Annual Report
Information Commissioner
1991-1992

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

Subsection 2(1)
Access to Information Act

The Honourable Guy Charbonneau
The Speaker
Senate
Ottawa, Ontario

June 1992

Dear Mr. Charbonneau:

I have the honour to submit my annual report to Parliament.
This report covers the period from April 1, 1991 to March 31, 1992.

Yours sincerely,

John W. Grace

The Honourable John A. Fraser, PC, QC, MP
The Speaker
House of Commons
Ottawa, Ontario

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Mandate

The Information Commissioner is a special ombudsman approved 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 agencies.

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

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

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

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

The Commissioner's investigators may examine any record except Cabinet documents.

His independent status and power of review are strong incentives to government institutions to adhere to the act and respect applicants' rights.

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

Information in Tough Times

In the real world, the year in access to information under scrutiny in this report was one of crisis: war, recession, national unity malaise, lack of public confidence in government and, yes, distrust of elected officials. Any one crisis would test the mettle of a government's commitment to openness. Here we have a fistful, one striking at the very heart of nationhood. Not a propitious time for anything as much at the margin of government, even in good times, as an *Access to Information Act*.

Secrecy, after all, is the traditional refuge of government under siege. All the old attitudes and the old evasions rise to the surface: fear of embarrassment, misguided--if well-intentioned--paternalism, gamesmanship, the supposed easy way out (it is often the hard way), foot-dragging and, in a very few instances, unadorned disdain for the legal requirements of the law in the name of a self-evoked higher cause.

All of this should conspire to give "openness" the fight of its life. It should also mean that if openness survives, battered though it may be, it can survive anything.

Well, the *Access to Information Act* survives--and in relatively good shape. The government may sometimes seem to be ahead on points; yet "openness" is very much in the fight, even winning a few rounds. And there has been no knock-out!

In the ninth year of the *Access to Information Act*, any credible assessment must talk specifics: particular cases in particular government institutions. It is no longer sufficient to recite the old generalizations about the government's performance. Even if the poet William Blake had not warned, though poets must never be taken literally, that "to generalize is to be an idiot", the facts simply do not support earlier characterizations of a concerted, systematic effort to thwart the law; nor do they justify the heralding of a new golden age of openness.

But the government's performance is not the only subject of the report, though inevitably government receives most of the attention -- and criticism. The record of the Information Commissioner and his office is also exposed to Parliament's and the public's scrutiny. If no self-flagellation can be expected, the statistics of the year's work and the issues raised offer at least a quantitative accounting of zeal.

Whether the Commissioner appears too hard or too soft on government seems to depend upon point of view. Public servants have complained that his office is overly-aggressive in interpreting the right of access and does not sufficiently recognize the validity of the exemption process. On the other side, some users of the Act continue to argue that the legislation contains too many exemptions and the Commissioner is too accommodating to them and to the government.

On the same day this year, articles appeared in two newspapers, one in Ottawa criticizing the Commissioner for not being hard enough on government, the other in Toronto saying the Commissioner was too tough to survive. Perhaps it is not merely defensive to observe that a commissioner would have real grounds for self-doubt if the complaints were from only one side.

This may be of little comfort to those who have had their rights of access to government records frustrated over the past year. They will be understood and forgiven for their cynicism about the efficacy of our *Access to Information Act*.

Take the person who applied to Treasury Board for access to records related to one of the government's national unity task forces, the Task Force on Overlap and Duplication (of federal and provincial programs). Almost a year passed, yet the department had not disclosed records, or even claimed exemptions to justify withholding--mere basics which, ordinarily, are to be completed in 30 days.

After an intervention by the Information Commissioner and facing the prospect of recourse to the court to force an answer (some answer, any answer!) Treasury Board replied. It told the requester that no records would be released in order to prevent possible injury to federal-provincial relations--a response which became the subject of another complaint to the Information Commissioner. All of this over records composed, almost entirely, the Commissioner argued, of descriptive and factual information about the various programs delivered by federal and provincial departments!

Without a unity crisis, this saga of recalcitrance would never have occurred. Some senior government officials fervently believe, in all good faith, that the unity crisis justifies diminishing access rights. If there is any risk, however slight, goes the argument, that disclosure of information could jeopardize the effort to keep Canada together, secrecy should prevail.

Yes, the motives are noble. No one questions them. Once uttered, however, the argument begs a difficult question: since the outcome of any informed public debate on constitutional renewal is uncertain, should debate itself be hobbled by secrecy?

To the aphorism that a little knowledge is a dangerous thing, an information commissioner must say the best protection against such danger is more knowledge, more information. Or, to put it the other way and in the words of A.J. Liebling, that great chronicler of the *Wayward Press*, "Where there is no information, the experts come into their own."

From poll to poll

Last year's report relegated the issue of public opinion polls to the back of the book: a discussion of a complaint from a requester who was denied timely access to a poll conducted by the Department of Finance.

What was said then bears repeating up-front, though self-quotation may verge on bad taste or testify to ineffectualness.

> "The Information Commissioner is not in business to tell a government department when to conduct polls and on what subjects. He makes no comment on the proliferation of polling as an instrument for devising policy. He is entitled to note, however, that it is passing bizarre that the public should be denied knowing what the public thinks when the public pays for collecting information about itself. He does warn those wishing to hold back poll results that they have a heavy burden in justifying delay on the grounds of not controlling the data or of injury to government interests."

That notice was noticed. Some polls are at last going out and the battle has now been largely confined. It rages mainly over those dealing with national unity issues. No serious defence is being heard against the release, later if not sooner, of other polls. Indeed, no serious defence can be made.

Many reporters cannot understand why all public opinion research isn't publicly available. One

journalist's efforts to obtain them have left him "lurching so much from poll to poll" that he feels "like a dog on diuretics". There are days when the Information Commissioner feels the same way.

No the media are not complaining about being overwhelmed by polling data. Perhaps here lies a solution. Nothing causes reporters to lose interest in an issue faster than overwhelming them with too much information, cheapening and demystifying facts until they come to be considered propaganda. Reporters then think they are being used. Imagine the reaction if government requested the media to publish poll results in the public interest. Take out an ad, they would say.

Yet, the government argues that if Canadians were to learn what the polls were saying about what Canadians thought on constitutional matters, harm would be done to the government's ability to conduct federal-provincial relations. By such reasoning, the Privy Council Office delayed or denied journalists and others access to poll results, even to the poll *questions*.

The paradox, if not the contradiction, here is that the denial came against the background of the government's own much-stated intention and unprecedented efforts to bring the constitutional renewal exercise out from behind closed doors into the stark light of public consideration. Though this admirable intention has no legal bearing on the decision whether to release information under the *Access to Information Act*, it is not unfair to point out the inherent contradiction and to argue that the Privy Council Office should support the government's own professed and admirable intention. And it is not unfair to ask: can the public mood of cynicism come as a surprise to anyone?

By the time this report appears, the issue of polls, one hopes, will have been resolved. This single case, important as it is, is raised at the outset of this report, however, for more than its own sake: it is a hard test of the commitment to the principle of open government upon which rests the *Access to Information Act*.

Releasing information which is convenient to release is no test at all. Releasing information with no potential for embarrassment is no test. Releasing information which reveals mistakes or misjudgments or has a potential for misunderstanding is a test. And, let it be said at once, government institutions pass such tests every day. Again, no generalizations here.

The magic words, which appear in hundreds of news stories, "according to information released under the *Access to Information Act*", are their own unsolicited testimonial to the public servants who, though their department may be discomfited, respect the legislation and are making it work.

Here is an unscientific, random catalogue of a few revelations attributed to the efficacy of the *Access to Information Act*: Cabinet instructions to the Royal Canadian Mounted Police on obtaining information about separatiset activity in Quebec; a Revenue Canada audit discussing difficulties of tax collectors under a new regime of being gentle with taxpayers; memos and letters dealing with the admission to Canada of the former Iraqi ambassador Mohammed Al-Mashat; 17 background studies on the impact of free trade; Employment and Immigration figures of money spent on job creation in the Prime Minister's riding; an External Affairs report on the percentage of Canadian wine served at 69 diplomatic posts (17 per cent).

Significant, or trivial, the stories come out routinely day by day. Most of the time the Information Commissioner's office doesn't know about the request until the reports appear: no complaint was received, no intervention was necessary. Perhaps some of this information would have been released without a formal request. But can anyone doubt that, without the *Access to Information Act*, much of what now goes out, would never have seen the light of day? And media users, let it be remembered,

make up only some ten per cent of those who apply formally for information. They are merely the most visible users. Business and corporate requesters (54 per cent) don't rush out and publish their goodies. So much to the diminishing band who say this legislation is not working.

Back, however, to public opinion polls and a case demonstrating the complications which can arise when people practice to deceive.

A suspicious reporter complained to the Commissioner when told, in response to a request, that certain unity poll results had not yet been received by PCO from the polling company. The investigation confirmed the existence of a scheme designed to avoid the requirements of the access law by artificially delaying receipt of polling documents. Under this practice, officials could receive poll results orally from the polling organization while all supporting documents were left in the possession of the company for delivery at a later date.

The Commissioner concluded that the briefing records were properly considered as being under the control of PCO even though physical possession was with the polling firm. To its credit, PCO retrieved the records and processed them under the Act. More important and commendable was a commitment to cease this practice in the future.

That being said, it is disappointing when so-called "lead" departments, whatever pressures they are under, fail to provide leadership to other government institutions by failing to respect the letter and spirit of the access law. The Privy Council Office, which is the Prime Minister's department, and Treasury Board, the department mandated by law to ensure the proper administration of the access act across the government, quite simply have a moral responsibility to show the way.

There is a silver lining in all this. As the reporting year came to a close, the Commissioner was officially informed that a process to make public opinion surveys more routinely accessible is actively considered by the government. The policy would see the results of most polls being made public as a matter of routine (no request necessary!). It would, of course, be an important step in the right direction. While no final decisions have been made, the Commissioner believes the intent is serious, commends the initiative and encourages its early adoption. Score one round for access to information.

Even the optimists among us should not expect miracles. The government remains convinced that the results of national unity polls should be withheld from the public: apparently, they will not be part of the routine release policy. As well, the government may reserve the right to withhold portions of other polls in exceptional circumstances. On balance, however, a commitment by the government to more openness concerning polls would be an important new and substantial development.

We're in style

The *Access to Information Act* has enough strength that those who seek an unwarranted degree of secrecy face considerable hurdles. It is increasingly clear that while access can be delayed, it can rarely be entirely denied. Yes, delay and denial often amount to the same thing. But delay can be, and will be, aggressively tackled--a plan of attack is described later in this report.

Over the past year there has been only one case (out of 877 complaints) in which a government institution refused to accept the Commissioner's recommendation that additional records be released (for the record, it was the Federal Business Development Bank). When it comes to exemptions, then, the record shows that departments eventually disclose what the law requires (at least in the cases the Commissioner knows of by way of complaint). Another round for the good guys.

