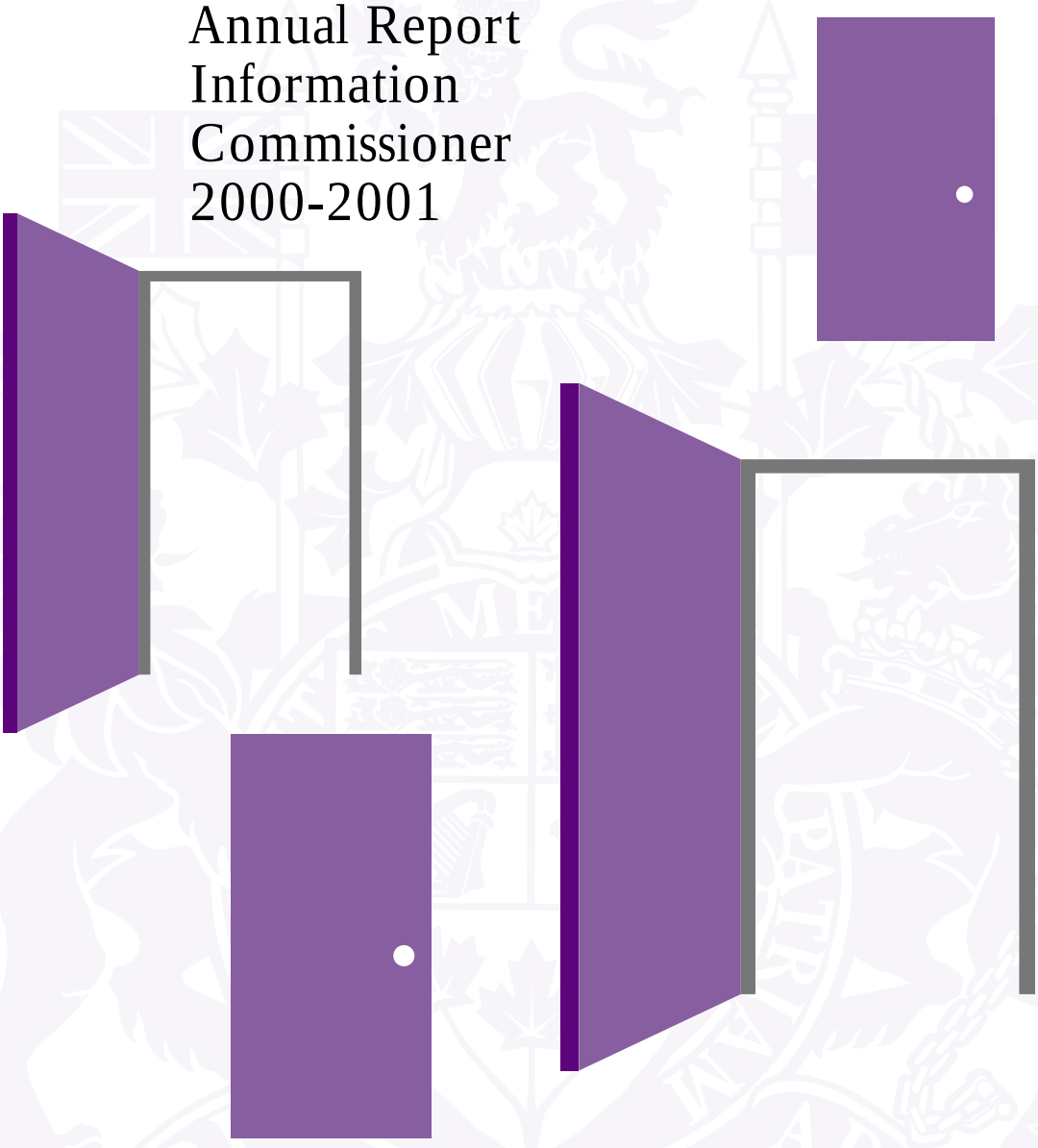
Information Commissioner of Canada

Commissaire à l'information du Canada

Annual Report Information Commissioner 2000-2001



Annual Report
Information Commissioner
2000-2001

"Information is the current that charges accountability in government."

Former Auditor General of Canada, Denis Desautels, FCA in *Reflections on a Decade of Serving Parliament*, February 2001.

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Cat. No. IP20-1/2001
ISBN 0-662-65843-4

“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 2001

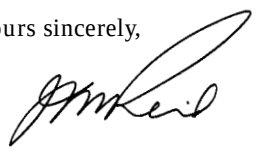
The Honourable Daniel Hays
The Speaker
Senate
Ottawa ON K1A 0A4

Dear Mr. Hays:

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

This report covers the period from April 1, 2000 to March 31, 2001.

Yours sincerely,



The Hon. John M. Reid, P.C.

June 2001

The Honourable Peter Milliken
The Speaker
House of Commons
Ottawa ON K1A 0A6

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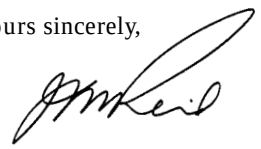

The Hon. John M. Reid, P.C.

2000-2001 ANNUAL REPORT

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MANDATE

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

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

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

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

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

- they have been denied requested information;
- they have been asked to pay too much for copied information;
- the department's extension of more than 30 days to provide information is unreasonable;
- the material was not in the official language of choice or the time for translation was unreasonable;
- they have a problem with the InfoSource 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.

CHAPTER I
RESTORING THE FOUNDATIONS OF ACCOUNTABILITY

In August, 2000, the government commenced another internal review of the *Access to Information Act*. Since the legislatively mandated review in 1986 by a Parliamentary Committee, there have been a number of internal reviews, but the one now in progress is billed as being more comprehensive and consultative.

Under the auspices of the Minister of Justice and President of the Treasury Board, a Task Force of some 12 public servants has been created. However, no public hearings are planned and the Task Force has chosen not to focus debate around a set of possible changes. An advisory panel of independent, non-governmental experts was to have been struck to assist the Task Force; no such panel had been convened by the end of the 2000-2001 fiscal year. However, an interdepartmental committee of some 17 Assistant Deputy Ministers holds regular meetings to offer advice. The Task Force has been asked to make its proposals by the Fall of 2001.

This reform process is exciting because it is so long overdue. At the same time, vigilance is appropriate. Will this Task Force bring forth proposals designed to serve the interests of Canadians who use the law over the interests of the bureaucrats who administer it? This call to caution does not imply bad faith or motive on the part of the government in this reform exercise. It merely is recognition that, to this point, the major perspective from which the review is being viewed is the insider perspective.

The background for this reform exercise is the reality that no government—not in Canada, not elsewhere in the world—lives comfortably with a legal right of access to government-held records. In opposition, politicians tend to be ardent champions of access laws and information commissioners. The law gives them enforceable rights, after all.

Once in government, however, the law imposes obligations on them to conduct thorough searches, minimize secrecy and produce records in a short period of time. The obligations limit in a dramatic way the options available to governments for "managing the message". Consequently, the temptation is great for any sitting government to address its own agenda for relief from what it sees as "onerous" obligations and to do so in the guise of reform.

Our *Access to Information Act* is too important, with the basics too well-crafted, for us to tolerate a wolf-in-sheeps-clothing package of reforms. Here are the elements of such a package which would terribly undermine our rights of access:

1. new reasons for secrecy, such as an exemption for records dealing with national unity matters;

2. fewer records covered by the Act, such as records held in ministers' offices or the office of the Prime Minister;

3. an expansion of the secrecy surrounding Cabinet by removing the current window into the process which allows access to background explanations, analysis of problems and policy options after the Cabinet decisions to which they relate have been made public (or four years thereafter, if the decisions have not been made public);

4. a new right given to government allowing it to refuse to answer any access request it deems to be abusive;

5. a limit on the number of requests per person in a specified period of time;

6. an increase in the application fee (now $5.00);

7. the termination of the five hours of search time included with each access request;

8. the introduction of a fee for viewing records;

9. an increase in the fees chargeable for search and preparation;

10. a fee régime based on number of pages disclosed;

11. an increase in the period within which responses must be given (currently 30 days);

12. an expansion of the reasons for which extensions of time to respond may be claimed;

13. a requirement that dissatisfied requesters exhaust a departmental review process before making a complaint to the Information Commissioner;

14. the introduction of a fee for making a complaint to the Commissioner;

15. a curtailment of the investigative powers of the Information Commissioner such as removing his superior court of record powers to compel the attendance of witnesses and production of records, to take evidence under oath and to punish for contempt; and

16. the right of government to invoke new exemptions before the Federal Court which were not investigated by the Commissioner.

If a package of proposals similar to this one should come forward, then no reform would be, by far, the better option.

As a way of opening and broadening the discussion, the Information Commissioner offers this year's Annual Report as his brief to the Task Force, and at the same time to Parliament and the public, concerning reforms of Canada's access to information régime. Reform of the *Access to Information Act* is but one part of what is needed. More important, in many respects, is reform of the public service theory of its role in governance and the place of transparency in the discharge of its role. Values and ethics initiatives are at the heart of this project. Secondly, there is the desperate need to resuscitate the terminally ill information management structure of the Government of Canada.

In these two domains – public service culture and information management – the office of the Auditor General of Canada and the office of the Information Commissioner of Canada have been sounding the same alarms. Both have taken the position that the cultural change towards a more ethical, value-based public service has been glacially slow. Managers continue to cling to secrecy and resist external review.

VALUE/ETHICS

In his final report to the House of Commons entitled: **Reflections on a Decade of Serving Parliament**, Canada's Auditor General, Denis Desautels, said the following:

" I believe that maintaining and promoting sound values and ethics are a vital part of good governance and ultimately are needed to maintain public confidence in democratic institutions. We do not underestimate the difficulty of successfully managing values and ethics initiatives. Creating the institutions, engaging the active support of political leaders and senior managers, and overcoming skepticism among the public servants will be major challenges. However, Canadians deserve nothing less than the highest standard of conduct in government." (p. 24)

Mr. Desautels put his finger on one of the principal reasons why the commitment to ethics and values in the public service has not gone far beyond lip service. It is because Canadian public servants cling to an outdated notion of "ministerial accountability" as defining their relations with ministers, parliamentarians and members of the public. Put in its most stark terms, this outdated notion has three components: 1) a public servant's job is to cast his or her minister in the best possible light; 2) a public servant should not take either the blame or the credit for outcomes and 3) a public servant should exercise no independent judgment in determining what actions are in the public interest.

This belief system encourages public servants to suppress bad news until the problems are fixed or until a strategy to minimize the impact on the Minister / government is developed. The plain fact that this approach backfires more often than it succeeds has not diminished faith in the method. Individual public servants who recognize the benefits to governance of candour with Parliamentarians and the public are silenced with swift discipline.

Mr. Desautels describes it this way:

"Other countries are rapidly strengthening accountability, and Canada is in danger of being left behind.

Part of the problem is the nature of Canadian politics. There is a reluctance to let Parliament and the public know how government programs are working, because if things are going badly you may be giving your opponents the stick to beat you with. And even when a Minister is not personally concerned with this, senior public servants assume this fear on the Minister's behalf. The people who write government performance reports seem to try to say as little as possible that would expose their department to criticism." (p. 86)

The Task Force has a golden opportunity to provide a blueprint for dismantling the prevailing "culture of secrecy". The plain fact is that the persistence of this culture does not promote good governance. **The prevailing notion of ministerial accountability cries out for redefinition. Practical lines must be drawn between a minister's area of accountability and that of the senior public servants.**

In this long-overdue migration of public servants from a culture which encourages them to be spin doctors in their dealings with the public, some strong protections will be required. **To that end, the Task Force should support legal protections – such as whistle-blowing laws – for public officials who discharge their obligation to ensure that instances of maladministration or wrongdoing do not go undetected or uncorrected.**

A former Information Commissioner, John W. Grace, urged the government on several occasions to drop "loyalty" as a value expected of public officials and replace it with "obedience to law". Loyalty is understood by public servants to imply loyalty to the minister and the government of the day. Interpreted in that manner, the value of loyalty may suppress public candour and obedience to law. Dr. Grace put it this way:

> "The second reason why even well-motivated exercises to improve public ethics may be ineffective is the over-emphasis upon, even the subversion of, the honourable word "loyalty". In a recent article in **The New Yorker**, Henry Louis Bates Jr. writes of loyalty: "Its natural context is a social world of reciprocal dependencies: lords and vassels, lieges and subjects." Loyalty, let there be no mincing of words, is often interpreted as a code word for those who go along, get along! It can be contorted by the self-serving into an admonition to public officials not to exhibit moral courage; not to criticize or speak up, not to report misdeeds for appearing disloyal - the unforgivable corporate sin." (1997-1998 Annual Report of Information Commissioner, p. 6)

INFORMATION MANAGEMENT

A solution to the problem of the culture of secrecy would not, in and of itself, repair the crumbling foundations of accountability in government. A decade or more of neglect of basic, good information management has devastated the ability of departments to create, maintain and effectively use an institutional memory. Wheels are reinvented, history repeats itself (for better or worse), ministers receive incomplete advice, programs are more easily politicized, the ability to audit decisions is compromised, the historical record of our time is eroded, the right of access to information is undermined and governance moves from the realm of the professional to that of the amateur.

On this point too, the outgoing Auditor General was eloquent in his final report to Parliament. Mr. Desautels said:

> "The problem of failing to disclose bad news is being compounded by the poor quality of records kept in departments. Part of this can be attributed to a certain paranoia over Access to Information rules and the traditional reluctance of senior public servants to keep records of direction from Ministers or discussions of why decisions were made.
>
> Accountability is also made more difficult by damage to the audit trail. Efforts to reduce administrative overhead appear to have resulted in disproportionate cuts in records management. This hampers not only the public's ability to gain direct access to government records but also the institutional memory of the departments themselves. The ability to audit decisions suffers as well.
>
> The audit trail is also damaged by the way the information technology is used. At one time, all correspondence and documents were on paper and were physically filed in a department's central registry. Today, internal memos have been replaced by e-mails, which are not filed centrally and which evaporate when the server where they are stored runs out of space. Most knowledge workers have their own hard disk and keep many important records there, invisible to the departmental records managers. I agree with the Information Commissioner in his opinion that these practices are eating away at the foundation of accountability in the federal government. I am concerned that without better use of technology, it will become more difficult to know how and why important decisions were made." (p.p. 86-87)

A detailed set of recommendations is offered in chapter II (pages 23 to 42) designed to advance the resuscitation of the government's information management function. No project – including that of addressing the looming crisis of recruitment to the public service or implementing e-government – deserves greater priority on a government-wide basis. What is at stake is the public's right to know, to challenge, to participate in, to influence and ultimately hold to account, the governance process.

There is, happily, a growing recognition of the importance of good information management to the achievement of the government's business strategies and goals. This recognition was stimulated, in part, by release of a Treasury Board / National Archives report on "Information Management in the Government of Canada, A Situation Analysis". Central agencies, departments and institutions are planning and undertaking new initiatives to strengthen information management. Many projects are focussing on the government's commitments with regard to the electronic delivery of government information and services. The need for change, however, extends much further than these operational priorities. The next chapter will advocate fundamental shifts in culture, policy, law and information-based services to enhance information management in the service of effective and accountable governance.

The key changes are:

1. a legal "duty to document" an institution's organization, functions, policies, procedures and transactions and to include such records within institutional records systems – especially in the case of electronic records;

2. a legal "duty to preserve" records for a period appropriate to their purpose and content;

3. a legislated accountability framework governing essential recordkeeping and reporting requirements and procedures; and

4. a coordinated leadership approach to completing the revitalization project with the oversight of a Parliamentary Committee.

Special thanks are due to Mr. Andrew Lipchak, whose experience and wisdom in the field of information management informs Chapter II.

REFORMING THE ACT

In Chapter III, pages 43 to 78, this report offers a set of amendments designed to modernize and strengthen the right of access without compromising legitimate reasons for secrecy.

The Chapter borrows liberally from the recommendations made by the Standing Committee on Justice and Solicitor General in 1986 and from those advanced by former Commissioner John Grace in 1994.

It is important to approach reform with eyes wide open. In that spirit, one must recognize that the *Access to Information* Act is working remarkably well.

Hundreds of thousands of records are disclosed each year. For every complaint made to the Information Commissioner at least ten other individuals obtained good service from government under the *Access to Information Act*. The Act needs to be modernized and improved—it does not need to be remade. The greatest shortcomings in the right of access are not shortcomings in the words of the Act but in the deeds of those who administer the Act. Reform must focus on where it is most needed.

Since the *Access to Information Act* came into force in 1983, all of the provinces and territories, save one (P.E.I. which now has a bill before the legislature) have passed laws and many have already reviewed and strengthened their laws. With minor exceptions, the federal Act has not changed in 18 years.

Why has reform of the federal *Access to Information Act* been such an elusive goal? The unanimous recommendations for reform, put forward in 1986 by the Standing Committee on Justice and Solicitor-General, were ignored. So, too, have been the recommendations for reform put forward since 1986 by three Information Commissioners. A dozen or more private members' bills proposing amendments to the access law have died without the government's support, the most recent, and notorious, being the government's decision to kill the comprehensive set of amendments put forward by John Bryden. Only one private member's amendment to the Act has been adopted since 1983. A number of proposals for reform have been developed within government only to be rejected by Cabinet or blocked upon arrival at the Privy Council Office.

Conservative governments and Liberal governments alike have recoiled from the task of nurturing the proud principle of openness which both parties originally championed in bringing forward the *Access to Information Act*.

The reasons for past failure provide clues to the pitfalls which the current review faces. Secrecy in government is deeply entrenched—primarily at the senior levels of the bureaucracy. Secrecy cloaks public servants in relative anonymity as the handmaiden of the notion of "ministerial accountability". Secrecy, too, gives governments more control over the management of information flows to the public. The access law—with a positive right of access by anyone present in Canada to most records held by government, coupled with a deadline for response—constitutes a frontal attack on both of these perceived virtues of secrecy. Consequently, there is every incentive for officials to resist, if not impede, the operation of the law.

A legitimate fear, then, is that a reform proposal, cobbled together by government insiders without the benefit of a full, public, parliamentary review, will address the concerns of the bureaucracy at the expense of the concerns of the public.

There is a belief, widespread in government, that the right of access is being abused by frivolous requesters and bulk or business requesters. That belief is demonstrably false.

The *Access to Information Act* came into force on July 1, 1983. There have been almost 18 years of experience with the Act and there have been some surprises. Most surprising is the modest use Canadians make of the *Access to Information Act*. Before the Act was passed, the government forecast that approximately 50,000 requests per year would be received by the totality of government institutions (some 150) covered by the Act. In fact, it took an accumulation of requests over 10 years to reach the 50,000 request mark. The year just past - 1999-2000 - was the year in which the most access requests were received since the Act's passage — there were some 19,000.

The point is simply this, the popular mythology that the volume of access requests is so great as to interfere with the effective administration of government, is without foundation.

There is, too, the complaint about the so-called "bulk" users, those who make many requests, often for the purpose of reselling the information (often with value added). "Surely", public servants say "the Act was not intended to be used to make a private profit!" On this point, too, the outrage is misplaced and undeserved.

From the beginning, it was recognized that entrepreneurs would make use of the Act to obtain government information for commercial purposes. That has been the experience in all jurisdictions which operate in a freedom of information régime. It makes economic good sense to allow entrepreneurs to "mine" government holdings for saleable information. First, new information businesses pay taxes and the tax system is a more effective revenue collector than would be even the highest of access fee régimes.

Second, information requesters give government valuable clues as to where its informational "gold" is hidden—and, should it so desire, the government can undertake, itself, the economic exploitation of the information. An example of this occurred in the former Revenue Canada, which decided to develop a "for sale" version of its advance tax rulings after an access requester had obtained the information and started a commercial report service containing the data.

Once Revenue Canada started its own service, all the related access requests ceased (but so, too, did the tax revenue stream from the private service—which went out of business).

If the government is not ready, willing and able to exploit its own information resources, why not let an entrepreneur do so? If a government institution is not astute enough to exploit its own information resources, why not let others do so and be content with reaping the benefits through the tax system?

If modest use is the first surprise, the second is that, even after 18 years of trying, several of the major departments of government have been unable to deliver the access program effectively to the citizens. Why has there been an apparent failure of competent management in this area?

The persistent problems in the system fall into three groups:

1. Delays
2. Excessive secrecy
3. Improprieties such as:
    - improper records-handling practices
    - using fees/extensions as a barrier to access
    - inadequate searches
    - political interference

Delays

The Act subjects government departments to a response-deadline régime. Access requests must be answered within 30 days of their receipt unless that period is extended for one or more of the following reasons:

1. the request involves a large volume of records (or search through a large volume) and meeting the 30 days would unreasonably interfere with the operations of the department, or
2. additional time is required to conduct consultations with other departments, other governments or with private third parties.

In these circumstances, the department is entitled to extend the response deadline for as long as it chooses, subject only to the requirement that the extended period of time be reasonable in the circumstances. If the deadline is set at more than 60 days from the date of receipt, the Commissioner must be notified of the extension.

Yet many departments have been unable to respect, on a consistent basis, this generous response deadline régime. The Task Force will be scrutinized carefully to see if it recommends measures, including penalties, to end the ignominious, 18-year record of disrespect for the requirement that responses to access requests be timely.

Excessive Secrecy

The second problem area in the administration of the Act is the problem of excessive secrecy.

The access law has quasi-constitutional status. The right of access operates "notwithstanding any other Act of Parliament". Parliament took the unusual step of stating the Act's purpose in clear language it is:

2. (1) "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 exceptions 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.

   (2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public."

Despite the strong legislative exhortation to openness, and the narrowly-worded exemptions from the right of access, the Act is administered all too often as a secrecy statute. All too often the test used by officials is: "if in doubt, keep it secret" - a test which has been specifically rejected by the Federal Court.

As well, there are only halting efforts being made to put information into the public domain on a proactive basis without waiting for access requests. Even after 18 years, no department, of which we are aware, does an annual content analysis of the requests received and answered, with a view to identifying information which could be made available on a routine basis — perhaps on a website.

Why complain of the burden of access requests until every effort within your control, as public officials, has been made to disclose information proactively, informally and routinely?

The story-of-the-year about excessive secrecy has to do with the government's failure to disclose to the public, after Cabinet decisions are made, the background information, analysis of problems and policy options presented to Cabinet for consideration in coming to the decision. Prime Minister Pierre Trudeau asked officials to disclose such information even before the Act came into force. The information was not disclosed. Prime Minister Joe Clark reaffirmed that policy; the information was still not disclosed. Parliament enshrined that policy as a requirement of law in paragraph 69(3)(b) of the *Access to Information Act*, yet PCO continues to resist. This year, the Federal Court, at the request of the Information Commissioner, ordered the government to end this 18 years of unjustified secrecy, which Mr. Justice Blanchard said: "could be viewed as an attempt to circumvent the will of Parliament". (for further discussion of this case see pages 107 to 109).

This, too, is an area where the Task Force will be carefully scrutinized: How will Cabinet confidences be treated? All studies suggest that the Cabinet confidence exclusion should be made a reviewable exemption and that the definition be substantially narrowed. As it stands, the exclusion is ripe for abuse.

And when it comes to excessive secrecy, the Task Force will be graded on whether or not it recommends a class exemption for national unity records and whether or not it ends "secrecy creep" by abolishing section 24 of the Act. All studies to date have indicated that, with the exception of s. 69 (which should be made an exemption) and s. 24 (which should be abolished) the Act has achieved a remarkably good balance between openness and secrecy.

Improprieties

The third area of difficulty in administering the Act concerns improprieties with respect to: handling records, conducting searches, estimating fees, applying extensions and interfering for political purposes.

Little needs be said about the problem of records' alteration and destruction. The problem was of sufficient concern to prompt Parliament to unanimously adopt a private member's bill making it an offence to engage in certain records-handling practices with the intent to deny a right of access. Any tampering by the Task Force with this new offence will be greeted with horror by members of Parliament of all parties and by the public whose outrage over destruction cases caused MPs to propose and support the amendment.

The Commissioner's office is presently investigating complaints against one department for allegedly applying 3-year extensions of time to answer even simple requests involving small numbers of records. We regularly see cases where searches have been entirely inadequate and unprofessional and where inflated fee estimates (and demands for prohibitively large deposits) are presented to requesters perceived to be "troublesome". The Task Force will be expected to propose sanctions or disincentives for such behaviour.

Finally, with every change in Minister and every turnover in ministerial exempt staff, cases arise where the Minister's office disrupts the process — slowing it down, dictating the timing of release, directing the application of exemptions over the objections of the professionals. The communications needs of Ministers are, too often, given precedence over the legal rights of access requesters. That is not just troubling, it is illegal, and Deputy Ministers have the obligation to ensure that their Ministers understand and respect their legal obligations.

Having been a minister of the crown, this Commissioner knows that ministers can be killed with kindness. There is the well-intentioned enthusiasm of exempt staff who see only the political dimension of issues and who don't understand that even Ministers have laws to obey. There is, too, the deference of Deputy Ministers who don't like to say "NO" to Ministers. Too often, cases arise where officials refrain from "speaking truth to power" in the hope that the Information Commissioner will be the bearer of bad news to the Minister.

The access requests made by journalists and opposition members of parliament get slower service, closer scrutiny, and more conservative treatment from a misguided sensitivity to the Minister's needs and, when the accounting comes, who bears the blame and wears the shame? It is, of course, the Minister. In this area too, the Task Force will be expected to advance solutions and offer leadership.

Why Do These Problems Persist?

Why are these problems so intransigent? The causes will help point out the kind of remedies needed. There is no mystery regarding the causes; the problems have been studied to death by the Information Commissioner, Treasury Board, Justice Canada, various DM and ADM committees and by a Parliamentary Committee. Here are the causes:

1. inadequate resources;
2. absence of targeted educational programs;
3. poor procedures and practices (including the matter of poor information management);
4. inadequate delegation to, and classification of, Access Coordinators; and
5. slowness of Ministers / Deputy Ministers and senior managers to change the culture of secrecy by force of leadership.

In some senses, that list is in reverse order of importance, with failure of leadership being a factor in all these problems. The resource crunch many ATIP offices found themselves in over the past eight years was directly attributed to the flawed assumption that ATIP could be treated like any other program for budget cutting purposes. It was a failure of leadership to assume that a department could ignore a mandatory, legal obligation (i.e. to give timely answers) because the government had imposed a restraint program. More finesse than that was required!

What remedies do these causes beg? Those likely to be most effective can be accomplished without legislative amendments. Here they are:

Solving the Problems

First, departmental ATIP groups, and appropriate operational areas, must be assigned sufficient resources to answer the anticipated workload of access requests based on historical trends. It is not necessary to resource for peaks, but it is necessary to have a contingency plan for peaks such as a roster of contractors, an arrangement with Treasury Board to borrow experts from elsewhere and / or a plan for obtaining quick approval for additional positions. Treasury Board has already notified all departments that it will consider favourably new resource requests to ensure response-time obligations are met.

Second, all employees who play a role in processing access requests must be educated as to their access obligations on a mandatory, regular and targeted basis. In other words, the education program for ministerial staff will differ in some respects from that for senior managers or officials in operational areas — but there must be ongoing educational programs in each department.

Third, a processing flow plan must be adopted in each department which minimizes decision/approval points, which sets times within which each action must be taken (i.e. search, review, approvals) and which tracks progress, provides follow-up and entails consequences for non-compliance. An essential part of good access management will be good information management. That subject is dealt with in Chapter II.

Fourth, it is vital that ATIP coordinators be trusted members of senior management having the full delegation to answer access requests without multi-layers of concurrence or approval. Too often, coordinators are underclassified, file preparers who must rely on more senior officials to make the real decisions. When it comes to the approval process, Deputy Ministers should follow this simple advice: get a coordinator you trust and get out of the way!

Finally, the senior management cadre must realize that the attitude its members express towards access rages like a grassfire through a department. If employees feel that compliance is not a priority for the leaders, increasing instances will be seen of delays, inflated fees, antagonism towards requesters, inadequate searches, increasing numbers of complaints and more visits from my investigators. When the leaders decide not to keep minutes of meetings, and advise others not to write things down, when they perpetuate the myths about abusive requesters, when they tolerate giving the Minister's needs priority over legal rights, when they do not foster a culture of openness in general — their employees get the message loud and clear.

Often senior officials say: "I don't have to like this law; I only have to obey it!" — and that grudging attitude is infectious in destructive ways at lower levels. No matter how well crafted an access law may be, it will only be a good law if public officials make it work. The courts, the public, members of Parliament, the media, almost every group in society believe strongly in the right of access, they support a strengthening of the *Access to Information Act*, they are convinced that openness makes our governance better, our democracy stronger. Senior officials need to hear this message and show some enthusiasm in their departments for this program which is not going to go away.

CHAPTER II
RESUSCITATING INFORMATION MANAGEMENT

In this chapter the message turns somewhat more clinical, technical, even bureaucratic. But this is the heart and soul of the project to strengthen government accountability. What, then, is this "thing" called information management?

Information Management will be, in this chapter, intended to refer to policies, standards, practices and techniques for the creation, maintenance/control, use and disposition of information to support business*, accountability and public access needs. It includes a range of operational and strategic activities including:

- information needs planning;
- life-cycle management of recorded information in electronic, paper and other media (including identification, organization, storage, retrieval and disposal);
- documentation strategies to ensure an appropriate level of recordkeeping to support operational, legal, audit and accountability requirements;
- information access and privacy policies and practices;
- development and management of information systems and architectures;
- capture, sharing and use of information and knowledge to support organizational decision-making and action; and
- information preservation (long-term archiving).

Government is in the information business. In the conduct of its affairs, the Government of Canada and its agencies and institutions create, collect, maintain, use and disseminate information in a vast variety of media and forms. This information supports and documents all decision-making, business activities and legal processes, and the measurement of their outcomes and effects. It is the authoritative evidence of activities, decisions and commitments, and of government's interactions with the public and other bodies.

Government "recordkeeping" is the foundation of efficient, effective and accountable government. The information and knowledge captured and available in government records represents a major investment of intellectual property. As well, the selection and archival preservation of records with long-term significance ensures the continuity of the government's corporate memory and documents the aspirations and achievement—and yes, shortcomings—of a nation. In short, the federal government bears a fiduciary duty—to carefully create, preserve and protect its records—to the ultimate owners of the records, the citizens of Canada.

* *It has become fashionable in government to refer to the mandated activities of a government institution as its "business" or "business lines". As much as that term diminishes the unique complexities of governance, the convenient shorthand will be used in this chapter.*

In an era when the Internet and other communications technologies are empowering individuals and organizations, the public's expectations of government are increasing. Citizens are better informed about public affairs in general and about their information rights in particular. Yet, in the midst of the Information Age, the ability of the Government of Canada to manage and provide access to its information resources is at serious risk.

The information landscape has changed…

The information landscape in the Government of Canada has changed radically, making more difficult the task of managing and providing access to federal records and data. Some of these changes are ones which have affected other governments and bodies, including:

- the rapid growth in the volume of records and variety of record media and formats;
- the emergence of diverse and increasingly complex computer-based information systems and communications technologies;
- frequent government restructuring which blurs responsibility for creating and keeping appropriate records;
- staff reductions and other cost-cutting which impact on departmental priorities and the time workers can spend on managing their information;
- the decline of centralized records management activities in departments and deficiencies in information management knowledge and skills among staff.

Information technologies are providing new opportunities and special challenges …

As in other public and private sector environments, the rise of new information technologies is radically changing the way organizations function, providing both opportunities and unique challenges. As part of the move to an electronic work environment, information is increasingly created, captured, stored and distributed in electronic form through local and wide-area networks, the Internet and intranets, datawarehouses, electronic kiosks and other technologies. These technologies are providing major benefits in terms of automating business processes, eliminating unnecessary activities and delivering information, programs and services more efficiently. At the same time, the rapidity of technological change and the increasing complexity of record and data formats are complicating the task of ensuring that information is available, accessible, authentic and secure. The problems of preserving electronic information in useable forms over long periods of time represent a particular threat to corporate memory.

As electronic systems proliferate, huge volumes of paper records continue to be acquired, used, disseminated and stored in government offices and records centres. In many situations and for many information seekers, paper is a convenient and effective means of receiving, sharing and maintaining information. Predictions of paperless government remain unrealized.

A Culture of Openness…

None of these challenges can be overcome unless there is a high value placed by elected officials, senior managers and public servants on openness and transparency in the conduct of government affairs. This value must be reinforced in law, championed at the highest political levels, communicated as a fundamental expectation of public service, consistently demonstrated in practice and adequately rewarded. These are essential elements of a culture which values information and takes steps to ensure its availability, accessibility and quality.

In such a culture, cooperation and collaboration are the expected ways of doing business. In a large and fragmented bureaucracy, however, both human nature and keen competition for attention and resources often encourage a "ghetto" or "silo" mentality when it comes to information, in spite of the efforts of public servants to work together. As part of this mentality, records and data are often seen as personal property or considered departmental or work unit possessions. The inclination to share information is at odds with the tendency to hoard it to satisfy personal or departmental objectives rather than larger government goals or public needs. Key to realizing the benefits of electronically enabled government is to encourage government employees to follow the lead of private sector institutions such as MIT. Our federal information resources should be released to fertilize as much intellectual and business growth as possible.

Management cultures can and do change when they are under *pressure*. In terms of improving information management and access in the federal government, those pressures must include: the *weight* of internal, public and media demands for openness and transparency; the *risk* and potential *cost* of legal, financial, program and political liability; the *impact* of strong accountability arrangements; the *force* of effective standards for information management and the *recognition* and *reward* of effective performance.

Some Positive Signs…

Happily, the importance of good information management is becoming more widely recognized in public sector organizations, as in private sector firms. Senior managers are realizing that greater attention to the management and use of information will enable them to plan and deliver their programs and services more effectively. A more immediate stimulus in the Government of Canada, however, is the growing awareness that the success of Government On-Line depends on good information management and a much stronger information and data infrastructure. Electronic service delivery will be a wasted effort if the information offered is unavailable, incomplete, out-of-date, unreliable or inconsequential.

Stimulus has also been provided in reports of this and previous Information Commissioners and through comments from such respected officials as the National Archivist, the Auditor General and the Chief Information Officer of

Canada. As well, a number of public controversies, such as that surrounding the HRDC Transitional Jobs Fund, have demonstrated the political, legal and other costs of poor recordkeeping practices.

In the spring of 2000, a major report on information management was prepared for Canada's Chief Information Officer and the National Archivist. "*Information Management in the Government of Canada, A Situation Analysis*" is the first comprehensive analysis of the state of information management in the federal government. It clarifies the importance of information management, describes the current IM landscape in the Government of Canada, outlines key issues and makes a number of valuable recommendations. Treasury Board Secretariat and others are in the early stages of implementing some of these proposals.

