the parties did not intend that information such as the Alberta operations manual, which was an RCMP generated record, be covered by the confidentiality agreement.

The commissioner wrote to the Attorney General of Alberta expressing his concerns and, in response, the Attorney General said that he had no objection to disclosure. Moreover, he pointed out that Alberta hopes, in 1997, to rescind the confidentiality agreement entirely.

Lessons Learned

As noted in previous annual reports, this problem with RCMP provincial policing information needs to be resolved at the government-to-government level. In the meantime, the provisions of 16(3) should be read narrowly and strictly so that as little information as possible is swept under its umbrella.

The good news is that each year the problem becomes less acute because some provinces are revoking the confidentiality agreements entered into in the early eighties. They are now ready to permit the RCMP to treat requests for provincial policing information in the same manner as it treats requests for other information. To date, British Columbia, Saskatchewan and Nova Scotia have rescinded their confidentiality agreements. As noted above, Alberta proposes to do so soon. Newfoundland is studying the matter.

Advance Warning
(06-97)

Background

A journalist asked the Immigration and Refugee Board (IRB) for copies of any letters written to the Board by Cabinet ministers. The Board located a letter written by the then Minister of National Defence. Before the letter was released to the journalist, the Prime Minister accepted the minister's resignation for breaching a rule against communicating with quasi-judicial tribunals. The journalist asked the Information Commissioner to investigate whether the Minister or Prime Minister had been given advance warning of the impending release and, if so, whether such warning was appropriate under the access law.

Legal Issue

Is there any constraint on a government institution which receives an access request from informing others, including ministers or the Prime Minister, of impending disclosures?

The facts showed that the IRB was ready to answer the request on October 2, 1996 and so advised PCO. In response, PCO asked that it be consulted in order to determine whether the records qualified for secrecy as being Cabinet confidences. The records were sent for consultation and determined by PCO not to be Cabinet confidences. It took two additional days to complete that consultation and issue the reply. During that two-day period, the Minister submitted his resignation to the Prime Minister (October 3, 1996) and it was accepted (October 4, 1996).

The commissioner concluded that there was no reasonable need for consultation with PCO, and thus, the additional two-day delay. He found that the records requested by the journalist contained no information which might be considered, even by the broadest of interpretations, as being possible Cabinet confidences. The commissioner replied, as follows, to the complainant:

> "It would be my expectation that government institutions would respond to access requests as quickly as possible, even if, by law, they may take up to 30 days. In particular, I encourage government institutions to avoid delaying responses by engaging in consultations which are not required."

Lessons Learned

If a record might reasonably be a Cabinet confidence or if there is a need for advice on the application of an injury-based exemption, holding up release pending consultation with PCO would be appropriate.

It would also be entirely appropriate to give PCO — or any other institution — advance warning of impending disclosures of sensitive information. But such consultations or warnings should not be at the cost of delay in releasing records already processed and set to go.

Pressure Tactics
(07-97)

Background

In June of 1995, an officer of the Customs Excise Union asked Revenue Canada to disclose a copy of a consultant's report on the powers of customs officers. After waiting almost three months for an answer, the requester complained to the Information Commissioner. At the urging of the commissioner, Revenue Canada finally answered. The answer was a refusal to disclose the record. The department argued that the report, written by a lawyer, qualified for exemption from the right of access under solicitor-client privilege (section 23) and that the record was excluded from the right of access as a cabinet confidence (section 69). The requester again complained to the Information Commissioner.

Legal Issue

The disposition of this case involved consideration of two issues:

1) is a consultant's report subject to solicitor-client privilege if the consultant is a lawyer?, and

2) does a consultant's report that may (or may not) be relied upon in a future memorandum to Cabinet qualify as a Cabinet confidence?

The commissioner concluded that records prepared by lawyers do not, automatically, qualify for solicitor-client privilege. One must assess, on a case-by-case basis, whether the record was created in the course of a solicitor-client relationship between the lawyer and the government institution.

The commissioner noted that the contract for the consultant's services was not entered into by or on behalf of the Minister of Justice. The government contracting regulations require that "contracts for the performance of legal services" be arranged in that manner. Moreover, the commissioner found nothing in the statement of work provisions in the contract which falls within an ordinary solicitor-client relationship, nor did it call for legal advice.

The commissioner considered that the report was not prepared for the purpose of briefing Ministers or Cabinet. It was a stand-alone record which could not become a cabinet confidence simply by being used in cabinet briefings or extracted in Cabinet submissions. The evidence was clear that the report

itself was never intended to be provided to Cabinet. For its part, Revenue Canada originally obtained certification from the Privy Council Office that the record qualifies as a Cabinet confidence. After considering the views of the Information Commissioner, however, PCO reversed its position, agreed with the commissioner and informed RC that the record was not a Cabinet confidence.

Faced with a recommendation from the Information Commissioner to disclose the record, the then Deputy Minister of Revenue Canada made one last-ditch effort to restrict disclosure of the record. He convened a meeting with senior representatives of the union, though keeping the union in the dark about the Information Commissioner's recommendation for full disclosure. The Deputy Minister informed the union leadership that he would be prepared to disclose a copy of the report to the leadership with these provisos:

1) the union's complaint to the Information Commissioner be withdrawn;

2) the report not be shared with the membership;

3) the report not be made public in any way.

Unless the union agreed to the Deputy Minister's terms, he informed the union leadership that Revenue Canada would fight disclosure in the Federal Court. In that eventuality, the union would not be able to have any access to the report in order to prepare itself for dealing with proposed legislative changes to the powers of customs officers.

The union president agreed to the terms. The Information Commissioner was informed of the union's wish to withdraw the complaint. The Information Commissioner did not accept the withdrawal; he told the union that the law obliged him to report the results of the already completed investigation to the union. He provided such a report.

On reading the commissioner's report, the union became concerned, feeling that it had been misled by the Deputy Minister. It informed the Deputy Minister that attaching strings to the disclosure of the report may have been contrary to law. The department recognized the error of its ways and disclosed the report to the union with no caveats or restrictions.

Lessons Learned

First, records do not become Cabinet confidences merely because some of their content has been used to brief Ministers or Cabinet. If the record is a "stand-alone" record, which cannot be connected with Cabinet, it is not considered a Cabinet confidence. The rule of thumb is this: if a record was born for Cabinet, it is a Cabinet confidence. If not, the record is not necessarily a confidence, even if it subsequently reaches Cabinet in whole or in part.

The second lesson from this case is that it is improper for a public official to attempt to set restrictions on the disclosure of information which is otherwise accessible under the access law. Departments are

capable of using delay to undermine the value of information to requesters and it is, thus, all the more inappropriate for a department to trade a timely response for an agreement by a requester to be bound by restrictions on the subsequent use of the information. There is no place for this kind of pressure tactic in a regime of open government.

Stalling on Polls
(08-97)

Background

Readers of the commissioner's previous reports will recall the efforts made by the government of former Prime Minister Mulroney to suppress disclosure of public opinion polls on national unity issues. It took a judgment by the Federal Court of Canada to force the government to share with members of the public the results of polls paid for by taxpayers and containing the views expressed by members of the public. At the time, the Liberal opposition was a vocal critic of the excessive secrecy of the Conservative government. As almost a first order of business when the Liberals formed the government in 1993, they vowed to disclose public opinion poll results without even the need for an access to information request. This case shows that the old ways sometimes die hard.

In July 1996, a journalist asked the Privy Council Office (PCO) to disclose the results of opinion polls on unity issues conducted in May and June of 1996. After waiting several months for an answer, the journalist complained to the Information Commissioner.

