Annual Report
Information Commissioner
1994-1995

The Information Commissioner of Canada
112 Kent Street, 3rd Floor
Ottawa, Ontario
K1A 1H3

(613) 995-2410
1-800-267-0441 (toll-free)
Fax (613) 995-1501

Cat. No. IP20-1/1995
ISBN 0-662-61862-9

"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 Gildas Molgat
The Speaker
Senate
Ottawa, Ontario

June 1995

Dear Mr. Molgat:

I have the honour to submit my annual report to Parliament.
This report covers the period from April 1, 1994 to March 31, 1995.

Yours sincerely,

John W. Grace

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

June 1995

Dear Mr. Parent:

I have the honour to submit my annual report to Parliament.
This report covers the period from April 1, 1994 to March 31, 1995.

Yours sincerely,

John W. Grace

Table of Contents

Mandate

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

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

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

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

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

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

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

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

Superhighway or Yellow Brick Road?

Highway or hypeway? Is it the most exciting convergence of new technologies since Buck Rogers or a back road to an ultimate dead end where reality overcomes the dream? The blithe metaphor of an information highway is attractive and enduring because the vastness of its promise is matched by the imprecision of its definition.

It can mean almost anything anyone thinks it means, or wants it to mean.

Praise it or doubt it, this tantalizing and powerful image cannot be ignored by gatherers and custodians of information or by those with legislative (members of Parliament) or statutory (an information commissioner) responsibility towards a law called the "*Access to Information Act*".

The temptation is to rush in where even angels don't fear to tread. It should be stoutly resisted. Flux cannot be managed – least of all by government. The issues remain in an inchoate state. Even the alarums are contradictory: fears over censorship versus fears about hate messages and pornography; fears about restricted access versus fears about the anarchy of free-for-all; fears over privacy invasion versus fears about excessive secrecy. The public is confused and properly hesitant to make hard choices based largely on gleams in Alvin Toffler's mind. All we can say with any certainty is that information flows in ways which defy artificial control. The choices that matter, when they are made, will be made by the marketplace, not by policy-makers.

A cottage industry of futurists, policy wonks (fashionable slang for a fashionable concept), professional worriers and other assorted deep thinkers (including the Information Commissioner!) continues to set forth laudable objectives for the great binary highway in the sky. Alas, these are as yet hopelessly irreconcilable, so utterly unmanageable that the most doctrinaire central planner (are there any left?) should not dare to try.

No one can now predict what the public wants or what the marketplace will pay for and what the rushing generations of technology will make possible or cost. Parliament should hold a watching brief, monitor the clash of ideas, goods and technologies. But at this stage intervention could be foolhardy. A fierce, almost Darwinian process of natural selection is taking place. In the end, it will be the fittest which survives, not what politicians or bureaucrats prefer and decree.

The government's efforts to find marketable information points to the powerful, positive effect which a full-blown information economy could have. There are encouraging possibilities here of a sea-change in our philosophy of freedom of information from a request-driven approach to a dissemination approach, as earlier of these reports have advocated. But we are not witnessing the end to the struggle over government secrecy. All fields of human endeavour – from the political to the spiritual – are implicated in the exploitation of information, computers and communication technology.

All governments, including ours, have touted the information superhighway as integral to political reforms. Its benefits are seen to be as various as greater government integrity, openness, privacy, accountability and affordability of government, improved services, decreased deficits, economic growth and employment. The superhighway, it would seem, is really the yellow brick road to Oz!

In the United States, Democrats and Republicans alike seek to get more information into the hands of citizens. In his first week as Speaker of the House of Representatives, Newt Gingrich established, through the Library of Congress, an on-line system called Thomas. In the first week, 28,000 citizens and 2,500 institutions are said, by conservative (naturally) estimate, to have accessed the system. The system, when fully operational, will provide universal, free access to all Congressional papers – legislation and committee reports – as these records are produced. In Mr. Gingrich's words: "There's no longer any great advantage to being an insider, because everybody's an insider, as long as you've got access".

In Canada there is as yet nothing so dramatic as "Thomas". The Liberals talk, however, the same talk. In its party platform Creating Opportunity (the red book) "openness" is described as the "watchword of the Liberal program". The red book also observes, rightly, that "people are irritated with governments that do not consult them, or that disregard their views, or that try to conduct key parts of the public business behind closed doors". No one will dispute that truism. In Canada, as in the United States, part of the selling of the information superhighway is the promise it will bring more power to the people.

Warning: No matter how cleverly the information highway is finally constructed and how effectively its traffic runs in both directions, it will never be the answer to an information commissioner's prayers.

Even should it live up to all the impossible hype; if it provides easy access to its infinite unencumbered straightaways for rich and poor, computer genius and techno-peasant, for every special interest that every human rights commission can invent; if its planners and privacy commissioners accomplish all their noble purposes and succeed in protecting every scrap of personal information which might wander vulnerable and naked on to this unbiquitious network; if every culture from Canadian to Urdu is not only preserved but made to flourish; if the interests of all television, cable and telephone companies, every competition tribunal, regulatory agency and every free marketer are somehow miraculously reconciled in the 500-channel universe and the economics of it all somehow works; if language purists (or police) manage finally to block forever this tedious metaphor, even then, ladies and gentlemen, be aware and be warned.

The dreary problems and frustrations faced today by many a seeker of government information will not be swept away by mere cleverness and the ingenuity of wondrous new machines. No, the key to opening up government is not better applied science; it is somehow changing the encrusted, timorous old attitudes which see openness as a threat, not an opportunity for both citizens and governments.

Routine access to routine government data may become, well, routine. Some government data bases may be newly, marvellously and universally accessible. More, certainly, should be. But no technology devised by man or woman can make governments fess up or make unnecessary the arts of investigation, persuasion and mediation practised by any information commissioner's office.

Example: In one case this year, Revenue Canada refused to disclose draft tax policy papers even though these so-called "drafts" were used by officials to guide their actions. Why shouldn't the public know the rules of the game even if they are still fluid? Why should only insiders be in-the-know? In the end, Revenue Canada initiated a new data base covering policies which are in development and made it available to the public and officials simultaneously on an electronic bulletin board. The right result, but it needed a nudging along.

No technology, after all, is much likely to be permitted by governments to expose governments' vulnerable dark side. The good stuff – information truly politically empowering: the mix-ups, foul-ups, cover-ups, the options, advice, evaluations and trade-offs – will always be fought over because

governments will always resist.

That is why the *Access to Information Act* should have Parliamentary champions. This old pious wish showed signs this year of coming true. The Act received more attention and discussion in the House of Commons than at any time since its passage.

A private member's bill, tabled by a member of the Reform party, proposed to extend the access law to cover Parliament and all Crown corporations. An eminently sensible proposition, as this report has argued before. In the end it was defeated by the government majority, killed by kindness as most private members' bills are. It was not that anyone was against openness in principle, certainly not government MPs! The Prime Minister's parliamentary secretary, for example, called for a thorough consultative process with the Canadian people to develop a more comprehensive and up-to-date access law. But she and her liberal colleagues argued that the time was not right (nor, perhaps, the price) and no changes should be made before a full review of the law. All counsels of perfection, of course. The government members then voted against the opposition parties to defeat the motion.

The inevitability of the end of the exercise does not detract from its usefulness: all major parties in this Parliament are on record as supporters of a strengthened right to know.

Another positive sign is that members of Parliament from both sides of the House are becoming more frequent and knowledgeable users of the access law. They have discovered at first hand that the right to know is a powerful tool for better understanding and, even, for influencing government. They are also discovering the Act's frustrating shortcomings and, thus, able to be more attentive to all Canadians' access rights.

At this confusing and challenging stage of the Information Age, the best ally the *Access to Information Act* and open government may finally have is Parliament itself. A commissioner can hope.

Governing in the Open: the Liberal Version

This reporting period, April 1, 1994 to March 31, 1995, marks another milestone in the life of the *Access to Information Act*: the first full year of governing in the open for the Liberals. A new experience all 'round. Among those who care – and they are a growing number – expectations were high that the party which gave Canadians (in 1983) the right to know what their federal government is up to would respect the right. Was it merely naive to hope that the Liberals would rescue the access law from the malaise into which it had tumbled under intervening Conservative regimes?

In those 10 years, the Liberals, as opposition parties are wont to be, were defenders of openness. They excoriated former Prime Minister Mulroney for what they saw as his penchant for secrecy and dislike for the *Access to Information Act*. They fuelled the now ubiquitous (and just as over-stated) cynicism that all government secrecy is designed to cover incompetence, dishonesty, weakness or disarray. The Liberals promised to do better than the Conservatives – much better. See the red book. Many Canadians, thus, anticipated a new government with the self-confidence to be candid.

No surprise, as it turns out, that some of the expectations for a bright new day with sunshine in all the old dark places were unrealistically high. By no means have all been dashed. As we will see later, there are some hopeful signs; all is not gloom.

Anything so varied and complex as a year's worth of experience, however, cannot be compressed into a maxim without risking T. S. Eliot's rebuke, "That is not it at all". Safe to say that the slogan of every access advocate should be: complacency about the right to know is always foolhardy!

From out of the depths

Nothing handicapped the access law more during its first 10 years than the disdain shown for it by some at the most senior levels of government, even in the office of the Prime Minister. A climate of obstruction, obfuscation and delay was created and tolerated in responding to Canadians seeking information from government.

In this report last year, the argument was made that Prime Minister Chrétien could make an enormously important contribution to a new culture of openness by giving an unambiguous signal that those bad old ways will no longer be tolerated, and his new government would respect the letter and spirit of the *Access to Information Act*. That report set out a blueprint for strengthening and preserving the right to know into the next century.

Its first recommendation was a call for a parliamentary committee to review and improve the access law. The second, and equally important, recommendation was for the Prime Minister to give specific written direction to his ministers and senior officials that public access to government information is not to be unreasonably delayed or denied. The clear direction should be: Find a way to release information, not a way to withhold it.

A year and a half has gone by and the Prime Minister has given no such public signal of his support for openness. Whatever good intentions there may be, the same tired message has been left officially

unchallenged from the top. Whatever the improvements on the ground, the attitude continues to prevail in influential places that the *Access to Information Act* is a pain in the neck to a government with more important things to do than put energy and resources into a pious abstraction. Will it always be so, whatever the government?

Investigations of complaints about excessive secrecy continue to reveal that departments often don't bother with reasons to support secrecy unless and until there is a complaint. Once investigations are launched, departments seek time to develop their reasons for relying on particular exemptions. It should, of course, be the other way around. Old ways die hard.

Another lapse: Departments still do not take seriously their obligations to undertake a two-step process before applying discretionary exemptions. Too often departments are content to address only the question: "May the requested records be kept secret?" They should also be asking: "Even if they may, why should the records be kept secret?" Even under the Liberals, the fear of establishing a precedent is powerful. An unnecessary (but lawful) secrecy too often wins out.

The closest the government has come to asserting a commitment to the *Access to Information Act* was informal, but no less welcome words of support from Justice Minister Allan Rock. He acknowledged (first, to a journalist and, then, to members of the House of Commons, in response to a question from the Liberal member for Notre-Dame-de-Grâce, who is also the Chair of the Standing Committee on Justice and Legal Affairs) that Canadians want open government and the access law should be strengthened. Although no concrete steps have been taken, nor even any timetable or mechanism announced at the time of this writing, the resolve to review the access Act appears to remain. Mr. Rock's intentions are undoubtedly serious and his brave promise to add access to information to his ambitious agenda is a bright spot on the year's sometimes grey landscape.

A plea: Any review should be conducted in the open, by a parliamentary committee, as recommended in this report a year ago.

If it was disappointing that the Prime Minister did not formally and publicly commit his government to openness, his own department, the Privy Council Office (PCO) showed leadership by example. In the past, the PCO has been guilty of chronic, unjustified delay in responding to access requests and, perhaps even more ominous, of
perpetuating an aura of support for unnecessary and pervasive secrecy.

Under its present clerk, the PCO is showing a new attitude of openness, being more forthcoming with information and more timely in its responses. Indeed, the PCO has instituted the practice of regular, informal and timely disclosure of some records which, in the past, were only given in response to formal access requests.

No, not all its problems are solved. For example, responses to requests for information about security and intelligence matters continue to be delayed. And there is more to be done in clearing away the cobwebs of excessive secrecy. But there is a clear will to do better. Case in point: The PCO has agreed to be more open about explaining to the Information Commissioner why records are considered to be cabinet confidences. For some honourable reasons, the PCO does not want the commissioner to see the confidences though, in the commissioner's view, independent verification would be best for everyone. The PCO has accepted, however, the need to better demonstrate to the commissioner that the cabinet confidence exclusion is not being abused.

That being said, the PCO remains to be tested on its commitment in some hard cases ahead. As a

Quebec constitutional referendum comes closer, the pressure increases on the government to "manage" information. Canadians will know then how deep the PCO conversion really is. Will it fully disclose the results of any national unity polls in a timely fashion?

No longer a nemesis?

Another positive sign under the Liberals was the announcement, that, as a matter of policy, the results of public opinion polls would be routinely released. The polls policy was formalized in a Treasury Board directive. This policy is certainly an improvement over the secretive approach taken by the previous government. Canadians may remember that it took court action by the Information Commissioner and news media interests to force the Conservatives to disclose such polls.

In exceptional circumstances, the directive does allow ministers to withhold portions of poll results. If they decide to withhold, however, written notification must be given to the Information Commissioner.

The directive falls, however, short of an unqualified promise that all polling on constitutional issues will be disclosed. Rather, it says that there should be routine disclosure of the "final report" of polling results. Herein lies a potential loophole of monumental proportions.

During the last rounds of constitutional discussions (including Meech Lake, Charlottetown and the referendum on the Charlottetown Accord), a great deal of polling was done at public expense. Some of the polls were of the so-called rolling polls variety in which samplings of opinion were taken on a regular, even daily, basis. There was never a "final report".

In the case taken to court by the Information Commissioner to force disclosure of poll results, no "final reports" were involved. All of which to say that if the Liberals follow the precise and excessively cautious words of the directive, there will be precious little positive effect. The spirit of openness is affronted by the weasel words of the directive. But there is no reason, in the end, to assume the worst. The Federal Court, after all, has made it all but impossible to justify the secrecy of polling results.