These initiatives, however, are inconsistent and far from firmly established. Departments and central agencies have yet to exploit operational and strategic opportunities to promote good information management. More importantly, the laws, standards and other infrastructure needed to assure the integrity and accessibility of government information are not fully in place; the related interests of citizens are not fully protected; and change in these areas is too often set by bureaucratic and technocratic priorities rather than by public needs. Parliament's leadership has been conspicuously absent.

Opportunities for Change

In the Government of Canada, the key reasons why change towards the goal of available, accessible, and quality information is impeded, include:

- The **duty to document** important business activities and **maintain records** in a system of records as an essential element of responsible public administration are often neglected and the related legal framework is inadequate;
- An adequate, general, government **accountability** framework is not in place that clearly identifies the importance of, and assumes responsibility for, recordkeeping;
- The government's **framework** of information management policies, standards and practices is inadequate;
- The **criteria** designed to help government institutions determine what records need to be created and kept have not been developed;
- Clear policies and direction for evaluating the **effectiveness** of information management have not emerged; and
- **Information-centred professions and cultures** are fragmented, uncoordinated and underdeveloped, and responsibility for information management has not been assigned effectively at senior levels.

An overarching weakness in the system is the diffusion of leadership, coordination and oversight for information management. There is no clear mandate setting out the responsibilities and activities of

government **central agencies** and the **role of Parliament** in ensuring that information issues are recognized, monitored and managed to ensure government effectiveness and accountability.

Information Management Law

As a matter of course, individuals and departments create and acquire records to document and support their business functions, legal requirements and other needs. In a large and increasingly complex government bureaucracy, however, it can no longer be assumed that departments are consistently creating and keeping appropriate records. Aside from the day-to-day pressures of work, contributing factors include:

- uncertainty among government staff as to when and how best to document their activities amidst a confusing array of communications choices – e-mail, voice mail, faxes, memos and other media, formats and technologies;
- an increasingly *informal communications* environment where sometimes no clear or authoritative record of an important decision or action is made;
- the rise of *shared work environments* and government / non-government partnerships which often blur responsibility for creating and keeping proper records; and
- concerns about access to information requirements.

As a result, there is a general trend in many jurisdictions to be more explicit in legislation regarding records creation and other recordkeeping responsibilities of government officials. Unlike many other jurisdictions, however, there is no federal legislation that deals expressly with the "duty to document" important actions and decisions or certain other aspects of recordkeeping.

Although important parts of the government's legal framework for information management exist, all address specific issues (e.g., access / privacy, archiving) and most implicitly assume that the information exists and that appropriate records are being created and maintained. Ironically, the presence of the *Access to Information Act* sometimes works against good recordkeeping. In potentially contentious and controversial situations, officials sometimes weigh the need for a clear record of what was said and done against the prospect that the file will be accessible to others and accountability for its contents demanded. Fewer and fewer senior committees of government keep agendas, minutes or records of decisions.

Treasury Board's *Management of Government Information Holdings* policy (*MGIH*) makes brief mention of the need to "sufficiently document projects, programs and policies to ensure continuity in the management of government institutions and the preservation of a historical record." While this suggests good practice, it has little weight and provides minimal direction. Moreover, as currently structured, *MGIH* is addressed to

records managers and other specialists, not senior officials nor the general body of public servants. In our present decentralized computing environment, it is the latter group which most influences the information management state of health.

The establishment of recordkeeping legislation would not be a bold step; numerous other jurisdictions provide precedents. In the United States, for example, the **Federal Records Act** states:

> "The head of each Federal Agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities."

U. S. federal regulations and administrative standards reinforce this requirement. As well, a number of states also have legislative provisions for the creation and keeping of records (e.g., Illinois, Indiana, Minnesota and Rhode Island). Many of these are modeled on the wording in federal legislation.

In the United Kingdom, departments are subject to the *Public Records Act* and the Lord Chancellor's draft *Code Of Practice On The Management Of Records under the Freedom Of Information Act*. Section 8 (1) of the *Code* instructs each business unit of an authority to "have in place an adequate system for documenting its activities." Records of a business activity "should be complete and accurate enough to facilitate audits and examinations, protect legal and other rights, and demonstrate that the records are credible and authoritative."

Australia and New Zealand have long been progressive jurisdictions with regard to information management and archival development. The *Australian Standard AS 4390 – Records Management* (1996), endorsed for all Commonwealth agencies, says agencies are responsible for creating "full and accurate records" for all activities and decisions in accordance with requirements in the *Standard*. The Australian Law Reform Commission recommended that one of the principal elements of an effective Commonwealth records system should be a strong legal requirement to create, maintain and make accessible full and accurate records (in a proposed new *Archives and Records Act*). New Zealand and various Australian states have established clear records creation and recordkeeping provisions in law, including New Zealand (*State Sector Act*), New South Wales (*State Records Act*), Queensland (*Libraries and Archives Act*), Victoria (*Public Records Act*), and Western Australia (*Public Sector Management Act and State Records Act*).

The requirement to file and retain records is either explicit or implicit in the above legislation. Where implicit, relevant policies, standards and systematic practices have been put into place to guide government staff. Many jurisdictions have developed, for example, model *function-based* file classification schemes for use by all departments in manual and electronic filing systems. Together with "common schedules" which identify the length of time different classes of records must be retained on file, they cover many of the

records that are common to all government departments (e.g. personnel, financial, audit and legal files).

The Government of Canada lacks a simple, government-wide file classification scheme for such records and only has interim retention guidelines in place for administrative records. Standards and related training are urgently needed, especially in an electronic work environment where computer files are often stored, retained and deleted on an arbitrary basis—without ever passing through the hands of records managers.

Canadian provincial and territorial jurisdictions have had less experience with "recordkeeping" laws, although all of them have put in place policies which address records creation, maintenance and disposal. One province is considering enacting omnibus legislation setting out powers of ministers (to reduce the need for individual ministry legislation). It has been proposed by some agencies that a key *obligation* be included in such an act: ministers are to ensure that full and accurate records of the business activities of their departments are created and maintained.

It is time for intense discussion of the merits, feasibility and scope of new recordkeeping or information management law for the Government of Canada. On one end of the spectrum, such a law could require that appropriate records be created and maintained and that their management, retention and disposal be according to approved government policies and standards. At the other end, an information law could be a comprehensive legal instrument that integrates various existing legislation, governs the full life cycle of records and the related information management infrastructure, identifies departmental and central agency rights and responsibilities, and establishes relevant penalties. One model worth considering is the *State Records Act* (1998) in New South Wales, Australia, which includes provisions for:

- making and keeping full and accurate records of government activities;
- protecting records in the custody of a public office;
- establishing and maintaining a records management program in conformity with standards and codes of best practice;
- making arrangements for monitoring and reporting on records management programs;
- keeping technology dependent records accessible;
- disposing of and archiving records; and
- providing public access to older government records (not covered in other access legislation).

The experience in other jurisdictions has been that legislating key recordkeeping requirements (supported by appropriate policies, standards, practices and tools) is valuable. A legal framework brings order to a critical area of government activity, guides recordkeeping in a

complex and confusing information and technology environment, and promotes the goal of accessible and accountable government.

Options for the location of responsibility for a recordkeeping law (depending on scope) include: Treasury Board (as part of new "records", "management of government" or "accountability" legislation); the National Archives (through enlargement of its legislation along proposed Australian lines); the Auditor General; in a separate agency established for the purpose; or some coordinating group of stakeholders. Another approach would be to insert a "full and accurate records" clause into all new program legislation or into new or existing legislation governing specific business or regulatory functions within government (e.g. the *Financial Administration Act*). Each of these approaches would serve to introduce the concept of a "duty to document" into the regulatory framework, management vocabulary and accountability environment.

The Government of Canada should establish a legal framework for information management which would, as a primary feature, require federal departments, agencies and institutions to create and appropriately maintain records that adequately document their organization, functions, policies, decisions, procedures, and essential transactions.

Accountability Framework for Records

Accountability can be defined as the obligation to demonstrate and take responsibility for one's actions and statements. "Full and accurate" records are essential to accountable government because they provide evidence of what government has done or said it would do. **Legislation requiring government staff to create and keep good records will not likely have significant impact, however, unless it forms part of a larger management and accountability framework for the Government of Canada**.

The principle of accountability must be a part of the management culture, expressed in formal and informal codes of conduct, measured in its performance and rewarded in its attainment.

A results-based accountability framework would identify the principles and values underlying good public administration, identify the general responsibilities of government staff in supporting effective management practices and provide standards and guidelines for establishing and maintaining performance reporting and other accountability mechanisms. Treasury Board's *Results for Canadians: A Management Framework for the Government of Canada* (2000) satisfies part of this need. It describes essential values of the public service, defines the government's management commitments and describes how the board, departments and agencies must work together to provide effective citizen-centred services. It espouses "sound values and standards of public accountability", including the responsibility of managers and employees to provide ministers, Parliament and the public with "full and accurate information on the results of [their] work."

Results for Canadians, however, is not a detailed accountability framework or guideline. True, Treasury Board provides general guidance on the subject, offers guidelines for departmental results reporting and on accountability issues in specific environments (e.g. alternative service delivery and information technology project management)—those discrete initiatives are steps in the right direction. There is much more to do.

The absence of strong control and accountability frameworks within departments is frequently emphasized in reports of the Auditor General of Canada. In his *2000 Report*, the Auditor General suggested that it is time for the government to consider introducing "accountability legislation". Such legislation would require departments to provide Parliament (and by extension, the public) with full and accurate information about performance and results. Although the Auditor General's nominal focus is on government spending, an accountability law would have an impact on every facet of government activity and on the availability of all government information. From an information management perspective, it could provide an important part of the legal framework for recordkeeping that is now missing, i.e., it could obligate departments to make sure that important program-related information was produced, maintained, protected and accessible.

A number of other jurisdictions have developed government-wide accountability laws or policy frameworks, including Australia, New Zealand, the United States, as well as Canadian provinces (Alberta, British Columbia, Quebec and Ontario). Ontario's *Accountability Directive* (1997), for example, includes an essential obligation that records of important decisions and transactions should be available to support program and financial monitoring, evaluation and reporting.

As federal government accountability frameworks or laws are established or revised, steps should be taken to ensure that essential recordkeeping requirements are reflected in the relevant policies, standards, practices, and systems.

The Information Management Framework

In addition to a general accountability framework (in which the necessity of good recordkeeping is identified), there also needs to be a comprehensive policy-based framework for information management in which accountability is a central tenet. An information management framework is a coherent set of principles, objectives, standards, guidelines, laws and responsibilities that describe and guide information management programs and activities at the corporate and departmental levels.

Most government jurisdictions – including Canada – have various elements of an information management framework in place. In the Government of Canada, these elements are fragmented and incomplete, lack coordination and sometimes coherent expression. There is currently no authoritative and integrated corporate information management policy for the federal government. Governance and

accountability for information management are weak compared with arrangements for government finances and personnel. These issues were recognized in the Treasury Board / National Archives report which recommended that the government's information management policies be strengthened.

At present, the closest expression of an information management "policy" is Treasury Board's *Management of Government Information Holdings (MGIH)*. It sets out requirements for the management of government records in all media and makes an attempt to relate program requirements and accountability requirements with departmental information management infrastructure. Many elements of the policy are valuable and relevant. It is, however, primarily addressed to information specialists, is overly broad in scope, excessively detailed in some areas, lacks clarity regarding some issues and is inadequate in terms of its treatment of electronic records and the information management infrastructure. *MGIH* does not adequately address corporate or departmental information management governance, monitoring and evaluation issues.

Treasury Board Secretariat recognizes the limitations of the *Management of Government Information Holdings* policy and is currently revising it in consultation with the National Archives, government departments and others. It is anticipated that the new version, among other changes, will be oriented to general managers rather than records specialists – a positive change. It will be a key piece – but not the only piece – in the developing IM infrastructure.

An information management framework or policy may range from a single document expressing essential elements to a linked set of principles, objectives, policies, standards and guidelines. In whatever form, it must clearly tell the officials and staff of government institutions why good information management is important and what must be done to ensure that it happens. It must communicate a vision of public administration centred on the responsible management and effective use of information and knowledge in support of business and accountability goals. It should be based on fundamental information *principles*, such as:

1. **Availability:** Information and data must be created, acquired and maintained so as to document important activities and decision-making processes adequately;

2. **Accessibility:** Information should be accessible to, and shared with, those who need to access it and have a right to do so;

3. **Stewardship:** Departments should be accountable for ensuring the accuracy, authenticity, relevance and reliability of their information resources;

4. **Creation and Retention:** Government information should be created, acquired and retained only for valid business, legal, policy, accountability and archival needs;

5. **Privacy and Security:** The security of information should be protected to ensure privacy, confidentiality and information integrity, consistent with business, legal and policy requirements;

6. **Life-Cycle Management:** Information in all media and forms should be managed as a strategic resource throughout its life-cycle (from creation or collection through storage, use, destruction or archival preservation).

The framework should address critical issues in the development and implementation of information management programs, including:

Governance: roles and responsibilities for governing information management programs and activities must be clearly assigned at appropriate levels (see also ***People and Professions***);

Individual Responsibility: all staff must understand their responsibility for maintaining good information management practices and have access to relevant standards, guidelines and training, especially with regard to electronic information; senior managers, in particular, should ensure that an effective departmental IM program is in place;

Legislation: appropriate legislation and regulations mandating good information management policies and procedures must be in place, understood and adhered to; when any new government legislation is introduced, the information management implications should be identified and provided for;

Public and Political Records: standards, practices and training should be provided to guide political and other staff in distinguishing between and appropriately managing public records and political / personal records – an area in need of attention in the federal government;

Measurement: information management policies and programs must be periodically reviewed, evaluated and modified as needed;

Resources: information management programs must be adequately resourced to ensure their effectiveness – this includes personnel, space, equipment, materials and training.

Canada can learn from other jurisdictions where effective information management frameworks have already been developed. The Lord Chancellor's *Code of Practice* in the United Kingdom, for example, says that departments should have "an overall policy statement, endorsed by top management and made readily available to staff at all levels of the organization, on how it creates and manages its records, including electronic records." The policy, it says, should:

> "provide a mandate for the performance of all records and information management functions…set out an authority's commitment to create, keep and manage records…outline the role of records management and its relationship to the authority's overall strategy; define roles and responsibilities including the responsibility of individuals to document their actions and decisions…provide a framework for supporting standards, procedures and guidelines; and indicate the way in which compliance with the policy and its supporting standards, procedures and guidelines will be monitored."

In Australia, the *Australian Standard – AS 4390 – Records Management*, approved for Commonwealth and state governments, represents another excellent model. The *Standard* addresses key elements of records and information management programs and includes sections on: principles, benefits, scope of information systems, characteristics of records, regulatory environment, essential policies, responsibilities, strategies for program design and implementation, operations, monitoring and auditing, and training. The International Organization for Standardization (ISO) is adapting the *Australian Standard* for use by other jurisdictions. The *Standard* has received considerable international attention and has already served as a significant catalyst for the advancement of recordkeeping programs around the world. Canada, through the National Archives, has been a major contributor to the development of the ISO standard.

In a number of jurisdictions, information management policy is closely linked to the development of "enterprise information architectures" which bridge the IM and IT areas. These are frameworks for defining information and information technology (IT) requirements, resources and plans at corporate and program levels. Ontario's architecture framework, for example, requires that documents and data be managed throughout their life-cycle according to approved standards for recorded information (and assigns the primary standard-setting role for document management to the Archives of Ontario).

The Public Sector Chief Information Officers Council (PSCIOC) of Canada is also developing a draft information management framework. The Council recognizes the need for consistent approaches to IM policy and infrastructure development across Canada. As Treasury Board Secretariat contributes to this initiative, it should also accelerate the development of a comprehensive framework for the management of information in the Government of Canada, and which includes: the legal framework and mandate; essential principles; role of information management with regard to the organizational strategic goals and objectives; governance and accountability; supporting standards, procedures and guidelines; training and skills development; and measures for program assessment and compliance.

Guidance in Documenting Government Actions and Decision-Making

In discussing government recordkeeping, the National Archivist, Ian E. Wilson, has said that, "The key issue is not what records do exist but what *should* exist to support open and accountable government." Complaints by the Information Commissioner, the Auditor General, the media and others that important records are not available or are not trustworthy suggest that government staff – aside from other pressures on them – are often uncertain as to when and how to document their activities adequately.

A *recordkeeping law* provides a legal mandate for good information management and accountability and *IM frameworks* provide prescriptions for responsible management. None,

however, tell government staff what kinds of records to keep or how to ensure their reliability and usefulness. Staff need guidance as to how and in what circumstances to create proper records. "Documentation standards" are directions or guidelines which tell departments and staff when and how to document business decisions, actions and transactions. They identify the types of records that need to be created in different circumstances and for different purposes. They also serve as a guide in avoiding over-documentation. Adequate documentation standards form an important part of an effective framework of laws, policies and procedures for managing information. No government-wide documentation standards currently exist in the Government of Canada, however, although advice is available from the National Archives and others.

Where they do exist, such standards usually reflect a *risk management* approach, represented by such questions as, "What could be the impact of not documenting a decision or activity to a certain level of accuracy or detail?" Such risk may range from minor inconvenience to public scandal and the loss of confidence in government.

To be of value for business, legal, accountability and other purposes, records must possess certain essential characteristics. They must be:

- *Accurate/current* – reflecting accurately and in an up-to-date fashion the transactions that they document;
- *complete* – containing not only the content, but also the structural and contextual information necessary to document a transaction;
- *adequate* – sufficient for the purposes for which they are kept;
- *comprehensive* – documenting the complete range of the organization's business for which evidence is required;
- *meaningful* – containing information and / or linkages that ensure the business context in which the record was created and used is apparent;
- *authentic* – enabling proof that they are what they purport to be and that their purported creators did in fact create them;.
- *useable* — identifiable, retrievable, accessible and available when needed;
- *secure* – maintained to prevent unauthorized access, alteration or removal; and
- *compliant* – satisfying the record-keeping requirements arising from the regulatory and accountability environment in which the organization operates.

Documentation standards are in wide use in other jurisdictions. For example, the *Australian Standard* – AS 4390 provides guidance for achieving the above characteristics with regard to specific types of business records and activities, including: oral decisions and commitments; decisions and recommendations; meetings; drafts and versions; precedent cases; individual actions; and records of correspondence. The National Archives of Australia provides related training and assistance within government. For example, "Creating Records – Tips for Commonwealth Officers" is directed to all government staff and provides

"easy-to-follow advice on how and when to create records…that fulfil your role and obligations as a Commonwealth employee [and] provide evidence of decisions and/or processes you have taken". The New South Wales "Standard on Full and Accurate Records" provides similar guidance.

The U.S. National Archives and Records Administration (NARA) has also developed criteria to ensure "adequate and proper documentation" in both paper and electronic environments. Guidelines identify and discuss areas where inadequate documentation is a particular problem, such as in decision making accomplished orally or electronically. NARA also provides guidance to staff on media and formats, recording techniques and technology, "transitory" records and political and personal records.

The Treasury Board/National Archives "Situation Analysis" proposed the development and use of documentation standards, but to date there has been no action. **Effective standards for adequately documenting government decision-making and activities in the Government of Canada should be developed and disseminated and their implementation measured.**

Evaluating Information Management and Assessing its Impacts

To ensure the availability of accurate, complete and reliable information where needed, the effectiveness of government information management activities needs to be audited. Notwithstanding the recordkeeping concerns raised by the Information Commissioner, the Archivist, the Auditor General and others, and by much publicized records-related controversies, information management reviews or assessments have seldom been undertaken in the Government of Canada. Although there are many formal provisions and mechanisms for evaluating the management of other types of assets – finances, facilities and equipment, and human resources – there are no clear or systematic guidelines or requirements for conducting information "audits", whether initiated within departments or imposed by central agencies. In general, little attention has been given to identifying how well the government's information and knowledge resources are managed and used and how they contribute to government objectives and public needs for information and services.

An information management audit can have educational benefits as well. It can help managers and staff understand the nature of information management and identify its benefits. It can help them (and political officials) understand that poor information management is more than just "sloppy paperwork". It can increase recognition that information – like other government resources – is a corporate asset that needs to be managed and used effectively. Most of all, it can draw a fundamental connection between good IM and responsible and responsive government.

The scope and detail of an audit can vary widely. In its most comprehensive form, it would go far beyond a normal "business audit" and comprise a "public interest" audit as well. It could include the following purposes:

- to assess how well the information held by an agency meets the **agency's needs** and supports its goals and objectives;
- to assess how well the information meets **clients' needs**;
- to assess how well the information has improved the **agency's accountability;**
- to assess the relevance, usefulness and effectiveness of the **activities** performed related to creation, collection, storage, use, access and disposal;
- to assess the completeness, accuracy, consistency and reliability of **information holdings** of the agency (and to update its inventory of holdings);
- to assess the compliance of information management with **regulatory** and **legal requirements**;
- to identify **changing information needs** arising, for example, from new business or legislative demands or changed agency objectives, and assess their impact on information management and training within the agency;
- to identify the **costs** of information management in the agency;
- to identify the **operational value** of the information asset in an agency, in terms of its importance to the agency's purpose, and other value (e.g. revenue earned, and cost to replace);
- to recognize **changing technology** and assess its impact on information management within the agency.

Whether or not it is this comprehensive, an information audit can be undertaken internally by departmental staff (with additional external expertise if needed) or by other government agencies in collaboration with the department. A departmental self-audit generally provides the highest degree of management ownership. "*Information Management in the Government of Canada, A Situation Analysis*" proposes development of an information management self-assessment guide. Along these lines, Treasury Board Secretariat has developed a useful checklist for departments to help them address key information management elements of their Government On-Line proposals. It has the advantage of providing a clear operational context and incentive for departments: those departments which adequately address IM issues in their Pathfinder projects are more likely to receive funding.

As TBS has overall authority for guiding and assessing government administrative practices, it should ensure that systematic evaluations of information management infrastructure and activities occur at the department level. These assessments routinely take place in other key resource management areas: human resources, financial management and information technology. TBS should also ensure that all reviews of government programs and functions account for the adequacy of information management policies, standards, practices, and systems that support those activities.

The Office of the Auditor General has the responsibility for undertaking independent audits and reviews of government programs and resource management on behalf of Parliament. It has repeatedly expressed its concern with the lack of proper recordkeeping in departments. It would focus attention on this government-wide issue, were the Auditor General to undertake a review of the adequacy of the government's overall information management infrastructure. The review might assess the quality and value of the infrastructure in terms of the support it provides to decision-making, program delivery and accountability as well as the other challenges and issues presented in this report.

Precedents for information management audits and reviews can be found in a number of other jurisdictions, particularly Australia, the United States and the Netherlands. Typically, they are intended to evaluate performance and compliance in the context of existing accountability frameworks and IM laws, standards and best practices. In the U. S. federal government, the responsibility to "conduct inspections or surveys of records and record management programs and practices" and make related recommendations is specifically assigned to the National Archivist. He or she is authorized to report to Congress (and others) on the results of inspections and provide "estimates of the cost to the Federal government resulting from the failure to implement such recommendations." In New South Wales, Australia, the *Information Management Audit Guideline* provides clear directions for IM audits and promotes a collaborative approach involving program management, audit, data management and recordkeeping expertise. It is recommended that similar guidelines be developed for the Government of Canada. They would be of value both to individual departments as well as to central agencies such as the Auditor General, TBS and the National Archives.

Can an information management audit be effective if the quantifiable benefits (or corresponding costs or penalties) are unclear? Quantifiable benefits and savings may readily be identified for some programs and processes, but in other situations may be intangible or indirect. Qualitatively, benefits lie in greater operational efficiency and effectiveness, stronger accountability and reduced liablity. Incentives to encourage good IM performance also need to be considered, such as increased levels of resources and authority. The extent to which senior managers in government institutions exercise effective stewardship of their institution's information should become a standard part of performance reviews and contracts.

Clearly, the best incentives for an information management review lie with the desire – at both the central and departmental level – to improve programs and services, demonstrate meaningful accountability and generate evidence of the need for appropriate resources.

People and Professions

At the centre of good government are *people* – managers and staff who strive to serve clients and the public well, who work collaboratively with others, who manage their resources effectively and who accept responsibility for their

actions and decisions. People are also at the centre of the government's information management infrastructure. They need to be aware of recordkeeping requirements and best practices, be equipped to implement them through adequate training and tools, and be recognized and rewarded when they have done so.

The TBS "*Situation Analysis,*" however, notes that, among other problems in the current IM environment, public servants often: lack awareness of their role as stewards of information; are not aware of the existing policy and legal structure relating to information management; do not appreciate the value and relevance of information created in the past; and lack sufficient opportunities for learning information management skills.

Traditionally, training in managing information has focused on records management (RM) personnel and has been focused on operational standards and practices. As the number of RM staff declines along with centralized records programs, more training is needed for the vast majority of public servants who are now their own records managers. They need to know how to manage their business records and data in traditional and electronic forms (e.g., the deluge of electronic mail). At present, however, few get even basic training. Even so, "records-management" skills are not enough. Managers and staff must be equipped to deal with other dimensions of information management, such as:

- knowing what information is needed to support the development, delivery and evaluation of policies, programs and services (*information planning*);
- determining whether it exists, where it is available and how it can be accessed, within the organization or externally (*information searching and retrieval*);
- understanding how to assess information in terms of relevancy, accuracy, authenticity, authoritativeness and other characteristics (*information evaluation*);
- knowing how to document activities, decisions and transactions adequately for business, legal and accountability needs (*documentation standards*, discussed earlier);
- learning how to capture and share the knowledge of co-workers (gained through personal experience) to enhance collaborative problem solving and the application of this knowledge in new and innovative ways (*knowledge management*).

Training and orientation programs should be established to strengthen awareness, by public servants at all levels, of their responsibilities for government information and to provide the necessary skills for the effective development, management and use of information and knowledge. Models in other jurisdictions include innovative training materials such as the *Insider's Guide to Using Information in Government* (New York State).

Another important and longer term need is to develop the professional staff who will be needed to support the emerging information and technology management environment. At present, largely discrete, fragmented and isolated professions and perspectives predominate. As examples, IT

specialists often define IM as "data management", data security and other transaction-centred functions related to short-term systems management objectives. The "records management" community has largely been associated with paper records and many RM staff have limited impact on, or expertise regarding, electronic information systems. These and other information-centred professions are beginning to converge and change. Current work in many jurisdictions, on identifying the information and knowledge management core competencies that will be needed in the future, reflects this trend. In time, all good managers will be *knowledge managers*.

To reach this goal, all those concerned with the availability, accessibility and integrity of government information – program and policy staff, IT systems specialists, records managers, access and privacy administrators, auditors, lawyers, librarians and archivists – must collaborate much more closely than is now the case.

The convergence of information management and information technology is reflected in the emerging governance arrangements for information and knowledge management. The trend in Canadian and international jurisdictions is to associate these responsibilities with a senior executive in charge of both information management and information technology. As an example, the responsibilities of Chief Information Officers (CIOs) in U. S. government departments usually include:

- managing information resources to increase program efficiency and effectiveness;
- improving the integrity, quality and utility of information in the agency;
- developing a strategic information resources management plan;
- ensuring that information management needs are integrated with organizational planning, program, budget, financial management, human resources management and information technology decisions.

Whether part of a CIO's responsibilities or those of another official, the overall responsibility for information management should be assigned at the highest level possible in the institution and closely aligned with the strategic management of information technology. At lower levels as well, responsibility for information management should be clearly assigned across the organization.

Leadership and Coordination

The increasing importance of good information management also calls for much greater collaboration and coordination among central departments and agencies of the Government of Canada. These bodies include:

- the **Office of the Chief Information Officer**, with its leadership role for information management and information technology (and primary responsibility for implementing the "Situation Analysis" report);
- the **Clerk of the Privy Council**, who sets the standards for professionalism and accountability in the public service;

- the **National Archives**, with its legislated responsibility to "facilitate the management of [government] records" and its expertise and authority in recordkeeping standards and practices and information preservation;
- the **Information** and **Privacy Commissioners**, with their respective oversight roles for information access and personal privacy;
- the **Auditor General**, with his concern for the efficient and effective management of government resources;
- the **National Library**, with its responsibility for Canada's published heritage; and
- the **Department of Justice**, with its responsibilities for the legal framework for information and evidence.

Each of these bodies has an important role to play in developing and supporting a strong information management infrastructure for the Government of Canada. Their corporate functions and strategic interests depend on how well they collaborate to achieve this goal. The relationship between Treasury Board Secretariat and the National Archives is particularly critical: the operational priorities of TBS need to be balanced with the National Archives' present and potential contribution to the overall integrity of government recordkeeping.

All of the above agencies (and collaborative bodies such as TIMS, the Information Management Board and the IM Forum) must help to ensure the availability, accessibility and quality of government information; determine how best to capture and share knowledge within the public service; and maximize the positive impact of new technologies on democratic processes and institutions. For his part, the Information Commissioner of Canada will continue to encourage, and make a constructive contribution to, the attainment of these goals.

The Role of Parliament

Ultimately, leadership responsibility rests with Parliament in its many roles and dimensions. Parliament has the opportunity and authority to promote good recordkeeping and provide strong oversight of information management. It can deal with information issues and concerns through a variety of means, including:

- strengthening the legal framework for information management and program accountability as described in this report;
- considering ways to improve departmental reporting and accountability (such as those identified by the Auditor General and the Standing Committee on Procedure and House Affairs);
- questioning departmental information policies and practices through standing committees (such as Public Accounts) and special purpose committees;

- receiving and considering reports on government recordkeeping by the Information Commissioner, the Privacy Commissioner, Treasury Board and others; and establishing mechanisms to ensure that IM issues are dealt with in a coordinated and focused way;
- supporting the Auditor General in undertaking an independent review of the government's information management infrastructure;
- fully and fairly considering questions put to the Government by Members regarding accountability issues and the integrity of government recordkeeping.

Specific opportunities for Parliament to address information issues are abundant. Dependent as they are on good information management, initiatives such as Government On-Line and departmental requests for related spending, provide a good opportunity for Parliament to demonstrate leadership. In reviewing those plans, Parliament should require government institutions to report on the extent to which they have addressed information management issues.

Many of these opportunities remain untapped amid the work pressures, political priorities and adversarial environment of Parliament. The desire of parliamentarians to scrutinize performance is often at odds with the tendency of departments to simplify reporting and focus on the "good news".

Beyond these opportunities, nothing less than Parliament's attention will suffice to deal with the larger concerns expressed in this report about government openness, accountability and organizational culture. The interest and involvement of Parliament are essential in recognizing and preparing for the broad and as yet unforeseen impacts of "electronic government" and "digital democracy." In this regard, the hard work and keen interest of MP Reg Alcock, stands out. His thoughtful contributions have enriched the "thinking" in the area of information policy for electronic governance. An active role by more Parliamentarians in these matters is essential if the principle of accountable government is to remain effective in the rapidly changing economic, social and technological environment.

CHAPTER III
BLUEPRINT FOR REFORM

This is a good law, a very good law. It is, nevertheless, long past time to mend its five major weaknesses and to make the numerous "fine-tuning" changes necessary to keep this Act current with new forms of governance and technology. Admittedly, it is a "mugs game" to categorize some changes as more important than others. In the end, it will be the package of reforms as a whole which must bear scrutiny. Part A of this chapter sets out in detail the five changes to the Act which the Information Commissioner considers essential to addressing its major weaknesses. They are:

1. transforming the Cabinet confidence exclusion (now section 69) into a more focussed exemption subject to independent review;

2. closing the gaps in the Act's coverage by i) establishing a description of the types of institutions which should be covered by the Act and requiring that all such institutions be included in the schedule of institutions to which the Act applies; and (ii) clarifying the status of records held in the offices of heads of institutions;

3. ending "secrecy creep" by abolishing section 24. That section makes it mandatory to refuse disclosure of any record which any other statute, listed in Schedule II of the Act, requires to be kept confidential;

4. adding incentives and penalties for failure to respect response deadlines; and

5. providing a legislatively defined mandate for Access to Information Coordinators.

Part B of this chapter (pages 65 to 78) contains the Commissioner's recommendations for the less pressing, yet needed, changes to modernize the Act.

PART A – MAJOR REFORMS

i) Reform of Cabinet Confidences

Records described by section 69 of the Act as being confidences of the Queen's Privy Council—hereafter referred to as Cabinet confidences—are excluded from the coverage of the *Access to Information Act* for a period of 20 years from the date of their creation. Section 69 contains a list of seven types of records which constitute Cabinet confidences; it does not, however, contain a definition of what interests are intended to be protected by this exclusion.

Any record which the government considers to be a Cabinet confidence is withheld from an access requester in the same manner as if the record had been withheld under one of the Act's "exemption" provisions (sections 13-26). Requesters are told, at the time of denial of access, of their right to complain to the Information Commissioner about the denial.

The distinction between an "excluded" record and an "exempted" record becomes significant during the process of investigating and reviewing the government's decision to deny access. When the record has been withheld under section 69, because it is "excluded" from the right of access, neither the Information Commissioner nor the Federal Court of Canada may examine the withheld record to determine whether or not it is, in fact, a Cabinet confidence.

This restriction on the Commissioner's and Court's power to examine excluded records is accomplished by two provisions of the Act—sections 36(2) and 46—which state that the power to independently examine records is limited to records "to which this Act applies".

There is, thus, no meaningful, independent review of government decisions to refuse disclosure of any records it considers to be cabinet confidences. Often called the Act's "Mack Truck" clause, this special treatment for Cabinet confidences is entirely at odds with the purpose clause of the Act, set out in section 2. In particular, it infringes the principle that "exceptions to the right of access should be limited and specific" and it infringes the principle that "decisions on the disclosure of government information should be reviewed independently of government."

A recently decided case (discussed in detail in Chapter VI at pages 107 to 109 illustrates in graphic terms how open to abuse is the section 69 exclusion. In that case, the government endeavoured to remove from public access the content of discussion papers wherein background explanations, analysis of problems and policy options are presented to Cabinet. Section 69 requires that this class of cabinet confidences shall become subject to the right of access (i.e. no longer excluded) once the Cabinet decision to which discussion papers relate has been made public, or, if not made public, when four years have passed since the decision.

The Information Commissioner presented evidence to the court showing that the government—almost immediately after the *Access to Information Act* was passed—stopped presenting discussion papers to Cabinet. Instead, it put the background, analysis and options material in the "analysis section" of the Memorandum to Cabinet. The government argued that since this analysis section is not called a "discussion paper", its decision to exclude the material it contains, as a Cabinet confidence, cannot be questioned by the Commissioner or the Federal Court. To emphasize the point, the Clerk of the Privy Council, certified, pursuant to section 39 of the *Canada Evidence Act*, that the withheld records are Cabinet confidences and asserted that the certificate effectively ended the matter.