More good news comes from an unexpected source: an unsolicited, independent testimonial found in the Canadian Press (CP) *Stylebook*. That arbiter of journalistic correctness ("Avoid using the jargon that often flows so freely from government news releases or officials' mouths") devotes three pages (303-305) to "Access to Information". CP is realistic, noting that the federal and provincial access acts "are better tools of history than of journalism" and the exemptions under which information can be denied. But then the *Stylebook* comes as close as journalists ever can to becoming positive, if not downright enthusiastic. Let the *Stylebook* report under the heading "What you can get".

> "There are some easy records to obtain.
>
> "1. What's going on: basic facts on just about anything the government does.
>
> "2. Who's telling governments what: public opinion research, including surveys of the public, focus groups or experts.
>
> "3. How well the money and effort was spent: audits, the details of spending practices and assessments of the effectiveness of departments and programs.
>
> "4. Who went where and did what: bureaucratic expenses covering such items as the costs and contractual details for consultants, hospitality, travel and conferences.
>
> "5. Who wrote what and when: memos and reports, some of which may have crucial information deleted. These records have to be in the control of a department or agency subject to the act. They can't be owned by someone else."

Well, perhaps not always "easy" to obtain, i.e., public opinion research. The point is to recognize how far we have come when records, jealously guarded before the *Access to Information Act*, are now described as "easy" to obtain. And CP offers a wise exhortation to patience.

> "Bear in mind that the acts are less than 10 years old. In other countries where there are similar laws, they have taken a generation to become effective."

Journalists and others who have access to information frustrations should be consoled by CP's testimonial. And they might remember that there are only a dozen countries in the world brave enough to have such legislation. They should also know that in Canada, there was no right to government information. Access to federal government information could be granted or denied arbitrarily. The outcome depended on the whim of a public servant who liked, or did not like, a requester or who thought the information harmless enough to allow it to see the light of day; or who was in a good mood or a bad mood. It was that capricious.

While the New Jerusalem of a perfect access world is still off in the distance, the great comfort today is that the right of access is enshrined in law. It does not depend upon knowing someone in high places in government or why one wants a record. The rules of the game are well established, if not always observed.

Yes, there is foot-dragging. But the Canadian law is an extraordinarily generous realization of the

people's right to know. The law is an extraordinary act of faith in the benefits of an informed citizenry.

Neither authoritarian governments, nor kings or despots, would subject themselves to freedom of information laws. It is only a relatively few democratically-elected governments which have chosen to accept the rigors of openness. They have given the force of law to the injunction of an American founding father, James Madison, that "the people who mean to be their own governors must arm themselves with the power which knowledge gives".

A later-day American, the historian Henry Steele Commanger, observed that Madison's generation "thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to." Yet it took until 1966 for even the Americans, with their great heritage of open government, to realize that noble sentiments and aspirations, perhaps especially noble sentiments and aspirations, require the law behind them.

Canada is not a country to embrace even good causes impetuously. It was not until July 1, 1983, after the heroic personal crusade of Gerald "Ged" Baldwin, that the *Access to Information Act* came into force. Ged Baldwin's name is invoked now not only to recognize this historical fact, but to record, with sadness, that he died last December. Though he was too self-effacing ever to make the claim, Ged Baldwin was the single irresistible force which inspired Canada's information law. He showed what a private and solitary Member of Parliament, even in opposition, can do when the cause is good and the will is strong. Though the media may be the most passionate and public advocates of access rights today, the initiative was not theirs: it was Ged Baldwin's. This law is his enduring monument.

Delays: the problem

Delays in the access system can occur in three places: in departments when statutory response times are not met; in the Commissioner's office when complainants are made to wait too long for the conclusion of lengthy investigations; and finally, in the Federal Court when disputes over the accessibility of records languish unheard and undecided for years. Reduction of these delays is now the number one priority of the Information Commissioner. Thus, an action plan to address them has been developed and will be vigorously pursued.

A major contribution to negative public perception of the access law is the length of time government institutions take to respond to requests for records. In 1990-91 (the most recent year for which Treasury Board has compiled statistics) 44.5 per cent of all requests made under the Act were not responded to within the statutory 30 days; 18.1 per cent took between 30-60 days and 26.4 took more than 60 days. When the figures for this reporting year (the so-called year of crisis) become available, they will undoubtedly show an even greater reliance on extensions.

In absolute terms, the problem grows even worse because each year almost 10 per cent more access requests are being filed. More requests are being delayed and the delays are getting longer. A double whammy!

Even after almost nine years of living with the legislation, some government institutions apparently do not yet have the necessary infrastructure (records management practices, training and human resources) to provide the Canadian public with the information "service" required by law. So, while millions of Canadians obtain passports, rebates, benefits, licences and social insurance numbers with comparative ease and alacrity, the relatively few individuals (11,093 in 1990) who exercise their right to request government records experience at best, uneven service. This poor record is evidence of a failure of the

will to live gracefully with the "right to know" that Parliament has given Canadians.

Some officials openly ignore requesters' legal rights of access for reasons of departmental convenience. For example, the Department of Finance informed the Commissioner that it could not comply with a requester's legal right of access because its Minister was too busy to sign off on the file.

Another requester was told that his legal right of access to records would be "postponed" in order to permit the minister--in this case, the Minister of Transport--to make a public announcement associated with the records.

For how long will legal rights of access be considered as being subject to the "conveniences" of ministers and senior officials? Surely, meeting legal obligations is ample justification for all departments to establish workable delegations of authority.

Again, the story is not all bad. Many requesters receive timely replies. And there is a desire to yet do better. The acting Deputy Minister of Employment and Immigration circulated a memo to her managers with just the right message.

> "Regrettably, over the last few years the percentage of our requests completed within the 30-day deadline has remained at approximately 50 per cent, while the government as a whole has completed about 85 per cent of requests within 30 days over the same period. This statistic gives the unfortunate appearance that EIC is negligent in giving access to its records and leaves us vulnerable to public censure.
>
> "I hope you will assist in improving our performance in this area by encouraging your staff to cooperate with Public Rights Administration. It is important to remember that we are legally obliged to comply with the *Access to Information Act* and that failure to produce records within the legislated time limits contravenes the law."

Delays: a will and a way

Delays can be successfully tackled. The starting place is finding the will.

The ordinary complaint process does not afford the Information Commissioner an effective opportunity to address the root causes of delays. Relatively few of even the poorly served are complainers. Even if some satisfaction can be secured for them, the overall problem remains. Consequently, in the coming years, the Office of the Information Commissioner will institute two initiatives.

Processing audits

By reviewing departmental and Treasury Board statistics, along with our own complaint investigation experience, the office will select departments and investigate the practices and procedures they have in place to respond to access requests. During these reviews, the office will assess the efficacy of existing approaches and, where necessary, suggest improvements, drawing from the procedures and practices of institutions which handle access requests expeditiously.

These audits are intended to be constructive and conducted in a spirit of cooperation with departmental officials. Our approach will be to secure the concurrence and support of deputy heads and to assist them to discharge more effectively what are, after all, statutory responsibilities. No opposition is

anticipated. After all, the Commissioner could, if necessary, conduct these audits under his power to initiate complaints.

Departments will also be encouraged to include access request processing in their internal audit plans. There is no need, of course, for a department to wait for the Information Commissioner's audit before undertaking its own review. Industry, Science and Technology Canada has already concluded internal audits of compliance with the privacy and access laws. Its initiative (which was both principled and practical) is commendable. A good internal audit will make a protracted external review unnecessary.

Extension notices monitoring

The *Access to Information Act* requires government institutions to notify the Commissioner of every case where the response period is to be extended for more than 30 days beyond the basic 30-day period. In the past, these notices have not been the trigger for any special action by the Commissioner. They should have been. Only in rare cases has there been follow-up. No longer will this be good enough.

To the extent limited resources permit, extension notifications will now receive more rigorous attention. There will be follow-up to ensure that claimed extensions are lawful and reasonable; there will be monitoring to ensure that extended deadlines are met. Moreover, the results of the monitoring will be important data in deciding audit priorities and for securing systemic improvements in departmental response time performance.

Delays: the Commissioner's office

During the reporting year, significant improvements have been made in the turnaround time for complaint investigations. On average, it took 4.9 months to complete an investigation, down from last year's figure of 7.4 months. Complaints involving disputed exemptions took on average 7.2 months, delays 2.6 months and fees 2.4 months.

These times will be improved. By the end of 1992-93, our overall turnaround target is 4.5 months which includes a one-month target for delays.

To achieve these improvements will mean setting a pace which cannot always be tailored to the preferences and conveniences of the departments which are the subject of complaints. The hope is that departmental officials will be understanding of, and cooperative with, the accelerated investigative process.

Though mutual adjustments will be necessary, the days are gone when an access investigator will simply put a file aside until such time as a departmental official sees fit to come back with requested documents or information. The informal rather than a legalistic approach will still be the preferred method of proceeding. But there will be no hesitation to invoke formal powers to press an investigation, should that seem necessary, to ensure timely service to clients.

It should be emphasized, however, that turnaround time is only one measure of good service. Full, fair and productive investigations will not be jeopardized by a preoccupation with speed.

A final word on investigative "style". The Commissioner's preference for informality (which reserves unannounced searches, summonses, taking evidence under oath and holding hearings for desperate cases) is, quite simply, a preference for what works.

Informality, experience has shown, is more effective because problems may be addressed at the level where they arise and, ideally, resolved at that level in the course of an investigation. Experience has shown that problems or errors are more likely to be remedied if officials are given the chance to correct their own mistakes. Formality, on the other hand, encourages early adoption of rigid (and hard to change) positions.

Informality also seeks to develop an atmosphere of mutual trust between the public service and this office. On the other hand, it can easily be destroyed if there are impediments to candid communication; if investigators believe they are obstructed or misled or if officials perceive investigators as heavy handed or unfair. Informality is working well and great credit is due the thousands of public officials who have dealt so professionally and cooperatively with the Commissioner's staff.

Delays: the Federal Court

The Commissioner and aggrieved access requesters have the right to seek redress in the Federal Court of Canada when a government institution withholds requested records. As well, businesses or individuals who have supplied information to government may ask the court to prevent the release of their information if a government institution is preparing to do so. Thus, the pace of the court process is an integral part of the effectiveness of the *Access to Information Act*.

There has been, however, no systematic examination of how these court cases fare. For that reason, the Commissioner's office undertook and completed over the reporting year a detailed research project into the processing of access to information (and, *en passant*, privacy) cases by the Federal Court.

The revelations were disquieting, if not entirely surprising.

Since 1983 (the inception of the Act) until August 26, 1991, some 309 cases have been taken to the Federal Court under the *Access to Information Act*: 58 have been decided, 156 withdrawn or abandoned and 95 remain before the court.