Legal Issue

Was there a reasonable explanation for the delay? When would an answer be given? These were the issues investigated by the commissioner.

There was no delay caused by difficulty in retrieving and reviewing the records. The request clearly described the records sought. Rather, the delay resulted from internal indecision over whether or not to disclose the polls. There was, quite simply, a lack of concern for the legal entitlement of the requester to receive a response — any response — within 30 days of the request and a remarkable insensitivity to the government's own promise to be open and non-obstructionist in dealing with requests for public opinion polls.

After almost four months of investigation and negotiations, PCO had still not given the requester the courtesy of an answer (not even a yes or a no!); neither were there apologies or promises to answer. Not until some seven months after the request was made was an answer provided — and that only after a critical newspaper article appeared and after the Information Commissioner indicated that court action to force a response would follow. When the answer finally came, a few portions were withheld on the grounds of potential injury to the conduct of federal-provincial relations.

The brighter side to this saga are assurances from PCO that response times will be taken seriously from now on. An investigation into the legitimacy of the exemptions applied to the polls is under way at this writing. The results will be reported in next year's report.

Lessons Learned

The strategy of delay sometimes works. There is no provision in the access law to punish or dissuade blatant transgressions. But, too, the strategy of delay may backfire. Foot-dragging gives the appearance of being the result of political considerations which have no basis in the access law. To quote an american journalist: "If you fudge and deny and equivocate long enough, even coming clean can make you look dirty."

How Public are Parole Hearings? **(09-97)**

Background

In 1995, two Members of Parliament attended a hearing before the National Parole Board (NPB) about whether or not to grant parole to an offender convicted of murder. Also in attendance, among others, were the mother of the victim and a CBC reporter.

Some months after the hearing, one of the Members of Parliament, acting on behalf of the mother of the victim, asked the NPB to provide her with a transcript of the parole hearing. The NPB refused the request and the Member of Parliament complained to the Information Commissioner.

Legal Issue

On what legitimate basis could the NPB refuse disclosure of the transcript of a parole hearing, taking into account the fact that the requester attended the proceeding as did a member of the press? That question puzzled the complainant and became the focus of the investigation.

The NPB justified its decision to refuse disclosure of the transcript on the basis of subsection 140(6) of the *Corrections and Conditional Release Act* (CCRA). In particular, the NPB argued that this provision has the effect of requiring the protection of information about parole proceedings even when members of the public are in attendance at those proceedings. The provision states:

> "Where an observer has been present during a hearing, any information or documents discussed or referred to during the hearing shall not for that reason alone be considered to be publicly available for purposes of the *Access to Information Act* or the *Privacy*

Act."

The Information Commissioner concluded that the above-quoted provision was not as broad a secrecy provision as contended by the NPB. The commissioner reasoned as follows: the access law requires disclosure in a number of circumstances only one of which is where the information is otherwise publicly available (see paragraph 19(2)(b) of the Access Act).

Subsection 140(6) says that information presented during a parole hearing does not become "publicly available" simply because an observer is in attendance at the hearing. However, the information may be otherwise publicly available (for example, if it has been published) and subsection 140(6) would not then preclude disclosure. As well, if disclosure is authorized for some other reason, such as by consent of the person to whom the information relates (paragraph 19(2)(a)), or as a result of an overriding public interest in disclosure (paragraph 19(2)(c)), subsection 140(6) of the CCRA does not preclude disclosure.

In the case at hand, there was information in the transcripts about the victim's mother (on whose behalf the MP made the complaint). Since this person clearly consented to the disclosure of her own personal information, the commissioner concluded that she had a right to receive it, notwithstanding subsection 140(6) of the CCRA.

The NPB agreed to review the transcript of the parole hearing and disclose all portions concerning the victim's mother. The other portions were withheld because there was no consent from others (such as the offender) for disclosure of their personal information.

Lessons Learned

There is no blanket protection from disclosure for information presented during parole hearings. Subsection 140(6) of the CCRA does no more (and no less) than state that the presence of an observer at a hearing does not, of itself, give rise to the implication that information provided during the hearing is publicly available. There are, of course, reasons other than "publicly available" why information from parole hearings must be disclosed. These remain in force notwithstanding subsection 140(6) of the CCRA.

Hide and Seek
(10-97)

Background

A group promoting the welfare of animals made a request to Fisheries & Oceans (F&O) for a paper submitted to organizers of a conference sponsored by the Northwest Atlantic Fisheries Organization in Nova Scotia in 1995. The request specifically sought a paper entitled "Seal Predation: Is there

evidence of increased mortality on cod?." Two of the authors of the paper were employees of F&O. A representative for the group complained about the F&O's response which stated that no relevant records were found.

The investigation discovered a paper in F&O files that existed in September of 1995 entitled, "Seal Predation: Is there evidence of increased mortality on juvenile cod?." This paper went through a number of revisions and the title had changed slightly by the time the complaint was received in this office. The subject matter, however, remained the same. When questioned about the fact that the paper did indeed exist at the time of the request, officials at F&O argued that the paper was not relevant to the request because it was never "submitted" to the organizers of the conference.

Legal Issue

How narrowly or how broadly should a department interpret a request? The governing provision in answering this question is section 6 of the Act which states:

> ". . . a request for access to a record under this Act shall be made in writing to the government institution that has control of the record and shall provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record . . . . "

In this case, the commissioner found that F&O interpreted the request too narrowly. While the paper was not "submitted" to the organizers of the conference, the title and the authors were the same as that cited in the request. By focusing on the fact that the paper was not "submitted", the department was being picayune, if not deliberately evasive. While it was true that the paper was never "submitted", the department was very much aware of which paper was being referred to in the request.

In this case, the commissioner found that the paper was relevant to the request and recommended its consideration for release. While maintaining its original position that the paper was not relevant, F&O did comply with the commissioner's recommendation.

Lessons Learned

It is not necessary for requesters to be 100 per cent precise in describing records they seek from government. The access law does not place such a heavy burden on requesters. The onus on requesters is to provide adequate detail about the requested record to enable an experienced employee, with reasonable effort, to locate the record. Public officials (who are, after all, the experts) must act in good faith to give access requests a liberal and fair interpretation. Moreover, if officials are uncertain as to which record is being requested, a simple phone call to the requester is advisable. Finding a bureaucratic, technical reason to say "no" is never an acceptable way of proceeding.

Unfair Advantage
(11-97)

Background

The department of Foreign Affairs and International Trade (FAIT) holds competitions for its foreign service officer recruitment process. The tests for candidates — including oral interviews and written examinations — were developed by FAIT in conjunction with PSC officials at a cost of approximately $200,000.

The requester was an unsuccessful candidate in two foreign service officer competitions. The department had accommodated him, on an informal basis, by providing him with copies of his own test results, including the ratings of his performance by the FAIT interview panels.

The access request was for five specific items related to the results of the foreign service officer competition:

1) the questions used in the interviews;

2) the expected (best) answers;

3) the answers provided to the interview panel(s) by the 20 highest-ranking candidates;

4) a copy of the essay questions used in the tests; and,

5) a copy of two of the highest-ranking candidates' essays for each question asked.

FAIT responded by informing the requester that all the information was exempt under the provisions of section 22. The requester complained.

Legal Issues

The complainant argued that the only way he could determine whether he had been treated fairly by the interview panels and marked correctly on the essay questions was to compare his answers with those of the highest-ranking candidates.

Section 22 of the *Access to Information Act* may be applied to protect information relating to "testing . . . procedures or techniques or details of specific tests to be given . . . if the disclosure would prejudice the use or results of particular tests."