Justice Blanchard of the Federal Court, Trial Division chafed at the government's view that it has an entirely free hand to roll any material it wishes behind the cabinet confidence veil of secrecy. He concludes:

> "I support the findings of the Information Commissioner. Parliament intended that a certain type of information be released, and in my view, regardless of the title

given to the information. If a document contains information the purpose of which is to provide background explanations, analysis of problems and policy options, Parliament meant for this information to be disclosed. This is the only interpretation of paragraphs 69(1)(b) and 69(3)(b) of the *Access to Information Act*, and paragraphs 39(2)(b) and 39(4)(b) of the *Canada Evidence Act*, which gives those sections any meaning. Understanding the meaning of "discussion paper" as a paper produced by a department as part of a planned communication strategy, is not provided for in the *Access to Information Act*. Transforming the "discussion paper" into the "analysis" section of the current Memorandum to Cabinet effectively limits access to background explanations, analysis of problems or policy options provided for in the *Access to Information Act*. Such a change to the Cabinet Paper System could be viewed as an attempt to circumvent the will of Parliament." (**Information Commissioner** v. **Minister of Environment**, Federal Court, Trial Division, 2001 FCT 277 at p. 26)

Over the 18 years since the *Access to Information Act* came into force, numerous instances have arisen where the government has certified information to be a Cabinet confidence when the information clearly does not so qualify. Occasionally, the Information Commissioner sees the information which has been so certified because the certification comes as a last resort after all efforts to justify an exemption have failed. In one current case, the Clerk of the Privy Council has certified as a Cabinet confidence all references in other records to the fact that a minister, acting in the capacity of member of Parliament, wrote to another minister on a matter of public concern.

The Commissioner expressed the view that the withheld information could not properly be considered "records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy." Before invoking this provision to exclude information, the Commissioner argued, the content of the discussions or communications must be at risk. The Clerk refused to reconsider, claiming that his decision to label information as a "Cabinet confidence" is not subject to independent review.

And, too, there have been cases – by far the rarer - where the Clerk has been prepared to remove a certification after receiving representations from the Commissioner. The point of all this being, that, in the absence of independent review, the cabinet confidence exclusion is likely to be applied to a broader range of records than intended by Parliament. As Mr. Justice Evans said in **Canadian Council of Christian Charities** v. **Minister of Finance** (1999) YFC245 at 255: "Heads of government institutions are apt to equate the public interest with the reasons for not disclosing information, and thus to interpret and apply the Act in a manner that gives maximum protection from disclosure for information in their possession."

In its report of the results of its review of the first three years of operation of the *Access to Information Act*, the Standing Committee on Justice and Solicitor General said:

"The Committee is strongly of the view that the absolute exclusion of Cabinet confidences from the ambit of the *Access to Information Act* and the *Privacy Act* cannot be justified. The Committee heard more testimony on the need to reform this provision than on any other issue. The exclusion of Cabinet records has undermined the credibility of the *Access to Information Act* and the *Privacy Act*. The then Minister of Justice, the Honourable John Crosbie testified before the committee as follows:

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

The Committee agrees."

(**Open and Shut: Enhancing the Right to Know and the Right to Privacy** March 1987, p. 31)

The litmus test of whether or not the government is serious about reforming the *Access to Information Act* will be its willingness to rectify what every independent analyst considers to be the law's greatest weakness—the exclusion of Cabinet confidences. By no means does reform mean abandonment of a degree of secrecy necessary to preserve the important convention of collective ministerial responsibility and the need to foster frank exchanges among ministers.

All independent analysts agree that records should not be disclosed if their content would reveal the substance of Cabinet deliberations. What is required is a happy medium. The Justice Committee Report of 1987 put it this way:

> "The Committee recognizes that there must be an exemption protecting certain Cabinet records; to a substantial degree, our Parliamentry system of government is predicated upon the free and frank discussion of matters of state behind closed doors. Nevertheless, the Committee believes that a suitably worded exemption - **not an exclusion** - would provide ample protection for Cabinet secrecy. In recognition of the special role that the Cabinet plays in our parliamentary system, no injury test should apply to information of this category." (**Open and Shut**, p. 31)

The Information Commissioner, too, advocates the transformation ot the Cabinet confidence exclusion into an exemption, and supports narrowing the scope of Cabinet secrecy by confining it to information which would reveal the deliberations of Cabinet. The detailed proposals in this regard are as follows:

(a) Exemption or exclusion

The current federal approach to exclude Cabinet confidences from access legislation is out of step with the purpose of the Act and with the approach taken in provincial jurisdictions.

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

(b) Mandatory or discretionary exemption

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

(c) Injury test

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

(d) Nature of class test

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

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

- it focuses the exemption and narrows it to the specific interest which requires protection. It eliminates the need for lengthy definitions of types of records which may qualify for the exemption and illustrations of exceptions to general rules. In other words, it is simpler, yet protects the

vast majority of records, currently defined in the PCO policy on *Release of confidences of the Queen's Privy Council for Canada*, after its various exceptions are taken into account;

- it is more generic in character. As a result, would not suffer damage if PCO decides to alter the Cabinet papers process and the nature and types of records which are created;
- it does eliminate the need for government institutions to review and to sever from documents all simple references to Cabinet processes (e.g., RD numbers and TB numbers as is now the case). Such disparate references would only have to be removed when their disclosure would actually reveal the *substance* of Cabinet deliberations.

Consequently, the test for a Cabinet confidences exemption should be that the disclosure of a record would reveal the substance of deliberations of Cabinet.

(e) Definition of Cabinet

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

There is, thus, no need to change the current definition of the term "Council" in the *Access to Information Act*, which includes the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(f) Coverage of exemption

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

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

- agendas, formal and informal minutes of Cabinet and Cabinet committees and records of decision;
- Cabinet memoranda or submissions (including drafts) and supporting materials;
- draft legislation and regulations;
- communications among ministers relating to matters before Cabinet or which are to be brought before Cabinet (including draft documents);
- memoranda by Cabinet officials for the purpose of providing advice to Cabinet (including draft documents);
- briefing materials prepared for Ministers to allow them to take part in Cabinet discussions (including draft documents); and

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

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

Thus, the exemption provision for Cabinet confidences should provide a non-inclusive, illustrative list of generic types of records which would qualify for protection.

The list of examples should be structured as follows:

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

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

(iii) a record containing background explanations, analysis of problems or policy options for consideration by Council in making decisions;

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

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

(vi) draft legislation regulations; and

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

(g) Splitting the protection of Cabinet confidences

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

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

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

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

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

(h) Exceptions to Cabinet confidences exemption

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

(i) Time limits

Because of the class nature of all protection for Cabinet confidences, all other access statutes, except the Australian FOI Act, include a limit governing the period of time during which all or part of a record can be considered a Cabinet confidence. The original standard was 20 years (federal and Ontario). The federal Standing Committee recommended that the limit be reduced to 15 years, the length of time of a minimum of three Parliaments. This standard has now been adopted in British Columbia and Alberta.

The time limit for all or part of a record to be considered a Cabinet confidence should be reduced from 20 to 15 years.

(j) Background explanations, analysis of problems and policy options

In paragraph 69(3)(b) of the Act, Parliament directs that background explanations, analysis of problems and policy options presented to Cabinet should be subject to the right of access after the decisions to which they relate have been made public or, otherwise, after four years. Parliament's will in this regard was, in effect, thwarted in the intervening years, as discussed previously.

This exception for background explanations, analysis of problems and policy options is crucial in opening up the information which forms the general basis on which Cabinet acted, without exposing its deliberations. It is essential to promoting improved government accountability and helping to assure that officials provide to Cabinet the best information on which to base decisions — since this, after all, will become open to review and comment.

Given the history of resistance by governments to disclosing such information, the Act should be amended to make it crystal clear that background explanations, analysis of problems and policy options are subject to the right of access.

(k) Summary of decision

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

(l) Cabinet as appeal body

From time to time, Cabinet or a Cabinet committee (e.g., Treasury Board) may serve as an appeal body, under a specific Act. It can be argued that, in such instances, the record of the decision, but not the advice and recommendations supporting it, should be publicly available. Often such decisions are communicated to the public. But there needs to be a general rule that such decisions are not to be treated as Cabinet confidences. Such a provision is made in both the British Columbia and Alberta FOI legislation.

(m) Disclosure with consent of Cabinet

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

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

confidences, it would seem appropriate to include a paragraph in the exceptions part of any proposed Cabinet confidences exemption which recognizes the process.

(n) Disclosure in the public interest

Disclosure in the public interest is a large and important access to information issue in and of its own right. It has become a feature of most modern access legislation in Canada and will have to be seriously considered in any reform of federal access legislation. Ontario was the first to include a more general "public interest override" in its freedom of information legislation. This override generally states that, despite any other provision of the Act, the head of a government institution must, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so. The disclosure requirement is extended to Cabinet confidences but the public interest is restricted to a record that reveals a grave environmental, health or safety hazard to the public. The Ontario legislation also provides for a specific public interest override of several of its exemption provisions but not for Cabinet confidences.

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

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

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

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

(o) Restrictions on examination and review of Cabinet confidences

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

The nature of any review mechanism is dependent, however, on the overall review structure under a reformed *Access to Information Act*. If it were to remain unchanged, with the Commissioner carrying out an ombudsman's role for refusals of access, then the recommendations of the Standing Committee must be dealt with.

The Committee recommended that the refusal of access to Cabinet confidences should not be referred to the Information Commissioner but rather should be reviewed directly by the Associate Chief Justice of the Federal Court. Such a procedure would be exceedingly confrontational and expensive, as well as place a very heavy workload on the Associate Chief Justice. There would seem to be merit in empowering the Commissioner to investigate this type of refusal of access as is done in all other cases. The Information Commissioner should be bound, however, to restrict his or her delegation of powers of investigation, as is now the case for specific provisions relating to international affairs and defence under subsection 59(2) of the *Access to Information Act*. If an appeal is made to the Federal Court, it should be heard by the Associate Chief Justice as is also required under section 52 for matters of international affairs and defence.

(p) Suggested exemption provision for Cabinet confidences

An amended exemption for Cabinet confidences reflecting the recommendations in this chapter, would read as follows:

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

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

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

(c) a record containing background information, analysis of problems or policy options presented to Council for consideration in making decisions;

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

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

(f) draft policy or regulations; and

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

2. Subsection (1) does not apply to:

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

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

(c) a record or part of a record, which contains background explanations, analyses of problems or policy options, submitted, or prepared for submission, to Council or its committees for their consideration in making a decision if:

(i) the decision has been made public; or

(ii) four years or more have passed since the decision was made or considered;

(d) a record attached to a Cabinet submission which was not brought into existence for the purpose of submission for consideration by Cabinet or one of its committees;

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

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

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

ii) Plugging Gaps in the Act's Coverage

The *Access to Information Act* applies only to institutions listed in Schedule I of the Act. There is no general principle dictating which institutions must be added to the schedule. The Cabinet has the authority to add to, but not subtract from, the schedule but it is not obliged to make additions to the schedule. This régime has resulted in an obsolete Schedule I wherein are listed institutions which no longer exist and from which are missing some institutions which are normally understood to be part of the federal governance apparatus.

The better approach would be to articulate in the law the criteria for inclusion in the Act's Schedule I and require Cabinet to add any qualified institution to the Schedule. Too much uncertainty would be introduced into the system by doing away with the schedule altogether. Institutions, especially new forms of enterprises engaged in public functions, need to know with certainty whether or not they

are covered by the law; they deserve an avenue by which to challenge inclusion and the public deserves an avenue to challenge Cabinet's failure to include an institution in the Act's schedule.

The mechanism which is recommended is this: Cabinet should be placed under a mandatory obligation to add qualified institutions to Schedule I of the Act. Any person (including legal person) should have the right to complain to the Information Commissioner, with a right of subsequent review to the Federal Court, about the presence or absence of an institution on the Act's Schedule I. As at present, the Commissioner should have authority to recommend addition to or removal from the Schedule and the Federal Court, after a de novo review, should have authority to order that an institution be added to or removed from the Schedule.

Professor Alasdair Roberts, of Queen's University, has written thoughtfully about how freedom of information laws, traditionally designed to respect the public sector / private sector split, are becoming less and less effective. He reports that there is little consensus on how to deal with this problem; a variety of approaches have been adopted in jurisdictions with freedom of information laws. Here are some of the options:

- any organization would be covered that undertakes important public functions, whether it is publicly or privately owned;
- any organization would be covered which exercises "functions of a public nature" or which provides under contract with a public authority "any service whose provision is a function of that authority";
- any organization would be covered whose activities raise the prospect of an abuse of power; and
- any organization would be covered if failure to do so would have an adverse effect on the fundamental interests of citizens.

The clear challenge for Canada is to find criteria for determining coverage of the Act which are as objective as possible so as to make them clearly understood and facilitate their application in specific cases. **To that end, it is recommended that any institution, body, office or other legal entity be added to Schedule I of the *Access to Information Act*** if it meets one or more of the following six conditions:

1) it is funded in whole or in part from Parliamentary appropriations or is an administrative component of the institution of Parliament;
2) it or its parent is owned (wholly or majority interest) by the Government of Canada;
3) it is listed in Schedule I, I.1, II or III of the *Financial Administration Act;*
4) it or its parent is directed or managed by one or more persons appointed pursuant to federal statute;
5) it performs functions or provides services pursuant to federal statute or regulation; or

6) it performs functions or provides services in an area of federal jurisdiction which are essential in the public interest as it relates to health, safety, protection of the environment or economic security.

It is, of course, not possible to predict with certainty the forms of institutional arrangements which will arise in future, through which functions of governance will be exercised. In recent years, air traffic control services have been moved from a government department, where they were subject to the right of access, to a private corporation, where they are not covered. In future years, there may be changes in the way governments manage corrections, drug approvals, grants and contributions, policing, emergency response measures—the list goes on. Accountability through transparency should not be lost merely because the modality of service provision has changed. The proposed criteria for inclusion are intended to be objective, yet flexible enough to be useful guides for the future.

Under the above-described criteria for inclusion, examples of institutions not now listed in the Act's Schedule I which would be added, include:

The House of Commons and its components

The Senate and its components

The Library of Parliament

The Chief Electoral Officer

The Information Commissioner

The Privacy Commissioner

The Commissioner of Official Languages

The Auditor General

The Canadian Broadcasting Corporation

Canada Post Corporation

Canadian National Railways

Atomic Energy of Canada Limited

Navcan

The Canadian Blood Service

The Canadian Wheat Board

The St. Lawrence Seaway Corporation

The Canada Pension Plan Investment Board

The Export Development Corporation

It is important to note that the criteria set out above would also capture offices of MPs and senators as well as the Supreme Court, Federal Court and Tax Court. In its 1987 report, the Justice Committee recommended that these bodies be explicitly excluded from the coverage of the Act. Former Information Commissioner, John Grace, did not recommend coverage of these bodies in the proposals for reform he tabled in Parliament in 1994.

There is wisdom in the view that the judicial branch of government, which must adjudicate complaints under the *Access to Information Act* and make binding orders thereon (unlike the Commissioner who is called on to investigate and recommend), should not itself be subject to the Act's requirements, nor to the investigative jurisdiction of the Information Commissioner. More importantly, by

convention and constitution, court proceedings are open to the public to a much greater degree than are the activities of other institutions of governance.

As well, there is wisdom in the view that the offices of MPs and Senators should not be covered by the law. Their role in governance is mediated through the institutions of party and Parliament. Their decisions and actions do not cry out for accountability in the same way as do those of government ministers or the various institutions of Parliament of which individual members are part.

Consequently, it is recommended that the Act include a specific exclusion from its coverage for the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada and for the offices of members of Parliament and Senators.

Two further requirements will be necessary to prevent records from "leaking" out of institutions covered by the Act into those which are not. First, the most common way this occurs is for an institution which is covered to contract out a particular function (for example an harassment investigation or a managerial review or a strategic plan) and to provide that all records relevant to the contracted activity (except, of course, the deliverable) will be kept in the possession of the contractor.

To counteract this practice, the *Access to Information Act* should deem that all contracts entered into by scheduled institutions contain a clause retaining control over all records generated pursuant to service contracts.

Second, institutions have sought to limit the scope of access by arguing that records held in Ministers' offices or in the office of the Prime Minister are not subject to the right of access. As of this writing there is litigation in the Federal Court wherein the Crown is asserting this restrictive interpretation of the Act. The Act should be amended to end the uncertainty by making it clear that the geography of where a record is held is not determinative of whether or not the record is subject to the right of access. **In particular, the right of access in s. 4 should explicitly state that it includes any records held in the offices of Ministers and the Prime Minister which relate to matters falling within the Ministers' or Prime Minister's duties as heads of the departments over which they preside.**

iii) Slipping away below radar – Section 24

Former Information Commissioner, John Grace, called section 24 of the Act the "nasty little secret of our access legislation" (1993-94 Annual Report at pp. 31-32). By that description, he was referring to the fact that section 24 allows the government to keep information secret even when there may be no reasonable justification for secrecy. He noted that even confidences of the Queen's Privy Council receive absolute protection for only 20 years. Yet records covered by section 24 are accorded mandatory secrecy forever. The section reads as follows:

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

In order to add or delete provisions from Schedule II, the Schedule must be amended by Parliament. This whittling away of the right of access occurs largely unnoticed in the back pages of other legislation as a "consequential amendment" to the *Access to Information Act*.

Since section 24 is a mandatory exemption and one which does not require a reasonable likelihood of injury before being invoked, Parliament required that its use should be carefully monitored. For that reason, subsection 24(2) requires that each statute contained in Schedule II be reviewed by Parliament at the same time as the general review prescribed by subsection 75(2). This review was carried out in 1986 by the Justice and Solicitor General Committee.

In its report of June 1, 1986, the Committee noted that the spirit of the *Access to Information Act* was articulated in subsection 2(1) which provides as follows:

> "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 exceptions 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."

The Committee concluded that two of the three principles set out in this clause are violated to some degree by the existence of section 24. First, it said, to the extent that many of the statutory provisions in Schedule II contain a broad discretion to disclose records yet fall within the mandatory prohibition in section 24, the exception to the right of access cannot be termed "limited and specific". Second, the Committee also noted that since the scope of the Commissioner's review of government decisions to withhold records under this exemption is limited simply to a determination of whether the disclosure is subject to some other statutory restriction, there can hardly be a full independent review.

After reviewing the history and purpose of section 24, the nature of the information listed in Schedule II and hearing witnesses in the matter, the Committee concluded as follows:

> "We have concluded that, in general, it is not necessary to include Schedule II in the Act. We are of the view that in every instance, the type of information safeguarded in an enumerated provision would be adequately protected by one or more of the exemptions already contained in the *Access to Information Act*." (Open and Shut, p. 116)

The Committee demured, with respect to three statutes, in the following terms:

> "Despite our view that the interests protected by the Schedule II provisions could adequately be protected by other existing exemptions in the *Access to Information Act*, we are persuaded

that there should be three exceptions to the conclusion. The sections of the *Income Tax Act*, the *Statistics Act* and the *Corporations and Labour Unions Returns* Act which are currently listed in the Schedule deal with income tax records and information supplied by individuals, corporations and labour unions for statistical purposes. Even though the exemptions in the *Access to Information Act* afford adequate protection for these kinds of information, the Committee agrees that it is vital for agencies such as Statistics Canada to be able to assure those persons supplying data that absolute confidentiality will be forthcoming. A similar case has been made for income tax information."

Consequently, the Committee recommended that section 24 and Schedule II be repealed and replaced with new provisions which would incorporate and continue to protect the special interests contained in the *Income Tax Act*, the *Statistics Act* and the *Corporations and Labour Unions Returns Act*. It also recommended that the Department of Justice undertake an extensive review of the remaining statutory restrictions in Schedule II and amend their parent acts in a manner consistent with the *Access to Information Act*.

It would seem that the Committee's wise advice has fallen on deaf ears, as the statistics illustrate. When the *Access to Information Act* was proclaimed in 1983, the 33 statutes listed in Schedule II contained, among them, some 40 separate provisions restricting disclosure in some way. Three years later, at the time of the Parliamentary Review in June of 1986, the number had grown to 38 statutes incorporating 47 specific confidentiality provisions. As of December 31, 2000, that list has grown to 52 statutes, with 66 particular provisions which affect the confidentiality of records.

These "by the back door" derogations from access rights are as troubling to the Commissioner as they were to the Justice Committee. When Parliament adopted the right of access to government records it included a very important phrase: "notwithstanding any other Act of Parliament" (section 4). The continuing growth of Schedule II now threatens to erase the vital constraint on creeping secrecy which those six words originally gave.

There being no doubt that the Act's existing exemptions afford adequate protection for all legitimate secrets, it is time to abolish section 24.

iv) Strong Medicine for Delays

Since the beginning, users of the *Access to Information Act* have complained about chronic and long delays in receiving answers. This despite the fact that Parliament explicitly stated, in subsection 10(3), the principle that access delayed is access denied. That provision states:

> "Where the head of a government institution fails to give access to a record requested under this Act or a part thereof within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access."

There is no penalty in the Act for failure to respect the mandatory legal obligation to respond to an access request within 30 days (or within a validly extended response period). Consequently, many departments adopted early on—and to this day—a "we'll do our best" response period.

Complaints about delay – even after 17 years of trying – comprise some 50 percent of the complaints made to the Information Commissioner. Several major recipients of access requests consistently get failing grades on the Commissioner' s delay "report cards". (For details on this year's report cards and the current delay situation, see Chapter IV, pages 85 to 91). This situation is the Act's "festering, silent scandal"—to borrow a phrase from a former Commissioner.

In its 1987 report, the Standing Committee on Justice and Solicitor General recommended that the Treasury Board, in conjunction with the Public Service Commission, investigate methods for enhancing timely compliance with the *Access to Information Act*. The problem, even then, was of such concern to the Committee that it asked for the investigation to commence immediately and that its results be submitted to the Justice Committee within one year.

The Treasury Board ignored the recommendation; did not investigate methods to solve the problem; did not report back to the Committee. To this day, no such investigation has been undertaken by the Treasury Board —at least to the knowledge of this Commissioner. One must bear in mind that it is the President of the Treasury Board who is designated as the Minister responsible for the good administration of the Act across government.

It is almost unprecedented to be in a position of seeking ways to "encourage" public officials to obey mandatory legal obligations. Just think about the implications. Yet that is where the Justice Committee found itself in 1987 and where we find ourselves in 2001.

Except for its recommendation that Treasury Board study the matter, the only other delay-related recommendation made by the Committee was to make a statutory connection between the timeliness of answers and the collection of fees. In particular, the Committee recommended that the Information Commissioner be given the power to make an order waiving all access fees in cases of unjustified delay.

In his 1993-94 recommendations for reform, former Information Commissioner Grace endorsed the view that the right to collect fees should be lost when answers are unjustifiably delayed. He entered this caveat: "This sanction, admittedly, would be largely symbolic because large fees are seldom collected from requesters. But it is a start. There is no reason requesters should pay anything for poor service." Dr. Grace went on to propose a more "mind-focussing" sanction, being to prohibit government from relying upon certain of the Act's exemption provisions in late responses. In that proposal, the government could only invoke exemptions 13, 17, 19 and 20 to withheld records in late responses. Those provisions protect confidential foreign

or provincial records, personal safety and privacy and confidential, third-party information.

There is some question as to whether this proposal would be workable. Several provisions which government would be precluded from invoking contain injury tests and, if those tests are met, surely the information merits protection even if the answer is late. The idea behind this "sanction" is a good one. It would have every bit as much force, without risking highly damaging disclosure, if it were restricted to loss of the ability to invoke sections 21 (internal advice) and 23 (solicitor-client) in late responses. These two sections are discretionary and protect the internal, advice-giving process. A sanction so limited would pinch where the pinch is needed.

Consequently it is recommended that the Act be amended to preclude reliance upon sections 21 and 23 in late responses.

This "strong medicine" for late responses is only justifiable if government institutions are given a reasonable response-time régime to work within. In 1991-2000, government institutions were able to meet that deadline in 63 percent of cases. The Standing Committee on Justice and Solicitor General recommended, in 1987, that the response period be shortened to 20 days. However, access requests are becoming increasingly complex and sophisticated, and volumes are up significantly over 1987 levels. There appears to be no system-wide reason for increasing—or decreasing—the current 30-day response deadline.

However, concerns have been raised with respect to the extension of time provisions in the Act. Requesters frequently choose to submit a large number of individual requests on the same subject (perhaps broken up by time periods) rather than one comprehensive request. They do so, despite the additional application fees involved, in order to take advantage of the five hours of search time included with each access request.

This approach does not, however, reduce the department's burden of work to respond, yet it may restrict the department's legal entitlement to avail itself of an extension of time. For example, no single request in the group may involve a large volume of records, hence, no extension pursuant to paragraph 9(1)(a) of the Act would be permitted. Whereas, if the group of requests were considered as a unit, the "large volume" criteria might be met.

This defect in the extension régime should be remedied by permitting a government institution, for the purposes of paragraph 9(1)(a) of the Act, to group all requests received from a requester (within 30 days of receipt of the initial request) on the same subject matter.

When grouping has been employed for the purposes of paragraph 9(1)(a), it is appropriate that the requester be so informed in the extension notice.

While the extension provision deserves broadening in the manner set out above, its open-ended nature should also be addressed. As it stands, when extensions are permitted, they may be taken for a duration of time which is

"reasonable—having regard to the circumstances." (s. 9(1)) When one considers that a complaint to the Information Commissioner must be made within one year from the date the request is received, the right of complaint may be effectively denied through the use of the extension power. This defect, too, calls for a remedy.

It is recommended that section 9 be amended to provide that no extension of time may exceed one year without the approval of the Information Commissioner. Further, it is recommended that section 31 be amended, to give the Commissioner discretion to extend the one-year period within which a complaint must be made.

There is one further measure which would assist Parliament and the public in identifying the government institutions which fail to respect their response-time obligations. Section 72 of the Act requires the head of every government institution to report to Parliament every year on the administration of the *Access to Information Act* within his or her institution. Those reports are permanently referred to the Standing Committee on Justice and Human Rights. The Act is silent on what those reports should contain. Treasury Board has issued guidelines as to what should be contained in such reports but it does not ask institutions to grade their own performance in meeting response deadlines.

It is recommended, therefore, that section 72 be amended to require government institutions to report each year the percentage of access requests received which were in "deemed refusal" at the time of the response and to provide an explanation of the reasons for any substandard performance. In other words, by statute, all institutions should be required to provide Parliament with a "report card" similar to that which the Commissioner has provided on selected institutions over the past several years.

v) Recognizing, Fostering and Protecting the Coordinators

Since the Act's beginning, every government institution has managed the intake, processing, and responding to access (and privacy) requests through an official known as the Access to Information and Privacy (ATIP) Coordinator. That is, however, where the uniformity ends. Some coordinators are full-time, some part-time; some are senior, some are junior; some are empowered to apply exemptions, some merely prepare the files for others to decide; some have direct access to deputy ministers, some do not; some are encouraged to be the "information rights" conscience for their institution, some are encouraged to apply the access law in the most restrictive fashion.

All ATIP coordinators, on occasion, experience an uncomfortable conflict between their responsibilities under the *Access to Information Act* and their career prospects within their institution. This troubling reality was recognized by the Justice Committee during its three-year review. Treasury Board, too, remarked on this difficulty after reviewing responses given by coordinators in 1986 to a survey on their roles and job satisfaction. The study found:

> "In general, coordinators felt that there is a need for senior government officials to come to grips with the reality of Access and Privacy legisaltion, and to recognize that this represents a fundamental change in the conduct of public affairs affecting all stages in the treatment of government information, from creation to disposal, with implications well beyond the administrative processing of requests." (Review of Access to Information and Privacy Coordination in Government Institutions, 1986 Treasury Board Secretariat)

Despite the central, indispensible role of ATIP coordinators in the system—transforming black letter rights into a real service—they do not even get a mention in the *Access to Information Act*. In paragraph 5(1)(d) of the Act, the President of Treasury Board is required to publish a catalogue of institutions covered by the Act together with a description of their information holdings. In that catalogue—now called INFOSOURCE—there must be included: "the title and address of the appropriate officer for each government institution to whom requests for access to records under this Act should be sent." That is the closest the Act comes to recognizing the role of the ATIP coordinator. To make matters worse, if one consults INFOSOURCE, none of the individual listings make reference to the ATIP coordinator. Only in the "useful terms" section at the beginning of the publication will one see reference to the ATIP coordinator as follows:

> "**Access to Information and Privacy Coordinator**. Each federal government department or agency has an Access to Information and Privacy Coordinator. The coordinators' offices are staffed by people who can answer questions and help you identify the records you wish to see. The coordinators may be contacted in person, by telephone or by letter. If you send a letter, include as much information as you can to help the staff locate the records you want and send you a reply as soon as possible." (InfoSource, 2000-2001, p. 3)

In 1987, the Justice Committee believed that the time was long past due to professionalize the role of ATIP coordinators, to classify them as part of departmental senior management group, make them a part of departmental executive committees, give them direct reporting relationships with deputy heads of departments, develop a uniform set of job descriptions and set of expectations for them, ensure that they have completed standard, formal training in their discipline and surround them with a leadership culture which does not penalize them for making the access law effective within their institutions.

Those wise recommendations were not followed. In almost every Annual Report of this and previous Information Commissioners since the Act's coming into force, the impossible, thankless role of the ATIP coordinator has been brought to the government's attention. In 1998, then Commissioner Grace proposed a professional code of conduct for ATIP coordinators and urged Justice Canada, Treasury Board Secretariat, users of the Act and coordinators to

work together in finalizing and adopting such a code. With the exception of the coordinators' own initiative in organizing the Canadian Access and Privacy Association (CAPA) as a mechanism for sharing information, ideas and concerns and for providing education and training through conferences and seminars, little has been done over the years to address the needs and concerns of these officials. Parliament could, and should, nudge the process along.

To that end, it is recommended as follows:

– The Act include a definition of "access to information coordinator" as:

  "access to information coordinator" means the officer of a government institution identified pursuant to paragraph 5(1)(d) and delegated pursuant to section 73 to receive, process and answer requests under this Act for access to records."

– Section 73 be amended to read as follows:

  "The head of a government institution may, by order, designate one senior officer, having direct reporting access to the head or deputy head of the institution, as the institution's Access to Information Coordinator and may delegate to that official and to others for the purpose of assisting that official, the authority to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order."

– A new section, 73.1, be added as follows:

  s. 73.1(1) – It is the Access to Information Coordinator's duty to respect the letter and purpose of this Act, and to discharge this duty fairly and impartially.

  (2) – The Access to Information Coordinator shall promptly report to the head or deputy head of the institution any instance which comes to his or her knowledge, involving interference with rights or failure to discharge obligations, set out in this Act.

  (3) – The Access to Information Coordinator shall take all reasonable precautions not to disclose the identity of an access requester, the reason for a request or the intended use of requested information except:

  i) to the extent reasonably necessary for the proper processing of the access application;

  ii) with the consent of the requester; or

  iii) if disclosure is permitted by section 8 of the *Privacy Act*.

Access to Information Coordinators may, at any time, seek the independent advice of the Information Commissioner concerning compliance with this section and no coordinator may be penalized in any way for so doing.

PART B
LEGISLATIVE TUNE-UP

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

To that end it is recommended that there be a single minister, preferably the President of the Treasury Board, to be responsible for the *Access to Information Act* — all of it, its administration and policy.

To make the bureaucracy reflect the new leadership, it would make sense to sever the Information Law section of the Department of Justice from its present department (and from its inherent conflict of interest) and merge it with the Information, Communications and Security Policy Division of the Treasury Board Secretariat. This expanded unit would provide a locus of real leadership on information policy to public officials and practical advice to the community of access co-ordinators. Most important, this unit would be a much-needed counterweight to the powerful, yet heavily legalistic, influence which Justice, in its legal advisory role, exerts over all departments.

Government information as a national resource

The great lesson to be drawn from the access law's first 18 years of life is clear: to enhance open and accountable government, the *Access to Information Act* must become more than the mechanism by which individual access requests are made and answered. To accomplish this, three essential principles should be enshrined in law. These are:

1. **Government information should be generated, preserved and administered as a national resource.**
2. **Government should be obliged to help the public gain access to its national information resource.**
3. **Government information should be readily accessible to all without unreasonable barriers of cost, time, format or rules of secrecy.**

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

Creating the records: their care and safekeeping

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

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

As discussed in detail in Chapter II, it is time for the passage of information management legislation and to impose, among other duties, the duty to create such records as are necessary to document, adequately and properly, government's functions, policies, decisions, procedures, and transactions. A duty to create records has been imposed on the United States federal government by the *Federal Records Act*.

Among important records not now kept in an easily accessible form are copies of documents released under the access law. That should change. **All government institutions should be required to maintain a public register containing all records which have been released under the access law.** Why should departments duplicate their efforts and why should subsequent requesters have to wait unnecessarily, and pay again, for information which someone has already received? **As well, government institutions should maintain a current, public register of all public opinion surveys, which surveys should be disclosed on request without application of exemptions under the Act.**

Creating pathways to information

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

Eliminating barriers to access price barriers

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

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

At their current levels and as currently administered, fees for requests under the Act seem designed to accomplish one purpose — and one purpose only: to

discourage frivolous or abusive access requests. The fee system is not designed to generate revenue for governments or even as a means of recovering the costs of processing access requests. That is not an acceptable premise on which to build a right of access.

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

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

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

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

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

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

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

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

- there can be an objectively reasonable judgment by the applicant as to the academic or public policy value of the particular subject of the research in question;
- the information released meaningfully contributes to public development or understanding of the subject at issue;
- the information has already been made public, either in a reading room or by means of publication;
- the applicant can make some showing that the research effort is most likely to be disseminated to the public and that the applicant has the qualifications and ability to disseminate the information. The mere representation that someone is a researcher or plans to write a book should be insufficient to meet this latter criterion.

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

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

- is needed by individuals to make use of a service or program for which they may be eligible;
- is required for public understanding of a major new priority, law, policy, program, or service;
- explains the rights, entitlements and obligations of individuals;
- informs the public about dangers to health, safety or the environment."

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

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

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

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

(a) an application fee of $5 at the time the request is made; and (b) where applicable, a fee for reproduction of the record or part thereof to be calculated in the following manner:

(vi) for magnetic tape-to-tape duplication, $25 per 731.5m reel.

(3) Where the record requested pursuant to subsection (1) is produced from a machine readable record, the head of the government institution may, in addition to any other fees, require payment for the cost of production and programming calculated in the following manner:

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

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

The idea that producing a report from a database is tantamount to programming a computer is outdated. Current technology, available at a modest cost, can easily produce a variety of reports from a single database. As well, charging for central processing time was reasonable when processing capacity was a scarce resource. Mainframe computers were very costly to purchase. Charging for processing time was one way to

amortize their cost. The same reasoning does not apply to much less costly personal computers.