Cases taken to court by the Commissioner took on average, 28 months to secure a decision. When an individual took the case it was 14 months and when a third party sought to block release it took an average of 22 months. Of the 95 cases which are outstanding before the court one statistic is especially disturbing: in 79 cases, the government (which is always the respondent) has not even filed an answer to the originating notice of motion (application) despite the fact that, on average, 13 months have elapsed since the application was filed.

The conclusion is obvious. There is a need for improvements in the court's handling of access cases. As well, the results highlight the need for the Department of Justice (the legal representative of the government in almost all these cases), to defend them more efficiently.

This apparent lack of vigour by Justice is especially troubling in cases taken pursuant to section 44 of the *Access to Information Act*. Such cases arise only when the government decides that a requester is lawfully entitled to third party records and the third party has asked the court action to block release. Out of 206 such cases, 69 remain undecided. The average length of time the undecided cases have been with the court is 16 months. And in 63 of these cases, Justice has not even filed a response to the applications.

The impetus to this research was the observation by Mr. Justice Décary, quoted here last year, that

"things would have been made easier for practitioners had the court adopted the 'special rules' it was directed to make by section 45 of the Act." Since the Information Commissioner's office has a unique responsibility toward the Act, it took the liberty of drafting a set of rules for the court's consideration. At the heart of the proposed rules is the goal of bringing review applications to the hearing stage in a maximum of six months.

Before the rules were submitted to the Rules Committee of the Federal Court, they were the subject of broad consultation with members of the legal community across Canada and with a number of government lawyers and private individuals familiar with access and privacy legislation. The decision to adopt the rules is, of course, the Federal Court's. The rules were presented in the hope of assisting the court and all interested parties in ensuring that, in this part of the system, justice will not be denied by being delayed. Further information about the draft rules can be obtained from the commissioner's office.

Staying out of court

The prospect of inordinate delays in the Federal Court is a significant, but not primary, reason why the Information Commission has sought to make recourse to the court a rarely used last resort. The principal reason is one of philosophy.

By choosing to create a uniquely independent ombudsman to deal with access disputes, Parliament expressed its preference for a non-judicialized administration of the access to information regime. Although the U.S. *Freedom of Information Act* was influential on the design of Canada's law, Parliament specifically rejected its approach of requiring all dissatisfied requesters to seek redress in the federal circuit courts.

Under Canadian law, dissatisfied users are given the right to go to court but only after the information ombudsman has had an opportunity to look into the dispute and, if rights have been denied, to obtain (through persuasion) remedial action.

The goal for any ombudsman is to have all recommendations for remedial action accepted and, thus, avoid court entirely. The number of cases an Information Commissioner takes to court may be one measure of his or her success. So the system provides its own check against the prospect of an ombudsman "going soft" on the government. Complainants who don't get satisfaction from the Commissioner have the right to go to court.

The principal ingredient to being an effective ombudsman is easy, two-way communication. There is little incentive for government institutions to engage in meaningful communication about access disputes if the impression has been conveyed by a history of litigation that perfunctory negotiation is but a ritual dance towards the courthouse steps.

When the government disengages from meaningful communication, even the most capable, principled, and fair ombudsman becomes irrelevant--that is reality. However, the government has not so disengaged. As long as that is the case, this Commissioner's approach will continue to treat every court action as an admission of failure. He will expect the government to continue making the mediation process work by doing the same. Let no one succumb to the illusion, however, that this Commissioner would tolerate infringements of the access law rather than invoke the aid of the courts!

In the reporting year no court cases were commenced by the Commissioner; by the court test at least, the ombudsman's approach was successful. In fact, examining the pattern of Federal Court decisions reveals that it generally supports the Commissioners' views as to the disclosability of requested records.

The pattern is as follows:

- when the government opposes disclosure, it is generally right;
- when the Commissioner seeks disclosure, he is generally right;
- when the third party opposes disclosure, it is generally wrong;
- when a requester seeks disclosure, he or she is generally wrong.

The four remaining cases before the Federal Court which had been initiated by the former Commissioner have been withdrawn. Two cases were withdrawn on the basis of settlements agreed to by the government which respected the Commissioner's original recommendations for remedial action. The other two cases before the Federal Court of Appeal had gone against the Information Commission at the trial level. The Commissioner determined that further expenditures of public funds on the matter was neither legally justified nor in the best interests of the future administration of the access law. The complainants gave their consent to withdraw.

For those interested in dollars and cents, the decreasing need to go to court is directly reflected in "the bottom line". Since 1985 (when outside legal costs were first incurred) until 1991, the office's average annual expenditure on legal fees was in excess of $200,000. The high, in 1989-90 was $367,000. From those levels to $33,200 in the reporting year, the savings for this office alone are dramatic. If one were to include the total reduced legal fees throughout the system occasioned by a less litigious approach, the annual savings would be in the millions of dollars.

Interventions: beyond the rules

The effort to encourage more expeditious disposition of Federal Court applications goes beyond the proposal for new rules. Thus, the Commissioner will seek leave of the court to intervene in selected cases which have been launched (under section 44 of the Act) by third-party businesses to block release of information to requesters.

In an ever-growing number of cases (206 as of August 1991) businesses which have supplied information to government are asking the court to block release of information which the government proposes to disclose to requesters under the *Access to Information Act*. Although such cases only arise when the government "wants" to release information (having formed the view that the access law does not permit withholding), there rarely is much conviction to its position--at least as measured by the vigour with which the Justice department defends the action.

For its part, of course, the third-party in such cases has no incentive to have the court review proceed with dispatch. Delays in the court serve its goal of non-disclosure. Requesters have a right to become parties to section 44 actions but they rarely have the resources to do so. After all, they presume that the government is there to champion the right of access. As a result, in section 44 court cases, there is not the usual tension between opposing parties which serves to engender the pressure for a speedy hearing and decision. While not surprising, it is nonetheless disturbing that although only five per cent of section 44 applications result in an order preventing release of records, such applications delay disclosure for years.

The Information Commissioner has only played a limited role in section 44 reviews in the past. In fact, the Commissioner has intervened twice, once during a complaint investigation and once after. Usually,

section 44 cases fall entirely outside the complaint process. In the majority of such cases, the requester has nothing about which to complain to the Commissioner since the government has decided that the requested records should be disclosed. Moreover, the objecting third party has a right to go to court without ever having the matter reviewed by the Commissioner.

This unhappy experience of delays may indicate that there is also a role for the Commissioner to play even in section 44 cases which have not arisen after a complaint investigation. By becoming an intervener in selected section 44 cases, the Commissioner could reintroduce the "tension" necessary to accelerate the process.

It would not, of course, be the Commissioner's role in such cases to champion one side over the other. Not having investigated the matter or reviewed the disputed records, he could hardly intervene to argue either for or against release.

His presence, however, would keep the parties and the court mindful of Parliament's expressed direction that such cases "shall be heard and determined in a summary way" (section 45). The investigative resources and expertise of the Commissioner's office would also be available to assist the court in any way the court considers appropriate.

Since the Act specifically empowers the Commissioner to appear, with leave, as a party in any section 44 case, the course of action proposed here appears to have been contemplated by Parliament. Yet, systemic solutions to the delay problem are to be preferred.

The Commissioner hopes that in the long term special Federal Court rules and a renewed commitment by the Justice department to treat section 44 cases as a priority will make unnecessary his interventions.

Business interest, and the public interest

The increasing number of court challenges by businesses to information release is paralleled by (and, perhaps, a result of) the increasing number of requests by businesses for information about other businesses. As noted earlier, in 1990-91, 54 per cent of all requests under the *Access to Information Act* were from businesses. Some see this as evidence that the Act is no longer serving its intended purpose: as if business was not part of the public and as if business doesn't pay taxes. Rather than giving the public a window on how government conducts its affairs, goes the argument, the Act is becoming a tool to permit businesses to spy on their competitors.

There is much less truth to this charge than appears at first blush. True, there is a growing corporate interest in information supplied by private firms to governments--information about drug products, airlines, pesticides, weapons, prosthetic devices, food products, service contracts, computer contracts, tendering procedures: the list is long.

A business inquirer, like any other, is entitled to receive and to use such information for any purpose, including self-interest. What is not recognized by the critics is that there can also be public interest in business users acquiring this information. Pricing for government contracts may be more competitive; business checking on business can also help consumers.

But there is more. Anyone who has followed the public controversy over the silicone gel breast implants will realize that "the public interest" in openness does not begin and end with information about government. The public's interest in knowing what government knows about businesses goes far beyond "spying" by competitors.

Subsection 20(6) provides that government institutions may disclose information which could be harmful to a private business if "disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to prejudice to the competitive position of or interference with contractual or other negotiations of a third party."

The limitations of this public interest override are becoming more apparent. It is difficult to understand why the law should not permit disclosure of information provided by third parties whenever there is any public interest in disclosure which clearly outweighs any probable resulting harm. As it now stands, the public interest must relate to "public health, public safety or protection of the environment". An example will illustrate the limitations of this test.

A requester - a pharmacist - became concerned about the efficacy of a certain lip balm sold as a relief for cold sores. He asked Health and Welfare Canada to disclose the records demonstrating the efficacy of the product which the manufacturer had submitted in order to obtain government approval under the *Food and Drugs Act*. There was no evidence that the product posed a threat to public health, but some medical authorities are of the view that the product has no healing effect whatsoever. In a recent article in the *Globe and Mail* with the headline, "A lifelong ailment that's sealed with a kiss", one of Canada's leading experts on the herpes virus which causes cold sores is quoted as saying: "None of these products have any effect against active cold sores that can be demonstrated in clinical trials and subject to scrutiny by [scientific] peer review".

Because of the Act's narrowly defined public interest override, the information which Health and Welfare Canada has in its possession (and on the basis of which it approved the product) remains secret. Yet isn't there a public interest in determining whether the product is "snake oil"? Must it be always "buyer beware"? Surely the case demonstrates a weakness in the law which Parliament should address.

A word for the access professionals

A Treasury Board survey of 34 access to information coordinators a few years ago found that many of them "had problems balancing their loyalty to government with the public's 'right to know'". Some even feared "becoming targets of shoot-the-messenger syndrome."

Yet, they--and their superiors--should know that the Information Commissioner is their staunch ally who sees himself almost as much the helper of coordinators as of complainants. Coordinators must deal with conflicting loyalties. They must weigh their institutions' positions against the public's access rights. Few jobs in government are as testing, few require more knowledge of a department and more trust from their superiors.

All of which is why coordinators need a direct line to the most senior levels of their institutions. It is good to report that larger numbers now have such direct access and are found higher in the bureaucratic hierarchy. Many, however, remain at levels or in reporting relationships which give them little influence or opportunity to be their department's conscience for openness.