More encouraging signals

Some cabinet ministers are showing no terror in the face of access requests, telling their deputies to be as open as the law allows. The minister of Transport Canada, for example, does not demand to see, or even want to hear about information being released under the *Access to Information Act* by his department. Thus, the old "it's-in-the-minister's-office" excuse disappears. A refreshing change from the stories of a former minister of finance spending hours pouring over dreary records prior to the release of a single page! Ministers newly wise in access ways will know that they should be more concerned about what a department withholds than with what it releases.

Governments find themselves in trouble more often by trying to conceal, evade or delay than they ever do by obeying the access law. Releasing information without whimpering, even information a minister would devoutly prefer to withhold is, like honesty, the best policy.

More evidence of access enlightenment (or, how to live peacefully with the *Access to Information Act*) comes from a new senior administration at the Department of Fisheries and Oceans (DFO). This is a department where, for historic reasons, an information commissioner might expect whining about the

burden of access rather than an unsolicited testimonial of support. But here it is, set forth in a "fact-sheet" entitled "the new DFO Framework":

> "Because of the increased demands under the *Access to Information Act* and *Privacy Act*, and the demands for enhanced information capabilities, savings achieved with Corporate Services will be re-invested in these programs."

Perhaps this is the way of the brave new access world: no proclamations of openness sent down from the mountaintop (the Prime Minister's office) but steady, incremental progress by departments, whose leaders have quietly decided, if not to enjoy the rigors of access, to accept its inevitability.

There now exists a growing band of senior public servants who have worked under an access regime long enough to come pragmatically to the conclusion that the burdens imposed by opening up government are more imaginary than real. This new generation of managers has lived under and with access to information for 11 years now. It has slowly become a fact of their professional lives and its acceptance is growing inexorably. Those who fight the old, rear-guard action against the new reality will soon be type-cast as dinosaurs.

This new breed of public service leaders sees access as something much more than a deterrent – in the way of the Auditor-General – against extravagance or the farther reaches of stupidity. A compelling disincentive such as this is, of course, entirely salutary. Prime ministers, cabinet ministers and any public servants possessing the power to be generous to themselves with public money, will think twice (perhaps even three times) before spending lavishly. They know that there is a good chance that the cost of office renovations, or a retreat or a trip on a government jet will be the subject of an access request.

Yet, in the grand scheme of government spending and decision-making, the potential for exposure won't erase the deficit.

While there may be psychic public or media satisfaction taken at the rascals being exposed, using the access law for bottom feeding exploits a fraction of the Act's possibilities. Used excessively or exclusively in this way, the legislation is trivialized. Used at its full potential, this law goes to the very heart of good governance.

This new generation of senior public servants tells the Information Commissioner that the access law is a call to greater professionalism. Example: The growing probability that their departments' regular internal audits will be released in response to a request is a powerful new incentive to run a good shop in the first place.

Perhaps some of the more lurid language or details in the old secret audits are laundered out in the anticipation of going public. Perhaps there is a little less candour; there have been reports of that. But good auditors are good auditors; they will not cover up essentials. Little of importance will be lost and much gained because a bad audit report could blight the careers of the responsible managers.

Professionalism of a public servant has other aspects. None is more important to good government than distinguishing and observing the sometimes fine line between the political and the public interest. As a result of systematic access requests, many internal memos and reports now see the light of day, often on the front page of newspapers. Being conscious of this probability, by their own admission, powerfully deters senior public servants from crossing the line into political judgments.

The fathers of freedom of information could not have foreseen all these benefits flowing from their handiwork.

The deputy minister community passed an especially difficult test this year. It did not resist (the commissioner never received a complaint) a request for the expense claims of a large number of deputies. The kind of close public scrutiny represented by this request is one to which prime ministers and cabinet ministers have become accustomed. It was undoubtedly an unnerving new experience, however, for some public servants. They were schooled, after all, in the belief that they were shielded from this kind of minute, personal accountability. But, the point is, they passed this test.

Most senior public servants are persons of undoubted integrity. It will rankle when members of the public question their honesty or, through access requests, impose an extra burden of work on their personnel. But most realize that the old "trust us" view is an anachronism, foolhardy in any democracy – at any rate, doomed in the new era of access to information.

And yet, and yet...

All the battles are far from being over. Suspicion of the access law as an alien (read American) importation, coupled with a somewhat paternalistic faith in the integrity of public officials, continues to have a foothold among some members of the new government and public service.

A rear-guard action against the access law continues to take familiar and predictable forms: calls for the right to ignore troublesome requests which may be irksome because of their number but by any standard are neither vexatious nor mischievous; the right to impose higher, that is, prohibitive, fees on users of the law; the freedom to ignore response deadlines if resources are strained (aren't they always?). Still others look to expand the available exemptions from the right of access and to remove more and more records from the Act's ambit, including records held in ministers' offices.

When the government amends the access law, any temptation to make changes which strengthen the hands of officials at the expense of users should be vigorously resisted.

The test of timeliness

What better litmus test of a government's commitment to openness than its respect for the response deadlines contained in the law? Parliament recognized the importance of timely responses and that unreasonable delay is tantamount to outright denial of access. Subsection 10(3) of the *Access to Information Act* provides:

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

In past years, delay was the tactic of choice for departments or agencies when they found it uncomfortable to be open. It is not yet possible to say with any precision how the current government compares on this score with its predecessors. The Treasury Board Secretariat collects response times statistics but the most recent, at the time of writing, are for 1991-92. Delay upon delay!

The Treasury Board Secretariat does not keep tabs on the number of occasions departments are

deemed to have refused access by virtue of delay. These statistics would be relatively easy for departments to keep and for the Treasury Board Secretariat to compile. Despite the commissioner's urging that such statistics be kept as an accountability measure, the Treasury Board Secretariat has not done so.

Based on the complaints received by the Information Commissioner over the year and on his reviews of departmental practices, an impressionistic assessment of the current government's performance in meeting response times can be made. It is not encouraging, as much as one wishes to attribute good intentions to a new administration. The problem of delay does not appear to be going away. Indeed, the reverse seems to be true.

As the public service experiences more and deeper budget cuts, the danger is that officials, already cool to the access law, can cloak themselves in self-righteousness. Resource constraints will be seized upon as a respectable justification for ignoring the law's response deadlines. Canadians should be skeptical of such excuses. (One doesn't detect any government sympathy for the argument that tough times permit Canadians to ignore deadlines for filing tax returns!)

Speaking of tax filing deadlines, not even Revenue Canada seems much impressed by the law's response times. In one case, more fully described in the case summaries, an unjustified delay of over 200 days caused the Information Commissioner to ask the department, as a gesture of goodwill, if not penitence, to refund the fees which the requester had paid, a mere $53.40. The deputy minister agreed that the delay was excessive and unfortunate, but refused to make amends to the requester.

CASES in point: Health Canada and Immigration and Refugee Board

Health Canada is an example of how even a department well-disposed to access can fall into bad habits and fail to discharge its legal responsibilities under the Act. To its enormous credit, it turned to the Information Commissioner's office for help and welcomed his staff's audit to find the extent of the problem and solutions. (Over many years of experience with departments' performances, the commissioner's staff knows what works and what doesn't in access procedures.)

The audit discovered that 80 per cent of access requests received by Health Canada are not responded to within the legislated 30-day deadline. Health Canada doesn't always invoke the extension provisions the law allows and, when the department does, it often ignores its obligation to notify the Information Commissioner of the extension.

It is not as if senior officials of Health Canada were unaware of their problem. But would they have taken the easier (at least for a time) path of large-scale non-compliance if the clear word from the top was that the government wanted the access law observed in letter and spirit? One thinks not, especially if careers were placed at risk.

It is not as if obeying the law requires massive new human or financial resources. Even to think that is unrealistic. The Information Commissioner's audit report said that only three additional persons could clear away the backlog in six months. Once that was achieved, the department's existing access staff, working under streamlined processes, should be able to answer new requests on time. It is much more a matter of will and cleverness than money.

Citizenship and Immigration Canada is another department having a problem with response deadlines.

It has the dubious distinction of standing at the top of this year's "complaints against" list. The commissioner's office formed the impression that, in this department, the right of access was considered as a troublesome irritant which interfered with its real job. Perhaps it does interfere, as many good causes do. To its credit, Citizenship and Immigration Canada has begun to re-organize its access resources and get on with the job of answering requests. It may soon be replaced as leader of the delays "honour" list. Any candidates?

This report observed last year that the Information Commissioner's office was conducting an audit of delays in the Immigration and Refugee Board (IRB). That audit was completed and provided to the IRB in June of 1994. It was not difficult to determine that the IRB's problems arose from a sudden large increase of access requests. In 1990-91, the IRB received 45 requests; in 1993-94, the number was 360. The resources allocated to handle access requests simply had not kept pace.

The IRB was responsive to the commissioner's suggestions for improving response times. Additional resources have been allocated to the access coordinator's staff and internal review and approval processes have been streamlined. The IRB has initiated formal training for its employees on access to information requests. The chairperson of the board has made it clear to all employees that access requesters are to be treated with respect and requests are to be answered in a timely fashion. It has worked. The IRB is no longer number one on the "complaints against" list; this year the IRB has dropped to number four.

As to next year's audits, National Defence, Revenue Canada and Atlantic Canada Opportunities Agency are possible candidates. All are experiencing difficulties in meeting the legislated response times.

The test of affordability

Over the years relatively few problems have emerged over fees for access to government records. Departments have occasionally tried to discourage a troublesome requester, or urged a requester to narrow a request, by giving a prohibitively high fee estimate. The intervention of the Information Commissioner usually encourages saner heads to prevail.

A number of complaints this year against the RCMP, Revenue Canada and Foreign Affairs exposed a developing confusion over the proper interpretation of the access to information fee regulations. These institutions tried to expand the types of activities for which they charge search and preparation costs. Some looked for more opportunities for levying photocopying charges and limiting the opportunity of requesters to reduce fees by viewing records rather than taking copies. In part these developments appear to be driven by the government-wide efforts to recover revenues and lower costs.

However noble the motives (and the motives here were not entirely noble), officials have no authority to impose new fees or to increase existing fees by fiat. The authority to do so is in the Act or its regulations. The Information Commissioner made an effort, successful, it seems, to foil any unauthorized fees being imposed upon information requesters. Some detail about the regulations will help clarify the problem and the commissioner's position.

What is "search and preparation"?

Subsection 7(2) of the access regulations authorizes charging $2.50 per person per quarter hour ($10 per hour) for every hour in excess of five hours spent in "search and preparation" of non-computerized records. The terms "search" and "preparation" are not defined in the regulations or in the statute.

Practice throughout government since 1983 has determined, however, that "search" means any activity by an institution's employees to locate the requested records. A "search" includes physical inspection of files, file indexes, cabinets, records room or archives. No apparent confusion exists among public officials as to what the term "search" means.

Things are not so clear-cut when it comes to "preparation" costs. Most institutions concede that time spent deciding which records, or portions of records, qualify for secrecy cannot be charged to a requester. Such activity is not "preparation" for the purposes of the regulations. "Preparation" is usually interpreted as rendering illegible the portion to be kept secret from the requester. In this limited sense, preparation is frequently referred to as "cut-and-paste".

Some institutions wanted a broader interpretation. They wished to charge for activities such as removing records from files, copying them for processing purposes, considering comments gathered from consultations, telephone conversations with requesters and the drafting of related correspondence.

In the commissioner's view, requesters should only be charged for "cut-and-paste". If photocopies must be made to facilitate the application of exemptions (such as from microform to paper or from paper originals to paper copies), such costs may not be considered "preparation costs" and charged to the requester. Neither may time spent on correspondence or preparing reports about the processing of requests.

What are reproduction costs?

Most government institutions charge reproduction fees for records provided to a requester in response to a request. Reproduction costs incurred while applying exemptions and preparing material for viewing (if viewing is requested) are absorbed by departments.

In this reporting year, a few departments took a different approach. If records contained exemptions and had to be photocopied to make the exempted material illegible prior to viewing, requesters were informed that they must pay all reproduction charges. Even though the requester may have decided to take only one or two, or none, of the pages after viewing, the entire reproduction cost was levied. The viewing option became useless.

The RCMP even took the position that, in the application of exemptions to records in microform, the entire cost of transforming the microform records to paper form must be borne by the requester – whether or not any of the records were disclosed. This institution believed, moreover, that if a second paper copy had to be made to ensure that exempted material was illegible, the requester had to bear the cost of that second paper copy as well.

On the issue of reproduction charges, the commissioner concluded that requesters may only be charged for pages disclosed to them. If paper copies are made from any medium in applying exemptions, these costs may not be levied against the requester. Finally, if copies are made for ease of viewing, only the cost of the pages selected by the requester may be charged.

In the end, the institutions attempting to broaden the fees and charges agreed to accept the commissioner's interpretation. The Secretary of the Treasury Board concurred in a narrow interpretation of the fee regulations. He offered to issue an interpretation bulletin in order to ensure consistency throughout government. The Office of the Information Commissioner and the Treasury Board Secretariat will work together on a bulletin.

The Right to Know and the Right to Privacy

Since the coming into force of the access and privacy laws in 1983, the right to know and the right to privacy have lived in comfortable co-existence. Though that co-existence was sometimes put to the test, the complementarity of these two values has been preserved. Canadians are insistent upon their right to see government files; they also understand that the personal information of others deserves protection.

Strains are growing, however, between these two values. The source is a temptation to hide behind the banner of privacy as a justification for keeping secret embarrassing details about, for example, misuse of public funds or position.

An illustration: Criminal justice records are of considerable interest to journalists, victims and victims' rights groups, indeed to all members of the public. A difficult policy debate is now going on over balancing the public's right to know how the corrections and parole systems are working, on the one side, with offenders' privacy rights on the other.

Officials in the system have sometimes sought to protect the privacy of their colleagues by withholding the portions of records and reports which questioned their actions or competence. (Officials were, of course, more ready to disclose the personal details of the behaviour of offenders or the identity of staff whose actions they approved!) Such a selective and seemingly self-serving application of privacy rights in the corrections and parole systems increases the cynicism of the news media and Canadians about the value of the right to privacy.

An example from this reporting year is the government's refusal to disclose the names of former MPs in receipt of a pension. Protection of privacy was the reason given. The commissioner could not accept this justification and has asked the Federal Court to order disclosure. The details of the case are set out in the section of this report entitled: In the Federal Court.

In another case, a requester asked the Department of Transport to disclose a list of employees receiving parking privileges. Under the department's policy, three groups of employees and privileges are involved:

- managers may receive priority parking spots on departmental premises and are reimbursed one-half the government parking rate;

- handicapped employees receive priority parking spots on departmental premises and are provided with parking free of charge; and

- all other employees may apply on a point system for priority parking on departmental premises and are charged a subsidized government rate.