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

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

The format barrier

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

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

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

As database technology evolves, the parallels with paper records become ever more remote. Databases have come to resemble pools of information rather than collections of discrete documents. A record may result from the synthesis of information retrieved from several files — information conjured up only to dissolve again on command. As such, a specific record may not be created until a request is made and the software associated with the database compiles the information. But to exclude such information from the scope of the Act would be inconsistent with its purpose.

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

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

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

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

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

The exemption barrier

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

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

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

So much for what exists. Exemptions are difficult creatures to draft. It is even more difficult to obtain a consensus on what they should be. Thus, it is with some trepidation that changes are suggested. Nevertheless, after 18 years of experience, it is clear that some change is overdue to ensure that the law's purpose is better served.

Discretion and injury

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

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

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

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

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

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

It is far from clear that these are better approaches to balancing the right to privacy with the right to know what government is up to. To embrace such an approach, legislation must set out what is, and is not, an invasion of personal privacy, under whatever test is established. Further, both Ontario's and British Columbia's law require that individuals be notified when a public body intends to release a record that an official has reason to believe contains exemptible personal information. While the process is fair, it is onerous and bureaucratic. It is also bound to result in delays. On the whole, such a régime is unlikely to be an improvement over the current federal practice and may, in fact, weaken existing protection of personal privacy.

The need for an exemption to protect information obtained in confidence from other governments is understandable. Through the Act's section 13, mandatory protection is given to information provided to the federal government by foreign, provincial or municipal governments. Each government should be responsible for controlling and releasing its own information. **The courtesy needs to be extended to the subdivisions of foreign states (e.g., an American state)**. The provision was extended to cover "an aboriginal government" by way of a consequential amendment to the *Nisga'a Final Agreement Act* which was proclaimed on May 11, 2000.

Freedom of information legislation in Ontario, British Columbia and Alberta already has discretionary exemptions for records relating to "intergovernmental relations", exemptions which verge on injury tests (i.e., "could reasonably be expected to reveal a confidence"). **An amendment to section 13 should be rewritten as a discretionary, injury-based exemption. A time limit of perhaps 15 years should apply to all such confidences unless the information relates to law enforcement or security and intelligence matters, or is subject to extensive and active international agreements and arrangements. A public interest override should apply to this exemption.**

Public interest override

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

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

The absence in the federal Act of a general public interest override is a serious omission which should be corrected. Again, with the exception of the personal privacy exemption, the Act should require government to disclose, with or without a request, any information in which the public interest in disclosure outweighs any of the interests protected by the exemptions

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

Section 14: Federal-provincial affairs

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

Section 15: International affairs and national defence

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

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

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

Section 16: Law enforcement

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

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

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

Section 17: Safety of individuals

In 10 years the government has rarely used the threat to the safety of individuals as a reason for refusing access. It exists largely for cases dealing with offenders' records. **Nevertheless, it would be useful to address a potential area of controversy by making explicit that this exemption also applies if disclosure could reasonably be expected to pose a threat to an individual's**

mental or physical health. The British Columbia law goes this extra step and so should the federal law.

Section 18: Economic interests of Canada

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

The issue of protecting "confidential business" information for the government's Special Operating Agencies (SOAs) has also arisen. Several of these entities are being asked to compete with the private sector without the protection other companies enjoy under section 20 — third-party information.

Section 19: Personal information

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

Section 20: Confidential business information

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

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

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

New rules of the road are needed to govern the right to know more about government dealings with the private sector. First, the law should tell firms choosing to bid for government

contracts that the bid details, and details of the final contract, are public for the asking. Access to such records is essential if this facet of government is to be transparent and if the public is to have confidence that taxpayer dollars are being well-spent. As matters now stand, only partial glimpses are possible. There is partial disclosure of winning bids, none at all of losing bids. Contract prices are released without details. That is not good enough. Section 20 should be amended to put more accountability in the government contracting process.

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

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

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

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

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

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

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

Not only is the present Act overly cautious in extending secrecy protection to private businesses, it puts in place an unwieldy procedural apparatus which contributes to delay and administrative burden.

Delays are the result of the mandatory requirement that government institutions give direct notice to and consult with third parties before records may be

released. Similar requirements are imposed on the Information Commissioner if he proposes to recommend disclosure. Often there are many third parties (in one previous case there were 126,000 of them) and the direct notice and consultation requirement is simply impractical. Faced with those situations, departments are tempted to take the path of least resistance. They simply refuse to disclose the information and pass the dissatisfied requester over to the Information Commissioner, along with all the notice and consultation headaches.

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

Section 21: Advice and recommendations

The advice and recommendations exemption, together with the exclusion of Cabinet confidences, ranks as the most controversial clause in the *Access to Information Act*. From early debate to this day, critics have attacked its broad language which can be made to cover — and remove from access — wide swaths of government information. The Standing Committee voiced its opinion that the exemption "has the greatest potential for routine misuse". The government seemed to agree, taking pains in its policy guidance to admonish caution and to build in the injury test omitted from the legislation.

The question then: How best to reform section 21? The Standing Committee recommended that it contain an injury test that would acknowledge the need for candour in the decision-making process — a measure consistent with the Treasury Board's Secretariat's policy. The committee went on to advocate another clarification. The exemption would only apply to policy advice and minutes at the political level of decision-making, not factual information used in the routine decision-making process. Finally, the committee recommended reducing time limitation in the current exemption from 20 to 10 years. It seems an appropriate period of time to protect material used in a decision-making process. **The committee's recommendations here are more than a good start. Yet reform needs to go further. An amended section should emulate the laws of Ontario and British Columbia. Each has a long list of types of information not covered by the exemption — factual material, public opinion polls, statistical surveys, economic forecasts, environmental impact statements and reports of internal task forces.**

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

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

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

Section 23: Solicitor-client privilege

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

Tax dollars paid for these opinions and, unless an injury to the conduct of government affairs could reasonably be said to result from disclosure, legal opinions should be disclosed. These opinions are to lawyers what advance tax rulings are to accountants and should be equally accessible.

One final matter on section 23. The Act is unequivocal that section 23 is subject to section 25: any information in a record which does not qualify for solicitor-client privilege must be released. Section 25 is the so-called "severance" requirement. The Courts, too, have decided that section 23 is subject to the severance requirement. Nevertheless, the Justice department continues to advise institutions not to apply severance to a record containing solicitor-client material. Justice clings to the view that, if any portion of a record is disclosed from a record containing privileged material, the privileged portions may somehow be stripped of their privilege.

For this reason, section 23 should be amended to spell out that the application of severance to a record under the authority of section 25 does not result in loss of privilege on other portions of the record.

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

Section 26: Information to be published

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

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

Second, the provision has been relied upon as a device to buy extra time. An institution may receive a request for a record, deny the request on the basis of section 26 and, when that period expires, change its mind about publication and simply apply exemptions to the record.

Section 26 should be amended to prevent such abuse by stipulating that if the record is not published within the 90 days (or 60 days as recommended) it must be released forthwith in its entirety with no portions being exempted.

Third, the provision did not contemplate publication by posting on a website. It is appropriate that the provision be expanded to cover any form of publication, including electronic.

Witness protection

Subsection 36(3) of the Act encourages witnesses to be cooperative and candid with the Commissioner by providing that the evidence they give may not be used against them except in limited circumstances, including in respect of a prosecution of an offence under the Act. As a result of the addition of subsection 67.1 to the Act in 1999, a new offence was created (improper records alteration or destruction).

Subsection 36(3) does not prevent the use of witness evidence against a witness in a prosecution for an offence under subsection 67.1. This poses fairness problems as well as practical problems for the Commissioner in securing witness cooperation and candour. The Commissioner is not in the business of conducting criminal investigations and witnesses should not fear any self-incrimination with respect to any offence, save perjury and obstruction, when they give their evidence.

Consequently, it is recommended that subsection 36(3) be amended to specify that evidence given to the Commissioner by a witness is inadmissible against the witness in a prosecution of an offence under subsection 67.1.

Section 68

Section 68 excludes from the Act "published material or material available for purchase by the public." Situations have arisen where information is available for purchase at prohibitively high price or published in a format which is inaccessible to some individuals. Yet, despite the effective barriers to access posed by the price and format, it was not possible for the information seekers to assert a right of access under the Act.

These circumstances are rare, but may arise more frequently when government begins making exclusive use of Internet websites to "publish" information, while many citizens many not have access to the net.

The Act should solve this weakness in section 68 by providing that any records which are available for purchase at a "reasonable price" and which are published in "reasonable formats" are excluded from the Act. In cases of dispute over the meaning of those terms, a complaint would be available to the Information Commissioner.

CHAPTER IV
THE YEAR IN REVIEW

In the reporting year, 1,680 complaints were made to the Commissioner against government institutions (see Table 1). Table 2 indicates that 1,337 investigations were completed, 43.1 percent of all completed complaints being of delay (see Table 2). Last year, by comparison, 49 percent of complaints concerned delay. The system-wide, chronic problem remains of non-compliance with the Act's response deadlines. It remains the office's first priority.

In addition to the complaints received this year, our office responded to 2,419 enquiries.

Resolutions of complaints were achieved in the vast majority of cases (99.9 percent of cases, to be precise). In two cases it proved impossible to find a resolution. These have been brought before the Federal Court for review.

As seen from Table 3, the overall turnaround time for complaint investigations increased to 5.40 months from the previous year's 4.34 months. This turnaround time is not acceptable and it is getting worse. As well, Table 1 reminds us that there continues to be a troubling backlog of incomplete investigations. Last year, it was 571, this reporting year 924 complaints. Treasury Board's refusal to provide the resources needed to clear the backlog and prevent its return, was reported last year. The figures don't lie—the resource starvation is depriving Canadians of an effective and timely avenue of redress for abuses of access rights.

The five institutions subject of the most complaints in 2000/2001 are:

- Citizenship and Immigration 275
- Human Resources Development Canada 165
- Foreign Affairs and International Trade 93
- Fisheries and Oceans 77
- National Defence 68

Last year's "top 5" list was significantly different. The 1999/2000 list was:

- Health Canada 307
- National Defence 216
- Indian and Northern Affairs Canada 167
- Citizenship and Immigration Canada 135
- Canada Customs and Revenue Agency 78

With the exception of Citizenship and Immigration Canada, which doubled the number of complaints investigated last year, only National Defence repeats on the Top 5 list, and with a much lower number of complaints against it. The fact that Health Canada, Indian and Northern Affairs and Canada Customs and Revenue Agency do not appear on this year's Top 5 list is the result of dedicated hard work by officials in those institutions. They deserve and get, this Commissioner's kudos for addressing long-standing problems of delay in constructive ways.

Regrettably, the same cannot be said for Citizenship and Immigration Canada. It did not face up to an, admittedly, challenging burden of access requests in an entirely "constructive" manner. It did not act in a timely way to put needed resources and procedures in place to give good service. Rather, it chose to apply unreasonably long extensions of time, up to three years, for even straightforward requests for small numbers of records. (This "story" is more fully covered at pp. xxvii to xxxii).

The Commissioner's office will work closely with the three new institutions on the Top 5 list to determine whether the number of complaints against them signals any systemic problems. It would appear, for example, that HRDC's volume of complaints relates to last year's Transitional Jobs Fund issue, a matter well in hand and not indicative of a systemic problem.

Table 1: STATUS OF COMPLAINTS

	April 1, 1999 to Mar. 31, 2000	April 1, 2000 to Mar. 31, 2001
Pending from previous year	742	571
Opened during the year	1359	1688
Completed during the year	1530	1337
Pending at year-end	571	922

Table 2: COMPLAINT FINDINGS

April 1, 2000 to March 31, 2001

FINDING						
Category	**Resolved**	**Not Resolved**	**Not Substan-tiated**	**Discon-tinued**	**TOTAL**	**%**
Refusal to disclose	263	2	187	82	534	39.9
Delay (deemed refusal)	493	-	50	32	575	43.1
Time extension	83	-	66	2	151	11.3
Fees	28	-	20	6	54	4.0
Language	-	-	-	-	-	-
Publications	-	-	-	-	-	-
Miscellaneous	13	-	6	4	23	1.7
TOTAL	880	2	329	126	1337	100%
100%	65.8	0.1	24.6	9.4		

Table 3: TURNAROUND TIME (MONTHS)

CATEGORY	98.04.01 – 99.03.31		99.04.01 - 2000.03.31		2000.04.01 - 2001.03.31	
	Months	**Cases**	**Months**	**Cases**	**Months**	**Cases**
Refusal to disclose	5.86	526	5.99	537	7.83	534
Delay (deemed refusal)	2.50	669	3.44	749	3.33	575
Time extension	2.80	71	2.33	134	4.18	151
Fees	5.69	45	5.41	55	7.02	54
Language	-	-	-	-	-	-
Publications	-	-	-	-	-	-
Miscellaneous	4.54	40	4.34	55	4.61	23
Overall	3.99	1351	4.34	1530	5.40	1337

Table 4: COMPLAINT FINDINGS (by government institution)

April 1, 2000 to March 31, 2001

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Agriculture and Agri-Food Canada	10	-	4	-	14
Atlantic Canada Opportunities Agency	4	-	1	-	5
Business Development Bank of Canada	1	-	1	-	2
Canada Customs and Revenue Agency	29	1	6	1	37
Canada Economic Development for the Quebec Region	2	-	1	4	7
Canada Information Office	2	-	2	-	4
Canada Mortgage & Housing Corporation	2	-	-	-	2
Canada Newfoundland Offshore Petroleum Board	1	-	-	-	1
Canada Nova Scotia Offshore Petroleum Board	1	-	-	-	1
Canada Ports Corporation	4	-	-	-	4
Canadian Environmental Assessment Agency	-	-	1	-	1
Canadian Film Development Corporation	1	-	-	2	3
Canadian Food Inspection Agency	5	-	7	-	12
Canadian Heritage	7	-	14	6	27
Canadian Human Rights Commission	4	-	-	1	5
Canadian International Development Agency	9	-	3	-	12
Canadian Museum of Civilisation	-	-	-	1	1
Canadian Nuclear Safety Commission	4	-	1	-	5
Canadian Radio-Television and Telecommunications Commission	1	-	-	-	1

Table 4: COMPLAINT FINDINGS (continued)

April 1, 2000 to March 31, 2001

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Canadian Security Intelligence Service	1	-	6	-	7
Canadian Space Agency	2	-	-	-	2
Citizenship & Immigration Canada	222	-	37	16	275
Communications Security Establishment	1	-	-	-	1
Correctional Service Canada	13	-	11	2	26
Environment Canada	7	-	5	-	12
Finance Canada	8	-	3	1	12
Fisheries and Oceans Canada	60	-	16	1	77
Foreign Affairs and International Trade	59	-	28	6	93
Fraser River Port Authority	1	-	-	-	1
Halifax Port Authority	-	-	-	1	1
Health Canada	14	-	7	8	29
Human Resources Development Canada	139	-	20	6	165
Immigration and Refugee Board	12	-	7	-	19
Indian and Northern Affairs Canada	20	-	3	13	36
Industry Canada	9	-	19	9	37
Justice Canada	20	1	10	13	44
National Archives of Canada	38	-	15	0	53
National Capital Commission	-	-	8	-	8
National Defence	50	-	12	6	68
National Energy Board	1	-	1	-	2
National Library of Canada	-	-	1	-	1
National Research Council Canada	1	-	-	-	1
Natural Resources Canada	2	-	-	-	2
Ombudsman National Defence and Canadian Forces	1	-	-	-	1

Table 4: COMPLAINT FINDINGS (continued)

April 1, 2000 to March 31, 2001

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Office of the Superintendent of Financial Institutions	-	-	-	2	2
Pacific Pilotage Authority Canada	1	-	-	-	1
Privy Council Office	16	-	14	8	38
Public Works and Government Services Canada	32	-	10	2	44
RCMP Public Complaints Commission	2	-	1	-	3
Royal Canadian Mint	2	-	-	-	2
Royal Canadian Mounted Police	25	-	30	3	58
Social Sciences and Humanities Research Council of Canada	-	-	6	-	6
Solicitor General Canada	1	-	5	1	7
Statistics Canada	2	-	1	-	3
Status of Women Canada	-	-	-	1	1
Toronto Port Authority	2	-	-	1	3
Transport Canada	14	-	7	1	22
Transportation Safety Board of Canada	1	-	-	-	1
Treasury Board Secretariat	11	-	1	9	21
Vancouver Port Authority	2	-	-	-	2
Veterans Affairs Canada	-	-	1	1	2
Western Economic Diversification Canada	4	-	-	-	4
TOTAL	883	2	326	126	1337

Table 5: GEOGRAPHIC DISTRIBUTION OF COMPLAINTS (by location of complainant)
April 1, 2000 to March 31, 2001

Outside Canada	Rec'd 12	Closed 25
Newfoundland	33	25
Prince Edward Island	4	2
Nova Scotia	34	41
New Brunswick	11	9
Quebec	100	99
National Capital Region	772	622
Ontario	271	187
Manitoba	40	57
Saskatchewan	6	8
Alberta	39	38
British Columbia	361	218
Yukon	0	1
Northwest Territories	5	5
TOTAL	**1688**	**1337**

Delay Report Cards

In addition to investigating some 726 complaints of late or improperly extended responses, the office conducted a full review of the Department of Fisheries and Oceans' (F&O) performance in meeting response deadlines. As well, follow-up reviews were conducted in the five institutions which received failing grades in last year's "report cards". Those five institutions are: Canada Customs and Revenue Agency (CCRA), National Defence (ND), Citizenship and Immigration Canada (CIC), Transport Canada (TC) and the Department of Foreign Affairs and International Trade (DFAIT).

It will be helpful to introduce the summary of the results of these reviews with some background. (The detailed review results for the six departments are contained in Appendix A to this report.)

The Act requires that a request be answered within 30 calendar days, unless an extension is claimed. If the timelines are not met, the request becomes a "deemed refusal" under subsection 10(3) of the Act.

Six departments were identified in the 1996/97 Annual Report as departments with serious delay problems. The departments were Citizenship and Immigration Canada, Foreign Affairs and International Trade, Health Canada,

National Defence, Privy Council Office and Revenue Canada (now the Canada Customs and Revenue Agency). The 1997/98 Annual Report identified the remedial initiatives that these departments were taking to reduce the delay problem.

In the 1998/99 Annual Report, a Report Card was issued on each of these departments. The Report Card assessed or graded each department relative to their performance in meeting the statutory time requirements of the *Access to Information Act*. All of the departments received a grade of "F", meaning that 20 percent or more of requests were not answered within the time requirements of the Act. The actual percentages of requests not responded to within the Act's time requirements in the six departments ranged from 34.9 % to 85.6 % for the first eight months of fiscal year 1998/99.

The departmental Report Cards also contained a number of recommendations for each of the six departments on methods to reduce the delay problem. In November 1999, the Commissioner's Office reviewed the status of the recommendations with each of the six departments. Statistical information was also collected to report on the progress of reducing the number of requests not meeting the Act's time requirements. The statistical information dealt with the number of requests in a deemed-refusal situation over the first eight months of fiscal year 1999/2000. A brief report was prepared for each department on the status of each recommendation with accompanying statistical information on the progress in reducing the number of requests in a deemed-refusal situation. Of the departments reviewed, two – Privy Council Office and Health Canada– came into "ideal compliance" with the Act's time requirements with a grade of "A", meaning that five percent or fewer of requests were not answered on time. Although the remaining departments all made varying degrees of progress in reducing the number of requests in a deemed-refusal situation, each of the departments remained in "red alert" with a grade of "F".

In December 2000, the four departments were again reviewed to determine the status of the previous year's recommendations and the status of the deemed-refusal situation. In addition, the status of the recommendations in the 1999 Transport Canada Report Card was reviewed to determine which recommendations were implemented and to determine the number of requests in a deemed-refusal situation.

The following table presents the grading standard.

Table: Grading Standard

% Of Deemed Refusals	Comments	Grade
0-5%	Ideal compliance	A
5-10%	Substantial compliance	B
10-15%	Borderline compliance	C
15-20%	Below standard compliance	D
More than 20%	Red alert	F

The following table provides a summary of the current to previous year's new request to deemed-refusal ratio for the departments reviewed this year.

Table: New Request to Deemed-Refusal Ratio

Department	% April 1, 1999 To Nov. 30, 1999	% April 1, 2000 To Nov. 30, 2000
CCRA	51.5 (F)	14.9 (C)
ND	38.9 (F)	17.0 (D)
CIC	23.4 (F)	19.7 (D)
TC	30.6 (F)	23.7 (F)
DFAIT	27.6 (F)	29.3 (F)

All of the departments with the exception of the Department of Foreign Affairs and International Trade made progress in reducing the number of requests in a deemed-refusal situation. Of particular note, the Department of National Defence, Citizenship and Immigration Canada and the Canada Customs and Revenue Agency made substantial progress against a background of high volumes of access requests.

This year's review of F&O determined that 32.8 percent of the requests it received were not answered within statutory deadlines. This performance is unacceptable under the standard grading scheme and earns F&O a grade of "F".

The following general observations flow from this year's reviews:

Management Plan

Departments with a management plan to reduce the number of requests in a deemed-refusal situation appear to be the most successful in their efforts to improve. Although individual measures can assist in improving the situation, a coordinated plan, based on the specific departmental reasons for requests in a deemed-refusal situation, will provide a comprehensive framework to promote progress. Therefore, it is recommended that departments not in compliance with the time requirements of the Act should develop an ATI Improvement Plan specifically directed at the reduction of requests in a deemed-refusal situation. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance.

Senior Management Attention

The best efforts of the ATI Coordinator to reduce the number of requests in a deemed-refusal situation will not be successful without the active support of senior management. It is recommended that senior management support the ATI Improvement Plan and closely monitor its progress. The success of the plan requires all members of the departmental access process to work together as a team. Without the full support of all the members of the team, and senior management, continued progress in reducing the number of requests in a deemed-refusal situation is unlikely.

Consultants

Many of the departments dealing with requests in a deemed-refusal situation make extensive use of consultants. Consultants offer an excellent way of handling peak workloads. But the long-term use of consultants to process access requests does not represent a value for money approach to processing. In addition, consultants operating for a period of time in a department are not able to contribute to the operation of the ATI Unit in the same way as staff with on-going ATI accountability to a department. It is recommended that, whenever possible, indeterminate personnel be recruited to process access requests, relying on contract for short-term peaks only.

Staffing Shortage

That being said, one of the reasons for reliance on contract workers is the lack of skilled ATI staff available. All of the departments have plans to increase ATI staff. In some cases, the increase in staffing will be substantial if the staffing plans are approved. While increased ATI resources are needed as part of the measures to reduce the number of requests in a deemed-refusal situation, the increasing demand for staff has created an overall shortage in the system of skilled ATI staff. It is recommended that a coordinated effort be undertaken in government, led by Treasury Board, to encourage recruitment into the access units, appropriate classification levels and the necessary training. For the longer term, the Government of Canada should encourage institutions of higher learning to offer education in this discipline. The University of Alberta has commenced a program and it deserves support.

Focused Training Versus Awareness Training

Although many departments provide ATI training, much of the training is focused on an awareness of the Act. Although awareness training is an essential component of a well-managed ATI program, limited training resources should focus on the areas of most need. ATI staff are in an excellent position to determine training priorities. They are in day-to-day contact with operational personnel, are involved in ATI briefings and issue management with officials at all levels and oversee the ATI complaint process. These areas all provide sufficient input for the ATI Coordinator to identify where ATI training priorities are in the department. The priorities should be incorporated into a training plan that provides maximum value for the training expenditure.

Abuse of Extensions?

As can be seen from the legal chapter, Citizenship and Immigration Canada applied to the Federal Court in this reporting year seeking to have quashed an order for the production of records issued to the Deputy Minister of CIC. The order was issued after the Commissioner had determined that CIC acted unreasonably in applying three-year extensions to some 30 requests from a single requester. The order was issued to enable the Commissioner to proceed with an investigation of what, in his view, was a "deemed refusal" to give access.

Readers may recall that the Federal Court of Appeal, in the case of **Information Commissioner and Michael Drapeau** v. **ND**, found that a late answer is deemed to be a refusal and should be investigated by the Commissioner as a real refusal. In other words, the court found that the Commissioner should assess whether or not there are any justifications for the refusal (such as applicable exclusions or exemptions) and that he should avail himself of his order powers, if necessary, to obtain the required evidence and explanations from the relevant department.

For its part, CIC argues that it has the right to apply an extension of any length it considers reasonable and the Commissioner may not intervene until the extension period has lapsed. In other words, CIC hopes to find a way around the rigors of a "deemed-refusal" investigation mandated by the Court of Appeal, by applying these unprecedented three-year extensions.

Happily, CIC is an aberration in this regard. By-and-large, government institutions manage their extensions reasonably and with restraint. The problem of delay across government is being seriously addressed. Resources are being devoted to the task and CIC is one which has recently received significant new resources to address its backlog of delayed cases.

Stubborn Resistance

In last year's report, Parliament was informed of the strains between the Office of the Information Commissioner and lead agencies such as PMO, PCO, Justice and Treasury Board. As will be seen from the legal chapter, the Federal Court of Appeal reinstated subpoenas requiring witnesses from the Prime Minister's Office and the office of the Minister of Defence to appear before the Commissioner to give oral evidence and to produce records.

The witnesses appeared, gave their evidence and produced the requested records. The struggle, however, appears to be far from over. The records provided in response to the subpoenas were censored to remove material which the Clerk of the Privy Council asserts to be confidences of the Queen's Privy Council—there is nothing new in that. The novel development is that, for the first time in the history of the *Access to Information Act*, the government has withheld records and record portions from the Commissioner pursuant to sections 37 and 38 of the *Canada Evidence Act*.

In particular, a senior foreign and defence policy adviser to the Prime Minister presented to the Commissioner a certificate stating that it would be injurious to the public interest to produce certain information to the Commissioner which the Commissioner had ordered produced. In particular, information was withheld relating to federal-provincial relations, national defence and international relations—information which the Prime Minister's adviser asserts contains the identities of continuing contacts and sources of confidential information as well as confidential information obtained from those sources.

The reason this "excuse" for not providing information to the Commissioner has not been used before is straightforward. The reasons put forward by the PM's adviser correspond with exemption provisions in the Act. It is the Commissioner's statutory role to conduct an independent review of such material and disclosure to him does not equate to disclosure to the public. The most sensitive records held by government have been reviewed by the Commissioner with no resulting injury to any protected interest as a result.

Why then, is this attempt now being made to withhold such information from the Commissioner? It is no more than the stubborn effort of the Crown to resist allowing the Commissioner to complete his investigation into whether or not certain records held in the offices of the Prime Minister and the Minister of Defence are subject to the right of access and related issues. This latest refusal to provide portions of records in response to the Commissioner's order has been brought before the Federal Court for determination, adding further delay and complexity to the Commissioner's investigation.

This case has also given rise to another, bizarre, twist. Even though it has been decided by the Federal Court of Appeal that the Commissioner may continue his investigations, involving the offices of the Prime Minister and Ministers, the Crown insists that witnesses will not appear, or produce records, voluntarily. If the Commissioner wants evidence, according to the Crown's lawyers, he must issue subpoenas. These members of Cabinet and senior officials show a troubling example to all the other public servants who, until now, have cooperated voluntarily and candidly with the Commissioner's investigations.

As troubling as is this stubborn insistence at the top to do things the hard way in dealing with the Commissioner, the law requires, and the public has a right to expect, the Commissioner to be undeterred in his conduct of thorough, impartial investigations.

During the conduct of investigations in this reporting year, the Commissioner issued 21 orders compelling the production of records and/or the appearance of witnesses. This compares with eight last year, an increase explained by the reasons mentioned above. The breadkown this year is as follows:

7 – compelled appearance of witnesses

5 – compelled appearance of witnesses and records

9 – compelled production of records

Orders were issued to four Deputy Ministers, six senior officials, five exempt staffers and three third parties. Some individuals received more than one subpoena during the year.

The Crown commenced judicial review proceedings in the Federal Court seeking to quash seven of the subpoenas. Those challenges remain unresolved at this writing. It is particularly difficult to understand the hostility displayed by the government leadership when one bears in mind that the Information Commissioner only has the power to recommend the disclosure of withheld records.

CHAPTER V
CASE SUMMARIES

1. Women's Role in the Navy

File: 3100-13790/001

Background

The Department of National Defence was considering whether to use mixed gender crews in Canadian Forces submarines. It commissioned a study exploring the attitudes of naval personnel about volunteer service and mixed gender crews. Part of the report consisted of selected responses extracted from a survey administered to 1248 men and women in the Navy, in both submarine and non-submarine positions. None of those whose responses were reported were identified in the report.

A journalist sought access to the report. National Defence supplied parts of the report, but refused to disclose the anonymous responses, arguing that they constituted an account of consultations or deliberations involving officers or employees of a government institution. The requester did not agree with the exemptions and complained to the Information Commissioner.

Legal Issues

Paragraph 21(1)(b) of the Act permits the head of a government institution to refuse to disclose any record that contains an account of consultations or deliberations involving officers or employees of a government institution. At issue was whether the anonymous responses of naval personnel about mixed gender crews could be considered "an account of consultations or deliberations."

National Defence explained its reluctance to disclose this information because it felt that releasing candid personal opinions of sailors might provoke public debate that would tend to impede decision making. The complainant did not consider that the "raw data" from opinion surveys would constitute an account of a consultation or deliberation. He also did not see the necessity for secrecy, given the discretionary nature of the exemption.

National Defence countered that the information consisted of comments by CF members and could not be considered factual raw data since it was a compilation of opinions. In its view, when opinions are solicited for the express purpose of making a decision, they qualify as a consultation, or at least as an exchange of views leading to a particular decision.

National Defence also challenged the position that the denial of information under paragraph 21(1)(b) is appropriate only if it is a necessity. The department argued that the Minister of National Defence is not required to prove injury to invoke the provision. It also argued that the release of the information in this case would force the department to make a policy decision before it had finished all consultations, effectively circumventing the normal government decision-making process. The department argued that section 21 was included in the Act expressly to prevent this from happening.

The Information Commissioner concluded that the anonymous responses of the CF members did not qualify for exemption under paragraph 21(1)(b). The information that the department attempted to withhold was a compendium of anonymous quotations from individuals asked for their views about a hypothetical set of circumstances, including the use of mixed gender crews. This information, in the Commissioner's view, did not differ from that in other opinion surveys which are routinely disclosed by government. Anonymous views or impressions extracted from a survey of attitudes do not constitute an account of consultations or deliberations under paragraph 21(1)(b). As well, the Commissioner saw no justification for exercising the discretion, contained in the exemption, in favour of secrecy. Institutional "discomfort" is not an appropriate basis for choosing secrecy.

The Information Commissioner found that the complaint was well-founded. National Defence agreed to withdraw the exemptions and disclose the report in its entirety to the complainant. The complaint was considered resolved.

Lessons Learned

Given the underlying purposes of the Act, "an account of consultations and deliberations" should be interpreted narrowly. The anonymous responses extracted from a survey of attitudes do not constitute an account of consultations or deliberations. The head of a government institution therefore has no discretion to refuse to release the information under paragraph 21(1)(b). Even if the information does qualify for exemption under this provision, institutional discomfort with, or embarrassment over, disclosure is not a proper basis for exercising discretion in favour of secrecy.

2. Discharging the Burden

File: 3100-12610/001

Background

NATO conducts low-level fighter aircraft exercises at Goose Bay, Labrador. National Defence monitors the effects of this low-level flying on human activity and wildlife.

The requester had sought all documents related to National Defence efforts to obtain ISO 14,000/1 accreditation regarding military flight training monitoring programs at 5 Wing Goose Bay. National Defence located and provided the records, but withheld portions, relying on several exemptions in the Act. Some exemptions were based on claims that the severed information fell into one of two categories:

- confidential information supplied to a government institution by a third party; and
- information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of a third party.

The department did not investigate whether the claims for third-party exemptions under subsection 20(1) were justified. It decided, without any representations or written evidence, that the entire document would be denied

without severance. The department only communicated with the third party to report that the department intended to exempt materials under paragraphs 20(1)(b) and (c). Not surprisingly, the third party did not object to the decision to exempt the information.

The requester objected to the censoring and asked the Information Commissioner to investigate.

In response, National Defence claimed that any document coming from a third party constituted "confidential third-party information." On this basis, it would continue to refuse the disclosure. The third party also argued that the entire document was confidential and that no segments could be disclosed. When reminded that many segments of the document contained information that was public knowledge or in the public domain, the third party replied that the complainant should obtain it from the same source that gave the information to the third party.

After consultations with the Information Commissioner's office, National Defence wrote to the third party requesting objective evidence to demonstrate that the tests for secrecy in paragraphs 20(1)(b) and (c) had been met. As well, the department advised the company that it would need to present additional facts to support why the information or portions of information should not be disclosed in the public interest, since subsection 20(6) provides a public interest override for this exemption.

The department reviewed the third-party's response and concluded that it was not sufficient to make the case for exemption under subsection 20(1). It concluded that further information should be released in the absence of a rationale meeting the criteria of subsection 20(1) and advised the third-party of its intention to disclose the information. As is its right, the third party has since requested a review of the department's decision by the Federal Court Trial Division under section 44 of the *Access to Information Act*.

Because the right of access to these records was no longer disputed by National Defence, the Information Commissioner's role in the matter was concluded. He recorded the complaint as resolved.

Legal Issues

Is it mandatory for government institutions to consult with third parties to whom requested information relates before invoking exemptions under section 20 of the Act? The third-party notice and comment provisions are set out in sections 27, 28 and 29 of the Act. None are triggered unless and until the head "intends to disclose" the third-party record. Consequently, the Commissioner concluded that if the institution is fully satisfied that the information qualifies for a section 20 exemption, no consultation with the third party is required.

However, the Commissioner also emphasized that, without consultation, it may be difficult as a practical matter for the institution to have the evidence necessary to justify a section 20 exemption to the Commissioner. Section 20 is a very case-specific exemption, and consultations are appropriate in most cases.

Lessons Learned

In section 20 cases, it is difficult for the department to secure the evidence necessary to justify invoking an exemption without consultation with the third party. Departments should ensure that the evidentiary base is adequate before invoking the exemption. It is inappropriate to play a wait-and-see-if-there-is-a-complaint game.

The burden to show that the conditions for exempting information under subsection 20(1) are met lies with the institution and the third party. If they fail to discharge this burden, they cannot rely on these exemptions. Part of the process of discharging this burden involves showing why the information should not be released in the public interest under subsection 20(6). The institution's processing file should document the considerations about disclosure, both pro and con, which have been taken into account.

3. Formal vs Informal

File: 3100-14410/001

Background

The Pest Management Regulatory Agency (PMRA) of Health Canada evaluates and approves new pest control products to minimize the risks associated with these products.

A company official asked the PMRA to evaluate and approve two of the company's pesticides. The reviews of scientists of the PMRA identify any deficiencies in the data supplied by companies that request an evaluation of their products. In the past, these reviews were provided informally to the companies who submitted new applications for registration at no cost. This time the company did not receive a copy of the review.