These are not merely brave words written here to court popularity with coordinators. The same message was sent to a Cabinet minister in a letter from the Information Commissioner:

> "Access coordinators are in a difficult position at the best of times. They feel most

> strongly the pressures to release records (from requesters and investigators) and the pressures to withhold them (from line managers and political staff). The best coordinators are committed to ensuring that their minister's legal obligation to comply with the access law is fulfilled.
>
> "Without coordinators who have that courage and commitment, ministers run much more serious risks than the momentary discomfort caused by disclosure of an embarrassing record. And yet, ministers will not have the assurance of dedicated, committed access coordinators if they are not carefully nurtured, heeded and protected by the most senior departmental officials."

This can be said: without the professionalism of coordinators, no information commissioner stands a chance of furthering the goals of the *Access to Information Act*; no institution has a chance of being in compliance with that act.

A tip to ATIP coordinators

If resort to the courts is to be avoided, the Commissioner's office will be required to "sell" the sweet reasonableness of his views, first to institutions and coordinators, then to complainants. Departments may need persuasion to release information they have been holding back. Complainants may need convincing that they have received all the rights they are entitled to under the law and taking a case to Federal Court (which is their right and they are always so informed) stands little chance of achieving anything but unproductive litigation and expense.

At the risk of incurring some resentment from departments, the Commissioner's letter of finding to a complainant sometimes contains critical comments about a department, even though the Commissioner may not uphold the complaint. It is rather like a lecture from a policeman in lieu of a speeding ticket. Departments shouldn't be too defensive, nor should they be reluctant to put information they are releasing in a meaningful context.

Offering clarifying explanations to requesters should not be seen as being either apologetic or garrulous. Explanations and context will make a record more understandable--and that serves everyone's purpose. Tip to ATIP coordinators: you need not be mute messengers.

Access and privacy--should they be one?

In its February budget, the Government made public its intention to combine the Offices of the Information Commissioner and the Privacy Commissioner. Since the creation of the two offices in 1983, they have always been joined in some measure. Both offices, for example, share a common corporate management branch. This branch provides financial control, personnel, library, records management, mailroom and receptionist as well as administrative services (accommodation, furniture, vehicles) and telecommunications and electronic data processing support.

With remarkable prescience when it passed the *Privacy Act*, Parliament made provision for the possibility of having one Commissioner for both privacy and access to information. Section 55 of the *Privacy Act* provides:

> "The Governor-in-Council may appoint as Privacy Commissioner under section 53 [which requires prior approval of the appointment by resolution of the Senate and House of Commons] the Information Commissioner appointed under the *Access to*

Information Act."

The section 55 option has hitherto not been used. The theory has been followed that the dual values of privacy and openness deserve separate champions. The Standing Joint Committee on Justice and Solicitor-General in 1987 addressed this issue (*Open and Shut: Enhancing the Right to Know and the Right to Privacy*) and concluded that, even the existing degree of integration was too much. Complete separation was its recommendation.

In its budget announcement, the government indicated that its proposal is not designed primarily to achieve greater administrative efficiency. "More importantly", it states, "from a public policy point of view, it [merging the two offices] will encourage a balancing of interests between the two objectives of privacy and access to information. This balancing becomes increasingly necessary as Canada moves away from a single-interest approach in a wide range of policy and program areas".

Those somewhat delphic words are apparently saying that the burden of reconciling the occasionally conflicting values of openness and privacy is best placed in the office of one commissioner. Ministers and their deputies have sometimes complained that in receiving conflicting recommendations from two commissioners they are put in an invidious, no-win situation, open to criticism from the "losing" commissioner.

More important for the public, whether the request be for one's own records or for other government records, there will be a single clearly understood avenue for redress of grievances. That would eliminate some present confusions.

When he was Privacy Commissioner, the present Information Commissioner in defending the territory and the legislation, worried, if a little facetiously, that giving one person the dual responsibility would be a recipe for occupational schizophrenia. Better a commissioner suffer than bureaucrats?

There is, of course, much to be said for the old twin regimes. For almost nine years, they served Canadians well. They ensured that the values of openness and privacy each have clearly identifiable and unambiguous advocates. While both Commissioners are required by law to reasonably balance access rights and privacy rights, each has a clear mandate to be a lightening rod for, and champion of, one of the two values.

That being said, the government's proposed model (one commissioner for both access and privacy) can also be effective. In fact, the federal level is the only Canadian jurisdiction where openness and privacy are the responsibility of separate offices. In Ontario and Quebec, for example, both access and privacy rights are courageously and effectively enforced through a single commission.

British Columbia is proposing the same model. In other provinces with access and privacy laws, enforcement is through the ombudsman. The Ontario Standing Committee on the Legislative Assembly issued, in December of 1991, the report of its review of the Ontario *Freedom of Information and Protection of Privacy Act, 1987*. The Committee examined the issue and saw no reason to recommend separate commissioners for openness and privacy.

And so, it would seem, there is no definitive argument of theory, principle or practicality working against the government's announced intention to merge the Offices of the Information and Privacy Commissioners. Yet, should Parliament approve such a change, it would seem appropriate to provide for a timely review by the Justice and Solicitor General Committee of the impact of the new arrangements.

Marketing the government's information

One of the most positive developments in the government's information policy over the past year has been the recognition that a "dissemination" philosophy should supplement the rights of access to information provided by the *Access to Information Act*. While the Act provides a valuable window on government activity, it places the burden on requesters to identify what may be of interest to them and, then, to proceed through a rather formal application and review procedure (with the attendant delays referred to previously).

A dissemination approach means the government takes the initiative in identifying information holdings which may be of interest to various segments of the public and making them available (through publications or in appropriate electronic formats). The positive result: no need for applications under the access law.

The future of access to information lies, as this report argued last year, precisely in such systemic openness--seizing upon the wizardry and the promise of the new technologies to make the government's vast information holdings routinely available.

Earlier this year, an article in the British publication, *The Economist*, conjured up "a world where the grumpy civil servant behind a counter is replaced by an easy-to-follow screen that makes all the government's information available at the touch of a button." That may be premature. (Besides, our public servants are never grumpy). But computer communication between citizens and their government is the wave of the future and, in some jurisdictions this future is now.

The first tentative steps towards "electronic democracy" are being taken, in such places (where else?) as California where the state government has recently installed 15 "Info/California" kiosks in two cities, each kiosk contains a computer connected to a state databank. Futurists and enthusiasts (they are often the same), envision a 5,000-kiosk statewide system developing from the pilot project. They see saved time, saved paperwork and saved jobs as well as having much better informed citizens.

If it is best to observe and profit from such daring experiments of others, it is not too soon for information managers to make the imperatives of public access a priority in the development of their wondrous new electronic databases.

The Information Commissioner has undertaken a modest research effort into how best to bring access to information into the electronic age. Next year's report should contain the results of the project and some recommendations to keep public information policy abreast of the new technologies. Yet, these technologies must not become impediments to an informed public's need for government records in whatever form. Parliament should remain alert to the daunting challenge.

No need to wait for the results of experiments elsewhere or for future exhortations from an information commissioner to change government attitudes toward information sharing. To its great credit, it now seems clear that the Treasury Board (the government's information management policy-maker) is embarking upon a laudable campaign to change fundamental perspectives. The new course is intended to lead government institutions away from seeing their information holdings as raw materials for their use only but, equally important, as a marketable public commodity. The Information Commissioner will be an enthusiastic cheerleader!

Though significant success has already been achieved in identifying and cataloguing information holdings,

the most difficult steps await. First, the attitudinal obstacles must be overcome--the old notion of seeing requesters as the enemy, not as customers. Then there is the novelty of assessing the "marketability" of the various holdings and of developing dissemination strategies in desirable formats, through effective arrangements and at reasonable prices.

Above all, the engendering of an entrepreneurial spirit in government institutions vis-à-vis the information they hold will not be easy. Governments are not good about collecting money for their goods and services. If Revenue Canada-Taxation in 1988 had had the foresight (or the resources, its officials would say), to market its own valuables, it may never have received more than 4,500 formal requests (yes, count them!) from one person asking for tax-related information.

That blockbuster request (it receives a full and final accounting of its own; see p. ____) challenged the very integrity of the *Access to Information Act*. Sufficient to say here that today Revenue Canada-Taxation has learned the painful lesson: it is so much more responsive and less trouble to routinely make available even the most arcane of its decisions, advance tax rulings and policies (properly sanitized, of course, to protect personal or corporate tax information).

There are a handful of admirable examples, notably Statistics Canada, of enlightened efforts to market information holdings. That department uses sophisticated means to assess the various private sector groups which need its information. From the early stages of planning information collection or compilation, the marketing concern is brought to bear.

But even Statistics Canada has its critics. One regular "consumer" of Statistics Canada's data expressed consternation at the high cost of some information. He says that he frequently finds it cheaper to obtain the needed (and identical) information from Statistics Canada's U.S. counterpart. Cross-border shopping, it seems, extends even to information!

This anecdote goes to the heart of the most vexed practical difficulty in bringing the entrepreneurial spirit to bear on the dissemination of government information holdings: how does one accomplish this without risk of monopolistic (and hence, restrictive) pricing of information by government. It should not be terribly difficult to persuade any government to exploit its information resources if there is money to be made. Such a policy merely begs the question put by one lawyer critical of what he sees as government information policy:

> "Is government information a commodity to be sold to help governments balance their budgets, or is it something to be made available for the public good?"

Any answer to this pertinent question requires confronting the arcane and little understood notion of "Crown copyright".

Crown copyright: who is the Crown?

The term is redolent with royalty and authority. Who would want to challenge the power, rights and privileges, first vested in kings, then in governments, over work produced for or by the Crown?

No one, not until now, for the good reason that since Confederation, Crown copyright has not been consistently asserted in Canada. The whole quaint notion has been all but dormant, ignored under the reasonable assumption that what the government produces for the public with public funds is in the public domain.

The Parliamentary Committee charged with examining revisions (some still pending) to the *Copyright Act* recommended in 1985 that the practice of more than 100 years be enshrined in the new legislation, namely, that what has been treated as in the public domain should be confirmed. The committee's recommendation has been, however, thwarted by obstruction from a few government departments over what can only be perceived as narrow territorial, if not self-serving, reasons.

Crown copyright which had seemed to be long decently interred has thus been resurrected. That is why members of the legal profession, and publishers of legal information (also for self-serving reasons, of course), are challenging efforts to use the once sacred prerogative of Crown copyright to hinder the reproduction, for commercial or professional use, of statutes, regulations, or judicial decisions.

From an information commissioner's perspective, the concept of a perpetual Crown copyright in any field richly deserves to be challenged. It is antique curiosity essentially incompatible with the government's own stated information policies and the spirit of the *Access to Information Act*. It is an impediment to wide and easy distribution of government information.

The works covered by this anachronistic relic cover everything published by government. But Crown copyright is capriciously and arbitrarily invoked. In particular, Crown copyright makes no sense in an era of expanding government databases when records are held electronically, in T.S. Eliot's phrase, between "fixity and flux".

