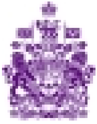

Information Commissioner of Canada

Commissaire à l'information du Canada

Annual Report Information Commissioner 2002-2003

1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003

20 YEARS

1983 - 2003

Annual Report
Information Commissioner
2002-2003

"The future of Canadian democracy depends on being open with the people unless there is some clear reason why openness would endanger our society."

<u>The Myth of Security at Canada's Airports</u>,
Report of the Standing Committee
on National Security and Defence,
January, 2003 at p. 138

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

Subsection 2(1)
Access to Information Act

June 2003

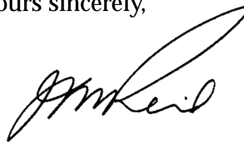
The Honourable Daniel Hays
The Speaker
Senate
Ottawa ON K1A 0A4

Dear Mr. Hays:

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

This report covers the period from April 1, 2002 to March 31, 2003.

Yours sincerely,



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

June 2003

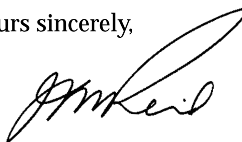
The Honourable Peter Milliken
The Speaker
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Milliken:

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

This report covers the period from April 1, 2002 to March 31, 2003.

Yours sincerely,



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

2002-2003 ANNUAL REPORT

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MANDATE

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

The Act came into force in 1983 and gave Canadians the broad legal right to information recorded in any form and controlled by most federal government institutions.

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

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

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

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

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

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

CHAPTER I
20th ANNIVERSARY YEAR IN REVIEW

Twenty years ago, on July 1, 1983, the *Access to Information Act* came into force in Canada. From that moment, Canadians had a right of access to records held by federal government institutions (subject to limited and specific exemptions) and a right to have refusals to disclose records reviewed, independently of government, by the Information Commissioner and the federal courts. Two decades is not long in the life of a statutory right. Yet, in its short life, the *Access to Information Act*'s ability to overcome barriers to openness, thrown up by a deeply-imbedded governmental culture of secrecy, has been put to test after test. The Act has risen to the challenge; it has shown its strength to overcome barriers of unreasonable delay, fees and application of exemptions. In the face of incidents of records alteration, hiding and destruction, Parliament amended the access law to strengthen its ability to overcome these barriers to access as well. Parliament made it an offence to engage in or counsel such activities, punishable by imprisonment for up to two years, a fine not exceeding $10,000 or both.

Only four major barriers to the full vibrancy of the right of access remained--until this reporting year--unresolved. Three of these intransigent barriers arose from the government-held views that: 1) the Act gives government an unreviewable right and obligation to exclude any information from the right of access which it considers to be a "cabinet confidence"; 2) the Act constrains the public right of access by a broadly-defined zone of privacy for information about public officials; and 3) the Act does not apply to records held in the offices of ministers of the Crown or in the Prime Minister's office. The fourth barrier arises from the crisis in information management in government.

This year, the first two of these remaining barriers to public access were struck down by the Supreme Court of Canada and the Federal Court of Appeal in three unanimous decisions. The Supreme Court of Canada ruled that decisions by government to refuse access, by asserting that records contain cabinet confidences, may be reviewed by courts and by bodies such as the Information Commissioner.

As well, the Federal Court of Appeal ordered the government to narrow the zone of secrecy heretofor afforded to cabinet confidences. The Federal Court of Appeal ordered the Clerk of the Privy Council to begin respecting the will of Parliament (as expressed in the *Access to Information Act*) by disclosing the records or portions of records which contain the background, problem analysis and policy options presented to Cabinet for decision-making purposes.

Also, this year, the Supreme Court of Canada ruled that the sphere of privacy accorded to public officials is significantly smaller than that previously asserted by government. It reminded governments that the value of accountability has to be taken into

account in defining the proper zone of privacy for public officials.

Indeed, in all these decisions, our senior courts emphasized that the purpose of the *Access to Information Act* is to enhance the accountability of government and constrain the ability of government to assert secrecy to interfere with public inquiry.

These three decisions (which will be discussed in more detail later) constitute profoundly important 20th anniversary gifts of recognition to the *Access to Information Act.* They are the highlight of this reporting year.

However, it is important to note that there remains unresolved the barrier of secrecy with respect to records held in the departmental offices of ministers and the Prime Minister's office. This issue remains under investigation by the Information Commissioner and it is the subject of applications by the government before the Federal Court Trial Division. As well, there remains unresolved the serious shortcomings in information management in government. This matter is more fully dealt with in Chapter II at pages 29 to 44.

In the short life of this law, it has proved its ability to overcome the methods of resistance to openness invented by governments. In a word, hindsight shows that Parliament was remarkably prescient when it adopted this law--it not only articulated with care the limited and specific circumstances in which secrecy is authorized, it also expressed clearly the purposes of the Act in order to guide ministers, information commissioners and courts in assessing whether or not specific records meet the Act's stringent tests for asserting secrecy.

Yet, there remains a deep nostalgia in the bureaucracy for the days when officials controlled information and the spin of the message. Officials have not given up the fight to weaken the law, but they have come to realize that the only effective strategy left to them is to rewrite the law. Such a strategy is in train and it prompted the Information Commissioner, this year, to submit a Special Report to Parliament waving a flag of concern and caution about the government's proposals to rewrite the *Access to Information Act.* This matter is discussed at pages 26 to 28.

A. JUDICIAL GUIDANCE

1) The Assertion of Cabinet Confidence to Justify Secrecy

In the final days of committee hearings, before the *Access to Information Act* was put to a final vote in Parliament, the then Liberal Government of Pierre E. Trudeau made two changes to the Access to Information Bill. First, the government withdrew the provision of the Bill which created a reviewable exemption from the right of access for cabinet confidences. Instead, the government included in the Bill a section providing that "this Act does not apply to" cabinet confidences. Second, the government changed the sections of the Act governing the authority of the Information Commissioner and the courts to examine records. These changes removed the authority of the courts and the Information Commissioner to examine cabinet confidences in the course of their reviews of denials of access. The new provisions limited these review bodies

to examining only records "to which this Act applies".

At the same time, the government amended the *Canada Evidence Act* to provide a mechanism by which the government could assert the cabinet confidence privilege before any court or body having the power to compel the production of records. The mechanism set out in the *Canada Evidence Act* was a certificate issued by a minister of the Crown or the Clerk of the Privy Council which certificate, once issued, would prevent the court or body from examining or compelling production of the information covered by the certificate.

With the passage in 1983 of the Bills containing those changes, the government took the position that it is under an obligation to assert the cabinet confidence privilege in every case where it arose. As well, the government took the position that a decision by a minister, or Clerk of the Privy Council, to assert the cabinet confidence privilege, is unreviewable by any court or by the Information Commissioner. Since 1983, it has been the position of governments that there is no legal choice but to take the word of the asserting official, that withheld information qualifies for the cabinet confidence privilege. It must be acknowledged that some jurisprudence supported the government's broad interpretation of its unrestricted authority and responsibility to assert the cabinet confidence privilege.

Babcock Case

The appropriateness of the government's view came before the Supreme Court of Canada in this reporting year in a case involving litigation by a group of Crown lawyers against the government, alleging that lawyers in Vancouver should be paid at the same rate as lawyers in Toronto. In that case, during the pre-court stages, the government had disclosed records to the Vancouver lawyers. However, when the matter reached court, the government issued a certificate, pursuant to section 39 of the *Canada Evidence Act*, asserting that previously disclosed records were cabinet confidences and could not, thus, be used by the other side or examined by the court. When the Vancouver lawyers objected to the validity of the certificate in these circumstances, the government took its traditional position that the decision to assert cabinet confidence privilege was obligatory and unreviewable by the courts. The Information Commissioner intervened in the case because section 69 of the *Access to Information Act* parallels section 39 of the *Canada Evidence Act*. It was the Commissioner's position that governments are under no mandatory legal obligation to assert the cabinet confidence privilege.

In its decision, the Supreme Court of Canada agreed with the Information Commissioner's view and decided that the courts, as well as other bodies with authority to compel the production of records, have authority to review the legality of the assertion of the privilege. The only limit the Supreme Court of Canada accepted was that, in reviewing the government decision to assert the cabinet confidence privilege, the reviewing court or body may not examine the records at issue. The court also decided that there are limits on the authority of government to assert the cabinet confidence privilege.

First, Chief Justice McLachlin, for the court, agreed that "cabinet

confidentiality is essential to good government". However, she went on to list other, equally important, principles in our society as being: the right to pursue justice in the courts, the rule of law, accountability of the executive and the principle that official actions must flow from statutory authority clearly granted and properly exercised.

According to the Supreme Court, the mechanism provided by Parliament for the responsible exercise of the power to claim cabinet confidentiality is the certification process set out in section 39 of the *Canada Evidence Act*. In the court's view, there are four requirements for a valid certification:

> "… the Clerk must answer two questions before certifying information: first, is it a cabinet confidence within the meaning of sections 39(1) and (2); and second, is it information which the government should protect taking into account the competing interests in disclosure and retaining confidentiality? If, and only if, the Clerk or minister answers these two questions positively and certifies the information, do the protections of section 39(1) come into play. More particularly, the provision that 'disclosure of the information shall be refused without examining or hearing of the information by the court, person or body' is only triggered when there is a valid certification". (paragraph 22, Babcock)

> "A third requirement arises from the general principle applicable to all government acts, namely, that the power exercised must flow from the statute and must be issued for the bona fide purpose of protecting cabinet confidences in the broader public interest. The function of the Clerk under the Act is to protect cabinet confidences, and this alone. It is not to thwart public inquiry nor is it to gain tactical advantage in litigation." (paragraph 25, Babcock)

> "A fourth requirement for valid certification flows from the fact that section 39 applies to disclosure of the documents. Where a document has already been disclosed, section 39 no longer applies." (paragraph 26, Babcock)

The court also elaborated on what must be disclosed by the Clerk or minister to demonstrate that the first requirement has been met. In this regard, Chief Justice McLachlin said:

> "… the first element of the Clerk's decision requires that her certificate bring the information within the ambit of the Act. This means that the Clerk or minister must provide a description of the information sufficient to establish on its face that the information is a cabinet confidence and that it falls within the categories of section 39(2) or an analogous category…The kind of description required for claims of solicitor-client privilege under the civil rules of court will generally suffice. The date, title, author, and recipient of the document containing the information should normally be disclosed. If confidentiality concerns prevent disclosure of any of these preliminary indicia of identification, then the onus falls on the government to establish this, should a challenge ensue." (paragraph 28, Babcock)

The Supreme Court, thus, has made it clear that the validity of a section 39 certificate may be challenged on the basis that the four requirements, set out above, were not respected. These four requirements involve matters of application and interpretation of law and matters of exercise of discretion. According to the Supreme Court:

> "The party challenging the decision may present evidence of improper motive in the issue of the certificate…, or otherwise present evidence to support the claim of improper issuance…" (paragraph 39, Babcock)

Ethyl Canada Case

The first application of the Babcock decision to a case under the *Access to Information Act* came in the case of *Canada (Information Commissioner)* v. *Canada (Minister of the Environment)*. By way of background, the case began with an access request by Ethyl Canada to Environment Canada for records relating to the government's decision, in 1995, to introduce legislation banning the inter-provincial trade and import of a gasoline additive known as MMT. Ethyl Canada requested access to:

> "Discussion papers, the purpose of which is to present background explanations, analysis of problems or policy options to the Queen's Privy Council for Canada for consideration by the Queen's Privy Council for Canada in making decisions with respect to Methylcyclopentadicmyl Manganese Tricarbonyl (MMT)".

The wording of this request was significant because it used the precise words of a provision of the *Access to Information Act* which limits the ability of government to assert the cabinet confidence privilege. Once cabinet decisions are made public, paragraph 69(3)(b) of the Act provides that "discussion papers, the purpose of which is to present background explanations, analysis of problems or policy options to (Cabinet)…" are no longer excluded from the right of access.

Despite the wording of the request, and the specific wording of the access law, the government refused to disclose the information. It argued that "discussion papers" had been abandoned in 1984 as a vehicle for presenting background, analysis and options to Cabinet. The Clerk of the Privy Council certified that all other records containing such information with respect to MMT constitute cabinet confidences.

The Information Commissioner, after an investigation into the history of the cabinet papers system and why discussion papers were abandoned as soon as the access law came into force, concluded that the Clerk of the Privy Council had no lawful authority to refuse disclosure of background, analysis and options information with respect to the decision to ban MMT. The government disagreed and the matter went before the Federal Court, Trial Division. The court agreed with the Information Commissioner and ordered the Clerk of the Privy Council to disclose the information. The government appealed and, this year, the Federal Court of Appeal dismissed the government's appeal.

First, Justice Noel, for the Court of Appeal, dismissed the government's contention that courts may not review decisions by government, under the *Access to Information Act* and *Canada Evidence Act*, to assert cabinet confidence. The court stated: "The judgement in Babcock makes it clear that the courts can review decisions which 'do not flow from statutory authority clearly granted and properly exercised' and may consider 'surrounding evidence' to determine whether statutory power has been properly exercised". (paragraph 20 – Ethyl Canada case).

Further, the court concluded that the "surrounding evidence", uncovered during the Information

Commissioner's investigation, supported the view that "discussion papers" could be found elsewhere in the cabinet papers system either incorporated into, or appended to, other records such as memoranda to Cabinet or briefs to ministers.

Accordingly, the Court of Appeal ordered the Clerk of the Privy Council to review the withheld records to determine:

> "a) whether there exists within or appended to the documents a corpus of words the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions, that can be reasonably severed from the documents pursuant to section 25 of the Access Act;
>
> b) if such severable corpus of words is found to exist by the Clerk of the Privy Council, it is hereby ordered that it be severed and released to the applicant subject to any exemption which may be claimed by the head of the government institution."
> (paragraph 27 – Ethyl Canada)

Cabinet Secrecy for the Future

The decisions of the Supreme Court of Canada in Babcock and of the Federal Court of Appeal in Ethyl, will be enormously important catalysts for reducing the zone of cabinet secrecy. In future, for example, it is to be hoped that, after cabinet decisions are made public, a great deal of related information will be disclosed, such as: the record of cabinet decision, references to the decision and its content in other records and portions of cabinet records containing background explanations, analysis of problems and policy options. From now on, governments must exercise their discretion to invoke the cabinet confidence privilege with bona fides and in a manner designed to serve the public interest and promote accountability.

However, it may take some time--and some nudging by the Information Commissioner and the courts--before governments bring their cabinet confidentiality practices into compliance with the law and the judicial direction given this year. Examples of government's slowness to face up to the new post-Babcock reality are discussed at pages 21 to 25.

2) The Zone of Privacy for Public Officials

The *Access to Information Act* and the *Privacy Act* are companion pieces of legislation. They were passed by Parliament at the same time, they make reference to each other in their provisions and the offices of the Information Commissioner and Privacy Commissioner constitute a single department of government. Both laws contain provisions requiring that information about identifiable individuals, known as "personal information", be kept confidential and both contain provisions permitting disclosure of personal information.

It is rare that the public's right to know comes into real conflict with individual privacy rights. Occasionally, the conflict surfaces with respect to information about accused persons, inmates seeking parole, or escaped offenders. In such cases there may be public safety and accountability considerations outweighing the right to privacy. Routinely, however, conflicts between openness and

privacy arise with respect to information about public officials.

The definition of what constitutes "personal information" is contained in the *Privacy Act* and, in that definition, Parliament sought to make it clear that certain information about identifiable individuals who are public officials does not qualify for privacy protection. Paragraph 3(j) of the *Privacy Act* states that the privacy exemption in the *Access to Information Act* (i.e. section 19) may not be invoked to withhold:

> "Information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual."

Governments have, over the years, interpreted this provision narrowly, in an effort to give public officials as much privacy as possible. Members of the public have objected to the resulting interference with the value of accountability through transparency. Finding the right balance between the privacy of public officials and the obligation on government to be accountable to the public has been so difficult that the issue has come before the Supreme Court of Canada twice in the short life of these two Acts, most recently in this reporting year.

In both cases, the Supreme Court of Canada ordered the government to disclose the information about public officials which had been withheld on privacy grounds. In the first case, (*Dagg* v. *Canada (Minister of Finance)),* the information at issue was the names appearing on the Finance Department's log of employees entering the headquarters outside normal working hours. In the second case, decided in this reporting year, *Canada (Information Commissioner)* v. *Canada (Commissioner of the Royal Canadian Mounted Police*), the information at issue was a list of previous postings for several RCMP officers. Here are the details of this year's Supreme Court decision.

RCMP Case

This story begins with an encounter between a citizen and five RCMP officers. The citizen felt aggrieved and asked the RCMP whether or not there had been public complaints filed against these officers. The RCMP responded that any such complaints, if they existed, would be filed in the detachment where the officers serve or served. However, the force refused to disclose to the citizen a list of the posting of these officers in order to protect their privacy. The citizen complained to the Information Commissioner.

During the course of the Information Commissioner's investigation, the Commissioner of the RCMP decided that he would disclose the current postings of four officers and the last posting of one of the officers who had retired. Anything more would remain secret. The Information Commissioner concluded that the withheld information relates to the positions or functions of the RCMP officers and, hence, could not be withheld on privacy grounds.

The dispute went, first, to the Trial Division of the Federal Court. The Commissioner of the RCMP argued that paragraph 3(j) of the *Privacy Act* should be interpreted narrowly. In his view, only information relating to the "current" position or functions of a public official should escape privacy protection. Justice Cullen agreed. He held that, if section 3(j) were given a retrospective application: "there

would be little left to contemplate in private and little meaning to the protection of employment history". (paragraph 24)

The Information Commissioner appealed to the Appeal Division of the Federal Court. Justice Létourneau, for the court, disagreed with the Trial Judge's view that section 3(j) could not have retrospective application. However, he was concerned about disclosing all of the past postings. Justice Létourneau, thus, fashioned a judicial compromise. He concluded:

> "… a request about a named individual's position, especially in respect of the past positions held, has to be specific as to time, scope and place. It cannot be a 'fishing expedition' about all or numerous positions occupied by an individual--over the span of his [or her] employment". Consequently, Justice Létourneau, concluded that the access request was for employment histories and not for information about a current or specific past position and, hence, was properly denied.

The Information Commissioner then requested, and was granted, leave to appeal to the Supreme Court of Canada.

The unanimous decision of the Supreme Court of Canada was written by Justice Gonthier who disagreed with the Trial Court's effort to give section 3(j) of the *Privacy Act* a narrow interpretation by limiting its application to current positions. He expressed the view that such a narrow interpretation failed to take account of the obligation in a democracy for public officials to be accountable to the public. In the words of Justice Gonthier:

> "The purpose of section 3(j) is to ensure that the state and its agents are held accountable to the general public. Given the lack of any indication that Parliament intended to incorporate such a limitation into the legislation, the fact that a public servant has been promoted or has retired should not affect the extent to which she or he is held accountable for past conduct." (paragraph 29)

Similarly, the Supreme Court was of the view that the compromise fashioned by the Court of Appeal was "unnecessarily restrictive and without sufficient legal foundation". (paragraph 32) Under the compromise fashioned by the Court of Appeal, too much subjective judgement would be required in order to answer access requests for information about public officials. For example, if the government felt the request was a "fishing expedition" about an official's employment history, the government could refuse disclosure. The Supreme Court rejected this approach saying:

> "The Court of Appeal's approach fails to recognize that it is the nature of the information itself that is relevant--not the purpose or nature of the request." (paragraph 32)

Justice Gonthier again emphasized the accountability purpose for restricting the zone of privacy for public officials, and he emphasized that it is not the proper role of government to decide which requests do or do not serve an accountability purpose. He said:

> "… it is not open to the RCMP Commissioner to refuse disclosure on the grounds that disclosing the information, in this instance, will not promote accountability; the Access Act makes this information equally available to each member of the public because it is thought that the

"availability of such information, as a general matter, is necessary to ensure the accountability of the state and to promote the capacity of the citizenry to participate in decision-making processes." (paragraph 32)

Being mindful that this issue of section 3(j) of the *Privacy Act* had been considered once before by the Supreme Court before in Dagg, Justice Gonthier took pains to offer specific guidance as to what types of information "relate to the position or functions" and what types do not. First, he rejected the test suggested by the Information Commissioner which proposed that objective and factual information relating to positions or functions be disclosed while subjective and evaluative information relating to positions or functions should be protected. Justice Gonthier made it clear that any information "that relates to" the positions or functions of a public official should be released. Later, Justice Gonthier said that information falls within section 3(j) if it would be "relevant to understanding the functions they perform" or "shed light on the general attributes of the positions and functions..." (paragraph 39)

By way of example, Justice Gonthier quoted from Justice LaForest's reasons in Dagg as follows:

> "Generally speaking, information relating to the position, function or responsibilities of an individual will consist of the kind of information disclosed in a job description. It will comprise the terms and conditions associated with a particular position, including such information as qualifications, duties, responsibilities, hours of work and salary range."

By contrast, Justice Gonthier referred to the decision of Justice Jerome in *Information Commissioner* v. *Solicitor General* [1988] 3 F.C. S51 (T.D.) as offering examples of information about public officials which does not fall within section 3(j) of the *Privacy Act*, as follows:

> "...certain opinions expressed about the training, personality, experience or competence of individual employees... Such information is not a direct function of the individual's position--rather, it concerns the competence and characteristics of the employee." (paragraph 38, RCMP)

Applying these principles, the Supreme Court ordered the Commissioner of the RCMP to disclose the list of past postings of the five RCMP officers.

B. Privacy vs. Openness - Census Records

During this reporting year, another conflict between the values of privacy and openness came to a head. Statistics Canada has steadfastly resisted allowing genealogical and historical researchers to have access to individual census returns--even very old census returns. The Chief Statistician's professional concern to protect the confidentiality of individual returns was always based on a desire to maintain the public's trust and, hence, ensure public cooperation with the census.

On the other hand, that strong refusal to disclose historical census returns ran counter to the less rigid confidentiality régime for census records set out in the *Privacy Act* Regulations.

The *Privacy Act* Regulations (section 6) provide that historical census returns transferred to the National Archives become accessible for research

purposes after 92 years have elapsed from the date of the census. Many researchers became frustrated about the Chief Statistician's refusal to transfer census records to the National Archives and, hence, their inability to take advantage of the access régime set out in the *Privacy Act* Regulations.

In the face of this impasse, several researchers made requests to Statistics Canada, under the *Access to Information Act*, seeking access to the individual returns for the 1906 census. Upon receiving Statistics Canada's refusal, some 29 complaints were made to the Information Commissioner. In parallel, a researcher launched an action in the Federal Court challenging the Chief Statistician's refusal to transfer the 1906 census records to the National Archives.

The Information Commissioner completed his investigation and determined that Statistics Canada was under a legal obligation to transfer the 1906 census records to the National Archives. He also concluded that the failure to respect the legal obligation could not be asserted as a valid basis for refusing access to these records. Consequently, the Information Commissioner recommended that the 1906 census returns be disclosed to the requesting researchers in the same terms as if they had been transferred to the Archives.

The Chief Statistician refused to comply with this recommendation and, with the consent of the requesters, the Information Commissioner prepared to file applications for review in the Federal Court seeking orders compelling disclosure. On the day the Federal Court applications were to be filed (literally, the originating documents were in the court's registry), the minister responsible for Statistics Canada (the Minister of Industry) announced that the 1906 census records had been transferred to the National Archives and were available, online, to the public.

The minister also announced that he would introduce a Bill in Parliament with amendments to the *Statistics Act* designed to establish an access régime for post-1906 census records to the present, and for the future. This government initiative resulted from the government's view, on the one hand, that the census data base is a national resource from which researchers should not be barred. On the other hand, the government was also of the view that the existing 92-year rule in the *Privacy Act* Regulations is not sufficiently sensitive to individual privacy to engender the trust of Canadians necessary to full cooperation with future census surveys.

The new compromise régime was introduced this year in the Senate in the form of Bill S-13. Here is the proposed régime:

For any census between 1910 and present:

1) Public access will be permitted after 112 years.

2) Researchers will be permitted access after 92 years (subject to an undertaking not to disclose some personal information until 112 years have elapsed).

For any census in the future:

1) Public access will be permitted after 92 years but only if the person completing the return has consented to such access.

2) Secrecy of the return will be maintained forever if consent is withheld.

As might be expected, this compromise is highly controversial--especially with respect to the terms of access to future census records. It is the Information Commissioner's view that the compromise scheme contained in Bill S-13 is seriously flawed.

Under existing law, 1911 and 1916 census records are accessible by anyone--in accordance with section 6 of the *Privacy Act* Regulations--after 92 years from the date of the census. There is no reason to restrict that access now nor to treat these census records any differently from the 1906 census records. There is no evidence of any promise having been made to Canadians that there would be any longer period of secrecy for these records.

For the future, there is no justification for allowing Canadians to throw a blanket of secrecy over census information forever, merely by withholding consent for disclosure after 92 years. This expansion of the zone of secrecy would be unprecedented. As attractive as the notion of up-front consent may be, other personal information held by government--even the most sensitive, such as medical, psychiatric, parole or criminal records--may be kept secret only until 20 years have elapsed after an individual's death. Moreover, the consent provision will result in a severely degraded data base for future researchers. When adopted in Australia, almost 50 percent of respondents refused to give consent for future disclosure.

This consent proposal is a recipe for the serious degradation of the census database as a national research resource. It must be emphasized that there is no evidence indicating that a régime of access to census records after 92 years would jeopardize in any way voluntary participation rates in any future census. The British permit full access after 100 years, the Americans after 72 years; neither jurisdiction has participation rate problems as a result.

Consequently, the Information Commissioner has urged Parliament to drop the consent provision. If, as proposed in Bill S-13, 112 years represents an appropriate period after which the law should deem that privacy interests cease in past census records, then it should also apply for the future. Such a time period is consistent with the *Privacy Act*'s provision that privacy rights survive only until 20 years after the death of an individual.

C. Thorny Cases (Cabinet Confidences)

The strong guidance provided by the Supreme Court in Babcock has direct implications for access to information requesters and for the Information Commissioner during complaint investigations. Five groups of complaints had been set aside, pending the judgements in Babcock and Ethyl. They are:

1) complaints where inadequate information was provided to the commissioner to establish on its face that the withheld information is a cabinet confidence;

2) complaints where the severance requirements of the Access Act (section 25) may not have been properly applied to disclose background explanations, problem

analysis and policy options presented to Cabinet for making decisions (information subject to the right of access by paragraph 69(3)(b) per Ethyl Canada);

3) cases where the content of the withheld records may have already been made public;

4) cases where there may not have been an exercise of discretion, as required by Babcock concerning whether the need for cabinet secrecy outweighs the public interest in legitimate public inquiry; and

5) cases where the provisions of section 69 may have been interpreted in an overly broad fashion to withhold information which does not reveal the deliberations of Cabinet, such as:

    1) the fact that one minister wrote to another on a topic;

    2) the fact that one minister met another minister or the Prime Minister on a certain day, time and place; and

    3) the fact that Cabinet met on a certain day, time and place.

Some progress has been made in addressing these five problem groups. With respect to the first group, the Privy Council Office has offered a six-month trial during which it would provide to the Information Commissioner the same descriptive details about confidences withheld pursuant to section 69 of the *Access to Information Act* which Babcock requires be disclosed in a certificate pursuant to section 39 of the *Canada Evidence Act.* With respect to group 2, the government has decided not to appeal the Ethyl Canada decision and, hence, will proceed to sever and disclose the records or portions of records which have the purpose of presenting to Cabinet background explanations, analysis of problems and policy options.

With respect to groups 3-5, discussions are being held between the Office of the Information Commissioner and the Privy Council Office. The difficulty at the heart of these discussions is how to develop an efficient section 69 review and advice process which respects the Babcock requirements (especially the proper exercise of discretion) without the necessity for the Information Commissioner to use his order powers to trigger the formal certification process under the *Canada Evidence Act.*

The challenges to changing long-standing practices and mind-sets, with respect to cabinet secrecy, should not be underestimated. The revolution in thinking about cabinet secrecy occasioned by Babcock and Ethyl will change not only the types of information available to the public but, also, the information which public officials may provide to parliamentary committees concerning the details of government's decisions, actions and expenditures.

Catch 22 - The Information Commissioner

The Information Commissioner found himself, this year, in the midst of a struggle between a parliamentary committee and the government concerning the types of information the Information Commissioner should keep secret about his office's budget. That struggle illustrates how “bizarre” has become the reach of cabinet secrecy. Here are the details.

For the first time in the almost 20-year history of the Office of the Information Commissioner, it was necessary for him to ask Treasury Board Ministers to approve additional monies to avoid going over budget for fiscal year 2002-2003. Ministers decided to give additional funds to the Information Commissioner in the amount of $311,000. As is required, the government then tabled Supplementary Estimates in Parliament seeking approval to expend the additional funds awarded to the Information Commissioner (and to many other government institutions). Review of the portion of the Supplementary Estimates relating to the Office of the Information Commissioner was assigned to the Standing Committee on Government Operations and Estimates. The information available to the Committee--as set out in the Supplementary Estimates--was the following:

Objects of Expenditure

Operating

Personnel	$ 60,000
Professional and Special Services	$251,000
Total	$311,000

As might be expected, the Information Commissioner's office was called before the committee to give explanatory details. In preparation (for a first appearance of this kind), officials of Treasury Board were asked if the expenditure details contained in the Treasury Board decision--but not in the Supplementary Estimates--could be shared with the committee. The Information Commissioner was anxious to make full disclosure.