The company official then made an access to information request for copies of all information from Health Canada related to the reviews for registration of these two pesticides. The PMRA sent only a monograph, not the full series of reviews.

According to an officer of the PMRA, the number of requests for copies of the reviews had increased significantly. The PMRA recently decided that any requests for such information would be processed through the *Access to Information Act*. Curiously, officials at the PMRA now thought that under the Act they would be able to provide only summaries of the evaluations, not the full reviews.

The company wrote to the Information Commissioner claiming that it had been refused access to the reviews.

Legal Issues

Under what circumstances is it appropriate for a government institution to cease providing information informally in favour of the formal access to information route? In this case the issue was whether a desire to reduce costs and the volume of information disclosed justified the cessation of the informal approach.

The Commissioner was of the view that the informal route is always the appropriate course when (1) requests are received for the same information on a routine basis, (2) page-by-page review for exemptions is not required, and (3) where the department has chosen not to disseminate the information through a priced publication. It is rarely appropriate, the Commissioner found, for an institution to be more secretive in response to a formal access request than it had been in routine releases of the same records in the past.

The Act sets out a number of specific exceptions to the right of access. Nowhere does it permit denying information that would otherwise be available to a requester simply to streamline the access process. Government institutions may not, concluded the Commissioner, extend the limited and specific exceptions in the Act simply to suit their convenience. The purpose of the Act is not to make life easy for government institutions, but rather to provide a right of access to information, with only limited and specific exceptions. Allowing convenience to be read into the list of exceptions would quickly eviscerate the Act.

As for the issue of fees, it is rarely cheaper for a department to process an access request under the Act than it is to disclose informally. The fees charged under the Act are more than outweighed by the additional administrative costs placed on the institution.

Lessons Learned

The *Access to Information Act*, by virtue of subsection 2(2) "is intended to complement and not replace" other means of providing access. Given the significant costs associated with processing a formal access to information request every effort should be made to disclose records informally, outside the Act. Unless records contain sensitive information which qualifies for exemption, the formal route should be avoided. In cases where records have been routinely released in the past, it will not be justifiable to censor those records in response to a formal access request.

4. Reneging on a Promise

Files: 3100-14483/001 and 002

Background

A journalist had complained to the Information Commissioner about the refusal of the Transportation Safety Board (TSB) to release to him the air traffic control tape and transcripts relating to a plane crash in Newfoundland in May 1998. During the Information Commissioner's investigation, the TSB agreed to release the tape and transcripts. The Information Commissioner therefore considered the complaint resolved and concluded his investigation. However, shortly after he reported this to the complainant, the TSB advised the Commissioner that these records would not be released.

The Commissioner immediately reopened the matter by initiating a complaint on his own motion. He concluded that the complaint about the refusal to disclose was well founded and recommended that the records be disclosed in their entirety. The Executive Director of the TSB then advised the Commissioner that he did not intend to follow the Commissioner's recommendation.

Legal Issues

Subsection 19(1)

Subsection 19(1) of the *Access to Information Act* requires the head of an institution to refuse to disclose any record that contains personal information as defined in section 3 of the *Privacy Act*. The TSB relied on subsection 19(1) to refuse to disclose the records. The TSB agreed to seek the consent of the individuals to whom the personal information related, for disclosure of that information. However, the TSB concluded that, unless consent was given, the information could not be disclosed.

The Information Commissioner concluded that the transcripts of the air traffic control tapes were not "personal" as that term is defined in section 3 of the *Privacy Act*. The information in the transcripts was not "about" individuals, but instead was about the status of the aircraft, flying / weather conditions and other matters associated with the air traffic and flight control of the aircraft.

The Commissioner concluded that whether audio tapes constitute "personal information" must be determined on a case-by-case basis. In this case, the voices displayed no characteristics that would reveal information about identifiable individuals if disclosed. He found nothing remarkable in the tonal demeanour of any of the parties as to enable a listener to glean information "about" identifiable individuals from the voice sounds alone.

Since the Commissioner concluded that the transcripts and audio recordings did not constitute "personal information" under section 3 of the *Privacy Act*, the TSB could not rely on subsection 19(1) of the *Access to Information Act* to claim that it had an obligation to refuse to disclose the tapes and transcripts.

However, the Commissioner also took the view that, even if this information were considered personal, the exception to the prohibition against disclosure of personal information set out in paragraph 19(2)(c) should have resulted in disclosure of the information.

Paragraph 19(2)(c) allows the head of an institution to disclose personal information if the disclosure complies with section 8 of the *Privacy Act*. Section 8 authorizes the release of personal information without the consent of the subject if the public interest in disclosure clearly outweighs any invasion of privacy which could result from the disclosure.

In particular, the Information Commissioner found no evidence to demonstrate that the TSB had considered paragraph 8(2)(a) of the *Privacy Act*. That provision authorizes the disclosure of personal information without consent if the disclosure is for the purpose for which the information was compiled or for a use consistent with that purpose. The Commissioner found that disclosure of air traffic

control tapes and transcripts would, at the very least, be consistent with the purpose for which the information was obtained or compiled by the TSB.

The Commissioner also concluded that the TSB did not properly consider and apply the public interest override contained in subparagraph 8(2)(m)(i) of the *Privacy Act*. If subparagraph 8(2)(m)(i) had been properly considered, there would have been ample reasons to conclude that no invasion of privacy was likely to result from disclosure of the records. Consequently, even a slight public interest in disclosure, a public interest admitted by the TSB, would be enough to satisfy the test for disclosure set out in subparagraph 8(2)(m)(i).

The Information Commissioner pointed out, as well, that the TSB failed to consider its own policy of disclosure at the time the records were collected or compiled. Nor did it consider that air traffic control communications can be heard on radio frequencies in an unscrambled format.

The TSB placed emphasis on its view that the *Radiocommunications Act* prohibits disclosure of the information. The Information Commissioner disagreed with that interpretation of the legislation. He argued that section 4 of the *Access to Information Act* would take precedence in any event, since the *Access to Information Act* applies "notwithstanding any other Act of Parliament."

In light of the TSB's refusal to disclose the records, the Information Commissioner considered it appropriate to seek the consent of the complainant to apply to the Federal Court for a review of the matter. The complainant consented to the application and the matter is now before the Federal Court.

Lessons Learned

It is, of course, of scant value to draw lessons from a case which is still before the court for determination. However, this case is helpful in illustrating the steps required before the subsection 19(1) exemption may be properly invoked. First, it must be determined whether or not the information is "personal". For that purpose, the definition in section 3 of the *Privacy Act* must be assessed. That definition states that the information must be "about an identifiable individual". It gives nine specific examples of such information and it describes four classes of information which is not "personal" for the purposes of subsection 19(1) of the *Access to Information Act*.

Second, if the information has been determined to be "personal", subsection 19(2) must be considered. If there is consent for disclosure, if the information is publicly available or if section 8 of the *Privacy Act* authorizes disclosure, the exemption may not be invoked. The "public interest" override is contained in subparagraph 8(2)(m)(i) of the *Privacy Act*.

5. Who Got the Loans

File: 3100-11141/001

Background

The requester asked the Atlantic Canada Opportunities Agency (ACOA) for a list of loans made by two Business Development Corporations (BDCs) in Newfoundland and Labrador. ACOA was responsible for the program that funded these BDCs. BDCs use this funding to provide loans to assist in the creation of small businesses and in expanding, modernizing and stabilizing existing businesses.

ACOA advised the requester that no list of loans existed. Puzzled by this response, and believing that ACOA must know where its money goes, the requester complained to the Information Commissioner.

ACOA argued that BDCs are autonomous, community-based organizations which are not listed in Schedule I of the *Access to Information Act* and, hence, are not obliged to provide records about their clients in response to an access request. ACOA also argued that it operates at arm's length from BDCs and holds no records about individual investment decisions by these Corporations. According to ACOA, the complainant would need to approach the BDCs directly for these records. The complainant felt that the relationship between the two entities – ACOA giving the funds which the BDCs loaned – meant that the list of loans should be accessible as a matter of public accountability for the use of public funds.

Legal Issues

This case raised the issue of whether ACOA had a sufficient degree of control over records related to the request that the records became subject to the right of access. ACOA and the BDCs argued that the right of access in section 4 applies only to records "under the control of a government institution". For the purposes of the *Access to Information Act*, ACOA is a government institution. BDCs are not. Moreover, ACOA and the BDCs argued that they operate autonomously. Even though BDCs receive their funds from ACOA, the BDCs are not accountable to ACOA for their loan decisions.

The Commissioner's investigation determined that the relationship between ACOA and the BDCs is governed by contract. The contract gives ACOA the right to be represented on the board of each BDC, as well as the right to receive copies of the minutes of BDC board meetings. These minutes contain details about specific loan decisions and, hence, are relevant to the access request. The investigation further determined that some minutes were in the hands of ACOA employees.

Taking into account the relationship between ACOA and the BDCs as evidenced by the contract and the legal entitlement of ACOA to receive copies of BDC minutes, the Commissioner concluded that the minutes were "under the control" of ACOA for the purposes of section 4 of the Act. He asked ACOA to retrieve the minutes from the BDCs and process them under the Act. ACOA agreed, retrieved the records and disclosed portions of the minutes in accordance with the Act. The complaint was concluded as resolved.

Lessons Learned

Even when an organization itself falls outside the jurisdiction of the *Access to Information Act*, its records may sometimes be accessible under the Act through a related institution that is covered by the Act. Contracts or other aspects of the relationship between the organization and a government institution will be assessed to determine whether there is a degree of shared control sufficient to raise an obligation to process records under the Act.

6. Keeping Tabs on Offenders

File: 3100-14486/001

Background

The National Parole Board (NPB) has authority to impose conditions on parolees who are released under a program known as automatic statutory release. In this case, two men had been released under this program to the Oskana Centre, a half-way house in Regina, to complete the last third of their sentences.

While on day parole in 2000, they allegedly committed various armed robberies and one allegedly committed a brutal sexual assault. It is the normal practice of Correctional Service Canada (CSC) to conduct a review of all incidents involving inmates and police. The complainant asked for these file reviews. The complainant had earlier obtained copies of the NPB's Decision Sheets (which deal with decisions about release and conditions of release) on both parolees.

CSC withheld the file reviews, arguing that they contained personal information and could therefore not be disclosed. The complainant asked the Information Commissioner to investigate.

The Information Commissioner concluded that some personal information contained in the file reviews appeared to be publicly available. For example, some personal information was found in the NPB Decision Sheets. These are available to the public from the NPB while an inmate is on parole. Furthermore, some personal information in the file reviews had been made public in a police news release. Finally, it did not appear that CSC had properly considered whether or not the public interest in disclosure clearly outweighed any invasion of privacy which could occur.

The Information Commissioner asked CSC to review the matter. It did so and agreed to disclose portions of the reviews consistent with the approach taken in NPB Decision Sheets. CSC also informed the Commissioner that it intended to change its policy concerning file reviews. Subject to the appropriate exemptions, it plans to release records of this type on a routine basis in future.

The Information Commissioner concluded that the information that CSC continued to withhold was personal information that qualified for exemption under the Act. He therefore recorded the complaint as resolved.

Legal Issues

Subsection 19(1)

Subsection 19(1) of the Act requires the head of a government institution to refuse to disclose any record that contains personal information as defined in section 3 of the *Privacy Act*. However, the head may disclose any record if the information is publicly available (paragraph 19(2)(b)) or if the disclosure is in accordance with section 8 of the *Privacy Act* (paragraph 19(2)(c)).

In this case, the Information Commissioner concluded that:

- some information in the file reviews did not consist of personal information; it was therefore inappropriate to claim an exemption under subsection 19(1);
- some personal information in the file reviews was already publicly available; it was therefore necessary to disclose such information in accordance with paragraph 19(2)(b);
- the file reviews did contain some personal information that was properly exempted from disclosure under the Act; and
- there was no indication of whether the Commissioner of Corrections had exercised the discretion under paragraph 19(2)(c) to consider whether to release personal information in the public interest as permitted by section 8 of the *Privacy Act*.

Lessons Learned

Before invoking subsection 19(1) to deny access to requested records, reasonable care must be taken to determine whether or not any of the information is already publicly available. This is especially so in situations where the subject matter of the records is one in which more than one government institution has an interest. One institution may not keep information secret if another is making it public.

7. Number Please

File: 3100-12973/001

Background

A journalist requested the Department of Foreign Affairs and International Trade (DFAIT) to provide the cellular telephone call listings of Raymond Chan, Secretary of State (Asia-Pacific) covering the period from 1996 to 1998. Some 8000 phone calls were involved.

DFAIT provided 240 pages of censored cellular telephone records. The records did not include the telephone numbers that had formed part of the original record. DFAIT representatives explained that they had determined that the telephone numbers on these records must be exempted because they constitute personal information of both the caller and the called party.

The journalist complained to the Information Commissioner. The Information Commissioner determined that about half of the cellular calls originated from, or were made to, government numbers. The remaining 50 percent of calls were made from or to British Columbia. The Information Commissioner concluded that it would be unreasonable and impractical to determine which calls related to government business and which did not. Accordingly, the Information

Commissioner asked DFAIT to consider releasing the area code and the first three digits of each number appearing in the listings as a way of resolving the matter. DFAIT agreed to do so. The Information Commissioner concluded therefore that, with the release of this information, the complainant had been given access to all records to which he was entitled. He recorded the complaint as resolved.

Legal Issues

Personal Information

Section 19 contains a general prohibition on disclosing personal information. The Information Commissioner concluded that billing/usage records pertaining to government-issue telephones, including cellular telephones, are not, as a class, "personal information". However, the Commissioner recognized that some government-issue cell phones, will be used for personal as well as business calls. The extent of the usage should be disclosed, but not the precise phone numbers of the called parties.

Severability

Section 25 of the Act deals with severability. It acknowledges that the head of an institution may be authorized to refuse to disclose information under the Act. However, it also requires the head of the institution to disclose any part of the record that does not contain information or other material that the head is authorized to refuse to disclose if these can reasonably be severed from the other information or material.
In this case, a portion of the phone numbers (area code plus first three digits) could be disclosed without disclosing personal information. At the same time, the requester would know the extent of the calling and something about call patterns.

Lessons Learned

In the present case, it would have been unreasonable to expect DFAIT to determine which of the thousands of telephone numbers related to personal calls and which to government business. Institutions, however, may need to develop policies governing personal use of government-issue cell phones. Although the Commissioner did not do so in this case, in future cases, a Court might require that all calls made on a government-issue phone be deemed to be a business call. In the meantime the principle of severance should be used when requests for phone usage records are received. As much information as possible should be given to show the extent and nature of usage.

8. Disclosing E-Mail Addresses

Files 3100-11984/001 and 002

Background

Two requesters, independently, made access requests to the Department of Foreign Affairs and International Trade (DFAIT) for a listing of employee e-mail addresses. The Department of Foreign Affairs and International Trade (DFAIT) denied access to the information on the basis that disclosure could reasonably be expected to be injurious to the conduct of international affairs.

DFAIT representatives explained to the Information Commissioner that release of e-mail addresses could compromise the stability of its SIGNET communications system—the primary communications vehicle between Canada and missions abroad. Attacks on the system could, for example, take the form of large numbers of e-mails to overload a communications system, or they could consist of e-mails containing viruses aimed at disrupting the system.

DFAIT representatives ultimately agreed to reconsider their refusal to release the e-mail addresses. However, they asked for additional time to complete and ensure the stability of the SIGNET communications network. The Information Commissioner was satisfied that the department required additional time before it could prudently disclose the list of e-mail addresses.

DFAIT informed the Commissioner that it intended to be in a position to release the e-mail list by June 30, 2000. The Information Commissioner accepted this commitment as a reasonable resolution of the complaint.

Prior to the June 30 proposed release, the DFAIT Deputy Minister wrote to the Information Commissioner expressing concern over the continuing vulnerability of critical communications systems. He informed the Commissioner that the security concerns raised earlier had not yet been overcome. Furthermore, the Deputy Minister did not believe that it was in the government's best interest from an operational perspective to release the information at that time. He therefore requested additional time so that a more extensive threat and risk assessment could be completed that would take a government-wide perspective on the issue. He promised to report by the end of September 2000 on the findings of the threat and risk assessment and the department's progress on the issue.

The complainant was not satisfied with this proposed course of action and so informed the Commissioner. The Information Commissioner reopened the matter in July 2000 and reinstated his powers of investigation. The Commissioner communicated to DFAIT and other agencies interested in the issue of disclosure of bulk e-mail addresses his view that there would be little utility in the traditional threat and risk assessment on the issue of e-mails. Bulk e-mail addresses of public officials were already in the public domain by virtue of widespread disclosures on Web sites, in directories and on business cards. In addition, the "template" form of e-mail addresses used in government effectively means that e-mail addresses of most federal employees can be easily assembled by any member of the public from public sources of information. It was therefore too late to seriously consider a "containment" strategy. Instead, existing defensive measures must be improved and augmented to confront the potential e-mail abuses now faced by government.

DFAIT ultimately agreed to proceed with the defensive measures required and to disclose the requested information no later than November 15, 2000. This undertaking constituted a satisfactory resolution of the matter.

Legal Issues

Subsection 15(1) of the Act gives clear authority to refuse to disclose records if disclosure could reasonably be expected to be injurious to the interests therein mentioned including the conduct of international relations. All systems connected to the Internet are vulnerable to receive high volumes (sometimes crippling) e-mail messages and viruses attached thereto. The issue in this case was whether or not disclosure of additional e-mail addresses would materially and negatively affect the vulnerability of an already vulnerable system.

When applying subsection 15(1)—or any injury test exemption—it is necessary for departments to assess the amount and nature of related information which is already in the public domain. If the requested information might be used in an injurious manner, that does not end the analysis. It must be shown that disclosure of the requested information, in the context of what is already publicly available, would materially and negatively affect the risk of injury. In this case, the public availability of even one government e-mail address increases the risk of virus introduction or system overload through volume of messages. However, given the large number of addresses which are publicly available, giving out the remainder would not materially change what is already a high risk. The appropriate solution in this case was to take countermeasures to protect an already vulnerable system rather than trying to close the barn door after the horse had bolted.

Lessons Learned

Departments have an obligation to ensure that security concerns are addressed before they release information. However, if the evidence is that disclosure does not increase an already existing risk, it is better to focus on countermeasures than to belatedly invoke secrecy.

Index of the 2000/2001 Annual Report Case Summaries

Section Of ATIA	Case No.	Description
2(2)	(03-01)	Formal vs. Informal
4	(05-01)	Who Got The Loans
15(1)	(08-01)	Disclosing E-Mail Addresses
19(1)	(04-01)	Reneging On A Promise
	(06-01)	Keeping Tabs On Offenders
	(07-01)	Number Please
20(1)	(02-01)	Discharging The Burden
21(1)(b)	(01-01)	Women's Role In The Navy

Glossary

Following is a list of department abbreviations appearing in the Case Summaries

ACOA Atlantic Canada Opportunities Agency

BDC Business Development Corporation

CSC Correctional Service Canada

DFAIT Department of Foreign Affairs and International Trade

ND National Defence

NPB National Parole Board

PMRA Pest Management Regulatory Agency of Health Canada

TSB Transportation Safety Board

CHAPTER VI
The Access to Information Act in the Courts

A: The Role of the Federal Court

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

Requesters dissatisfied with responses received from government to their access requests first must complain to the Information Commissioner. If they are dissatisfied with the results of his investigation, they have the right to ask the Federal Court to review the department's response. If the Information Commissioner is dissatisfied with a department's response to his recommendations, he has the right, with the requester's consent, to ask the Federal Court to review the matter. This reporting year the Commissioner's office investigated 1,337 complaints and of those, as of the date of this report, 2 applications had been filed in the Federal Court. Third parties opposing disclosure filed 34 applications.

Last year Parliament was alerted to a developing strategy by the government to muzzle the Commissioner by means of court challenges to his jurisdiction and powers. During this reporting year, the efforts heated up with the government filing 4 applications before the federal court challenging the Commissioner's investigative jurisdiction and powers.

B: The Commissioner in the Courts

I. Cases completed

Information Commissioner of Canada v. Minister of Environment Canada and Ethyl Canada Inc. (T-1125-99) Trial Division

(See also 1999-2000 Annual Report at p. 44 for further details)

This application was heard on January 15, 16 and 17, 2001. On April 2, 2001, Mr. Justice Blanchard allowed the Information Commissioner's application for review with costs awarded to the Information Commissioner. Ethyl Canada Inc. made a request under the *Access to Information Act* for access to confidences of the Queen's Privy Council for Canada ("Cabinet confidences") falling within the class of information described in paragraph 69(1)(b) of the Act and dealing with the fuel additive known as "MMT". Cabinet confidences are excluded from the right of access except in the circumstances described in subsection 69(3) of the Act which are:

1) 20 years have elapsed since the confidences came into existence, or

2) if the confidences are discussion papers presenting background explanations, analysis of problems and policy options to Cabinet and if

   i) the decision to which such confidences relate have been made public, or

   ii) otherwise, if four years have elapsed since the related decision.

Ethyl Canada Inc. believed that the conditions set out in paragraph 69(3)(b) of the Act were satisfied in respect of the Cabinet confidences it requested, being Discussion Papers the purpose of which was to present background explanations, analysis of problems or policy options to the Queen's Privy Council for Canada in making decisions with respect to the fuel additive.

The Minister of Environment Canada acknowledged that she had documents relevant to the access request but refused to disclose any portions of the records, on the basis of advice from the Privy Council Office (PCO). Environment Canada based its refusal on the ground that Discussion Papers no longer exist and on the ground that the documents found relevant to the request were not stand alone records bearing the appellation: "discussion papers". The records were withheld from access as being a memoranda to Cabinet and records used to brief ministers of the Crown in relation to matters before the Privy Council.

The Information Commissioner investigated the matter and concluded that the former content of Discussion Papers had been moved to other Cabinet confidences primarily into the Analysis section of the Memorandum to Cabinet. He found the refusal was not justified because paragraph 69(3)(b) of the *Access to Information Act* authorizes disclosure of the requested information and brought an Application for Review in Court seeking an order for disclosure of this information.

Approximately three months before the scheduled hearing of the application for review, the respondent filed as part of the Respondent's Record a certificate of the Clerk of the Privy Council allegedly prepared in response to three specific undertakings given by the respondent during the course of cross-examinations of the respondent's witnesses by the applicant. The certificate was issued pursuant to section 39 of the *Canada Evidence Act* and claimed absolute privilege against disclosure of the four documents identified as relevant to the access request by the respondent.

Paragraph 39(4)(b) of the *Canada Evidence Act* is identical to paragraph 69(3)(b) of the *Access to Information Act*, hence, the Commissioner, having been granted leave to amend his Application for Review, argued that if the refusal to disclose is improper, the certificate of the Clerk is also invalid. Mr. Justice Blanchard agreed with the Information Commissioner's position and concluded that the Clerk of the Privy Council erred in law by "not considering whether the information in the documents is within the exception in paragraph 39(4)(b) of the *Canada Evidence Act*." Mr. Justice Blanchard stated: "Being the master of its own economy, Cabinet is free to use whatever Cabinet Paper System it chooses and is equally at liberty to modify its paper system at will to fit the practical reality of the day. But such

liberty cannot extend to a paper system that, in my view, results in a circumvention of the intent of Parliament, namely the elimination of "discussion papers" as a document only to include similar background information in another part of the Memorandum to Cabinet and thereby prevent its release as required by law and in accordance with paragraph 69(3)(b) of the *Access to Information Act* or paragraph 39(4)(b) of the *Canada Evidence Act*."

Information Commissioner of Canada v. Minister of the Environment and Ethyl Canada Inc. (A-762-99) Court of Appeal

Minister of the Environment v. Information Commissioner of Canada and Ethyl Canada Inc. (A-761-99) Court of Appeal ***and Canada (Information Commissioner) v. Canada (Minister of the Environment)*** Supreme Court of Canada

(See 1998-99 Annual Report p. 33 and 1999-2000 Annual Report p. 45 for further details)

During the investigation, the Commissioner collected records from the Privy Council Office which were allegedly subject to solicitor-client privilege. The Crown objected when the Commissioner filed these records in confidence with the Federal Court as part of the evidence in support of an application for a review under s.42 of the Act. The Motions Judge had decided on November 15, 1999 that documents obtained by the Information Commissioner during the course of his investigation, which he wished to use and file in support of his case at the Trial Division (T-1125-99) and which were claimed by the government to be covered by solicitor-client privilege, should be filed confidentially. He also found that the judge hearing the case at the Trial Division (T-1125-99) should determine the use to be made of these documents.

The Minister had appealed this portion of the Order, arguing that the Motions Judge disregarded the importance of the solicitor-client privilege, adopted an overly broad interpretation of the power of the Information Commissioner and the Court to "examine" documents, and improperly exercised his discretion when he referred the issue of the admissibility of the documents to the judge hearing the case at trial. On April 6, 2000, in a unanimous decision, the Court of Appeal (Létourneau, J.A., Evans, J. A., Malone, J. A.) dismissed the Minister of the Environment's appeal. The Court of Appeal determined that the Information Commissioner may, in reviews under the Act, confidentially file and use documents, solicitor-client or otherwise, which he obtained during the course of his investigation.

The wording of sections 37 and 46 of the *Access to Information Act* gives the Commissioner and the Court authority to examine any record notwithstanding any privilege under the law of evidence. The Court found that this power goes beyond a mere inspecting power to encompass the ability to use privileged documents as evidence to decide whether a government department had the authority to refuse to disclose requested documents. This is also consistent with the purpose of the Act which specifies that the decisions on the disclosure of government information

should be reviewed independently of government. In coming to this conclusion, the Federal Court of Appeal took into account the fact that reliance on such evidence was important because the actual documents at issue were alleged to be Cabinet Confidences and could not be reviewed by the Court.

The Minister of the Environment applied to the Supreme Court for leave to appeal this decision but the court dismissed the request on November 23, 2000, without reasons, awarding costs to the Information Commissioner.

The Information Commissioner of Canada v. Minister of Citizenship and Immigration Canada and Phil W. Pirie
(T-1569-99) Trial Division

(See 1999-2000 Annual Report p. 43-44 for more details)

This application for judicial review was heard on January 22, 2001, and the judgment was issued on March 22, 2001. The central issue in this application was the interpretation and scope of paragraphs 3(e), (g), (i) and (j) of the definition of "personal information" found in section 3 of the *Privacy Act*.

The respondent, Citizenship and Immigration Canada, argued that the names of persons interviewed during an administrative inquiry into an allegedly dysfunctional workplace at CPC Vegreville, where those persons had expressed views or opinions about the requester, would reveal information about the interviewees. According to the department, the names of the interviewees were exempt from disclosure to the requester, even though he was the subject of the opinions, because of section 3(i) of the definition of "personal information".

The Commissioner argued that section 3(g) required the disclosure of the names of the interviewees to the requester who was the subject of the views and opinions stated. To do otherwise would offend the comprehensive scheme set out in sections 3(e) (g) and (h) of the *Privacy Act* all of which deal with the disclosure of opinions or views of an individual. The Commissioner also argued that section 3(j) operates to remove opinions (and names of those expressing the opinions) given in the course of employment from the definition of "personal information". In the Commissioner's view, those who give opinions during an administrative inquiry do so "in the course of employment".

The Court (Dawson, J.) agreed that the requesters had a right to know the opinions expressed by others about him. However, it held that the names of the employees who gave views or opinions about the requester were their personal information and properly exempted under section 19(1) of the Act. The Court found that, since not all employees of CPC participated in the review, the release of the names would reveal who participated in the review, notwithstanding the fact that they expressed views or opinions about the requester.

The Court disagreed with the Information Commissioner's statutory analysis argument which relied on legislative history and the general principles of statutory interpretation because "this method of statutory interpretation is not applicable where the general opening words of the definition [of "personal information"] are intended to be the primary source of interpretation and subsequent enumerations merely exemplifiers."

However, the Court considered the application of paragraph 3(j) of the *Privacy Act* and held that the identities of all managers who were interviewed should be disclosed together with any of their recorded opinions or views which have not yet been disclosed. These opinions, according to the Court related to the positions or functions of the managers because of their responsibility to prevent harassment in the workplace or to administer a harassment policy.

The Court ordered the Information Commissioner to prepare a draft order for endorsement which must be consented to by the respondent. If no agreement is reached, a motion will be made to the Court for further directions.

The Information Commissioner has appealed this decision. The outcome will be reported in next year's annual report.

The Information Commissioner of Canada v. The Commissioner of the Royal Canadian Mounted Police and the Privacy Commissioner of Canada (A-820-99) Court of Appeal

(See p. 47 Annual Report 1999-2000 for further details)

In this case, the Information Commissioner appealed the decision of Mr. Justice Cullen of the Trial Division dated November 18, 1999, in which he found that the Commissioner of the RCMP was authorized to withhold a list of past postings of four RCMP officers, including their ranks attained, places of posting, dates of postings, hiring date and total years of service. The Trial Judge decided that such information fell within the definition of "personal information" in section 3 of the *Privacy Act* and did not agree with the Information Commissioner's position that the requested information fell within an exception to the definition of personal information as "information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual." He, however, found that the RCMP did not consider whether it was, nonetheless, in the public interest to disclose the information. Thus he referred this question back to the Commissioner of the RCMP. One month later the Commissioner of the RCMP sent a letter to the Information Commissioner indicating that he would not release the information. No reasons for this decision were provided.

The Information Commissioner appealed on the grounds that the Trial Judge erred in determining that the requested information was properly exempted as personal information within the meaning of section 19(1) of the *Access to Information Act* and improperly interpreted the exception to the definition of personal information found in paragraph 3(j) of the *Privacy Act*. On February 21, 2001, the Information Commissioner's appeal was heard by a panel of three judges of the Court of Appeal (Décary, J.A., Létourneau, J.A. and Noël, J.A.). The decision was issued on March 13, 2001. In its decision, the Court stated that:

> "Paragraph 3(j) authorizes the release of information about an individual's position, whether current or past, and is not limited, as the motions judge found, to positions currently held. The very fact of employment past or present, can be revealed and, indeed, is essential to a citizen in determining whether his request for disclosure is addressed to the appropriate authority and is worth pursuing."

However, the Court dismissed the Information Commissioner's appeal on the basis that:

> "A request about a named individual's position, especially in respect of the past positions held, has to be specific as to time, scope and place. It cannot be a fishing expedition about all or numerous positions occupied by an individual within the Government over the span of his employment as it becomes, in fact, a request about that individual's employment history. For example, a citizen could properly ask whether John Doe worked for the Department of Justice in 1994, what position he held at that time, the duties and responsibilities of that position and where he exercised his functions. But he could not, without being properly opposed paragraph 3(b), request information about John Doe's positions in the Government between 1980 and 1994."

The Information Commissioner sought leave to appeal this decision to the Supreme Court of Canada. The outcome will be reported when there has been a disposition of the matter.

Yeager v. Correctional Service of Canada, Commissioner of Corrections and Information Commissioner of Canada

(T-549-98) Trial Division

(See p. 50 Annual Report 1999-2000 for further details)

The requester originally challenged the decision of Correctional Service of Canada to exempt requested records from disclosure and also asked for relief against the Information Commissioner in the form of a declaration that the latter contravened his own Act when he found that the requester's complaint against CSC was unfounded and contravened the requester's freedom of expression under the Charter of Rights and Freedoms. The requester erroneously characterized the Information Commissioner's report as a 'decision' regarding the release of records. The Information Commissioner attempted to correct this misapprehension by informing the requester that as an ombudsman he can only make recommendations to government institutions regarding the

release of requested documents and thus, he should not be a party to the requester's application. In any event, the Information Commissioner argued that the application against him was bereft of any possibility of success since he had no power to order the government institution to disclose the requested documents. Upon engaging new counsel, the requester asked the Court to amend the application to, amongst other things, delete the constitutional challenge against the Information Commissioner, and provide the requester with the right to file new evidence and make additional arguments.

This request was challenged by the Information Commissioner who also asked that the application be dismissed against him. On April 20, 2000, an Order was issued granting the request to amend his application, file new evidence and make additional arguments. The Court also removed the Information Commissioner as a party and gave the requester twenty-one days from the date of this decision to name a proper responding party. The judge (Mr. Justice O'Keefe) found that a board or tribunal whose decision is under review is not a proper responding party. He also found that a challenge with respect to the refusal of the Information Commissioner to investigate a complaint may be subject to an application for review [pursuant to the *Federal Court Act*] however, he held that the merits or the appropriateness of the Information Commissioner's recommendation are not. The failure of the applicant to comply with the order resulted in the allowance of the motion to strike the relief against the Information Commissioner.

The Attorney General of Canada (Canada) v. Daniel Martin Bellemare and the Information Commissioner of Canada
(A-598-99) Court of appeal

On November 27, 2000, the Court of Appeal (Décary, J.A., Létourneau, J.A., Noël, J.A.) set aside the preliminary order of the Motions Judge in which the latter only struck part of Bellemare's application for review under the *Access to Information Act*. The Court gave the judgment that the Motions Judge should have given, namely an order striking the application in its entirety. There were two access requests at the heart of this application for review. The first access request was for a list of attorneys who participated in an Interchange Canada Program within Industry Canada Legal Services since 1986. The second request asked for information relating to lawyers who had at some time worked for Industry Canada Legal Services.
The complaint to the Information Commissioner pertained to an improper refusal to disclose some of the requested information. The Information Commissioner reported the complaints to be unfounded and Bellemare's application sought a review, under section 41, of the Information Commissioner's two 'decisions'.
The Court of Appeal struck out the application in its entirety on the grounds that section 41 does not provide any recourse against the Information Commissioner, but rather is specifically directed against decisions by the government institution to refuse access. Thus, the Court had no jurisdiction, under section 41, to conduct a judicial review of the Information Commissioner's findings.

William Rowat v. The Information Commissioner of Canada and the Deputy Information Commissioner of Canada (T-701-99) (Trial Division)

(See Annual Report 1999-2000 p. 49 for more details)

This case involved the refusal of Mr. William Rowat (a senior adviser to the Privy Council Office) to answer questions put to him by the Deputy Commissioner about how he discovered the identity of an access requester who had sought information about the terms of his secondment to the government of Newfoundland and his expense claims as Deputy Minister of Fisheries and Oceans.

Mr. Rowat challenged the Commissioner's jurisdiction to investigate a complaint about an alleged breach of confidentiality in the processing of an access request. He also challenged the constitutionality of the Commissioner's power to compel him to answer questions pursuant to paragraph 36(1)(a) of the Act.

On June 9, 2000, the Federal Court (Campbell, J.) dismissed Mr. Rowat's application for judicial review. The Court found that the investigatory jurisdiction of the Commissioner under section 30 is broad and that paragraph 30(1)(f) "places no limits on the subject matter required to be investigated by the Commissioner".