In one way or another, each of the three groups of employees receives a discretionary, financial benefit because neither priority parking nor a subsidized rate are legal entitlements. The *Privacy Act* is clear in stating that details about any discretionary benefit of a financial nature cannot be kept secret in order to preserve privacy.

Transport Canada decided that the details of the parking benefits should remain secret. Since these benefits are distributed according to a fair system, it believed that they should not be considered "discretionary". Commendable though it may be that the department has a fair system for conferring parking benefits on employees, the benefits remain discretionary. While concern for employee privacy is laudable, Parliament has decided that the public's right to know takes precedence over privacy concerns when it comes to discretionary benefits.

For these reasons the Information Commissioner recommended that the records be disclosed. After consulting with the Privacy Commissioner, the department decided not to follow the Information Commissioner's recommendation for disclosure. At the time of this writing, the Information Commissioner has asked the requester to consent to having the matter referred to the Federal Court for review.

Regrettably, too broad invocations of the right to privacy in order to protect public officials places legitimate privacy rights at risk. Parliament made it clear in the *Privacy Act* that public officials should have fewer privacy rights than other Canadians enjoy. It is a reasonable price for the privilege of working for government. Any information about a public official which "relates to the position or functions of the individual" is not considered to be "personal". Such information includes:

- the fact that the individual is or was an officer or employee of the government institution;
- the title, business address and telephone number of the individual;
- the classification, salary range and responsibilities of the position held by the individual;
- the name of the individual on a document prepared by the individual in the course of employment; and
- the personal opinions or views of the individual given in the course of employment.

But it ends there. All other personal information about public servants enjoys the same right to confidentiality as does the personal information of any other Canadian. Common sense says that members of the public should have a right to know who they are dealing with in government, what the duties of officials are and the identity of the official who has prepared, signed and received government documents. Were it to be otherwise, government would be "faceless" in a truly Kafkaesque way.

A foolish, self-serving invocation of privacy rights by public officials backfires. The cynicism engendered by public officials denying access rights by hiding behind privacy rights encourages the courts to strip public officials of more of their privacy than Parliament intended. Case in point: (Dagg v. Minister of Finance, (November 8, 1993), T-2662-91 (F.C.T.D.)). Justice Cullen of the Federal Court Trial Division ordered the disclosure of the names, identification numbers and signatures of public servants contained on the after-hours sign-in sheets at the Department of Finance.

The department considered this information to be "personal" and had withheld it in response to a request under the Act. The requester then complained to the Information Commissioner who upheld the department's decision. That should not be surprising: an information commissioner is mandated to defend privacy rights too (section 19).

In ordering the department to disclose those sign-in sheets, Justice Cullen reduced significantly the privacy rights of public servants. He took the view that, since the sign-in sheets didn't disclose anything

sensitive, they didn't qualify for protection. In his words: "Revealing the masses of individuals entering and leaving a government premise for a certain timeframe is hardly the stuff of revealing personal information".

With all respect, as the lawyers say, that view is dangerously ill-conceived. An employee's pattern of after-hours attendance at the workplace could be highly sensitive; indeed, it could put personal safety at risk. While it is understandable that any privacy claim by a public official has become suspect (because of the abuses previously mentioned), it is regrettable that the courts would respond by further narrowing the already limited privacy protections which Parliament saw fit to provide to public officials. The Federal Court of Appeal has heard the appeal and has reserved decision.

Some officials have pitted the Privacy Commissioner and the Information Commissioner against each other. Though there can be honourable differences over which of two sometimes conflicting values should prevail in a given case, playing the privacy card is also a delaying tactic. In the end, the worst outcome for ministers in these cases is the no-win situation of having to choose between commissioners.

Parliament may wish to consider the wisdom of the single commission model for both access and privacy as used in the provinces. One-stop shopping makes policy as well as economic sense.

A recent convert to the single commission approach (in addition to the Information Commissioner himself) is the Information and Privacy Commissioner of British Columbia, David Flaherty. Before assuming that office, while an academic and expert in data protection (privacy) issues, he argued against the proposal (put forward in the 1993 budget) to merge the offices of the federal privacy and information commissioners. In a recent speech at the University of Victoria, however, he said:

> "I am frequently asked whether it is not inherently contradictory to try to be both the Information Commissioner and the Privacy Commissioner for this province. In fact, in the spring of l992, from my supposed vantage point as an academic commentator, I urged the Attorney General and Murray Rankin to create two separate positions. Despite the risk of being perceived as simple-minded now, I just do not see the problem or incongruity or incompatibility between the dual roles, nor has it been an issue for me in 18 months in office here."

In the Federal Court

Unlike many of his provincial counterparts, the federal Information Commissioner functions as an ombudsman. He has extensive investigative power but no power to order the release of records. If he concludes that a complaint is well-founded and that government should disclose disputed information, he may only recommend remedial action – a limitation which he continues to welcome.

When a minister declines to follow the commissioner's recommendation that additional information be disclosed, the commissioner's only recourse is to ask the Federal Court to order the government to disclose the disputed information. The commissioner must obtain the consent of the requester who was denied the information before such a court action can be filed.

In his previous four years in office, the Federal Court has been required to hear only one case brought there by the commissioner, although several have been settled on the courthouse steps. The commissioner continues to believe that turning to the courts to settle a complaint should be only a last resort when all powers of persuasion and mediation have failed. Parliament put an ombudsman in place to settle complaints, not turn them over to the judges to decide. It takes goodwill on both sides, however, to settle disputes and avoid the courts.

In the reporting year, the commissioner filed three such actions, one against the Solicitor General of Canada (in his role as minister responsible for the RCMP), one against the minister of Public Works and Government Services and one against the president of the Atlantic Canada Opportunities Agency (ACOA).

Here, in summary, are the three cases.

The RCMP's witness protection program

A journalist asked the RCMP for explanatory information about its witness protection program. He wanted to know how many persons were in the program, its cost and details about its terms of reference. The RCMP supplied information relevant to the first two aspects of the request; it denied access to any information about the program's terms and conditions. The journalist complained to the Information Commissioner.

The information withheld is part of the RCMP operations manual and contains details about who is eligible for the witness protection program, what types of protection are available and how the program is administered. The RCMP wished to maintain a high degree of secrecy about these matters out of, undoubtedly, an abundance of caution.

While it produced no convincing evidence that disclosure could jeopardize its program, it felt justified in being cautious because lives could be at stake. The RCMP argued that even seemingly innocuous and disparate information might be used by sophisticated criminals in unanticipated ways to penetrate the program. The RCMP also maintained that the witness protection program is an "investigative technique" which the access law allows to be kept secret.

While the Information Commissioner agreed with the RCMP that some of the information in question should be kept secret, he recommended the remainder be released. He noted that in the United States and Ontario, disclosure is routine of the kind of information which the RCMP withheld in this case. The witness protection programs in those other jurisdictions were not compromised as a result of the publication of general policy information about the program's terms and conditions. In the commissioner's view, the RCMP's concerns, however honourably held, were not reasonably based.

As for the "investigative technique" argument, the Information Commissioner concluded that a publicly known program of the RCMP could not properly be considered an "investigative technique" which needed to be protected. The Information Commissioner commenced action in Federal Court against the Solicitor General after the RCMP refused to accept his recommendation that some additional information be disclosed.

In the closing days of the reporting year there was good news for the requester and for taxpayers. The RCMP agreed to disclose the disputed information avoiding the expense of a trial. Moreover, the Solicitor General tabled a bill in Parliament establishing a formal witness protection program and setting out its terms and conditions. Now, all Canadians will know the ground rules.

Public Works Canada – MPs pensions

The Department of Public Works and Government Services administers a number of statutes, including the *Members of Parliament Retirement Allowances Act* (MPRAA). Under that statute, former members of Parliament with at least six years of service are entitled to a pension. A private individual asked the department for a list of all former MPs receiving a pension under the MPRAA and the amounts of each pension. The request was denied based on the authority of subsection 19(1) of the *Access to Information Act* in order to protect the privacy of the pension recipients.

The department argued that the information related to the personal finances of identifiable individuals, that none had given consent for the disclosure and that the information was not publicly available from other sources. Consequently, the department concluded that subsection 19(1) required the information to be kept confidential.

After his investigation, the commissioner concluded that some of the requested information was properly kept secret. While he found that the names of survivors of former MPs receiving pensions as well as the specific amounts of the pensions qualified for protection, he believed that the names of former MPs receiving pension benefits should be released. The commissioner found that with modest, if tedious, effort anyone could consult published sources, such as the Parliamentary Guide, and compile a list of former MPs who had served in Parliament for six years. Since subsection 19(2) of the access law requires disclosure of publicly available personal information, he concluded that the names should be disclosed.

The commissioner disagreed with the department's view that there was no overriding public interest in disclosure. He argued that there was widespread, serious public interest in, and debate over, the subject of MPs pensions. All information which would be helpful in assessing the appropriateness of the MPRAA would have, in the commissioner's view, a public-interest benefit. Since there was an insignificant countervailing privacy interest (names of recipients being so easily determinable) the commissioner concluded that disclosure should be made in the public interest.

The Information Commissioner commenced action in Federal Court after the minister, on the advice of the Privacy Commissioner, refused to accept the recommendation that the list of names be disclosed. The outcome of this case will be reported in next year's annual report.

Atlantic Canada Opportunities Agency – How many jobs were created?

In May of 1994, a journalist asked the Atlantic Canada Opportunities Agency (ACOA) for information supporting ACOA's claim that some 40,000 jobs had been created by firms which ACOA had assisted. In response, ACOA refused to disclose on the basis that such information was supplied to it in confidence by the firms which had received grants or loans. The journalist complained to the Information Commissioner.

During the investigation, it was determined that much of the relevant information (the business names and addresses where jobs were created and the amount of public money involved) was already publicly available in ACOA's own quarterly reports. ACOA continued, however, to refuse to disclose the number of jobs created at specific companies. That information, according to ACOA, was extrapolated from responses given by a sample of recipient firms to a survey conducted for ACOA by Price Waterhouse. These firms were promised by Price Waterhouse that their responses would be kept confidential. This case, then, addresses the question: Does an institution have the authority to make binding promises of confidentiality, the effect of which is to make departments the judge of what will and will not be secret?

Put in legalese: Is a promise of confidentiality made to a third party by a government institution (or its agent) sufficient grounds, in and of itself, to justify relying on paragraph 20(1)(b) to deny an access request? Paragraph 20(1)(b) reads as follows:

"20(l) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains...

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

In this case, ACOA's sole reason for refusing access to the specific number of jobs created by each firm was the promise of confidentiality made by Price Waterhouse.

The Information Commissioner relied on a wealth of jurisprudence from the Federal Court which holds that information must be shown to be confidential in nature by some objective test before qualifying for exemption under paragraph 20(1)(b). The courts have insisted on an objective rather than subjective test in order to prevent government institutions from undermining the right of access through confidentiality agreements with third parties.

The commissioner was not satisfied that the withheld information was, by its nature, confidential. There was no evidence that the firms consistently maintain in confidence the number of jobs created as a result of assistance from ACOA. As a result, all firms affected, some 600 in total, were notified of the commissioner's concerns and given an opportunity to make representations.

Fewer than six per cent of these firms objected to disclosure. They did so because they had been given

assurances of confidentiality by Price Waterhouse and felt their trust had been betrayed. None of the few who objected to disclosure presented evidence showing that the number of jobs created is information confidential in nature (by an objective standard) or that it was consistently held in a confidential manner by them.

The commissioner, thus, concluded that secrecy was unjustified and the consultant had no legal authority to make such a promise. He recommended that the information be disclosed. ACOA refused to follow the recommendation. With the consent of the requester, action was commenced in Federal Court by the commissioner against ACOA, seeking an order requiring disclosure. The results will be reported in next year's report.

The commissioner intervenes

The Information Commissioner also intervened in a case before the Federal Court of Appeal in which Canada Post was the appellant and the minister of Public Works and Government Services was the respondent. In this case the minister had decided to disclose records to a requester but a third party, Canada Post, sought the aid of the Court in preventing disclosure.

The commissioner asked for, and was given, leave to become involved in the case for two reasons. First, an important question of interpretation of the access law was at stake. Second, he had learned that the Department of Justice (acting on behalf of the minister of Public Works) intended to take no position before the Court of Appeal on this question of interpretation. What follows, then, is a discussion of the legal issues involved, the court's decision and the appropriateness of the behaviour of the Department of Justice.

Canada Post Corporation v.
Minister of Public Works:

The facts of this case are straightforward. A representative of the Canadian Union of Postal Workers asked Public Works Canada for records relating to the realty management services which Public Works provides, under contract, to Canada Post Corporation. Subject to certain exemptions, Public Works concluded that the records qualified for disclosure under the *Access to Information Act*. Canada Post objected. In its view, the records were held by Public Works only as Canada Post's agent. The records, it argued, were under the legal control of Canada Post and Canada Post is not subject to the access law.

The right contained in the *Access to Information Act* is a right of access to "any record under the control of a government institution" (subsection 4(1)). Public Works Canada is a government institution for the purpose of the Act; Canada Post is not. Public Works Canada, in this case, had physical possession of the records, created the records in the course of its official duties and managed the records on a daily basis. Public Works Canada was acting, however, as an agent of Canada Post with respect to the realty management records it created, possessed and managed.

Both the trial and appeal divisions of the Federal Court agreed that a broad interpretation should be given to the phrase "under the control of". The trial judge, Justice Rothstein, said:

> "In my view, the fact that a government institution has possession of records, whether in a legal or corporeal sense, is sufficient for such records to be subject to the *Access to Information*

Act."

In the Court of Appeal, reasons were given for the majority by Justice Létourneau. He adopted and relied upon the reasons given by the trial judge. He also said:

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

He later concluded:

> "I am satisfied that Public Works Canada (PWC), as a government institution, had in its possession records which fell under its control, that the information contained in these records was obtained by PWC in the legitimate conduct of its official activities pursuant to a contract with the appellant and therefore that such information constituted government information subject to the Act."

Where was Justice?

These two strong judicial decisions in favour of a broad and liberal interpretation of the scope of the access law are reminders of how critical a role the Federal Court plays in keeping vibrant the right of access to government records. But this saga is yet another example of the reluctance of the Department of Justice to embrace its special responsibility to nurture the *Access to Information Act*. It is yet another example of the department's inherent conflict of interest in serving two masters: the access law and government clients.