To his great surprise, Treasury Board, in consultation with the Privy Council Office, said "NO". Here are the exact words used: "Both TB submissions and decision letters are considered cabinet confidences, and must be treated as such (i.e. not revealed in any way)…The information has not been made public, so it is still a confidence which must not be revealed."

When the Deputy Information Commissioner appeared before the committee, he explained the dilemma in which the office found itself. He made it clear that the Information Commissioner wished to explain the details of the authorized expenditures and the terms under which the additional funds were approved by Treasury Board Ministers. However, he also explained that, in the absence of a committee order to disclose the information, the commissioner was not in a position to substitute his judgement for that of the government as to whether or not the details in the Treasury Board decision qualify for the cabinet confidence privilege.

The committee understood the difficult position in which the commissioner found himself, but was adamant that the information be provided. As a result, the committee decided to write to the Information Commissioner requiring him "to provide to the committee any and all information required by the committee to justify the new appropriation in the Supplementary Estimates (B) in the amount of $311,000". Treasury Board and Privy Council Office were given notice of the committee's order and of the date and time when the commissioner was required to appear to respond.

At the appointed hour, the Deputy Information Commissioner appeared

for the second time. No official from the Privy Council Office or the Treasury Board appeared to assert the cabinet confidence objection to disclosure. Consequently, the Deputy Commissioner provided to the committee the detailed breakdown of the $311,000 which had been authorized by Treasury Board Ministers. He also informed the Committee that Treasury Board Ministers had placed $126,000 of the total in a “frozen allotment”, which means that it would be claimed back from the commissioner's 2003-2004 budget.

It seems obvious to the Information Commissioner that an interpretation of the cabinet confidence privilege, which impedes the constitutional role of Parliament to review government expenditures, is overly broad and inappropriate. Moreover, such an interpretation appears inconsistent with the Supreme Court's guidance in Babcock which cautions against the use of cabinet secrecy to thwart the public interest in legitimate public inquiry. Surely, in a democracy, there is no form of inquiry with more legitimacy than that performed by elected representatives into expenditures which government is asking them to approve.

Catch 22 - the Auditor General

The Auditor General, this year, also found herself in a secrecy “Catch-22” caused by the government's overly broad application of the cabinet confidence privilege. During hearings by the Public Accounts Committee into the Auditor General's December 2002 Report on the costs of the Canadian Firearms Program (CFP), a dispute arose between the Auditor General and the Deputy Minister of Justice. The Auditor General informed the Committee that the CFP had been designated by Treasury Board as a “major Crown project”--a designation which should have entailed more rigorous controls. The Deputy Minister of Justice, on the other hand, informed the Public Accounts Committee that he was unaware that the CFP had been so designated. In the face of this difference of view, the Committee asked the Auditor General for additional documentation supporting her view.

It transpired that the records on which the Auditor General based her view were three submissions to Treasury Board by Justice Canada and the three decisions taken by Treasury Board Ministers in response thereto. However, the Auditor General could not provide these records to the Public Accounts Committee because the government asserted that they were cabinet confidences. The Auditor General, on February 26, 2003, wrote to the Public Accounts Committee as follows:

> “Points 1 to 3 in the attachment refer to information in submissions to the Treasury Board by the Department of Justice and subsequent decisions of the Treasury Board on the Canadian Firearms Program. It is our understanding that the source documents are considered by the government to be confidences of the Queen's Privy Council. Neither my office nor departments may release these documents. However, I have paraphrased the information in them relating to the issue of whether the Canadian Firearms Program was a major Crown project. Your committee may wish to consider asking the government to release the source documents if it wants to review the exact wording.”

The very same issue (was CFP a major Crown project) was the subject of a question of privilege in the House of Commons alleging that the President of Treasury Board had misled the House by asserting that the CFP was not a major Crown project. In her defence, the Minister chose not to disclose the Treasury Board submissions and decisions referred to by the Auditor General. Rather, she asserted that no records could be found confirming that Treasury Board Ministers had designated the CFP as a major Crown project. There being no records available to the Speaker contradicting the minister's assertion, he accepted her version of facts and dismissed the allegation that she had misled the House.

What legitimate governmental or public interest purpose could possibly be served by the government's insistence that the resource requests and approvals for the CFP be kept secret? Does accountability have much meaning in a system where bureaucrats and ministers may invoke cabinet secrecy to refuse to provide Parliament and the public with documentary support for their assertions and assurances? Would this incidence of secrecy pass the “smell test” described by the Supreme Court in Babcock?

D. Anti-terrorism and Secrecy

Since the terrorist attacks in the United States on September 11, 2001, the Canadian government has taken a number of initiatives designed to restrict public access to information and restrict the ability of the Information Commissioner to independently review government refusals to disclose information. In last year's report, Parliament's attention was drawn to the fact that the *Antiterrorism Act* (introduced as Bill C-36) gave the Minister of Justice the authority to issue a certificate which would not only cloak information in secrecy, but also terminate any ongoing investigation by the Information Commissioner related to such information. (See pages 15-20, 2001-2002 Annual Report.)

As well, the Privy Council Office, since the September 11th tragedy, insisted that it be involved in the review of all access to information requests concerning post-9-11 matters.

It can be reported that, in this reporting year, no secrecy certificates have been issued under the antiterrorism legislation to terminate access investigations. As well, PCO has ceased requiring departments to seek its review of all requests concerning antiterrorism/security matters. That is the good news!

The bad news is that Citizenship and Immigration Canada has asked Cabinet to give it a greater ability to cloak information in secrecy by designating its enforcement and intelligence branches as an “investigative body” under the *Access to Information Act*. Only investigative bodies may avail themselves of the exemption set out in paragraph 16(1)(a) of the Act, which authorizes such bodies to keep their records secret for twenty years, without the necessity of demonstrating that an injury to law enforcement or investigations could result from disclosure.

In the 20 years since the access law has been in force, this is the first new application for investigative body status. The Information Commissioner

was given an opportunity to comment on the application and he recommended that the application be denied. The text of his letter of recommendation to Justice Canada is appended to this report at pages 129 to 130 (Appendix A).

Canadians continue to complain about excessive secrecy on the part of government institutions which play a role in ensuring public safety. The most high profile example this year involves the refusal of Transport Canada to disclose information about the results of their tests of airport baggage and passenger screening. The Information Commissioner is investigating a complaint against a refusal to disclose even the results of past tests which have been disclosed in response to previous requests. This high level of caution was also of concern, this year, to members of the Standing Senate Committee on National Security and Defence which undertook an examination of security at Canadian airports.

In January of 2003, the Senate Committee issued a report entitled: *The Myth of Security at Canada's Airports.* Here is what that report has to say about the government's refusal to disclose security-related information:

> "The Committee recognizes the need to balance the public's right to know against the interests of national security. But unreasonable secrecy acts against national security. It shields incompetence and inaction, at a time that competence and action are both badly needed. The *Parliament of Canada Act* designates Parliament as the primary agent in providing Canadians with good, balanced government. The Committee sees itself as helping to perform this role on behalf of all Canadians, and considered the resistance of some people who chose to hide behind a false wall to be most inappropriate." (p. 13).

The *Access to Information Act* was intended to move us beyond a form of government accountability based solely on trusting the word and good faith of public officials. While trust in our public officials is important, and usually deserved, the Access Act allows us to verify that our trust is well-placed. This important role of openness in our society is not given adequate weight by our public officials who are involved in security-related work.

E. Reform of the *Access to Information Act*

An important event in this reporting year was the publication in June 2002, of the report of the government's Access to Information Review Task Force, entitled: *Access to Information: Making it Work for Canadians.* Based on almost two years of work by a group of public servants, the report makes extensive recommendations for changes to the *Access to Information Act* and for administrative changes designed to make the overall access régime more efficient and effective.

The Information Commissioner responded to the Task Force Report in a special report to Parliament tabled in September 2002. The special report expresses grave concern about the "insider" perspective of the Task Force and the resulting, government-friendly, proposals for "reform". To use the words of the Information Commissioner's Special Report:

"By any reasonable measure, the Task Force review 'process' was entirely inadequate for determining how to strengthen the right of access. As a result, there is a great irony in the title which the Task Force gave to its report: *'Making it Work for Canadians'*. By design of the process, and (as we shall see) from an assessment of its content, this set of reform proposals might, more aptly, be titled: 'Making it (Less) Work for Government Officials'….

Every non-insider review of the *Access to Information Act* over the past 20 years has come to the same conclusion: narrow the scope of exemptions, broaden the coverage to include new records and institutions, make the system speedier, reduce fee barriers, strengthen the powers of oversight and make government more accountable for its obligations under the Act. The Task Force recommendations do not measure up to these expectations."

No effort will be made in this annual report to repeat, or even summarize, the content of this year's Special Report. To this point, the government has not responded to the Task Force recommendations. Many of its administrative proposals--better training, more resources, improved collection of evaluative statistics--require no legislative change and should be proceeded with. However, since the recommendations for legislative change do not reflect a broad range of perspectives drawn from the relevant stakeholders, they are an unacceptable basis for draft legislation. For this reason, the Information Commissioner urged the Minister of Justice and government to engage a more open process of review before introducing an access reform Bill. Here is the commissioner's proposal:

"The right of access is one of those rights which, by design, is uncomfortable for governments to live with. This is the type of legislation which justifies giving parliamentarians and the public more freedom to influence the shape of amendments than is possible once a government Bill has been tabled. It is to be hoped that the Minister of Justice and the government will support a public review of the Task Force proposals, by a Parliamentary Committee, prior to introducing proposed amendments in the form of a Bill". (Special Report, p. 33)

In January 2003, the Leader of the Opposition wrote to the Prime Minister expressing his concern about Task Force proposals and urging the Prime Minister to submit the matter of reform of the *Access to Information Act* to a Parliamentary Committee. The text of that letter is as follows:

"In 1993, you formed a Liberal government that was to be based on openness and transparency. The foundations of your electoral win were premised upon these basic ideals and a greater importance on ethics in government. All Canadians placed their faith in your stewardship and expected you to uphold our most fundamental values of freedom and democracy.

It is against this backdrop that I wish to raise your attention to the Access to Information Review Task Force and the corresponding Special Report to Parliament by the Office of the Information Commissioner. As an independent officer of Parliament, the Information Commissioner highlights fifteen separate recommendations in the Task Force report that increase the

level of secrecy in the federal government. If adopted, these measures will result in even less openness and transparency than there is currently. They expand the number of exclusions and exemptions under the Act and will place a chill on access requests.

Of equal concern, the government is also proposing a long list of new restrictions on Canadians who make use of the *Access to Information Act*. The Task Force is proposing to authorize government institutions to refuse to process access requests that the government considers to be frivolous, vexatious or abusive. It would also require requesters to refer to a specific subject matter or to specific records. This is unnecessary and punitive.

I submit to you that Canadians deserve better. They want a federal government that leads the way in making information available and is a global leader in providing information to Canadians. They want crown corporations that are open and transparent. They want information made available without the need to make requests under an Act of Parliament. They do not want a more secretive government that seeks to exempt and exclude huge sections of government information.

Canadians expect us to act in openness and transparency.

Accordingly, I urge your government to take the lead and reject the recommendations for increased secrecy proposed by the Task Force.

I urge you to submit the *Access to Information Act* and the Information Commissioner's Special Report for review to a Standing Committee of Parliament in order to draft changes to this vital piece of legislation."

CHAPTER II
ADDRESSING THE CRISIS IN INFORMATION MANAGEMENT*

A. Executive Summary

The Information Commissioner of Canada has long expressed concern regarding the state of information management in the Government of Canada. Good recordkeeping is a pre-requisite for the successful administration of the *Access to Information Act* as well as a central component of good governance. Effective information management is also essential to protect the security of Canadians in a post-September 11 world, while respecting their access and other democratic rights.

The commissioner's annual reports, those of the Auditor General and other evidence confirm that the government does not have adequate control over a fundamental resource of governance. Weak records and information management continues to jeopardize public programs and services and impede government openness and accountability. Too often, records of important business decisions, actions and transactions are not created or they are inaccessible or unreliable. The electronic information environment is overwhelming traditional skills and resources.

The commissioner's 2000-2001 Report to Parliament made a number of recommendations for improving federal government recordkeeping. There is considerable evidence that the government is responding to these and other calls for change:

- Information management is becoming more widely recognized as a core discipline of public sector management.
- There is a better understanding of what information management is.
- There is stronger leadership for information management.
- There is greater collaboration among central agencies and departments.
- There are new mechanisms for addressing IM issues and developing shared solutions.
- There are new policies and tools to support information management.
- Individual departments are improving their IM programs.
- There are promising efforts to raise IM skills and develop a new IM community within the public service.

There is now a will and some momentum within the bureaucracy to improve records and information management. Key roles are being played by the Chief Information Officer Branch, the Library and Archives of Canada and a number of progressive departments. Within departments, a key indicator of success is the level of support from deputy ministers.

It will take time, however, for awareness and effort to be translated into good recordkeeping practices. The government needs to accelerate its efforts in the above areas so that the current momentum is not lost. As well, the government needs to act on

* see page 44

other recommendations previously made by the commissioner:

- Parliament must play a more active oversight role for IM.
- The government needs a recordkeeping law.
- Clearer strategies and roles for information management are needed.
- Strong support is needed to implement the Management of Government Information policy.
- Information management must be better funded.
- Progress in implementing information management policies and practices needs to be objectively evaluated.
- Better metrics for IM are required.
- An IM education and training strategy is needed.

A more fundamental issue is the need to change the bureaucratic and political culture of the federal government. Despite the efforts of many conscientious and dedicated civil servants, large bureaucracies sustain a culture that resists openness and transparency. An introverted and risk-reluctant command-and-control hierarchy still characterizes many parts of the federal government. A dogged unwillingness to admit error still persists. Where this is the case, the tendency is to hold onto information rather than to release it and to place loyalty to a minister above the public interest.

Change must come from the ranks of the most senior public servants and from the political level itself. The best guarantee of that change is greater access by the public, the media, non-government organizations and others to information that enables them to scrutinize the workings of government and hold public servants and politicians accountable. The Privy Council Office can play an important role in this process as it links the political and public service dimensions of government. It has the opportunity and the responsibility to advance information management and access as it develops a strong vision of evidence-based governance in the electronic age. Good records and effective information management provide the evidence needed to make decisions and take action that identify, protect and serve the public good.

B. Weakened Levers of Accountability

The Information and Privacy Commissioners, the Auditor General, Parliamentary Committees and others have repeatedly called attention to poor information management and its impacts. Most recently, poor recordkeeping was cited as a key factor of concern in the management of the gun registry program, in concerns over GST fraud, in the improper tendering of government contracts, in the inability to locate costly commissioned reports, and in the lack of security for sensitive information placed on government websites. The Auditor General has said that some programs were so poorly documented that an audit could not even be completed.[i] The records were simply unavailable, incomplete or unreliable.

In his own area of responsibility, the Information Commissioner has found that many complaints about the lack of access to requested records involve

poor records management. Record searches are often lengthy and incomplete because records are inappropriately filed.

Relevant records are often duplicated in many locations and in multiple versions of uncertain authoritativeness. Records that should be present in the files often have not been created (for example, when the minutes of important meetings are not taken and filed). Records have sometimes been destroyed prematurely and without authorization. In some cases, the records have been altered or their location obscured to avoid discovery. The result is that often neither government staff nor the public has ready and reasonable access to important information it needs and has a right to see.

As well, many of the records that document publicly funded activities are not accessible or adequately protected. The programs are delivered by non-government bodies not subject to government audit, access and privacy legislation or government records management standards.

Other problems stem from the huge volumes of records found in government departments in electronic, paper and other formats; the use of complicated and quickly changing technologies; and the lack of basic skills among government staff for creating and managing their own records and shared files. In particular, the volume of e-mail and web-based documents are overwhelming government workers who have difficulty understanding what to keep and what to discard.

The federal government has been creating the complex technology infrastructure needed to support Government On-Line. Less attention has been given to the quality and timeliness of information that Canadians want and need. A report by the Public Policy Forum called attention to the danger of an "emperor's clothes syndrome" where "the outer clothes of Internet portals and websites are removed to reveal a fragile and inadequate information infrastructure…"[ii]

The bottom line is that the Government of Canada does not have adequate management control over a fundamental resource of governance.

The impact of poor records management goes far beyond the government's access and privacy regime. Within government, the lack of accurate and authoritative information results in poor decisions, failed programs and lost opportunities. Time wasted finding information and the storage of records no longer needed increase government operating costs. The failure to maintain and protect records with high legal and intellectual property value results increased liability and financial loss. The premature destruction of records with long-term archival value contributes to our collective historical amnesia and the loss of valuable knowledge.

The impact on the public ranges from inconvenience (when requested information is not conveniently available) to a decline in the quality of governance (when citizens lose faith in government). As the Information Commissioner has commented, at issue is:

> "whether the public has confidence that government will be responsive to its needs, will act openly and transparently, will recognize its duty

to document its actions and be accountable for them, and whether it will respect the rights of individuals and organizations to access information that shows how well government has met these responsibilities and expectations."

In other words, at stake is whether society is able and willing to maintain its trust and confidence in government. Without these qualities, democracy itself is in serious jeopardy.

The security of Canadians is also at stake. In a post-September 11 world, that security depends directly on what information is created and collected, its quality and reliability, how the information is protected and whether and to whom it is disseminated. The government must ensure that it has effective policies and a strong information management infrastructure to protect vital information assets, address serious security concerns and safeguard fundamental public access and other rights.

C. Moving in the Right Direction

Interest in and attention to information management have increased considerably following the recommendations in the Information Commissioner's 2000-2001 Report (and in the government's own *Situation Analysis* report in 2000).[iii] Central agencies and an increasing number of departments are responding to the calls for action:

Information management is becoming more widely recognized as a core discipline of public sector management.

In government workshops and public presentations, the National Archivist, the Chief Information Officer and other senior government officials have been working to raise awareness of the value of records and information management. Treasury Board Secretariat now sponsors an annual fall "IM Day" for public service managers. Presentations and case studies underline the importance of IM. In February, the Library and Archives of Canada sponsored a symposium for 245 senior government staff on "Achieving Excellence in Information Management". The objectives were to engage senior managers, recognize IM achievements and strengthen the government's IM community. More than 80% of senior executives who attended left the symposium committing to support stronger IM programs in their departments.

Aside from the reports of the Information Commissioner, the Auditor General and Treasury Board itself, other studies have focused on information management. A review of the government's ATIP regime echoed the Information Commissioner's call for a stronger access culture and the need for better training, tools, awareness, leadership and incentives for documenting government activities and managing government records.[iv]

New materials have appeared that provide a potent business case for improving information management. The Library and Archives of Canada prepared and widely disseminated a *Case for Action for Improving Information Management in the Government of Canada.*[v] The *Case for Action* defines IM, its benefits, the risks of inaction and describes how the Government of Canada is lagging behind other governments and the private sector in

improving information management. As well, a recent discussion paper published by the Public Policy Forum discusses in detail the intimate relationship between good recordkeeping and good governance.[vi]

As Government On-Line matures as an electronic service delivery strategy, more attention is being paid to the quality and relevance of program information, not just the speed and convenience of internet-based access.

Numerous conferences and workshops for government staff are focusing on the business value of information management and knowledge management. "IM" and "KM" are becoming both trendy catchwords as well as serious disciplines that impact on every aspect of public (and private) sector activity.

All of these activities are raising the profile of information management and helping to generate greater interest in improving it in the Government of Canada. Information is becoming recognized as one of the four primary assets that government depends on and must manage in an effective and professional manner (the other resources being money, people and technology).

There is a better understanding of what information management is.

The definition and level of understanding of what comprises information management vary widely. "IM" encompasses a variety of processes and practices related to records management, data management, web content management, access and privacy administration, knowledge management and others. There is, however, a more widely shared understanding of IM than before. A new *Management of Government Information* (MGI) policy makes clear what managers and other public servants must do to manage different forms of information in their care. The Library and Archives of Canada's *Case for Action* defines the fundamental information management activities and processes. Treasury Board Secretariat's new *Framework for the Management of Information* describes the wide range of elements and activities that constitute IM. These and other initiatives to describe and discuss information management have provided more clarity and stimulated greater awareness of information management and about what needs to be done to better manage government records and data in electronic, paper and other forms.

There is stronger leadership for information management.

At both the central agency and departmental levels, stronger leadership for information management is emerging. Within Treasury Board Secretariat, the Chief Information Officer Branch is creating a stronger focus on IM and linking IM more closely with its Government On-Line priorities. At the operational level, the Library and Archives of Canada is emerging as the centre of expertise and lead agency for the life-cycle management of government records and documents. Both agencies have a number of IM initiatives underway and senior IM staff have shown themselves to be energetic in leading change.

Two "champions" for information management have been designated to promote IM across the government: the National Archivist and the Associate Deputy Minister of National

Defence. Together, they combine the perspectives and expertise of an important information management professional with that of a highly respected government business manager.

At the departmental level, a clearer focus for IM leadership is also emerging, albeit slowly. The IM responsibilities of chief information officers (and other senior executives) are becoming more apparent and more integrated with their business and technology-related functions. The new *Management of Government Information* policy specifically requires that a senior executive in each department be designated with overall responsibility for implementing the policy. Deputy ministers themselves are increasingly expected to actively support and provide resources for IM development. This expectation comes both from central agencies as well as from their own managers looking for leadership. To promote better governance and accountability for IM, the Chief Information Officer Branch has drafted detailed guidelines in these areas for departments (see page 11, "Policies and Tools").

The Government of Canada is also demonstrating leadership in information management internationally. The Library and Archives of Canada, Public Works and Government Services Canada and the Canadian International Development Agency (CIDA) are involved in initiatives to share Canadian expertise in IM with developing countries. These activities reflect a strong Canadian role in the G8 nations efforts to implement the Okinawa Charter on Global Information Society. [vii]

There is greater collaboration among central agencies and departments.

A tradition of top-down policy and program development has long existed in the federal bureaucracy. While change is inconsistent, a more collaborative approach is becoming more prevalent. The *Framework for Managing Information*, the *Management of Government Information* policy and the *Information Management Capacity Check* tool (discussed later) are the products of significant consultation among central agencies and line departments. As well, the IM roles of the two most prominent agencies (the Chief Information Officer Branch of Treasury Board Secretariat and the Library and Archives of Canada) are becoming clearer, more coherent and better coordinated. There is an understanding that the development of most operational policies, practices and tools for records and information management will be undertaken through interdepartmental teams with central agency leadership.

The joining of the National Archives and National Library to form the Library and Archives of Canada also provides an important opportunity to strengthen the institution's IM leadership role by integrating library, archival and document management perspectives and breaking down professional and other barriers.

There are new mechanisms for addressing IM issues and developing shared solutions.

New governance structures and mechanisms are enabling IM issues to be more readily discussed and addressed. These include an Information Management and Policies Committee (IMPC) of Treasury Board, consisting of director generals in

departments and central agencies and co-chaired by the Chief Information Officer Branch and Health Canada. IMPC is a subcommittee of the Service, Information and Technology Management Board (SIMB). IM proposals discussed and endorsed at these levels flow to Treasury Board's existing Information Management Sub-Committee (TIMS), consisting of the Chief Information Officer of Canada and a number of deputy ministers. And although confusingly named, an Information Management Champions Committee (IMCC) provides a forum specifically for human resources development issues. Other advisory and "sounding board" bodies are the Information Management Advisory Group (IMAG) and the Chief Information Officer Council. All of these bodies bring needed process, collaboration and governance to information management matters. At TIMS, in particular, there is now both greater opportunity and need to consider the IM dimensions of major government programs. These committees are complimented by other bodies such as the Information Management Forum, the Records Management Institute and the Council on Federal Libraries.

There are new policies and tools to support information management.

A strong policy foundation for the government's IM program has now been developed. The *Management of Government Information* policy was approved by Treasury Board in April 2003. MGI succinctly defines the life-cycle operational requirements for managing information in all forms. It provides information about the legal framework for recordkeeping, requires that departments ensure effective IM governance and accountability arrangements, and necessitates ongoing evaluation of IM activities. Unlike earlier policies, MGI speaks to all managers and identifies the value of well-managed information to the government and to Canadians.[viii]

MGI is at the centre of Treasury Board Secretariat's *Framework for Managing Information* (FMI). The *Framework* maps the elements of the government's IM infrastructure (laws, policies, standards, guidelines, etc.) and shows their interrelationships. While some of the elements of the infrastructure are already in place within the government, others still need to be developed or adapted. Over time, the web-based *Framework* will provide links to all of these materials.

One of these elements is a guideline for departments for establishing strong governance and accountability arrangements for IM.[ix] Still in draft form, this document defines governance and accountability and related processes. It describes in detail the IM roles and responsibilities of ministers, deputy ministers, the senior executive responsible for IM and other managers and staff (including information management and information technology specialists). It is a blueprint for establishing effective leadership and accountability for IM within federal institutions. When released, it will substantially respond to the Information Commissioner's call for a strong information-centred accountability framework.

A newly developed tool and methodology helps departments measure their current capacity for managing information. The Library and Archives of Canada's *Information Management Capacity Check* (IMCC) identifies six aspects of information

management (including management of the records life cycle) and for each describes the characteristics of five "maturity levels" ranging from "Non-existent/Undeveloped" to "Industry Best Practices".[x] Consistent with the International Records Management Standard[xi] (ISO 15489), the *Capacity Check* provides a basis for departments to establish a baseline and determine IM development priorities. The intention is eventually to link each area assessed to a suite of practical tools (model standards, policies, guidelines and practices) that departments may use. The government has endorsed the IMCC for use by all departments.

A number of other central IM initiatives are underway. Led by either the Library and Archives of Canada, the CIO Branch or undertaken collaboratively, they include:

- development of a web-based *Records and Information Life-Cycle Management Guide* describing IM processes and resources for managers as well as a guide for deputy ministers;
- development of government-wide retention periods for common administrative records in departments;
- updating of "Records Disposition Authorities" that allow departments to dispose of their records when no longer needed;
- special projects to dispose of unneeded departmental paper records ("Clearing Paper Mountains");
- development of a government-wide file classification model and implementation guide for common business functions;
- work on a strategy for preserving archival electronic records;
- review of the federal records centres program;
- implementation of a government-wide metadata standard (a model for describing records and data holdings) and a related thesaurus of common terms;
- development of specific guidelines for the management of e-mail records, web documents and encrypted and digitally signed documents;
- development of new guidelines for the management of government publications.

Individual departments are improving their IM programs.

Individual departments are taking steps to improve records and information management. With the necessity to implement the new *Management of Government Information* policy in mind, a number of departments are reviewing their IM infrastructure, raising internal awareness, and introducing departmental policies, standards and processes.[xii]

More departments are implementing electronic records and document management systems such as RDIMS, although cost and complexity remain barriers. Departments that have already implemented RDIMS are realizing that their success depends as much on changes in the business culture (e.g. the willingness to document key activities) as it does on learning to use the new software.
As well, RDIMS requires a high and continuing level of training and support to become an accepted way of

managing records and documents at the desktop.

At the Library and Archives of Canada's IM symposium in February, ten departments were singled out for significant information management projects. "Leading by Example Awards" were given to the Department of Foreign Affairs and International Trade, Public Works and Government Services Canada, Transport Canada, Solicitor General of Canada, Citizenship and Immigration Canada, Human Resources Development Canada, Statistics Canada, Canadian International Development Agency, Health Canada and Natural Resources Canada. Examples of initiatives include: "clearing paper mountains", evaluating their IM capacity, developing virtual libraries, introducing department-wide file plans and introducing e-mail management tools.

Overall, progress "on the ground" is still modest and varies widely depending on the degree of senior management support and the level of resources made available. (At the IM symposium, managers agreed that strong IM leadership from their deputy ministers was among the most crucial factors for moving ahead.)

There are promising efforts to improve IM skills and develop a new IM community.

The e-government information environment requires a new breed of information professionals. A common complaint of deputy ministers and other senior managers is that people who understand and can support this new environment are not available. Records managers, file clerks and other traditional positions common in the paper world have long been disappearing. Reasons include budget cuts and the naïve assumption that new technology would make "records management" unnecessary. Managers subsequently realized that managing complex electronic records and data systems was an even more challenging task than dealing with "paper mountains".

As attention shifts from technology management to information management (and eventually, it is hoped, to knowledge management), departments are beginning to appreciate the need for professionals who understand the management requirements of both "data" and "records" in multiple media. Such staff are essential for designing and implementing a mature information systems environment and helping to embed effective recordkeeping and other IM practices in business processes and technology tools. As an example, public service values and codes should include a commitment to documenting government decisions and actions.

There is strong evidence that central agencies are helping generate a new IM "community of practice". The Organizational Readiness Office (ORO) in the Chief Information Officer Branch is leading this change management process. Based on earlier work to identify IM core competencies, it has placed a repository of IM work descriptions on the federal intranet that can be used by departments to develop or revise IM positions. In general, these represent more sophisticated and better paid positions than traditional records management jobs. In particular, ORO is establishing models for three director-level "signature" positions that departments

should have. These positions relate to information management, knowledge management and access/privacy management. ORO has proposed a two-year "IM Leadership" development program for director-level managers. As noted earlier, the CIO Branch has also drafted governance and accountability guidelines for departments that describe IM roles and responsibilities of managers and staff.

Much of this activity is community-driven: IT staff, records specialists, librarians and program managers recognize that issues, perspectives and skills are converging as e-government emerges. Professional islands are beginning to disappear. "Web content managers" are an example of a new position that should require knowledge of government programs, document management and preservation, and new technology.