The Court also found that the Commissioner's power to compel witnesses to give evidence pursuant to section 36(1) of the Act by way of a contempt proceeding does not offend section 7 or 11(d) of the *Canadian Charter of Rights and Freedoms*. The Court had regard to the statutory guarantees of independence and impartiality provided by the *Access to Information Act* and concluded that in seeking to compel Mr. Rowat to answer the questions put to him, the Commissioner was simply attempting to comply with the mandatory requirements of the Act.

The Court awarded costs to the Information Commissioner which were later assessed by way of motion on a solicitor-client scale. The grounds which the Commissioner relied on when seeking solicitor-client costs were that: (1) Mr. Rowat amended his notice of application to include a complex constitutional challenge to the Commissioner's power to require the attendance of witnesses and the production of evidence less than two months prior to the hearing of the application; and (2) after the decision in the application, Mr. Rowat attended before the Deputy Information Commissioner and gave evidence that indicated that the application brought by him was unnecessary and resulted in the misuse of the resources of the Office of the Information Commissioner and of the Federal Court of Canada. The Court awarded the costs sought by the Commissioner in the amount of $30,700. These costs were paid by the Privy Council Office on behalf of Mr. Rowat.

II. Cases in Progress - Commissioner as Applicant

Information Commissioner of Canada and Telezone Inc. v. Minister of Industry (A-824-99) Court of Appeal

3430901 Canada Inc. and Telezone Inc. v. Minister of Industry (A-832-99) Court of Appeal

In these cases, the Information Commissioner and Telezone (3430901 Canada Inc. and Telezone Inc. in the style of cause) appealed the November 17, 1999, decision of Madam Justice Sharlow in which she dismissed their applications against the Minister of Industry. The applications were for the disclosure of the guidelines and weighting factors used in the evaluation process that gave rise to a final decision by the Minister of Industry to provide radio spectrum licenses to provide wireless communication services. Telezone had applied, unsuccessfully, for such a licence.

As reported in last year's annual report (see 1999-2000 Annual Report at p. 46), the case before the Federal Court turned on the proper interpretation of the statutory exemptions relied on by the Minister, being paragraphs 21(1)(a) (advice or recommendations) and (b) (account of deliberations) of the Act. Madam Justice Sharlow gave a broad interpretation to these paragraphs.

The Information Commissioner and Telezone appealed this decision. The hearing of the appeal will take place on May 29 and 30, 2001. At issue will be the proper interpretation to be given to paragraphs 21(1)(a) and (b) and to section 48 of the Act, which places the burden of proof in access litigation on government institutions.

The Minister of Industry Canada v. The Information Commissioner of Canada and Patrick McIntyre Trial Division (A-43-00) Court of Appeal

(See also 1999-2000 Annual Report at p. 48 for more details)

In this case, the Minister of Industry appealed the January 14, 2000, decision of Mr. Justice Gibson who allowed the Information Commissioner's application for review against the Minister of Industry for disclosure of the weighting percentages it used when it reviewed the proposals submitted by private companies for an award of orbital slots for direct broadcast satellite services.

This case, before the Federal Court, also turned on the proper interpretation of paragraph 21(1)(a) of the Act relied on by the Minister to justify his refusal. In his reasons, the learned Trial Judge came to the conclusion that while the weightings originated as advice or recommendations, they lost that character when the respondent Minister accepted them. They became the respondent's decision when he did so and they ceased to be advice or recommendations.

This appeal will be heard at the same time as the appeals referred to above involving the Information Commissioner, Telezone and the Minister of Industry (in Court Files A-824-99 and A-832-99), which have been set to be heard on May 29 and 30, 2001. At issue will be the proper interpretation to be given to paragraph 21(1)(a) of the Act.

The Information Commissioner of Canada v. The Executive Director of the Canadian Transportation Accident Investigation and Safety Board (T-465-01 Trial Division)

In this case, the requester, a journalist, requested all records regarding the investigation into Kelner Airways, Pilatus PC-12 plane crash near Clarenville, Newfoundland on May 19, 1998, including the final report and with ministerial briefings, witness statements and audio tape copy of the voice cockpit recorder conversations. The Transportation Safety Board released some material but, contrary to the recommendation of the Commissioner, exempted the audio tape and transcript thereof as constituting personal information pursuant to subsection 19(1) of the Act.

With the consent of the requester, the Information Commissioner commenced an application for judicial review of the refusal to disclose the audio tape and transcript. The notice of application alleges that the Executive Director of the Transportation Safety Board erred in finding that the requested records constituted personal information. The application also asserts that the Executive Director failed to disclose the audio tape and transcript which he has already released to other journalists. Portions of the audio tape were broadcast on a national television news magazine show. The Commissioner has filed his affidavit evidence with the Court. The outcome will be reported in next year's Annual Report.

III. Cases in Progress - The Commissioner as Respondent in Trial Division

Attorney General of Canada and Bruce Hartley v. Information Commissioner of Canada (T-1640-00) Trial Division

Attorney General of Canada and Meribeth Morris, Randy Mylyk and Emechete Onuoha v. Information Commissioner of Canada (T-1641-00) Trial Division

During the investigation of complaints which arose out of separate requests to the Privy Council Office and the Department of National Defence, the Deputy Information Commissioner issued subpoenas to Mr. Bruce Hartley, the Prime Minister's Executive Assistant, and to Mr. Emechete Onuoha, Ms. Meribeth Morris and Mr. Randy Mylyk, members of the Minister of National Defence's staff. In each subpoena, the Deputy Information Commissioner ordered the individuals to produce documents relevant to the investigation of the complaints including documents that appear to be the requested records.

In the first case, an access request was made to the Privy Council Office for the agenda of the Prime Minister from January 1, 1994, to December 31, 1997. In the second case, an access request was submitted to the Department of National Defence for minutes or documents produced from DND M5 management meetings for 1999. (It appears that the M5 meetings are regular among the Minister of National Defence, the Deputy Minister of National Defence and the Chief of the Defence Staff where some of the minister's staff are also present.)

The individuals who were subpoenaed and the Attorney General commenced two applications for judicial review seeking declarations that the documents sought by the Commissioner are not under the control of the Privy Council Office and the Department of National Defence and are therefore not records within the meaning of subsection 2(1) of the Act. The applicants also sought an order nullifying the subpoenas and prohibiting the Commissioner from requiring the individuals to give evidence or produce documents which are not under the control of a government department. They argued that the individuals subpoenaed have no relevant evidence to provide.

Before the Trial Division (McKeown, J.), the Commissioner sought to strike out the two applications for judicial review in their entirety. The Commissioner asserted that the declarations sought in the applications are entirely within his jurisdiction to determine and that by requiring him to take an adversarial position prior to the conclusion of his investigations the application will taint his appearance of neutrality, which is an essential component of his role as an impartial ombudsofficer. The Commissioner submitted that it would be improper for him to file evidence in support of a position or to cross-examine the applicants' witnesses within the litigation process before the Federal Court.

The Commissioner's motions were dismissed. The motions judge granted the applicants' motion for interim relief and prohibited the Information Commissioner from enforcing his order compelling the attendance of the witnesses and the production of the required documents. These decisions have been appealed [see A-674-00 and A-675-00) page 118]. The applications for judicial review were stayed pending the outcome of the Commissioner's appeal.

Further, the Information Commissioner also submitted that the Attorney General's applications for a declaration that the records sought are not under the control of the Privy Council Office is improper because the Prime Minister (who is the head of PCO and who had refused to disclose the requested records because allegedly they are not under the control of PCO) may not as a decision-maker bring an application for judicial review before Federal Court seeking confirmation from the Court of his decision. In other words, the Attorney General and the Prime Minister are subverting the review process provided under the *Access to Information Act*.

The Information Commissioner of Canada v. The Attorney General of Canada and Bruce Hartley

Court file A-674-00

The Information Commissioner v. The Attorney General of Canada and Meribeth Morris, Randy Mylyk and Emechete Onuoha and David Pugliese

Court file A-675-00

These are appeals of an Order of the Federal Court Trial Division dismissing the Commissioner's motions to strike in Court Files T-1640-00 and T-1641-00 (set out in greater detail at p.116 of this Report).

The Commissioner argued before the Court of Appeal (Richard, C.J.; Noel, J.A.; Evans, J.A.) that the Motions Judge erred in law by failing to appreciate that the scheme of the access legislation precluded the Attorney General from seeking a declaration that particular records are not under the control of a government institution prior to the conclusion of the Commissioner's investigations, the issuance of the report to the government institution and the issuance of a report to the complainant. The Commissioner also appealed the order of the Motions Judge prohibiting the enforcement of subpoena *duces tecum* issued to the applicants on August 11, 2000, which sought the production of the documents at issue in these matters.

The Federal Court of Appeal allowed the Information Commissioner's appeal in part, and set aside the order prohibiting the Commissioner from requiring the applicant to attend to give evidence and bring with them documents pursuant to the subpoena *duces tecum* issued on August 11, 2000. The Court found that the Motions Judge erred in concluding that the applicants would suffer irreparable harm if a stay were not granted. The Court concluded that, in light of sections 63 and 64 of the Act and the need for an independent review of the government institution's refusal to disclose information, it could not be seriously argued that irreparable harm would result from a review of the documents and evidence at issue by the Commissioner, an authorized officer of Parliament.

However, the Court dismissed the Commissioner's appeal of the Motions Judge's decision to not strike out the applications for judicial review in the Court Files T-1640-00 and T-1641-00. The Court found that the Act does not oust the jurisdiction of the Federal Court under section 18.1 of the *Federal Court Act* to grant a declaration on an application for judicial review. Nonetheless, the Court stated that:

> "the Judge hearing the application for judicial review is not precluded from refusing relief in the exercise of his or her discretion on the ground, for example, that it would be premature for the Court to intervene prior to the completion of the Commissioner's investigation and recommendations, especially if there were factual issues to be determined."

Thus, the Court left all such arguments to be raised during the hearing of the merits of the applications for judicial review.

Attorney General of Canada and Janice Cochrane v. Information Commissioner of Canada (T-2276-00 and T-2358-00) Trial Division

The Attorney General and the Deputy Minister of Citizenship and Immigration Canada brought two applications for judicial review against the Information Commissioner challenging the jurisdiction of the Information Commissioner in issuing two Orders for Production of Documents. These Orders for Production were issued in furtherance of the investigation into the department's actual refusals to disclose certain documents that were the subject of access requests (namely its application of exemptions under the Act) and the department's deemed refusals to disclose other requested documents (namely its failure to give access to documents within a reasonable period of time).

The Orders asked the Deputy Minister or her delegate to produce the following sets of documents: the documents which are the subject matter of the requests, the documents relating to the processing of the requests and to the investigation and any legal opinions concerning such processing. The A.G. and Deputy Minister Cochrane asked the Court to prevent the Information Commissioner from requiring Cochrane to give evidence or produce documents pursuant to the Orders of Production and asked that the effect of the Orders for Production be stayed pending the outcome of the court proceedings.

This case, which challenges the Information Commissioner's powers of investigation, has not yet proceeded to court. A full account of the outcome will be given in next year's Annual Report. In the interim, however, there have been numerous procedural matters including those relating to the protection of the confidentiality of information pertaining to the identity of the access requester. These procedural matters were set in motion when counsel for the A.G. and the Deputy Minister placed such confidential material on the public court record. The Information Commissioner made an urgent request to the court to have the file sealed to protect the identity of the access requester. The A.G. and Deputy Minister were, as a result, required to file expurgated copies of these documents in which all information which would reveal the identity of the access requester was removed.

Canadian Tobacco Manufacturers' Council A and B (Confidential) v. Minister of National Revenue, Information Commissioner of Canada and Robert Cunningham (T-877-00) (Trial Division)

In this case, the Minister of National Revenue initially refused to disclose information provided by the tobacco industry in relation to marking/stamping on tobacco products to the requester. After a complaint was made to the Commissioner and an investigation was conducted, the Minister of National Revenue determined that it did not have sufficient evidence to justify withholding the records identified as relevant.

The third party, the Canadian Tobacco Manufacturers' Council and others, whose names cannot be released due to a confidentiality order of the Federal Court of Canada, have brought an application under section 44 of the Act to review the decision to disclose the records.

The third parties have raised two main issues in this case. First, are the records identified by the Minister of National Revenue relevant to the request. Second does the exemption in section 20(1) of the Act apply to the records in question.

The Information Commissioner intervened in this matter pursuant to paragraph 42(1)(c) in order to assist the Court by providing evidence obtained during the Commissioner's investigation of the related complaint.

Cross-examinations have been completed, however, the case is not yet ready for hearing.

C. Court Cases not involving the Information Commissioner

Sheldon Blank & Gateway Industries Ltd. v. The Minister of the Environment (T-1111-98) (Trial Division)

This application for review brought by the requester under section 41 of the *Access to Information Act* does not discuss any legal tests for the application of exemptions under the Act. However, its importance lies in the analysis it provides on the application of the costs provision in section 53 and how the Court treats delays in responding to access requests.

The requester sought disclosure of communications between Environment Canada and Fisheries and Oceans regarding his possible prosecution for depositing effluent into the Red River; the contents of certain files, documents distributed in advance of the new Pulp and Paper Mill Effluent Regulations, and the distribution list. This Office upheld the exemptions raised by the government institution. A number of records were disclosed before and after the application for review was filed, leaving approximately 544 pages and one video tape in dispute.

There was a question of delay in providing records responsive to the access request and in disclosing records not covered by exemptions. Partial releases were made in April and July of 1997. The requester complained to the Information Commissioner under subsection 10(3) of the department's deemed refusal to disclose records he requested. The government department then committed itself to a full response by September 30, 1997, but the response date was extended to November 28, 1997, due to the volume of records. Further partial releases were made in September 1997; November 1997; December 1997; February 1998; March 1998, and up to and following the dates of the hearing of the application for review. In addition, the respondent took seven months from the date of an Order of the Trial Division to disclose better particulars of records which the department alleged to be exempted under the solicitor-client provision (section 23). Although the access request involved a review of approximately 7,655 pages and the processing involved significant third-party consultations, the Trial Judge

(Gibson, J.) still found that the inordinate delay by the respondent in processing the access request contravened the policy of dealing with access requests in a summary manner. Thus, costs were awarded to the applicant under subsection 53(1) of the Act and his application was granted in part.

Stenotran Services v. Canada (Minister of Public Works and Government Services) (T-1281-99) (Trial Division)

The Trial Judge dismissed an application brought by Stenotran pursuant to section 44 challenging a decision by the Minister of Public Works and Government Services to disclose the unit prices offered by Stenotran. The latter had been awarded a contract for reporting services at the Competition Tribunal. Stenotran relied upon paragraph 20(1)(b) of the *Access to Information Act*, arguing that the information was commercial, confidential, was supplied to a government institution and was consistently treated as confidential. The Minister argued that the information was not confidential nor was it consistently treated as confidential by Stenotran. The Trial Judge noted that confidentiality should be assessed using an objective standard. She noted that Stenotran (the third party) had the burden of proving that the information in dispute should not be released. She was not persuaded by the confidentiality clause in the "Request for Standing Offer" as it "only ensures that the information will be treated as confidential pursuant to the provisions found in the [Access] Act". Furthermore, the Standing Offer contained a disclosure clause whereby the company agreed to disclose its standing offer unit prices and that such disclosure was not restricted to other government departments.

Coopérative fédérée du Québec v. Canada (Agriculture and Agri-Food) (T-1798-98) (Trial Division)

The Trial Judge dismissed the application brought by Cooperative fédérée (the third party) pursuant to section 44 for a review of the government's decision to disclose information sent to the Canadian Food Inspection Agency concerning facility inspection reports. The third party relied upon the exemptions in paragraphs 20(1)(c) and (d) of the Act to justify their position against disclosure. The Trial Judge determined that access should not be prohibited only because the information might be unfavorable to the people it concerns. Coopérative fédérée failed to demonstrate, under paragraphs 20(1)(c) and (d), that the disclosure could give rise to a reasonable probability of material financial loss or would prejudice their competitive position or interfere with contractual or other negotiations. Unfair treatment or an unbalanced portrayal by the press of the information in question should not be presumed. The Trial Judge also discounted the third party's argument that the public will incorrectly interpret the information. He found that the third party was merely speculating on the consequence of disclosure and thus, failed to meet the test of "reasonable expectation of probably harm" established by the court. He thus ordered disclosure of the requested information upon the expiration of the time period for Coopérative fédérée to appeal this decision.

Blank v. Canada (Minister of the Environment) (T-1474-99, T-1477-99) (Trial Division)

The Trial Judge rejected these applications pursuant to section 41 of the *Access to Information Act* in which the applicant claimed that the Minister of the Environment did not provide him with certain records responsive to the request which he suspected were in existence. The Trial Judge found that the Court can only order disclosure as a remedy and thus, cannot exercise its jurisdiction if disclosure has already taken place. Further, there must be some evidence beyond mere suspicion that documents are being withheld. The Trial Judge found that there was no actual or constructive denial of access and that the Court had no jurisdiction to grant an order for a "more thorough search and disclosure." He also found that the additional fee of $5,700 and 50% deposit charged by the government institution was reasonable for the search and preparation of information responsive to the request for deleted e-mails. He noted that the Act gives the government institution the discretion to weigh the magnitude of the request against the amount of time and effort required to provide the information in order to determine whether to waive the fee.

Merck Frosst Canada Inc. v. Canada (Minister of National Health) (T-262-98) (Trial Division)

The Trial Judge rejected an application pursuant to section 44 of the *Access to Information Act*, for a review of two decisions by Health Canada to partially disclose information related to the drug FOSAMAX. The Trial Judge found that Merck Frosst (the third party) failed to discharge its burden of proving that the following exemptions applied: paragraphs 20(1)(a) (trade secrets 20(1)), (b) (confidential financial, commercial, scientific or technical information supplied to government and treated consistently as confidential); and 20(1)(c) (disclosure which could reasonably be expected to result in material financial loss/prejudice). As the third party, in its representations to Health Canada, did not characterize any information as trade secrets, it could not successfully argue paragraph 20(1)(a). As there was evidence that much of the information could be found in the public domain and no evidence was brought by Merck Frosst to demonstrate that the information was confidential, the requirements of paragraph 20(1)(b) were not satisfied. With regards to paragraph 20(1)(c), Merck Frosst failed to provide the Court with evidence that there was a reasonable expectation of probable harm from disclosure of the requested information. The affidavit evidence the company provided only speculated that harm could occur.

D. Legislative Changes

I. Changes to the *Access to Information Act*

When the act entitled: An *Act to give effect to the Nisga'a Final Agreement* was proclaimed in force on May 11, 2000, a number of other Acts were amended, including the *Access to Information Act*. Subsection 13(1) of the *Access to Information Act* was amended by striking out the word "or" at the end of paragraph (c), by adding the word "or" at the end of paragraph (d) and by adding the following after paragraph (d):

(e) an aboriginal government.

The following was also added after subsection (2):

Definition of "aboriginal government"

(3) The expression "aboriginal government" in paragraph (1)(e) means Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the *Nisga'a Final Agreement Act*.

New government institutions

During the1999-2000 fiscal year, new government institutions became subject to the *Access to Information Act* while others were struck out if abolished. The following amendments were made to Schedule I of the Act:

"Canadian Forces Grievance Board" and "Military Police Complaints Commission" were added under the heading "Other Government Institutions" (1998, c. 35, s. 106, with respect to the "Military Police Complaints Commission", in force 99.12.01 and with respect to the "Canadian Forces Grievance Board", in force 00.03.01).

"Mackenzie Valley Land and Water Board" was added under the heading "Other Government Institutions" (1998, c. 25, s. 160(2) in force 00.03.31).

"Belledune Port Authority" was added under the heading "Other Government Institutions" (SOR/2000-175, Can. Gaz., Part II in force 00.05.04).

"Atomic Energy Control Board" was struck out under the heading "Other Government Institutions" and "Canadian Nuclear Safety Commission" was added under the heading "Other Government Institutions" (1997, c. 9, ss. 83 and 84 in force 00.05.31).

"Canadian Institutes of Health Research" was added under the heading "Other Government Institutions" (2000, c. 6, s. 42 in force 00.06.07).

"Financial Transactions and Reports Analysis Centre of Canada" was added under the heading "Other Government Institutions" (2000, c. 17, s. 84 in force 00.07.05).

"Anciens combattants" was replaced with "Anciens Combattants" in the French version of the Schedule (2000, c. 34, par. 94(a) in force 00.10.27).

"Canada Ports Corporation" was struck out under the heading "Other Government Institutions" (1998, c. 10, s. 159(1) in force 00.11.01).

"Canadian Tourism Commission" was added under the heading "Other Government Institutions" (2000, c. 28, s. 47 in force 01.01.02).

II. Statutory prohibitions against disclosure of government records

Schedule II

Schedule II of the Act contains statutory prohibitions against disclosure of government records. During the1999-2000 fiscal year, the following amendments were made to this Schedule:

The reference to "*Canadian Environmental Protection Act*" and the corresponding reference to "sections 20 and 21" were struck out (1999, c. 33, s. 344 in force 00.03.31).

"*Atomic Energy Control Act*" and the corresponding reference to section 9 were deleted and "Nuclear Safety and Control" and a corresponding reference to paragraphs 44(1)(d) and 48(b) were added (1997, c. 9, ss. 85 and 86 in force 00.05.31).

The reference to "subsection 29(1)" opposite the reference to "*Competition Act*" was replaced with a reference to "subsections 29(1) and 29.1(5)" (2000, c. 15, s. 20 in force 00.07.05).

A reference to "*Proceeds of Crime (Money Laundering) Act*" and a corresponding reference to "paragraphs 55(1)(a), (d) and (e)" were added (2000, c. 17, s. 85 in force 00.07.05).

The reference to "subsection 144(2)" opposite the reference to "Canada Labour Code" was replaced with a reference to "subsection 144(3)" (2000, c. 20, s. 25 in force 00.09.30).

III. Private Members' bills to reform the Access to Information Act

During the 2nd session of the 36th Parliament, six different Private Member's bills aimed to reform the *Access to Information Act*. The ones that were tabled before the end of February 2000 were described in last year's annual report. They were Bill C-206 (introduced by J. Bryden), Bill C-329 (introduced by R. Bailey) and Bill C-418 (introduced by R. Borotsik). The Bills that were tabled after the month of March 2000 in the 2nd session of the 36th Parliament are the following:

Bill C-448 was introduced by B. Gilmour (Canadian Alliance, Nanaimo-Alberni) on March 1, 2000. The purpose of the bill was to make all Crown corporations subject to the *Access to Information Act*. The bill did not proceed to second reading.

Bill C-489 was introduced on June 13, 2000 by G. Breitkreuz (Canadian Alliance, Yorkton-Melville. The purpose of the Bill was to:

i. make Cabinet confidences mandatory exemptions as opposed to exclusions;

ii. exclude from the exemption documents that refer to, but do not reveal the substance of Cabinet confidences and certain other documents;

iii. shorten the exemption period for Cabinet confidences from twenty to fifteen years; and

iv. to provide that in the Federal Court, the special procedures existing for other sensitive matters such as defence be followed for Cabinet confidences and review of Cabinet confidences to be handled only by Commissioner, Assistant Commissioner or specified officers.

The bill did not proceed to second reading.

Bill C-494 was introduced on September 19, 2000 by B. Casey (PC Cumberland-Colchester). The purpose of the bill was to subject NAV CANADA to the provisions of the *Access to Information Act*. The bill did not proceed to second reading.

In the first session of the 37th Parliament commencing in January of 2001, only one Private Member's bill proposing to reform the *Access to Information Act* has been tabled at this time, it is the following:

Bill C-249 has been introduced on February 7, 2001 by R. Borotsik (PC Brandon-Souris). The Bill has been placed in the order of precedence February 8, 2001. The purpose of the bill is to define "government institution" in section 3 of the *Access to Information Act* to mean any department or ministry of state of the Government of Canada listed in Schedule I, any body listed in Schedule I or any Crown corporation as defined in the *Financial Administration Act*, and including the Canadian Wheat Board.

CHAPTER VII

Corporate Management

The Privacy and Information Commissioners share corporate services while operating independently under their separate statutory authorities. These shared services—finance, human resources, information technology and general administration—are centralized in the Corporate Management Branch to avoid duplication of effort and to save money for both government and the programs.

The Branch is a frugal operation with a staff of 19 and a budget representing 13% of total program expenditures. In spite of the fact that the budget was slightly lower than the previous year, the Branch managed to fulfill its predetermined objectives. For example, the Government's Financial Information Strategy was successfully implemented by Financial Services on April 1, 2000; conversion to the Universal Classification Standard progressed on schedule; obligations associated with the new *Employment Equity Act* were met, and great strides were achieved in implementing a records management system (RDIMS).

Resource Information

The Branch continued to pursue innovative approaches to the delivery of its program without adversely affecting the quality of service to the access program during fiscal year 2000-2001. As indicated previously, resource constraints have had a serious, adverse affect on the timeliness of service to the public.

The Offices' combined budget for the 2000-2001 fiscal year was $13,331,000. Actual expenditures for 2000-2001 were $13,128,178 of which personnel costs of $8,298,784, professional services expenditures of $1,224,909, and acquisition costs of machinery and equipment $1,366,538 accounted for more than 80 percent of all expenditures. The remaining $2,237,947 covered all other expenditures including postage, telephone, office and office supplies.

Expenditure details are reflected in Figure 1 (resources by organization / activity) and Figure 2, (details by object of expenditure).

Figure 1: Resources by Organization/Activity (2000-2001)

	FTE's	FTE Percent	Totals	Exp. Percent
Privacy	56	50%	7,292,795	56%
Corporate Management	19	17%	1,860,223	14%
Information	37	33%	3,975,160	30%
Total	112	100%	13,128,178	100%

Figure 2: Details by Object of Expenditure

	Information	Privacy	Corporate Mgmt.	Total
Salaries	2,437,876	3,774,726	928,182	7,140,784
Employee Benefit Plan Contributions	463,200	544,260	150,540	1,158,000
Transportation and Communication	67,836	261,299	186,801	515,936
Information	118,470	969,475	3,822	1,091,767
Professional Services	398,755	584,913	241,241	1,224,909
Rentals	510	33,036	27,657	61,203
Repairs and Maintenance	23,743	327,711	65,359	416,813
Materials And Supplies	34,461	62,309	54,856	151,626
Acquisition of Machinery and Equipment	430,043	734,812	201,683	1,366,538
Other Subsidies and Payments	266	254	82	602
Total	**3,975,160**	**7,292,795**	**1,860,223**	**13,128,178**

*Note: Expenditure figures do not incorporate final year-end adjustments.

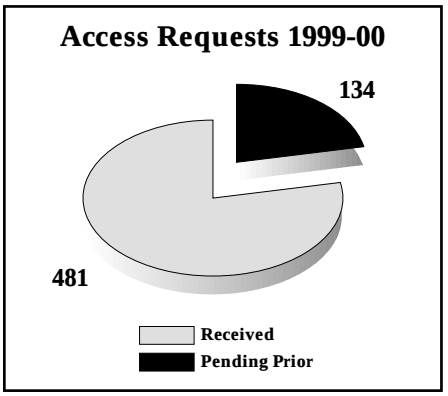
APPENDIX A
DELAY REPORT CARDS

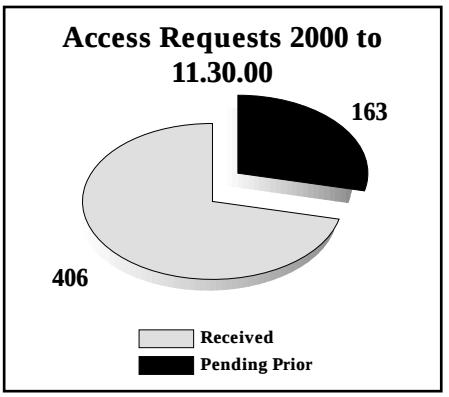
INDEX

FISHERIES AND OCEANS

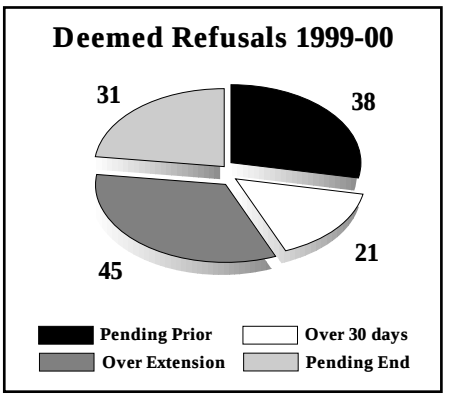
Statistical Information

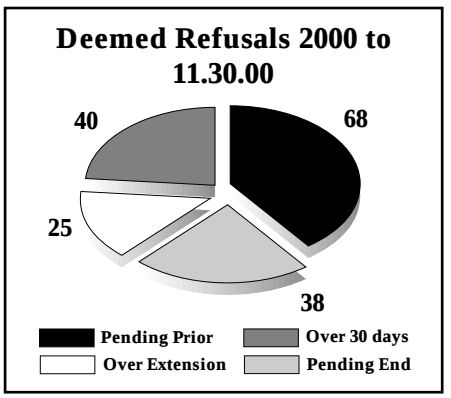
1. Requests





The charts above present a good visual picture of F&O's request backlog.





At the outset of the 1999-00 fiscal year, F&O's Access to Information Office had 134 outstanding requests—21 (15.7%) were already in a deemed-refusal situation. The 2000-01 fiscal year shows an increasing backlog at the start of the year with 163 outstanding requests—38 (23.3%) in a deemed-refusal situation.

With 481 new requests received in the 1999-00 fiscal period and 406 new requests received in 2000-01 to November 30th, a trend of an increasing backlog of requests in a deemed-refusal situation at the start of the year represents a burden to the ATI Office. Non-compliance considerations aside, this backlog must be eliminated. The statistics show that, in the review period, the new request to deemed-refusal ratio is 406:133=32.8%. This earns a grade of F on this report card which represents unacceptable performance.

The time taken to complete new requests also shows problems in meeting the time requirements of the Act.

In 1999-00, processing times for 31 requests completed beyond the 30-day statutory limit without an extension were:

- 22 (71.0%) took an additional 1-30 days to complete
- 4 (13.0%) took between 31 to 60 additional days
- 3 (9.5%) took between 61 to 90 additional days
- 2 (6.5%) were completed in over 90 additional days

In 2000-01 to November 30th, additional processing times for 40 non-extended new requests were:

- 27 (67.5%) took an additional 1-30 days
- 6 (15.0%) took between 31 to 60 additional days
- 4 (10.0%) took between 31 to 90 additional days
- 3 (7.5%) were completed in over 90 additional days

(This did not include completion figures for the deemed-refusal backlog, since the self-audit questionnaire did not ask F&O's ATI Office to provide that information.)

For extensions taken and not met, the following time delays occurred.

In 1999-00, of the 84 time extensions, 45 (53.6%) exceeded the extension of time as follows:

- 20 (44.4%) took an additional 1-30 days
- 12 (26.7%) took between 31-60 additional days
- 9 (20.0%) took between 61-90 additional days
- 4 (8.9%) were completed in over 90 additional days

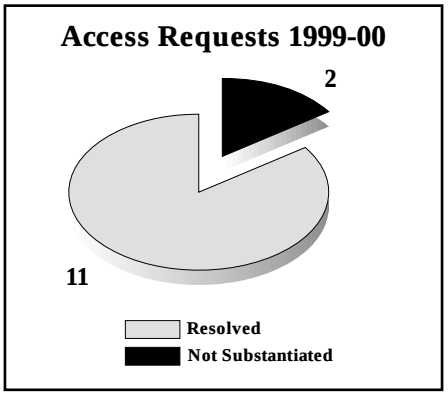
For completed requests received this fiscal year, 25 (37.9%) exceeded the extension of time as follows:

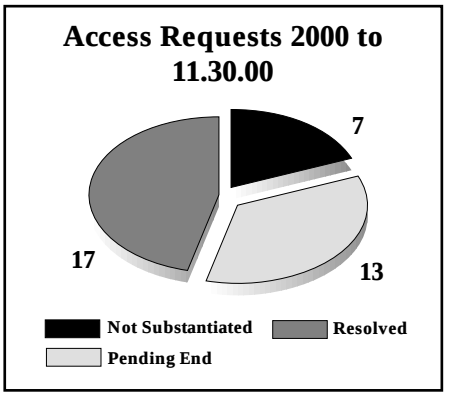
- 16 (64.0%) took an additional 1-30 days
- 6 (24.0%) took between 31-60 additional days
- 2 (8.0%) took between 61-90 additional days
- 1 (4.0%) were completed in over 90 additional days

As of November 30, 2000, 68 unfinished new requests were in a deemed-refusal situation. The duration of time beyond the time requirements of the Act for these outstanding requests is unknown.

Of note, F&O is reducing the time taken to respond to delayed requests even as the volume of requests increases.

2. Complaints—Deemed Refusals





In 1999-00, the Office of the Information Commissioner received 13 deemed-refusal complaints against F&O – 11 (84.6%) were upheld (resolved).

In 2000-01, as of November 30, the Information Commissioner's Office received 37 deemed-refusal complaints. Of the 20 completed complaints, 13 (65%) were upheld (resolved).

3. ATI Office—Staff

The processing of access requests is the responsibility of the ATI Office under the direction of the ATI Director. The office is also responsible for processing requests under the *Privacy Act*. The staff of the ATI Office is comprised of 11 other employees — a Deputy Coordinator, 7 officer-level and 3 support staff. In 1999/2000 to November 30, five consultants and two support staff were also working in the ATI Office processing access requests. The ATI Director is of the view that the number of staff is not sufficient to meet the ATI processing needs of the department.

4. ATI Office—Budget

The ATI salary dollar budget for 2000-01 is $561,000 for 12.1 person years. The 1999-00 budget was $461,000 for 9.0 person years. The 1998-99 budget was $436,000 for 9.8 person years.

The ATI operating budget for 2000-01 is $302,200. For previous years, the 1999-00 budget was $319,300 and the budget for 1998-99 was $329,200. The portion of the budget allocated for training for the above years was not available.

5. Allotted Times for Request Processing

The 30-day statutory time limit allows 20 days for processing. F&O's current planned turnaround times are listed below. The F&O chart allows 30 working days to respond to a request (without an extension).

Area	Turnaround Time
Receipt ATI Office	1 day
Retrieval OPIs	10 days
Processing ATI Office	7 days
Review / Concur OPIs*	10 days – 90% of requests
Communications	1 day - 35% of requests
Delegated Approval and Mail Out ATI Office	1 day

* *review/concur: the OPI provided the records to the ATI Office without recommendations on exemptions or the ATI Office did not agree with the recommendations of the OPI. The records are returned to the OPI with the ATI Office recommendations for exemptions to obtain the concurrence of the OPI.*

Sources of Delay

There appear to be a number of reasons for the delay problem at F&O. The reasons include insufficient information to and follow-up by senior management, a lack of exercise of the delegation authority to make decisions under the *Access to Information Act*, a cumbersome approval process and delays by OPIs in searching for and retrieving records.