The Information Commissioner concluded that all of the withheld information fell within the meaning of

section 22. The department demonstrated to the Information Commissioner's satisfaction that the questions and answers will be re-used in future tests. Furthermore, the Information Commissioner was persuaded that disclosure of details of the test results would compromise the integrity of the competition process and thereby prejudice the results of future foreign service tests. The Information Commissioner was satisfied that the department properly exercised its discretion in its decision to withhold the records. In particular, the commissioner took into account the fact that the complainant had the right to appeal his own test results under the Public Service Commission's normal appeal process.

Lessons Learned

The right of access cannot be used to circumvent a legitimate federal government testing process and thereby gain information which would give an individual an unfair advantage over other candidates on future tests. However, it is all the more important that there be an effective method for challenging the fairness of test results. Secrecy should not be allowed to shield a testing process which is demonstrably unfair.

Too Unity Conscious
(12-97)

Background

A researcher asked the department of Agriculture for copies of daily logs, records and meeting schedules of the Minister, Deputy Minister and various assistant deputy ministers. Some portions of the agendas were disclosed, others withheld. The researcher complained to the Information Commissioner.

During the course of the investigation, much of the initially exempted information was either released or confirmed as properly withheld. But senior departmental officials continued to refuse to release entries showing when meetings were scheduled to discuss the unity issue — the majority of these entries consisted only of the letter "U". The department argued that disclosure of the "U" would show the timing of meetings and provide details of the department's activities pertaining to unity issues. It argued that any such disclosure would be injurious to the conduct of federal-provincial affairs.

Legal Issues

The legal issue in this case was simple. Could disclosure of the letter "U", as it appears on the agendas of the senior officials, impair the government's ability to conduct federal-provincial relations? The commissioner argued that the principles set out by the Federal Court in the case of *Information Commissioner* v. *Prime Minister* be followed. There must be clear and convincing evidence to demonstrate, at the level of a probability that disclosure of the agenda entry, "U", would give rise to the alleged harm. In the commissioner's opinion, the government did not discharge this burden of proof.

No evidence was presented showing how knowledge of the mere timing of unity meetings could be used to undermine the federal strategy and tactics in the unity file.

The department was asked to consult with the inter-governmental affairs section of the Privy Council Office for its view. PCO agreed that the entries did not provide any indication of the issues discussed and that there was no need to protect the fact that federal Ministers and officials were meeting and discussing national unity. As a result, the department agreed to follow the commissioner's recommendation for disclosure.

Lessons Learned

Sensitive matters, such as unity, do not give officials the green light to become excessively secretive simply from an abundance of caution. The "reasonable expectation of injury" test requires more than mere speculation as to probable injury. In assessing the probability of injury, the view of the experts in the field — in this case, the inter-governmental affairs section of PCO — should be sought.

Manuals and Reading Rooms (13-97)

Background

A former employee of Revenue Canada challenged his tax assessment and the case was destined for the tax court. To prepare his case, the former employee asked for permission to consult certain manuals used by employees of Revenue Canada while performing their duties. The individual encountered two problems which he found frustrating.

First, the department did not have publicly available up-to-date manuals. Before current manuals could be provided, the working manuals (in regular use by employees) would have to be reviewed to determine if some portions needed to be censored in order to protect sensitive "insider information." That process would be enormously time consuming and of little benefit to the requester whose tax hearing was rapidly approaching.

The second frustration was the lack of a reading room in the district taxation office serving the individual. The department did not have suitable facilities where manuals (even old ones) could be consulted.

The individual complained about these matters to the Information Commissioner.

Legal Issue

Are government institutions under a legal obligation to ensure that up-to-date manuals are available to

the public and that there are appropriate facilities for viewing such manuals? Answers to these questions flow from section 71 of the access law which states:

> "71.(1) The head of every government institution shall, not later than July 1, 1985, provide facilities at the headquarters of the institution and at such offices of the institution as are reasonably practicable where the public may inspect any manuals used by employees of the institution in administering or carrying out programs or activities of the institution that affect the public.
>
> "(2) Any information on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act may be excluded from any manuals that may be inspected by the public pursuant to subsection (1). R.S. 1985, c.A-1, s.71."

The commissioner concluded that, in order for this provision to have its intended effect, it must be interpreted as requiring up-to-date manuals (subject to justifiable exemptions) be made available for inspection by the public. As well, he concluded that reasonable efforts must be made to provide facilities, even in regional or local taxation offices, where departmental manuals may be inspected.

Revenue Canada agreed with the commissioner's view. The department proposed a timetable for preparing public versions of up-to-date manuals and for ensuring, on an on-going basis, that these manuals are kept current. As well, arrangements were made for the complainant to consult the manuals.

Lessons Learned

It is a little-known requirement of the access law that manuals used by public servants must be made available to members of the public. Many departments complied with this requirement when the Act came into force in 1983. All did not, however, set processes in place for ensuring that public versions of manuals are updated when changes are made to working copies.

All departments would be well-advised to ensure that public versions of their manuals are kept current. Departments should also provide public reading rooms at their various office locations, to the extent that is reasonably practicable.

Searching for Leaks at the IRB **(14-97)**

Background

In the fall of 1995, articles appeared in the *Vancouver Sun* about events alleged to have transpired

during closed hearings held by the Immigration and Refugee Board (IRB). These articles alleged that certain refugee claimants had been asked by Board officials to disrobe in order to display scars.

Though senior management of the IRB did not feel that the media accounts were fair, their main concern was the possibility that there had been a leak of information from a closed hearing. In order to help the IRB decide whether or not to call in the RCMP or take some other course of action, senior IRB officials hired an outside lawyer to conduct a fact-finding mission. This consultant was asked to interview employees who had some involvement in the closed hearings to determine if there had been leaks and, if so, who was responsible for them. The consultant's report was provided to the IRB on January 31, 1996. In the end, the RCMP was not called in.

An employee who had been interviewed asked to see the report as well as the consultant's interview notes. The IRB refused the request on the basis that disclosure could reasonably be expected to be injurious to the conduct of future lawful investigations. Citing paragraph 16(1)(b) of the access law, the IRB argued that the fact-finding mission in this case was an "investigation" and that those interviewed had been promised confidentiality. If that promise was not kept, the IRB argued, employees would not cooperate with internal, administrative investigations in the future. This failure to cooperate would impair the IRB's ability, it argued, to discharge effectively its obligations as employer and its mandate under the immigration and refugee legislation.

The requester was of the view that any opinions or views expressed about him by others, recorded in the notes or final report, should be disclosed to him. He felt that if any accusations had been made against him he had a right to know what they were and who made them.

Legal Issue

The principal issue in this case is whether an institution which is not a law enforcement body is entitled to rely on paragraph 16(1)(c) to justify non-disclosure of records compiled during internal, administrative inquiries. The other side of the issue was also before the commissioner: Is an individual entitled to know what others have said about him or her during an internal, administrative inquiry?

The commissioner concluded that, the fact-finding inquiry which took place in this case for the purpose of helping the IRB decide whether or not to call in the RCMP was not a law enforcement activity nor a "lawful investigation" for the purposes of paragraph 16(1)(c). In his view, to consider internal, administrative inquiries of this nature to qualify as "investigations" would give section 16 a broader scope than intended by Parliament. It would permit institutions to keep records relating to a broad range of activities secret — a result which, in the commissioner's view, would be inconsistent with the purpose clause (subsection 2(1)) which states that "necessary exemptions to the right of access should be limited and specific."