Consideration is also being given to the education and training programs needed to develop this new group of IM managers and staff. The Knowledge Institute in Public Works and Government Services Canada is considering the role it can play in training supervisors and other middle managers. It has offered some valuable IM training in the past (e.g., "*IM: Its Role in Government On-Line*"). There is also potential for the Canadian Centre for Management Development to develop programs that deal directly with the information management dimension for senior executives. These prospects and plans are still at an early stage, however.

As IM professions and their development strategies slowly converge, an increasing number of consultations, training and development events is being offered to government managers and information management staff by a variety of public and non-government organizations.

As they proceed, these efforts will show that information management is a core discipline in the public service. Managing information is what everyone does.

D. Steps Ahead

The progress that is being made in strengthening IM practices and infrastructure is both overdue and welcome. There are now clear signs of a bureaucratic will to do something. It will take time, however, for awareness and effort to be translated into more efficient and effective recordkeeping practices. The pace of change is often glacially slow within large bureaucracies with competing and changing priorities. The *Management of Government Information* policy--a basic set of IM precepts--took almost three years to develop and approve.

In some areas of the government, there is still little visible evidence of change. Program and policy managers, information specialists, auditors, legal staff and parliamentarians who rely on good business records to do their work continue to be frustrated. Audit reports and newspaper headlines still remind the public that it cannot always access or trust government information to which they have a right.

As the Information Commissioner emphasized in his 2000-2001 Report to Parliament, recordkeeping will improve when openness and transparency are "reinforced in law, championed at the highest political levels, communicated as a fundamental expectation of public

service, consistently demonstrated in practice and adequately rewarded."[xiii]

The significant progress that has occurred needs to be recognized and applauded. The government must accelerate its efforts in the above areas, however, so the IM momentum is not lost. As well, government needs to take action in the following areas:

Parliament must play a more active oversight role for IM.

The effectiveness of Parliament as a fundamental institution of democratic governance depends on the information it receives, considers and is able to act upon. The Auditor General and others (including parliamentarians themselves) have repeatedly noted that Parliament often does not receive the information it needs to exercise its role effectively.

It is essential that Parliament demand the information it needs to review and approve programs and expenditures, assess their effectiveness, consider new legislation and perform other functions. It has the authority to require officials to provide complete and credible information about their programs, activities and expenditures and should rigorously question the information it receives. It also needs to assure itself (and Canadians) that departments have the necessary underlying IM infrastructure and recordkeeping practices in place. It can accomplish these ends through its standing and special committees, through reports and audits it requests from departments (or undertakes itself) and through other opportunities to exercise oversight.

Access to reliable information about government activities and decisions lies at the core of responsible representative government. Parliament needs to play a more active role in promoting better information management in support of these goals. This will not only enhance democratic governance, but make Parliament a stronger and more relevant institution.

The need for a recordkeeping law

Federal government recordkeeping policies and practices still lack a strong foundation in law. Canada has legislation dealing with certain aspects of information management (e.g., public access and privacy, archival preservation). What is missing is legislation that deals explicitly and comprehensively with the creation of records and the government's stewardship of recorded information over its complete life cycle.

Although some program-specific legislation includes records provisions, Canada does not impose a general legal obligation on ministers of the Crown and their departments to create and maintain full and accurate records of their business activities (the duty to document).[xiv] In an increasingly casual communications environment, we can no longer presume that appropriate records are being created and kept (e.g., the minutes of meetings are no longer routinely taken).

The purpose of a recordkeeping law would be to enhance the integrity and effectiveness of government operations and the availability and quality of the information on which they depend. The law would recognize the business and other value of government's information assets in all forms

(including their importance for public safety and security) and require their effective life-cycle management. Many other countries have passed records legislation to underpin these objectives.

A new recordkeeping law might include the following elements:

- Identify basic information management principles, values and objectives regarding government integrity, security, effectiveness, accountability, asset management, etc.;
- Require ministers and agency heads to ensure that records are created, acquired and maintained that adequately document key organization functions, activities, decisions, policies and transactions;
- Require that a records and information management program be established within each department/agency and appropriately resourced;
- Require that a senior executive be designated within each department with overall responsibility for information management;
- Require that the program include standards, procedures and training related to documenting business activities, identifying and organizing records, storing and protecting records, providing access to records; and retaining and disposing of records (all of these in conformity with other laws and standards);
- Require that all government programs and operations adhere to the above standards and practices in the management of recorded information;
- Require that certain types of organizations doing business with the federal government or receiving substantial federal funds have in place adequate records management;
- Require that technology-dependent records be kept accessible for the duration of their authorized retention periods;
- Provide for the monitoring, evaluation and reporting on the records and information management program (and of the performance of related officials);
- Establish consequences for failing to meet the requirements of the Act (and identify the circumstances under which they might apply).

At its centre, the law would provide a legal basis for the *Management of Government Information* policy and its key provisions. It could potentially provide a foundation for other government information-centred policies as well. [xv]

The value of and suggested options for a new information law were discussed at length in the Information Commissioner's 2000-2001 Annual Report. The Government of Canada should formally assess the merits of a recordkeeping law.

Clearer strategies and roles for information management are needed.

While central agency leadership in IM is increasing, there is still a need for a more coherent "whole of government" approach. There is no clearly defined government strategy or roadmap for improving IM. Its absence increases the risk of poor coordination, fragmented initiatives and blurred accountability. It needs to be

developed by central agencies and departments and reviewed by the IM committees.

The strategy could help clarify the roles and relationship between the CIO Branch and the Library and Archives of Canada. Although a valuable partnership is evolving, it is difficult to determine who is accountable overall as well as for specific initiatives. The Treasury Board Secretariat's internet site on IM governance lists only the archival preservation responsibilities of the National Archives. Treasury Board Secretariat's own IM role is described as relating to the "management of the government's human, financial and material resources". [xvi] Inexplicably, the management of information resources is not mentioned. Within the CIO Branch itself, key IM units now have different reporting relationships, making coordination more difficult.

Leadership for information management would also be greater if the Chief Information Officer were given a more direct and active role in the review of departmental estimates. This would help ensure that key information management issues are identified and addressed in major program plans.

At the departmental level, leadership for IM is still often absent. Attendees at the February IM Symposium identified "lack of leadership" as the greatest barrier to good information management in their institutions. Treasury Board guidelines for IM governance and accountability need to be disseminated and actively promoted.

Strong support is needed to implement the Management of Government Information policy.

To support the implementation of MGI, departments will need a phased implementation strategy and operational plan. They will also need practical tools and appropriate models in various areas. These include models for developing an IM business case, evaluating IM risks and benefits, documenting business activities, creating file plans, determining records retention periods, managing e-mail and web documents, devising training plans, and others. Portions of this tool kit already exist within the government and others can be adapted from international models. It is the intention of the Chief Information Officer Branch and the Library and Archives of Canada to make such materials and related supports available. As yet, the resource materials on central agency IM websites are incomplete and the sites are not yet sufficiently structured, integrated, coordinated and linked. As part of government-wide implementation plan for MGI, these resources need to be available to help guide departments and sustain the current momentum.

Information management must be better funded.

Even with good laws, policies and leadership in place, a strong IM infrastructure cannot be developed and sustained without sufficient funds. In earlier government program reviews, records management programs were mistakenly seen as low-level administrative activities and were decimated. Finding and developing qualified staff, introducing electronic records management systems and developing department-specific policies and standards require money. The *Management of Government Information* policy has raised

expectations of the resources needed to implement it.

Central agencies, too, need the funds to plan and implement corporate IM initiatives. The Library and Archives of Canada, for example, is attempting to build a strong government-wide leadership role without the necessary resources to sustain it.

Progress in implementing information management policies and practices needs to be objectively evaluated.

The introduction of the MGI policy is encouraging departments to assess the current state of their IM infrastructure and to plan improvements. Over the longer term, departments regularly need to assess their progress in implementing the policy. Clearly, the internal evaluation of programs is the most effective strategy for generating greater management ownership of programs and results. Self-assessment by program managers is not always sufficiently objective, however, nor does it provide a whole-of-government view of the state of IM. Important roles need to be played by internal auditors, central agencies and by the Auditor General in assessing whether records management programs meet standards. [xvii] Once the MGI policy has had time to take effect, the Office of the Auditor General should assess the success of its implementation in individual departments and on a whole-of-government basis.

The Information Commissioner also recommended (in the 2000-2001 Report) that all program and spending audits should directly address program-centred information management issues and gaps.

A barrier to generating wider appreciation of IM (as well as in evaluating IM initiatives) is the difficulty in measuring its costs, risks, benefits and other impacts. As information management permeates all aspects of government operations, it is often difficult to quantify the above elements or attribute impacts to specific IM activities. Still, better metrics are needed to justify, develop, implement and evaluate IM initiatives. Useful approaches are available. Governments (including the federal government) and the private sector have, for example, developed risk assessment methodologies that can be adapted to an information management context. The Gartner Group has researched the amount of time that workers take (and often waste) in locating and retrieving records, reviewing and responding to e-mail and performing other information management tasks. [xviii] Methodologies exist to measure the value of "intellectual capital" embedded in records and documents. [xix] As well, many departments have undertaken successful initiatives that provide specific examples of financial or other benefits (lower storage costs, shorter processing time, etc.).

The federal government (as well as Ontario and others) have developed privacy impact assessment tools. A similar methodology could be used to ensure that other information management issues and impacts are considered in the development or re-design of programs, services and information systems.

The federal government should undertake research into IM metrics,

codify useful approaches and assemble a catalogue of direct and indirect (proxy) measures as well as examples of real-world benefits. This would be useful in helping departments justify, plan and evaluate IM projects and the performance of managers responsible for them.

An IM education and training strategy is needed.

There is increasing attention to the need to modernize the public service and ensure that it has the skills it needs to manage in an information and technology-rich environment. The most recent budget statement announced new initiatives in this area. Information management needs to be an important part of these efforts. The ability to manage and effectively use information is a core skill that needs to be at the centre of any public sector education and training strategy.

The Chief Information Officer Branch, the Library and Archives of Canada, the Canadian Centre for Management Development, the Knowledge Institute of Public Works and Government Services (and others) should collaborate to develop a strategy for IM education and training. The strategy should identify the topics that elected officials, senior executives, middle managers, information specialists and other government staff need to know. It should identify leadership for developing and implementing IM education and training programs for each audience. Significant roles can also be played by other government, professional and private sector bodies.

A Fundamental Priority – Changing the Bureaucratic and Political Culture

Some issues are more fundamental, complex and difficult to change. Despite the efforts of many conscientious and dedicated civil servants, large bureaucracies sustain a culture that resists openness and transparency. An introverted and risk-reluctant command-and-control hierarchy still characterizes many parts of the federal government. A dogged unwillingness to admit error still persists. Where this is the case, the tendency is to hold onto information rather than to release it and to place loyalty to a minister above the public interest. Senior managers at the February IM Symposium identified “organizational culture” as the second greatest barrier to good information management (after “lack of leadership”). [xx]

Change must come from the ranks of the most senior public servants and from the political level itself. The best guarantee of that change is greater access by the public, the media, non-government organizations and others to information that enables them to scrutinize the workings of government and hold public servants and politicians accountable. The Privy Council Office can play an important role in this process as it links the political and public service dimensions of government. It has the opportunity and the responsibility to advance information management and access as it develops a strong vision of evidence-based governance in the electronic age. Good records and effective information management provide the evidence needed to make decisions and take action that identify, protect and serve the public good.

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[i] Office of the Auditor General of Canada, *December 2002 Report*, Chapter 10; http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20021210ce.html

[ii] Andrew Lipchak, "Information Management to Support Evidence-based Governance in the Electronic Age," Public Policy Forum, Ottawa, November 2002; (http://www.ppforum.com/english/index.html)

[iii] John McDonald, "Information Management in the Government of Canada – A Situation Analysis", Treasury Board of Canada/National Archives of Canada, June 2000

[iv] "Report of the Access to Information Review Task Force", Treasury Board, June 2002 (Chapters 9 and 11)

[v] The "Case for Action" is available at: http://www.archives.ca/06/0603_e.html

[vi] Andrew Lipchak, "Information Management to Support Evidence-based Governance in the Electronic Age," Public Policy Forum, Ottawa, November, 2002; (http://www.ppforum.com/english/index.html)

[vii] ibid

[viii] The Management of Government Information policy replaces the Management of Government Information Holdings policy, largely directed to records specialists.

[ix] "Governance and Accountability in Government Institutions Guideline", Treasury Board Secretariat, October 2002 (Draft)

[x] The National Archives *IM Capacity Check* tool is a available at: http://www.archives.ca/06/0603_e.html

[xi] ISO 15489 (*Information and Documentation - Records Management*), released October 2001; http://www.iso.ch/iso/en/commcentre/pressreleases/2002/Ref814.html

[xii] 78% of those attending the February IM Symposium indicated that they were planning, were undertaking or had completed an IM assessment and action plan.

[xiii] The Hon. John M. Reid, P.C., Annual Report, Information Commissioner, 2000-2001, June 2001; http://www.infocom.gc.ca/reports

[xiv] The *Financial Administration Act* does require that departments and crown corporations keep records and accounts with regard to the management of finances and other assets.

[xv] Examples include the Government of Canada Communications Policy, Government Security Policy, Management of Information Technology Policy, Public Key Infrastructure Management Policy, Electronic Authorization and Authentication Policy.

[xvi] http://www.cio-dpi.gc.ca/imgi/governance/gov_e.asp#Central%20Agency%20Name

[xvii] Treasury Board Secretariat and the Library and Archives of Canada also have assessment functions as part of their mandates.

[xviii] In its *"Case for Action"*, the Library and Archives of Canada uses some of these measures to estimate the high cost of this wasted time in the Government of Canada (more than $870 Million annually).

[xix] Useful sources include: http://www.derwent.com/ipmatters/features/ipvalue.html; http://www.canadalawbook.ca/headlines/headline32_arc.html; Valuation of Intellectual Property and Intangible Assets (Gordon V. Smith, Russell L. Parr)

[xx] "Organizational culture" was not defined in the poll taken at the symposium.

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CHAPTER III
INVESTIGATIONS AND REVIEWS

A. Workload Statistics

In the reporting year (2002-2003), 956 complaints were made to the commissioner against government institutions (see Table 1). Table 2 indicates that 1,004 investigations were completed, 16.2 percent of all completed complaints being of delay. Last year, by comparison 28.2 percent of complaints concerned delay. This significant drop in the number of delay complaints is indicative of a generally improving performance by government in meeting response deadlines.

In addition to the complaints received this year, the office responded to 3,157 inquiries.

Resolutions of complaints were achieved without the intervention of the courts in every completed investigation with only two exceptions. Those cases are reported at pages 71 to 73. With the consent of the requesters, they have been brought before the Federal Court for review.

As seen from Table 3, the overall turnaround time for complaint investigations increased to 8.18 months from 7.85 months last year. Parliament was alerted last year to the deterioration in the office's ability to deliver timely investigations due to resource constraints, a heavy burden of complex investigations and difficulty in securing informal cooperation from government institutions. Table 3A illustrates the effect on completion time of the increasing percentage of workload in the more complex, difficult complaint categories.

Table 1 reminds us that there continues to be a troubling number of incomplete investigations. Last year it was 729, this year it is 631. Of this number, 373 have been under investigation for a period which indicates that they are backlogged. Even though progress was made this year in reducing the backlog, it remains at an unacceptable level and effects the completion time of all cases. Some of the progress in reducing the backlog is due to a modest infusion of new resources from Treasury Board. At this writing, the commissioner is endeavouring to convince the Treasury Board that there is some further way to go before his office is adequately resourced to effectively fulfill its mandate.

As can be seen from Table 4, complaints were investigated against 54 government institutions. Some 66 percent of all complaints were made against only ten government institutions. This phenomenon corresponds with the access requests received by government as a whole: a few institutions account for the bulk of all requests.

Of the complaints closed this fiscal year, the top ten "complained against" institutions are:

Institution	
1. Citizenship and Immigration Canada	111
2. National Defence	84
3. Public Works and Government Services Canada	70

4. Royal Canadian Mounted Police — 60

5. Canada Customs and Revenue Agency — 54

6. Environment Canada — 54

7. Fisheries and Oceans Canada — 50

8. Treasury Board of Canada, Secretariat — 50

9. Foreign Affairs and International Trade — 46

10. Justice Canada/Privy Council Office — 45

Being on this list does not necessarily mean that these institutions performed poorly. To better assess "performance", one must look at the number of complaints against each institution which were found to have merit versus the number which were not substantiated.

Nevertheless, if one were to list the "top ten" institutions against whom complaints were made which the commissioner found, in this reporting year, to have merit (resolved or well-founded), the list would be:

Institution	
1. Citizenship and Immigration Canada	56 of 111
2. Public Works and Government Services Canada	53 of 70
3. National Defence	50 of 84
4. Treasury Board of Canada, Secretariat	44 of 50
5. Fisheries and Oceans Canada	32 of 50
6. Statistics Canada	32 of 34
7. Environment Canada	31 of 54
8. Foreign Affairs and International Trade	30 of 46
9. Justice Canada	29 of 45
10. Canada Customs and Revenue Agency	28 of 54

Last year, special mention was made of the difficulties being experienced by Citizenship and Immigration Canada in dealing with a large volume of access requests in an efficient manner. Since that report, additional resources and new procedures have been put in place. While Citizenship and Immigration Canada still tops both lists (number of complaints against and number of meritorious complaints against), improved performance is beginning to show. As indicated in the report card results (see pages 139 to 144), the percentage of requests received which are answered late dropped to 3.8 percent for the period April 1 to November 30, 2002. By comparison, last year, the rate was almost 13 percent However, there is also some evidence to be explored in the coming year--that Citizenship and Immigration Canada's improvement may have resulted from an overly liberal use of extensions.

Table 1: STATUS OF COMPLAINTS		
	April 1, 2001 to Mar. 31, 2002	April 1, 2002 to Mar. 31, 2003
Pending from previous year	928	729
Opened during the year	1123	1114
Cancelled during the year	87	208
Completed during the year	1235	1004
Pending at year-end	729	631

Table 2: COMPLAINT FINDINGS *(April 1, 2002 to March 31, 2003)*						
	FINDING					
CATEGORY	Resolved	Not Resolved	Not Substantiated	Discontinued	TOTAL	%
Refusal to disclose	301	31	218	39	589	58.7%
Delay (deemed refusal)	135	–	24	4	163	16.2%
Time extension	86	–	24	15	125	12.5%
Fees	35	–	8	5	48	4.7%
Language	1	–	2	–	3	0.3%
Publications	–	–	–	–	–	–
Miscellaneous	27	1	43	5	76	7.6%
TOTAL	**585**	**32**	**319**	**68**	**1004**	**100%**
100%	58.3%	3.2%	31.8%	6.7%		

Note : 30 of the 32 complaints with a finding of "Not Resolved" involved requests for access to census records held by Statistics Canada (29 of the Refusals and the one Miscellaneous case). At the time the commissioner issued his finding, the complaints remained unresolved (and thus must be reported as such in this report).

However, on the same day applications for review were to be filed with the Federal Court, Statistics Canada changed its position and decided to disclose all requested records in accordance with the commissioner's recommendation.

Table 3: TURNAROUND TIME *(Months)*

	2000.04.01 – 2001.03.31		2001.04.01 – 2002.03.31		2002.04.01 – 2003.03.31	
CATEGORY	Months	Cases	Months	Cases	Months	Cases
Refusal to disclose	7.83	534	9.76	690	9.74	589
Delay (deemed refusal)	3.33	575	4.99	348	4.54	163
Time extension	4.18	151	5.59	76	8.27	125
Fees	7.02	54	5.84	68	4.73	48
Language	–	–	2.33	1	7.17	3
Publications	–	–	–	–	–	–
Miscellaneous	4.61	23	7.82	49	5.88	76
Overall	**5.40**	**1337**	**7.85**	**1232**	**8.18**	**1004**

Table 3A: TURNAROUND TIME *(Months)*

	2000.04.01 – 2001.03.31				2001.04.01 – 2002.03.31				2002.04.01 – 2003.03.31			
	Standard		Difficult		Standard		Difficult		Standard		Difficult	
CATEGORY	Months	%	Months	%	Months	%	Months	%	Months	%	Months	%
Delay (deemed refusal)	3.25	41	5.32	2	4.67	26	8.26	3	3.35	10	6.53	6
Time extension	4.03	11	6.47	1	5.43	5	5.93	2	3.75	5	11.29	7
Fees	6.59	4	11.25	0	5.31	5	10.53	1	3.02	2	6.18	3
Language	-	-	-	-	2.33	0	-	-	3.52	0	8.99	0
Publications	-	-	-	-	-	-	-	-	-	-	-	-
Miscellaneous	4.62	2	-	-	5.60	3	13.99	1	3.67	5	9.67	3
Subtotal – Admin. Cases	3.65	57	6.40	3	4.91	38	8.92	6	3.48	22	8.82	19
Refusal to disclose	7.10	35	13.46	5	8.59	47	16.35	8	7.63	45	16.93	13
Overall	**4.96**	**92**	**10.80**	**8**	**6.95**	**86**	**13.36**	**14**	**6.27**	**68**	**12.15**	**32**

Notes:
1. Difficult Cases – Cases that take over two times the average amount of investigator time to resolve.
2. Cases take on average four times as much investigator time to resolve than administrative cases.
3. Trend 1 – Administrative cases now account for just 41% of our workload compared to 60% in FY 2000/01.
4. Trend 2 – Difficult cases now account for 32% of our workload compared to just 8% in FY 2000/01.

Table 4: COMPLAINT FINDINGS *(by government institution) April 1, 2002 to March 31, 2003*					
GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Substantiated	Discontinued	TOTAL
Agriculture and Agri-Food Canada	11	-	1	-	12
Atlantic Canada Opportunities Agency	1	-	1	-	2
British Columbia Treaty Commission	-	-	1	-	1
Business Development Bank of Canada	15	-	7	-	22
Canada Customs and Revenue Agency	28	-	23	3	54
Canada Economic Development for the Quebec Region	2	-	-	-	2
Canada Mortgage & Housing Corporation	2	-	-	1	3
Canada Nova Scotia Offshore Petroleum Board	-	-	1	-	1
Canadian Commercial Corporation	1	-	-	-	1
Canadian Film Development Corporation	-	-	1	-	1
Canadian Food Inspection Agency	2	-	1	-	3
Canadian Heritage	4	-	3	1	8
Canadian Human Rights Commission	-	-	1	-	1
Canadian International Development Agency	5	-	-	-	5
Canadian Radio-Television and Telecommunications Commission	1	-	-	1	2
Canadian Security Intelligence Service	1	-	10	1	12
Canadian Space Agency	1	-	1	1	3
Citizenship & Immigration Canada	56	-	45	10	111
Communication Canada	8	-	-	-	8
Correctional Service Canada	17	-	10	1	28
Environment Canada	31	-	7	16	54
Finance Canada	4	-	1	2	7
Fisheries and Oceans Canada	32	-	17	1	50
Foreign Affairs and International Trade	30	-	11	5	46
Freshwater Fish Marketing Corporation	1	-	-	-	1
Health Canada	24	-	6	2	32
Human Resources Development Canada	17	-	7	-	24
Immigration and Refugee Board	6	-	6	1	13

Table 4: COMPLAINT FINDINGS *(continued)*

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Substantiated	Discontinued	TOTAL
Indian and Northern Affairs Canada	7	-	6	-	13
Indian Residential Schools Resolution Canada	-	-	1	-	1
Industry Canada	15	-	5	-	20
International Centre for Human Rights and Democratic Development	2	-	-	-	2
Justice Canada	29	-	12	4	45
National Archives of Canada	7	-	20	1	28
National Capital Commission	1	-	-	-	1
National Defence	50	-	33	1	84
National Parole Board	-	-	1	-	1
Natural Resources Canada	5	-	-	-	5
Office of the Inspector General of CSIS	1	-	-	-	1
Office of the Superintendent of Financial Institutions	2	-	-	2	4
Ombudsman National Defence & Canadian Forces	1	-	-	1	2
Parks Canada Agency	-	-	2	-	2
Privy Council Office	24	-	20	1	45
Public Service Commission of Canada	1	-	-	-	1
Public Works and Government Services Canada	53	-	15	2	70
Royal Canadian Mounted Police	24	-	29	7	60
Solicitor General Canada	3	-	1	-	4
Statistics Canada	2	30	-	2	34
Transport Canada	12	-	4	-	16
Transportation Safety Board of Canada	-	2	-	-	2
Treasury Board Secretariat	44	-	5	1	50
Trois-Rivières Port Authority	1	-	-	-	1
Veterans Affairs Canada	-	-	2	-	2
Western Economic Diversification Canada	2	-	1	-	3
TOTAL	**585**	**32**	**319**	**68**	**1004**

Table 5: GEOGRAPHIC DISTRIBUTION OF COMPLAINTS
(by location of complainant) April 1, 2002 to March 31, 2003

	Rec'd	Closed
Outside Canada	20	12
Newfoundland	26	16
Prince Edward Island	2	0
Nova Scotia	71	77
New Brunswick	9	9
Quebec	81	79
National Capital Region	347	427
Ontario	146	113
Manitoba	34	32
Saskatchewan	11	17
Alberta	52	53
British Columbia	149	163
Yukon	0	1
Northwest Territories	4	3
Nunavut	4	2
TOTAL	956	1004

B. Demystifying the Investigative Process

The *Access to Information Act* confers upon the Information Commissioner broad discretion to select the procedures by which investigations are conducted. This discretion recognizes the need for a body charged with conducting investigations of complaints against government institutions to have flexibility in its choice of investigative methods, styles and approaches. Investigative flexibility is required to respond effectively to variations in:

- Types of complaints;
- Complexity of the factual or legal issues;
- Potential negative impact on individuals;
- Likelihood of related court proceedings;
- Level of cooperation from government institutions, witnesses and complainants; and
- Availability of resources.

While recognizing the need for such flexibility, the Information Commissioner also recognizes the importance of assisting all parties involved in investigations to better understand what procedural options are open to the commissioner and the circumstances in which they are likely to be used.

Informal Process

The investigative method of choice for fact-finding (used in well over 90 percent of investigative activities) is the **informal interview** conducted by an investigator delegated for the purpose by the commissioner. Informal interviews are pre-arranged at mutually convenient times, face-to-face or by telephone, at venues usually

chosen by the interviewees. Such interviews are not conducted under oath. Informal interviews are rarely recorded and never without the knowledge of the interviewee.

In the informal interview process, investigators take care to ensure that interviewees are interviewed in private and out of the presence of others (including co-workers, supervisors and legal representatives of the employer). Only if an interviewee asks to be accompanied by others, and only if the investigator is convinced that the others will assist the investigation and not impede the candor of the interviewee, will others be permitted to be present during an informal interview.

The informal investigative method of choice for obtaining representations from complainants and government institutions is a combination of interviews (face-to-face or telephone) and exchanges of letters. With respect to obtaining the representations from heads of government institutions, investigators deal directly with the official delegated by the head of the institution to provide representations to the commissioner.

This description of the informal investigative process should be read in conjunction with the commissioner's **Quality of Service Standards for Investigations** which are set out at pages 54 to 58.

Guidelines for Formal Investigations

When the Information Commissioner is of the view that evidence or representations should be offered "on the record", the investigative process may become more formal. Situations which may trigger a more formal process include:

1) Lack of cooperation by a witness/departmental official with the informal process (i.e. failure to agree to an interview time; failure to appear for interview; refusal to answer a question; insistence on a formal, on-the-record process; refusal to provide records; inappropriate behaviour);

2) Presence of circumstances (such as, for example, allegations of wrongful destruction of records) which may give rise to a finding, comment or recommendation which is adverse to an individual;

3) The existence of conflicting evidence and issues of credibility;

4) Potential that judicial proceedings may ensue;

5) Insistence by a witness that he or she be accompanied by counsel; and

6) The need to ensure that a witness fully understands the nature, quality and gravity of the evidence which they have offered informally.

In the formal process, evidence is taken during a proceeding conducted by a presiding officer delegated for the purpose by the Information Commissioner. Formal proceedings are arranged by invitation, at a mutually convenient time. Only if it is not possible to secure the witnesses' participation voluntarily will a subpoena be issued to compel attendance. Usually, formal proceedings are conducted on the premises of the Information Commissioner. The formal proceeding is recorded (usually audio only, although audio-visual recording may be made to facilitate investigative

training) and witnesses swear an oath to be truthful and complete in their evidence. Witnesses may be accompanied by counsel but not by co-workers, supervisors or representatives of the witness's employer. Evidence may be received from more than one witness during a proceeding if the presiding officer is satisfied that a panel of witnesses would assist the investigation and all witnesses agree to be interviewed in the presence of the others.

The presiding officer conducts all aspects of the proceeding including the conduct of the questioning and ruling on procedural and evidentiary issues. The presiding officer may be assisted by counsel and investigative staff during the proceeding. The presiding officer is not constrained by the rules of evidence applicable to the courts and, hence, may require evidence on any matter he or she considers relevant to the full investigation and consideration of the complaint(s).

i) Role of Counsel

Lawyers have no greater role or rights during a formal proceeding than would counsel for a witness in a civil judicial proceeding or a proceeding before a commission of inquiry.

During the formal proceeding, witnesses and their counsel are asked to communicate only with the presiding officer and not with each other. Should either the witness or counsel wish to communicate with each other, the presiding officer will ordinarily agree to such a request and will adjourn for the purpose of permitting the witness and counsel to have a private communication.

It is not the role of counsel to examine his or her witness. However, at the end of the questioning by the presiding officer, counsel may ask the presiding officer for permission to put questions to the client--a request which, ordinarily, will be granted.