1. Senior Management Support

There are varied reasons why delays occur in responding to access requests within the timeframes established by the *Access to Information Act*. Senior management must be aware when the number of requests in a deemed-refusal situation start to increase and accumulate in an unacceptable backlog of delayed responses to requesters. Senior management also needs to be informed of the remedial measures that can be taken to reduce the number of requests in a deemed-refusal situation. The remedial plan can only be organized after the department analyzes the causes of the delays.

To maintain effective oversight of the access process, senior management should receive routine reporting on the status of requests, including adherence to the statutory timelines. The F&O ATI Office does provide weekly reports to offices of three of the headquarters Assistant Deputy Ministers. A routine report is not provided to the offices of the other Assistant Deputy Ministers or the offices of the Regional Directors.

Although “on request” reports are provided to senior management, there is no routine reporting. Routine reporting allows senior management to gauge how the overall department is performing against planned performance measures. This type of reporting will also provide senior management with the information necessary to monitor actions taken to reduce the number of requests in a deemed refusal situation.

2. Approval Delegation

The F&O Delegation Order establishes the authority and process for making recommendations and decisions on access requests. The Delegation Order dated April 1995 delegates certain responsibilities under the *Access to Information Act* to either the Director, ATI or the ATI Coordinator. There is no longer an ATI Coordinator’s position (although there is a position Director and Deputy ATI Coordinator). The Delegation Order requires updating to reflect the responsibilities of the Director and the Deputy ATI Coordinator for decision-making under the Act. There may also be an opportunity to delegate administrative

decisions under the Act to ATI Officers. Examples of such decisions are fee notices and notices to third parties.

3. Approval Process

In our view, although the current Delegation Order provides delegated authority to two individuals in the ATI Office, in practice a form of collective decision-making through "concurrence" takes place.

The OPI is expected to return records responsive to the access request to the ATI Office with recommendations on exemptions that might apply or identification of sensitive records. Examples of sensitive records cited in the department's information to OPIs are records that form part of an ongoing investigation, records subject to solicitor-client privilege, research records awaiting publication or Cabinet confidences. The Sector Assistant Deputy Minister or a delegated official is expected to sign off on the recommendations of the OPI before forwarding the records to the ATI Office.

In many cases, the records are sent to the ATI Office without any recommendations. When the records arrive without recommendations or the ATI Office does not agree with the OPI recommendations, the ATI Office recommendations and records are returned to the headquarters or regional OPI for concurrence. The concurrence is obtained via the Review / Concur Memo. Approximately 90% of requests are returned to OPIs for review / concurrence.

Other parts of the organization that may be part of the review process include the Minister's Office (30% of requests), Legal Services (1%) and the Deputy Minister's Office (2%). For the above offices, the review is in parallel with the OPI review / concur part of the access process.

Communications also reviews the records waiting for disclosure for 35% of access requests. Communications will receive the disclosure package as part of the access process.

As part of the concurrence process, the Policy Sector receives copies of records related to federal / provincial relations even if Policy did not provide the records responsive to a request and if the records are going to be disclosed. The notification is done by issuing a Review / Concur Memo to the Policy Sector.

Because concurrence is a subtle form of approval, it is unclear who precisely is accountable for decisions under the Act. Although words like review and concur are used to describe the stage in the approval process, the effect of multiple notifications and "sign-offs" prior to the release of records appears to create an institutional culture of "play it safe".

The Table below provides information on the time taken by OPIs in 2000-01 to November 30th to complete the concurrence stage for access requests closed during the period.

Performance Report - Summary

Criteria: Request Type = Access; Date Created Between 04/01/2000 and 11/30/2000

Name	*Number Days of Times*	*Total Working Days*		*Avg Working*	
		Elapsed	*Overdue*	*Elapsed*	*Overdue*
INTERNAL REVIEW/CONSULT					
Aboriginal Affairs	81	826	363	10.20	4.48
Access to Information and Privacy Secretariat	21	166	56	7.90	2.67
Aquaculture and Oceans Science	1	25	3	25.00	3.00
Aquaculture Development	2	8	0	4.00	0.00
Associate Deputy Ministers Office	1	8	0	8.00	0.00
Canadian Coast Guard (CCG)	17	297	225	17.47	13.24
Central and Arctic Region	20	173	36	8.65	1.80
Commissioners Office (CCG)	4	22	3	5.50	0.75
Communications Directorate	20	258	166	12.90	8,30
Conservation and Protection	11	93	27	8.45	2.45
Corporate Services	3	20	11	6.67	3.67
Deputy Ministers Office	1	9	1	9.00	1.00
DFO Legal Services	2	63	52	31.50	26.00
Finance and Administration, Corporate Services	7	26	0	3.71	0.00
Fisheries Management	33	664	498	20.12	15.09
Gulf Region	20	165	65	8.25	3.25
Habitat Management and Environmental Science	8	37	3	4.63	038
Human Resources	3	3	0	1.00	0.00
Information Management & Technical Services	12	45	3	3.75	0.25
International Affairs	5	24	2	4.80	0.40
Level Two	9	25	0	Z78	0.00
Maritimes Region	103	1,003	355	9.74	3.45
Minister's Office	17	196	116	11-53	6.82
Newfoundland Region	30	285	127	9.50	4.23
Oceans	26	227	50	8.73	1 92
Office of Sustainable Aquaculture	1	9	3	9.00	3.00
Pacific Region	45	649	394	14.42	8.76
Policy	15	282	190	18.80	12.67
Policy, Coordination & Liaison	1	7	1	7.00	1.00
Program, Planning and Coordination	3	17	1	5.67	0.33
Real Property Management	1	2	0	2.00	0.00
Région Laurentienne	16	149	56	9.31	3.5
Resource Management	24	225	104	9.38	4.33
Review Directorate	6	17	3	2.83	0.50
Science	17	101	25	5.94	1.47

The Table shows that the review / concur process is a major contributor to delays in responding to access requests. The department allocates up to 10 calendar days for the review / concur stage and the Table provides information in working days. In working days, the allocated time would be between six and eight days.

The access process should be reviewed to eliminate the need for multiple sign-offs. A revision to the Delegation Order and streamlining of the approval process should be accompanied by a direction from the Minister that the individual holding delegated authority is the only individual both responsible and accountable for decisions under the Act.

This recommendation is not meant in any way to discourage a strong communication network between OPIs and the ATI Office to discuss an access request and the response to the request. The ATI Coordinator and ATI Officers are the staff in institutions who have expert knowledge of the *Access to Information Act*. Consultation must take place with program staff and others involved in the process as part of the process for responding to access requests. Our view is that the consultations should take place as part of the records processing by the ATI Office, not as a separate step in the process requiring multiple reviews and / or sign-offs. Adding additional steps in the access process usually lead to delays in response times and increases in the number of requests in a deemed-refusal situation.

4. Allocation of Processing Time

An institution has 30 calendar days to respond to an access request unless a time extension is taken under section 9 of the Act. The overall processing time is allocated by stage in the process to ensure that each party is aware of the time allocated to them. For example, the OPIs at F&O have ten days to locate and retrieve records responsive to an access request (among other responsibilities relating to a request).

In reviewing the planned versus actual processing time at F&O, it was evident that the performance standard was not being met for those parts of the organization that were measured. The Table below provides information on the delays encountered in retrieving records and the review / concur process. The planned versus actual performance of all of the functions in the department with responsibilities in the access process is not available.

Table on Planned Versus Actual Processing Time

Processing Stage	Allocated Time Calendar Days	Actual Time Working Days April 1/98 to March 31/99	Actual Time Working Days April 1/99 to March 31/00	Actual Time Working Days April 1/00 to Nov. 31/00
Receipt	**1**			
Retrieval	**10**	**13.24**	**20.27**	**12.17**
Processing	**7**			
Concur	**10**	**9.65**	**13.29**	**10.45**
Communications	**1**			
Approval	**1**			

The Act provides 30 calendar days or 20 working days to respond to requests. The above Table shows that the average time to respond to requests from April 1, 2000 to November 30, 2000 was 22.62 working days for only two stages of the access process. Information on the actual time taken for other stages of the access process was not available.

It essential to maintain information on performance measures for all stages of the access process and to make that information available to those parts of the organization involved in the process. The information is also needed by senior management of the department on a routine basis to assess the magnitude of and remedies for delays in responding to access requests. Currently, senior management is not provided with a routine report on requests in a deemed-refusal situation. As well, only three Headquarters Assistant Deputy Ministers' Offices receive routine reports on requests in a deemed-refusal situation (as well as other information on the nature and status of requests).

5. Operational Areas (OPIs)

OPIs are required to search for and retrieve records to respond to access requests. The OPIs are required to provide records to the ATI Office within ten calendar days of receipt of the request from the ATI Office.

On receipt of an access request, the ATI Office generates an e-mail in approximately one day to the OPI describing the request (the actual access request is no longer sent to the OPIs). The OPI contact is an individual in a Sector Assistant Deputy Minister's Office (in a few cases, a Director General's Office reporting to an Assistant Deputy Minister will be contacted directly) in Headquarters and a Regional Director's Office in Regions. The OPI contact is responsible for:

- receiving the email retrieval memo sent by the ATI Office
- disseminating the request to the offices within the sector that hold the records relevant to the request

- providing the ATI Office with the status of requests when contacted
- providing estimates for the time required to search for records
- forwarding all relevant records from the sector to the ATI Office
- providing support and guidance to ensure that the sector meets deadlines and requirements specified under the *Access to Information Act*.

Once the Sector OPI has retrieved the records and recommendations are prepared for release or withholding of the records or identifying sensitive records, the Assistant Deputy Minister, Regional Director or a delegated official is supposed to sign-off on the recommendations. The recommendations are provided along with the records to the ATI Office. In some cases, the records will be sent to the ATI Office without any OPI review.

The Table below presents information from ATIPflow on the planned versus actual time taken by OPIs this fiscal year to November 30th to retrieve records. Note that the information is in working days and that the department has 20 working days to respond to access requests where there is no time extension. Where an extension was claimed and the extension was due to records retrieval, the OPI received a further allocation of days that is factored into the statistics below. The "overdue" column reflects the time taken beyond the total number of days allocated to the OPI for retrieval of records.

In the current fiscal year to November 30th, it took OPIs an average 12.17 working days to retrieve records. The planned allocation of time is 10 calendar days. The Table shows that there is a need to reinforce the time requirements of the Act by instituting measures to comply with the requirements.

Performance Report - Summary

Criteria: Request Type = Access; Date Created Between 04/01/2000 and 11/30/2000

Name	*Number Days of Times*	*Total Working Days*		*Avg Working*	
		Elapsed	*Overdue*	*Elapsed*	*Overdue*
RETRIEVEAL					
Aboriginal Affairs	62	1,314	1,005	21.19	16.21
Access to Information and Privacy Secretariat	1	1	0	1.00	0.00
Aquaculture Development	7	52	2	7.43	0.29
Associate Deputy Ministers Office	9	92	43	10.22	4.78
Canadian Coast Guard (CCG)	22	199	51	9.05	2.32
Central and Arctic Region	48	584	326	12.17	6.79
Commissioners Office (CCG)	30	230	48	7.67	1.60
Communications Directorate	73	683	271	9.36	3.71
Conservation and Protection	67	653	274	9.75	4.09
Corporate Services	1	16	8	16.00	8.00
Deputy Ministers Office	12	253	195	21.08	16.25
Finance and Administration, Corporate Services	62	636	228	10.26	3.68
Fisheries Management	108	1,663	867	15.40	8.03
Gulf Region	88	930	386	10.57	4.39
Human Resources	19	195	80	10.26	4,21
Information Management & Technical Services	92	1,091	480	11.86	5,22
International Affairs	20	152	55	7.60	2.75
Level Two	7	122	46	17.43	6,57
Maritimes Region	104	966	348	9.29	3.35
Minister's Office	35	554	313	15.83	8.94
Newfoundland Region	94	1,097	458	11.67	487
Oceans	74	1,183	660	15.99	8.92
Office of Sustainable Aquaculture re	5	58	26	11.60	5,20
Pacific Region	122	1,704	649	13.97	5,32
Policy	84	867	274	10.32	3 26
Program, Planning and Coordination	18	254	147	14.11	8 17
Real Property Management	6	41	9	6.83	1 50
Region Laurentienne	51	477	153	9.35	300
Resource Management	69	705	341	10.22	494
Review Directorate	35	359	150	10.26	4,29
Science	64	1,075	656	16.80	1025
Security	1	1	0	1.00	0..00
Small Craft Harbours	13	93	27	7.15	2.08
Year 200 Driectorate	2	12	0	6.00	0.00

The specific reasons for the requests in a deemed-refusal situation for this fiscal year up to November 30th should be identified and measures taken to reduce the number of requests in a deemed-refusal situation. The measures should be part of an overall plan to bring the department into substantial compliance with the Act by March 31, 2002. The ATI Improvement Plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities. The plan should be monitored by the Senior Management Committee of the department.

6. ATI Office

The ATI Office maintains the ATIPflow System to manage the access request caseload. The System is capable of providing numerous reports to manage and report on the caseload. Routine reporting on a departmental basis of pertinent, timely information provides OPIs and senior management with information to gauge how the department is processing the ATI caseload. Routine reporting also provides a vehicle for communicating information to provide an early warning of increasing workloads. The ATI Office should review the reporting capabilities of ATIPflow System to determine what routine reporting would support efforts to keep the access process on track.

The number of access requests and the pages processed are both increasing at F&O. To manage the increasing workload, the ATI Office has engaged five consultants since April 1, 2000. Consultants (or contractors) are useful for peaks in the workload. When the workload trend is increasing in the longer term for the ATI Office, the long term use of consultants does not represent value for money. Funding for a consultant will cost considerably more than funding for an employee. Any knowledge about the organization's records and access process will disappear with the end of the consultant's contract.

7. Training and Process Documentation

For OPIs to complete their part of the access process, ATI training and documented procedures including timelines are required.

OPIs expect strong support from the ATI Office in training to understand precisely what their responsibilities are under the *Access to Information Act*, particularly with respect to timelines and extensions. In addition, the OPIs need procedural and instructional information on how to carry out tasks assigned to them as part of the process for responding to access requests.

Training is an essential component of ATI operations. A properly planned and delivered ATI training program will provide OPIs with the ability to fulfill their responsibilities in the access process. A planned approach will maximize the training expenditure.

The ATI Office offers training on an "as requested" basis. A proactive approach to training would complement existing training. The ATI Office should develop a training plan that includes priorities, staff identified as benefiting from new or additional training, number and location of sessions and ATI responsibilities for delivery of the training.

The ATI Office is in the best position to identify training priorities. The office understands the level of knowledge of OPIs on the *Access to Information Act* through interaction on access requests. The office is aware of complaints about problems in meeting the requirements of the Act and is aware of departmental issues that may impact on the Act.

The ATI Office has developed a number of memos, ATIP Desktop Procedures and training material that describe the access process and OPI responsibilities. In addition, the ATI Office has a very good description of the overall access process including complaints on the departmental Internet site at **http://www.dfo-mpo.gc.ca/atip-aiprp/uguide_e.htm.**

The information on e-mails and memos to OPIs that partially describe the access process are useful focused reminders of individual tasks.

Management Response to the Problem of Delay

1. Operational Areas (OPIs)

F&O is a department of approximately 10,000 employees dealing with varied responsibilities. The responsibilities include Coast Guard matters, science and fish habitat issues, fish management duties and concerns, aboriginal rights to the fishery, international and federal / provincial issues, *Fisheries Act* violations and investigations, and many legal and policy matters related to the fishery. The ATI Office has the expertise in applying the provisions of the *Access to Information Act*, but its officers cannot be experts in all of the areas in which the department is involved.

The lack of recommendations from most F&O OPIs concerning the disposition of records (whether to exempt, sever or disclose) has been a serious concern for the ATI Office. The lack of recommendations has been the cause of many delays in responding to access requests. The ATI officers continually contact many OPIs to clarify the nature and sensitivity of records before the ATI Office can make a determination on the question of whether records are exempt or should be disclosed. As well, in part due to the lack of recommendations received "up front" when the records are retrieved by OPIs and provided to the ATI Office, a cumbersome review / concur or approval process is in place. The review / concur process results in further delays.

In order to facilitate the provision of records to the ATI Office in a timely manner, the ATI Coordinator reduced the number of copies required from OPIs from two to one copy of relevant records. Given the large volume of pages processed by F&O (more than 130,000 in the last fiscal year), this has resulted in a significant reduction in time and paper burden for OPIs.

2. Management Support

Memos were sent by the Deputy Minister of F&O and the Assistant Deputy Minister, Corporate Services, clarifying the roles and responsibilities of F&O employees concerning the *Access to Information Act*. The memos make it clear that there is a requirement to provide recommendations when records are retrieved by OPIs and sent to the ATI Office.

As well, an e-mail memo from the ATI Office was initiated during the year 2000 and is now sent to all OPIs instead of a hard copy memo. The e-mail is used to inform OPIs of the particulars of an access request. This initiative is another significant time saver for the access process and the initiative has reduced the paper burden on F&O OPIs. The e-mail memo provides clear instructions to OPIs in Headquarters and the regions concerning the retrieval of records in response to an access request. The memo also calls for recommendations to be provided by the OPIs on the release of records.

With the cooperation of all sectors, the ATI Coordinator requested that each sector provide a designated ATI contact in order to facilitate the retrieval and tracking of access requests. These individuals are the primary contacts for ATI files related to their respective sectors. The ATI Office held a training session for the F&O ATI contacts in which their roles and responsibilities as well as their concerns were discussed. This initiative has streamlined the retrieval process and helped facilitate more timely responses to access requests.

3. ATI Office

Weekly staff meetings are held to discuss office issues and special files as well as to brief new employees (including consultants) on changes to the F&O ATI desktop procedures. The ATI Office currently keeps track of changes to its procedures in a desktop manual that is available to all staff via a shared drive. The manual helps to ensure a consistent staff approach to processing requests and ensure the most effective processes are in place for timely delivery of ATI services.

An Introduction to ATI, a concise summary of the ATI roles and responsibilities of employees, has been prepared and will be included in an orientation kit for all new F&O employees. The kit currently is under development by the Human Resources Branch of the department. The kit is an amalgamation of information that all new F&O employees will need.

In March 2000, senior management approved three additional resources for the ATI Office. This includes a PM-05 Deputy ATI Coordinator, one part-time PM-03 position and a PM-02 Officer Trainee.

The delay problem in responding to access requests has been identified as a priority that will be addressed. As part of the overall plan to deal with F&O delay problems, F&O senior management made a commitment to provide additional officer-level resources in 2001.

4. ATI Training and Awareness

An ATI Intranet site is on line for the use and reference of F&O employees. An ATI Internet site has also been created and is available for use by the public.

ATI awareness training is an ongoing project carried out by the ATI Office. During the last two years, sessions were conducted in all regions, and yearly visits are planned in all regions in the future. Awareness sessions are conducted in F&O Headquarters on an ongoing basis upon request.

Recommendations

This review recommends the following:

- **The ATI Coordinator is directly responsible for ensuring compliance with the *Access to Information Act* and should take a strong leadership role in establishing a culture of compliance throughout F&O. Such a role requires the unwavering support and endorsement of the Minister and the Deputy Minister. Senior management support for the development and monitoring of an ATI Improvement Plan is one method of making a commitment to comply with the time requirements of the Act.**
- **Routine reporting on planned versus actual time taken to process access requests and the status of measures taken to reduce requests in a deemed-refusal situation should be instituted. The reports will provide senior management, OPIs and the ATI Office with information needed to gauge overall departmental compliance with the Act's and department's time requirements for processing access requests.**
- **The Delegation Order should be revised to reflect the intent to delegate to the ATI Director and Assistant ATI Coordinator sole responsibility for making decisions under the *Access to Information Act*. Consideration should also be given to the delegation of administrative decisions under the Act to ATI Officers.**
- **The ATI Director should be directed by the Minister, in writing, to exercise the delegation to answer requests within deadlines whether or not the approval process has been completed.**
- **The approval process should be reviewed to remove steps that do not add value to the process, particularly the review/concur stage and the Communications review.**
- **The department should develop an ATI Improvement Plan. The Plan should identify the sources of the delays in responding to access requests and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance. The plan should be monitored by the Senior Management Committee of the department.**
- **The specific reasons for the requests in a deemed-refusal situation for this fiscal year up to November 30th should be identified and remedial measures developed for incorporation into the ATI Improvement Plan.**
- **An information sheet or a schedule of expected turnaround times on the e-mail to OPI clearly showing the expected turnaround times for each stage in the access process should be incorporated into the process. This might help those unfamiliar with the process to understand the tight timelines.**

- A training plan should be developed for the 2001-02 year that includes priorities, staff identified as benefiting from new or additional training, number and location of sessions and ATI responsibilities for delivery of the training.
- If an extended date will not be met, the ATI Office should routinely contact the requester to indicate it will be late, to provide an expected response date and of the right to complain to the Information Commissioner. This will not impact the deemed-refusal status once the extension date is missed; however, it will alleviate some of the requester's frustration and perhaps avert a complaint.
- Performance contracts with operational managers should contain consequences for poor performance in processing access requests.
- F&O should come into substantial compliance with the Act's deadlines no later than March 31, 2002.
- ATI training should be mandatory for all new managers as part of their orientation and for all managers.
- The use of consultants to provide processing resources for long-term increases in the ATI workload should be reviewed to determine what the best value for money approach is to staffing for the increased workload.

CANADA CUSTOMS AND REVENUE AGENCY

Summary

The Agency has made noteworthy progress in meeting the time requirements of the *Access to Information Act*.

In 1999, the Office of the Information Commissioner issued a Report Card on the Agency's compliance with the statutory time requirements of the *Access to Information Act*. The Report Card contained a number of recommendations on measures that could be taken to reduce the number of requests in a deemed-refusal situation. In the 1999 Report Card, the Agency received a red alert grade of F with a 85.6 % request to deemed-refusal ratio for access requests received from April 1, 1998, to November 30, 1998.

In December 1999, the Office of the Information Commissioner reviewed the status of the recommendations made in the Report Card and made further recommendations for measures to reduce the number of requests in a deemed-refusal situation. At that time, the statistics showed that from April 1, 1999, to November 30, 1999, the deemed-refusal ratio for access requests improved to 51.5 %. Of particular note at the time was that the length of time taken to respond to requests in a deemed-refusal situation was substantially reduced compared with the previous year.

This report reviews the progress of the Agency to come into compliance with the time requirements of the *Access to Information Act* since the last update in December 1999. This report also reviews the status of recommendations made in the December 1999 review.

The Agency is now in "borderline compliance" with the Act for the period April 1, 2000, to November 30th. This represents a grade of C with a request to deemed-refusal ratio of 14.9 %. The attainment of this ratio denotes substantial progress in reducing an extremely burdensome deemed-refusal situation.

All of the trend lines are in the right direction. The number of requests carried over from the previous year in a deemed-refusal situation continues to decrease both in absolute numbers and as a percentage of requests carried over. The time taken to respond to requests in a deemed-refusal situation continues to decrease rapidly as shown on the following table.

Table: Time to Respond to Non-extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where no extension was taken	April 1999-March 2000	April 2000-Nov. 2000
1-30 days	134	26
31-60 days	52	5
61-90 days	30	6
Over 91 days	43	0

The Agency may want to consider the following measures to achieve a Grade of B that constitutes "substantial compliance".

Recommendations for 2001

1. Deemed-Refusal Situation Analysis

To take a proactive approach to continued progress in reducing the number of requests in a deemed-refusal situation, an analysis should be made of the reasons for the requests in a deemed-refusal situation between April 1, 2000, and November 30, 2000. The analysis can be used to pinpoint what further measures are required to bring the Agency into substantial compliance with the timelines in the *Access to Information Act.*

Recommendation # 1

The Agency should conduct an analysis of the specific reasons for requests in a deemed-refusal situation between April 1, 2000, and November 30, 2000 and develop a plan with specific measures to reduce the number of future requests in a deemed-refusal situation.

2. Training Plan

To maintain the progress to date, the Agency should identify training priorities for 2001/02 that assist with the reduction in the number of requests in a deemed-refusal situation. Training priorities can be identified by the ATI Office through daily interaction with OPIs, assessment of complaints under the Act and assessment of Agency issues that have or may impact on the Act.

Recommendation # 2

The Agency should develop a Training Plan for 20001/02 with specific priorities for the continued reduction in requests in a deemed refusal situation.

3. Build on Performance

The Agency should continue to devote the resources necessary to build on its efforts and increased performance in meeting the time requirements of the *Access to Information Act* to come into substantial compliance with the time requirements of the Act by March 31, 2002.

Recommendation # 3

The Agency should establish a target date of March 31, 2002 to be in substantial compliance with the time requirements of the Act.

Status of 1999 Recommendations

In the December 1999 report on the status of recommendations in the 1999 Report Card, further recommendations were made on measures to reduce the number of requests in a deemed-refusal situation. The status of the December 1999 recommendations is described below.

1. **The Canada Customs and Revenue Agency should continue to devote the resources and effort necessary to meet the time requirements of the *Access to Information Act*.**

   In 2000/01 other programs contributed $800,000 through an internal reallocation of funds in the Agency. In 2001/02, the $800,000 will be included in the funding base of the ATI Office. The ATI Office currently has 52 FTEs approved.

2. **The Agency should identify and implement additional measures needed to come into substantial compliance with the time requirements of the *Access to Information* Act by December 30, 2000.**

   The Agency continues to improve its practices to reduce the number of requests in a deemed-refusal situation. Training is continuing and further measures are planned for implementation in 2001/02 as described below.

3. **The Agency should develop and circulate to operational managers information reports on the planned versus actual performance of those parts of the organization with responsibilities in the access to information process.**

   On April 1, 2001, the upgraded ATIP Tracking System in the ATI Office will allow the office to report on planned versus actual performance reporting for those parts of the organization involved in the access process. The planned time for the access process is:

   Initial preparation – 4 days
   Search, locate and provide records to ATI Office – 8 days
   Record analysis – 10 days
   Record preparation – 6 days
   Approval – 2 days

   The current average for OPIs is seven days. What is currently not tracked is the time taken to return to OPIs for missing records, if applicable. The fact that records are missing is often only discovered during the records analysis stage.

4. **The Coordinator should be directed by the Minister, in writing, to exercise the delegation to answer requests within deadlines whether or not the senior approval process has been completed.**

   The ATI Coordinator has full delegated authority but has not been directed by the Minister to exercise the delegation when deadlines are not met.

5. ATI training should be mandatory for all new managers as part of their orientation and for all managers on a refresher basis.

The ATI Coordinator is meeting with all Assistant Commissioners' Management Committees to provide awareness training. In addition, approximately 700 staff have received awareness training on the Act this year.

A Policy, Consultation and Training Group is being formed in the ATI Office. The Group will develop a Training Action Plan for 2001/02. It is anticipated that a training module for new managers will be developed. The ATI Training Manager will be working with Human Resources Branch to determine how this training module can best meet the needs of new managers.

6. Performance contracts with operational managers should require compliance with internal and legislated response deadlines.

Meeting ATI program expectations was one of a number of key commitments proposed for the 2000/01 cycle of performance agreements for EX and SM performance agreements. Although it was not ultimately selected as an Agency-wide "Key Commitment", it was listed in the Guideline on completing performance agreements. It was listed as an example of a key commitment that might apply to an executive's organization and therefore be included in the performance agreement. In the Guideline under Program Delivery, the following information was provided:

"Targets should be as specific as possible (e.g.: increase by % the number of cases completed per FTE; meet X% of the time the turnaround timeframe for ATI requests)".

NATIONAL DEFENCE

Summary

The department has made noteworthy progress in meeting the time requirements of the *Access to Information Act.*

In 1999, the Office of the Information Commissioner issued a Report Card on the department's compliance with the statutory time requirements of the *Access to Information Act*. The Report Card contained a number of recommendations on measures that could be taken to reduce the number of requests in a deemed-refusal situation. In the 1999 Report Card, the department received a red alert grade of F with a 69.6 % request to deemed-refusal ratio for access requests received from April 1, 1998 to November 30, 1998.

In December 1999, the Office of the Information Commissioner reviewed the status of the recommendations made in the Report Card and made further recommendations for measures to reduce the number of requests in a deemed-refusal situation. At that time, the statistics showed that from April 1, 1999, to November 30, 1999, the deemed-refusal ratio for access requests improved to 38.9 %. Of particular note at the time was that the length of time taken to respond to requests in a deemed-refusal situation was substantially reduced compared with the previous year.

This report reviews the progress of the department to come into compliance with the time requirements of the *Access to Information Act* since the update in December 1999. This report also reviews the status of recommendations made in the December 1999 review.

The department is now "below standard compliance" with the Act for the period April 1, 2000, to November 30th. This represents a grade of D with a request to deemed-refusal ratio of 17 %. The attainment of this ratio denotes substantial progress in reducing an extremely burdensome deemed-refusal situation.

All of the trend lines with the exception of the time to respond to extended requests in a deemed-refusal situation are in the right direction to continue reducing the number of requests in a deemed refusal situation. The number of requests carried over from the previous year as requests in a deemed-refusal situation continues to decrease. The time taken to respond to requests in a deemed-refusal situation continues to decrease rapidly for non-extended requests as shown on the following table.

Table: Time to Respond to Non-extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where no extension was taken	April 1999-Nov. 2000	April 2000-Nov. 2000
1-30 days	126	39
31-60 days	36	1
61-90 days	12	0
Over 91 days	5	1

For requests in a deemed-refusal situation where a time extension was taken, the following table shows an increase in the number of requests.

Table: Time to Respond to Extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where an extension was taken	April 1999-Nov. 2000	April 2000-Nov. 2000
1-30 days	30	36
31-60 days	7	12
61-90 days	2	4
Over 91 days	2	0

The department may want to consider the following measures to support continuing progress to achieve a Grade of B that constitutes "substantial compliance" with the time requirements of the *Access to Information Act*.

Recommendations for 2001

1. Deemed-Refusal Situation Analysis

To take a proactive approach to continued progress in reducing the number of requests in a deemed-refusal situation, an analysis should be made of the reasons for the requests in a deemed-refusal situation between April 1, 2000, and November 30, 2000. The analysis can be used to pinpoint what further measures are required to bring the department into substantial compliance with the timelines in the *Access to Information Act*.

Recommendation # 1

The department should conduct an analysis of the specific reasons for requests in a deemed-refusal situation between April 1, 2000, and November 30, 2000 and develop a plan with specific measures to reduce future deemed-refusal situations.

2. Proactive Training Plan

The ATI Office is in the position to identify where ATI training needs are in the department. To date, the department ATI Office has taken a reactive approach to training.

Training requirements can be identified from daily interaction with OPIs, dealing with complaints under the *Access to Information Act* and dealing with briefings on policy and other issues involving the Act. The training requirements should be prioritized to strategically plan where the most value will be derived from ATI training.

Recommendation # 2

The department should develop a Training Plan for 2001/02 with specific priorities for the continued reduction in the number of requests in a deemed-refusal situation.

3. Information Sheet

A clear plan of how days are allocated to the access process by process stage and accountable organizational unit lets all members of the "team" understand their critical role in a process with tight timelines. This information should be a routine part of the information circulated with each access request.

Recommendation # 3

Information on the days allocated to each stage of the access process should be part of the information circulated with each access request.

4. Performance Contracts

The department is considering at which management level performance contracts will include targets for ATI timelines. The performance accountability should reside with those individuals in the department responsible for managing the access process timelines.

Recommendation # 4

Performance contracts with operational managers should require compliance with internal and legislated response deadlines for access requests.

5. Build on Improvements

The department has made substantial progress in reducing the number of requests in a deemed-refusal situation subject to complaints. It is important to build on these efforts to maintain the momentum evident in the progress to date.

Recommendation # 5

The department should continue to devote the resources and effort necessary to build on its performance in meeting the time requirements of the *Access to Information Act* to come into substantial compliance with the time requirements of the Act by March 31, 2002.

Status of 1999 Recommendations

In the December 1999 report on the status of recommendations in the 1999 Report Card, further recommendations were made on measures to reduce the number of requests in a deemed-refusal situation. The status of the December 1999 recommendations is described below.

1. **National Defence should continue to devote the resources and effort necessary to meet the time requirements of the *Access to Information Act*.**

   The department has continued to devote resources to meet the requirements of the Act. Because of difficulties recruiting staff, the department has relied on contract consultants to offset shortfalls in existing staffing levels. The department views the use of private sector consultants as a short-to-medium-term solution to provide time to implement a staffing plan. The staffing plan will allow a significant reduction in the contract work by the end of 2000/01. The Plan includes reclassifying ATI positions at appropriate levels and staffing the positions to reduce the use of consultants. The staffing recruitment difficulty the department is encountering appears to be shortage of ATI expertise because a number of other departments and organizations are also recruiting ATI staff.

2. **The department should identify and implement additional measures needed to come into substantial compliance with the *Access to Information Act* by December 31, 2000.**

   As has been previously reported, most recently through an interim report from the Deputy Minister of National Defence to the Information Commissioner, the ATI Coordinator's view is that the department has made significant changes to its procedures and its culture respecting the administration of access to information issues. The Coordinator anticipates that the development and implementation of new measures (beyond those to which the department already committed itself) will be preceded by a period during which recently revised practices will be tracked, evaluated, and, where indicated, improved.

3. **The department should develop and circulate information reports on the planned versus actual performance of those parts of the organization with responsibilities in the access to information process.**

   Information is circulated at the Assistant Deputy Minister level OPIs on actual versus planned performance. As part of the 2001/02 Business Plan, the ATI Office will "develop and implement OPI performance indicators". Development is scheduled for completion by August 31, 2001, and implementation completed by October 31, 2001.

4. **National Defence should develop a plan to provide training to OPIs and update the Access to Information procedures for OPIs and the ATI Office.**

   ATI procedures for OPI's across the department have been developed and are available as Departmental Administrative Orders and Directives across in both paper and electronic format. The aide-memoire included in individual ATI case files forwarded to OPI's is being rewritten by the department's ATI Policy and Training Section to improve its usefulness as a supplementary guide to OPI's.

   The content of a manual for use by ATIP office staff is presently under design by the department's ATI Policy and Training Section. Agreement on the manual's content is scheduled for March 31, 2001. In the interim, procedural reliance is placed on the ATI administrative guidelines issued by the Treasury Board Secretariat.

   The ATI Office is developing a specific, in-depth training package for OPIs (a target completion date is not available). Currently, the office offers a very general package for all staff.

   The ATI Office also has goals in the Business Plan to monitor and refine the existing ATI awareness and introductory training and to develop a training program for new ATI staff (ATI staff package target date of May 31, 2001).