The only reason this "control" issue came before the Federal Court is because the minister of Public Works had decided, rightly it turns out, that his department controlled the records and that some qualified for disclosure. Canada Post, not the Department of Justice, commenced action in Federal Court, naming the minister of Public Works as the respondent. This was the first occasion, since the law's coming into force, in which the issue before the court was the proper jurisdictional ambit of the access law: whether to interpret broadly or narrowly the right of access given to Canadians in section 4 of the Act.

This was the background against which Justice (acting for the minister of Public Works) decided to take no position on this ground-breaking issue. Justice did not want two Crown entities (Canada Post and Public Works) to be seen to be pitted against each other. It left it to the requester (whom Justice felt had competent counsel) and Canada Post to fight it out. The department whose minister has the responsibility for access to information policy in government simply chose to sit on the sidelines.

Not until the case was heard in the trial division did the Information Commissioner learn of Justice's failure to act. Yet, the trial judgment supported a strong right of access. When Canada Post appealed, however, and Justice reaffirmed its intention to say nothing, the Information Commissioner sought leave to argue in support of the trial court's decision.

If the Information Commissioner is in court it is ordinarily against a minister of the Crown, seeking an order to force disclosure. In this case, the Information Commissioner was in the ironic position of

defending the minister of Public Works' decision because the minister's own lawyers refused so to do.

Strange things like this happen when the very department charged with guarding the public's right of access is, at the same time, responsible for protecting the interests of "the Crown", including the government's right to secrecy. The department is in a chronic state of conflict-of-interest. For this reason the commissioner recommended in last year's report that Justice relinquish its lead policy role vis-à-vis the access law. Let Justice serve its clients, but let another minister be guardian of the right to know in cabinet and across government.

In the Supreme Court

During the reporting year, the Supreme Court of Canada granted leave to appeal in the case of Clerk of the Privy Council v. Rubin (March 14, 1994), A-245-93, (F.C.A.). This will be the Supreme Court's first occasion to consider a case arising under the *Access to Information Act*. The case was brought by a private citizen who requested, and was denied access to, records held by the Prime Minister's department. The records comprised communications between the PCO and the Information Commissioner generated during a previous investigation by the commissioner of a complaint against the PCO.

The PCO denied access on the basis that the law requires the commissioner to conduct his investigations in private. If subsequent requesters are able to obtain access to such records at a later stage, the "in private" requirement would be undermined. The Information Commissioner supported the PCO's decision to refuse disclosure. He took the position that the effectiveness of an ombudsman depends heavily on candid, confidential communications between the government and the commissioner. The trial judge sided with the requester and the appeals division of the Federal Court sided with the PCO. The Supreme Court has not yet scheduled a date for the matter to be heard.

Kudos to the Federal Court

The commissioner's office has been working since 1991 with the Federal Court to help assess and solve its serious problem of delay in handling access to information cases. As discussed in the commissioner's 1991-92 report, the commissioner first documented the procedural history of every access case filed with the court since 1983. Next, the commissioner undertook a consultation across Canada with interested members of the Bar and users of the access law about possible solutions.

Following that consultative process, the commissioner proposed that the court adopt special rules of practice in access cases. The commissioner undertook as well to intervene in selected cases before the court in order to urge their timely disposition. These initiatives are discussed in the commissioner's 1992-1993 annual report.

On December 3, 1993, the Associate Chief Justice of the Federal Court, trial division issued a practice direction setting out a case management approach in access cases to ensure that they would be heard in a more timely manner. Under Associate Chief Justice Jerome's guidance, and with the help of the court's registry officers, the direction was enforced and the positive results were almost instantaneous. The good news was reported in the commissioner's 1993-1994 report.

As of this writing, one year and three months after the implementation of the practice direction, delay and backlog in access cases are, if not problems of the past, certainly well in hand. In 1994, 34 applications for federal court reviews were made under the access law. When added to the court's previous year's backlog of 89 cases, the court's access caseload totalled 123 files. However, with the help of the practice direction, 16 cases were discontinued and 27 judgments were issued. More cases were disposed of than were filed. The present backlog of 80 cases marks a decrease over last year and is the smallest since 1989. There is work to be done to meet the goal of disposition in six months, but the progress is heartening.

Well done!

The rising cost of information

The access law has traditionally been used to pry out information previously held secret in government files. More and more, however, Canadians are seeking to use the access law to gain access to information which the government has already published. Government is increasingly refusing to disclose information even though it is already in the public domain. What possible explanation can there be for this seemingly bizarre behaviour on both sides?

In fact, the behaviour on both sides is perfectly rational. Government is making more information public for a price, through direct selling or licensing arrangements. The most recent, well-publicized example of government's infatuation with being a seller of information is its decision to charge $500 for an electronic version of the budget, $1,000 for a LAN version and $25 for the printed version of the detailed economic, fiscal and technical documents related to the budget.

In response, many Canadians are seeking to acquire the published information more cheaply by exercising their rights of access under the *Access to Information Act* where fees are low. Government

is denying these requests and requesters are forced to buy the information at published prices. Requesters complained to the commissioner.

It is not possible to report the outcome of these as yet unfinished cases. It is possible to offer some initial observations on this new and troubling phenomenon.

As government budgets continue to shrink, the pressures are on officials to operate in a cost-recovery mode: If there is a demand for government information, don't just fill the demand, officials are told. The new battle cry appears to be, "fill and bill".

Some public officials apparently have accepted without question the proposition (which some members of the public find astounding) that taxpayers legitimately may be asked to pay twice for government information. First, they pay indirectly through their taxes for the collection, or compilation of the information, most of which is undertaken for the government's own use. Second, they may be asked to pay directly should they wish to have access to the information itself.

This double-charging is flawed public policy and flawed economics. It is flawed public policy because basic documents essential to understanding the respective rights and obligations of government and citizens (such as our laws or the budget) should not be available only to those who can afford to pay. Such an approach is inherently undemocratic.

Why does the user-pay-twice philosophy make poor economic sense? The government stands to gain more through tax revenue by allowing a struggling information industry to flourish than it will ever garner through direct or indirect user fees.
Governments are notoriously poor at making money except through taxation. Their marketing, cost control and service capacities simply cannot match those found in the private sector. In the United States, where there is no Crown copyright on government publications, information companies add value to raw government data – and thrive. (Remember, it is Crown copyright which allows the government to behave like a monopolist in setting prices and controlling distribution arrangements for its information.)

Setting fees for the budget, the federal statutes, and, perhaps the ultimate irony, even the index to government information holdings (Info Source) is ill-conceived and demonstrates why the government's monopoly position vis-à-vis its information holdings should be reviewed.

Two recommendations have been made in previous annual reports in this matter: First, Crown copyright should be abolished (annual report, 1991-92). The government's ability to over-price and restrict the distribution of its publications would thus be constrained. Second, section 68 of the *Access to Information Act* should be amended to provide that the access law may be used to gain access to publications which are unreasonably priced or unreasonably restricted in their availability (annual report 1993-94).

At present, if a record is published or available for purchase (no matter what the price or format), the government argues that it is not accessible under the access law. This very issue is under investigation by the Information Commissioner and the results will be reported next year.

While the issue of what is "reasonable" will vary from case to case, some guiding principles should be followed. For discussion, a few are offered here:

- Fees should not be charged for documents essential to the understanding of the roles, functions

and obligations of government or the rights, duties and responsibilities of individuals. No restriction should be placed on the subsequent use of any such information.

- For any other documents, fees should not be set for government information unless a business plan has been completed demonstrating that the forecast revenues exceed the costs associated with levying and collecting those fees. In addition, fees should be dropped if, in practice, revenues do not exceed the costs associated with levying and collecting the fees.

- Fees should not be set to recover the costs of collecting, compiling or processing information. These costs have already been paid by the taxpayer.

- Fees for information products should be set to recover only the direct costs of dissemination.

- There should be no exclusive or restricted licensing arrangements for the sale or dissemination of government information.

- Information should generally be available in paper or machine readable format.

In cases where the government collects, processes, disseminates or adds value to information for the benefit of a specific group, rather than for the general public, fees may be set on a commercial basis in order to recover more than the direct cost of dissemination. However, in cases such as this, it may be preferable to have the private sector rather than government provide the service.

Important as it is that the government be constrained in its ability to act as a monopolist in pricing its information resources, it is equally important to avoid the dead hand of excessive regulation. We do not need another or an enlarged Canadian Radio-television and Telecommunications Commission. We do not need an ever-expanding Office of the Information Commissioner.

Though it goes against many bureaucratic instincts, government can best accomplish the cost-cutting and revenue-generating goals by resisting the temptation to set restrictive prices and restrictive conditions on its information products. There is some hope that it will do so because it makes good economic sense to resist. But, if it fails to resist, independent oversight of prices, terms and conditions will inevitably be demanded – and required.

Case Summaries

What follows here are summaries of some of the commissioner's findings. They represent what the commissioner considers to be cases of particular significance during the past year in terms of law, fact or policy. In this report, an attempt has been made, perhaps at some risk, to be somewhat more legalistic and less journalistic than in the past in the presentation of the cases. By so doing, it is hoped that these case summaries, and those in future years, will more usefully set forth the commissioner's "jurisprudence". Following the summaries is an index arranged to relate the cases to specific sections of the Act.

Tug-o-war over fees (01-94)

Background

In the ritualistic dance between requesters (especially sophisticated requesters) and government departments, the lead often changes. Two cases this year illustrate the point. In one, a department wanted to force the requester to split a single request into four requests and, of course, to pay four application fees. In the other, a department refused to allow a requester to split his one request into 10 requests. It did not want to give the requester 10 times more free search and preparation time. The disputes came before the Information Commissioner.

Case one – Citizenship and Immigration

A frequent user of the access law asked the Department of Citizenship and Immigration (C&I) for copies of correspondence between an identified policy adviser and an unidentified assistant deputy minister (ADM). C&I determined that the policy adviser had corresponded with four ADMs on various matters. In line with its internal policy calling for access requests to be broken down by subject, C&I decided to treat the request as four separate requests. The requester was asked to pay an extra $15 beyond the $5 he had already paid. He complained to the Information Commissioner.

Legal issue

Section 6 of the *Access to Information Act* sets out the requirements for a valid request. It must be in writing and provide sufficient detail to enable an experienced employee with reasonable effort to identify the record. Apart from the additional requirements that the requester be present in Canada at the time of the request (or a Canadian citizen or permanent resident) and that the $5 fee accompany the request, the *Access to Information Act* sets no other conditions for a request to be valid.

The commissioner concluded that the department could not force a requester to submit, and pay for, four requests if he wished to make only one. Of course, it is open to departments to process requests in whatever fashion is most expeditious. If that means breaking down a request into component parts, so be it. But no additional charges may be levied against the requester as a result.

The department accepted the commissioner's recommendation.

Case two – Foreign Affairs and International Trade

Some time after a requester had made a request for records to the Department of Foreign Affairs and International Trade (FAIT), he decided that he could reduce his overall fees by breaking his one request into 10 requests. While this would mean paying 10 application fees totalling $50, it would also mean he would receive 10 times the amount of free search and preparation time. (With each application comes five hours of search and preparation time after which the charge is $10 per hour per person.)

The department balked. It had already done much of the search and preparation work before the requester decided to split his request. In its view, it was too late for the requester to seek to minimize his fees in this way. The requester complained on the basis that the department had no authority to refuse to process his 10 new requests.

Legal issue

Are there any circumstances in which a department has the authority to refuse to accept and process access requests? As indicated in the first case, the *Access to Information Act* only requires that the request be in writing, be reasonably clear, be accompanied by a $5 fee and be submitted by a qualified applicant. If these requirements are met, it would seem that departments have no right to refuse to process a request.

The commissioner, however, took the view that the right to charge fees implicitly authorizes departments to take reasonable steps to prevent requesters who have incurred fees from avoiding them. If departments expend the resources involved in processing a request, it would be unreasonable to allow the requester to abandon it at the last moment and to reconfigure new requests (designed to minimize fees) for the same records.

So that requesters have a full opportunity to choose the option best for them, the commissioner concluded that the critical decision point in the process should be when the requester is provided with a fee estimate. If the requester pays the deposit and authorizes the processing to proceed, then the nature of the request becomes fixed unless there is mutual agreement to modify it.

In this case, FAIT had not provided the requester with a fee estimate, nor had it received authorization to proceed with the processing. The commissioner recommended that the department accept the 10 new requests. It agreed so to do in light of the general principles which the commissioner adopted for future cases.

Lessons learned

Requesters have every right to formulate their requests in the manner they choose and to seek to minimize fees wherever possible. Departments may not impose extra fees on a requester by dictating the manner in which requests are to be formulated. On the other hand, government institutions have a right to expect requests to become fixed at some point in the process so that charges legitimately incurred can be claimed from requesters. Requesters may not escape legitimately incurred charges by reformulating requests late in the process. To keep these rights and obligations in balance, the requester's response to a formal fee estimate and deposit request becomes the critical factor. It fixes

the nature of the request unless it is subsequently modified by mutual agreement.

"E"(vaporating)-mail (02-95)

Background

An employee of the Immigration and Refugee Board (IRB) was interested in knowing more about the language-of-work policies in force at the IRB. She asked for any complaints submitted by employees about, or requests for clarification of, the policy. When the response was received, the requester believed that she had not been given all the relevant records and complained to the Information Commissioner.

During the investigation, it was confirmed that an IRB personnel officer had deleted E-mail messages received from employees for clarification of the official languages policy and her responses to them. The deletion of the E-mail records was not intentionally done to frustrate the requester's right of access but because the officer wanted to avoid storing additional records on the subject.

Yes, the IRB has a magnetic tape back-up system for E-mail. However, it stores messages for only five to 10 days. The same back-up tapes are reused every five days in the Toronto region and every 10 days at headquarters in Ottawa. The relevant message could not be recovered.

Legal issue

This case raises two issues: first, whether E-mail messages are subject to the *Access to Information Act*; second, it raises the question whether departments are under an obligation to retain E-mail messages. The *Access to Information Act* makes it clear (in the definition of "record") that E-mail messages are covered by the Act. But the Act is silent concerning the obligation to conserve E-mail messages.

In determining the department's obligations towards its E-mail messages, the commissioner took into account the retention provisions of the *National Archives of Canada Act* and the Treasury Board Guidelines. The Archives Act provides that no record under the control of a government institution shall be destroyed without the consent of the National Archivist. Indeed, the Archivist has published General Records Disposal Schedules of the Government of Canada which cover administrative records of the sort at issue in this case.