What makes particularly bad sense is any attempt to apply Crown copyright to court judgments. That conjures up the spectacle of royalties being charged each time judges' words are quoted! Equally absurd is the notion that the same claim of copyright should be extended to legal statutes and regulations. There is something ironic, if not repugnant (and perhaps even unconstitutional), in the notion that the constituent records of our law could through ownership be subject to any restrictions on access or use.

Yet the Law Society of Upper Canada has supported precisely such remarkable claims! As recently as January, the benchers reaffirmed their 1985 (or is it 1685?) position that "copyright is vested in the Crown by way of Crown prerogative". If that isn't bizarre enough, consider the British Columbia government. It is now suing a legal publisher for what it calls the breach of Crown copyright in publishing and distributing provincial statutes, regulations, bills and orders-in-council.

Such efforts to make the law better known deserve medals from law societies and governments, not lawsuits. And the idea that statutes or judicial decisions can "belong" to somebody, even to governments is abhorrent to a democratic state. In the context of Crown copyright, who is the "Crown" if not the people?

Some six years ago, as the *Law Times* reminded its readers recently, the distinguished Canadian counsel, J.J. Robinette, said that any effort to bring court judgments under the umbrella of Crown copyright was "not only nonsense, but vicious and fundamentally wrong". "Vicious" might be intemperate; "fundamentally wrong" seems judicious in describing the application of Crown copyright, not only upon legal information but any information generated by the government and funded by taxpayers.

The most common arguments in support of Crown copyright are that it is essential to impose better quality control upon data, to manage data more effectively as a resource, to protect the public interest and to ensure public access. If these arguments seem vague, weak, unconvincing and paternalistic, it is because they are.

They no longer stand up to scrutiny, if they ever did. Of course, there is always the possibility of inaccuracy, misquotation and misunderstanding when information leaves officialdom--or any publisher. But government control can't go beyond the department office door. The marketplace will decide who are the reliable purveyors of government-originated data. No one has any interest in offering shoddy products.

Apart from all that, and even granting some of the arguments for Crown copyright -- a challenging intellectual exercise in 1992 -- the fundamental principle remains: the public interest is best served by keeping government-produced information as free as possible from restrictions on dissemination.

There are enough "necessary" restrictions, as any frustrated user of the *Access to Information Act* will say.

Crown copyright is not a necessary restriction. It flies in the face of the principles of the *Access to Information Act*. The power to copyright, as noted by Robert Gellman, the U.S. Congress's freedom of information expert, "is the power not to publish". It is monopoly without a regulator. Crown copyright by another name is political or bureaucratic control and bureaucratic empire building. One of the reasons why Canada has an access law is precisely to take the decision of what is released out of the hands of politicians and bureaucrats. Crown copyright is a residual remnant of the bad old way.

Consider the Americans. Section 105 of the U.S. *Copyright Act* says that copyright protection is not available for any work of the United States government. As a result, anyone can use a U.S. government publication in any way he or she sees fit: no restrictions (except for reasons of security); no royalties; no attribution necessary. It happens all the time and, according to Mr. Gellman, "no problems".

With the customary caution, Canadians will want to pause before taking such a leap. But the Information Commissioner commends the issue to Parliament, whose members may be surprised to learn of the inconsistencies, confusions, and the intimidation lurking behind the virtuous-sounding Crown copyright.

Before it recently -- and regrettably -- closed its doors, the Canadian Legal Information Centre (CLIC) studied the impact of Crown copyright on the dissemination of primary legal materials. It found especially inhibiting the fact that the federal government, in theory at least, requires the private sector to ask permission before quoting from its statutes, regulations and judicial decisions. No royalty is asked, let us be grateful, only and for some obscure reason, "permission".

CLIC found, to no one's surprise, that the requirement to ask for permission to print primarily legal materials has been generally ignored. Lawyers do not ask for permission when they take and reproduce statutes, regulations or decisions from government publications and publishers, as well as the legal profession, has been doing this since confederation. With notable exceptions, those who publish without permission are not prosecuted.

Thus does common sense make mockery of an unenforceable concept. The solution is to make the law correspond with reality. The Montreal Association of Law Libraries had it right:

> "Government should grant the private sector non-exclusive rights to their raw 'data' for development and dissemination of 'value added' products. Competition, as opposed to monopoly, leads to a better quality of product. Prices are controlled by marked

forces."

In tough economic times, governments look to find sources of revenue. They may be tempted to see their own vast information holdings as a mother lode. Cost recovery is not an unworthy goal, as inefficient as government is at collecting money. Charging user fees for information is also sometimes seen as a self-supporting means of developing the new technologies to meet the information management challenges. But imposing some legitimate charges is a long way from maintaining the old fiction that something substantial clings to Crown copyright.

The abandonment of Crown copyright would have one profoundly important effect. It would mean that, as a practical matter, government could not establish monopolistic prices for its information. A hypothetical example will illustrate.

Suppose a department offered on-line access to certain of its data bases at an arbitrarily high per-subscriber cost. In the absence of Crown copyright, there would be no impediment to resale of the data or single subscriptions by consortia of members among whom the cost (and, of course the data) would be distributed. This would have the effect of reducing the cost of the data to its marginal cost--an objective which an information commissioner can only applaud.

But Crown copyright means no constraint on charges. Copyright costs borne by publishers will inevitably be passed on to consumers. Thus will the public pay twice for information: in taxes to the government for collecting it; in extra charge by the publishers. The bureaucratic process involved would also involve a delay for the consumer in receiving the information.

The Department of Justice is aware of the need for some new thinking. It told CLIC:

> "The issue of Crown copyright and control of statute, regulation and judgment databases as well as other primary legal information raises numerous questions. These ownership issues will be determined by federal government policy, led by other federal departments and agencies such as the Departments of Communications, Supply and Services and Consumer and Corporate Affairs and the Treasury Board Secretariat."

Crown copyright in general is the issue here, not merely Crown copyright as it applies to legal information. In the age of electronic databases Crown copyright is even more quaint and more inhibiting to the free flow of information. The Information Commissioner urges Parliament to give direction: a direction not to allow Crown copyright to stand in the way of the democratization and the dissemination of information for which the *Access to Information Act* stands.

A test of our civility

A recent report prepared for the Canadian Disability Rights Council (CDRC) carries the sobering reminder that more than half a million adult Canadians (and this figure is some six years old), find it difficult or impossible to read print due to visual impairment or other physical disability.

For these Canadians, the *Access to Information Act* is of scant value as it specifically excludes from its ambit all the government's published records and, for non-published records, places no obligation on government to provide access in formats favourable to the visually impaired.

The news is not all bad; the government's access to records "policies" acknowledge the right of people with disabilities to information in a useable format. There is little evidence to suggest that the disabled

community is not being well-served when the wish for alternative formats has been identified. Yet, with a few exceptions (mostly Revenue Canada which produces income tax information in braille, audio and large print formats), most institutions do not produce alternate format records as a matter of course.

The Canadian Human rights Commission has urged the government to improve its record of service to the visually impaired. To this, the Information Commissioner adds his voice, calling for the informational enfranchisement of people with disabilities. Treasury Board's policy on alternative formats--"Fair Communication Practices"--contains the right spirit and intent--realizing the goals (since the guidelines are not mandatory) is the challenge.

The CDRC report advances the view that an amended *Access to Information Act* is the most effective way to respond to the challenge.

The proposed amendments would provide that, for visually impaired persons, accessible records must be provided in a useable format. Although it would not be necessary to specify, in legislation, any particular format, there are four choices currently favoured by persons with disabilities: braille, audio-cassette tape, large print and computer disk formats.

As well, CDRC proposes that the Act should be amended to cover published records, but only when requested by persons with disabilities affecting their ability to use print material.

There is much to recommend this approach. First, since it is demand driven, it avoids the need for unnecessary production and storage. Moreover, print enlarging photocopiers, braille printers attached to computers and floppy disks (which can be used by those having voice-synthesizing computers) represent readily available technologies enabling government institutions to produce alternate format records.

The Information Commissioner is not in a position to assess, with any reliability, the additional human and financial resources which would be required to ensure that visually impaired persons have equal access to government information. Such an assessment is needed to enable the government to select the most effective and efficient means to achieve equal access. What does seem clear is that practical difficulties--and there will be some--must not diminish the will to act.

Whether or not the eventual solution involves special rights set out in, and enforced through, the *Access to Information Act*, the Information Commissioner pledges to play an active role in securing, without delay, effective informational enfranchisement for those whose disabilities make print material unusable. To that end, his first (and, perhaps, most important) step is this: to urge every member of Parliament to champion this minority right with vigour. When demands outstrip resources, the call for us to prove the true civility of our society is the loudest.

Slipping away, little by little

One provision of the *Access to Information Act*, section 24, requires the government to refuse to disclose records containing information which is protected from disclosure by another statute. The list of statutes to which this provision applies is set out in Schedule II of the 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 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.

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, between 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. Five-and-a-half years later (December 31, 1991) that list has grown to 41 statutes with 58 particular provisions which affect the confidentiality of records.

And more are to come! At the time of this report's preparation there were four government Bills on the order paper containing proposals for additions to Schedule II. This would bring the total to 45 statutes and 63 confidentiality provisions.

These "by the back door" derogations from access rights are as troubling to the Commissioner as they were to the Justice Committee. The spirit and intent of the *Access to Information Act* can be whittled away by oft-ignored consequential amendment provisions buried at the back of other laws. For that reason, too, Parliamentarians have reason for concern. 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.

Complaints

The following tables provide a statistical overview of the sources of complaints (Tables 3 and 4); the categories and dispositions of complaints (Table 2) and the investigative workload (Table 1).

The five institutions against which the most complaints were made are:

Revenue Canada Taxation	275*
Transport Canada	81
Department of National Defence	60
Canadian Security and Intelligence Service	41
Privy Council Office	30

*When the 208 discontinued complaints are removed, RCT drops to second position.

The list changes somewhat when arranged by the number of "justified" complaints.

Transport Canada	38
National Defence	37
Revenue Canada Taxation	37
Revenue Canada Customs and Excise	21
Finance Canada	18

The Treasury Board's most recent statistics (for 1990-91) show that the five institutions which received the most access requests are:

Supply and Services	-	2,358 (21.3%)
Revenue Canada Taxation	-	1,875 (16.9%)
National Archives	-	1,088 (9.8%)
National Health and Welfare	-	643 (5.8%)
National Defence	-	468 (4.2%)

58 per cent of total requests received by all institutions

From these statistics it is not surprising that Revenue Canada Taxation and National Defence also appear in the top five list of "complained against" institutions. It is surprising, and pleasantly so, that Supply and Services, National Archives and Health and Welfare do not. They deserve special commendation.