Counsel will not be permitted to represent a witness if the counsel also represents other witnesses or the witness’s employer, unless it is reasonably possible--by means of confidentiality orders and undertakings--to ensure that the witness has an opportunity to offer evidence “in private” and that the private nature and integrity of the investigation is preserved.

ii) Confidentiality Orders

The requirement of law that the commissioner’s investigations be conducted “in private” entails obligations on all parties involved to maintain confidentiality. From time to time, however, the presiding officer will reinforce the obligation with specific confidentiality orders addressed to the witness, the counsel or both. Such orders may be issued in the following circumstances:

1) A witness is accompanied by Crown counsel or by a counsel who also represents other witnesses or the witness's employer. (dealt with above under **Role of Counsel**)

2) The evidence of one witness in a prior proceeding is likely to be disclosed by the presiding officer during questions to another witness.

3) The integrity of the investigation is served by limiting disclosure of evidence amongst potential witnesses.

It is also as a result of the “in private” requirement for investigations that copies of the tapes or transcripts of

formal proceedings are not given to witnesses. Witnesses (or their counsel) may consult the tapes or transcripts of their own evidence but only on a supervised basis at the premises of the Information Commissioner.

iii) Potential Adverse Comment

During either the formal or informal process, evidence may be presented or discovered which raises the possibility that the Information Commissioner may make comments or recommendations (in his reports to the complainant, the government institution or Parliament) which are negative or adverse towards identifiable individuals. In such cases, any such individual will be (1) notified in writing of the potential of an adverse comment or recommendation; (2) informed of the evidentiary basis for the potential adverse comment or recommendation; and (3) afforded a fair and reasonable opportunity to offer evidence and make representations in response to the notice of potential adverse comment or recommendation.

In no case will the Information Commissioner make findings of criminal or civil wrongdoing against an individual (except in the context of contempt proceedings).

Should the commissioner come into possession of evidence suggesting that a federal or provincial offence has been committed, he is authorized to disclose such evidence to the Attorney General of Canada. If the possible offence is that of perjury, or if it arises under the *Access to Information Act*, the commissioner may refer the matter to the RCMP for criminal investigation.

Last year, the commissioner invoked his powers to order the appearance of witnesses and production of records, on 7 occasions. This year, 9 orders were issued, as follows:

3 compelled the appearance of witnesses and the production of records

2 compelled the appearance of witnesses

4 compelled the production of records.

In accordance with standard practice, all witnesses who received subpoenas were first invited to cooperate voluntarily. No witness who received a subpoena challenged its legality.

C. Quality of Service Standards

In last year's annual report, the view was offered that one of the reasons for the lengthy duration of the commissioner's investigations (in addition to insufficiency of resources) is the slowness by institutions in responding to investigative requests for meetings, explanations and documentation. As well, last year, the commissioner informed government to his intention to develop timelines for investigative activities designed to bring investigations to completion by fixed target dates or “standards”. Such timelines and standards were developed, shared with Treasury Board and discussed with the community of access to information coordinators. Having taken into account comments and suggestions made during the consultation process, the commissioner has adopted the following service timelines and standards to guide the work of his investigators and government officials with whom they deal.

Policy on Service Standards

It is the policy of the Office of the Information Commissioner that every reasonable effort will be made, in cooperation with complainants and government institutions, to complete all "administrative" complaints (delays, fees, language and extensions) within 30 days from the issuance of the notice to the department under section 32 of the Act. With respect to all other complaints (exemptions, exclusions and missing records), every reasonable effort will be made to complete them within 90 days from the date of the issuance of the notice.

In order to achieve these targets, it will be necessary to expect staff of the Office of the Information Commissioner, and staff of government institutions against which complaints are made, to respect certain timelines and processes in their dealings. In excess of 90 percent of investigations are informal (evidence is not taken under oath or recorded, the production of records or witnesses is not compelled by order, original records are rarely required). Consequently, these service standards guide the informal investigative process.

A. Within five days of being assigned a complaint, the investigator will make every reasonable effort to communicate in person or by telephone with the complainant for the following purposes:

   i) to make introductions and provide the complainant with information concerning how to contact the investigator;

   ii) to explain the commissioner's investigative process and the complainant's right to make representations;

   iii) to discuss the nature of the complaint to ensure that it is well-understood by the investigator and well-focussed by the complainant; and

   iv) to obtain all supporting evidence available to the complainant.

B. Based on a review of the wording of the complaint, supporting evidence provided by the complainant and any clarifications provided by the complainant, the investigator will make a determination as to whether or not the complaint constitutes a matter falling within the commissioner's jurisdiction as set out in subsection 30(1) of the *Access to Information Act*. If the investigator determines that the matter of the complaint does not fall within the investigative jurisdiction of the Information Commissioner, the investigator will report the matter to the Information Commissioner with a recommendation that the complainant be so informed. The final decision whether or not the commissioner has jurisdiction to investigate a matter rests with the Information Commissioner.

C. If the complaint concerns a matter falling within the commissioner's jurisdiction, the investigator will formally initiate the investigation by personally serving a notice of intention to investigate, containing a summary of the substance of the complaint (as required by section 32 of the Act), on the delegate of the head of the institution against which the complaint is made. Normally, the delegate receiving the commissioner's section 32 notices is the institution's access to information and privacy coordinator.

D. Investigators and institutional access coordinators are expected to work together to arrange a mutually convenient time, within five days of a request to the coordinator by the investigator, for the initial investigation meeting. The purpose of the initial meeting will be:

   i) to effect personal service of the section 32 notice;

   ii) to ensure that there is a common understanding of the complaint;

   iii) to provide the investigator with the original of the institution's administrative file(s) relating to the processing of the access request(s) to which the complaint relates as well as a copy of the ATIPflow record related to the request(s) to which the complaint relates. The original file will be copied by the investigator on-site or returned to the institution within 10 days after a copy is made.

   iv) to ensure that the investigator has an up-to-date copy of the institution's designation order pursuant to section 73 of the Act;

   v) to obtain copies or originals of all records relevant to the access request(s) in respect of which a complaint of improper denial of access has been made. These records are to be provided in their entirety except in cases where the institution has relied on section 69 of the Act to deny access to the requester and there is appropriate documentation from PCO in the processing file confirming that the withheld information constitutes a cabinet confidence;

   vi) to obtain any additional documentation not contained in the processing file which sets out the rationale on which the designated authority relied in invoking any of the Act's fee, extension, exclusion or exemption provisions (or any other provision to which the complaint relates);

   vii) to obtain names and contact information for the principals involved in the processing of the request(s) to which the complaint relates including: the assigned ATIP analyst; the OPI official(s) who provided advice concerning the sensitivity of the records and/or the time, effort and cost involved in processing the request(s); the individual(s) who conducted the search for relevant records; and the individuals who approved the response giving rise to the complaint;

   viii) to compile a list of deficiencies including:

   - adequacy of the section 32 notice and

   - adequacy of the processing file;

   ix) arrange a mutually convenient time for a second meeting, within 10 days of the initial meeting.

(Note: original records provided to the investigator will be returned within 10 days of a request for them as provided for in subsection 36(5) of the Act.)

E. The purpose of the second investigative meeting between the investigator and the ATIP coordinator will be:

- to address any outstanding information deficiencies;
- to discuss and finalize the investigator's plan for future steps in the investigation. The investigation plan will include specific dates for completion of investigative steps designed to bring the investigation to a conclusion within the target dates (i.e. 30 days (administrative complaints); 90 days (denials of access)).

F. The investigator will, after receiving the institution's representations, afford the complainant an opportunity to make representations and to respond to the substance of the institution's representations (subject to the investigator's confidentiality obligations under sections 63 and 64 of the Act).

G. Within five days of completion of the steps set out in the investigation plan, the investigator will complete and submit to the Information Commissioner a report of the results of the investigation including the investigator's recommendation as to whether the complaint is:

1. not well-founded
2. resolved
3. well-founded with recommendations to the head of institution for remedial action.

The investigator's report will, when warranted, specify reasons why the 30-day or 90-day service standard was not met.

The Investigation Plan

Since it is the role of the Information Commissioner to conduct independent, thorough investigations, it is essential to avoid the reality or appearance that government institutions control how investigations of complaints against them will be conducted.

Nevertheless, it is also important to make investigations as efficient as possible by securing, informally, the cooperation of institutions in assisting investigators in fact-finding, obtaining representations and finding solutions. It is for this latter purpose that investigators will discuss, with ATIP coordinators, certain elements of their investigation plans. In rare cases, where there may be allegations of wrongdoing, issues of credibility or special confidentiality requirements, investigators may choose to refrain from sharing elements of the investigation plan with ATIP coordinators.

Ordinarily, the investigator seeks the agreement of the ATIP coordinator to facilitate specific activities within specific times. The elements of the investigation plan for which timelines are to be discussed and agreed upon at the second investigative meeting include:

1. interviews with officials;
2. provision of additional records to the investigator;
3. provision by investigator to ATIP coordinator of his or her analysis of the merits of the position of the institution;

4. provision by the designated official to the investigator of representations in support of his or her decisions;

5. provision by the investigator to the designated officials of a proposal for resolution (subject to the approval of the Information Commissioner);

6. provision by the designated officials to the investigator of a response to the investigator's proposed solution; and

7. when relevant, a statement of reasons why it was not possible to agree on times which permit the investigative activities in the plan to be completed within the 30-day or 90-day service standard.

The Information Commissioner recognizes that the ability of his office, and government institutions against which complaints are made, to meet these investigative service standards will depend on adequate resources, efficient processes, as well as mutual cooperation, respect and goodwill. Experience will be carefully monitored in consultation with Treasury Board Secretariat. If service standards cannot be met, early action will be taken to address the causes.

D. Delays

For many of the access law's 20 years of life, the priority of the Office of the Information Commissioner has been to address a chronic problem in government of delay in answering access requests. At the beginning of this commissioner's term, in 1998, the "Report Card" initiative commenced under which selected departments were graded on the basis of the percentage of access requests received which were not answered within statutory deadlines. Those report cards (37 in all, covering 11 institutions) have been tabled in Parliament either as special reports or, as this year, included within the commissioner's annual reports.

Since the report card initiative commenced, in 1998, there has been a dramatic reduction in the number of complaints of delay received by the commissioner, from a high of 49.5 percent of all complaints to a low, this year, of 16.2 percent.

The Office of the Information Commissioner continued this year to focus attention on the performance of departments in meeting response deadlines. The same grading standard was used this year as in the past. It is based on the Act's provision which "deems" late answers to be "refusals". The grade depends on the percentage of all requests received which are not answered within statutory deadlines and, hence, are deemed refusals, as indicated in the tables below.

In previous years, three departments achieved ideal compliance, Privy Council Office and Health Canada

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

received an A in early 2000, one year after the initial Report Card. Human Resources Development Canada received an A in early 2000.

This year, a Status Report was completed on all nine departments that were issued Report Cards in previous years. In addition, two departments, Public Works and Government Services Canada and Correctional Service Canada, were tested and graded for the first time.

The results achieved by the nine departments in processing access requests from April 1 to November 30, 2002, within the time requirements of the *Access to Information Act* are displayed in Table 1.

Overall, departments have made significant progress in implementing the Report Card recommendations and reducing the incidence of delay. Each department has taken a somewhat different approach to reducing the number of requests in a deemed-refusal situation. Because the Report Cards and the Status Reports are issued for a portion of the fiscal year (April-November), there is a tendency to end the year with a grade less than the grade for the first eight months of the fiscal year. Table 2 illustrates the situation among the departments that were issued a Status Report in January 2002.

Table 1: New Request to Deemed-Refusal Ratio - April 1 to November 30, 2002

Department	% of Deemed Refusals	Grade
Canada Customs and Revenue Agency	3.5%	A
Citizenship and Immigration Canada	3.8%	A
Department of National Defence	9.1%	B
Department of Foreign Affairs and International Trade	7.8%	B
Fisheries and Oceans Canada	4.2%	A
Health Canada	5.0%	A
Human Resources Development Canada	19.7%	D
Privy Council Office	17.5%	D
Transport Canada	19.0%	D

Table 2: New Request to Deemed-Refusal Ratio

Department	Grade for Apr. 1 to Nov. 30, 2001	Grade 2001-2002
Canada Customs and Revenue Agency	B	B
Citizenship and Immigration Canada	C	C
Department of National Defence	C	C
Department of Foreign Affairs and International Trade	D	F
Fisheries and Oceans Canada	F	F
Transport Canada	C	D

Table 3					
	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003
CCRA	F	F	C	B	A
CIC	F	F	D	C	A
CSC	-	-	-	-	F
DFAIT	F	F	F	D	B
F&O	-	-	F	F	A
HCan	F	A	-	-	A
HRDC	-	A	-	-	D
ND	F	F	D	C	B
PCO	F	A	-	-	D
PWGSC	-	-	-	-	F
TC	-	F	F	C	D

As can be seen from Table 3, there has been an overall positive improvement in performance since the Report Card process commenced in 1998.

All of the six institutions originally receiving an "F" pulled up their socks in subsequent years. Four of the six attained "A"s and two achieved "B"s. Only one of the original six showed backsliding from its best grade. In its 1999-2000 Report Card, PCO moved from the failing category to an "A". This year it was retested and found to merit only a "D".

Transport Canada was not tested until 1999-2000 when it received an "F". Its grade had improved to a "C" by 2001-2002. Regrettably, there was backsliding this year to "D". Notable, too, is the fact that HRDC received an "A" in its first test in 1999-2000. In its retest this year, it joined PCO in dropping to a "D".

The two institutions tested for the first time this year--CSC and PWGSC--both received failing grades. (Full Report Card reports are found in Appendix B.)

It seems evident that the problem of delay is less serious but not yet solved. There are many factors in the access process that may lead to an unacceptably high number of access requests in a deemed-refusal situation. Of all of these factors, four stand out as potential causes of delay:

- **Slow records retrieval:** Records retrieval within the allocated timeframe is essential to avoid initial delays in the process;
- **Inadequate resources:** The access to information coordinator must have sufficient resources to handle the volume of requests received by the department along with the appropriate delegated authority;
- **Top-heavy approval process:** An approval process that requires a number of reviews is burdensome and causes substantial delays in departments that continue to operate in a "play it safe" mode; and
- **Inadequate attention from the top:** The entire access process needs the support of senior management. If their support is not visible and communicated to departmental staff, adherence to timelines tends to break down over time.

Time extensions for consultations under paragraph 9(b) of the *Access to Information Act* continue, at times, to be

an impediment to reducing the number of access requests in a deemed-refusal situation. A lack of communication among departments can mean that the length of time selected for a time extension is determined without seeking the input of the department that will review the records. In addition, a department may forward more than one access request to another department at the same time for consultation without prior communication with that department.

Over time, Health Canada has demonstrated the highest level of consistency in meeting response deadlines under the Act. The Director, Access to Information and Privacy Division of Health Canada, identified a number of factors that, in his opinion, contributed to the maintenance of ideal compliance with the *Access to Information Act*'s time requirements. Overall, the director identified constant perseverance to succeed in maintaining a grade of A and teamwork on the part of HCan staff as requisite ingredients to maintain ideal compliance. In addition, the following factors influenced the department's ability to process access requests on time:

OPI Communication

It is essential to regularly communicate the time requirements of the access process to offices of primary interest (OPIs) and their responsibility as part of the access to information (ATI) team to meet the time requirements. The OPI ATI contact person may change, or their priorities may change. Nonetheless, there is a statutory requirement to meet both legislated and HCan timelines for completing the OPI's part of the access process and this must be conveyed to OPIs on a regular basis.

Request Clarification

When an access request requires communication with the requester to clarify the request, the receipt date of the request must be changed to take into account the clarification.

ATIP Director's Assistance

At times, the ATIP director has to become involved in the access process for a request regardless of how much delegation occurs. The director makes himself available to ATIP staff when staff alert him to a potential delay problem. Focussing on a potential deemed-refusal situation and possible corrective measures a few days before a delay may occur is one method of avoiding a deemed-refusal request.

Fee Estimates

HCan always “stops the clock” when a fee estimate is sent to a requester. The actual days for processing the request do not include the time taken by a requester to respond to a request for a deposit or a fee as provided by the *Access to Information Act* Regulation concerning fees.

Continuous Improvement

It is always possible to make improvements to the access process. For example, previously, one OPI contact person would complete a report on the search for records. A report was completed even if records did not exist. The director general of the area signed the report. Through streamlining, the report has been eliminated and the OPI contact person sends an e-mail directly to the ATIP Division on the result of the search for records.

Contact of the Month Award

In order to recognize excellence, the ATIP Division of HCan has established an OPI Contact of the Month Award.

Senior Management Engagement

The ATIP director provides a weekly report to the deputy minister's office identifying late access requests and reasons that the requests are late.

E: Shifting the Commissioner's Priorities

The problem of delay in the access system will remain a priority for the Information Commissioner in the coming years. However, the focus of attention will shift and a new priority will be added.

The shift of focus with respect to delays will involve careful attention to the manner in which government institutions are interpreting and applying the time extension provisions in section 9 of the *Access to Information Act*. It is important to verify that the reduction in incidence of failure to meet response deadlines is not due to an overly liberal use of the Act's time-extension provisions. As well, attention will be paid to compliance with the subsection 9(2) requirement that institutions notify the Information Commissioner of any extensions of time longer than thirty days.

The new priority for attention will be the philosophy and approach to application of exemptions--particularly discretionary exemptions. The need for attention to this matter is well articulated in the June 2002 Report of the Access to Information Review Task Force, as follows:

"While we have concluded that the overall structure (of the Access Act) is sound, this does not mean that the outcomes that Parliament intended are always achieved. It is our view that this is not so much due to the general structure of the Act, or even the specific exemptions or exclusions. Rather, it is due to the way discretionary exemptions are understood and applied.

The exercise of discretion inherently implies a consideration of the factors relevant in each particular case, including any anticipated harm from disclosure. However, it is our impression that heads of government institutions (or their delegates) do not always consider all relevant factors in exercising their discretion, nor do they articulate clear reasons for withholding information. We found that this is a problem in all the jurisdictions we consulted.

The challenge is to find ways to bring the practice more in line with the intent of the Act. We believe that institutions should consider whether an identifiable harm could result from disclosure, regardless of whether a particular exemption includes a specific injury test. We also believe that, in exercising discretion, institutions should consider the fact that information usually becomes less sensitive over time. The most productive reform would be to find a way to ensure that discretion is exercised only after such consideration. An exemption would then be claimed only where good reasons can be articulated for withholding information.

The application of exemptions should not be a matter of intricate legal reasoning, but of basic

questions asked consistently at all stages in the process: Are there good reasons for withholding the information in this case? How soon can it be made available without causing harm to one of the interests protected by the Act?" (pages 43-44)

This new priority will be reflected in next year's Report Cards and will involve analysis of a sample of responses to access requests which were not the subject of complaint to the Information Commissioner. Among the factors to be assessed in such reviews will be:

1) Are reasons for exemption recorded on the processing file?

2) Were an appropriate range of factors, pro and con, weighed before invoking exemptions?

3) Is there evidence indicating that discretion was exercised in favour of disclosing exemptible information?

4) Have the delegated authority and access professionals been given training with respect to the proper exercise of discretion?

5) Is there evidence on the file that the delegated authority plays a challenge role when operational managers recommend secrecy?

6) Does the department have written guidance concerning the proper exercise of discretion and establishing a philosophy that exemptions and exclusions are to be interpreted and applied to facilitate and promote, as much as possible, the disclosure of information?

F: Treasury Board Initiatives

The minister responsible for the good administration of the *Access to Information Act* across government is the President of Treasury Board. The minister is assisted in that regard by the Treasury Board Secretariat's Information and Security Policy Division (ISPD). Officials of ISPD have a critical role in providing guidance to all government institutions with the goal of ensuring consistency in the application of the access law, fostering a culture of openness and solving problems before they become systemic or the subject of complaints to the commissioner.

Over the years, information commissioners have been critical of the lack of priority and resources which Treasury Board Ministers have devoted to these important responsibilities. Recently, and again this year, there are signs of improvements, but there remain reasons for concern.

On the negative side, the Treasury Board President has not yet proceeded with administrative or funding initiatives, which were recommended almost a year ago by the Access to Information Review Task Force. As well, the Board has not yet begun to collect the kind of statistics on the operation of the access system which would enable it to assess the "health" of the system and to intervene in a timely way to solve problems of process, resources or attitudes.

It is largely because of Treasury Board Secretariat's decision not to actively monitor the performance of the system that the Information Commissioner has taken on the function of preparing Report Cards on selected institutions.

On the positive side, TBS held the first joint conference of the ATIP and Security Communities on March 4, 2003. The theme for the day was "Building the Learning Capacity of the ATIP and Security Communities: Key Tools for Personal Development". The objectives of the conference were to expose participants to the concepts of personal learning and development and to provide members of the two communities the opportunity to network and foster a stronger working relationship. The day's activities included a combination of presentations and workshops on topics such as, modern comptrollership, mediation and negotiation, innovation in the workplace, coaching, and creativity and innovation in learning.

At the same conference, TBS recognized the accomplishments and achievements of the ATIP community in providing quality service in the delivery of the access to information program by announcing the winners of the second annual ATIP Community Awards for Excellence. The awards were given in two distinct categories: "Excellence in Service and Innovation" and "Dedication, Leadership and Community Spirit". While special recognition went out to the winners of the awards, the valuable work of the community as a whole was underscored. This positive recognition for those who work "in the trenches" of the access to information system is very constructive.

An important aspect of ISPD's role consists of providing strategic advice and support to institutions. Given the significance of this role, ISPD developed a Service Delivery Standard. The standard focuses on three main areas of effective service: quality, timeliness and availability. In general, ISPD will ensure that the response provided to client institutions is relevant to the circumstances and fulfills the needs of the institution to the greatest extent possible. With the addition of a new member to ISPD, the division has reorganized to provide a more central point of contact on general policy matters and the interpretation of the guidelines. A follow-up survey will be conducted in nine months to assess the degree to which the Service Standard and the new procedures are meeting the community's needs.

As part of the academic studies conducted by a member of the ISPD staff, a discussion paper on the renewal of the ATIP community was completed and shared with members of the Senior Advisory Committee of Coordinators (SACC). The paper focuses primarily on the well-being of ATIP practitioners and builds on the survey of the ATIP community conducted last year. A number of issues of interest to the community are examined in the paper including: training and development; workload, resource allocation; recruitment and retention; and the development of competency profiles. The ISPD intends to build on this initiative and further the development of the competency profiles, which are seen as the foundation of recruitment strategies and a training plan.

A two-year project was also initiated to review the Info Source publications and develop recommendations for their improvement. Specific objectives of the project are to improve the format and content of all Info Source publications and to identify new technology to improve the yearly updating process. The project will include the identification of the

challenges presented by current publications, a holistic review of standard banks in consultation with key stakeholders, establishment of a user-friendly format, and the establishment of a quality assurance (QA) process. Info Source extends beyond being a key reference tool to facilitate public understanding of government activities. The publications also provide the Secretariat with an opportunity to review institutions' personal information banks and record descriptions supporting its active monitoring function of the government's ATIP program.

During the 2002-2003 fiscal year, the TBS website was converted to meet government-wide Common Look and Feel requirements. As part of this, ISPD has undertaken to modernize the Treasury Board Secretariat's ATIP websites to facilitate the dissemination of information relating to access to information and privacy to the ATIP community and to the public. During the upcoming year, changes will be made to the content and layout to provide more information and improve navigation throughout the site.

Of continued interest to the ISPD is the Coordination of Access to Information Requests System (CAIRS). The system was created in 1989 and was modernized in 2000 to meet Y2K requirements. Its basic functionality remained relatively unchanged, despite earlier considerations to open the site to the public. The Board is working towards removing the remaining impediments to on-line access, which include removing personal identifiers and respecting official languages requirements.

A total of 30 training sessions were delivered by ISPD this year. With a noted 30% increase in participation from the previous year, ISPD's ATIP training program continues to be well received by the community. In addition to maintaining ISPD's core ATIP training program, ISPD is in the process of organizing a workshop that will provide ATIP practitioners the opportunity to share best practices in three main areas: processing requests, management of ATIP administrative files, and dealing with requesters, offices of primary interest and investigators. The workshop will also highlight some best practices suggested by the commissioner in previous annual reports and institutional report cards.

Finally, following the release of the Report of the Access to Information Review Task Force on June 12, 2002, ISPD conducted a detailed review and costing exercise to identify the funds necessary to implement the various proposed recommendations. TBS is in the process of identifying options to fund some of the administrative initiatives outlined in the report; however, as indicated above, no decisions have yet been taken.

CHAPTER IV
CASE SUMMARIES

1. Public, But Inaccessible - Case #1

Background

Industry Canada maintains a registry of corporations registered under the *Canadian Business Corporations Act* which includes the names of the corporations' directors. On the department's **Strategis** website, all registered corporations are listed by corporation name and registration number; for each listing the corporation directors are included. For a period of time, Industry Canada also maintained a computer kiosk with a search capability which allowed interested members of the public to search the **Strategis** database. For example, a search could be conducted for all corporations having a particular director.

As a result of public discussion about the purchase by a Toronto businessman of Prime Minister Chrétien's interest in a golf club, an individual went to Industry Canada to search the **Strategis** database for a list of the names of all corporations of which the Toronto purchaser was a director. To his surprise, the person who wanted to conduct the search was told by Industry Canada that it had closed to the public the computer kiosk containing the search capability. This action prompted the interested individual to make an access to information request for the list of companies.

Upon receipt of the access request, Industry Canada took the position that it had no obligation to provide the requested information since the information was already public in the **Strategis** database. In other words, the department invited the requester to go through all the listings for every federally incorporated company and, through a process of elimination, make up his own list of companies having the Toronto businessman as a director.

Industry Canada offered to supply the requester with printed pages from the **Strategis** database at a cost of $564,000. As might be expected, the puzzled and frustrated requester complained to the Information Commissioner.

Legal Issue

Section 68 of the *Access to Information Act* provides that the right of access does not extend to "published material or material available for purchase by the public". Could Industry Canada rely on this provision to refuse to create the sought-after list electronically from the raw data which was, admittedly, published on its **Strategis** website? This was the legal issue at the heart of the case.

The commissioner determined, first, that Industry Canada had the capability to electronically search the database and produce the requested list. When asked by the commissioner's investigator, the department was able to electronically generate the list in minutes without special programming or cost.

Second, the commissioner determined that the list of companies (for which the Toronto businessman was a director) was not "published" or "available for purchase by the public".

Against this factual background, the commissioner determined that Industry Canada had given an overly broad interpretation to the exclusion from the right of access described in section 68 of the Act. Taking into account the purpose of the Act, set out in section 2 (including the principles "that government information should be available to the public" and "that necessary exceptions to the right of access should be limited and specific"), the commissioner concluded that Parliament did not intend section 68 to be used as a barrier to reasonable access. The unreasonableness of the department's position, according to the commissioner, was evident from the department's own admission that a manual search of the public database would be prohibitively costly.

Having determined that section 68 did not justify the refusal to disclose, the commissioner then considered whether the Act required the department to create the requested list of companies when no such list existed in the department. In this regard, the commissioner took into account subsection 4(3) of the Act which explicitly states the right of access applies to records which do not exist but can be produced electronically "using computer hardware and software and technical expertise normally used by the government institution". The commissioner concluded that the list of companies at issue in this case could easily be produced by Industry Canada using already existing electronic search capabilities.

For these reasons, the commissioner found the complaint to be well-founded and recommended that the requested list of companies be created and disclosed to the requester.

Industry Canada accepted and implemented the commissioner's recommendation.

Lessons Learned

The right of access set out in section 4 of the Act is a right of access to "records under the control of a government institution". As a general rule, the Act does not require departments to do research for requesters and to create records to respond to requester questions or research interests. However, if electronic data can be manipulated or searched so as to produce specifically requested records (without unreasonably interfering with the operations of the government institution), there is an obligation on government to create the requested record.

Moreover, it is not open to a government institution to refuse to create specifically requested records simply because the database in question is publicly accessible. The exclusion of published information from the right of access must not be interpreted and applied as a barrier to access--that is not its intended purpose. Government institutions may only rely on section 68 to refuse disclosure when the requested information is already in the public domain and readily accessible to interested members of the public.

2. Public, But Inaccessible - Case #2

Background

Correctional Service Canada (CSC) is required, by directives issued by the Commissioner of Corrections, to disclose certain information to inmates.

The information, concerning rules, rights, obligations, procedures and so forth, is compiled on a CD-ROM and copies of the CD-ROM are made available for inspection in inmate libraries.

An inmate was not satisfied with being limited to inspecting the content of the CD-ROM in the inmate library and made a request for a copy of the CD-ROM under the *Access to Information Act*. The request was refused. CSC took the position that, under section 68, published material or material maintained for public reference, is not subject to the right of access.

The inmate complained to the Information Commissioner about CSC's refusal to disclose a copy of the CD-ROM.

Legal Issue

Is information placed in an inmate library "published material" or "library material preserved solely for public reference"? If so, section 68 of the Access Act excludes it from the right of access; if not, the information must be disclosed.

The investigation confirmed that some of the information on the CD-ROM was previously published elsewhere by the CSC or other government departments. However, some of the contents were exclusively prepared for inmate purposes and had not been made available to the public at large. The investigation also confirmed that the CD-ROM was not available to the general public through any library loan system or even listed as a reference item for availability to public libraries. Finally, the investigation confirmed that inmate libraries are not open to the general public.

Against this factual background, the commissioner concluded that, since some of its contents had not been published, the CD-ROM could not be exempt from the right of access as "published material". Second, the commissioner concluded that the CD-ROM is not "library material preserved for public reference" since inmate libraries are not accessible to the general public.