The commissioner also offered the view that Treasury Board Guidelines help in separating significant E-mail records from the trivial. Those guidelines use the term "transitory" rather than trivial, and say that a record should not be considered transitory if:

> "It is used either to initiate or continue a departmental activity, provides comments on an activity underway which requires administrative action, or requests an opinion on an activity of interest to the institution."

In the light of that guidance, the commissioner found that the deleted E-mail records in this case should have been retained by the IRB for at least two years. He recommended that the IRB apprise its

employees of the requirement to preserve electronic records and that the board ensure that the archivist's retention schedules are respected. The IRB agreed so to do.

Lessons learned

It is a widespread misconception among public servants that E-mail messages in themselves are "trivial" or "transitory" and no special care need be taken to preserve them. This casual attitude to electronic records poses a risk to the preservation of our historical heritage and, as well, to our right of access.

Officials should treat the "delete" command on their computers with greater caution and ensure that proper back-up facilities and rules are in place for retention of E-mail messages.

Danger in the workplace (03-95)

Background

An Ottawa man regularly asks various federal departments to provide lists of so-called "call-up personnel". These are workers engaged by private personnel agencies and hired by departments on temporary assignments. In response to a request he made to the Department of Justice, the workplace addresses of certain administrative personnel were withheld. The department units were disclosed but their physical location was kept secret. The requester was curious about this unusual secrecy and he complained to the Information Commissioner.

The workplace addresses were withheld to protect the safety and security of two departmental units – the Crimes Against Humanity and War Crimes Unit and the Public Programs Systems Division. The type of work performed by the former unit is well-described in its title. The latter unit is responsible for enforcing family maintenance orders made against federal government employees. When a province indicates that an employee is delinquent in paying child support, this unit takes steps to enforce orders through garnishment, for example.

Legal issue

Section 17 of the *Access to Information Act* allows government institutions to keep secret information which, if disclosed, "could reasonably be expected to threaten the safety of individuals". Can this provision apply when it comes to the addresses of government offices? Both of the work units at issue in this case had received threats of sufficient gravity to cause concern for the physical safety of the employees. Specifics of the threats were provided in writing to the commissioner along with details of the special defensive measures taken by the employer to protect the employees. The threats were more serious than the usual spate of letters from disgruntled persons that every government office receives from time to time.

Taking into account those facts, the commissioner concluded that the workplace addresses of the call-up personnel in these two units could be kept secret.

Lessons learned

Every office involved in some form of law enforcement receives threats from time to time. In the ordinary course, such threats could not reasonably justify keeping secret the address of the office. However, where there is documentary evidence of serious, repeated, credible threats of physical harm against personnel working in a location which is not already well-known, section 17 of the *Access to Information Act* may be relied upon to continue to protect the location of the work unit.

A taxing request (04-95)

Background

In response to an access to information request, the National Archives of Canada sent a fee estimate which included amounts covering the goods and services tax (GST) and the provincial sales tax (PST). The requester asked the commissioner to consider whether the estimate of fees was proper. While the requester did not specifically raise the tax aspect, it became part of the investigation.

The department included GST and PST on advice of its financial services branch. It had been charging these taxes on access fees for about six months prior to the investigation.

Legal issue

The *Access to Information Act* and its associated regulations are silent about GST and PST. The department held the view that the provision of records in response to a request was a purchase or sale of goods transaction which attracted GST. As well, the department referred to a 1961 cabinet decision (X-0325-61 RD (01)) which stipulates that all federal departments engaged in selling goods and services to the public must collect and remit any applicable provincial sales taxes.

The commissioner determined that in Ontario, as elsewhere, provincial sales taxes were not applicable with respect to provincial access to information requests. Moreover, he found that it would be contrary to the *Access to Information Act* to levy provincial sales taxes against users of the *Access to Information Act*.

As to the GST, the commissioner informed the Archives that there is a clause in the GST act which prohibits charging the GST for access to information requests. He recommended that the Archives refund the taxes in this case and cease the practice for the future. The Archives agreed.

Lessons learned

The exercise of the right of access is not a taxable transaction. In the absence of specific legislative authorization, government institutions should not charge GST or PST for records disclosed under the *Access to Information Act*.

The art of appraising art (05-95)

Background

The Canadian Cultural Property Export Review Board (CCPERB) is responsible for, among other things, issuing tax certificates for works of art donated to Canadian galleries and museums. The board satisfies itself as to the true market value of the donated work and issues a certificate allowing the donor to claim the amount as a deduction for income tax purposes.

The board assesses the market value of the donated art based on appraisals paid for, and provided by, either the donor or the recipient institution. The CCPERB's role in protecting the public purse from inflated appraisals is vital because there is incentive for donors to inflate appraisals and for recipient institutions to turn a blind eye to inflated appraisals. The donor wants to maximize the tax benefit and the recipient wants to acquire art without having to deplete limited acquisition budgets.

Some Canadians, wanting to assess how well the CCPERB is doing in protecting the public, asked to know the appraised value the board put on certain art works and for the appraisals which were submitted by the donors or the recipient institutions. The two following cases arose from such requests.

Case one

An art consultant and appraiser asked the CCPERB to provide records on which the board assessed the market value of a donation made to the National Gallery of Canada. The donation, comprising 84 paintings by Canadian artist, James W. Morrice, was made by the late G. Blair Laing of Toronto. The CCPERB refused to disclose the records. It relied on provisions in the *Access to Information Act* which protect the privacy of others (section 19 of the *Access to Information Act*) and which protect the confidentiality of income tax information (section 241 of the *Income Tax Act*). The requester complained to the Information Commissioner.

Legal issues

Two issues were dealt with here. First, whether the provisions of the *Income Tax Act* had any relevance when considering a request under the *Access to Information Act*. Second, whether the appraised values of donated art constitute personal information about the donor.

On the first issue, the commissioner found that the information submitted to the CCPERB does not qualify for protection under the *Income Tax Act*. The donor may or may not make subsequent use of the CCPERB's tax certificate in dealing with the tax department. The appraisals submitted to the CCPERB, in support of a donated work's market value, will not be part of any subsequent income tax deduction claim.

As for the second issue, the commissioner concluded that the recipient institution had already made public the name of the donor and the appraised value of the collection. Indeed, the National Gallery had disclosed the appraisals in response to an access request made directly to it. (In that instance, the commissioner's finding was also required and the case is described in his 1992-1993 annual report). In these circumstances, the commissioner was of the view that the information was sufficiently public to qualify for disclosure pursuant to subsection 19(2) of the *Access to Information Act*.

Even if the information had not previously been made public, the commissioner was of the view that it

could not be kept secret to protect the donor's privacy. He noted the *Privacy Act*, in paragraph 3(l), specifically states that "information relating to any discretionary benefit of a financial nature" is not entitled to privacy protection. In the commissioner's view, the donation of works of art and the claiming of a tax advantage entails a discretionary benefit of a financial nature. The decision by an approved cultural institution whether or not to accept a proposed donation is entirely discretionary. Once it is made, there is a direct benefit of a financial nature to the donor via the tax certificate. It is clear from paragraph 3(l) of the *Privacy Act* that Parliament gave public accountability a higher priority than personal privacy in such circumstances.

The CCPERB agreed, and the appraisals and related records were disclosed to the requester.

Case two

The same requester, perhaps heartened by the outcome of the first case, asked the CCPERB to provide appraisal records concerning a number of other donations. One of these involved a donation of Inuit carvings to the Art Gallery of Ontario. Again, the CCPERB refused on the same basis as before to disclose the records. However, this time, it also relied upon paragraph 20(1)(b) to protect confidential financial information which had been supplied in confidence to the CCPERB by the Art Gallery of Ontario.

Legal issue

Is it legally justifiable for the CCPERB and the Art Gallery of Ontario to rely on paragraph 20(1)(b) of the *Access to Information Act* to keep secret the appraised value of art which has been donated to the Gallery? The courts have limited the scope of this exemption by introducing the concept that the withheld information must "by its nature" be confidential. In other words, third parties and government cannot simply agree to keep information confidential. There must be some objectively defensible need for confidentiality.

In this case, the commissioner determined that the financial information had been submitted in confidence and that the appraised values of art are always kept confidential by the Art Gallery of Ontario. Moreover, the commissioner was satisfied that the Gallery had good and sufficient reasons for insisting on confidentiality. If disclosed, the values of art would affect the security arrangements within the Gallery and disclosure would have insurance implications for the Gallery. In these circumstances, the commissioner agreed with the CCPERB that the art appraisals qualified for exemption from the right of access.

He said as follows:

> "...as troubled as I am about the possible abuses which secrecy in this field can spawn, I have no choice but to conclude that paragraph 20(1)(b) of the *Access to Information Act* authorizes secrecy in these cases.
>
> "You may be assured that I will continue to press Parliament to broaden the public interest override which is contained in subsection 20(6). At present, it is confined to matters of public health, safety and protection of the environment. In my view, it should not be so limited to take account of cases such as this."

Lessons learned

Neither subsection 19(1) of the *Access to Information Act* nor section 241 of the *Income Tax Act* justifies the refusal to disclose appraisals submitted to the CCPERB in support of the current market value of donated art.

It may be possible, however, for a recipient institution to demonstrate that disclosure of these appraisals would infringe a legitimate need for confidentiality on its part. In such cases, paragraph 20(1)(b) of the *Access to Information Act* may be relied upon to justify non-disclosure.

The potential for abuse of the tax system through inflated appraisals for donated art is real. Secrecy only exacerbates the problem and the *Access to Information Act*, as currently written, does not adequately open the process to scrutiny. Consequently, there is a need for Parliament to include a broad public interest override with respect to the confidentiality of third-party financial information. Indeed, the commissioner made this recommendation to Parliament in his 1993-94 annual report.

Not telling!
(06-95)

Background

A Nova Scotia-based journalist asked the Canadian Security Intelligence Service (CSIS) for records covering any surveillance of black activists in that province in the '60s and '70s. In response, CSIS refused to confirm or deny whether it held any such records. The journalist complained to the commissioner.

Legal issue

Subsection 10(2) of the *Access to Information Act* stipulates that, in response to an access request, government institutions are not required to indicate whether a record exists if they do not intend to disclose it. The provision is intended to address situations in which the mere confirmation of a record's existence (or non-existence) could give rise to some injury. It is a legitimate purpose.

But, can an institution refuse to confirm the existence of records which contain information which has been made public by other means? In this case, for example, the commissioner's investigator found references to the surveillance of Black Power groups by the Security Service in the report of the Royal Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. As well, in his testimony before the Parliamentary Justice Committee, a former head of the RCMP Security Service publicly confirmed the service's interest in black activism. The commissioner took the view that, in the face of these public acknowledgements, CSIS could not refuse to confirm or deny the existence of the requested records.

As a result, CSIS acknowledged that it held records relevant to the request and more than 500 pages were disclosed.

Lessons learned

Government institutions should be cautious in invoking their right to refuse to confirm whether records exist. Reasonable efforts should be made to assess what is already in the public domain. In no case may a department refuse to confirm whether records exist if portions of them do not qualify for exemption under the *Access to Information Act*'s exemption provisions.

My diary is my business (07-95)

Background

When the *Access to Information Act* is resorted to during office disputes, the waters become muddy indeed! Such was the case when a manager in the Immigration and Refugee Board (IRB) made a request under the *Access to Information Act* for notes made by another employee concerning a meeting where grievances were aired. The board's access to information and privacy (ATIP) co-ordinator asked the employee for the notes so they could be processed in response to the request. The employee turned over the notes he had made during the meeting.

He mentioned, however, that he may have put some thoughts about the meeting in his personal diary which he kept in his computer at home. The ATIP co-ordinator asked for the diary notes to be produced to determine whether they, too, were subject to the *Access to Information Act*. The employee refused this latter request.

The ATIP co-ordinator brought this matter to the attention of the Information Commissioner not as a complaint (that would have been a first!) but for guidance. The commissioner decided that the best way to arrive at a full and fair account of the situation was to initiate a complaint on his own motion and commence an investigation. The stumbling block was the refusal of the employee to allow even the commissioner to look at the notes contained in the home computer diary.

Legal issues

This case raised two issues. First, whether the commissioner has the power to compel a person to produce records which the person considers to be his personal property and not a government record. Second, it raised the issue of the interpretation of the phrase "under the control of a government institution". Only records which are under the control of a government institution are, by virtue of section 4 of the Act, subject to the right of access.

As to the first issue, two provisions of the ATIA are relevant. Paragraph 36(1)(a) gives to the commissioner the power:

> "to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of records." (emphasis added)

Subsection 36(2) also deals with the commissioner's powers. It reads:

> "Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the commissioner on any grounds." (emphasis added)

The commissioner took the view that paragraph 36(1)(a) expands upon the powers given by subsection 36(2) and provides the necessary power to compel the employee to produce his home computer records. The commissioner felt that he must see the records in order to properly determine whether there was a sufficient connection between the records and the workplace to trigger the *Access to Information Act*. The employee, with the support of his union, resisted on the basis of subsection 36(2). In his view, if the record wasn't "under the control of" the IRB, then even the commissioner had no right to see it.

In the end the employee relented and produced the records. No summons needed to be issued.

As to the second issue, the commissioner determined that the records were personal to the employee and were not under the control of the IRB for the purposes of the *Access to Information Act*. In coming to that conclusion, the commissioner found that the location of a record (i.e., whether it is located on the premises of a government institution) is not the sole determining factor in the control issue. One must examine the content of the record, the circumstances under which it was created or compiled and the reasons it is located either on or off government premises.

In this case the records were not created in the ordinary course of the employee's duties; they were not recorded as part of a work-related instrument or task and they were, in content, consistent with personal, diary observations. These facts, together with the location of the records, supported the employee's contention that the Act did not apply. The commissioner dismissed the complaint.

Lessons learned

In determining whether records are accessible under the *Access to Information Act*, there is nothing magical about the physical location of the record. Public officials cannot protect a government record from disclosure simply by keeping it at home, or storing it with a third party not subject to the *Access to Information Act*.

Moreover, when "control" is an issue, the commissioner must view the disputed records. For this purpose, the *Access to Information Act* gives him the authority to view any records he considers relevant to the matter whether or not they eventually are determined to be under the control of a government institution.

Tangled webs of red tape (08-95)

Background

A requester could not have predicted the difficulties he would face when he requested records held by Transport Canada. He was interested in knowing more about an audit that Transport Canada had conducted of a small western air carrier.