The percentage of delay-related complaints (deemed refusals and time extensions) is down from 31.2 per cent in 1990-91 to 20.3 per cent in 1991-92. Complaints about exemptions (refusal to disclose) jumped by more than 10 per cent to 72.4 per cent of total complaints. While it is heartening to see a reduction in the delay complaints, it is not so heartening to see an increasing number of complaints requiring more time-consuming investigations.

Table 1

STATUS OF COMPLAINTS

(comparison of last and current fiscals)

April 1, 1991 to March 31, 1992

Pending from previous year	464
Opened during the year	643
Completed during the year	877
Pending at year-end	230

Table 2

COMPLAINT FINDINGS

April 1, 1991 to March 31, 1992

CATEGORY	Justified	Not Justified	Discon-tinued	TOTAL	%
Refusal to disclose	149	264	222	635	72.4
Delay (deemed refusal)	91	9	7	107	12.2
Time extension	44	26	1	71	8.1
Fees	8	10	5	23	2.6
Language	-	-	-	-	-
Publications	-	-	-	-	-
Miscellaneous	11	26	4	41	4.7
TOTAL	303	335	239	877	100%
100%	34.5	38.2	27.3		

Table 3

COMPLAINT FINDINGS
(By Government Institutions)

April 1, 1991 to March 31, 1992

GOVERNMENT INSTITUTIONS	JUSTIFIED	NOT JUSTIFIED	DISCON-TINUED	TOTAL
Agriculture Canada	1	7	0	8
Atlantic Canada Opportunities Agency	0	1	0	1
Atomic Energy Control Board	0	1	1	2
Canada Deposit Insurance Corporation	1	0	0	1
Canada Labour Relations Board	1	0	0	1
Canada Mortgage and Housing Corporation	0	5	0	5
Canadian Commercial Corporation	0	1	0	1
Canadian International Dev. Agency	0	5	0	5
Canadian Security Intelligence Service	12	28	1	41
Communications	9	3	0	12
Consumer and Corporate Affairs	1	4	0	5
Correctional Service Canada	3	5	0	8
Defence Construction (1951) Limited	1	0	0	1
Employment and Immigration	8	9	1	18
Energy, Mines and Resources	3	2	0	5
Environment Canada	14	7	1	22
External Affairs	13	10	0	23
Farm Credit Corporation	0	1	0	1
Federal Business Development Bank	2	2	0	4
Federal Provioncial Relations Office	0	2	0	2
Finance	18	8	1	27
Fisheries and Oceans	2	1	1	4
Health and Welfare	8	12	2	22
Immigration and Refugee Board	2	7	0	9
Indian Affairs and Northern Development	0	6	0	6
Industry, Science and Technology	0	6	0	6
International Development Research Centre	1	0	0	1

Table 3

Government Institutions	JUSTIFIED	NOT JUSTIFIED	DISCON-TINUED	TOTAL
Investment Canada	1	3	1	5
Jacques Cartier and Champlain Bridges Inc.	0	2	0	2
Justice	6	12	3	21
Labour	1	0	0	1
National Archives of Canada	5	12	2	19
National Capital Commission	5	2	0	7
National Defence	37	22	1	60
National Energy Board	0	1	0	1
National Research Council	1	2	1	4
National Transportation Agency	2	0	0	2
Patented Medicine Prices Review Board	1	2	0	3
Privatization & Regulatory Affairs, Office of	1	0	0	1
Privy Council Office	15	15	0	30
Public Service Commission	3	2	0	5
Revenue Canada - Customs and Excise	21	6	2	29
Revenue Canada - Taxation	37	30	208	275
Royal Canadian Mounted Police	4	15	0	19
Secretary of State	2	5	1	8
Security Intelligence Review Committee	10	0	0	10
Solicitor General	3	2	0	5
Statistics Canada	0	3	0	3
Superintendent of Financial Inst's., Off. of	2	0	0	4
Supply and Services	6	21	2	29
Transport Canada	38	35	8	81
Treasury Board Secretariat	2	2	0	4
Veterans Affairs, Department of	0	3	0	3
Western Economic Diversification	0	1	0	1
TOTAL	303	335	239	877

Table 4

GEOGRAPHIC DISTRIBUTION OF COMPLAINTS (by location of complainant)

Closed: April 1, 1991 to March 31, 1992

Outside Canada	6
Newfoundland	45
Prince Edward Island	3
Nova Scotia	8
New Brunswick	1
Quebec	334
National C Region	217
Ontario	96
Manitoba	18
Saskatchewan	5
Alberta	88
British Columbia	38
Yukon	0
Northwest Territories	18
TOTAL	877

Case Summaries

4,500 requests later

The Information Commissioner's 1989-90 report contained the revelation that one individual had made 2,679 complaints against Revenue Canada Taxation. That staggering figure sent shock waves not only through Revenue Canada and the Information Commissioner's office but, only a little lower on the Richter scale, into the whole access to information community and high levels of government.

Consternation, even anger, was the first instinctive reaction. To many in government this was abuse, pure and simple; a vexatious, if not a frivolous, use of the act. Ged Baldwin and Parliament couldn't have imagined one person making so many demands on the legislation. True. Today, Revenue Canada. Tomorrow, perhaps Employment and Immigration, Finance or the RCMP. Who knew when and where the next massive access attack would be made?

The 2,679 complaints against Revenue Canada were only the tip of the iceberg: in all, the same person made more than 4,500 requests of the department. Revenue Canada was forced to commit 10 persons, analysts and support staff, to servicing these requests. Last year the department reported that since February 1989 it had completed the processing of 4,450 requests and had disclosed 234,234 pages of information to one requester.

Even so, the department simply couldn't handle so many requests without serious delays: thus the complaints to the Information Commissioner whose office also required extra resources to handle the sudden new business. For one and one-half years, three investigators dealt exclusively with the cases of this single complainant.

As the backlog was slowly reduced, the number of persons devoted to these complaints has gone from two (for one year) to a single investigator still on the job on March 13, 1992--a day to circle on the access calendar!--when notice was received from the complainant that he was formally abandoning his remaining 206 complaints.

The cost to the taxpayers of Canada was enormous. Revenue Canada reported that its costs started out in 1989-90 at an average of $367 for each request, going down to $273 in the next year. While the requester paid, willingly, whatever fees he was billed by Revenue Canada, the chargeable costs under the *Access to Information Act* cover only search and preparation times. Departments cannot charge for the time of public servants who must pour over and examine complex records line by line in order to remove sensitive information (personal tax data, for example), which by law must be exempted from release. Thus, only a small percentage of the full costs were recovered by Revenue Canada; no charges can be imposed for complaint investigations.

A final bit of the history before the postmortem. The requester-complainant, who has made his identity public, is a Montreal tax lawyer. Though a requester need not say why information is being sought, this one made it clear from the start that his intention was to offer Revenue Canada's revelations to subscribers to his tax information newsletter--which he did.

Is this an abuse of the Access to Information Act? Whatever the legal right to make all these requests, why should taxpayers subsidize a business enterprise? Shouldn't departments be able to charge full

costs against such requests or, even, refuse them as vexatious? How can departments be protected from unacceptable resource burdens? (Shed a tear for Revenue Canada!)

Thus did the inevitable questions and comments come, some even from a new information commissioner who inherited the burden. Somehow, wisdom has prevailed.

The instinctive lashing back at a requester, understandable as it may be, is no solution to a real problem. In the end, the answer to a prolific requester (if the requests make sense, and this requester's did) is to make the professional requester redundant or unnecessary. Departments or institutions with information which the public has a right to see and a legitimate need to know should be organizing their holdings in a form which makes them conveniently and generally available. Revenue Canada Taxation itself came to realize that a general dissemination policy was necessary.

In a pre-access to information era, departments need not have bothered with the initial, sometimes heavy, costs of assembling their records in a form which did not require a time-consuming review (for example, to remove personal or solicitor-client information) before an access request could be answered. Those days are long past. Instead of hand-wringing, government institutions should be smarter in their records management and dissemination policies. Charge a fee to their clients: that is not against the Access to Information Act. Recover legitimate value-added costs. The subscribers to a tax newsletter should be just as willing to pay Revenue Canada and to receive its information directly.

Knowing how tax authorities treat particular situations (and, being able to benefit from such knowledge) should no longer depend upon some outsider's entrepreneurial enterprise. The tax rulings of Revenue Canada's experts should be available routinely and as a matter of right (thanks to the Access to Information Act) to all taxpayers.

Revenue Canada Taxation deserves great credit and commendation for soldiering on with the processing of an enormous load of requests. While it may have felt sorry for itself and whimpered from time to time, the integrity of the *Access to Information Act* was preserved. In the end, the department came to terms with its famous requester.

So the act survived perhaps its greatest challenge. The temptation to limit requests, to ignore some requests or to impose burdensome fees were all overcome. For that happy ending, the test may even have been worthwhile.

Private hurt and public good

When shall a strong private interest in keeping information confidential give way to a public interest in disclosure? All things being equal, or even nearly equal, the public interest should win every time. Alas, all things are rarely so simple and an information commissioner must make some delicate judgment calls.

Here is the case of a request for Transport Canada inspection reports on the condition of two aircraft. Transport Canada refused to release the reports, invoking paragraph 20(1)(c) of the *Access to Information Act* which provides for the exemption of information which could reasonably be expected to hurt the competitive position of a third party. What more damaging to an airline than an unfavourable inspection report! What more in the public interest than learning that an airline may be flying unsafe aircraft!

But there are inspection reports and *inspection reports.* Here is the Commissioner's response to a complainant who argued that all air carrier records should be released in the public interest.

"I have reviewed the aircraft inspection/occurrence reports which were withheld from you in these cases. In my view, disclosure of them could be detrimental to the air carrier to which they relate not because they reveal any unusual or uncorrected airworthiness problems but because, in isolation, they are open to misinterpretation which could result in unwarranted public alarm. I fully agree with you that public access to records is an important element of accountability--both for the department and for air carriers. On the other hand, indiscriminate disclosures of information can, at times, be entirely contrary to the public interest. The issue is where to draw the line.

"As you know, l am of the view that air carrier general audit reports should be made public. They indicate what was found lacking, what remedial action was taken and permit the public to assess within a meaningful context, the performance of both the carrier and the department in fulfilling their lawful obligations. It may well be that, in some cases, individual occurrence reports will disclose information which the public should know regardless of the harm to the carrier. Each case must be considered on its merits. In the cases dealt with in this report, however, l cannot come to the conclusion that the public interest in disclosure clearly outweighs the potential harm to the affected carrier."

Thus, a balancing test, provided for in the legislation, must be applied in each such case. Parliament provided for such a test as it also provided for the protection of third-party information.

What's in a name?

An applicant requested the minutes of meetings of the Canada Deposit Insurance Corporation (CDIC) Board of Directors for 1990. CDIC withheld almost all the records under a variety of exemptions, prompting the complaint that appropriate severance had not been applied.