Consequently, the Information Commissioner found the complaint to be well-founded and recommended that the CD-ROM be disclosed to the requester. CSC accepted the recommendation and disclosed the record.

Lessons Learned

As discussed in the previous case summary, the section 68 exclusion for "published" and "public reference" material is not intended as a barrier to access. When section 68 is relied upon in circumstances where the result is the inability of the requester to obtain access to or a copy of the information, it is likely that the exclusion has been improperly invoked.

3. Census Records – Facilitating Research While Protecting Privacy

Background

As discussed previously in this report, at pages 19 to 21, 30 individuals made complaints under the Act against Statistics Canada concerning the department's refusal to disclose the nominal census returns of the 1906 census of Canada's western provinces. The complainants were amateur and

professional historians and genealogists.

Statistics Canada relied on the confidentiality clause (section 17) of the *Statistics Canada Act* for authority to refuse disclosure. The complainants, on the other hand, argued that the *Privacy Act* permits disclosure of archived census records after 92 years. The complainants argued that the Chief Statistician could not, simply by refusing to transfer census records to the Archives, extend the 92-year period of secrecy.

Legal Issue

Did the Chief Statistician have lawful authority to refuse to transfer the 1906 census records to the National Archives? That was the central issue in the commissioner's investigation.

Statistics Canada offered a legal and a policy argument. The legal argument involved an interpretation of the instructions for the 1906 census which were approved by the cabinet of the day and published in the Canada Gazette on May 26, 1906. The instructions, according to Statistics Canada, contained an implicit promise that the census results would never be disclosed.

The policy argument advanced by Statistics Canada related to the importance in our society of encouraging voluntary compliance with future census surveys. If the 1906 promise of confidentiality is not respected, according to Statistics Canada, Canadians may be reluctant to trust in the future that the privacy of census records will be protected. Without such trust, Statistics Canada is of the view that participation rates could drop and, thus, put the integrity of future census surveys in jeopardy.

The complainants disputed both points. First, the complainants asserted that there was no legal promise of confidentiality governing the 1906 census. Indeed, the complainants asserted that the 1906 census instructions made it clear that the records would be transferred to Archives and be made available for research purposes.

With respect to the policy argument asserted by Statistics Canada, the complainants pointed out that, in the U.S., census records are made public 72 years after the census; in the U.K., they are disclosed after 100 years. In neither country are there voluntary participation rate problems. In this regard, the complainants maintain that the “secrecy forever” position taken by the Chief Statistician lacked balance by failing to recognize the importance of the census database for historical and genealogical research. One of the complainants put it this way:

> “The 1906 special western census represents a national treasure. It was taken at the height of the western settlement boom in the early twentieth century and therefore provides an unrivalled snapshot of the emerging West with its diverse peoples and rapidly expanding wheat economy. Indeed, access to this detailed material will be critical to the many studies and projects celebrating the centennial of Alberta and Saskatchewan in 2005.”

With respect to Statistics Canada’s legal argument, the commissioner’s investigation could find no evidence of a promise having been made to Canadians, prior to the 1906 census, that the nominal results would remain secret forever. However, there were clear words found in the census instructions that the results were to be transferred to the then Dominion

Archives and maintained as a permanent record. Thus, in the commissioner's view, the Chief Statistician could not lawfully continue to refuse to transfer the 1906 census records to the National Archives.

With respect to the policy argument, the commissioner agreed that there is an important public interest to be served by maintaining a certain period of secrecy for nominal census returns. Without assurances that answers to census questions will be kept confidential for an extended period of time, participation rates could be negatively affected.

On the other hand, the commissioner also agreed that there is an important public interest to be served by allowing the census database to be open to researchers after sufficient time has passed to overcome the privacy interests of those who completed census forms.

In the commissioner's view, the legal balance between these two interests has already been stuck in the *Privacy Act* Regulations, which authorizes access to census records transferred to the Archives after 92 years have elapsed from the date of the census.

Consequently, the commissioner found the complaints to be well-founded and recommended that the 1906 nominal census records be disclosed (92 years having elapsed since the date of the census). When the Chief Statistician refused to follow the recommendation, the commissioner sought the consent of the requesters and took steps to have the matter decided by the Federal Court of Canada.

On the very day the court applications were to be filed, January 24, 2003, the Minister of Industry and the Minister of Canadian Heritage decided to disclose the 1906 census in accordance with the Information Commissioner's recommendation. As well, they announced the government's intention to amend the *Statistics Canada Act* to set the disclosure rules for census records subsequent to 1906. (For the commissioner's view concerning this legislative proposal, see pages 20-21.)

Lessons Learned

When it comes to important databases of information about Canadians, it may not be easy to find a balance between the need to permit access for research purposes and the privacy rights of individuals. However, the difficulty does not justify one-sided solutions. Rather, the path to balance lies in the principle, accepted in the *Privacy Act*, that the privacy interest diminishes with time, disappearing entirely twenty years after the death of an individual. When it come to census records, the *Privacy Act* Regulations fix the point where the privacy interest disappears at 92 years after the census information has been collected. For the future, we will see whether or not Parliament continues with this approach to balancing the two interests or whether it decides to give privacy greater prominence by allowing Canadians to give or withhold consent for future research access to census responses.

4. Air Traffic Control Tapes

Background

In August 1999, an Inter-Canadian Fokker 28 aircraft was involved in an accident at the St. John's, Newfoundland and Labrador airport. During the Transportation Safety

Board's (TSB) investigation, a journalist asked the TSB for access to the tape of the communications between the pilot and the air traffic controllers (ATC tape).

TSB refused to disclose the ATC tape because it did not have the required equipment to listen to the tape and, hence, it could not make a transcript for processing purposes. The commissioner's investigator located an ATC tape of the same incident recorded in a format which was compatible with the TSB equipment. TSB agreed to process this second ATC tape but decided to rely on the privacy exemption (subsection 19(1)) to refuse disclosure of the tape.

Legal Issues

This case raised the same issues as a complaint against TSB reported at pages 55 to 58 of the commissioner's 2001-2002 Annual Report. For a complete discussion of the issues and the commissioner's findings, the reader is referred to last year's report.

In this case, the commissioner accepted the TSB's contention that some information on the portion of the ATC tape which had not been transmitted on public airwaves (private phone numbers and comments relating to the state of mind of the air traffic controller) should be protected on privacy grounds. However, he did not accept that the entire contents of the tape qualified for privacy protection.

The TSB also argued that the public interest in learning about the cause of the accident was better served by the release of the report of the results of the TSB's investigation than by the release of the ATC tape. In response to this position, the commissioner pointed out the TSB had not issued a final report of its investigation even though almost three years had elapsed from its commencement. The commissioner stated as follows:

> "I find that there is a vital public interest in access to this transcript. Without a final report to the public of the results of this investigation, release of the tape would help inform the public as to what transpired that day. The calm, cool and professional deportment of all the parties whose comments are found on that tape would reassure the public, and that clearly outweighs any invasion of privacy that might result."

Thus, the commissioner concluded that the complaint was well-founded and recommended to the TSB that the tape be disclosed. The TSB refused to accept the recommendation.

With the consent of the requester, the commissioner has applied to the Federal Court of Canada for a review of TSB's refusal to disclose the ATC tape. The matter has not yet been heard by the court.

Lessons Learned

Even though the privacy exemption is mandatory in nature, it does require government institutions to invoke it only after a careful weighing of the balance between the public interest in disclosure and the individual privacy interest in secrecy. The decision of the court in this case, and the case reported last year, will give guidance as to where the balance should lie when it comes to ATC tapes associated with air accidents.

(Note: a second complaint against TSB also related to a refusal to disclose ATC tapes. It, too, was found to be well-founded by the commissioner and,

with the requester's consent, it has proceeded to the Federal Court for review.)

5. Were Loans Repaid?

Background

One of the organizations covered by the *Access to Information Act* is Canada Economic Development for the Quebec Region (FORDQ). This organization, as its name implies, provides economic assistance--primarily through loans and grants--to firms in the Quebec region.

Similar organizations exist to assist economic development in other regions of Canada. For example, the Atlantic Canada Opportunities Agency (ACOA) for the eastern region and Western Economic Diversification Canada (WED) for the western region.

An individual made access requests to all three organizations seeking lists of the repayments made by the companies. ACOA and WED disclosed the lists for their areas; FORDQ, on the other hand, refused. FORDQ took the position that disclosure of the repayment records would be prejudicial to the commercial and competitive interests of the companies which had received loans.

Legal Issues

Could FORDQ prove, at the level of a probability, that disclosure would be injurious to the companies which had received loans? If disclosure was not expected to be injurious to the firms in the other regions, why would disclosure be injurious to firms in the Quebec region? These were the issues which the commissioner considered.

Early in the investigation, FORDQ communicated with the same 400 companies involved to determine whether or not any would consent to disclosure and, if not, why not. All but nine of the companies gave consent for disclosure. Although FORDQ continued to refuse to disclose the loan repayment records for these nine firms, FORDQ could not explain what injury would result from disclosure.

The commissioner informed FORDQ that it bore the legal burden of proving the reasonable likelihood of injury from disclosure and that it was not sufficient for FORDQ to justify secrecy merely because these nine third parties wanted secrecy. The commissioner also asked these nine companies directly to explain what injury they feared from disclosure of the loan repayment record. In response, the commissioner received either no response, or mere assertions that harm would occur without evidence to support those assertions.

FORDQ was informed that the case for exemption had not been proven along with a recommendation that the information be disclosed. FORDQ agreed to accept the recommendation and so informed the third parties. After the 20-day waiting period passed without court action to block release by the third parties, the records were disclosed to the requester.

Lessons Learned

Government institutions bear the burden of proof that information held in government files relating to private companies should be kept secret. It is not sufficient for government institutions to blindly follow the wishes of the private firms or to shift the burden of proof to the third parties.

In order for government institutions to discharge the burden of proof in such cases, simple assertions that harm will result from disclosure, or speculation as to the potential harm from disclosure, will not suffice. Concrete evidence is required which demonstrates, at the level of a probability, that competitive harm to the private company is likely to result from disclosure of the information.

6. A Right of Access to Ministerial Expense Records

Background

In early January 2002, two journalists requested records from Health Canada about the travel expenses of the minister and one of his special assistants. The department denied access to the records citing subsection 19(1) of the Act.

Health Canada based its response on a Treasury Board Secretariat (TBS) Implementation Report 78 (IR 78). This report informed departments that records of travel expenses for ministers and their exempt staff members are to be considered personal information and processed accordingly. The report also encouraged application of subsection 19(2) of the Act to effect disclosure of such information, essentially paragraph 19(2)(a), consent by the minister or staff member. Since consent was not forthcoming from the minister and his assistant, access to the requested records was denied.

Legal Issues

The complainants observed that the policy enunciated by IR 78 is a complete reversal of previous policy whereby travel expenses of ministers and exempt staffs were disclosed on request and were not considered to be personal information. They placed this issue before the commissioner: Does the Access Act give a right of access to expense claim records of ministers and their staff members, or is access dependent upon the willingness of these officials to consent to disclosure?

On March 15, following extensive media coverage of this policy reversal, the President of Treasury Board announced in the House of Commons that the Prime Minister had asked all ministers and their staffs to consent to the release of their travel expense records. Subsequently, officials at Health Canada sought and obtained consent from the minister and his assistant for disclosure of their records. The records were disclosed with small portions containing such personal information as personal credit card numbers, home addresses and telephone numbers withheld.

The commissioner’s role ended with the disclosure of the information. However, in another complaint against Treasury Board (still under investigation), the legal merits of the new policy set out in TBS Implementation Report 78 was challenged. The result will be reported next year.

Lessons Learned

As the commissioner indicated in his report last year on this topic (see Annual Report, 2001-2002 at pages 20-22), whatever be the legal merits, the government's decision to treat public access to ministerial expense records as a matter of “grace and favour” rather than “right” is unhealthy in a democracy. This new approach gives rise to conjecture about what ministers may be hiding and increases public

cynicism about the honesty and integrity of government. If accountability through transparency is required of all other public servants, why not, too, for ministers and their staff members?

7. Litigation Disbursements - Should They Be Protected?

Background

An individual submitted a request for information concerning the amount of money that the Freshwater Fish Marketing Corporation (FFMC) had spent on its legal fees in dealing with a lawsuit and the amount of money that FFMC has set aside as a settlement in the lawsuit. All of the records were withheld under section 23 of the Act as falling within solicitor-client privilege. The requester complained about the response to the Information Commissioner.

During the course of the Information Commissioner's investigation, the complaint was narrowed to the disbursement records since there were no records relating to the amount of money that has been set aside for settlement purposes.

Legal Issue

Is information about fees and disbursements paid to lawyers subject to solicitor-client privilege? That was the issue in this case. The commissioner placed reliance on the decision of the Quebec Court of Appeal in *Maranda* v. *Canada (Gendarmerie royale)* which found that, for the purposes of solicitor-client privilege, the statement of fees paid to an attorney would constitute a "fact" rather than a "communication" and, as such, would not be covered by solicitor-client privilege.

However, the jurisprudence also indicates that specific breakdowns of fees and disbursements could give insight into legal tactics, advice or instruction moving such detail out of the category of "facts" and into that of solicitor-client "communication". Consequently, the commissioner asked FFMC to disclose the total amount of fees and disbursements only. Without prejudice to its position that even the total amount qualified for solicitor-client privilege, FFMC exercised its discretion as the client to disclose the total.

Lessons Learned

When applying and interpreting the solicitor-client exemption (section 23), it is important to bear in mind that, since the client is the Crown, and since the fees paid are public monies, there is a public interest in accountability which may not be present for other solicitor-client relationships. Thus, it is important to keep the scope of the privilege as narrow as possible by using the "facts" vs. "communication" distinction. As well, it is important to exercise the discretion in the exemption to maximize public accountability.

8. What Is an Acceptable "Copy"?

Background

A journalist with a special interest in military matters had, in 1999, asked for and received from National Defence, the recruiting poster for the elite JTF2 unit. When he asked informally for the 2001/2002 version of the recruiting

poster, National Defence refused. The refusal prompted the journalist to make a formal request for the poster under the *Access to Information Act.*

In response to the formal access request, National Defence sent the requester an electronic copy by e-mail and a black and white photocopy by regular mail (neither copy was equivalent in size, colour, detail or quality to the poster itself). National Defence continued to refuse to provide the requester with the poster itself. The requester complained to the Information Commissioner.

Legal Issue

When a department holds specially printed versions of a record (in this case, a recruiting poster), must it give one of those specially printed versions, if asked under the Act, or may it simply make a photocopy or an electronic copy? That was the issue in this case.

The investigation determined that 3000 JTF2 recruiting posters had been printed at a cost of one dollar each. At the time of the request, approximately 2000 were in storage. The other 1000 posters had been distributed to 14 Canadian Forces bases and three Reserve Force armories. In other words, National Defence was not concerned about cost or availability in coming to its decision to refuse access.

Rather, National Defence relied upon jurisprudence which concluded that the Access Act does not give requesters a right to specify the format in which information is to be provided. For his part, the commissioner took the view that, in some circumstances, a photocopy may not constitute an acceptable copy--such as, in this case, when the original is in colour and of greater size and superior quality to the photocopy offered by the department.

In an effort to find a “common sense” solution, the commissioner asked National Defence to consider giving the requester one of the posters from storage. Without prejudice to its legal position, National Defence agreed and the commissioner considered the matter resolved on that basis.

Lessons Learned

Given the vast range of records to which there is a right of access (drawings, paintings, photographs, maps, x-rays, films, videos and “any other documentary material, regardless of physical form or characteristics”), it may be difficult to determine what is an acceptable copy for access purposes. As a rule-of-thumb, a copy is the best replica of the original consistent with standards of reasonableness of cost and effort.

9. Is a Promise Not to Make Access Requests Binding?

Background

As part of a settlement of a dispute with the Canadian Space Agency concerning his termination of employment, an individual agreed not to make future access (or privacy) requests relating to his employment with the Canadian Space Agency. Later, the individual asked the Information Commissioner to determine whether or not the settlement agreement could legally extinguish his right to make access requests relating to his employment with the Canadian Space Agency.

Legal Issue

What is the legal effect of a term in a private contract wherein one of the parties agrees to limit his or her use of the *Access to Information Act*?

In considering this issue, the commissioner noted that the settlement agreement does not purport to impose obligations on government institutions (not to receive and process access requests) or upon the Information Commissioner (not to accept and investigate complaints). Rather, the settlement agreement records an undertaking by one of the parties to a limited constraint on exercising his right of access.

Thus, in these circumstances, the commissioner concluded that the settlement agreement did not contravene any provision of the *Access to Information Act*. With respect to the consequences for the individual should he decide to make access requests in contravention of his agreement, the commissioner concluded that he is not the appropriate body to make a determination as to whether or not the agreement might be invalid for other reasons, such as duress.

Lessons Learned

Employees involved in labour-management disputes often make access requests to the department with which they are (or were) employed. From time to time, as part of settlement agreements, the Crown will ask the employee to promise not to make further access requests concerning the dispute and, from time to time, employees agree to so promise. There is nothing in the *Access to Information Act* or public policy to prevent such agreement provided the agreements are not void for one or more of the many other reasons (mistake, vagueness, duress, inequity, previous breach by the other party, for example) which may invalidate a contract.

10. When Will I Receive an Answer?

Background

Under the Nunavut Land Claims Agreement of 1993, the federal government is required to make expenditures on a number of implementation activities. A corporation made an access request to Indian and Northern Affairs Canada (INAC) for information about the expenditures made under the Claims Agreement during the first 10-year implementation period.

Upon receipt of the request, INAC determined that it would have to undertake consultations with other government institutions before responding. Consequently, INAC notified the applicant of its decision to extend the response deadline for consultation purposes, as permitted by paragraph 9(1)(b) of the Act. The department did not inform the requester how much additional time would be required, prompting a complaint to the Information Commissioner.

Legal Issue

Do requesters have a right to know when they can expect answers to their access requests? Put another way: What does a department do when it has a legitimate need to consult another government institution but no control over when the other institution will reply?

The commissioner determined that, in this case, there was a legitimate need

to consult with other government institutions and those consultations could not be completed within 30 days from the date of the request. Subsection 9(1) allows for an extension of the response deadline “for a reasonable period of time” in these circumstances. However, subsection 9(1) also requires that notice be given to the requester and sets out what information the notice must contain. One such piece of information which must be included is “the length of the extension”.

The department indicated that it had adopted a policy of not indicating the length of the extension in the required notice because of the difficulty in predicting how long the consultations would take.

The commissioner concluded that INAC was legally obligated to inform requesters of the duration of the extension claimed for consultation purposes. INAC agreed to respect this obligation in future.

Lessons Learned

In cases where external consultations are required in order to properly answer an access request, departments must balance the requester’s right to a timely response with the requirement to conduct meaningful consultations. The way to do this is to communicate with the party to be consulted in advance of claiming an extension in order to determine what length of time is reasonably required.

When the consulted party does not respond to the consultation within the time stipulated in the extension notice, institutions should proceed to answer the request without further delay. There is no justification for open-ended waiting for consulted parties to provide their views. Once the consulted party has been given a reasonable period of time to respond, the department's obligation shifts to giving an answer to the access request.

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Cumulative Index of Case Summaries from 1994-2002 are listed in the Information Commissioner's 2001-2002 Annual Report at pages 59-74.

CHAPTER V
THE *ACCESS TO INFORMATION ACT* IN THE COURTS

A. The Role of the Federal Court

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

Requesters dissatisfied with responses received from government to their access requests first must complain to the Information Commissioner. If they are dissatisfied with the results of his investigation, they have the right to ask the Federal Court to review the department's response. If the Information Commissioner is dissatisfied with a department's response to his recommendations, he has the right, with the requester's consent, to ask the Federal Court to review the matter.

This reporting year the commissioner's office investigated 1,004 complaints. Only two cases could not be resolved to the commissioner's satisfaction and these resulted in two new applications for review being filed by the commissioner. Five applications for court review were filed by dissatisfied requesters. Third parties opposing disclosure filed 14 applications.

B. The Commissioner in the Courts

I. Cases Completed

Canada (Information Commissioner)* v. *Canada (Commissioner of the Royal Canadian Mounted Police), File No. 28601, Supreme Court of Canada (on Appeal from the Federal Court of Appeal)

McLachlin C.J., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ., Appeal heard and reserved on October 29, 2002, decision issued on March 6, 2003.

(See 2001-2002 Annual Report, p. 85, 2000-2001 Annual Report, p. 111 and 1999-2000 Annual Report, p. 47 for further details.)

Nature of Proceedings

This was an appeal from a decision rendered by the Federal Court of Appeal, upholding the Applications Judge's ruling which dismissed the Information Commissioner's application for review brought pursuant to section 42 of the Act.

Factual Background/Issues/Outcome

(See pages 17 to 19 for details.)

The Information Commissioner of Canada and TeleZone Inc.* v. *The Minister of Industry Canada,
(A-824-99) Court of Appeal

3430901 Canada Inc. and TeleZone Inc. **v.** ***The Minister of Industry Canada,*** (A-832-99) Court of Appeal

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

Nature of Proceedings

(See Annual Report 2001-2002 p. 75 for more details.)

The commissioner had sought leave to appeal the decision of the Federal Court of Appeal to the Supreme Court. On June 13, 2002, the Supreme Court of Canada dismissed the application for leave to appeal with costs.

The Minister of Environment Canada **v.** ***The Information Commissioner of Canada et al.***, 2003 FCA 68, Court File No. A-233-01, Federal Court of Appeal

Décary, Noël, Sharlow J.A., February 7, 2003

(See 2001-2002 Annual Report, p. 86 for more detail and 2000-2001 Annual Report, p. 107 for more details.)

Nature of Proceedings

This matter involved an appeal from the determination of the Trial Judge, Blanchard J., which allowed the Information Commissioner's application for judicial review, pursuant to section 42 of the *Access to Information Act* in relation to the minister's refusal to disclose requested records based on section 69 of the Act.

(See pages 15 to 16 for details.)

Canada Post **v.** ***Canada (Minister of Public Works)*** 2002 FCA 320, Court File No. A-489-01 Court of Appeal

Décary, Evans and Pelletier JJ.A., September 11, 2002

Background

This is an appeal of an order of Madam Justice Tremblay-Lamer varying the confidentiality order issued by Mr. Justice Blanchard in court file T-2117-00.

On May 1, 2000, the Minister of Public Works and Government Services Canada (PWGSC) received a request for access to a specific report which had been provided to it by Canada Post. The request was denied as being a cabinet confidence and the requester complained to the Information Commissioner.

During the Information Commissioner's investigation, the Minister of Public Works changed his position and determined that some of the requested information was not excluded pursuant to section 69. Notices pursuant to sections 27 and 28 were sent to Canada Post indicating that PWGSC intended to disclose some of the requested information.

On October 23, 2000, Canada Post applied to the Federal Court of Canada pursuant to section 44 of the Act seeking to block disclosure. On December 7, 2000, in the course of the proceedings, Mr. Justice Blanchard issued a confidentiality order. The Information Commissioner was not a party to these proceedings.

On August 17, 2001, in the course of the commissioner's ongoing investigation into the refusal to disclose some of the requested information, PWGSC refused to provide records to the commissioner because of the confidentiality order issued by Justice Blanchard. The commissioner took the view that the confidentiality order did not justify refusal to provide records to him. He issued a subpoena *duces tecum*

requiring the ATIP coordinator at Public Works and Government Services Canada to produce the information.

The minister filed a motion for a variance of Mr. Justice Blanchard's confidentiality order in order to comply with the subpoena. The Information Commissioner was granted leave to intervene on the motion and opposed the motion, arguing that there was no conflict between the confidentiality order and the subpoena. The commissioner's reason for opposing the motion was to ask the court to settle, for the future, the principle that disclosure of the records to the commissioner does not violate any confidentiality order which is issued in a parallel section 44 case.

On August 23, 2001, the Motions Judge, Madam Justice Lamer, agreed that there was no conflict between the confidentiality order and the subpoena but, by abundance of caution, she varied the confidentiality order. The Information Commissioner appealed that decision in order to seek a more definitive direction for future cases.

Issues Before the Court

Since the Information Commissioner's subpoena was supported by the Trial Judge and since it had been complied with, the court considered whether or not the appeal was moot.

Findings

The court held that the criteria established in Borowski governing the court's exercise of its residual discretion to hear and determine moot issues had not been met. The fact that a question was liable to recur in subsequent litigation was not in itself sufficient to engage the discretion of the court, when, as here, the issue was not one that of its very nature is evasive of review. Moreover, the court held that the future utility of deciding the appeal on its merits was diminished by the fact that the terms of confidentiality orders issued under section 47 of the ATIA varies from case to case.

Judicial Outcome

The appeal was dismissed. The court, however, concluded by stating the following: "we would only observe that, in all the cases to which counsel drew our attention, the deciding prothonotary or judge concluded that the terms of the confidentiality orders under consideration did not conflict with the commissioner's subpoena. Moreover, in none of these cases was it said that a variance was necessary in order to avoid a conflict."

Canada (Information Commissioner)* v. *Canada (Minister of Citizenship and Immigration), [2002] F.C.J. No. 950 Court of Appeal, Court File No. A-326-01

Décary, Noël and Evans JJ.A., June 21, 2002

Nature of Proceedings

This was an appeal from a decision by the Applications Judge, Madam Justice Dawson, dismissing the Information Commissioner's application for review brought pursuant to section 41 of the Act.

Factual Background

In response to allegations of discriminatory behaviour and harassment at Citizenship and Immigration Canada's Case Processing Centre in Vegreville, Alberta, the minister requested an independent consultant to undertake an

administrative review with the objective of enhancing respect in the workplace for all individuals. As part of this administrative review, a number of employees and former employees were interviewed on a voluntary basis. They were, likewise, assured that their interviews would remain confidential.

The administrative review culminated in the consultant preparing a report to the minister. In part, this report was critical of the director of the Centre, as bearing some responsibility for the problems which were found to exist at the Centre. On the same day that the director was provided with a copy of the report, he was relieved of his duties.

Having effectively been dismissed subsequent to the report's release, the director made an access request to Citizenship and Immigration for the interview notes upon which the report was based. Ultimately, the minister provided portions of the opinions expressed about him but refused to release the names of the interviewees and any contextual information within the notes that might reveal the identities of those interviewed. The basis for this refusal was the minister's reliance on subsection 19(1) of the *Access to Information Act* which incorporates the definition of personal information contained in section 3 of the *Privacy Act*.

The requester complained to the Information Commissioner, who after investigating the complaint, commenced an application for judicial review under section 42 of the *Access to Information Act*.

This was an appeal from the Trial Judge's ruling which dismissed the Information Commissioner's application for review. The Trial Judge held that paragraph 3(j) required the release of the names of those managers with the responsibility of preventing harassment in the workplace, along with their views and/or opinions expressed. However, with regard to the non-management employees interviewed, the Trial Judge held that paragraph 3(i) of the *Privacy Act* applied so as to exempt from disclosure the names and any contextual identifying information contained in the interview notes. The Trial Judge reasoned that the disclosure of these interviewees' names and identifying information would reveal these individuals' participation in a voluntary administrative review, and that this, in itself, was the personal information of participants.

The Information Commissioner appealed the Trial Judge's ruling. The minister cross-appealed with regard to the application of paragraph 3(j) to those interviewees who were managers.

The Privacy Commissioner was granted leave to intervene and advanced the same position as the Information Commissioner.

Issues Before the Court

The central issues before the Federal Court of Appeal were as follows:

a) whether the promise of confidentiality provided to interviewees can override the obligation to disclose views and opinions expressed about another;

b) whether the names of individuals who express views or opinions about another are exempted from disclosure on the basis that the same constitutes the "personal

information" of the individual expressing the same, pursuant to paragraph 3(i) of the *Privacy Act*, and

c) where personal information pertaining to the interviewee is intermixed with views and opinions about another, such that to sever the same would render the views and opinions about another incomprehensible, must the personal information pertaining to the interviewee be disclosed.

Findings

The Federal Court of Appeal rejected the argument that a promise of confidentiality can override the obligation to disclose, stating:

> ". . .the promise of confidentiality made by the department to some of the interviewees cannot override the obligation imposed by statute to release the information, nor be opposed to Mr. Pirie should he be entitled to disclosure." (paragraph 11)

The Federal Court of Appeal also held that, pursuant to paragraph 3(g) (and mirrored in paragraph 3(e)), the names of individuals, who express views or opinions about another, are the "personal information" of the person being the subject of the view or opinion expressed, stating:

> "Contrary to the Applications Judge, I conclude that the name and identity of interviewees are as much the personal information of Mr. Pirie, pursuant to paragraph 3(g), as is the substance of the opinions or views expressed." (paragraph 25)

Further, the Federal Court of Appeal noted that the privacy interest in preserving the anonymity of participants in the inquiry is minimal in that "to the extent that they can justify the views they expressed, they should not fear the consequences of the disclosure" (paragraph 31) According to the court, the private interest of the requester is significant, given that the actions taken by the department as a result of the report is indicative that the department viewed the requester as bearing some responsibility for the problems which existed. The court stated :

> "the public interest in the disclosure is to ensure fairness in the conduct of administrative inquiries. . . fairness will generally require that witnesses not be given a blank cheque and that persons against whom unfavourable views are expressed be given the opportunity to be informed of such views, to challenge their accuracy and to correct them if need be." (paragraph 34)

Finally, the Federal Court of Appeal concluded that severance of "intermixed" information must be done in such a way as to give the requestor sufficient contextual information to enable him to fully understand the opinions which had been expressed about him.