The commissioner went on to find that, even if this fact-finding exercise could be said to constitute an "investigation" for the purposes of paragraph 16(1)(c), he could not agree that related records could continue to be kept secret after the investigation was terminated. The commissioner noted that in other investigative settings, such as the investigation of harassment complaints or other workplace grievances,

the blanket of secrecy is lifted after the investigation is concluded. He did not accept, therefore, the IRB's contention that secrecy was required in perpetuity in order to ensure the full cooperation of potential witnesses in future investigations.

The commissioner observed that Parliament has already made it clear, in the *Privacy Act*, that individuals have a right to know the opinions or views expressed about them by others. In recognition of this right, the commissioner recommended that the IRB disclose to the requester all portions of the requested records recording views or opinions expressed about the requester by others.

The chairperson of the IRB agreed to disclose the final report in its entirety but decided not to accept the commissioner's recommendation concerning the consultant's notes. With the consent of the requester, the commissioner has commenced action in Federal Court seeking an order compelling the disclosure of the information in dispute.

Lessons Learned

It would be rash to draw lessons from a case, part of which is unresolved and which is before the Federal Court. However, it is appropriate to offer an observation. Caution should be exercised by any official before offering promises of confidentiality to persons who cooperate in internal, administrative inquiries. It is unlikely that such promises can be kept in light of other provisions of law which enable individuals to learn what has been said about them by others. The wiser course, adopted by most investigative bodies, is to counsel witnesses that no assurances of confidentiality can be given but that disclosure to others will only be made in accordance with legal requirements. This type of counsel, experience has shown, does not reduce the likelihood that potential witnesses will cooperate with investigators.

Canada Blood Committee — Health Canada

Canadian Blood Committee Case: The Minister of Health Made it Public

Other than through selected case summaries contained here each year, the commissioner does not make his findings public. From time to time, however, complainants will give consent to have the commissioner's reports to them made public. That occurred last year in the case of the alteration of records at ND. This year, the Minister of Health released the commissioner's report of the results of his investigation into document destruction by the Canadian Blood Committee in 1989. As a result, the verbatim text (less appendices) of the commissioner's finding is as follows:

Dear Minister,

I write to provide to you the final results of my investigation of the complaint initiated on September 8, 1995 against Health Canada following reports of the destruction of audiotapes and verbatim transcripts in the possession of the Canadian Blood Committee Secretariat (the "Secretariat") of meetings of the Canadian Blood Committee (CBC) held between 1982 and 1989. The written representations provided to me, on your behalf, were helpful to me in assessing the appropriateness of my preliminary observations, findings and recommendations (which I submitted to you on December 3, 1996). I have carefully considered all the evidence in this matter and all the written responses to my preliminary report in coming to my final conclusions in this matter.

You will understand why I must take seriously and investigate thoroughly allegations of records being destroyed in order to thwart their release under the *Access to Information Act*. Any such destruction strikes at the heart of what the Federal Court has called the "quasi-constitutional" rights bestowed by that Act, being a wilful denial of those rights and a flagrant affront to the will of Parliament.

The Access Act does not now provide sanctions against those who may be found to have improperly destroyed records — perhaps because Parliament did not foresee public servants flouting this law. That omission, which seems naive in hindsight (I have recommended in a report to Parliament that it be remedied), makes vigilance against and exposure of improper record destruction the only existing deterrent. In its own way, however, it can be a salutary deterrent and a significant sanction.

Background

1. At the May 16-18, 1989 meeting (held in Winnipeg) of the CBC, a decision was taken by the CBC directing the Secretariat to destroy audiotapes and verbatim transcripts of all of the previous meetings of the CBC in the possession of the Secretariat since its inception in 1982. The official minutes of that meeting record the decision as follows:

"Dr. Hauser informed the Committee that, following each CBC meeting, a verbatim transcript is prepared from the tapes. Both the verbatim transcripts and tapes of all previous meetings of the Committee have been retained by the Secretariat. According to him, if the verbatim transcripts were requested under the *Access to Information Act*, they may have to be released. It was agreed that once the minutes of a meeting are approved by the Committee, the verbatim transcript will be destroyed, including all previous transcripts, and the tapes erased."

2. Dr. Jo Hauser, the Executive Director of the CBC Secretariat at that time, made a personal set of extensive notes of that meeting and these notes record the decision taken at the May 16-18 meeting as follows:

"Dr. Hauser informed the Committee that following each CBC meeting verbatim minutes are prepared from tapes of the minutes. Both the verbatim minutes and the tapes of all the meetings of the CBC since its initiation have been retained by the Secretariat. If the verbatim minutes were requested under the Access to Information legislation, they may have to be released. Since the verbatim minutes contain sensitive information, it was agreed that they should be destroyed. In future, the verbatim minutes will be destroyed as soon as the 'Record of Decisions' has been approved by the Committee." (emphasis added)

3. As a result of that decision taken at the May 16-18 meeting, the CBC Secretariat's collection of audiotapes and verbatim transcripts of CBC meetings was, in fact, destroyed.

4. The purpose of my initiation of a complaint against Health Canada into this matter was to permit me to investigate the circumstances giving rise to the destruction of these records with a view to determining whether actions were taken by officials of the Government of Canada which improperly interfered with the rights of access contained in the *Access to Information Act*.

5. My jurisdiction to pursue this investigation flows from the fact that the records which were destroyed were held by an entity (the Canadian Blood Committee Secretariat) which was a part of Health Canada, the latter being an institution subject to the *Access to Information Act*. Upon unanimous resolution, the CBC requested the inclusion of the CBC Secretariat within Health Canada. Upon approval of Treasury Board in July 1983 and after submissions made to the Federal Cabinet, the CBC Secretariat was formally brought into Health Canada in July 1983. All employees of the Secretariat were federal government employees. At all material times, the Secretariat was part of the Health Services and Promotion Branch of the department under the direct responsibilities of Peter Glynn. The Secretariat was also physically situated within a Health Canada office.

6. The CBC Secretariat was small and at the time material to this investigation, it was comprised of five employees: the executive director, a financial analyst, a program analyst, a policy analyst and a secretary. All the employees of the Secretariat except the secretary, were present at the May 16-18 meeting of the CBC when the decision was taken to destroy the tapes and

transcripts of previous CBC meetings.

7. This investigation has been unexpectedly lengthy. Although efforts were made by your officials to be responsive to our information requests, it was not until August 15, 1996, more than eight months after they were first explicitly requested, that key documents with respect to the access request which is at the heart of this matter were provided to me by your officials. Indeed, with respect to these key records, repeated assurances were given that they had been destroyed by Health Canada in the usual and ordinary course of business. (Our officials have agreed to explore the reasons for this delay outside the four corners of this investigation).

8. This investigation also involved one legal challenge launched by a former (1982-1988) Executive Director of the CBC, Dr. Denise Leclerc, designed to quash the investigation. That challenge was discontinued after a prolonged period of legal wrangling (Federal Court File T-752-96).

The Main Issue

9. The destruction of the audiotapes and the verbatim transcripts, it now seems clear, was improper because the transcripts (and arguably the tapes as well) of at least three CBC meetings (Feb. 9-10, 1988; Nov. 22-23, 1988 and Feb. 22-23, 1989) were relevant to an access to information request received by the Secretariat just 15 days before the destruction decision was taken. The contentious issue is whether this decision taken by the CBC (and the destruction carried out by government of Canada officials working in the Secretariat) was for an innocent purpose or was it for the purpose of interfering with the access rights of a particular requester and the public's right of access generally.