The saga began in February of 1990 when the request was made; it did not end until December of 1994 when the requester received the records. In the interim, there were several complaint investigations by the Information Commissioner and an action in the Federal Court of Canada by the air carrier.

Perhaps the most puzzling tangle in this web of red tape occurred at the end of the process – after the Federal Court action (launched by the air carrier to block disclosure) had been dismissed by consent of the parties. The dismissal came in August of 1994 but the department seemed caught off guard and was simply not ready to disclose the records. It began making photocopies of the 3,600 pages involved and (for the first time!) censored portions to protect the privacy of individuals referred to in the records. It was not until December of 1994, four years after the request and four months after the last legal impediment to disclosure had been removed, that the requester received the records.

Legal issue

The access law is silent as to how quickly departments must disclose records once a third party's court action (under section 44 of the Act) to block release has been dismissed. In coming to his finding in the matter, the Information Commissioner referred to subsection 28(4) of the access law which directs departments to disclose records "forthwith" if an affected third party does not object to the Federal Court within the established 20-day period. He reasoned that the same direction is implicit in the legislation once a third party's Federal Court action is dismissed. Consequently, he concluded that the records should have been disclosed "forthwith" upon the dismissal of the related Federal Court action. An additional delay of four months
simply didn't meet this requirement.

Lessons learned

Departments should be fully ready to disclose records as of the date when a paragraph 28(1)(b) notice is sent informing third parties of intent to disclose. All applicable exemptions will have been claimed and the records properly severed. If the 20-day period lapses without the third party having filed action in Federal Court, the records will be ready for immediate release. If the third party commences court action, the records will remain ready for immediate release in the event of a dismissal of the action. This process will also make it possible for the requester to complain to the Information Commissioner in a timely way about exemptions claimed (other than the third party records exemption). In this way, some of that delaying red tape can be reduced to the benefit of access to information requesters.

What will we do!
Whatever will we do!
(09-95)

Background

In recent years, Health Canada has been receiving increasing numbers of requests for records about

blood products and Health Canada's role in safeguarding the blood supply system. One requester, a journalist, asked for the records of a 1984 conference on heat-treated blood products.

The department received the request on January 19, 1994. By July 4, after the requester had received no response from the department, he complained to the Information Commissioner. By the time of the complaint, the department was already some five months late in meeting its response obligations.

The investigation quickly determined that the department had decided early in the game that the requester was legally entitled to receive the records. Indeed, the bulk of the requested material was intended for public disclosure at the fall 1994 hearings of the Royal Commission of Inquiry into Canada's blood system. What concerned Health Canada was the prospect of turning the information over to a journalist six months or more before government officials were due to testify. Senior departmental officials were of the view that they should not let the media lead the national inquiry.

On August 4, one month after the complaint was made, the records were disclosed. Almost seven months had elapsed since the request.

Legal issue

In truth, there was no real legal issue here and the department did not even argue that it had legal justification for the delay. The department clearly failed to give a response within 30 days. It also failed to claim a proper extension for the purposes of conducting consultations. The department was more worried about losing control of the public discussion of an issue, and of its ability to do damage control, than about its legal duty to provide access to government records in a timely fashion.

In concluding that the department had no reasonable justification for the delay, the commissioner admonished Health Canada for denying legal rights because of internal handwringing over releasing records perceived as sensitive.

Lessons learned

Departments are not prevented by the *Access to Information Act* from keeping their ministers and senior officials fully informed about the impending disclosure of sensitive records. They have every right to develop communications plans, explanations, and other forms of damage control. There is no lawful justification, however, for ignoring statutory response times for any of these purposes.

Check the fine print (10-95)

Background

The Royal Canadian Mint in 1988 engaged a consulting firm to review its costing and accounting systems. The consultant first provided an interim report containing draft recommendations and, then, its final report.

A curious requester asked the Mint, under the access Act, for a copy of the interim report. In

response, the Mint informed the requester that it could not locate such a report in its records holdings. This response prompted a complaint to the Information Commissioner.

The investigation confirmed that the Mint had conducted a thorough, professional search. The commissioner was satisfied that the Mint did not have physical possession of the interim report. There was no doubt that the report had been received but its whereabouts was a mystery. The Mint resisted suggestions that it obtain a copy from the consultant and provide it to the requester.

Legal issue

If a government institution does not have physical possession of a requested record, does that end the matter? Or, is there a requirement that even some records held elsewhere must be obtained and processed under the Act?

This issue turns to an interpretation of the phrase "under the control of a government institution" which appears in sections 2 and 4 of the *Access to Information Act*. That phrase describes the scope of the Act's coverage and, in the commissioner's view, should be given a liberal interpretation.

To assist him in resolving this issue in this case, the commissioner examined the contract between the Mint and the consultant. As well, previous agreements between the parties were examined to determine the normal requirements and practices of the Mint. The agreement clearly stipulated that an interim report was to be provided and that it was to be the property of the Mint. The commissioner concluded that the Mint had a legal right to obtain the interim report from the consultant. In his view, that meant that the Mint had the record under its control.

The Mint agreed to ask the consultant to provide it with the interim report. Alas, the consultant was also unable to locate its copy and the requester's curiosity remains unsatisfied.

Lessons learned

From time to time, a government institution will find that a record relevant to a request may not be in its possession but it may have a right to obtain the record from the person or entity which holds it. In such cases, there is an obligation on the government institutions to obtain the record and process it under the Act.

Deciding if then is now (11-95)

Background

A regular requester asked the Department of National Defence (DND) for copies of weekly access to information reports between a certain date and "the present". The application was dated July 28, 1994, and it was received by DND on August 10, 1994. DND's search for records stopped at July 28; the requester believed that the search should cover up to August 10 and he complained about the matter to the commissioner.

Legal issue

When a requester wants all records on a topic up to "the present" should departments limit the search to the date of the request or the date they receive the request? On this issue the *Access to Information Act* is silent but the commissioner took note of the fact that the *Access to Information Act*'s 30-day response period begins on the date a request is received. Would it be fair, he asked, for DND to insist that requesters be restricted by the date on the application when the department considers its obligations to begin on the date received? The commissioner decided that the benefit of the doubt should go to the requester and the department agreed to accept his view.

The commissioner urged the requester, however, to avoid the use of the phrase "to the present" in future requests in favour of the phrase "to the date of receipt of the request". By so doing, future misunderstandings would be avoided.

Lessons learned

There is inconsistency across government in determining the scope of requests. Some departments review all relevant records up to the date of receiving the application; others stop at the date on the application. The better approach is to adopt the date of receipt. That approach is more consistent with a service orientation and a spirit of openness. Requesters should also do their part to avoid confusion by being specific about the scope of their requests and avoiding the use of phrases such as "the present".

Secrecy gone mad (12-95)

Background

An Ottawa lawyer, on May 31, 1993, asked the Department of Justice to provide him with copies of native litigation reports. These reports contained summaries of cases in which the department's native law section was involved. The department refused to disclose the records claiming that they were subject to solicitor-client privilege.

Legal issue

This case raises the interesting connection between sections 23 and 25 of the *Access to Information Act*. Section 23 allows government to keep secret information which qualifies for solicitor-client privilege. Section 25 requires that any portion of a record which does not qualify for exemption should be severed and disclosed.

In refusing to disclose any portion of the requested records, the Justice department argued that, if a record contained any privileged information (no matter how little), the entire record must be kept secret. The Justice department believed that if it were to honour the requirements of section 25 (severance) it could lose the right to claim privilege on the withheld portions. It should be noted that the bulk of the information in the native litigation reports was factual and could be found by reading the pleadings or the published texts of the decisions which courts have made in the native law area.

The commissioner consulted both in-house and external counsel and concluded that there was no basis in law for the department's position. It is clear on the face of the statute that Parliament intended the principle of severance to apply to all exemptions. It gave solicitor-client privilege no special status. As well, jurisprudence supports the view that, even at common law, innocuous portions of records which also contain privileged information, can be disclosed without loss of privilege on the portion which remains confidential.

Of particular concern to the commissioner was the suggestion by Justice that, even though much of the content was not sensitive, it need not undertake severance because the task was time-consuming and irksome. Neither of these reasons justify any government official deciding to keep information secret!

After lengthy negotiations, Justice agreed to sever the records and disclose some 3,000 pages of records. It took more than a year from the date of his request for the requester to obtain the records and his rights.

Lessons learned

Section 25 of the *Access to Information Act* (the severance requirement) applies to all exemptions including section 23. Contrary to the belief widely held by federal government officials, the Act does not give solicitor-client privilege a special status. If portions of a record do not qualify for the privilege, those portions must be disclosed. The portions which remain confidential do not, thereby, lose privilege. It is never acceptable under the Act to refuse to respect the severance requirement because to do so would place a burden of inconvenience on public officials.

From bad to worse – to worst! (13-95)

Background

The prize for most unjustified secrecy and delay during the 11 years of the *Access to Information Act*'s life goes to a little-known component of the department of the Solicitor General: the Office of the Inspector General (OIG). This office exists to provide the Solicitor General with an independent view of the activities of the Canadian Security Intelligence Service (CSIS). In effect, the OIG is the Solicitor General's internal auditor for CSIS. The Inspector General provides the Solicitor General with annual "certificates" which comment on any shortcomings in the CSIS annual report and on any unauthorized, unreasonable or unnecessary exercise by CSIS of its powers.

On August 11, 1991 a journalist began this sorry saga by making a request under the *Access to Information Act* for the Inspector General's certificates between 1988 and 1991. The request seemed to mesmerize the OIG, the Department of the Solicitor General, the Department of Justice and the Privy Council Office. Senior officials of all these institutions became involved but couldn't decide what to do. They couldn't even decide to say "no".

It was not until November 25, 1992 – 14 months late and after a complaint to the Information Commissioner – that the requester was given an answer. Then, it was "no". The OIG had decided that the certificates constituted "advice and recommendations" for the Solicitor General which could be kept

secret pursuant to paragraph 21(1)(a) of the *Access to Information Act*. The long-suffering journalist (little did he know how long-suffering!) made another complaint about this broad claim of secrecy to the Information Commissioner.

Legal issue

Paragraph 21(1)(a) of the *Access to Information Act* allows a government institution to refuse to disclose any requested record that contains: "advice or recommendations developed by or for a government institution or a minister of the Crown". The Act does not define the terms "advice" or "recommendations" and the OIG argued that the terms should be read broadly.

The Inspector General took the position that any observation by a person having audit functions carries implied advice. If the observation is critical or negative, the implication is that something should be done in response. If the observation is positive, the implication is that no action need be taken.

The OIG was forced to take this view because the certificates contained very little explicit advice and few explicit recommendations. In the ordinary course, it is officials of the Solicitor General Secretariat who review the OIG's observations and suggest courses of action to the minister. Much of the content of the OIG's certificates was, therefore, factual.

The commissioner did not consider such a broad view of the scope of 21(1)(a) to be consistent with section 2 of the *Access to Information Act*. That section, the purpose section, stipulates "that necessary exceptions to the right of access should be limited and specific". The commissioner felt that, if accepted, such a broad interpretation could cloak in secrecy a great deal of information, such as internal audit reports, which is now routinely released. As well, the commissioner took into account the interpretation offered in the Treasury Board Guidelines as follows:

> "Two things should be noted about the definition of advice. Firstly, the definition requires an opinion be given either explicitly or implicitly. Secondly, it requires that the opinion be given or offered as to action. What is meant by the term 'opinion' is what one thinks about a particular thing, subject or point; a judgment formed; a belief, view, notion.
>
> "The second requirement i.e., that the opinion be given or offered as to action, is particularly important. Unless an opinion is tied to some action, it cannot generally be considered advice." (T.B. Manual 01-1293, Ch. 2-8, pp.66-67)

Consequently, the commissioner recommended to the Solicitor General that the disputed information be disclosed. Again there was dithering; it took until October 1994 before the requester received the records – more than three years after the request was made.

Lessons learned

Two lessons emerge from this case – the first a practical one. If a department is likely to refuse to disclose a requested record, it should do so with dispatch. A requester will feel much more wronged if, after a long wait for an answer, it finally comes as an "access denied".

The second lesson is of a substantive nature. The exemption protecting advice and recommendations should be read narrowly. Matters of fact, observations and background information do not qualify as

advice or recommendations. To qualify for exemption there must be a clear opinion as to a course of action. While the opinion or course of action may be either implicit or explicit both must be clear from a reasonably informed reading of the record.

Are RCMP planes safe? (14-95)

Background

The RCMP maintains a small fleet of aircraft for its operations. After a number of accidents in the 1980's, the Canadian Aviation Safety Board recommended that an aviation safety survey of the RCMP Air Services Branch be conducted by Transport Canada. Assurances of confidentiality were given to the pilots, mechanics and others who took part in the survey. In February and March of 1990, the survey was completed.

In June of 1993, an interested citizen made a request to the RCMP under the access law for a copy of the report of the results of the survey. The RCMP refused to disclose most of the survey, on authority of paragraph 21(1)(a) of the access law, in order to protect advice and recommendations given to the RCMP by Transport Canada. The requester complained to the Information Commissioner about what appeared to be excessive secrecy.

Legal issues

Two legal issues arose in this case: Does the report of an air safety survey (in whole or in part) constitute "advice and recommendations" for the purposes of paragraph 21(1)(a) of the *Access to Information Act*? Even if it does, should the discretion contained in the provision be exercised in favour of secrecy or disclosure?

As to the first issue, the commissioner concluded that the survey report contained a number of factual observations and a number of recommendations for action. At the very least, he concluded, the factual observations should be disclosed because they constitute neither "advice" nor "recommendations".

On the second issue, the commissioner noted that the survey results were approximately four years old (at the time of his finding), that the majority of the recommendations had been accepted and implemented by the RCMP, that disclosure of the contents would not identify any of the individuals who had taken part in the survey and that similar surveys of other public and private air fleets are routinely made public. He concluded that there was no reasonable basis for exercising discretion in favour of secrecy and recommended disclosure.

The RCMP reconsidered the matter and disclosed the bulk of the survey report.

Lessons learned

Reports which are in the nature of audits may not be withheld in their entirety simply because they contain some advice and recommendations. The provisions of section 25, which require severance, should be carefully applied to disclose all observations, background and descriptive material which do

not reveal specific advice or recommendations. Moreover, section 21 is a discretionary exemption; if prejudice or injury from disclosure is unlikely or insignificant, even the portions containing advice and recommendations should be disclosed.