Judicial Outcome

The appeal was allowed. The Minister of Citizenship and Immigration Canada was ordered to disclose to the requester the records, or parts thereof, that contain the opinions expressed about the requester, the names of those expressing the opinions and the contextual information relating to the opinions.

***The Information Commissioner of Canada* v. *The Attorney General of Canada and Brigadier General Ross*,**
(T-656-01, T-814-01 and T-1714-01)
Federal Court Trial Division

(See 2001-2002 Annual Report, p. 86 for further details.)

These applications for review were discontinued on May 29, 2002, and the records in respect of which the government had asserted privilege were disclosed to the Information Commissioner.

The Attorney General of Canada and Brigadier General Ross* v. *The Information Commissioner of Canada, (T-924-01) Federal Court Trial Division

(See 2001-2002 Annual Report, p. 88 for further details.)

This application for review was discontinued on February 28, 2002, and the records in respect of which the government had asserted privilege were disclosed to the Information Commissioner.

II. Cases in Progress

a) Commissioner as Applicant/Appelant

The Information Commissioner of Canada* v. *The Attorney General of Canada and Janice Cochrane (Court files A-126-02 and A-127-02)

(See 2001-2002 Annual Report, p. 80 for more details in the proceedings in Trial Division.)

Nature of Proceedings

This matter involved two applications for judicial review under section 18.1 of the *Federal Court Act*, R.S.C. 1985, c.F-7, by which the Attorney General asked that two subpoenas *duces tecum,* issued by the Information Commissioner and directed to the Deputy Minister of Citizenship and Immigration Canada (CIC), be set aside.

Factual Background

This matter arises from a complaint in relation to CIC's decision to extend the period for responding to a series of access requests to three years. The Information Commissioner reported the results of his investigation, concluding that the three-year period of extension claimed by CIC was unreasonable such that the complaint was well founded.

After categorizing the requested records into two annexes, the Information Commissioner ordered that documents listed in one annex be produced by November 6, 2000, and those listed in the second be produced one month later. The Information Commissioner likewise stated his intention to issue a subpoena *duces tecum* which would compel production of the records in the event that CIC refused to comply.

Thereafter, upon being advised of CIC's intention not to comply, the Information Commissioner proceeded to subpoena the records in the form of an "Order with Respect to Production of Records". In turn, CIC stated that it would commence an application to have this subpoena set aside on the basis that the Information Commissioner lacked jurisdiction to issue it.

In response, the Information Commissioner self-initiated a complaint on the basis that that CIC's three-year extension of time constituted a deemed refusal. He then issued a second subpoena (Order with respect to Production of Records) on the deputy minister in relation to the records in dispute.

In the within application for judicial review, the Attorney General sought to

have the two subpoenas issued by the Information Commissioner set aside on the basis that the Information Commissioner had exceeded his jurisdiction.

Issues Before the Court

What is the appropriate standard of review with respect to the Information Commissioner's decision to proceed with an investigation?

Did the Information Commissioner exceed his jurisdiction when issuing a subpoena *duces tecum* subsequent to having reported the results of his investigation to the head of the institution but not to the complainant?

Does an "unreasonable extension" of time constitute a "deemed refusal" thereby entitling the Information Commissioner to self-initiate a new complaint by which he may issue a second subpoena *duces tecum*?

Are the subpoenas to produce documents, as issued by the Information Commissioner in the circumstances of this case, an abuse of process?

Findings

The Applications Judge, Kelen J., held that the appropriate standard of review applicable to the Information Commissioner's decision to investigate a complaint is that of "correctness" (paragraph 17). He went on to decide that the Information Commissioner is without jurisdiction to issue an order of production after the issuance of a report of the results of his investigation to the head of the institution.

With respect to the commissioner's decision to initiate an investigation on the basis that an unreasonable extension could constitute a "deemed refusal" of access, Kelen J. concluded that, even if the response period is extended for an unreasonable period of time, the Act does not deem the extension to be a "refusal". It is only if and when an extended period lapses with no response given to the requester, according to Justice Kelen, that a "deemed refusal" arises:

> "A 'deemed refusal' is when the department fails to give access to the record within the time limits set out in the Act, i.e. either 30 days as provided in section 7 or an extended time limit under section 9. In my opinion, in this case, the extended time limit has not expired so that there can be no 'deemed refusal' to give access. Under the Act, there is no provision for the respondent to deem an unreasonable extension of time as a refusal." (paragraph 25)

Consequently, the court held that it was not proper for the Information Commissioner to:

- initiate a new complaint and launch a new investigation in relation to a matter in which he had already concluded an investigation;
- use his subpoena power to summon documents which CIC stated it could not process on an immediate basis.

Judicial Outcome

The Trial Judge allowed the Attorney General's two applications for judicial review and ordered that the two subpoenas *duces tecum* issued by the Information Commissioner be set aside.

Action Taken

Subsequently, the Information Commissioner filed a Notice of Appeal on March 6, 2002. This appeal will be heard on May 14, 2003, and the result will be reported in next year's annual report.

The Information Commissioner of Canada* v. *The Attorney General of Canada and Bruce Hartley (Court files A-82-02 and A-174-02)

Nature of Proceedings

Appeal of a motion

Factual Background

(See 2001-2002 Annual Report, p. 88-90 and 2000-2001 Annual Report, p. 116-117 for more details.)

In this case, the Information Commissioner has appealed the decision of Mr. Justice McKeown dated February 1, 2002, in which he found that the Federal Court has the jurisdiction to order that transcripts of evidence given to the Information Commissioner during his confidential investigations be filed with the court on a confidential basis. The transcripts were ordered to be filed in four of the seven consolidated applications for judicial review.

Issues Before the Court

In his Notice of Appeal, the Information Commissioner raises the following issues :

1. Did the Motions Judge err in fact and in law when he ordered that the confidential transcripts be filed in court pursuant to rule 318 of the Federal Court Rules, 1998?
2. If not, did the Motions Judge err in fact and in law in ordering copies of the entire confidential transcripts, and not portions thereof, to be filed in court?

Findings

The appeal has not yet been heard. The result will be reported next year.

The Information Commissioner of Canada* v. *The Executive Director of the Canadian Transportation Accident Investigation and Safety Board, (T-465-01, T-650-02, T-888-02 and T-889-02) Federal Court Trial Division

(See Annual Report 2001-2002, p. 87 and Annual Report 2000-2001, p. 116 for more details.)

During the reporting year, following the issuance of recommendations in three unrelated investigations, the Information Commissioner filed three additional applications for review on the same issue, i.e. the disclosure of audiotapes and transcripts of conversations between a pilot and air traffic controllers.

On November 15, 2002, the Information Commissioner filed a notice of constitutional question and a motion for leave to amend the Notices of Application. The constitutional issue relates to the validity of a section of the *Radio Communications Act* purporting to limit the disclosure of air traffic control communications. The Attorney General of Canada confirmed his participation on the constitutional issue.

The case will continue before the Trial Division and results will be reported in next year's annual report.

b) The Commissioner as Respondent in Trial Division

The Information Commissioner of Canada* v. *The Attorney General of Canada and Brigadier General Ross, (T-656-01, T-814-01 and T-1714-01)

As a result of the *Anti-Terrorism Act*, S.C. 2001, c.41, proclaimed in force on December 18, 2001, the respondents fully complied with the Information

Commissioner's subpoenas *duces tecum*, dated August 9, 2001, and August 11, 2000, and order for production of documents, dated April 26, 2001, relating to all pages being the subject of objections made under sections 37 and 38 of the *Canada Evidence Act*. Accordingly, these applications for review were discontinued on May 29, 2002.

The Attorney General of Canada and A. Eggleton* v. *Information Commissioner of Canada, (T-924-01) Federal Court Trial Division

The Information Commissioner advised the applicants on November 8, 2001, that he was satisfied that the Honourable Art C. Eggleton had complied with the subpoena *duces tecum* dated April 6, 2001. As a result, this application for judicial review in respect of the subpoena *duces tecum* was discontinued on February 28, 2002.

The Attorney General of Canada et al.* v. *The Information Commissioner of Canada

(T-582-01, T-606-01, T-684-01, T-763-01, T-792-01, T-801-01, T-877-01, T-878-01, T-880-01, T-883-01, T-887-01, T-891-01, T-892-01, T-895-01, T-896-01, T-1047-01, T-1049-01, T-1083-01, T-1448-01, T-1909-01, T-1910-01, T-1254-01, T-1255-01, T-1640-00, T-1641-00, T-2070-01) Federal Court Trial Division

(See Annual Report 2001-2002, p. 88 for further details.)

Stephen Byers* v. *The Hon. John M. Reid (The Information Commissioner of Canada) and Others, Court file T-1221-02 Federal Court Trial Division

Nature of Proceedings

This matter involves an application for review pursuant to section 41 of the *Access to Information Act* and section 18.1 of the *Federal Court Act* in relation to: a) the Treasury Board Secretariat's refusal to provide access to portions of requested records based on sub-paragraphs 69(3)(b)(i) and (ii) and, b) the Information Commissioner's "decision" to accept the Treasury Board Secretariat's refusal.

Factual Background

On July 30, 2002, Mr. Byer commenced an application pursuant to section 41 of the *Access to Information Act* and section 18.1 of the *Federal Court Act* for judicial review: a) of the Information Commissioner's "decision" to accept the decision of the Treasury Board Secretariat (TBS) to refuse him access to portions of requested records; and b) an order in *mandamus* compelling both TBS and the Information Commissioner to provide him with the impugned records. The Notice of Application contained a request, pursuant to Rule 317 of the Federal Court Rules, for materials in the possession of the Information Commissioner.

On August 21, 2002, the Information Commissioner filed an objection to the applicant's request for material. Likewise, the Information Commissioner brought a motion to strike the application, pursuant to Rule 221, on the basis that it disclosed no reasonable cause of action. Alternatively, pursuant to Rule 302, the Information Commissioner sought to have the application struck, on the basis that an application for judicial review ought to be limited to a single order in respect of which relief is sought. In the further alternative, the Information Commissioner requested an order directing that the matter as against the Information Commissioner, proceed to mediation.

Issues Before the Court

1. Was the application for review as against the Information Commissioner bereft of any chance of success?

2. Was the application in breach of Rule 302 in respect of the number of orders sought?

3. Was the application as against the Information Commissioner an appropriate case to proceed to dispute resolution conference?

Findings

The Information Commissioner maintained that the Notice of Application was bereft of any chance of success, as the jurisprudence makes clear that section 41 of the *Access to Information Act* does not provide for a review of the Information Commissioner's recommendations as contained in a report provided to a complainant in accordance with subsection 37(2) of the Access Act. Insofar as the application was brought pursuant to section 18.1 of the *Federal Court Act*, the Information Commissioner maintained that there was, likewise, no chance of success in obtaining the requested relief as:

(1) section 64 prohibits the Information Commissioner from disclosing information for which a government institution would be authorized to refuse to disclose; and

(2) the Information Commissioner is not the head of a government institution with control of the impugned records, such that the applicant has no clear legal right to compel him to provide the same and the prerequisites for *mandamus* could not be met.

Finally, the Information Commissioner took the position that the applicant's allegations of bad faith could not improve a claim for *mandamus*.

The applicant was in agreement with the Information Commissioner's interpretation of the foregoing provisions of the *Access to Information Act* and *Federal Court Act*. However, he argued that such an interpretation was only applicable or appropriate in "normal" circumstances, that is, where there were no allegations of bad faith.

The applicant argued that given the position taken by the Information Commissioner in *Canada (Information Commissioner)* v. *Canada (Minister of Environment)*, 2001 FCT 277 (Fed. T.D.), as compared to that adopted in the Information Commissioner's subsection 37(2) report in the within case, bad faith was established on the face of the record. He argued that the Information Commissioner has provided an insufficient explanation, if not, no explanation, which would justify the diametrically opposed positions adopted.

The applicant, further, alluded to the fact that the Office of the Information Commissioner falls within the purview of the Ministry of Justice, and that this compromises the integrity and independence of the Information Commissioner's investigations. Finally, he maintained that the Office of the Information Commissioner's bias stems from the fact that he is involved in concurrent litigation with the Attorney General wherein he requires the impugned records to "prove his case" regarding *ex gratia* payments.

Judicial Outcome

By order dated October 15, 2002, the matter has been referred to a dispute resolution conference. The outcome will be reported in next year's report.

Mertie Anne Beatty et al.,* v. *The Chief Statistician et al., Court File No. T-178-02 Federal Court Trial Division

(See Annual Report 2001-2002 for further details.)

Nature of Proceedings

This was an application for judicial review pursuant to section 18.1 of the *Federal Court Act*, in respect of the Chief Statistician to transfer possession and control of the Nominal Returns and Schedules of the 1906 Census of the Provinces of Manitoba, Saskatchewan and Alberta, and a microfilm thereof, to the National Archivist forthwith without condition; in the alternative, the failure of the National Archivist to make this information available to the public for research purposes.

Factual Background

The applicants were a group of historians and genealogists who applied to the Federal Court for an order compelling the Chief Statistician to transfer the nominal returns and schedules of the 1906 Census of the Provinces of Manitoba, Saskatchewan and Alberta to the National Archivist, and further and in the alternative, for an order directing, or alternatively permitting, the National Archivist to make this information available to the public for research purposes.

The 1906 Census was conducted in the provinces of Manitoba, Saskatchewan and Alberta. The census contained personal questions about the respondent, including age, religion, country of birth, location and types and amount of livestock. The National Archivist of Canada determined that the Nominal Returns and Schedules of the 1906 Census of Manitoba, Saskatchewan and Alberta were documents of historical importance to the nation and, by letter dated November 16, 1999, formally requested that the Chief Statistician transfer the individual census records for the 1906 Census to the National Archives of Canada. By letter dated December 22, 1999, the Chief Statistician of Canada refused the National Archivist's request on the basis that there were legal impediments to such a transfer.

On February 5, 2002, the applicants filed a Notice of Application naming as respondents the Chief Statistician, the Attorney General of Canada, the National Archivist, the Privacy Commissioner and the Information Commissioner of Canada.

On May 13, 2002, the Information Commissioner brought a motion to be removed as party from the proceeding. On May 21, 2002, considering the consent of all parties, the court ordered that the Information Commissioner be struck out as a party respondent.

On January 24, 2003, Allan Rock and Sheila Copps announced that the 1906 Census records were now publicly available at the National Archives of Canada. (See pages 19 to 21 for related details.)

c) The Information Commissioner as an Intervener

Babcock* v. *Canada (Attorney General) [2002] S.C.J. No. 58 (S.C.C.) Supreme Court of Canada (on Appeal from the Court of Appeal for British Columbia)

McLachlin C.J. and Justices L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel. The majority's reasons were provided by McLachlin C.J. L'Heureux-Dubé J., July 11, 2002.

(See Annual Report 2001-2002, p. 90 for further details.)

Nature of Proceedings

This was an appeal from a decision rendered by the British Columbia Court of Appeal, reversing the decision of the Motions Judge which dismissed an Application for production brought pursuant to B.C.'s Rules of Civil Procedure.

Factual Background/Issues/Outcome

(See pages 13 to 15 for details.)

Rubin* v. *Canada (Minister of Health)
2003 FCA 37, Court File No. A-575-01, Federal Court of Appeal

Justices Rothstein, Sexton and Evans, January 23, 2003

Nature of Proceedings

An appeal of an order dismissing an application pursuant to section 41 *Access to Information Act.*

Factual Background

The requester sought access to a review conducted by Health Canada on the safety of calcium channel blockers. He was provided with severed version of a report on the safety of these drugs. The requester complained to the Information Commissioner who proceeded to investigate. Initially, Health Canada relied on paragraphs 13(1)(a) and 20(1)(b) and (c) of the Act; however, during the investigation, Health Canada withdrew its reliance on paragraph 13(1)(a). In his letter of finding, the Information Commissioner concluded that Health Canada's reliance on subsection 20(1) was justified. A copy of this letter was provided to both the requester and Health Canada. Upon receipt of the commissioner's finding, the requester brought an application for judicial review of the decision of the Minister of Health pursuant to section 41 of the Act.

After the application for judicial review was filed, the requester was informed by Health Canada that it intended to rely on subsection 13(1) to exclude a portion of the record.

The Applications Judge concluded that paragraph 20(1)(b) had been properly relied on to exempt the severed portions of the requested record. He also found that there was no evidence that Health Canada had exercised its discretion to release documents concerning issues of public interest improperly. Finally, the Applications Judge concluded that Health Canada was precluded from relying on subsection 13(1) to justify non-disclosure because that section had been withdrawn during the investigation of the Information Commissioner.

The requester appealed the decision of the Applications Judge.

Issues Before the Court

The appellant raised four main issues:

1. The Applications Judge erred in not ordering the release of the record to which the government had applied paragraph 13(1)(a) once he had determined that the government was barred from relying on that section;

2. The judge erred in finding that paragraph 20(1)(b) was applicable given the failure of a third party to respond to a second inquiry about the confidentiality of a portion of the record;

3. The judge erred in finding paragraph 20(1)(b) was applicable in the absence of any attempt by the government institution to independently verify if information over which a third party asserts confidentiality is in the public domain; and

4. The judge erred in his interpretation of subsection 20(6) of the Act, more specifically, he erred by failing to require the government institution to apply a transparent and objective standard.

The respondent, in his memorandum, asked the Court of Appeal to decide that Health Canada was not barred from relying on paragraph 13(1)(a) of the Act even though it had withdrawn its reliance on that section before the Information Commissioner during his investigation.

Action Taken by the Information Commissioner

Upon reviewing the respondent's memorandum, the Information Commissioner sought and was granted leave to intervene on the following issue which in his opinion had broad implications for the administration of the Act as a whole:

Did the Applications Judge err in law in holding that a government institution could not invoke a mandatory exemption following the completion of the commissioner's investigation of a complaint with respect to the refusal of access to records?

Findings

The Federal Court of Appeal delivered its reasons from the bench. It held that a third party need not respond to subsequent inquiries about confidentiality from a government institution to maintain its initial claim of confidentiality. The court said "nothing in the Act specifies how, or how many times, a third party must assert confidentiality in order that it be maintained. "

The court agreed with the appellant that the burden is on a government institution to provide proof that there has not been public disclosure of the information. However, the court concluded that the determination that a government institution has satisfied the burden placed on it is a question of mixed fact and law and that an Applications Judge is entitled to considerable judicial deference on this point. The court held: "barring a palpable and overriding error, this court will not interfere with a finding of mixed fact and law by a Trial Division Judge under the *Access to Information Act*".

In answer to the appellant's argument that the exercise of discretion to disclose confidential information in the public interest under subsection 20(6) must be done objectively, the court found that "there is no authority for such an interpretation of subsection 20(6)". The court continued: "subsection 20(6) confers on the head of the government institution the authority to exercise his or her discretion to disclose, *inter alia*, otherwise confidential information if such disclosure would be in the public interest as it relates to public health. Nothing in subsection 20(6) expresses or implies specific conditions or requirements that attach to or fetter

that exercise of discretion". Thus, the courts should not interfere with the exercise of such a discretion unless there is evidence that the head of the government institution took irrelevant considerations into account or failed to comply with the principles of natural justice.

Finally, the court concluded that Health Canada had never ceased to rely on paragraph 20(1)(b) despite its attempt to apply subsection 13(1) to certain information. The issue surrounding the application of section 13 was, consequently, not commented on.

Judicial Outcome

The appeal was dismissed without costs.

Canada Tobacco Manufacturer's Council A and B (Confidential).* v. *The Minister of National Revenue, the Information Commissioner of Canada and Robert Cunningham (T-877-00) Federal Court Trial Division

(See Annual Report 2001-2002, p. 9 and 2000-2001 Annual Report, p. 119 for further details.)

The within application was scheduled to be heard on February 4, 2003. However, at the commencement of the hearing, the Applications Judge, Mr. Justice O'Keefe, advised the parties of his long-time friendship with one of the applicant's supporting affiants. Recognizing that the same could give rise to the appearance of his having a conflict of interest in the proceedings, Mr. Justice O'Keefe then invited the parties to request that he decline to hear the matter.

Given the parties' reliance upon conflicting evidence, the credibility of the affiants would clearly be an issue. In these circumstances, despite that nearly two years had passed since the date of the requisition for the hearing, the potential appearance of the judge's conflict of interest was too significant to be ignored. Accordingly, the Information Commissioner was required to ask that Mr. Justice O'Keefe excuse himself from the proceedings. Accordingly, the hearing was adjourned *sine die* and has, subsequently, been scheduled to be heard over the period of a day-and-a half commencing June 2, 2003.

C. Court Decisions Not Involving the Information Commissioner

AB* v. *Canada (Minister of Citizenship and Immigration) 2002 FCT 471, IMM-1683-01 Federal Court Trial Division

O'Keefe J., April 26, 2002

Nature of Proceedings

This was an application for judicial review of a decision of the Immigration and Refugee Board pursuant to section 18.1 of the *Federal Court Act.*

Factual Background

The applicant, a former member of the Peruvian wrestling team, is a successful refugee claimant. On February 19, 2001, he was informed by the Board that his personal information form, the transcript of his refugee determination hearing and the reasons for the determination that he was a refugee were being put into evidence at the hearing of a refugee claimant with a similar background.

The applicant objected to the release of his personal information. Despite his

representations, the information was released by the Board and put into evidence. Before the court, the Board argued that, because the personal information was provided for "immigration purposes", the use of the information in a subsequent refugee determination hearing was a "consistent use" pursuant to paragraph 8(2)(a) of the *Privacy Act*.

Issues Before the Court

The issue to be decided by the court was : "Is the Board's decision to disclose the applicant's personal information unlawful, in that the disclosure was for a purpose and to an extent not permitted under the *Privacy Act*?"

Findings

The court concluded that the Board had improperly released the applicant's personal information. The court found that the Board was required to comply with the provisions of the *Privacy Act* as well as the confidentiality provisions in its own Act.

When considering the exceptions set out in subsection 8(2) of the *Privacy Act*, the court stated that the exceptions in paragraphs 8(2)(a) and (b) of the *Privacy Act* are not "intended as a blanket endorsement for personal information of refugees to be shared at all refugee hearings [...] each case must be dealt with on its own merits." An example of a "consistent use" of a refugee's personal information would be the release of the information to show that subsequent testimony of a refugee giving evidence in another refugee determination hearing contradicts the information given by that person to the Board.

The court concluded :

> "In this case, the purpose for which the information was obtained was the determination of the applicant's claim for convention refugee status. In order for the disclosure of the applicant's personal information to be justified under this section, the use of that information must be a use consistent with the purpose for which the information was collected. I do not find that the determination of the refugee claim of the other applicant is consistent with the purpose of determining the applicant's claim for convention refugee status."

In considering sub-paragraph 8(2)(m)(i) of the *Privacy Act*, the court found that it would not apply unless the head of the government institution "provides an opinion that the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure". Since there was no such opinion, sub-paragraph 8(2)(m)(i) was inapplicable.

Judicial Outcome

The application for judicial review was allowed. The Board's decision to release personal information was unlawful and was consequently set aside (although the information had already been released).

Sherman* v. *Canada (Minister of National Revenue), [2002] F.C.J. No. 779 (FCTD) Federal Court Trial Division, McKeown J., May 22, 2002

Nature of Proceedings

This matter involves an application for judicial review, under section 41, of a decision by the minister refusing access.

Factual Background

This case involved an access request to the Minister of National Revenue for

information concerning the extent to which Revenue Canada uses the United States Internal Revenue Service (IRS) to collect Canadian taxes and, in turn, the extent to which the IRS uses Revenue Canada to collect U.S. taxes.

The minister refused to disclose the requested information, primarily based on paragraph 13(1)(a) of the *Access to Information Act*, which states that information obtained in confidence from the government of a foreign state is exempt from the right of access. In support of this position, the minister cited the Canada-United States Tax Convention, pursuant to which information received by either country is to be treated as secret and cannot be disclosed, save to those persons or authorities involved in the assessment of, collection of, or administration and enforcement in relation to taxes to which the convention applies. Further exemptions relied on by the minister included subsection 15(1), paragraphs 16(1)(b) or 16(1)(c) of the *Access to Information Act*.

The requester complained to the Information Commissioner who, following his investigation, determined that the complaint was not well-founded. Thereafter, the requester brought an application for judicial review pursuant to section 41 of the *Access to Information Act* in relation to the minister's refusal.

Issues before the Court

The principle issue in this case was the proper interpretation to be given to paragraph 13(1)(a) of the *Access to Information Act* and whether this exemption applied to information concerning the extent to which the Canadian and American tax agencies rely on one another for the purposes of collecting taxes.

A subsidiary issue was whether statistics about information properly exempted from disclosure pursuant to paragraph 13(1)(a) are, likewise, subject to the mandatory exemption with respect to information obtained in confidence from the government of a foreign state?

Findings

The court noted that paragraph 13(1)(a) is a mandatory class exemption such that it is not necessary to justify non-disclosure by reference to probable harm. (paragraph 17) Thus, the role of the court when reviewing decisions not to disclose pursuant to subsection 13(1) is to determine whether the head of the government institution erred in the factual determination that the requested information falls within the exemption.

If it is determined that the information falls within the mandatory exemption contained in paragraph 13(1)(a), the head of the government must refuse to disclose the information unless the United States either consents to disclosure or makes the information public.

The court determined that the requirements for paragraph 13(1)(a) were met. The information was exchanged pursuant to articles within the International Convention which require both CCRA and the IRS to treat the information obtained as secret.

The court rejected the requester's argument that there was a difference between statistics about exempted information and the information itself, ruling that:

> ". . . the statistics are an integral part of the information supplied under the Convention, as the statistics could not

exist without the information from the United States." (paragraph 18)

The court held that subsection 13(2) of the *Access to Information Act* did not apply so as to permit the disclosure, as the IRS had neither consented to the disclosure nor made the information public.

Further, having determined that paragraph 13(1)(a) applied so as to exempt the requested information from disclosure, the court did not go on to consider the application of subsection 15(1) or paragraphs 16(1)(b) and (c) of the *Access to Information Act.*

Judicial Outcome

The application for judicial review was dismissed.

With respect to costs, the court did not accept the applicant's argument that important new principles were raised in relation to the Act so as to warrant costs being awarded in favour of the applicant regardless of the outcome, pursuant to subsection 53(2) of the *Access to Information Act.*

However, because the application was brought in the public interest, i.e. as the applicant did not stand to benefit personally from the disclosure, the court refused to order costs.

Bacon International Inc.* v. *Canada (Agriculture and Agri-Food Canada)
2002 CFPI 587, File Nos. T-2290-98, T-2291-98, T-2292-98, T-2294-98
Federal Court Trial Division,
Mr. Justice Beaudry, May 23, 2002

Nature of the proceedings

This involves an application for judicial review under section 44 of the *Access to Information Act* concerning the decision of Agriculture and Agri-Food Canada to disclose a record of which the applicants requested its non-disclosure by relying on paragraphs 20(1)(b), 20(1)(c) and 20(1)(d) of the Act.

Facts

The applicants each operate a meat-packing and processing plant in the province of Quebec. The requester wanted to obtain the department's overall rating for all plants specializing in meat-packing and processing in the province of Quebec. The department decided to disclose the record because the applicants did not convince it that subsection 20(1) applied in order for the record not to be disclosed. The applicants filed this application for review to the Federal Court.

Questions determined by the Court

Do the exceptions stipulated in paragraphs 20(1)(b), 20(1)(c) and 20(1)(d) of the Act apply in the record?

Findings

The court reaffirms the general principles:

- A judicial review under section 44 of the Act is different from other judicial reviews because the court has to consider the case *de novo*. The court has the chance to assess the reasons raised by the third party to request the non-disclosure of information.
- The third party opposed to the disclosure of the information must prove according to the balance of probabilities that the requested information must not be disclosed.
- With regard to access to information, the disclosure of records is the rule and the exemption is the exception.

To assess the exceptions to disclosure, the court took into consideration Mr. Justice Rothstein's list of guiding principles in *Canada (Information Commissioner)* v. *Canada (Prime Minister)*. With regard to the application of paragraph 20(1)(b), the court found that it did not apply in the case at bar because it did not satisfy the criteria requiring that the record contain information supplied to a government institution by a third party. The record for which the applicants requested an exemption from disclosure was not supplied by them but came from the department. With regard to paragraphs 20(1)(c) and 20(1)(d) of the Act, the court was not convinced that the rating received in 1998 could have caused them to suffer financial loss or could have interfered with future negotiations with the requester. The court wrote:

> [Translation] "The applicants' affirmations concerning the prejudice they could suffer are too general and laconic for the court to find non-disclosure of the record to be preferable. It involves, rather, a possibility of prejudice and not a probability, as the applicants must prove."

On account of these findings, Mr. Justice Beaudry chose not to address the issue concerning the concepts of the C.C.Q. for the interpretation of paragraphs 20(1)(b), 20(1)(c) and 20(1)(d) of the *Access to Information Act* that were raised by the appellants. The court dismissed the application for judicial review and authorized the disclosure of the records.

Jaylynn Enterprises Ltd.* v. *Canada (Minister of National Revenue – M.N.R.), [2002] F.C.J. No. 791 (FCTD) Federal Court Trial Division

McGillis J., May 27, 2002

Nature of Proceedings

This was a motion in which Jaylynn Enterprises sought an extension of time to file an application for judicial review purportedly challenging a "decision" of the Information Commissioner.

Factual Background

Jaylynn Enterprises filed an application for judicial review in relation to decisions rendered by both the Information Commissioner and Privacy Commissioner. This application was struck on the grounds that, contrary to Rule 302 of the *Federal Court Rules*, (1998), two separate decisions were being challenged within a single application for review. Still, the Motions Judge stated that, in the event that leave was sought and obtained from the court to provide for any necessary extensions of time, Jaylynn Enterprises was at liberty to file separate applications against the Information Commissioner and/or Privacy Commissioner.