5. **The coordinator should be directed by the Minister, in writing, to exercise the delegation to answer requests within deadlines whether or not the senior approval process has been completed.**

   This recommendation is not being implemented.

6. **Allotted turnaround times should be tightened up, with some approval processes dropped or performed simultaneously. An information sheet, clearly showing the expected turnaround times for each stage in the access process, should be developed.**

   The access process continues to be improved. Public Affairs is not a sign-off part of the process. OPIs are informed of the time requirements for retrieving records, although an information sheet is not circulated as part of the process.

   The ATI Office is working with OPIs to help identify earlier in the process any need for an extension of time under paragraph 9 of the *Access to Information Act*.

7. **If an outstanding request is almost one year old, the ATI office should notify the requester about section 31, the one-year limitation on the right to complain.**

   The ATI Office will implement this recommendation in fiscal year 2000/01. (The requester is informed in the closing letter that there is up to one year to make a complaint to the Commissioner's Office, although this does not cover an outstanding request.)

8. **Performance contracts with operational managers should require compliance with internal and legislated response deadlines.**

   This is being considered as part of establishing performance indicators for all OPIs. The department still has to determine the management level to which the indicator will apply.

9. **ATI training should be mandatory for all new managers as part of their orientation and for all managers on a refresher basis.**

   The training objectives established for 2001/2002 are summarized under point 3.

   The ATI Coordinator believes that the formal course under development for OPI sectoral points-of-contact will be mandatory.

10. **The delegation order now in force (April 5, 1995) empowers the Access Coordinator, or in her absence the person holding the position of Staff Officer, DAIP 3-6 and the Assistant Deputy Minister (Finance and Corporate Services), to exercise all of the powers and perform the duties and function of the Minister under the *Access to Information Act* and the *Privacy Act*. It does not, however, make it clear who has the responsibility for decision-making under the Act. In practice, in all but the most straightforward cases, the responsibility seems to be a collective one. It should be made explicit where the responsibility for decision-making under the Act lies. Moreover, the delegated decider must be directed to exercise the delegation in accordance with the Act.**

    The Delegation Order was revised on July 12, 2000. The Order delegates all powers and functions under the Act to the Director and Deputy Director of the ATI Office. The Assistant Deputy Minister, Finance and Corporate Services, may exercise the powers and functions in the absence of the Director or Deputy Director. In addition, Team Leaders have been delegated authority to sign extension notices, fee estimates, consultation letters and responses to access requests where no records are found.

11. **Once the new tracking system is in place, the Coordinator should make use of the reporting capacity. Statistical and timeline-monitoring reports can help identify problematic areas.**

    A copy of a weekly status report is generated for OPI (see response to # 3).

12. Cyclical, newsworthy issues may cause significant surges in the number and complexity of requests received by ND's ATI office. ND's priorities during military situations are, understandably, "The Safety of CF personnel and the integrity of military operations." However, access to information requirements cannot be ignored or set aside at any time. Therefore, consideration should be given to setting up an additional ATIP team, which can be trained to deal with major issue surges. During periods of normal workflow, this team can deal with broad scope requests and/or assist with training.

Rather than organize a team for major issue surges, the ATI Office is organized by teams representing areas of expertise. Once the ATI recruitment and staffing process is completed the recommendation will be reviewed again. One option the department is considering is using consultants for short-term surges in access requests.

CITIZENSHIP AND IMMIGRATION CANADA

Summary

The department has made steady progress in meeting the time requirements of the *Access to Information Act*, although more effort is required to come into substantial compliance with the time requirements of the Act.

In 1999, the Office of the Information Commissioner issued a Report Card on the department's compliance with the statutory time requirements of the *Access to Information Act*. The Report Card contained a number of recommendations on measures that could be taken to reduce the number of requests in a deemed-refusal situation. In the 1999 Report Card, the department received a red alert grade of F with a 48.9 % request to deemed-refusal ratio for access requests received from April 1, 1998, to November 30, 1998.

In December 1999, the Office of the Information Commissioner reviewed the status of the recommendations made in the Report Card and made further recommendations for measures to reduce the number of requests in a deemed-refusal situation. At that time, the statistics showed that from April 1, 1999, to November 30, 1999, the deemed-refusal ratio for access requests improved to 23.4 %.

For 2000/01, the department has an objective of completing 70% of access requests within the timelines of the Act. The view of the Office of the Information Commissioner is that the objective falls short of what is needed to comply with the time requirements of the Act. The actual performance of the department from April 1, 2000, to November 30, 2000 was an 19.7 % request to deemed-refusal ratio resulting in a Grade of D denoting "below standard performance".

This report reviews the progress of the department to come into compliance with the time requirements of the Act since the last update in December 1999. This report also reviews the status of recommendations made in the December 1999 review.

The Tables below show that the department is making some progress in the reduction of time taken to respond to requests that are answered beyond the statutory time limits of the Act where no extension is claimed under section 9. When an extension is claimed under section 9 of the Act, the department is not making progress.

Table: Time to Respond to Non-extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where no extension was taken	April 1999-Nov. 1999	April 2000-Nov. 2000
1-30 days	270	180
31-60 days	60	68
61-90 days	40	28
Over 91 days	18	30

Table: Time to Respond to Extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where an extension was taken	April 1999-Nov. 1999	April 2000-Nov. 2000
1-30 days	126	123
31-60 days	58	55
61-90 days	16	36
Over 91 days	10	27

While the ATI Office has set a target for the number of requests answered within the time requirements of the Act, there is still no overall plan that identifies the milestones, tasks, targets deliverables and responsibilities for achieving substantial compliance with the time requirements. There is no routine reporting on a frequent basis to senior management in the department or to OPIs. Without a planned approach to the problem of requests in a deemed-refusal situation, well intentioned but disparate measures may not contribute as significantly as an overall planned approach to a significant reduction in requests in a deemed-refusal situation.

There is a need to distribute information to OPIs and other parts of the organization on planned versus actual time taken at each stage of the access process. Without this type of information, it is difficult to identify potential problems with the Act's time requirements. The information will also allow the ATI Office to take a proactive approach to potential problems in meeting the Act's time requirements.

The nature of the requests in a deemed-refusal situation may also be shifting. Previously, requests in a deemed-refusal situation were in many cases focused on the foreign missions. The ATI Coordinator states that delays are more commonplace in all steps of processing,

including the ATI Office, simply because of the continuous increases in the number of requests.

Without an analysis of what the reasons were for the requests in a deemed-refusal situation, it is difficult to develop a remedial plan of action. In addition, the departmental planned processing times for stages of the access process are not in compliance with the time requirements of the *Access to Information Act*.

There are a number of measures that could be taken to build on the work already underway by the department to come into substantial compliance with the time requirements of the Act. The measures are described below as a series of recommendations.

Recommendations for 2001

1. Deemed-Refusal Situation Analysis

To assist in determining the causes of the requests in a deemed-refusal situation in the department, an analysis should be made of the reasons that access requests were in a deemed-refusal situation during the period April 1, 2000, to November 30, 2000. The analysis can be used to pinpoint what further measures might be required to bring the department into substantial compliance with the timelines in the *Access to Information Act*. In addition, the department should establish planned times for the access process that comply in all cases with the time requirements of the *Access to Information Act*.

Recommendation # 1

The department should conduct an analysis to determine the specific reasons for each request in a deemed-refusal situation for the period April 1, 2000, to November 30, 2000, and then develop a plan to reduce the future number of requests in a deemed-refusal situation.

The department should issue an overall timing for the access process that complies with the time requirements of the Act.

2. ATI Improvement Plan

CIC should approach the time delay problem by establishing an overall plan to manage the tasks necessary to come into substantial compliance with the Act's deadlines. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance. Uncoordinated efforts to reduce the number of requests in a deemed-refusal situation are likely not as effective as an integrated group of measures established as a result of an analysis of the situation.

Recommendation # 2

CIC should develop an ATI Improvement Plan by March 1, 2001, specifically directed at the reduction of requests in a deemed-refusal situation and provide a copy of the plan to the Office of the Information Commissioner. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance.

3. Senior Management Involvement

Until senior management of the department is actively engaged in the measures to identify and improve the factors that lead to requests in a deemed-refusal situation in the department, it will be difficult to come into substantial compliance with the Act's timelines. Senior management should understand the nature of the problem and be involved in monitoring the success of the plan to reduce the number of requests in a deemed-refusal situation.

Recommendation # 3

Continued improvement in performance is unlikely without more upper management participation and leadership. The Deputy Minister must take a hands-on role by receiving weekly reports showing the number of requests in a deemed-refusal situation, where the delays are occurring and what remedial action is being taken or proposed. The Deputy Minister should directly oversee the ATI Improvement Plan under which CIC will come into substantial compliance with the time requirements of the *Access to Information Act*.

4. OPI Search and Approval Time

The time taken to retrieve records needs improvement if the department is to come into substantial compliance with the time requirements of the Act. The department should identify the OPIs with significant problems in meeting the time requirements and institute measures to assist those areas to comply with the time requirements.

OPIs must have information not only on time expectations for responding to access requests but also information on performance against those standards.

Recommendation # 4

Information be distributed to OPIs and other parts of the organization responsible for responding to access requests on planned versus actual performance beginning April 30, 2001.

5. Volume of Requests

The department has received a substantial increase in the number of access requests over the past three years. The department is commended on increasing the number of ATI staff to cope with the increases in volume. Because of the steady increase in the number of requests, the department should take a multi-year view of staffing and other resource needs to determine how to resolve the deemed-refusal situation from the perspective of the operation of the ATI Office.

Recommendation # 5

CIC continue to devote the resources and effort necessary to increase its efforts to meet the time requirements of the *Access to Information Act* to come into substantial compliance with the time requirements by March 31, 2002.

Status of 1999 Recommendations

In the December 1999 report on the status of recommendations in the 1999 Report Card, further recommendations were made on measures to reduce the number of requests in a deemed-refusal situation. The status of the December 1999 recommendations is described below.

1. **CIC should continue to devote the resources and effort necessary to meet the time requirements of the *Access to Information Act*.**

   The department has submitted a Treasury Board Submission under the Program Integrity Initiative for increased ATI staffing and information technology products. The ATI Office also secured 10 additional FTEs for 2000/01.

2. **An overall plan should be developed to come into substantial compliance, by March 31, 2001, with the time requirements of the Act including milestones, targets, tasks, deliverables and responsibilities.**

   While the ATI Office has set a target, there is still no overall plan that identifies the milestones, tasks, targets deliverables and responsibilities for achieving substantial compliance with the time requirements of the *Access to Information Act*. The target for 2000/01 is 30% deemed-refusal ratio while the target for 2001/02 will be set in the context of the 2001/02 operational planning and budget process.

3. **CIC should distribute information to OPIs and other parts of the organization on time taken at each stage of the access process and how this accords with benchmark turnaround times.**

   There is still no routine reporting to the OPIs and other parts of the organization on actual versus planned performance in meeting the time requirements of the Act.

   The ATI Office does provide a semi-annual report to the Departmental Executive Committee on the overall ATI program including what actions are being taken to come into compliance with the Act's time requirements.

   Overall performance on compliance is routinely reported each month to the ADM and discussed between the DG and the ADM, Corporate Services. The ATI Office also produces monthly reports that provide senior management with information on compliance rates, volumes of incoming, active and finalized requests, as well as an update of the number of complaints filed by requesters with the Information Commissioner.

CIC concludes that this recommendation is meritorious but cannot be conducted routinely at this time. To implement routine reporting would require that FTEs be reassigned from file processing with a resulting impact on compliance rates.

4. **ATI training should be mandatory for all new managers as part of their orientation and for all managers on a refresher basis.**

The department does not have a mandatory training program for managers. ATI training sessions are delivered in the context of some managerial training (e.g. International Region Program Managers) whenever requested. An ATI training plan for the department is under development with a first draft completed.

5. **Performance contracts with operational managers should require compliance with internal and legislated response deadlines.**

This recommendation was considered by CIC but not pursued.

6. **Continued improvement in performance is unlikely without more upper management participation and leadership. The Deputy Minister must take a hands-on role by receiving weekly reports showing the number of requests in a deemed refusal situation, where the delays are occurring and what remedial action is being taken or proposed. The Deputy Minister should directly oversee a plan under which CIC will come into substantial compliance with the deadlines.**

This recommendation was considered by the department but was not pursued. There is no overall plan for the Deputy Minister to monitor detailed compliance reports and weekly reports are not produced. However, monthly reports are provided to and discussed with the ADM, Corporate Services. It is now current practice for the Director to become involved in second and third follow-ups for records. The Director General's involvement is required very rarely.

7. **Procedures for OPIs and obtaining information from missions abroad should be examined. If feasible, areas that receive large numbers of access requests should be trained to identify records that would justify a valid extension. An e-mail or fax, even subject to unstable technology, can be faster than the diplomatic mail service. This early contact can trigger the ATI office to send the appropriate notice on time.**

A report has not been completed on the diplomatic bag process and alternatives. The department is taking time extensions within the 30 days. Research has focused on the potential use of imaging technology at key overseas visa offices.

TRANSPORT CANADA

Summary

The department has made some positive progress in meeting the time requirements of the *Access to Information Act*.

In early 2000, the Office of the Information Commissioner issued a Report Card on the department's compliance with the statutory time requirements of the *Access to Information Act*. The Report Card contained a number of recommendations on measures that could be taken to reduce the number of requests in a deemed-refusal situation. In the Report Card, the department received a red alert grade of F with a 30.6 % request to deemed-refusal ratio for access requests received from April 1, 1999, to November 30, 1999.

This report reviews the progress of the department to come into compliance with the time requirements of the *Access to Information Act* since the Report Card was issued. The recommendations made in the Report Card are listed and information is provided on implementation status of each of the recommendations. In addition, further recommendations are provided in this report to assist the department in its efforts to comply with the time requirements of the Act.

The current statistics on deemed refusals show some positive trends when compared to the statistics in the Report Card. Although the department received a red alert grade of F again, the deemed-refusal ratio has decreased to 23.7 % from 30.6 % for this fiscal year compared to the same period in the previous year. The decrease in requests in a deemed-refusal situation took place despite an increased number of access requests. The number of requests received rose from 232 received from April 1, 1999, to November 30, 1999 to 317 for the same period in 2000/01.

The number of requests in a deemed-refusal situation carried over from the previous year was reduced from 31 of 86 requests on April 1, 1999, to 26 of 110 requests on April 1, 2000.

The length of time taken to complete requests in a deemed-refusal situation has decreased for requests where no time extension was taken but increased when an extension was taken pursuant to section 9 of the Act as illustrated on the following Tables.

Table: Time to Respond to Non-extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where no extension was taken	April 1999-Nov. 1999	April 2000-Nov. 2000
1-30 days	22	20
31-60 days	2	3
61-90 days	2	0
Over 91 days	1	0

Table: Time to Respond to Extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where an extension was taken	April 1999-Nov. 1999	April 2000-Nov. 2000
1-30 days	8	15
31-60 days	1	4
61-90 days	4	4
Over 91 days	1	4

The time taken to respond to access requests varies among the OPIs for records retrieval and for sign-off. The following Table illustrates the variances. The Table identifies the Groups and others involved in retrieving records and making decisions on access requests.

Table: OPI Cumulative April to 31 October 2000 ATIP Performance Report

	Total Retrievals	Retrievals on time	Total Sign-offs	Sign-offs on-time
Atlantic	28	20	8	6
Québec	50	42	21	21
Ontario	57	43	24	21
Prairie &Northern	23	22	21	21
Pacific	40	30	26	17
Corporate Services	29	20	27	23
Safety & Security	133	83	60	37
Policy	50	32	37	18
Programs & Divestiture	53	49	21	18
Communications	9	5	80	43
TOTAL	**472**	**346 (73%)**	**325**	**225 (69%)**

There are a number of measures that could be taken to build on the work already underway by the department to come into substantial compliance with the time requirements of the Act. The measures are described below as a series of recommendations.

Recommendations for 2001

1. Senior Management Accountability

The department has chosen to make the Assistant Deputy Ministers responsible for decisions on exemptions under the Act through the delegated authority of the Minister. The ATI Coordinator has delegated authority for certain administrative matters. The responsibility of those involved in the access process includes meeting the time requirements of the Act as they pertain to their areas. There is reporting to the Deputy Minister and Assistant Deputy Ministers by the ATI Office on planned versus actual performance in meeting the time standards. There appears to be a lack of accountability attached to the responsibility for meeting the standards. Until performance contracts between the Deputy and senior staff and the ATI Coordinator specifically cite meeting the time requirements of the Act along with a specific objective or target, accountability is not established.

Recommendation # 1

The department should include specific targets for meeting the time requirements of the Act in the performance contracts of senior managers and other staff involved in the access process.

2. Deemed-Refusal Situation Analysis

To take a proactive approach to continued progress in reducing the number of requests in a deemed-refusal situation, an analysis should be made of the reasons that access requests were in a deemed-refusal situation during the period April 1, 2000, to November 30, 2000. The analysis can be used to pinpoint what further measures might be required to bring the department into substantial compliance with the timelines in the *Access to Information Act*.

Recommendation # 2

The department should conduct an analysis to determine the specific reasons for each request in a deemed-refusal situation for the period April 1, 2000, to November 30, 2000, and then develop a plan to reduce the future number of requests in a deemed-refusal situation.

3. ATI Improvement Plan

TC should approach the time delay problem by establishing an overall plan to manage the tasks necessary to come into substantial compliance with the Act's deadlines. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance. Uncoordinated efforts to reduce the number of requests in a deemed-refusal situation are likely not as effective as an integrated group of measures established as a result of an analysis of the situation.

Recommendation # 3

TC should develop an ATI Improvement Plan by March 1, 2001, specifically directed at the reduction of requests in a deemed-refusal situation and provide a copy of the plan to the Office of the Information Commissioner. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance.

4 OPI Search and Approval Time

The time taken to retrieve records still needs improvement if the department is to come into substantial compliance with the time requirements of the Act. The department should identify the OPIs with significant problems in meeting the time requirements and institute measures to assist those areas to comply with the time requirements. In addition, the department should determine what value is added by having the Communications function part of the approval process. Other departments fulfill communications requirements as a parallel process rather than as a part of the approval process.

Recommendation # 4

TC should identify measures to improve the performance of OPIs that persistently do not meet planned turnaround times. TC should examine the need to have the Communications function part of the approval process.

5. Improving Performance

The department should continue to devote the resources and effort necessary to build on its performance in meeting the time requirements of the *Access to Information Act* to come into substantial compliance with the time requirements of the Act by March 31, 2002.

Recommendation # 5

As part of the ATI Improvement Plan, TC should establish March 31, 2002, as the target to come into substantial compliance with the time requirements of the Act.

Status of 1999 Recommendations

In the December 1999 report on the status of recommendations in the 1999 Report Card, further recommendations were made on measures to reduce the number of requests in a deemed-refusal situation. The status of the 1999 recommendations is described below.

1. **The ATI Coordinator is directly responsible for ensuring compliance with the *Access to Information Act* and should take a strong leadership role in establishing a culture of compliance throughout TC. Such a role requires the unwavering support and endorsement of the Minister and the Deputy Minister.**

   The ATI Coordinator has placed significant effort in raising the profile of the Act across the department. This was accomplished through an awareness campaign focused on departmental managers, the promotion of ATI modules on Transport Canada courses and the distribution of performance statistics to ATI co-deliverers. The ATI Coordinator believes that the Deputy Minister provided strong support to her office. The Deputy Minister receives monthly ATI performance statistics and reviews ATI issues with her senior management group.

2. **It is unusual for Deputy Ministers to reserve to themselves the authority to answer access requests – especially in one-third or more of cases. This aspect of the delegation order and practice should be reviewed.**

   The Delegation Order was reviewed in late spring 2000 and the Minister signed an Order in October 2000. The new Order provides all Assistant Deputy Ministers with the authority to exempt information and therefore results in the elimination of a sign-off step in the ATI process (Delegation Order attached).

3. **The ATI Coordinator and the Deputy Minister should be directed by the Minister, in writing, to exercise the delegation to answer requests within deadlines whether or not the senior approval process has been completed.**

   The ATI Coordinator stated that the Minister signed a new Delegation Order in October 2000, which specifically states who will exercise his delegated powers under the *Access to Information Act*. The delegation to the Assistant Deputy Ministers reflects senior

management's accountability in the application of the legislation. The Minister has not directed that delegated power be exercised when the senior management approval process is not completed within the Act's time requirements.

4. **Allotted turnaround times should be revised, with some approval processes dropped or performed simultaneously. An information sheet, clearly showing the expected turnaround times for each stage in the access process, should be incorporated into the process. This might help those not familiar with the request process to understand the tight timelines.**

   The access process including the planned versus actual turnaround time for each step in the process is reviewed regularly by the ATI Office. Monthly statistics are provided to each Assistant Deputy Minister and Regional Director General as well as the Deputy Minister. Many changes were implemented this fiscal year. For example, a significant reduction of what is required from Program Officials at the time of retrieval has been implemented (no document list or page numbering). As well, following changes to the Delegation Order, the number of sign-offs was reduced.

   Participants to the ATI process are informed of their responsibilities, deadlines and certain key aspects for processing the access request by a notice to OPIs included with the Retrieval Notice. Due dates as well as the name and telephone number of the ATI Advisor that can respond to questions are clearly marked on both the retrieval form and sign-off form.

   Many of the above measures were planned in the Spring but implemented in the Fall so the effect on reducing requests in a deemed-refusal situation is not evident.

5. **If an extended date will not be met, the ATI office should routinely contact the requester to indicate it will be late, to provide an expected response date and of the right to complain to the Information Commissioner. This will not impact the deemed-refusal status once the extension date is missed; however, it will alleviate some of the requester's frustration and perhaps avert a complaint.**

   The ATIP Office ensures that extensions are applied within the timeframes. If an extended date will not be met, the requester is advised of this and of the expected response date.

6. **If an outstanding request is almost one year old, the ATI office should notify the requester about section 31, the one-year limitation on the right to complain.**

   The ATI office had no such files this fiscal year. However, requesters would be contacted for a number of matters including this issue when a file comes close to the one-year deadline. The department also provides interim disclosure responses when possible.

7. **Performance contracts with operational managers should contain consequences for poor performance in processing access requests.**

   Rather than having performance contracts with operational managers, the department chose to place responsibility for the application of the Act directly with the Assistant Deputy Ministers. The ATI Coordinator states that Groups or Regions not exercising diligence in meeting retrieval and sign-off deadlines are required to provide justification to the Deputy.

8. **TC should approach the time delay problem by establishing an overall plan to manage the tasks necessary to come into substantial compliance with the Act's deadlines. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance.**

   The ATI Coordinator states that seeking solutions to the time delay problem is ongoing and TC will continue to address this issue. Monthly performance reports are issued to senior management and an increase in the use of these reports is being considered, associated with training for poor performers. In addition, resources for the ATIP Office have been re-examined and increased for a third year in a row. The latest addition / approval for an additional clerk, an additional advisor and an assistant coordinator are expected to have a significant impact on the ability to achieve substantial compliance.

9. **TC should come into substantial compliance with the Act's deadlines no later than March 31, 2001.**

   The ATI Coordinator states that Transport Canada's senior management has indicated strong commitment to the department's compliance with the legislated deadlines. The department is endeavoring to be in compliance, as early as feasible, by allotting additional resources to the ATI Office and by emphasizing the importance of the Act to every employee, from the support level to the management level. Management is given periodic briefings on the requirements of the legislation and made aware of any changes. The ATI process has been streamlined and the levels in the delegation instrument have been reduced in an effort to bring the department to an acceptable level of compliance.

10. **The ATI Office should provide routine reporting that allows an assessment of whether OPIs and other parts of the department accountable for meeting time requirements for processing access requests are meeting their obligations. The reporting should include the ATI Office.**

    The ATI Office has been providing such data for approximately a year. Since June 2000, and at the Deputy's request, this data is included in the department's Major Activities Status Report that receives wide distribution within TC management and is examined by the Deputy's management group.

11. ATI training should be mandatory for all new managers as part of their orientation and for all managers on a refresher basis once the current 1999/2000 training program is completed.

Yearly and/or quarterly ATI training is provided to new departmental employees during the New Employee Orientation Course, to managers during the department's management courses and on certain specialized courses relating to program functions such as the System Safety Specialist. In addition to this regular training, the ATI Office provides custom training to departmental program areas on demand.

FOREIGN AFFAIRS AND INTERNATIONAL TRADE

Summary

The department has not made progress in reducing the number of requests that are answered beyond the time requirements of the *Access to Information Act*.

In 1999, the Office of the Information Commissioner issued a Report Card on the department's compliance with the statutory time requirements of the *Access to Information Act*. The Report Card contained a number of recommendations on measures that could be taken to reduce the number of requests in a deemed-refusal situation. In the 1999 Report Card, the department received a red alert grade of F with a 34.9 % request to deemed-refusal ratio for access requests received from April 1, 1998, to November 30, 1998.

In December 1999, the Office of the Information Commissioner reviewed the status of the recommendations made in the Report Card and made further recommendations for measures to reduce the number of requests in a deemed-refusal situation. At that time, the statistics showed that from April 1, 1999, to November 30, 1999, the deemed-refusal ratio for access requests improved to 27.6 %. For the comparable period in 2000/01, the deemed-refusal ratio moved up to 29.3 % or a red alert grade of F.

In December 1999, as part of the review of the recommendations contained in the Report Card the Director, ATI stated that:

> "the department has focused on ensuring that systemic and attitudinal changes were made to ensure that all staff contributed to the obligations required by the Act. This has been fully supported and directed by the Deputies and Executive Committee. Compliance with the Act has been identified by the ADM as the #1 priority of the 2000/01 Public Diplomacy Business Plan. In spite of a more than 40% increase in requests over last year, the processing improvements and significant streamlining introduced this year have ensured that the 'deemed refusal' rate has not had a corresponding increase."

The progress in reducing the number of requests in a deemed-refusal situation has stagnated. In addition to the number of new requests received after April 1, 2000, there was a backlog of requests in a deemed-refusal situation carried over from the previous year. At the start of 2000/01, 154 requests were carried over from 1999/00, with 42 in a deemed-refusal situation. The backlog of requests represents a serious impediment to operating within the Act's time requirements.

This report reviews the progress of the department to come into compliance with the time requirements of the *Access to Information Act* since the last update in December 1999. This report also reviews the status of recommendations made in the December 1999 review.

In the previous report, information was provided on the time to respond to access requests answered beyond the time requirements of the Act. The information from 1999/00 is compared to the information on access requests in a deemed-refusal situation for this reporting period in the Tables below. In making the comparison, one must also consider the number of requests received in the reporting period. In 1999, as of November 30th, 359 new requests were received. This year, for the corresponding reporting period, 256 new requests were received. Although the number of requests decreased from the corresponding previous reporting period, the number of pages reviewed increased.

Table A: Time to Respond to Non-extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where no extension was taken	April 1999-Nov. 1999	April 2000-Nov. 2000
1-30 days	54	22
31-60 days	4	7
61-90 days	3	6
Over 91 days	1	1

Table B: Time to Respond to Extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where an extension was taken	April 1999-Nov. 1999	April 2000-Nov. 2000
1-30 days	4	15
31-60 days	2	6
61-90 days	0	1
Over 91 days	0	1

Table C: Pages Processed

Year	Pages Reviewed	Pages Released
1998/99	58,563	38,965
1999/00	35,987	24,090
April 1 – Nov. 30, 2000 *	* 71,729	38,068

* In addition, 220,000 pages related to a request were reviewed and 144,957 pages electronically severed in a parallel unit to process requests related to softwood lumber.

Overall, the Tables show mixed results. Where no extension was claimed, the time taken to respond beyond 30 days has increased. At the same time, the number of requests in a deemed-refusal situation has decreased somewhat. Where an extension was taken under section 9 of the Act, the number of requests and time taken to respond have both increased.

There are a number of measures that could be taken by the department to come into substantial compliance with the time requirements of the Act. The measures are described below as a series of recommendations.

Recommendations for 2001

1. Deemed-Refusal Situation Analysis

To take a proactive approach to reduce the number of requests in a deemed-refusal situation, an analysis should be made of the reasons for the deemed refusals from April 1, 2000, to November 30, 2000. The analysis can be used to pinpoint what specific measures might be required to bring the department into substantial compliance with the timelines in the *Access to Information Act*.

Recommendation # 1

The department should conduct an analysis to determine the specific reasons for each request in a deemed-refusal situation for the period April 1, 2000, to November 30, 2000, and then develop a plan to reduce the future number of requests in a deemed-refusal situation.

2. ATI Improvement Plan

DFAIT should approach the time delay problem by establishing an overall plan to manage the tasks necessary to come into substantial compliance with the Act's deadlines. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance. Uncoordinated efforts to reduce the number of requests in a deemed-refusal situation are likely not as effective as an integrated group of measures established as a result of an analysis of the situation.

Recommendation # 2

DFAIT should develop an ATI Improvement Plan by March 1, 2001, specifically directed at the reduction of requests in a deemed-refusal situation with a copy of the plan provided to the Office of the Information Commissioner. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance.

3. Improving Performance

The department should continue to devote the resources and effort necessary to meeting the time requirements of the *Access to Information Act* to come into substantial compliance with the time requirements of the Act by March 31, 2002.

Recommendation # 3

As part of the ATI Improvement Plan, DFAIT should establish March 31, 2002, as the target to come into substantial compliance with the time requirements of the Act.

4. Routine Reporting

The ATIP Flow System is capable of generating performance reports. The performance reports compare planned versus actual time taken to complete each stage in the access process.

OPIs, senior management, the ATI Office and others involved in the access process require information on how they are fulfilling their part of the process. Senior management in particular needs routine reporting on the overall process to gauge the success of measures taken to reduce the number of requests in a deemed-refusal situation.

Recommendation # 4

Routine reporting on planned versus actual time taken to process access requests and the status of measures taken to reduce requests in a deemed-refusal situation should be instituted. The reports will provide senior management, OPIs and the ATI Office with information needed to gauge overall departmental compliance with the Act's and department's time requirements for processing access requests.

5. Delegation Order

The Delegation Order has not been changed in response to the recommendations of the Office of the Information Commissioner. Although the ATI Coordinator has delegated authority to respond to access requests, a "consultation" may take place with various OPIs in the department. Until the consultations are "appropriately concluded", the ATI Coordinator does not sign-off on the request response. While consultation with OPIs is necessary in the access process, that consultation is required within the statutory time requirements of the Act. A delegated authority exercised only after consultations are "appropriately concluded" has the effect of an additional sign-off. The delegated authority should be communicated in a way that makes it clear who is responsible and accountable for decisions under the Act.

Recommendation # 5

The Delegation Order should clearly indicate to staff that the ATI Coordinator is responsible for decision-making under the Act.

Status of 1999 Recommendations

In the December 1999 report on the status of recommendations in the 1999 Report Card, further recommendations were made on measures to reduce the number of requests in a deemed-refusal situation. The status of the December 1999 recommendations is described below.

1. **DFAIT should continue to devote the resources and effort necessary to meet the time requirements of the *Access to Information Act*.**

   Through the 1999-2000 Business Plan, the Access to Information Division was identified as the top priority for the Public Diplomacy Branch and, as a result, was allocated additional FTE for the unit and $150,000 to create a departmental fund for assistance to other divisions tasked with large access requests. During the 1999/00 FY, the department received a 45% increase in volume of requests and a significant increase in consultations from other departments. The 2000-01 Business Plan has requested additional incremental resources for the unit again to respond to the volume of work.

2. **DFAIT should develop and implement an overall plan with milestones, targets, tasks, deliverables and responsibilities to come into substantial compliance with response deadlines by December 30, 2000.**

   A plan as described above has not been developed although there is as overall business plan for the ATI Office.

   The ATI Coordinator's view is that implementation of this recommendation is difficult. The nature of the mandate of the department requires response to international developments, crises and events that cannot be predicted or anticipated through planning. Targets and tasks are clearly indicated to divisions tasked with responsibilities, however, such dates cannot always be met when all divisional staff have been dedicated to respond to an unplanned event or international development. The departmental access fund was created to allow some assistance to such situations. However, experienced staff with knowledge of the subject matter may still be unavailable for consultation for periods of time.

   However, a process to ensure more immediate identification of time delays is now in place and with introduction of the new web-based information site (as indicated in response #3), performance monitoring will be implemented.

3. **The department should provide reporting that allows an assessment of whether those accountable for tasks in the access to information process are meeting the time requirements allocated to the task.**

Weekly progress reports are currently circulated to all senior management in paper format. However the ATI office does not provide reporting to OPIs on planned, versus actual performance for processing access requests.

DFAIT is in the process of development of a web-based information management system that will provide management with "live" data related to processing of access requests which will highlight pressure points and time lapses for better management follow-up. This will be a pilot in government and has been developed in consultation with other departments for possible expanded use. The prototype has been delayed by technical problems but will be in place before fiscal year end.

4. **The Coordinator should be directed by the Minister, in writing, to exercise the delegation to answer requests within deadlines whether or not the senior approval process has been completed.**

   The ATI Coordinator has full delegated authority from the Minister to respond to requests. However, in her view, the complex and sensitive nature of some requests requires careful consultation with other parts of the department more familiar with the subject matter in order to ensure that information is appropriately protected from disclosure. The impact of error that could flow from a breach of confidentiality with a foreign governments or the release of information that could negatively impact on negotiations of the Government of Canada is significant. Unless such consultation has been appropriately concluded, a decision to release or protect information cannot be fully informed. The ATI Coordinator currently has full authority to release information as soon as such consultation is finalized.

5. **Performance contracts with operational managers should require compliance with internal and legislated response deadlines.**

   No action was taken on this recommendation.

6. **ATI training should be mandatory for all new managers as part of their orientation and for all managers on a refresher basis.**

   As part of the Canadian Foreign Service Institute training schedule, an ATI training module is part of the curriculum for all newly appointed Directors, newly recruited Foreign Service Officers and newly appointed Heads of Missions.

7. The delegation order now in force (March 11, 1998) empowers the Deputy Minister of Foreign Affairs, the Deputy Minister of International Trade, the Director General, Executive Services Bureau and the Access Coordinator to exercise all of the powers of the Minister under the Act. It does not, however, make it clear who has the responsibility for decision-making under the Act. In practice, in all but the most straightforward cases, the responsibility seems to be a collective one. It should be made explicit where the responsibility for decision-making under the Act lies.

The Order has not been changed. The Coordinator's view is that the full delegation of authority from the Minister of Foreign Affairs is currently to the ATI Coordinator. In practice, she states that the Coordinator has final sign-off for release of all requests. In some instances, the Coordinator consults with the Director General, who is a senior manager with extensive diplomatic experience abroad, to ensure appropriate application of the legislation. This process, and the nature of the delegation instrument, reflect the fact that DFAIT has two Ministers with broad mandates as well as two Deputy Ministers.