10. Health Canada's position is that the decision to destroy the records was for "housekeeping purposes" and that the only fault to be found with the decision was a failure to consult first with the records management officials of the department and, perhaps, with the National Archivist. Moreover, it is Health Canada's position that these officials, if they had been consulted, would have approved the destruction.

11. Dr. Hauser, the Executive Director of the CBC Secretariat at the time, and two of the members of the CBC who testified on this issue before the Commission of Inquiry on the Blood System in Canada (hereinafter the Krever Commission of Inquiry), maintain that there was no intention to interfere with legal rights. (It should be noted that, although Dr. Wayne Sullivan addressed this issue before Mr. Justice Krever, he was not, in fact, present during the meeting of May 16-18, 1989, when the decision to destroy the tapes and transcripts was taken.) They argue that the decision was purely administrative, designed to streamline the minute-taking/drafting process and to ensure that the only permanent record of CBC meetings would be the "approved" minutes. No reference was made before the Krever Commission of Inquiry to the fact that there was a pending access request when the decision to destroy the tapes and transcripts was taken. Indeed, it was Dr. Hauser's evidence before me that he did not learn until the summer of

1996 that there was an access request pending at the time the destruction decision was taken. Dr. Hauser's explanation to me of his role and intentions in this matter is as follows (unedited):

"Let me explain the situation when I arrived as Executive Director. I discovered that verbatim records were, verbatim transcripts were typed up, I had no concern that they were typed up, but that it seems a waste of money. The concern was time. After each meeting, it would take ten days to two weeks to have these verbatim (transcripts) and then staff would take them, and it's another time going through a hundred plus pages of verbatim transcripts in order to distil them down to a set of minutes which were then presented to the CBC for their approval. The problem is as an Executive Director that caused me is that after the meeting you get on with the actions to be taken. I didn't find out the action to be taken until two or three weeks later until we had and I felt that was an inappropriate delay because we used to have quite frequent meetings and that would compress us. Now sometime I remember what the actions were but often the staff was spending so much time on the minutes they didn't have time to get on with the actions. So I discussed this with the staff; in my view, the way you take minutes at the meeting is that you take notes of the meeting recorded on tape in order to double check with you have any area of concerns. But, I didn't see any need for verbatim transcript in order to produce the minutes. Staff have been doing this for many, many years expressing concerns all being done and this is how they had to do it. I said well! I'll show you how it is done. And so at the next meeting, I took notes and I dictated these.

"I am referring to the notes which is Canadian Blood Committee meeting, Winnipeg May 16-18, 1989; it is in courier type as different from . . . the official minutes. In my notes, to the staff, these are not the minutes; these are notes I have dictated . . . this is the kind of format that I would expect. You use these as you choose but go ahead in preparing your minutes. I was essentially showing them how to do minutes. I dictated these notes off after the meeting quite quickly. I have been only in the job for a month, six weeks, so I wasn't sure I was going to pick out every nuance in every issue and therefore they're very clearly not, not the minutes. Staff should prepare the minutes from their notes, may refer to these as a document that they may use in preparing the minutes. But it was the purpose of this was to show them how to do it."

12. As a matter of fact, the preparation of transcripts did not cease immediately following the meeting of May 16-18. Indeed, Dr. Hauser's own covering note of May 24, 1989 (when his notes of the meeting were circulated to his staff) clearly contemplates that a transcript will be made. It states:

"While I do not see these [Dr. Hauser's notes] as the minutes of the meeting, they should assist Elaine [Boily] in preparing the minutes based on the verbatim transcript."

Moreover, neither the minutes of the May 16-18 meeting, nor Dr. Hauser's notes of that meeting, make any reference to a discussion of ceasing the practice of creating a verbatim transcript. To the contrary, those minutes and notes clearly contemplate the continued preparation of verbatim transcripts.

13. There is no reliable evidence as to when the practice of creating verbatim transcripts ceased. Dr.Hauser recalls that none were made for meetings of the CBC subsequent to May 16-18, 1989.

14. In his testimony (August 31, 1995) before the Krever Commission of Inquiry, the CBC's Chairman, Robert Gamble, gave additional insight into the motives behind the decision to destroy the tapes and verbatim transcripts. The exchange between Mr. Gamble and Mr. Justice Krever is found at pp. 38471-72 of the transcript as follows:

> "If I can recall the discussion, we were not aware that transcripts were produced. Meetings were taped to assist in the creation of minutes. The minutes were produced and approved the way our Committee normally would. And once the minutes were approved, they become the official record, and they are available to the public. The backup documentation is available.
>
> "From time to time groups, and I can't think of others in [sic] the Red Cross, would indicate that they would brief us on specific issues, only if it was off the record. And we agreed to that, in advance. We would say, they will brief us on the subject, that subject, provided it is off the record.
>
> "And having agreed to that I think we were violating a commitment we made to them, if we maintained a record of that material."

15. In this regard, too, the official minutes of the May 16-18, 1989 meeting and Dr. Hauser's contemporaneous notes, make no reference to this fear that a commitment to the Red Cross may have been violated by keeping the tapes and transcripts. Rather, the minutes and contemporaneous notes link the decision to destroy the records with concerns over their accessibility under the *Access to Information Act* and to no other reason.

16. The credibility of these explanations of the motivations for the decision to destroy the tapes and transcripts suffers further when placed in context. The relevant context includes the following elements which are reviewed in greater detail in Appendix "A" to this report:

I. At the time the decision to destroy the tapes and transcripts was taken, an access to information request for CBC records had been made on April 25, 1989 by an individual, and received by the Health Services and Promotion Branch on May 1, 1989. This access request was given number HS-0030 and was later given number HS-0097. (This request was also known under number HP1218 in the Health Protection Branch and under number 6014-L5-1 in the Health Services and Protection Branch). The CBC Secretariat was informed and provided with a copy of this access request by the Health Services and Promotion Branch Access Coordinator on the same day, that is, May 1, 1989. On a fair reading of the request, some of the records later destroyed were encompassed by it. The Department claimed a time extension on May 30, 1989 to process this request. The request was in fact responded to by the Department on August 11, Sept. 6 and Sept. 28, 1989. Regrettably, the tapes and transcripts

had been destroyed between May 24 and August 4, 1989 — before the access request was fully answered.

II. Before the decision to destroy the tapes and transcripts was taken, members of the CBC had been informed (CBC Minutes of February 8-10, 1988) of a legal opinion that the records held by the CBC Secretariat were not excluded from the coverage of the *Access to Information Act* and that access to them could only be denied lawfully pursuant to the exemption provisions contained in the access law. This position was adopted by the Deputy Minister of Health Canada, Maureen Law, on April 20, 1988. This decision was communicated to the members of the CBC by the Chairman during its meeting of April 21-22, 1988. From September 1987 to May 1989, the Secretariat received fewer than 10 access requests.

III. At the time the decision to destroy the tapes and transcripts was taken, lawsuits related to tainted blood products had been launched against the Canadian Red Cross Society (CRCS) and concerns about liability and compensation were being discussed by the CBC.

IV. At the time the decision was taken to destroy the tapes and transcripts, the Executive Director of the CBC Secretariat and the Deputy Secretary General, Operations of the CRCS had discussions about the implications of the *Access to Information Act* for the CRCS and the desire of the CRCS not to provide its records to the CBC for fear of disclosure given current and potential litigation and liability concerns.

V. At the time the decision to destroy the tapes and transcripts was taken, the Executive Director of the CBC Secretariat and a senior official of Health Canada responsible for administering the *Access to Information Act* were discussing options for insulating CRCS records from the right of access.

VI. At the time the decision to destroy the tapes and transcripts was taken, the members of the CBC were concerned about the sensitivity of the information contained in the records.