Bank governor retires (15-95)

Background

In early 1994, John Crow's term as Governor of the Bank of Canada came to an end and he chose that occasion to retire after 21 years of service with the bank. A journalist asked the bank for records showing the retirement benefits package given to Mr. Crow. The bank refused to disclose the records to protect his privacy and the requester complained to the Information Commissioner.

Legal issue

This case posed the question: Do an employee's retirement benefits constitute "personal information" for the purposes of subsection 19(1) of the access law? If so, the details must be kept confidential; if no, then the information should be disclosed. Coming to an answer required an interpretation of the definition of "personal information" contained in section 3 of the *Privacy Act*. That definition is constructed in a very complex manner. First a broad definition is offered:

> "personal information means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing..."

Thereafter, nine specific types of information are listed as examples of "personal information", including:

> "(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been invovled."

Finally, the section lists four specific types of information which do not constitute "personal information" for the purposes of deciding whether the information may be disclosed under the *Access to Information Act*. One example of information which does not qualify for protection even though it may be about an identifiable individual is:

> "(l) information relating to any discretionary benefit of a financial nature, including the granting of a license or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit..."

The commissioner agreed that the requested information was information about an identifiable individual (as described in the general preamble of the definition) and that it related to financial transactions in which Mr. Crow was involved as described in paragraph 3(b). A portion of the benefits package appeared to the commissioner to be discretionary and to fall within the exception set out in paragraph 3(l).

The sticking point became the retirement allowance given to Mr. Crow by the bank's board. The

amount given to Mr. Crow was higher than the amount to which he was legally entitled under bank by-laws. Mr. Crow was entitled to a retirement allowance equal to 21/35 of his annual salary. In fact, he was given a retirement allowance equal to 35/35 of his salary.

In light of these facts, the commissioner concluded that the retirement allowance was a discretionary benefit of a financial nature and recommended that the relevant information should be disclosed.

In response, the bank informed the requester that Mr. Crow had been given a retirement allowance equal to one year's salary. The matter was considered resolved.

Lessons learned

The benefits received by public officials upon retirement may include discretionary and non-discretionary elements. While details about a retiree's non-discretionary benefits may qualify for confidentiality (assuming the details are not otherwise publicly known or there is no overriding public interest in disclosure), details about any discretionary benefits must be disclosed.

The rule of thumb is simple. When anyone gets a gift at taxpayer's expense, the public's right to know outweighs the recipient's privacy rights.

A whistleblower (16-95)

Background

An employee of Public Works and Government Services Canada had a direct interest in obtaining the results of an internal investigation into allegations of contracting irregularities and misappropriation of government funds. The requester was one of the persons who initially "blew the whistle" on the alleged wrongdoing and whose allegations were the subject of the internal investigation. The employee's career subsequently suffered and he wanted the records to support his legal claims against the department. In response to the employee's access request, the department refused to disclose most of the requested information.

The department argued that the alleged wrongdoers worked in a small work unit. Even if specific names were to be deleted from the report, any negative comments in the report would reflect directly on all members of the group. Thus, the department believed that the report's conclusions should be kept secret to protect the employees' privacy.

Legal issue

Is it proper to refuse disclosure of information which, even if depersonalized before disclosure, would clearly relate to a limited number of identifiable individuals in a small work unit? This question arises, from time to time, when departments feel that privacy may be at risk even if individual names are kept confidential.

In this case, two facts led the commissioner to conclude that disclosure should be made. First, the

department had already disclosed a summary of the report and, hence, had already publicly pinpointed the small work unit which was the subject of the investigation. Indeed, that disclosed summary included names of the affected employees.

The second reason the commissioner recommended disclosure was the importance, in the public interest, of exposing instances of misappropriation of public funds. In this respect, the commissioner was guided by comments made by Justice Muldoon of the Federal Court in the case of Bland v. Canada (National Capital Commission) as follows:

> "It is always in the public interest to dispel rumours of corruption or just plain mismanagement of the taxpayers' money and property. Naturally, if there has been negligence, somnolence or wrongdoing in the conduct of a government institution's operations it is, by virtual definition, in the public interest to disclose it, and not to cover it up in wraps of secrecy."

In response, the department agreed to follow the commissioner's recommendation to disclose the report's conclusions.

Lessons learned

When wrongdoing by public officials is at issue, the public interest in disclosure is strong. The potential invasion of privacy which could result from disclosure must be "a weighty matter" in order for secrecy to be maintained. As a general rule, before a department suppresses information about employee wrongdoing – even to protect privacy – the relative balance between the public interest in disclosure and privacy should be considered by the department's most senior officials.

Are ministers' offices off-limits? (17-95)

Background

The minister of Canadian Heritage became involved in controversy when he wrote the Canadian Radio-television and Telecommunications Commission (CRTC) about a matter before the commission. Because the CRTC is a quasi-judicial regulatory tribunal and because the commission forms part of the portfolio of the minister of Canadian Heritage, questions were raised in the House of Commons and in the news media about the propriety of the minister's actions. A journalist asked for all records concerning the matter which were held by Heritage Canada.

When the requester received his response, he was surprised by the absence of briefing notes designed to assist the minister in dealing with the issue in Question Period and with the media. He queried the department's access coordinator who explained that the minister's office was not considered part of the department of Canadian Heritage and that the access law did not apply to that office. The journalist, who had already fought (and won) a previous battle with a former minister of Justice on the same point, complained to the Information Commissioner.

Legal issue

Is the minister's office part of his department (and, hence, covered by the access law) or separate therefrom (and not covered by the law)? The issue has been canvassed in detail in the two previous annual reports. Suffice to say that the commissioner concluded that a minister's office forms part of the department and records held therein are subject to the access law.

In this case, the minister's staff were entirely co-operative. As it turns out, they had carefully searched the minister's office for records related to the journalist's request. The Information Commissioner's investigation confirmed that there were no special briefing notes prepared for the minister. All relevant records had been located and provided to the requester. Moreover, the minister accepted without protest the fact that his office was part of the department of Canadian Heritage for purposes of the *Access to Information Act*. Kudos to Michel Dupuy!

Lessons learned

When a search is made for records related to an access request, the record holdings in the minister's office must also be considered. Some records may, of course be exemptible under the Act. Others may be purely personal records or records relating to constituency affairs and, hence, not covered by the Act. Still others may be cabinet confidences which are excluded from the Act. And, so, while not all records in a minister's office (or anywhere else in a department) may be discloseable, records do not cease to be subject to the Act simply by virtue of being held in a minister's office.

Value for money (18-95)

Background

A lawyer asked for records prepared by Revenue Canada's audit and evaluation branch. The department claimed a 45-day extension beyond the 30-day response period for the reason that a large volume of records were involved. Near the end of the extended response time, the department asked the requester to pay $53.40 for photocopying charges. He paid immediately. The department did not reciprocate. It did not provide the records until some 260 days had elapsed from when the fee was paid. The requester looked to the commissioner for help.

Legal issue

When a government institution is responsible for an unquestionably excessive delay in respecting a person's access rights, does it have the authority to retain fees which have been tendered by the requester? Once a requester pays the application fee and other legitimate fees, the department is under an obligation to respect the response periods established by the Act. If this obligation is not respected, however, the Act deems the delay to be a denial of access and the requester has a right, then, to take the matter to Federal Court.

Upon such an application, the Federal Court has the power to order disclosure or to "make such other order as the court deems appropriate". The court could, for example, order all fees to be waived or reimbursed; it could also impose a fine upon the offending institution for its tardiness.

Failing such an order from the Federal Court, it would appear that even in cases of very tardy responses, the department has the legal authority to retain the fees paid by the requester. (There may, of course, be a civil remedy for breach of contract or failure to discharge a statutory duty which would offer the requester a remedy by way of damages.)

Nevertheless, the commissioner concluded that, since this department was excessively tardy in responding to an access request, it should refund or waive any associated fees without the need for the requester or the commissioner to obtain a court order. He made such a recommendation to the deputy minister of Revenue Canada. In response, the deputy minister refused to follow the commissioner's recommendation. While agreeing that the delay was excessive and regrettable, he expressed the view that his officials had acted in good faith. The deputy minister noted that the law only allows a fraction of the total cost of access requests to be recovered and that he would not reimburse the little he could collect.

Lessons learned

When departments fail to respect the remarkably generous timeframes for responding to access requests, they ought not be entitled so to do with impugnity. When Parliament deemed a wrongful delay to be a wrongful denial, it did so to enable the aggrieved requester to obtain redress from the courts. In cases of excessive delay, the commissioner will ask departments to make amends, such as by waiving or refunding fees. Despite the poor example set by Revenue Canada, it is to be hoped that they will do so without the need to invoke the aid of the Federal Court.

RCMP keeps Newfoundland's secrets (19-95)

A journalist was interested in knowing more about an incident in the annals of Newfoundland justice. In the early 1950's, the RCMP investigated and laid fraud charges against Alfred Valdmanis. Mr. Valdmanis was director, Economic Development in the Newfoundland government. He was subsequently found guilty and sentenced to four years of hard labour.

The RCMP refused to disclose its investigative records because it had been providing policing services to Newfoundland at the time the records were created. The RCMP believed that subsection 16(3) of the *Access to Information Act* imposes on it a mandatory obligation to keep the requested information secret. That provision is as follows:

> "The head of a government institution shall refuse to disclose any record requested under the Act that contains information that was obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province or municipality pursuant to an arrangement made under section 20 of the *Royal Canadian Mounted Police Act*, where the government of Canada has, on the request of the province or municipality agreed not to disclose such information."

Legal issue

This case raised the question of whether or not the subsection 16(3) exemption requires that access be denied to all such information. If, however, there is some flexibility in the application of the provision,

what is the extent and nature of the flexibility?

The Information Commissioner took note that the records were some 40 years old and that Mr. Valdmanis had died more than 20 years ago. In the commissioner's view, disclosure of the records would not prejudice privacy, policing or Newfoundland's interests. Having so found, the commissioner inquired into the nature of the understanding between the RCMP and Newfoundland concerning the non-disclosure of policing records.

In fact, there was an exchange of letters between a former Solicitor General of Canada and a former minister of Justice of Newfoundland which contemplates exceptions to the mandatory secrecy rule. One of the exceptions relates to information which may be of historical interest when the subject has been deceased for over 20 years and which is harmless to the Force or any other person or entity.

The Information Commissioner brought the case to the attention of the minister of Justice of Newfoundland seeking his consent to having the RCMP disclose the records to the requester. In response, the minister declined to give consent without further study of the matter. He did express a commendable readiness to consider allowing the RCMP more flexibility in responding to access requests for Newfoundland policing information. Discussions between the RCMP and Newfoundland are in progress.

The commissioner agreed with the RCMP that, unless and until Newfoundland consents to disclosure, the RCMP was required to refuse the request.

Lessons learned

All provinces have (or are soon to have) laws providing a right of access to government information. Yet most provinces continue to expect the RCMP to refuse to disclose, under the federal access law, any information arising from the RCMP's provincial policing activities. Unless and until the provinces are willing to agree to a more liberal process, the RCMP has no choice but to reject any requests for access to provincial policing records.
The provinces should provide such flexibility. It is to be hoped that the RCMP's negotiations with Newfoundland in this case will bear fruit and that the RCMP will conduct similar negotiations with the other provinces for which it conducts policing services.

Index of the 1994/95 Annual Report Case Summaries

SECTION of ATIA	CASE No.	
2(1)	13-95	**From bad to worse – to worst!** (OIGCSIS) (Purpose - Necessary exemptions - Limited and specific)
3	02-95	**"E"** (vaporating)-mail (IRB) (Record - Machine readable record)
4	07-95	**My diary is my business** (IRB) (Right of access - Records under the control of a government institution)
	10-95	**Check the fine print** (RCM) (Right of access - Records under the control of a government institution)
	17-95	**Are ministers' offices off-limits?** (CRTC) (Right of access - Records under the control of a government institution)
6	01-94	**Tug-o-war over fees** (FAIT) (Request for access to a record - Requirements)
	01-94	**Tug-o-war over fees** (C&I) (Request for access to a record - Requirements)
	11-95	**Deciding if then is now** (ND) (Request for access to record - Sufficient detail - Identify the record)
7	09-95	**What will we do! Whatever will we do!** (HC) (Notice where access requested - Within thirty days after the request is received)
10(2)	06-95	**Not telling!** (CSIS) (Existence of a record - Not required to indicate whether a record exists)
10(3)	18-95	**Value for money** (RC) (Deemed refusal)
11(2)	01-94	**Tug-o-war over fees** (C&I) (Fees - Additional payment)
	01-94	Tug-o-war over fees (FAIT) (Fees - Additional Payment - in excess of five hours - Search - Prepare - Notice - Deposit)
	04-95	**A taxing request** (NA) (Fees - Additional Payment)
16(3)	19-95	**RCMP keeps Newfoundland's secrets** (RCMP) Policing services for municipalities - Shall refuse - Agreed not to disclose)
17	03-95	**Danger in the workplace** (Jus) (Safety of individuals - Could reasonably be expected)
19(1)	05-95	**The art of appraising art** (CCPERB) (Personal information - Financial transactions)
	15-95	**Bank governor retires** (BC)(Personal information - Identifiable individual - (Financial transactions)
	16-95	**A whistleblower** (PWGSC) (Personal information - Identifiable individual)

	19-95	**RCMP keeps Newfoundland's secret** (RCMP) (Personal information - Criminal history - Dead for more than twenty years)
19(2)	05-95	The art of appraising art (CCPERB) (Personal information - Publicly available - Discretionary benefit - Financial nature - Exact nature of the benefit)
	15-95	**Bank governor retires** (BC) (Discretionary benefit - Financial nature - Exact nature of the benefit)
	16-95	**A whistleblower** (PWGSC) (Publicly available - Public interest - Clearly outweighs - Invasion of Privacy)
21(1)(a)	13-95	**From bad to worse – to worst!** (OIGCSIS) (Advice or recommendations)
	14-95	**Are RCMP planes safe?** (RCMP) (Advice or recommendations - May refuse)
20(1)(b)	05-95	**The art of appraising art** (CCPERB) (Financial information - Confidential)
23	12-95	**Secrecy gone mad** (Jus) (Solicitor - client privilege)
25	14-95	**Are RCMP planes safe?** (RCMP) (Severability - Information or other material contained in the record - Can reasonably be severed)
28(4)	08-95	**Tangled webs of red tape** (TC) (Disclosure of record - Forthwith - Review of the decision under section 44)
36	07-95	**My diary is my business** (IRB) (Powers of Information Commissioner in carrying out investigations - Produce such documents and things as the commissioner deems requisite - Any record to which this Act applies - Under the control of a government institution)

Glossary

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

ACOA	Atlantic Canada Opportunities Agency
BC	Bank of Canada
C&I	Citizenship and Immigration Canada
CCPERB	Canadian Cultural Property Export Review Board
CRTC	Canadian Radio-television & Telecommunications Commission
CSIS	Canadian Security Intelligence Service
FAIT	Foreign Affairs and International Trade
HC	Health Canada
IRB	Immigration and Refugee Board
Jus	Justice Canada
NA	National Archives of Canada
ND	National Defence
OIGCSIS	Office of the Insp. General of the Cdn. Security Intelligence Service
PWGSC	Public Works and Government Services Canada
RC	Revenue Canada
RCM	Royal Canadian Mint
RCMP	Royal Canadian Mounted Police

TC	Transport Canada

Investigations and Reviews

In the reporting year, 1,016 complaints were made to the commissioner against government institutions (see Table 1). The five institutions complained against most often are:

Citizenship and Immigration	149
National Defence	114
Revenue Canada	89
Immigration and Refugee Board	54
Transport Canada	49

Gratifying it is to report that the department which came second in last year's top five is no longer even on the list. The Privy Council Office is making laudable, successful efforts to respect the access law's letter and spirit. Noteworthy, too, is that last year's most complained against institution, the Immigration and Refugee Board, fell to the fourth position. Complaints against the board were reduced by half: an exemplary achievement.