The investigation was protracted and complex, involving lengthy discussions with the corporation. In the end, one particular difference persisted between the Commissioner's office and CDIC. This disagreement was about the extensive use by CDIC of subsection 19(1) of the *Access to Information Act* to withhold, as personal information, the identity of persons employed by firms who had contracts with the government.

In CDlC's view, employees should not lose the protection of their privacy simply because their employer had a contract with the government. The Commissioner held that, under paragraph 3(k) of the *Privacy Act*, such persons' names are subject to release -- as are those of regular government employees.

In support of its position, the Corporation cited the French version of paragraph 3(k) of the *Privacy Act* which appears to restrict the application of that provision only to those who have themselves signed contracts with the government. The English version, however, refers to any "individual who is or was performing services under contract for a government institution", thereby including all those who work under such contracts.

In support of its position, the Commissioner's office referred CDIC to a Federal Court judgment of Mr. Justice Dubé. He ruled that the French paragraph 3(k) of the *Privacy Act* was a bad translation and, further, that the act contains no provisions allowing more privacy to individuals hired by the government through (as in this case) personnel agencies than to full employees of the government.

Nonetheless, CDIC refused to concede its position on the matter, choosing instead to seek permission of those individuals who fell into the disputed category to release their names. Since all agreed to the release, the complainant was satisfied but the issue was left unresolved.

Pressing for press clippings

Do departmental press clippings constitute "published material or material available for purchase by the public" (the words of section 68 of the *Access to Information Act*)?

At first glance, the answer seems self evident. What could be more "published" than a newspaper? But the issue is a teaser and the answer important because, if press clippings qualify under section 68, they do not qualify for release since the information is publicly available.

A journalist had asked the Solicitor General's department for daily newspaper clippings distributed within the department in August. He added that, since he would be making the same request every month, the simple thing would be to put his name on the distribution list.

The department invoked section 68, telling the requester that clippings were kept for two years in its access to information and privacy reading room in Ottawa where they were available to the public. While the requester resides in the Ottawa area and could take advantage of the informal access, he challenged the validity of applying section 68.

The issue came down to deciding whether "clippings" acquire an enhanced value by being selected and compiled. If there is such enhancement, clippings have a life and value of their own, which distinguishes them from the "published material" from which they were taken.

A persuasive argument that clippings in fact represent value added is that, unless one knows precisely where an article comes from (date, publication, page), it cannot be obtained elsewhere except with great difficulty. Moreover, knowing what subjects a department has chosen for clipping could itself be informative.

For such reasons, the Commissioner persuaded the department to make its clippings available to anyone who asked. The informal system and Ottawa availability was no help to persons living away from the Ottawa area.

The department will charge 20 cents per page to cover photocopy and informal access will be provided.

In all, a reasonable compromise.

When is a lawyer not a lawyer?

An individual sought access to legal advice given the Secretary of State for External Affairs in a matter affecting the requester's family.

The document, prepared by the Legal Advisory Division of the department, was exempted in total under the provisions of section 23 (solicitor-client privilege) and paragraph 21 (1)(a) (advice). The investigation revealed that, despite its name, none of the lawyers in the Legal Advisory Division occupy positions classified as legal advisory and their advice, therefore, is not subject to solicitor-client privilege.

The department conceded the point and said it would rely solely on the "advice" exemption to refuse access to the entire record. When the investigator pointed out that most of the document contained factual information and only one paragraph contained advice, the substance of which the minister had already communicated to the requester in a letter, the department agreed to release the entire record.

Who is working late?

Finance Canada received a request for its employee sign-in sheets for specified weekends. It withheld the names, signatures and ID numbers to protect the privacy of the employees. The applicant complained because he felt that information indicating when government employees were at the workplace did not qualify for privacy protection.

The Commissioner took note of the fact that, in the *Privacy Act*, Parliament expressed its intention that public servants would have a lesser degree of privacy protection than would other individuals. Anyone should have access to information relating to a public servant's position or functions.

In this case, however, the information requested provided no insight into either the positions or functions of those listed on the sign-in sheets. Moreover, the Commissioner worried about the implications of subjecting employees to a form of physical surveillance through records disclosure. The department's decision to withhold the information was upheld .

The applicant has applied to the Federal Court for a review of this matter.

Murphy's law

This unhappy story tells of human error and lost mail, an illustration of Murphy's Law: whatever could go wrong did.

An immigration lawyer sent a request to External Affairs asking to examine on site the contents of a file held at the Canadian Commission in Hong Kong.

External Affairs responded by claiming a 30-day extension to consult with another institution in processing the request. Forty-five days later (problem number one: the extension had elapsed), the department sent a letter informing the applicant that the requested records were available subject to the payment of the applicable reproduction fees (problem number two: no photocopying was required since on his request, the applicant had indicated his wish to examine the file on site).

The delay of 15 days tagged on to the extension time would itself have been sufficient grounds for a complaint--if only the requester had received the department's letter in the first place (problem number three)! The wait on both sides dragged on, the lawyer waiting for permission to see the file, the department waiting for payment of photocopying fees.

Five months after his initial request, the lawyer complained to the Information Commissioner about the time it was taking External Affairs to provide access to the requested file.

The investigation was relatively speedy and simple: External Affairs recognized its oversight and took immediate remedial action to conclude the processing of the request. Unfortunately, External's "me a culpa" was of little relief to the complainant who said he lost his client over the delays and no longer needed to see the file.

An exemplary solution

Often an investigation not only finds a department right but exemplary.

A university professor sought records which required National Archives to consult with another institution. For that purpose, Archives claimed a 90-day extension. The professor objected and complained about delay.

The investigation revealed that National Archives has devised a thorough approach to establish the appropriate time extension needed when consultation with another institution is necessary. Archives asked the institution being consulted to take into consideration its own workload and the volume of records to be reviewed before committing to a date of completion. While this may seem like a strategy designed to slow the process, when properly carried out the reverse is true. By fixing deadlines, target dates are more likely to be met.

In this case, the two departments agreed on a 90-day extension. In proceeding this way, all parties combined their efforts to meet the legislation's requirements and establish a fair and realistic target date for completion. The requester was informed of an extended time limit based on similar cases, the current workload and the task at hand.

The approach taken by the National Archives of Canada neither overtaxed the consulting institution nor created false hopes for the requester.

The complaint was not supported.

The case of the mystery trucks

A citizen observed three unmarked trucks, carrying approximately 12 forty five gallon drums and three fifteen gallon drums, in the vicinity of an airport. Being suspicious that the containers may have contained toxic substances, he recorded the vehicle plate numbers. On the hunch that the trucks might be Transport Canada vehicles, the worried individual asked the department to provide him with information about the cargo, including its nature, ownership destination.

Transport Canada denied ownership of the vehicles, and a complaint was made about this response to the Information Commissioner.

The Commissioner's investigator made application to the Ontario Ministry of Transport requesting a search of its vehicle licensing data base for the three plate numbers. The search confirmed that the vehicles were, indeed, registered to Transport Canada.

Once that information was brought to the attention of Transport Canada, the information requested by the concerned citizen was assembled and provided to him along with the department's apologies.

Beware of the "helpful" bureaucrat

At the time of the Persian Gulf crisis, the Department of National Defence (DND) commissioned surveys of public attitudes towards Canadian participation in military action. A reporter requested access to the results. At the time of his request, DND did not have the results and a helpful employee suggested that, rather than receive a stark denial, the reporter might wish to let the request stay in limbo

to be reactivated at a later date. Who could resist such a sensible suggestion? Not the reporter.

To the journalist's surprise, however, once the agreed reactivation date arrived, he received official notice of a 60-day time extension beyond the standard 30-day response period. Even the extended period was missed by DND and the requester did not get a response until almost six months after the initial request.

What appeared at first blush to be a helping hand to a reporter had the effect of postponing his opportunity and right to complain to the Information Commissioner. Further, it gained the department some months of unbothered delay (by the Commissioner or the requester). The Commissioner frowned and both the department and the requester are the wiser.

And the winner is.....

Government institutions proposing to conduct a public opinion survey for any reason must first obtain approval for the project from the Cabinet Committee on Communications (CCOC). Proposals to, and decisions of CCOC are channel led through the Public Opinion Research office of Supply and Services Canada (SSC). Contracts for approved projects are then arranged by the Professional Services directorate of

A requester had asked SSC for a list of all such contracts let during a specific period. She asked also for the names of the client departments, the bidders invited and the contractors selected, together with the value of each contract. She was provided with a list of 12 contracts.

Because the total value of contracts let was significantly less than for a similar period in the previous year, the requester complained that the list appeared to be incomplete.

The complaint investigation found that the data for the response was provided by the Public Opinion Research office. That office acknowledged, however, that it used information supplied on a periodic basis by the Professional Services directorate and it could not be sure the data was up to date or complete. At the investigator's request, the Professional Services directorate ran a computer and manual search of its records and produced a list of 30 contracts for the period in question. The new list was provided to the complainant.

As a result of the investigation, the department proposes to obtain this data directly from the source (Professional Services) and will revise the computer data to reduce or eliminate the need for manual searches in future.

A very positive response indeed.

Publish or perish

The Solicitor General gave only one written direction to the Canadian Security Intelligence Service in fiscal year 1990-91 and he told the Chairman of the Security and Intelligence Review Committee that he would make the direction public in a statement to the House of Commons later.

Before he had an opportunity to do so, an individual sought access to the written direction. The department refused to disclose it under the provisions of section 26 which exempts records expected to be published within 90 days. The response to the requester was that, if the record was not published

within the time limit, the department would then re-activate the request and consider release under the act.

The requester complained about the "tentative" response and suggested this may be another way to gain a further 90-day extension before commencing action on the request.

The Commissioner found that, when section 26 was invoked, the department must have concluded that there was no harm in release since it proposed to publish the record. Thus, at the end of 90 days, if the record had not been published, the department was obliged to release the record forthwith and not merely"consider" release.

As it turned out, during the 90-day period, Parliament was in recess and the minister could not make his statement as he had planned. Consequently, the department did release a copy of the document to the requester eight days after the time limit had expired.

The sounds of silence

This applicant had requested a copy of all evidence provided to the Crown or Charlottetown Police in connection with actions brought against 10 individuals ultimately charged under section 430 of the *Criminal Code* during the Public Service Alliance of Canada (PSAC) strike. The records requested were to include written, electronically stored and video information as well as all internal correspondence associated with providing the Crown and the police with evidence.

When the Department of Veterans Affairs (DVA) in Charlottetown released a video tape, the applicant complained that it was a much shortened version of the original he had viewed at the police station and, as well, that the audio portion was erased. He also complained that the department failed to release internal documentation related to the provision of evidence by DVA to law enforcement authorities.

The Information Commissioner's investigator searched all DVA records, both nationally and regionally, relating to the PSAC strike. No additional records were located.

When the original video tape was copied in response to this request, the department was not aware how, or why, the audio was excluded. Once notified, departmental officials retrieved the original video from the police and released it to the applicant. The applicant viewed the tape complete with audio and was satisfied that it was not a shortened version.