Three months passed before Jaylynn Enterprises filed a motion seeking an extension of time for filing the application for review in relation to the Information Commissioner's determination.

Issues Before the Court

The procedural issue on this motion was whether or not to grant the applicant an extension of time to serve and file an application for judicial

review of the Information Commissioner's decision?

Findings on the Issue and Outcome

The court noted that the applicant had:

a) provided no explanation for the three-month delay between the striking of the latest application for judicial review and the motion in which the applicant sought the court's leave to extend the period in which to file a subsequent application; and

b) failed to establish the existence of an arguable case.

On this basis, the court dismissed the motion requesting leave to serve and file the judicial review application beyond the requisite timeframe.

Lavigne* v. *Canada (Office of the Commissioner of Official Languages), [2002] S.C.J. No 55 (SCC), Gonthier J., June 20, 2002

Nature of Proceedings

This case involves the application of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (OLA), and the *Privacy Act*, R.S.C. 1985, c. P-21 (PA), and, more precisely, the issue of whether the disclosure of personal information pursuant to the latter could reasonably be expected to be injurious to the conduct of lawful investigations by the Commissioner of Official Languages (COL).

Factual Background

The respondent, Robert Lavigne, worked in the Montreal office of the Department of National Health and Welfare. Between November 1992 and March 1993, Lavigne filed four complaints with the COL alleging that his rights in respect of language of work, and employment and promotion opportunities, had been violated by being forced to use French. In the course of their investigation, the investigators working for the Office of the COL questioned some 25 employees of the department, including the respondent, his immediate supervisor and some of his co-workers, as well as managers and other employees. Where the investigators encountered problems in conducting the investigation because the employees were reluctant to give information, fearing reprisals by the respondent, the investigators gave assurances that the interviews would remain confidential within the limits of sections 72, 73 and 74 of the *Official Languages Act*. After the interviews were conducted, the investigation report concluded that the respondent's four complaints were well-founded and made five recommendations to the department. The department did not question the COL's findings and agreed to implement the recommendations.

In the course of proceedings initiated by the respondent for a remedy under Part X of the OLA, the respondent made several requests to the COL for disclosure of personal information contained in the files on the complaints he had made to him. While some information was provided to the respondent, other portions were withheld under the exemption set out in paragraph 22(1)(b) of the *Privacy Act*.

The respondent filed a complaint with the Privacy Commissioner, who launched an investigation in the course of which he attempted to settle the respondent's complaints by mediation. The Privacy Commissioner ruled that

the personal information contained in the testimony of the interviewees, for which consent to disclose had not been obtained, had been properly exempted from disclosure under paragraph 22(1)(b) of the *Privacy Act*.

The respondent subsequently brought an application for judicial review of the COL's decision. At the time of the hearing of the appeal, the only personal information remaining at issue in the dispute consisted of the notes taken by the investigators in the Office of the COL of an interview with a named individual.

Issues Before the Court

1. Did the Federal Court of Appeal err in concluding that the COL may not rely on paragraph 22(1)(b) of the *Privacy Act* to refuse to disclose personal information that was collected in the course of an investigation conducted under the *Official Languages Act*, when the COL's investigation has concluded?
2. Did the Federal Court of Appeal err in concluding that there were no reasonable grounds for the COL's refusal?

Findings

Decisions of the Lower Courts:

Federal Court, Trial Division

According to Dubé J., under the *Privacy Act*, disclosure of personal information is the rule and withholding is the exception. Paragraph 22(1)(b) of the *Privacy Act* is an exception to the general rule and must therefore be narrowly construed. In this way, Dubé J. concluded that the section is a limited exemption relating solely to investigations that are underway or about to begin; it does not apply to future investigations. Being of the view that the investigation at bar was over, paragraph 22(1)(b) had no application. Additionally, Dubé J. concluded that the COL had not established that the disclosure of the personal information could reasonably be expected to be injurious to the conduct of its investigations.

Federal Court of Appeal

The Federal Court of Appeal concurred with Dubé J. that paragraph 22(1)(b) of the *Privacy Act* does not apply to protect information once the investigation has concluded. It also rejected the appellant's argument that Dubé J. had failed to consider whether disclosure could reasonably be expected to be injurious to the enforcement of any law of Canada, holding that the evidence in the record was not capable of supporting such a conclusion. The court held that the evidence, at most, established the possibility that witnesses may be reluctant to cooperate in an investigation unless they have an absolute assurance of secrecy.

Analysis

The Law:

The Supreme Court began its analysis of the interplay between the *Official Languages Act* and the *Privacy Act* by considering the purpose and scope of the two Acts, and the respective roles of the two commissioners.

Both the *Official Languages Act* and the *Privacy Act* are recognized by the court as having a special or "quasi-constitutional" status in the Canadian legal framework. The court states:

> "the *Official Languages Act* and the *Privacy Act* are closely linked to the values and rights set out in the

> Constitution, and this explains the quasi-constitutional status that this court has recognized them as having".

However, the court goes on to state the following:

> "that status does not operate to alter the traditional approach to the interpretation of legislation, defined by Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87:
>
> today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> The quasi-constitutional status of the *Official Languages Act* and the *Privacy Act* is one indicator to be considered in interpreting them, but it is not conclusive itself. The only effect of this court's use of the expression "quasi-constitutional" to describe these two Acts is to recognize their special purpose".

The *Privacy Act* clearly applies to the Office of the COL, according to the court, because the latter is listed in the schedule to the Act as a government institution. Section 2 of the P*rivacy Act* provides that its purpose is to extend the present laws of Canada, and this includes the *Official Languages Act*, although secti*on 82* of the *Official Languages Act* provides that the provisions of Parts I to V prevail over any other Act of Parliament. None of the sections relied on by the appellant, however, are found in those parts.

According to the Supreme Court, the *Privacy Act* must be applied to the Office of the COL in a manner consistent with the objective of the *Official Languages Act* of promoting equality of status of the two official languages of Canada and guaranteeing minority language groups the right to use the language of their choice within federal institutions. Parliament has expressly provided that investigations by the COL shall be conducted in private and that investigators shall not disclose information that comes to their knowledge in the performance of their duties and functions. These provisions illustrate Parliament's desire to facilitate access to the COL and to recognize the very delicate nature of the use of an official language at work by a minority group.

On the other hand, the court concluded that the COL's argument was overly broad when it asserted that Parliament intended that the information collected by the COL would remain confidential, unless, disclosure is authorized by the *Official Languages Act*. The court held that "the effect of that interpretation is to exempt the *Official Languages Act* from the application of the *Privacy Act.*" It would defeat the complainant's right to obtain access to personal information under the *Privacy Act* and would contravene the clear intention of Parliament. The two Acts, according to the court, must be interpreted and applied harmoniously.

On the matter of whether or not the exemption for investigations contained in paragraph 22(1)(b) applies after an investigation is complete, the court found nothing in the provision that would suggest that it is limited to a specific investigation, or an investigation that is circumscribed in time. The court therefore held that there is no justification for limiting the scope of paragraph 22(1)(b) to current investigations.

However, that determination did not end the matter. The court went on to examine whether or not disclosure of the withheld information could reasonably be expected to be injurious to future investigations by the COL. On this matter, the court concluded that the COL had failed to discharge the burden of proof of injury. The court noted that:

> "A refusal to ensure confidentiality may sometimes create difficulties for the investigators, but may also promote frankness and protect the integrity of the investigation process. The COL has an obligation to be sensitive to the differences in situations, and he must exercise his discretion accordingly."

Accordingly, the appeal was dismissed.

Canada Post Corp.* v. *National Capital Commission 2002 FCT 700, Court File No. T-558-01 Federal Court Trial Division

Kelen J., June 21, 2002

Nature of Proceedings

This was an application for review pursuant to section 44 of the *Access to Information Act* of the respondent's decision to disclose certain information concerning financial sponsorship assistance received by the National Capital Commission (NCC) from Canada Post Corporation with respect to three events: Canada Day, the Sound and Light Show, and Christmas Lights.

Factual Background

A request was filed with the NCC under the Act for access to information related to financial assistance received from sponsors, for public events for which the NCC is responsible. Pursuant to sections 27 and 28 of the Act, the NCC informed Canada Post of this request. Attached to the letter was a record detailing information about Canada Post with respect to contributions made for events on Canada Day, the Sound and Light Show, and the Christmas Lights, that the NCC intended to release, on the grounds that the information was not protected under subsection 20(1) of the Act. Canada Post provided the NCC with submissions objecting to the release of the information. NCC rejected Canada Post's submissions. Canada Post proceeded with an application to the Federal Court.

Issues Before the Court

The issue was whether the amounts paid by Canada Post for sponsoring these events are exempt from disclosure pursuant to either paragraphs 20(1)(b), (c) or (d) of the Act.

Findings

As regards paragraph 20(1)(b) of the Act, the court concluded that the amounts of financial assistance for sponsorship was "financial and commercial information", which information was confidential in nature. It held, however, that the negotiated amounts of financial assistance cannot be characterized as information "supplied to a government institution by a third party" as required by paragraph 20(1)(b).

As regards paragraph 20(1)(c), however, the court held that Canada Post had met its burden of proving that a reasonable expectation of probable harm would result from the disclosure of the information. Specifically, it held that the disclosure would give Canada Post's competitors a competitive advantage over Canada

Post by enabling them to outbid Canada Post. The court also accepted that disclosure would probably undermine Canada Post's negotiating position just as disclosure of rental rates paid by one tenant to prospective tenants could prejudice the competitive position of a landlord. The court held that paragraph 20(1)(d) does not apply, as the evidence and submissions did not establish that disclosure would obstruct future negotiations.

Judicial Outcome

The application was allowed on the basis of paragraph 20(1)(c), and the court ordered that the respondent refuse to disclose the information.

NCC decided not to appeal the decision.

Proxamis Systems Inc.* v. *Canada (Minister of Public Works and Government Services), [2002] F.C.J. No. 1204, Federal Court Trial Division

MacKay J., August 30, 2002

Nature of Proceedings

This matter involved an application under section 44 of the *Access to Information Act* for review of the decision by the minister to release certain information originally submitted by Proxamis Systems Inc. concerning specified contracts concluded between it and the minister.

Factual Background

Proxamis sought to prevent the Minister of Public Works from disclosing certain "total cost figures" contained in a contract proposal that was accepted by the government, on the basis that such disclosure would be detrimental to Proxamis' competitive position and could severely damage its business.

Issues Before the Court

Are total cost figures contained in a proposal and/or tender bid exempt from disclosure pursuant to subsection 20(1)?

More specifically

i) is this information "confidential information" within the meaning of paragraph 20(1)(b) of the Act?

ii) would the release of this information be reasonably expected to result in material financial loss or gain to, or reasonably be expected to prejudice the competitive position of Proxamis, thereby fitting within paragraph 20(1)(c) of the Act?

iii) would the release of this information reasonably be expected to interfere with contractual or other negotiations of Proxamis, including those with its staff, thereby fitting within paragraph 20(1)(d) of the Act?

Findings

i) Paragraph 20(1)(b) - Confidential Information

- The court accepted that three of the four requisite elements necessary to satisfy the requirements under paragraph 20(1)(b) were met; namely that this information: was financial, commercial, scientific or technical information; was supplied to a government institution by the third party; and was treated consistently by Proxamis in a confidential manner.

- Therefore, at issue was the remaining requirement under paragraph 20(1)(b), namely, whether total cost figures contained in a successful proposal and/or tender bid with a government institution constitutes "confidential information".
- The court, citing *Air Atonabee Ltd.* v. *Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (T.D.) with approval, held that whether or not information can be deemed confidential depends upon the content, purposes and circumstances in which information is compiled and communicated (paragraph 10).
- The court then concluded, for reasons of public policy, that total cost figures found in a successful proposal and/or tender bid with a government institution was not confidential information within the meaning of paragraph 20(1)(b) (paragraph 12).

In reaching this conclusion, the court noted that :

  - proposals are put together for the purpose of obtaining government contract, with payment to come from public funds (paragraph 11);
  - once a contract is either granted or withheld, there is not, except in special cases, a need for keeping tenders secret (paragraph 11).

ii) Paragraph 20(1)(c) - Reasonably expected to result in material financial loss or prejudice to competitive position

- The court noted that the applicant bears the onus on a balance of probabilities, that the disclosure of the information would result in a "reasonable expectation of probable harm".
- The court concluded that Proxamis had failed to satisfy this onus.
- In reaching this conclusion the court noted that, in order to satisfy the burden under paragraph 20(1)(c):

> "In general, it is not sufficient that an applicant's affidavit swear to his or her concerns about reasonable expectations of probable harm without some further evidence of specific harm anticipated." (paragraph 14)

- The court went on to cite *SNC-Lavalin Inc.* v. *Canada (Minister of Public Works)* (1994), 79 F.T.R. 113 at 127, with approval where it was held :

> "The applicant does not demonstrate probable harm as a reasonable expectation from disclosure of the Record and the Proposal simply by affirming by affidavit that disclosure "would undoubtedly result in material financial loss and prejudice" to the applicant or would "undoubtedly interfere with contractual and other negotiations of SNC-Lavalin in future business dealings". These affirmations are the very findings the court must make if paragraphs 20(1)(c) and (d) are to apply. Without further explanation based on evidence that established those outcomes are reasonably probable, the court is left to speculate and has no basis to find the harm necessary to support application of these provisions" [paragraph 14]

- Similarly, the court held that affidavit evidence regarding the speculative ripple effects of disclosure do not meet the burden required. (paragraph 15)

iii) Paragraph 20(1)(d) - Reasonably expected to interfere with contractual or other negotiations of a third party

- The court, citing *Société Gamma Inc.* v. *Canada (Secretary of State)* (1994), 79 F.T.R. 42, held that :

  "Under paragraph 20(1)(d), an applicant must show an obstruction in actual contractual negotiations and not merely a heightening of competition". (paragraph 17)

- And, further, that :

  ". . . a distinction must be drawn between actual contractual negotiations and the daily business operations of an applicant." (paragraph 17)

- Thus, affidavit evidence of the "possible effects of disclosure " and "hypothetical problems" are not sufficient to establish a reasonable expectation that any particular contracts or negotiations will be obstructed by disclosure. (paragraph 17, citing *Canada (Information Commissioner)* v. *Canada (Minister of External Affairs),* [1990] 3 F.C. 665 at 692)

- Finally, the court held that the evidence did not establish that there would be probable harm from interference with future negotiations between Promaxis and the minister or between it and its staff. (paragraph 18)

- The court held that :

  "... vague concerns about future negotiations between the parties or about employee relations with management do not suffice for the purposes of meeting the requirements of paragraph 20(1)(d). Those relations are properly matters within the day-to-day operations of Promaxis' business rather than matters arising from particular contractual negotiations with outside agencies." (paragraph 19)

Judicial Outcome

The section 44 application for review of the minister's decision to release the information in question was dismissed.

PricewaterhouseCoopers, LLP.* v. *Canada (Minister of Canadian Heritage) [2002] F.C.J. No. 1465 (F.C.A.) Court of Appeal

Justices Linden, Sexton and Sharlow, October 23, 2002

Nature of Proceedings

This was an appeal from a decision by the Applications Judge, Campbell J., allowing PricewaterhouseCoopers' application for review, brought pursuant to section 44 of the Act.

Factual Background

The Department of Canadian Heritage (Canadian Heritage) had a contract with PricewaterhouseCoopers (Pricewaterhouse), pursuant to which Pricewaterhouse was to produce two reports which would review, analyze and recommend changes to documents used by Canadian Heritage to "outsource" elements of the department's work. Despite that the contract contained a confidentiality clause, Canadian Heritage subsequently decided to disclose the two reports produced.

Pricewaterhouse opposed this release, taking the position that the disclosure of the two reports would permit competitors to deduce the proprietary methodologies and information that it had applied, so as to prejudice Pricewaterhouse's competitive

position. The Trial Judge agreed, ordering that the minister not disclose the two reports based on subsection 20(1) of the *Access to Information Act*.

Canadian Heritage appealed, arguing *inter alia* error of law on the basis that there was insufficient evidence to support the Trial Judge's conclusion that competitors would be able to deduce information about Pricewaterhouse's means, methodologies and analysis used when preparing the two documents.

Issues Before the Court

The main issue before the Federal Court of Appeal was the degree of deference to be given by an Appellate Court when reviewing the decision of a Trial Judge based on a contention of insufficient evidence.

Findings

The Federal Court of Appeal began by noting that "the sufficiency of the evidence is particularly within the purview of the motions judge and it is very difficult for a Court of Appeal to second guess the Motions Judge on this point" (paragraph 3). Accordingly, the appropriate question to ask is whether "there was evidence which permitted [the Applications Judge] to reach the conclusion he did". More specifically, in order to succeed in an appeal based on insufficient evidence, the appellant "would have to demonstrate that the Motions Judge had made an error of principle or completely misapprehended the facts or committed an overriding and palpable error".

The court noted that Canadian Heritage had adduced no evidence to support the position that competitors would not be able to deduce information concerning Pricewaterhouse were the two reports released and had not cross-examined Pricewaterhouse's witnesses. Accordingly there was no basis upon which the Appellate Court could overturn the decision of the Applications Judge.

Judicial Outcome

The appeal was dismissed with costs.

Canada (Minister of Public Works and Government Services Canada)* v. *Siemens Canada Limited 2002 FCA 414, Court file No. A-700-01, Federal Court of Appeal

Linden, Sexton and Sharlow JJ.A., October 24, 2002

Nature of Proceedings

Application pursuant to section 44 of the *Access to Information Act*

Factual Background

Pursuant to section 44 of the *Access to Information Act*, Siemens sought judicial review of a decision of the Minister of National Defence to release records concerning a successful proposal submitted by Siemens in response to a RFP for the provision of in-service support on Halifax and Iroquois class ships.

Initially, Siemens relied on the exemption found in subsection 20(1) but later raised subsection 24(1) of the *Access to Information Act*. Siemens argued that the records were exempt pursuant to subsection 24(1) of the *Access to Information Act* because the contract at issue was a "defence contract" within the meaning of section 30 of the *Defence Production Act* which is a provision listed in Schedule II of the *Access to Information Act*. The respondent government institution argued that documents which are part

of the solicitation process did not fall within the scope of section 30 of the *Defence Production Act.*

The Applications Judge found that the information at issue was indeed "obtained under or by virtue of the *Defence Production Act*" since the Minister of National Defence derives his authority to conduct procurements and all things incidental to procurements from section 16 of the *Defence Production Act.* The judge concluded that it is irrelevant that the proposal was submitted prior to the contract being formed because section 30 does not distinguish between documents which are part of the contract and documents which are part of the solicitation process. Thus, he concluded that the information was obtained by the minister by virtue of the *Defence Production Act* and the records were therefore exempt pursuant to subsection 24(1).

The Minister of Public Works and Government Services Canada appealed the decision.

Issues Before the Court

In his Notion of Appeal, the appellant minister raised two issues :

1. The Applications Judge erred in finding that he had jurisdiction to consider arguments under subsection 24(1) of the *Access to Information Act* and/or section 30 of the *Defence Production Act* in an application for judicial review under section 44 of the *Access to Information Act*; and

2. The Applications Judge erred in finding that information, which is provided to the Government of Canada as part of its solicitation of defence contracts, is information that is provided "under or by virtue of" the *Defence Production Act.*

Findings

The Federal Court of Appeal, Sexton J.A., writing for the court, dismissed the appeal from the bench. The court held that an Applications Judge has the jurisdiction to consider a subsection 24(1) exemption on a review pursuant to section 44 of the *Access to Information Act* brought by a third party duly notified of the government institution's intention to release records.

The court also found that the Applications Judge properly interpreted section 30 of the *Defence Production Act.* Thus, the court held that documents which form part of the solicitation process are obtained by the Minister of National Defence "under or by virtue of" the *Defence Production Act.*

Judicial Outcome

Appeal dismissed.

Ruby* v. *Canada (Solicitor General)
2002 SCC 75, Court File No.: 28029, Supreme Court of Canada (on appeal from the Federal Court of Appeal)

McLachlin C.J., L'Heureux-Dube, Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ., November 21, 2002

Nature of Proceedings

Constitutional Law – Charter of Rights, sections 1, 2(b), 7, 8; *Privacy Act*, paragraphs 51(2)(a), (3), & paragraph 22(1)(b)

Factual Background

Paragraphs 51(2)(a) and (3) of the *Privacy Act* state that, where a

government institution has claimed the "foreign confidences" or "national security" exemption, it is mandatory for a reviewing court to hold the entire hearing of a judicial review application *in camera* and to accept *ex parte* submissions at the request of the government institution refusing disclosure. (The *Access to Information Act* contains identical provisions.)

Prior to the hearing of a judicial review application brought pursuant to section 41 of the *Privacy Act*, the applicant, Mr. Ruby, brought a motion wherein he challenged the constitutionality of these procedural sections of the *Privacy Act*. He argued, *inter alia*, that the mandatory nature of these proceedings infringed upon his subsection 2(b) & section 7 Charter rights.

The Motions Judge held that paragraphs 51(2)(a) and (3) of the *Privacy Act* did not violate section 7. Further, while these provisions infringing upon subsection 2(b), this infringement was justified pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*. On appeal, the Federal Court of Appeal affirmed the Motions Judge's ruling.

Mr. Ruby appealed to the Supreme Court of Canada.

Issues Before the Court

1. Do the operation of paragraphs 51(2)(a) and (3) of the *Privacy Act* violate section 7 of the Charter?

2. The Solicitor General having conceded that paragraphs 51(2)(a) and (3) infringe upon subsection 2(b), the second issue was whether the mandatory *ex parte* and *in camera* provisions can be saved under section 1 of the Charter?

Findings

Madam Justice Arbour wrote the unanimous reasons of the court. With respect to the first issue, the court recognized that the effect of paragraphs 51(2)(a) and (3), is to exclude an applicant from portions of the government's submissions. Nonetheless, the court held that, even assuming that this exclusion amounted to a deprivation of liberty or security of the person, it was not contrary to the principles of natural justice so as to amount to a violation of section 7 of the Charter.

The court reasoned that "fairness" depends on the context of a particular case. While, the general rule is that a fair hearing must include an opportunity for the parties to know the opposing party's case, some situations require measures of secrecy, in which case fairness may be met through the existence of alternative procedural safeguards.

The court held that paragraphs 51(2)(a) and (3) exist within the context of a statutory framework that provides sufficient procedural safeguards to ensure that there is no breach of the principles of natural justice, including : a burden on the government institution to establish that the information is properly exempted; a duty on the government institution to act in the utmost good faith and make full, fair and candid disclosure of the facts, including those that may be adverse to its interests, when making *ex parte* submissions; and recourse to the Privacy Commissioner and to two levels of court who have access to the information sought and to the evidence supporting the claimed exemption.

Accordingly, the court held that, in the context of the unique circumstances in which a government institution asserts an exemption that the requested information involves national security and foreign confidences, there is no violation of section 7 where an applicant is excluded from parts of the government institution's submissions.

With respect to the second issue, the court held that the requirement to hear section 41 application or appeal *in camera*, as required by paragraph 51(2)(a), was overly broad. Accordingly, it did not meet the minimal impairment part of the Oakes test and could not be saved under section 1 of the Charter.

In reaching this conclusion, the court stated that it did not matter that the Solicitor General and the courts interpreted the *in camera* requirement in paragraph 51(2)(a) so as to apply only to those parts of a hearing that involve the merits of an exemption. The court held that this interpretation was not supported by the wording of the act so that "unless the mandatory requirement is found to be unconstitutional and the section is 'read down' as a constitutional remedy, it cannot otherwise be interpreted to bypass its mandatory nature."

Accordingly, the court held that the appropriate remedy is to read down paragraph 51(2)(a) so that it applies only to the ex parte submissions mandated by subsection 51(3).

Judicial Outcome

The appeal was allowed in part. Paragraph 51(2)(a) of the *Privacy Act* was read down so that it applies only to the *ex parte* submissions mandated by subsection 51(3).

Macdonell* v. *Quebec (Commissioner d'accès à l'information), [2002] SCC 71, Supreme Court of Canada on appeal from the Québec Court of Appeal

McLachlin C.J., L'Heureux-Dubé, Gonthier, Iacobucci and Arbour JJ. (Major, Bastarache, Binnie and LeBel JJ. dissenting), November 1, 2002

Nature of Proceedings

Factual Background

A journalist with the Montreal Gazette requested documents, pursuant to Québec's access legislation (*Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information,* R.S.Q., c. A-2.1), concerning the expenses of members of the National Assembly. The request was denied based on an exemption (section 34) which bars access to documents "produced for a member", save for if the member provides his/her consent to disclosure. Further, while one minister provided his consent to disclosure, the National Assembly took the position that the information, nonetheless, could not be released as it contains "nominative information", which is deemed "confidential" and not subject to disclosure under section 53 of the Act.

The requester appealed the National Assembly's refusal to the Québec Information Commissioner. The commissioner, dismissed the appeal. The present case is an appeal from judicial review proceedings with respect to the commissioner's decision.

Issues Before the Court

The focus of the case is on the appropriate standard of judicial review for decisions rendered by Québec's Information Commissioner and the

application of this standard to the commissioner's finding that the documents were properly exempted from disclosure under the Act.

Findings

The Supreme Court of Canada unanimously agreed that the issue of whether the documents in issue were "produced for a minister" is a question of mixed fact and law. Likewise, the court unanimously found that the appropriate standard of review for the Information Commissioner's findings of mixed fact and law is one of "reasonableness".

The court split, however, on the application of the "reasonableness standard" to the commissioner's finding that documents showing the expenses of a member of the National Assembly were "produced for a minister". The majority (5 judges) noted that the text of the statute states that all documents provided to the minister are exempt. Because the documents in issue were provided directly to the ministers, the majority held that the finding that they were, therefore, "produced for a minister" was not unreasonable, regardless of whether the documents were also used by the services of the National Assembly, or even belonged to it. The minority (4 judges) disagreed, stating that, in light of the purpose of the Access Act, the exemption with respect to "documents produced for a minister" ought to be narrowly construed so as to apply only to documents pertaining to members' decision-making process.

The court, likewise, split regarding the nature of the question : "do the documents contain confidential 'nominative information'". The majority held that this too was an issue of mixed fact and law and (noting the relative expertise of the commissioner, the limited scope of a right of appeal from the commissioner's findings and the existence of a strong privatise clause intended to limit the scope of a superior court's intervention) determined that the same deferential "reasonableness" standard ought to apply. While the minority implied the issue was one of pure law, which called for the application of a more stringent standard of judicial review of "correctness".

The majority applying the "reasonableness standard" held that the commissioner's decision that the information contained confidential "nominative information" was not unreasonable and therefore ought not to be disturbed. While the minority stated that the commissioner's finding failed to satisfy the standard of reasonableness, much less the standard of correctness which they favoured in this instance.

Judicial Outcome

The appeal was dismissed and the Québec Court of Appeal's ruling, restoring the Information Commissioner's decision to exempt from disclosure information concerning the expenses of members of the National Assembly, was upheld.

Correctional Service of Canada* v. *Yeager, 2003 FCA 30, Court File No, A-332-01 Federal Court of Appeal

Isaac, Malone, Stone JJ.A., January 22, 2003

Nature of Proceedings

The underlying application was made pursuant to section 41 of the *Access to Information Act.*

Factual Background

The requester is a criminologist who conducts research on and is a critic of the Canadian penal system. He requested from Correctional Service Canada (CSC) access to the "1992-93 CSC release cohort currently being used to recalibrate the (GSIR) General Statistical Indicator of Recidivism with personal identifiers deleted" and "the code book used to define and identify/locate the variables in each case" as well as "a copy of the Offender Intake Assessment software…". The evidence demonstrated that the requested records do not exist but that they could be recreated.

The Applications Judge found that there was no evidence that the recreation of the CSC release cohort would unreasonably interfere with the operations of the CSC. Similarly, she found that the creation of a code book would not unreasonably interfere with the operations of CSC. Consequently, she ordered that these records be provided to the requester. However, she concluded that CSC was not required to provide the requester with a copy of the relevant software because the requested software only existed for mainframe applications and not for personal computers and the CSC was not in the business of writing personal computer software. She also found that software is not a "record" as defined in the ATIA and, even if it existed, it would not be accessible to the requester.

CSC appealed the order of the Motions Judge and the requester cross-appealed.

Issues Before the Court

The main appeal raised two issues :

1. whether CSC was obliged, pursuant to subsection 4(3) *Access to Information Act*, to create and provide to the respondent the requested data and a code book of technical terms, simply because they were capable of creating such records; and
2. whether the learned Motions Judge erred in concluding that the appellant had not met the onus imposed by section 3 of the Regulations of showing that the production of these records would unreasonably interfere with the appellant's operations.

The cross-appeal raised three issues :

1. whether the Motions Judge erred in finding that "software" is not a record pursuant to section 3 of the Act;
2. whether the Motions Judge erred in finding that the cross-appellant's rights pursuant to subsection 2(b) of the Charter were not contravened; and
3. whether the Motions Judge erred in not awarding the cross-appellant costs pursuant to section 53 of the Act.

Findings

The Court of Appeal concluded that subsection 4(3) of the Act "…provides that a non-existent record that can be produced from an existing machine readable record is deemed to be a record to which the respondent [a requester] is entitled access." In so concluding, the court found that "…Parliament must have contemplated two different records : a new and distinct record must be produced from an existing machine-readable record." The court then set

out several factors which would allow one to determine if a record is produced "from a machine-readable record". More specifically, the court stated that "…the answer to this question is largely fact specific. Whether a record is produced "from" a machine-readable record depends upon a number of factors, including the requisite amount of independent composition as compared to purely mechanical and routine editing or manipulation."