17. Against this contextual background I make the following findings:

Findings

18. During the period 1982-1989, audiotapes (and verbatim transcriptions thereof) of the meetings of the CBC were created. The transcripts were made by the CBC Secretariat. These tapes and transcripts were, until the time of their destruction, held by the CBC Secretariat. The records of the CBC Secretariat were under the control of Health Canada. It is my view, therefore, that the tapes and transcripts were subject to the *Access to Information Act*.

19. These tapes and transcripts were not used solely to aid in the preparation of the official CBC minutes; they had several uses over the years including:

- to assist research into scientific presentations and policy discussions;

- to provide an authoritative source should it be necessary to resolve any disputes as to positions taken or decisions made during CBC meetings;

- to assist in seeking and obtaining legal advice or instructing legal counsel.

Consequently, and notwithstanding the existence of a pending access request, it is not clear that these records could be considered "preparatory" or "transitory" in nature and be destroyed without the approval of the National Archivist.

20. The decision to destroy the tapes and transcripts was taken during the CBC's meeting of May 16-18, 1989.

21. The tapes and transcripts were, in fact, destroyed between May 24 and August 4, 1989.

22. Dr. Hauser first attended a CBC meeting on February 22-23, 1989 to be introduced as the next Executive Director. However, he did not start working in the Secretariat until March 28, 1989. The meeting at which the decision was taken to destroy the tapes and transcripts was the first meeting of the CBC attended by Dr. Hauser in his capacity as Executive Director of the CBC Secretariat.

23. These tapes and transcripts were recommended for destruction by Dr. Hauser, or the decision to destroy them was supported by Dr. Hauser, for the purpose of ensuring that the records did not become subject to the right of access. It is not mere coincidence that the decision was taken in the context of concern about liability issues associated with tainted blood products and the related concern of the CRCS about the confidentiality of its records.

24. Of most concern to me is my finding that, at the time the decision to destroy the tapes and transcripts was taken, Dr. Hauser knew or ought to have known, that a formal request for them (and other records) under the *Access to Information Act* had been received. This request was received on May 1, 1989 just 15 days before the decision was made to destroy the records. The request was comprehensive: It clearly encompasses some transcripts as well as information supplied by the Red Cross. While Dr. Hauser testified that he does not recall the request, it was, by its nature and by established practice, one which would have been brought to his attention by his staff. And even if he did not know of the access request, Dr. Hauser should have made diligent inquiries concerning pending access requests before acceding to the decision that records be destroyed.

25. Whether or not some or all of the contents of the relevant transcripts might qualify for exemption, the requester had a right to be informed of their existence and of his right to complain to the Information Commissioner if all or part of the records were to be withheld and ultimately, of his right to apply to Federal Court for a review of the matter.

26. Moreover, it is my finding that, at the time the decision was made to destroy the tapes and

transcripts, Dr. Hauser knew, or ought to have known, that such destruction was improper given his general familiarity with his obligations under the *Access to Information Act*, his knowledge of legal advice confirming that records held by the CBC secretariat were subject to the access law and his responsibility to ensure that the access to information request which encompassed some of the records proposed for destruction, was fully answered.

27. A senior official of the department with responsibilities at that time for administering the access law, David Beavis, also contributed to the problem. He was consulted by Dr. Hauser prior to May 5, 1989 about the concerns of the CRCS concerning confidentiality. This official did not, in my view, provide appropriate guidance and leadership in this area of his responsibility. Rather, as a result of that conversation, Dr. Hauser formed the view that he could adopt record handling practices vis-à-vis CRCS records which are not in keeping with either the *Access to Information Act* or the *National Archives Act*. Moreover, Dr. Hauser confirmed his understanding of his conversation with Mr. Beavis by means of a draft letter to be sent to the CRCS, a draft which Dr. Hauser sent to Mr. Beavis for comment. At no time did Mr. Beavis advise Dr. Hauser to reject the following options in handling CRCS records:

i) agree to receive CRCS records, use them in the ordinary course of business, and then return them without making any copies, and/or

ii) send CBC Secretariat officials to the premises of the CRCS to view records necessary to the work of the CBC but ensure that no records were returned to the premises of the CBC Secretariat.

The first option, in my view, constitutes a disposition of records which could not be properly undertaken without the authority of the National Archivist. Both the options were schemes designed to circumvent the right of access by seeking to avoid the appearance that any of the records which the CBC Secretariat needed from the CRCS were under the control of the CBC Secretariat. The second option was, in fact, put into practice.

28. There is no evidence to indicate that Mr. Beavis had any prior knowledge of, or role in, the decision to destroy the tapes and transcripts.

Summary of Findings

29. In summary, it is my conclusion that the complaint is well-founded. At the time the members of the CBC decided to direct Dr. Hauser to destroy the transcripts, Dr. Hauser was an experienced, senior employee of Health Canada. He was knowledgeable as to his obligations under the ATIA and he was aware, or ought to have been aware, that an access request covering the tapes and transcripts had been received. It was Dr. Hauser's duty to refuse to support or follow the CBC's decision until he had requested further advice and authorization within the Federal Government concerning both access to information and archival requirements. He did not discharge this duty. Rather, in my view, Dr. Hauser followed a

course of action, approved by the members of the CBC, which he knew or should have known would thwart an individual's right of access and the general right of access afforded to the public — a course of action which was successful in its purpose.

30. I commend the department's former (until 1988) ATIP Coordinator, Guy Demers, for his determination to ensure that officials of the CBC Secretariat fully respected the *Access to Information Act*. I find, however, that a more senior official of the department with responsibility for administering the access law within the department, David Beavis, did not exercise due diligence, judgment and leadership in providing advice to Dr. Hauser about the appropriate options available for dealing with the concerns of the Red Cross about confidentiality.

Recommendations

31. In light of these findings, I recommend that a copy of this report and its appendices including the originals of the Health Canada documents listed at Appendix "B", be provided to the Krever Commission of Inquiry for its consideration.

32. It is my understanding that Dr. Hauser is no longer in the employment of Health Canada. I am not, thus, in a position to recommend that your department take any action to hold him to account for his actions. Mr. Beavis is, I understand, in the employ of Health Canada as Executive Director, Special Projects Directorate of the Corporate Services Branch. Consequently I recommend that appropriate education and written guidance be given to senior employees of Health Canada, including Mr. Beavis, designed to make them better aware of the requirements of the access law in an effort to prevent a recurrence of what took place in this case. My officials will be available to assist yours in developing the content of that education and guidance. I am grateful for the assurances already given by your Deputy Minister that steps will be taken to ensure that officers at all levels in the department are properly sensitized to these matters.

33. I reiterate the recommendations I made previously to Health Canada, in December of 1994, concerning the pressing need for central control over all Health Canada records, a common file classification system, improved monitoring of branch record-keeping systems and central control of the destruction of departmental records.

34. I would be grateful if you would inform me as to whether or not you intend to follow my recommendations in this matter.

35. In closing, I wish to thank your Deputy Minister, Michèle Jean, for her cooperation throughout this investigation. From the outset, she showed her concern to get to the bottom of the matter. Indeed, my letter initiating the investigation virtually crossed with a communication from her inviting me to look into this matter. Of course, many individuals, including officials of Health Canada, assisted me with the gathering of documents and by providing testimony. They, too, have my gratitude.

In his response, the Minister of Health informed the commissioner of his intention to follow all the commissioner's recommendations.