The investigation satisfied the Commissioner that the department did not deliberately withhold the audio portion or otherwise show any bad faith in the processing of the applicant's request. The complaint was not justified .

Cheaper by the minute

Included in the schedule of search costs which departments may charge for requested records is a per minute fee for computer time. When a consultant asked the Department of National Defence (DND) for its list of ministerial briefing notes and anticipated oral questions, he was not surprised to learn that the records were in a computer and that search fees would be required. He was very surprised, however, to receive a fee estimate of $7,840. He complained .

The investigation revealed that the estimated fee would have paid for the computer in which the records were stored several times over. Something was clearly wrong.

As it turns out, there was no illegality on DND's part; the quoted fee was authorized by the fee schedule. The problem was the fee schedule. It is based on the cost of mainframe computer time--a cost totally out of step with the newer, cheaper microcomputers.

To its credit, DND readily saw the unfairness and waived fees. The appropriate level of fees for searching data contained in microcomputers will be reviewed.

To the bank, please

A regular user of the act was surprised when his $5 application fee cheque was returned by the Bank of Canada--the institution to which he had applied for records. The bank wanted the cheque made out in its name instead of the Receiver General of Canada. The requester, concerned about the legality of this procedure, complained.

As it turns out, there was nothing nefarious or illegal about the bank's request. The Bank of Canada does not maintain an account with the Receiver General: it has a separate account. Moreover, there is nothing in the access law stipulating to whom the application fee cheque should be made payable. The only glitch was the bank's failure to ensure that its special requirements were indicated in the government's information index, *Info Source*.

The complaint did not delay the bank's response to the individual's request and it had the salutary effect of ensuring that future access requesters will be better informed of the bank's application requirements--a positive outcome for all concerned.

To court or not to court?

A request by a journalist for records of loans made by the Federal Business Development Bank led to a complaint which forced a decision whether to take the matter to court for judicial review.

The bank initially refused to release any records, claiming 10 provisions of the *Access to Information Act* as the basis for exemptions. As well, it argued that the principle of severability (section 25) did not apply because of the bank's overriding obligation of confidentiality to its customers. The latter was the key issue in the complaint.

The Commissioner was able to persuade the bank that it was under an obligation to undertake reasonable severance. As a result, some 400 records were released. Most of what remained was legitimately exempted as personal information, confidential commercial information or information subject to solicitor-client privilege. A small amount remained which the Commissioner found should be disclosed.

When the bank's president refused to accept the recommendation to disclose, it fell to the Commissioner to decide whether to challenge the bank in court. The effort and the expenditure did not seem justifiable.

The information in dispute consisted of a small number of records which did not cover what the requester wanted to know: the amount or terms of loans or the bank's reasons for having approved the loans in the first place. Moreover, since the bank had accepted the principle of severance, the dispute was not one of legal principle but one of differing judgments about the harm which could result from

disclosure. Consequently, the journalist was advised of his right to proceed to Federal Court on his own.

Scooped by CAIR

One of the paradoxes (or is it ironies?) of the *Access to Information Act* is that the government keeps a database of all requests received under the act. The database contains a record of what has been asked for, though not the names of requesters.

Called the Coordination of Access to Information Request System (that monstrosity reduced to the blessed acronym CAIR), it is justified as a method of preventing duplication of government effort. Requests for the same information are often made to various departments; coordination can save time and money. The concept makes sense.

CAIR comes under the *Access to Information Act*, which creates the problem for journalists, many of whom are suspicious about the very existence and purpose of CAIR in the first place (for suspicion, see below). CAIR data may be released to requesters. Reporters have maintained that its information should be held confidential. (Ah, there's a Paradox!)

One journalist has argued that information about what's being asked for should be considered as much a trade secret as any confidential business information which is protected from disclosure. He asserted that his competitive advantage is undermined because other reporters can check upon what stories are being pursued and "piggy back" on someone else's initiative. A scoop, he said, is a quantifiable business product: it sells papers, draws viewers. Nice point.

Here is part of the Commissioner's reply to his letter of complaint:

> "As a former journalist, I quite understand the importance you attach to preserving your competitive edge... As Information Commissioner, on the other hand, it is not my role to encourage government to limit the kinds of records which are publicly accessible. There are quite enough voices out there urging greater disclosure restrictions.
>
> "It is more than a matter of the public perception of my role. I might well receive a complaint from a requester who had been denied access to records about requests in progress. Were I to have championed precisely such an exemption, how could I be perceived as being open-minded on the issue?"

The Commissioner can be more supportive of those who suspect that the CAIR system was not designed primarily to help government manage access requests. By subjecting the requests to "computer surveillance", some users feel that the system is a tool to reduce openness to its lowest common denominator. In the pre-CAlR days (carefree?), inconsistent responses by different departments to requests for the same records ensured that the level of access rose to the level set by the most open department. After CAIR, departments receiving similar request consult!

One need not subscribe to theories of conspiracy to recognize the merits of a thorough evaluation of the operations of the CAIR system.

Federal Court Cases

As noted previously, during 1991-92, the Commissioner settled and withdrew two cases and filed a discontinuance of one appeal (covering two cases). Here briefly are summaries of those cases.

In **Information Commissioner v. Minister of National Revenue (Federal Court No.** T-1034-90), the Commissioner had challenged a Revenue Canada decision to deny an individual's request for background records concerning two specific Income Tax Interpretation Bulletins. In particular, the Commissioner did not agree that records withheld on the basis of solicitor-client privilege properly qualified for the privilege.

The case was resolved to the Commissioner's satisfaction when the department agreed to waive the privilege in some of the documents. Part of the settlement involved agreement on several mutually satisfactory principles to guide future use of the solicitor-client exemption.

In **Information Commissioner v. Minister of Indian Affairs and Northern Development (Federal Court** No. T-1471-90), the Commissioner challenged the department's decision to deny a requester access to reports about the social, political and legal situation at the Kanesetake (Oka) Mohawk Reserve. The reports had been prepared by a lawyer retained for that specific purpose. The department exempted the reports, claiming solicitor client privilege.

In this case, too, the issue was whether the solicitor-client exemption applied and, if so, were there portions not warranting protection which could be disclosed.

The case was discontinued when the department waived the privilege and released the requested reports.

In two related cases, **Vienneau v. Solicitor General of Canada (Federal Court No. T-842-87, Federal Court of Appeal No.** A-346-88), and **Kealey v. Solicitor General of Canada (Federal Court No. T-1106-87, Federal Court of Appeal No.** A-347-88), the Commissioner decided not to continue an appeal of the Trial Division decision that the act does not oblige government institutions to specify, directly on the severed records, which exemption provisions have been used. In practice, however, most institutions follow the trial judge's guidance that identifying exemptions next to each deletion is highly commendable and in keeping with the basic purpose of the act.

Based on legal advice supporting the merits of the Trial Division decision and taking into account the trial judge's exhortation to follow, in practice, the approach favoured by the Commissioner, he decided that pursuit of the appeal was unjustified.

The appeal was therefore discontinued.

Public Affairs

Meeting the People

The Commissioner and his staff remain undeterred in promoting the *Access to Information Act* despite the absence of a public information mandate conferred by the legislation. Parliament could hardly object to having an important law made better known. Unknown rights come close to being denied rights. The real constraint to informing more Canadians about their access rights is not legal inhibition, but lack of resources.

So there is no national "know-your-access-rights" campaign to report: no television, no full-page newspaper ads, no "mailings" or any other dubious and horrendously expensive techniques of mass advertising; nor should there be.

Better that the Commissioner and staff concentrate upon taking their message to what in public relations jargon is called "target audiences": public servants, from coordinators to deputy ministers, users of the Act; lawyers and law students. To advance their investigations, complaint officers now travel to the front-lines. Thus, last year meetings were held and speeches made in St. John's, Summerside, Moncton, Halifax, Montreal, Toronto, Edmonton, Peace River, Vancouver, Victoria.

Notable on the Commissioner's agenda was a week's program in Hong Kong--three speeches, two radio interviews, 12 meetings-- organized by External Affairs. The purpose of the initiative was to support efforts to achieve access legislation before the colony becomes part of China in 1997.

More than 4,400 copies of a first-time printing of an indexed version of the *Access to Information Act* were distributed to Members of Parliament, government offices, public and university libraries, the media, and business associations. In addition, 528 requests for publications were satisfied--a 34 per cent increase over last year.

The telephone continues to be the most direct and most used means of communication with the public: 2,488 calls were received on the office's "800" number. Staff responded to 1,220 other inquiries.

Corporate Management

Corporate Management provides both the Privacy and Information Commissioners' offices with financial, administrative, informatics and library services.

Finance

The offices' total resources for the 1991-92 fiscal year were $6,691,000 and 82 person-years, an increase of $367,000 and four person-years over 1990-91. Personnel costs of $4,954,336 and professional and special services expenditures of $480,324 accounted for more than 90 per cent of expenditures. The remaining $608,691 covered all other expenses.

The following are the Offices' expenditures for the period April 1, 1991 to March 31, 1992*

	Information	Privacy	Corporate Management	Total
Salaries	1,670,069	1,911,442	658,1825	4,240,336
Employee Benefit Plan Contributions	285,600	307,020	121,380	714,000
Transportation and Communication	75,621	59,500	124,875	259,996
Information	21,005	55,261	3,109	79,375
Professional and Special Services	209,028	190,237	81,059	480,324
Rentals	4,391	3,276	11,945	19,612
Purchased Repair and Maintenance	6,688	6,358	7,1991	20,245
Utilities, Materials and Supplies	18,692	9,814	29,070	57,576
Acquisition of Machinery and Equipment	109,474	44,361	12,9592	166,794
Other Payments	2,970	1,873	250	5,093
Total	2,403,538	2,589,142	1,050,671	6,043,351

* Expenditure figures do not incorporate final year-end adjustments reflected in the office's 1991-92 Public Accounts.

Personnel
In the spirit of PS 2000, the unit made several improvements to the offices' personnel management practices by recruiting a management trainee, developing incentive awards and an orientation program for new employees, and streamlining some of its personnel procedures. In addition, the unit conducted a triennial classification audit, followed up the 1987 official languages audit and signed a letter of understanding on official languages with the Treasury Board.

Administration
The unit made continued progress on a retention and disposal schedule for records and also on an automated inventory of assets. As well, it evaluated the offices' telephone system to improve service to the public.

Informatics
This year the unit completed three studies for a new case management system, office automation and using a computer network in a secure environment.

Library
The library provides inter library loan services, manual and automated reference and research, and subject oriented media monitoring files. In addition to acquiring information on freedom of information, the right to privacy, data protection and the ombudsman function, the library has a special collection of Canadian and international ombudsmen's reports and departmental annual reports on the administration of the two acts.

The library (which is open to the public) handled 1,298 publication requests and answered 1,084 reference questions during the year.

Organization Chart