The departments of Citizenship and Immigration, National Defence and Revenue Canada respectively, are one, two, and three on this year's top five. Revenue Canada appears for the first time. The number of complaints against Citizenship and Immigration are four times greater than the number received last year by its predecessor department, Employment and Immigration. The number of complaints against National Defence have more than doubled in the year. Revenue Canada received more than twice the number of complaints than were lodged against its two predecessor institutions, Revenue Canada – Taxation and Customs and Excise.

These institutions know that they have serious problems in meeting their access to information obligations. As a result of cooperative efforts between the commissioner's office and Citizenship and Immigration, significant progress towards improvement has already been made. The Information Commissioner will be working with Revenue Canada and National Defence in the coming year to find solutions to their problems.

The good news is that resolutions of complaints were achieved in the vast majority of the cases. Table 2 indicates that 960 complaint investigations were completed; 62.6 per cent were resolved by remedial action satisfactory to the commissioner while 29.3 per cent were considered not substantiated. In eight cases, no resolution was achieved. At the time of this writing, the commissioner has taken five of these cases to Federal Court and sought consent from the requester to do so in two others. In one case, the commissioner concluded that records had been wrongly destroyed and the department has undertaken to take steps to prevent such an occurrence in the future.

Some 35.5 per cent of all completed investigations involved delay complaints. Addressing the problem of delay continues to remain a top priority.

As can be seen from Table 3, the overall turnaround time for complaint investigations has not much improved over last year. While the investigations branch registered a 28 per cent improvement in productivity, this was offset by a 33 per cent increase in number of complaints received. The annual, even semi-annual round of budget cuts is having its effect. A growing backlog of cases is of real

concern.

The commissioner's small cadre of 19 investigators is making a herculean effort to handle more and more cases each year without sacrificing the quality of their investigations. In the end, maintaining a reasonable level of service to the public requires more investigators. However, budget cuts, not increases, form the reality the office faces.

Parliament should be aware that the government has cut the commissioner's budget by an additional five per cent over the years 1994-95 – l996-1997. Since 1991, when the present commissioner took office, his budget has been cut by 10 per cent. During that period, the office experienced a 56 per cent increase in the number of complaints received. Parliament may wish to consider taking on a greater role in controlling the government's ability to withdraw unilaterally resources from an officer of Parliament.

Table 1
STATUS OF COMPLAINTS

	April 1, 1993 to March 31, 1994	April 1, 1994 to March 31, 1995
Pending from previous year	241	274
Opened during the year	766	1,016
Completed during the year	733	960
Pending at year-end	274	330

Table 2

COMPLAINT FINDINGS

April 1, 1994 to March 31, 1995

	FINDING					
Category	Resolved	Not Resolved	Not Substantiated	Discon-tinued	**TOTAL**	%
Refusal to disclose	230	7	180	15	432	45.0
Delay (deemed refusal)	267	-	25	50	342	35.6
Time extension	44	-	24	-	68	7.1
Fees	26	-	20	4	50	5.2
Language	-	-	-	-	-	-
Publications	-	-	-	-	-	-
Miscellaneous	34	1	32	1	68	7.1
TOTAL	601	8	281	70	960	100%
100%	62.6	0.8	29.3	7.3		

Table 3

TURN AROUND TIME (MONTHS)

CATEGORY	92.04.01 - 93.03.31		93.04.01 - 94.03.31		94.04.01 - 95.03.31	
	Months	Cases	Months	Cases	Months	Cases
Refusal to disclose	5.58	376	5.40	378	5.87	432
Delay (deemed refusal)	1.86	135	2.18	221	2.36	342
Time extension	1.55	73	2.54	38	3.22	68
Fees	1.79	35	2.96	41	4.36	50
Language	-	-	3.68	1	-	-
Publications	1.81	1	-	-	-	-
Miscellaneous	2.60	100	3.86	54	4.02	68
Overall	3.87	720	4.03	733	4.22	960

Table 4

COMPLAINT FINDINGS
(by government institution)
April 1, 1994 to March 31, 1995

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Agriculture Canada	9	-	10	1	20
Atlantic Canada Opportunities Agency	4	1	-	-	5
Atlantic Pilotage Authority	1	-	-	-	1
Atomic Energy Control Board	-	-	1	-	1
Bank of Canada	3	-	-	-	3
Canada Council	-	-	1	-	1
Canada Deposit Insurance Corporation	1	-	-	-	1
Canada Mortgage & Housing Corporation	-	-	1	-	1
Canada Ports Corporation	1	-	2	-	3
Canadian Cultural Property Export Review	7	-	-	-	7
Canadian Heritage	8	1	5	1	15
Canadian Human Rights Commission	-	-	2	-	2
Canadian International Trade Tribunal	-	-	-	1	1
Canadian Museum of Nature	2	-	1	-	3
Canadian Radio-television & Telecommunications	-	-	1	-	1
Canadian Security Intelligence Service	4	-	2	-	6
Canadian Space Agency	1	-	-	-	1
Citizenship & Immigration	126	-	13	10	149
Communications	3	-	-	-	3
Correctional Service Canada	18	-	9	-	27
Defence Construction Canada	-	-	1	-	1
Employment and Immigration	2	-	-	1	3
Environment Canada	8	-	4	-	12
Federal Office of Regional Development (Quebec)	2	-	-	-	2
Finance	2	-	3	-	5
Fisheries and Oceans	24	-	5	1	30
Foreign Affairs and International Trade	14	-	10	-	24
Freshwater Fish Marketing Board	1	-	1	-	2
Government Services	2	-	3	-	5

Table 4

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Health Canada	10	-	3	1	14
Health and Welfare	16	-	3	-	19
Human Resources Development Canada	17	-	4	-	21
Immigration and Refugee Board	25	-	29	-	54
Indian Affairs and Northern Development	9	1	10	1	21
Industry Canada	6	-	7	-	13
Justice	14	-	3	4	21
National Archives of Canada	18	-	16	1	35
National Capital Commission	1	-	2	-	3
National Defence	77	-	31	6	114
National Energy Board	2	-	-	-	2
National Parole Board	-	-	2	-	2
Natural Resources Canada	-	-	1	-	1
Natural Sciences & Engineering Research Council of Canada	1	-	-	-	1
Office of the Inspector General of the Canadian Security Intelligence Service	6	-	-	-	6
Office of the Superintendent of Financial Institutions	7	-	-	-	7
Privy Council Office	28	-	10	1	39
Public Service Commission	2	-	-	-	2
Public Works	19	1	8	1	29
Revenue Canada	31	2	16	40	89
Royal Canadian Mint	3	-	3	-	6
Royal Canadian Mounted Police	19	1	18	-	38
RCMP Public Complaints Commission	1	-	1	-	2
Secretary of State	7	-	3	-	10
Security Intelligence Review Committee	1	-	1	-	2
Status of Women Canada	-	-	1	-	1
Solicitor General	2	-	-	-	2
Supply and Services	4	-	4	-	8
Transport Canada	27	1	21	-	49
Transportation Safety Board	1	-	-	-	1
Treasury Board Secretariat	3	-	5	-	8
Veterans Affairs Canada	-	-	4	-	4
Western Economic Diversification	1	-	-	-	1
TOTAL	601	8	281	70	960

Table 5

GEOGRAPHIC DISTRIBUTION OF COMPLAINTS
(by location of complainant)

April 1, 1994 to March 31, 1995

	Rec'd	Closed
Outside Canada	7	11
Newfoundland	13	17
Prince Edward Island	13	6
Nova Scotia	29	30
New Brunswick	10	9
Quebec	264	242
National Capital Region	355	326
Ontario	134	128
Manitoba	22	23
Saskatchewan	19	20
Alberta	47	45
British Columbia	101	101
Yukon	-	-
Northwest Territories	2	2
TOTAL	1016	960

Public Affairs

Spreading the word

During the reporting year, the commissioner's office was without the services of a public information officer. Yet, the commissioner and other officers responded promptly and fully to all requests for information and advice.

The commissioner continues to believe that the best public relations is doing a job well and, in the end, that speaks for itself. The commissioner undertook speaking engagements across Canada, at forums such as Canadian clubs, service clubs, law schools and conferences on information policy issues. News media interviews are a usual part of the commissioner's speaking engagements.

Three new publications were issued in this reporting year to inform Canadians about the origins of their access rights, how they are now working and directions for change. The publications, available free of charge from the commissioner's office are: The *Access to Information Act*: A Critical Review; Information Technology and Open Government and The *Access to Information Act*: 10 Years On. Some 700 have been distributed in response to requests. In addition, a new indexed edition of the *Access to Information Act* was printed and is now also available upon request.

If scarce resources permit, the commissioner intends to undertake more research into issues related to the pricing of information. The results would, of course, be made known to Parliament and the public.

In June of 1994, the Information Commissioner was host to a meeting of the information and privacy commissioners of Quebec, Ontario, Saskatchewan and British Columbia and the federal Privacy Commissioner. This annual rotating meeting offers the commissioners an opportunity to discuss issues of information policy and practice. In 1995, the commissioners will be guests of the Information and Privacy Commissioner of Ontario.

Though their access rights are now almost 12 years old, surprisingly few Canadians realize they have a right to know what government is up to. Fewer still exercise those rights. The vitality of the right to know depends on its vigorous exercise.

Parliament should be aware that the job of informing Canadians about their information rights properly belongs to government. The law's two responsible ministers, the minister of Justice and the president of the Treasury Board, have not made spreading the good news of access rights a priority.

Corporate Management

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

The branch is a frugal operation with only 14 staff and a budget that represents 15 per cent of the overall OIPC budget. Each employee of the branch performs a variety of tasks. While efforts will continue to be made to improve productivity, the branch is close to that precarious line between being lean and malnourished.

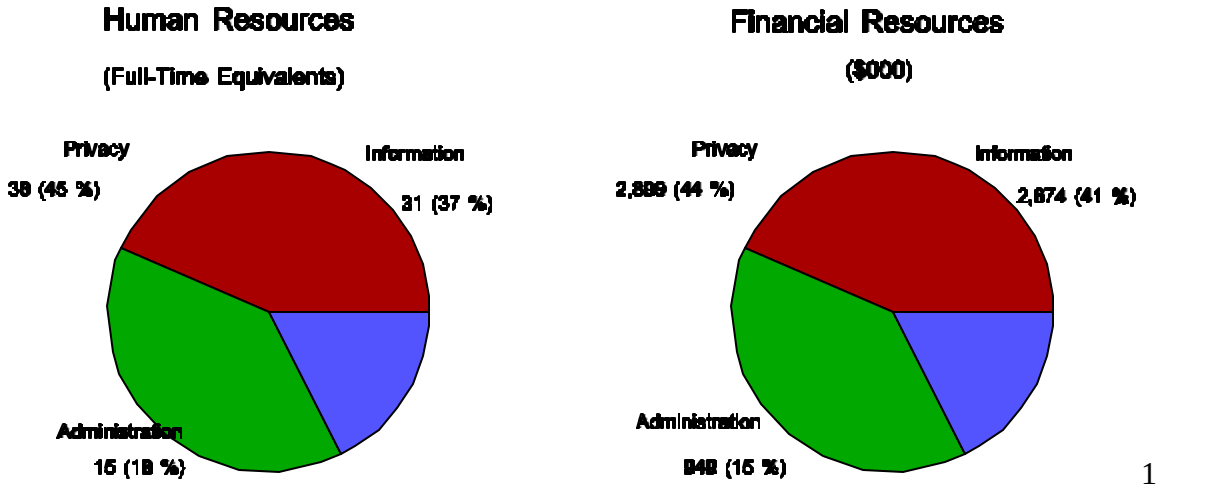
During the coming year, the position of Director General, Corporate Management, now being filled on an acting basis, will be permanently filled after a competitive process.

Resource information

The Offices' combined budget for the 1994-95 fiscal year was $6,696,000, a decrease of $123,000 from 1993-94. Actual expenditures for the 1994-95 period were $6,522,356 of which, personnel costs of $5,300,465 and professional and special services expenditures of $584,559 accounted for more that 90 per cent of all expenditures. The remaining $637,332 covered all other expenditures including postage, telephone, office equipment and supplies.

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

Figure 1: 1994-95 Resources by Organization/Activity
Human Resources



1

Figure 2: Details by Object of Expenditure				
	Information	**Privacy**	**Corporate Management**	**Total**
Salaries	1,820,595	2,252,850	587,020	4,660,465
Employee Benefit Plan Contributions	255,000	299,000	86,000	640,000
Transportation and Communication	58,653	78,470	106,272	243,395
Information	44,182	74,436	2,754	121,372
Professional and Special Services	345,823	134,371	104,365	584,559
Rentals	25,323	589	12,883	38,795
Purchased Repair and Maintenance	21,118	9,559	5,323	36,000
Utilities, Materials And Supplies	25,326	21,195	31,494	78,015
Acquisition of Machinery and Equipment	75,516	27,260	12,906	115,682
Other Payments	2,871	845	357	4,073
Total	2,674,407	2,898,575	949,374	6,522,356

Note: Expenditure Figures do not incorporate final year-end adjustments reflected in the Offices' 1994-95 Public Accounts.