Index of the 1996/97 Annual Report Case Summaries

02-97 **Who Receives Government Pensions?** (PWGSC) (Personal information - Where disclosure authorized - Publicly available - Consent - Public Interest)

22 11-97 **Unfair Advantage** (FAIT) (Testing procedures, tests and audits - Would prejudice - Use - Results of Particular tests)

23 07-97 **Pressure Tactics** (RC) (Solicitor-client privilege)

69 06-97 **Advanced Warning** (IRB) (Confidences of the Queen's Privy Council - Cabinet)

07-97 **Pressure Tactics** (RC) (Confidences of the Queen's Privy Council - Cabinet)

71 13-97 **Manuals and Reading Rooms** (RC) (Manuals - Used by employees of the institution - Programs or activities of the institution - Offices of the institution - reasonably practicable)

Glossary

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

AGR	Agriculture and Agri-Foods Canada
FAIT	Foreign Affairs and International Trade
F&O	Fisheries and Oceans
IRB	Immigration and Refugee Board
ND	National Defence
NPB	National Parole Board
PCO	Privy Council Office
PWGSC	Public Works and Government Services Canada
RC	Revenue Canada, Customs, Excise and Taxation
RCMP	Royal Canadian Mounted Police

Investigations

In the reporting year, 1,382 complaints were made to the commissioner against government institutions (see Table 1). Especially troubling is the fact that 45.1 per cent of all (completed) complaints concern delay (see Table 2). By comparison, in 1994-95, delays represented 35.6 per cent of complaints and in 1995-96, delays were 55.1 per cent. This consistently-high percentage of delay complaints is symptomatic of a system-wide problem in meeting response deadlines.

The commissioner's office informally surveyed five major departments and found that from 44 per cent to 74 per cent of access requests received are not answered within statutory deadlines. It is likely that other departments have a similarly poor record of service and this keeps the issue of delay at the very top of the Information Commissioner's priority list.

The good news is that resolutions of complaints were achieved in the vast majority of cases. Table 2 indicates that 1,497 complaint investigations were completed; 64.3 per cent were resolved by remedial action satisfactory to the commissioner, while 26.1 per cent were considered not substantiated. In 9 cases, or 0.6 per cent of all complaints completed, no satisfactory resolution was achieved. At the time of this writing all unresolved cases were before the Federal Court.

As can be seen from Table 3, the overall turn around-time for complaint investigations has begun to deteriorate. The office has explored all reasonable avenues for productivity improvement; without the resources to hire additional investigators, complainants will have to wait longer for the results of investigations. This increasing delay in the commissioner's office is especially unfortunate when one considers that, as mentioned above, 45.1 per cent of complaints to the commissioner, are about unacceptable delays. This is not a recipe for customer satisfaction!

Table 3 also shows that 1,497 investigations were completed during the year, leaving the backlog of incomplete investigations lower than last year yet still unacceptably high.

Of the complaints received in 1996-97, the five institutions complained against most often are: (a complete breakdown by department is found at Table 4 and by province at Table 5).

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

Last year the top 5 list was:

- National Defence
- Finance

- Citizenship and Immigration Canada
- Revenue Canada
- Health Canada

Those no longer on the list have earned praise for improving their performance. The others are becoming fixtures on the list and have no reason to be proud. It is time for Revenue Canada, National Defence and Citizenship and Immigration Canada to make a concerted effort to put the practices, procedures, resources and training in place to ensure that deadlines are met and that exemptions are sparingly applied.

A separate chapter of this report is devoted to the problems experienced at Defence along with specific recommendations for improvement (see pages 16-20).

Investigative Procedures: Delays

The investigation of cases of delay is a time consuming and highly adversarial process. Investigators seek out the reasons for the delay and attempt to obtain promises from the departments to answer within a reasonable time by a fixed date. Some departments are hesitant to make remedial promises and are reluctant to give detailed explanations of why a delay has occurred, who is responsible and accountable for the delay and what steps will be taken to ensure that there is not a reoccurrence.

The growing crisis of delay does not seem to be adequately addressed through the complaints process (there is no penalty for the offending department and long investigations merely prolong the wait for the requester). By using traditional ombuds-techniques such as persuasion, discussion and even exposure, the commissioner has been unable to secure from key senior public servants agreement to respect response deadlines. The only other alternative open to him under the law is the option of seeking the aid of the Federal Court and, with great reluctance, the option must now be seized. In the coming weeks, problem departments which seem unable to respect their response-time obligations will be informed of a streamlined investigative process. The new process is designed to reduce to a minimum the duration of delay investigations and bring recalcitrant departments before the court with dispatch.

Investigative Procedures: Formality

During the year, some public officials expressed surprise when a few of the commissioner's investigations included certain formalities such as issuance of subpoenas, taking evidence under oath, tape recording of witness testimony, physical searches of premises and insistence on the right to interview public officials in private with no representative of the employer being present.

Resort to these formalities, which the commissioner is empowered to employ at his discretion, will continue to be the exception rather than the rule. However, when credibility is an issue, when there is conflicting testimony, when there is concern that witnesses may not be fully cooperative or forthright, when time is of the essence, when the evidence is highly technical or when there are compelling reasons

of convenience, the commissioner will not hesitate to invoke the powers of investigation given to him by Parliament.

Public officials who are witnesses should be aware that the *Access to Information Act* provides them a great deal of protection. For example, subsection 36(3) provides that evidence given by a witness during investigations is inadmissible against the witness in any court or proceeding except: (1) in a prosecution for perjury during an investigation, (2) in a prosecution for obstruction of the commissioner or (3) in a review (or appeal therefrom) by the Federal Court under sections 41 or 42.

Similarly, the Act requires that investigations be conducted in private and authorizes the commissioner to enter government premises and converse in private with any public official. It is the commissioner's position that these requirements enable him to deny any requests from representatives of a witness' employer to be present during the witness' interview. The commissioner will, of course, permit a witness to be represented by his or her own counsel as long as the counsel does not also represent other witnesses or the employer.

Public officials do not want to be treated as wrongdoers during investigations. They want to be believed, trusted and treated with courtesy and fairness. On the other hand, public officials must realize that the nature of the Information Commissioner's role binds him to approach each investigation with a measure of professional skepticism. One may recall the words of Ronald Reagan when he was asked to trust the then Soviet President, Gorbachev. Reagan answered: "Trust, yes. But also verify!" For that reason, the commissioner urges public officials to understand his obligation to probe and test the evidence given to him. It is because of that obligation that the Act makes it an offence for anyone to obstruct the commissioner or his investigators in the performance of their duties and functions. For his part, the commissioner gives his assurance that, during investigations, public officials will be treated with courtesy and respect.

Table 1

STATUS OF COMPLAINTS

	April 1, 1995 to Mar. 31, 1996	April 1, 1996 to Mar. 31, 1997
Pending from previous year	330	512
Opened during the year	1,712	1,382
Completed during the year	1,530	1,497
Pending at year-end	512	397

Table 2

COMPLAINT FINDINGS

April 1, 1996 to Mar. 31, 1997

	FINDING					
Category	Resolved	Not Resolved	Not Substantiated	Discon-tinued	**TOTAL**	%
Refusal to disclose	338	6	266	31	641	42.8
Delay (deemed refusal)	519	2	58	96	675	45.1
Time extension	49	-	23	3	75	5.0
Fees	28	-	20	3	51	3.4
Language	-	-	1	-	1	0.1
Publications	-	-	-	-	-	-
Miscellaneous	29	1	22	2	54	3.6
TOTAL	963	9	390	135	1,497	100%
100%	64.3	0.6	26.1	9.0		

Table 3

TURN AROUND TIME (MONTHS)

CATEGORY	94.04.01 - 95.03.31		95.04.01 - 96.03.31		96.04.01 - 97.03.31	
	Months	Cases	Months	Cases	Months	Cases
Refusal to disclose	5.87	432	6.26	471	7.39	641
Delay (deemed refusal)	2.36	342	2.54	843	2.79	675
Time extension	3.22	68	2.40	116	3.31	75
Fees	4.36	50	5.58	57	7.28	51
Language	-	-	3.48	1	9.07	1
Publications	-	-	-	-	-	-
Miscellaneous	4.02	68	5.76	42	4.46	54
Overall	4.22	960	3.88	1,530	5.00	1,497

Table 4

COMPLAINT FINDINGS
(by government institution)
April 1, 1996 to March 31, 1997

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Agriculture Canada	9	-	7	1	17
Atlantic Canada Opportunities Agency	10	-	8	1	19
Atomic Energy Control Board	2	-	1	-	3
Bank of Canada	2	-	-	-	2
Business Development Bank of Canada	2	-	-	-	2
Canada Council	3	-	1	-	4
Canada Deposit Insurance Corporation	-	-	1	-	1
Canada Mortgage & Housing Corporation	3	-	2	-	5
Canada-Newfoundland Offshore Petroleum Board	1	-	-	-	1
Canada Ports Corporation	2	-	-	-	2
Canadian Commercial Corporation	3	-	-	-	3
Canadian Heritage	18	-	26	1	45
Canadian Human Rights Commission	2	-	1	-	3
Canadian International Development Agency	1	-	-	1	2
Canadian Security Intelligence Service	2	-	1	1	4
Canadian Space Agency	4	-	-	-	4
Citizenship & Immigration	90	-	19	51	160
Correctional Service Canada	41	-	4	1	46
Environment Canada	14	-	9	1	24
Federal Office of Regional Development (Quebec)	-	-	1	-	1
Finance	30	-	3	-	33
Fisheries and Oceans	33	-	15	2	50
Foreign Affairs and International Trade	21	-	7	6	34
Freshwater Fish Marketing Board	3	-	2	-	5

Table 4 (cont'd)

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Health Canada	25	-	31	4	60
Historic Sites and Monuments Board	1	-	-	-	1
Human Resources Development Canada	17	-	8	1	26
Immigration and Refugee Board	48	3	31	1	83
Indian and Northern Affairs Canada	30	-	5	-	35
Industry Canada	5	-	13	-	18
Investment Canada	-	-	-	1	1
Justice	28	-	25	1	54
National Archives of Canada	7	-	11	-	18
National Defence	184	4	61	7	256
National Parole Board	3	-	2	-	5
National Research Council of Canada	1	-	2	-	3
Natural Resources Canada	4	-	2	1	7
Office of the Superintendent of Financial Institutions	2	-	1	1	4
Pacific Pilotage Authority	1	-	-	-	1
Privy Council Office	37	-	8	2	47
Public Service Commission	2	-	-	-	2
Public Works and Government Services Canada	35	2	12	3	52
Revenue Canada	166	-	16	41	223
Royal Canadian Mint	1	-	-	-	1
Royal Canadian Mounted Police	30	-	23	2	55
Security Intelligence Review Committee	3	-	-	-	3
Solicitor General Canada	3	-	3	-	6
Statistics Canada	1	-	3	-	4
Transport Canada	30	-	10	2	42
Transportation Safety Board	1	-	-	-	1
Treasury Board Secretariat	2	-	9	1	12
Veterans Affairs Canada	-	-	6	-	6
Western Economic Diversification	-	-	-	1	1
TOTAL	963	9	390	135	1,497

Table 5

GEOGRAPHIC DISTRIBUTION OF COMPLAINTS (by location of complainant)

April 1, 1996 to March 31, 1997

	Rec'd	Closed
Outside Canada	23	22
Newfoundland	15	17
Prince Edward Island	3	3
Nova Scotia	45	32
New Brunswick	20	18
Quebec	399	411
National Capital Region	467	517
Ontario	166	177
Manitoba	35	42
Saskatchewan	16	15
Alberta	52	56
British Columbia	105	164
Yukon	1	1
Northwest Territories	35	22
TOTAL	1,382	1,497

Corporate Management

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

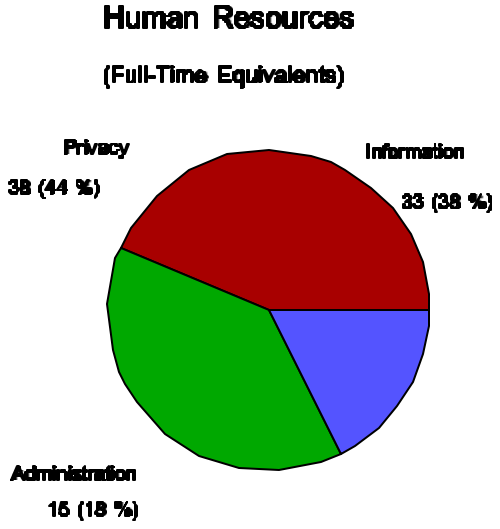
The Branch has 15 employees and a budget that represents approximately 15 per cent of total 1996-97 Program expenditures.

Resource Information

The budget of the Office of the Information Commissioner for 1996-97 was $2,651,000. Actual expenditures for the 1996-97 period were $2,667,963 of which, personnel costs of $2,273,206 and professional and special services expenditures of $259,691 accounted for more than 95 per cent of all expenditures. The remaining $135,066 covered all other expenditures including printing, travel, office equipment and supplies.

Actual expenditure details are reflected in Figure 1 (Actual Resource Utilization by Organization/Activity) and Figure 2 (Details by Object of Expenditure).

Figure 1: 1996-97 Resources by Organization/Activity
Human Resources



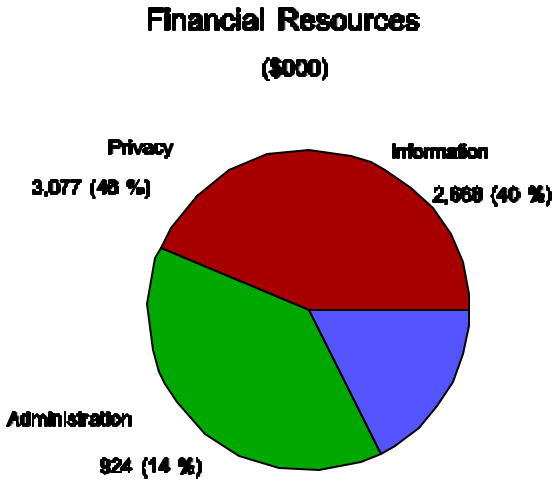


Figure 2: Details by Object of Expenditure				
	Information	**Privacy**	**Corporate Management**	**Total**
Salaries	1,996,206	2,169,513	593,447	4,759,166
Employee Benefit Plan Contributions	277,000	323,000	93,000	693,000
Transportation and Communication	48,979	59,566	128,191	236,736
Information	23,531	66,867	2,010	92,408
Professional and Special Services	259,691	421,326	40,231	721,248
Rentals	3,863	14,316	14,653	32,832
Purchased Repair and Maintenance	12,515	2,130	7,356	22,001
Utilities, Materials And Supplies	30,418	13,042	35,738	79,198
Acquisition of Machinery and Equipment	15,105	5,693	9,335	30,133
Other Payments	655	1,122	516	2,293
Total	**2,667,963**	**3,076,575**	**924,477**	**6,669,015**

Note: Expenditure Figures do not incorporate final year-end adjustments reflected in the Offices' 1996-97 Public Accounts.