The court then turned to section 3 of the Regulations which limits the obligation found in subsection 4(3) of the Act to cases where the production of the record would not "unreasonably interfere with the operations of the institution." The court concluded that the Applications Judge had misapprehended the evidence before her to such an extent that the error constituted an error of law. Thus, the court concluded that the evidence provided by the CSC was sufficient to demonstrate that the production of the requested data and the code book would "unreasonably interfere with the operation" of CSC. The Court of Appeal concluded that the Applications Judge had placed too high an evidentiary burden on the CSC.

The court then turned to the cross-appellant's contention that the Applications Judge erred in not ordering the release of the requested software. The court agreed that "software" is not a record pursuant to the *Access to Information Act.* The court adopted the following reasons of the applications judge, namely that : "… software is an item used to generate, view or edit a record, as opposed to the record itself" and is not analogous to the items listed in the definition of "record". Thus, in the absence of an express mention of software in section 3 , the Applications Judge concluded that Parliament did not intend for such information to be accessible. To this, the Court of Appeal added that the software was not under the control of the government institution because the government was a mere licensee and had no right to duplicate or otherwise use the software outside the agreements between it and the owners of the software.

The Court of Appeal found that the Applications Judge had not erred in not declaring that the purpose and effect of CSC's actions were to deny the requester's constitutional right to freedom of expression as guaranteed by subsection 2(b) of the Charter.

Finally, the Court of Appeal considered the issue of costs. The court concluded that the requester had raised an important new principle of law and should therefore be awarded his costs throughout despite his lack of success on appeal. On this point, Malone J.A. dissented stating that, once it has been determined that the requester has raised an important new principle of law in his application and subsequent appeal, the success of the requester is irrelevant to the matter of costs.

Judicial Outcome

The court allowed the appeal and dismissed the cross-appeal but awarded costs to the cross-appellant (requester) throughout on a party-and-party basis.

Style of Cause : *H.J. Heinz Co. of Canada Ltd.* v. *Canada (Attorney General)*

Neutral Citation: 2003 FCT 250, [2003] F.C.J. No. 344, T-1470-00, Federal Court of Canada – Trial Division

Name of Judge : Layden-Stevenson J.

Date of Judgment : February 27, 2003

Nature of Action: (sections 41, 42, 44 ATIA; section 18 FCA)

This was an application for review brought pursuant to section 44 of the *Access to Information Act.*

Factual Background

H.J. Heinz Co. (Heinz) brought an application for review, objecting to the Canadian Food Inspection Agency's (CFIA) intention to release requested records. Heinz took the position that the records were exempted from disclosure based on section 19, paragraphs 20(1)(b) and (c) of the ATIA. The Application Judge presumed that the access requester was advised by the government institution of the third-party application.

Heinz further raised a preliminary issue alleging that the records were not responsive to the request. Heinz maintained that the request was for "correspondence", a term which should be limited to "letters", as opposed to "communications".

Prior to the hearing, CFIA conceded that portions of the requested records were exempt pursuant to section 19 but questioned Heinz's right claim exemptions, other than section 20 of the Act, within the context of a section 44 application for judicial review.

In relation to the applicability of section 20 of the ATIA, the Crown took the position that paragraph 20(1)(b) could not apply because CFIA had created the records (albeit with confidential information from Heinz), and that there was insufficient evidence to support CFIA's reliance on paragraph 20(1)(c).

Issues Before the Court

1) Were the records at issue responsive to the request?

2) May a third party raise a section 19 exemption (which the government institution agrees applies to portions of the requested records) within the context of a section 44 application?

3) Are the requested records exempted pursuant to paragraph 20(1)(b)?

4) Are the requested records exempted pursuant to paragraph 20(1)(c)?

5) Is severance reasonable?

Findings on Each Issue (direct quotes from decision to extent possible)

1. Were the records at issue responsive to the request?

Justice Layden-Stevenson held that the records identified by CFIA were responsive to the access request. In doing so, she rejected Heinz's argument that the term "correspondence" referred only to "letters", stating instead that "correspondence" included all "communications".

2. May a third party raise a section 19 exemption (which the government institution agrees applies to portions of the requested records) within the context of a section 44 application?

The court rejected the Crown's argument that, within the context of a section 44 application for review, the applicant third party is prevented from

raising exemptions other than those set out in subsection 20(1) of the ATIA. Justice Layden-Stevenson noted that third parties are given the right, pursuant to section 28 of the Act, to make “respresentations” in relation to other exemptions, not just section 20 of the ATIA.

3. Are the requested records exempted from disclosure pursuant to paragraph 20(1)(b)?

Layden-Stevenson J., applied the test for paragraph 20(1)(b) as outlined in *Air Atonabee Ltd.* v. *Canada (Minister of Transport)* (1989), 27 F.T.R. 194, stating:

> “The applicant must satisfy four requirements to establish that an exemption from disclosure is warranted:
>
> (1) the information is financial, commercial, scientific or technical;
>
> (2) the information is confidential;
>
> (3) the information was supplied to the government institution by a “third party”, and
>
> (4) the information was treated consistently in a confidential manner.” (paragraph 32)

Applying this test, she concluded that the records met these requirements and qualified for exemption.

4. Are the requested records exempted pursuant to paragraph 20(1)(c)?

Layden-Stevenson J. stated that Heinz could not demonstrated a reasonable expectation of harm simply by affirming in an affidavit that disclosure would result in financial loss and interfere with contractual and other relations (paragraph 39), stating that :

> “the threshold is probability, not possibility or speculation...There must exist, in the affidavit evidence, an explanation establishing that those outcomes are reasonably probable. Here, the evidence merely speculates as to probable harm and does not support the position that disclosure would result in a reasonable expectation of probable harm.” (paragraph 40)

5. Is severance reasonable?

Layden-Stevenson J. rejected Heinz’s argument that the records in their entirety ought not to be disclosed on the basis that severance would result in the release of “disconnected snippets”. She held that severance was not unreasonable in the circumstances of this case. (paragraph 44)

Judicial Outcome

The application was allowed in part. Some portions were exempted under paragraph 20(1)(b) of the ATIA. Other portions were deemed to be exempted under section 19 as agreed by the government institution. CFIA was ordered to sever and release the records accordingly.

CHAPTER VI
LEGISLATIVE CHANGES

Changes affecting the *Access to Information Act*

Section 202 of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) came into force on June 28, 2002. (See Annual Report 2002, p. 107.)

Proposed Changes to the *Access to Information Act*

The Government public Bill C-25 entitled "*An Act to Modernize Employment and Labour Relations in the Public Sector and to amend the Financial Administration Act and the Canadian Centre for Management Development Act and to make consequential amendments to other Acts*" proposed to amend:

- Subsections 55(4) and 57(4) of the Act by replacing the expression "Public Service of Canada" by "federal public administration", wherever it occurs in the English version. (Section 224)
- Subsection 55(3) of the Act by replacing the expression "Public Service" by the expression "public service" wherever it occurs in the English version, other than in the expressions "Public Service Corporation", "*Public Service Employment Act*", "Public Service Pension Fund" and "*Public Service Superannuation Act*". (Section 225)

(2003, Bill C-25, Sections 224-225, introduced, read and printed, 2003.02.06, passed second reading and referred to Committee, 2003.02.20)

The following are proposed amendments to Schedules I and II of the Act.

Schedules I and II

The Government public Bill C-2 entitled "*An Act to establish a process for assessing the environmental and socio-economic effects of certain activities in Yukon*" proposed to amend Schedule I to the Act by adding in alphabetical order the "*Yukon Environmental and Socio-economic Assessment Board*" under the heading "Other Government Institutions" and to amend Schedule II by adding, in alphabetical order, a reference to "*Yukon Environmental and Socio-economic Assessment Act*" and a corresponding reference to "paragraph 121(a)". (2002, Bill C-2, ss. 127-128, passed by the House of Commons, 2003.03.18; passed second reading in the Senate and referred to Committee, 2003.04.03)

The Government public Bill C-6 entitled "*An Act to establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims to provide for filing, negotiation and resolution of specific claims and make related amendments to other Acts*" proposed to amend Schedule I to the Act by adding, in alphabetical order "*Canadian Centre for the Independent Resolution of First Nations Specific Claims*" under the heading "Other Government Institutions" and to amend Schedule II to the Act by adding, in alphabetical order, a reference to *Specific Claims Resolution Act* and a corresponding reference to "section 38 and subsections 62(2) and 75(2)". (2002, Bill C-6, ss. 78-79, re-introduced 2002.10.09 (Commons); passed by the House of Commons, 2003.03.18; passed second reading in

the Senate and referred to Committee, 2003.04.02)

The Government public Bill C-13 entitled "*An Act respecting assisted human reproduction*" proposed to amend Schedule I by adding the following in alphabetical order "*Assisted Human Reproduction Agency of Canada* " under the heading "Other Government Institutions" and to amend Schedule II to the Act by adding the following in alphabetical order "*Assisted Human Reproduction Act*" by adding a corresponding reference to "subsection 18(2)". (2002, Bill C-13, ss. 72-73, re-introduced 2002.10.09 (Commons) and debated on third reading, 2003.04.10)

The Government public Bill C-17 entitled "*An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety*" proposed to amend Schedule II to the Act by replacing the reference to "subsection 4.8(1) and 6.5(5)" opposite the reference to the *Aeronautics Act* with a reference to "subsections 4.79(1) and 6.5(5)".(2002, Bill C-17, s. 107, passed second reading and referred to Committee, 2002.11.20)

The Government public Bill C-23 entitled "*An Act respecting the registration of information relating to sex offenders, to amend the Criminal Code and to make consequential amendments to other Acts*" proposed to amend Schedule II to the Act by adding, in alphabetical order, a reference to *Sex Offender Information Registration Act* and a corresponding reference in respect of that Act to "subsection 16(4)". (2002, Bill C-23, section 22, introduced, read and printed, 2002.12.11 (Commons); passed second reading and referred to Committee, 2003.04.08)

The Government public Bill C-25 entitled "*An Act to Modernize Employment and Labour Relations in the Public Sector and to amend the Financial Administration Act and the Canadian Centre for Management Development Act and to make consequential amendments to other Acts*" proposed to amend:

- Schedule I to the Act by replacing the reference to "Public Service Staff Relations Board" with a reference to "Public Service Labour Relations Board". (Section 88)
- Schedule I to the Act by adding in alphabetical order under the heading "Other Government Institutions": Public Service Staffing Tribunal/Tribunal de la dotation de la fonction publique. (Section 246) (2003, Bill C-25, Sections 88 and 246, introduced, read and printed, 2003.02.06, passed second reading and referred to Committee, 2003.02.20)

The Senate public Bill S-6 entitled "*An Act to assist in the prevention of wrongdoing in the Public Service by establishing a framework for education on ethical practices in the workplace, for dealing with allegations of wrongdoing and for protecting whistleblowers*" proposed to amend Schedule II to the Act by adding the following in alphabetical order "*Public Service Whistleblowing Act* section 10, subsection 14(2) and section 20." (2002, Bill S-6, s. 24, first reading (Senate), 2002.10.03; debated March 25, 2003)

The private member Bill C-302 entitled "*An Act to amend the Access to Information Act (crown corporations and Canadian Wheat Board)*" proposed to make all crown corporations and the Canadian Wheat Board subject to the

Access to Information Act. (2002, Bill C-302, read and printed, 2002.11.18)

New Government Institutions

During the 2002-2003 fiscal year, new government institutions became subject to the *Access to Information Act* while others, which had been abolished, were struck out. The following amendments were made to Schedule I of the Act:

Schedule I

An Act to Amend Certain Acts and Instruments and to repeal the Fisheries Support Act (S.C. 2002, c. 17) was proclaimed in force on July 22, 2002 (SI/2002-105).

"F*isheries Prices Support Board*" was struck out under the heading "Other Government Institutions.

"*Canadian Film Development Corporation*" and "*the Canadian Film Development Corporation*" were replaced by "*Telefilm Canada*" in every Act of Parliament including Schedule I of the *Access to Information Act* under the heading "Other Government Institutions". (S.C. 2002, c. 17, s. 14, in force July 22, 2002, SI/2002-105)

"*Blue Water Bridge Authority*" was added in alphabetical order under the heading "Other Government Institutions". (SOR/2002-174, Canada Gazette, Part II, in force 2002.04.26)

Reference to "*Office of Infrastructure and Crown Corporations of Canada*" under the heading "Other Government Institutions" is replaced by "*Office of Infrastructure of Canada*". (SOR/2002-291, Canada Gazette, Part II, in force 2002.08.06)

"*Canadian Air Transport Security Authority*" was added in alphabetical order under the heading "Other Government Institutions. (SOR/2002-343, Canada Gazette, Part II, in force 2002.09.24)

Amendments to Heads of Government Institutions Designation Order (Not Included in the Previous Annual Reports)

The schedule to the French version of the *Access to Information Act Heads of Government Institution Designation Order* was amended by adding the following after item 0.1: "1.1 Canadian Air Transport Security Authority / Administration canadienne de la sûreté du transport aérien, Chief Executive Officer / Premier dirigeant" and the schedule to the English version of the Order was amended by adding the following after item 15.02: "15.021 Canadian Air Transport Security Authority / Administration canadienne de la sûreté du transport aérien, Chief Executive Officer /Premier dirigeant ". (SI/2002-130, Canada Gazette, Part II, in force 2002.10.09)

"*Canadian Film Development Corporation*" and "the *Canadian Film Development Corporation*" are replaced by "*Telefilm Canada*" in every regulation including Item 20 of the schedule to *the Access to Information Heads of Government Institutions Designation Order*, amended by replacing *"Canadian Film Development Corporation"* in column I with "*Telefilm Canada*" and that item is renumbered as item 98.01 and repositioned accordingly." (S.C. 2002, c. 17, s. 15, in force July 22, 2002, SI/2002-105)

The *Access to Information Act Heads of Government Institutions Designation Order* was amended by repealing Item 87 and by adding in numerical order Item 14.01 Canada Lands Company

Limited/Société immobilière du Canada limitée, Chief Executive Officer/Premier dirigeant (SI/2003-54, Canada Gazette, Part II, in force 2003.03.27)

The *Access to Information Act Heads of Government Institutions Designation Order* was amended by adding Item 19.1 Canadian Environmental Assessment Agency/Agence canadienne d'évaluation environmentale, President/Président (SI/2003-56, Canada Gazette, Part II, in force 2003.03.27)

Amendments to Schedule I of the Regulations Amending the ATI Regulations

Schedule I to the *Access to Information Act* Regulations was amended by adding the following after item 2: "2.01 Canadian Forces National Counter-Intelligence Unit / 2.01 Unité nationale de contre-ingérence des Forces canadiennes". (SOR/2002-341, Canada Gazette, Part II, in force 2002.09.24)

CHAPTER VII
ACCESS TO INFORMATION IN CANADA AND IN THE WORLD

1. Access to Information in Canada			
Province	**Legislation**	**Supervising Authority**	**Website**
Alberta	*Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25	Information and Privacy Commissioner	www.oipc.ab.ca
British Columbia	*Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165	Information and Privacy Commissioner	www.oipcbc.org
Manitoba	*The Freedom of Information and Protection of Privacy Act*, C.C.S.M., c. F175	Ombudsman	www.ombudsman.mb.ca
New Brunswick	*Right to Information Act*, S.N.B. 1978, c. R-10.3	Ombudsman	www.gnb.ca
Newfoundland and Labrador	*Freedom of Information Act*, R.S.N.L. 1990, c. F-25 [Repealed and replaced by the *Access to Information and Protection of Privacy Act*, 2002, c. A-1.1 – To be proclaimed]	Citizen's Representative [2002, c. A-1.1]	www.gov.nf.ca/just/
Nova Scotia	*Freedom of Information and Protection of Privacy Act,* 1993, S.N.S. 1993, c. 5	Freedom of Information and Privacy Review Officer	www.gov.ns.ca/foiro
Ontario	*Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31	Information and Privacy Commissioner	www.ipc.on.ca
Prince-Edward Island	*Freedom of Information and Protection of Privacy Act*, 2002, c. F-15.01	Information and Privacy Commissioner	www.gov.pe.ca/foipp
Quebec	*An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information,* R.S.Q., c. A-2.1	Présidente, Commission d'accès à l'information	www.cai.gouv.qc.ca
Saskatchewan	*The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01	Information and Privacy Commissioner	www.legassembly.sk.ca/officers

Province	Legislation	Supervising Authority	Website
Northwest Territories	*Access to Information* and *Protection of Privacy Act*, S.N.W.T. 1994, c. 20	Information and Privacy Commissioner of Northwest Territories	e-mail: atippcomm@theedge.ca
Yukon	*Access to Information* and *Protection of Privacy Act*, SY 1995, , c. 1	Yukon Ombudsman and Information & Privacy Commissioner	www.ombudsman.yk.ca/info/index.html
Nunavut	*Access to Information* and *Protection of Privacy Act*, S.N.W.T. 1994, c. 20	Information and Privacy Commissioner of Northwest Territories	e-mail: atippcomm@theedge.ca

2. Access to Information in the World[1]				
Country	**Legislation**	**Constitution**	**Supervising Authority**	**Website**
Albania	The Law on the Right to Information over the OfficialDocuments, No. 8503 (June 1999)	Article 23 of the 1998 Constitution	The Peoples's Advocate (Ombudsman)	www.avokatip opullit.gov.al
Australia	Freedom of Information Act 1982		Commonwealth Ombudsman	www.comb. gov.au
Austria	• The 1987 Auskunftspflichtgesetz (Federal Law on Duty to Furnish Information) • Code of Administrative Procedures • Data Protection Act	Article 20 of the 1987 Constitution		www.bla.gv.at/
Belgium	Loi du 11 avril 1994 relative à la publicité de l'administration	Article 32 of the Constitution as amended in 1993	Commission d'accès aux documents administratifs (for each jurisdiction)	
Belize	The Freedom of Information Act (1994)		Ombudsman	
Bosnia and Herzegovina	Freedom of Information Act (July 2001, in effect (Feb. 2002)		Ombudsmen of the Federation	www.bihfedomb. org/eng/index/htm
Bulgaria	Access to Public Information Act (June 2000)	Article 41 of the Bulgarian Constitution of 1991		www.aip-bg.org
Canada	*Access to Information Act* (1982)		Office of the Information Commissioner of Canada	www.infocom.gc.ca
Colombia	Law 57, July 5, 1985, Ordering the Publicity of Official Acts and Documents	Article 20 of the Constitution of Columbia (1991)	Contentious Administrative Tribunal	
Czech Republic	Law on Free Access to Information (May 1999)	Article 17 of the Charter of Fundamental Rights and Freedoms	Not specifically General Ombudsman	
Denmark	Access to Public Administration Files Act (1985)		Danish Ombudsman	www.ombuds manden.dk
England (see UK)				

[1] The titles of legislation set out in this table are offered for administrative purposes and may not reflect the official titles of statutes of the respective countries.

Country	Legislation	Constitution	Supervising Authority	Website
Estonia	Public Information Act (2000)	Article 44 of the Constitution of Estonia	Data Protection Inspectorate	www.dp.gov.ee
Finland	Act on the Openness of Government Activities (1999) The Swedish Parliament adopted in 1766 the world's first freedom of information law.	Section 12 of the Constitution of Finland (2000) (Freedom of Expression and Right of Access to Information)		
France	Loi no. 78-753 du 17 juillet 1978 de la liberté d'accès aux documents administratifs	Article 14 of the 1789 Declaration of the Rights of Man	Commission d'accès aux documents administratifs (CADA)	www.cada.fr
Georgia	The Law on Freedom of Information (included in the General Administrative Code of Georgia in 1999)	Article 37(5) of the Constitution of Georgia		
Greece	Article 5 of the Greek Code of Administrative Procedure (Law No. 2690/1999)	Article 10(3) of the Constitution of Greece		
Hong Kong	Code on Access to Information (1998)		Ombudsman	www.sar-ombudsman.gov.hk
Hungary	Protection of Personal Data and Disclosure of Data of Public Interest (Act No. LXIII of 1992)	Article 61(1) of the Constitution of the Republic of Hungary	Parliamentary Commissioner for Data Protection and Freedom of Information	www.obh.hu
Iceland	Information Act (Act no. 50/1996)		Information Committee	
India	Freedom of Information Bill (2000)			
Ireland	Freedom of Information Act, 1997		Ombudsman Office of the Information Commissioner	www.oic.ie
Israel	The Freedom of Information Law (1998)			
Italy	Chapter V of Law No. 241 (1990)		Committee on Access to Administrative Documents(under Office of the Prime Minister)	www.governo.it/sez_presidenza/dica/commissione/composizione.html

Country	Legislation	Constitution	Supervising Authority	Website
Japan	Law Concerning Access to Information Held by Administrative Organs		Minister of Public Management, Home Affairs, Posts and Telecommunications	www.soumu.go.jp/english/gyoukan
South Korea	Act on Information Disclosure by Public Agencies, Act. No. 5242, 1996		Minister of Government Administration	
Latvia	Law on Freedom of Information (1998)			www.dvi.gov.lv
Lithuania	• Law on the Provision of Information to the Public • Law on the Right to Obtain Information from State and Local Government Institutions (2000)	Article 25(5) of the Constitution of Lithuania	Ministry of Culture	www.muza.lt
Mexico	Federal Transparency and Access to Public Government Information Law (2002)		National Commission on Access to Public Information	
Moldova	Access to Information Law, No 982-XIV (2000)	Articles 34 and 37 of the Constitution of the Republic of Moldova (1994)	Ombudsman	
Netherlands	Government Information (Public Access) Act (1991)		National Ombudsman	www.nationale ombudsman.nl
New Zealand	• Official Information Act 1982 • Local Government Official Information and Meetings Act 1987	Section 14 of the Bill of Rights Act	Office of the Ombudsman	www.ombuds men.govt.nz
Nigeria	Freedom of Information Bill, 1999			
Norway	Freedom of Information Act of 1970		Ombudsman	www.lovdata.no/info/uenga.html
Philippines	Code of Conduct and Ethical Standards for Public Officials and Employees, Republic Act 6713 of 1987	Article III, Section 7 of the 1987 Constitution of Philippines	• Civil Service Commission • Office of the Ombudsman	
Poland	Act on Access to Public Information (2001	Article 61 of the Constitution of Poland	No specific authority	

Country	Legislation	Constitution	Supervising Authority	Website
Portugal	Law of Access to Administrative Documents (1993)	Article 268 of the 1989 Constitution of the Portuguese Republic	Commission for Access to Administrative Documents (CADA)	www.cada.pt
Romania	Law Regarding Free Access to Information of Public Interest (2001) (Article 31)		Ministry of Information	www.publicinfo.ro
Russia	(1995, Act No. 24-FZ) Russian Federation, art. 29			
Slovakia	Act on Free Access to Information (2000)	Article 26 of the 1992 Constitution of the Slovak Republic		
South Africa	Promotion of Access to Information Act, Act 2 of 2000	Section 32 (or 16) of the Constitution of the Republic of South Africa, Act 108 of 1996	South African Human Rights Commission	e-mail: sahrcinfo @sahrc.org.za
Spain	De Régimen Juridico de las Administraciones Publicas y del Procedimiento Administrativo Comun, (1992)	Article 105b of the Constitution of Spain, 1992		
Sweden	The Swedish Parliament adopted in 1766 the world's first freedom of information law. (Freedom of the Press Act of 1766) Current version of the Act adopted in 1949 and amended in 1976.	Freedom of the Press Act part of the Constitution	Parliamentary Ombudsman	www.riksdagen.se/ english/work/ ombudsman.asp
Thailand	Official Information Act, B.E. 2540 (1997)	Section 48 (or 58?) of the Constitution of the Kingdom of Thailand, B.E. 2534 (1991)	Official Information Commissioner (OIC)	www.oic.thai gov.go.th
Trinidad and Tobago	Freedom of Information Act, 1999		Ombudsman	www.foia.gov.tt
Ukraine	• The 1992 Law on Information • Article 2 of On the Order of the Dissemination of Information on Public Bodies and Local Governments Activity by Mass Media (1997)			

Country	Legislation	Constitution	Supervising Authority	Website
United Kingdom	• Freedom of Information Act (2000) • Code of Practice on Access to Government Information (1994) • Local Government (Access to Information) Act (1985)		Information Commissioner	www.dataprotection.gov.uk
Scotland	Freedom of Information (Scotland) Act (2002)		Information Commissioner	
Wales	Code of Practice			
United States	• Freedom of Information Act, 5 USC 552, 1966 • Electronic Freedom of Information Act Amendments of 1996 • Government in the Sunshine Act, 5 U.S.C. 552b • Federal Advisory Committee Act, 1972, 5 U.S.C. App II		No Ombudsman	www.usdoj.gov/oip/oip/htm
Uzbekistan	The Law on Guarantees and Freedom of Access to Information (1997)	Article 30 of the 1992 Constitution of Uzbekistan		
Zimbabwe	Access to Information and Privacy Bill (2002)		Media and Information Commission	

CHAPTER VIII
CORPORATE SERVICES

Corporate services provides administrative support (financial, human resources, information technology, general administrative and library services) to the Information Commissioner's office. Its objective is to ensure that internal overhead functions are in place to support program management decisions and accountability.

As mentioned in last year's annual report, from 1983-84 to 2001-02, the Offices of the Information and Privacy Commissioners of Canada shared corporate services based on service usage. These shared services avoided duplication of effort and saved money for both government and the programs.

At the end of 2001-2002, the Privacy Commissioner of Canada made the unilateral decision to no longer share corporate services. This departure from the traditional organizational design increased resource expenditures as each commissioner (one willingly, the other not) paid individually for formerly shared services. (It should be noted that Treasury Board Ministers directed the Office of the Privacy Commissioner of Canada to absorb the incremental costs associated with the Office of the Information Commissioner having to hire additional staff.)

Resource Information

The Branch continued to pursue innovative approaches to the delivery of its programs during fiscal year 2002-2003.

The Information Commissioner's operating budget for the 2002-2003 fiscal year was $4,896,000. Actual expenditures for 2002-2003 were $4,909,027 of which $34,261 is reimbursable to the department through Treasury Board Vote 5. Personnel costs of $3,534,110 accounted for 72 percent of all expenditures; whereas, the remaining $1,374,917 covered all other expenditures including other professional services, transportation and communication, and so forth.

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

Figure 1: Resources by Activity (2002-03)

	FTE's	Percent	Operating Budget	Percent
Access to Government Information	45	81%	$ 4,014,000	82%
Corporate Services	11	19%	$ 857,000	18%
Total Access Vote	**56**	**100%**	**$ 4,896,000**	**100%**

Figure 2: Details by Object of Expenditure (2002-2003)

	Access to Government Information	Corporate Services	Total
Salaries	3,028,195	505,915	3,534,110
Transportation and Communication	89,093	70,279	159,372
Information	42,762	3,618	46,380
Professional Services	632,983	203,935	836,918
Rentals	1,471	30,950	32,421
Repairs and Maintenance	13,676	19,557	33,233
Materials And Supplies	21,127	31,851	52,978
Acquisition of Machinery and Equipment	98,521	115,094	213,615
Other Subsidies and Payments			
Total	**3,927,828**	**981,199**	**4,909,027**

Note: Expenditure figures do not incorporate final year-end adjustments. Also, please note that $34,261 of salary expenditures are reimburseable to the Office of the Information Commissioner of Canada through Treasury Board Vote 5.

APPENDIX A

Based on the oral and written information provided to us, we attribute the following positions to CIC:

1. The Enforcement and Intelligence Branches of CIC do not allege that designation is required in order to enable them to protect sensitive information from disclosure. In particular, they do not allege that it is necessary for them to be able to rely on paragraph 16(1)(a) of the *Access to Information Act* in order to protect sensitive information from disclosure. In this regard, CIC admits that the other exemption provisions of the ATIA have been in the past, and will be in future, sufficiently robust to protect any sensitive information it holds as a result of its enforcement and intelligence activities.

2. CIC does allege that the designation is required to enable it to acquire information about individuals ("personal information") from other federal institutions and investigative bodies. In this regard, CIC officials provided one or two anecdotal accounts of instances where information was not provided to these branches of CIC by police agencies allegedly because these branches lacked status as "investigative bodies" for the purpose of the *Access to Information Act*.

3. In response to a request for any documented proof of such referrals, CIC officials provided two--one from Health Canada and the other from Canada Post. These two refusals, it is clear on their face, relate to paragraph 8(2)(e) of the *Privacy Act* (which is a section concerned with authorizing access, without consent, to personal information). These refusals do not relate to paragraph 16(1)(a) of the *Access to Information Act* (which is a section concerned with authorizing refusals by government to give public access to records).

4. CIC asserts that its Enforcement and Intelligence Branches are engaged in lawful investigations which are authorized by:

   - *Immigration and Refugee Protection Act* (sections 15-6; 55; 138-143 and 117-132)

   - Criminal Code (sections 487-492.2)

   - *Citizenship Act* (section 19).

While no statutory provision specifically empowers officers of CIC's enforcement or intelligence branches to conduct investigations, it is CIC's view that the "cumulative effect of these various provisions is to provide a clear framework for the significant level of investigative activities that are carried out by CIC". (From CIC's written responses to questions raised by the Office of the Information Commissioner.)

Assessment and Recommendation

Setting aside the issue of whether or not the CIC Enforcement and Intelligence Branches have statutory authorization to conduct investigations (regarding which, in our view, CIC has been unconvincing), it is our view that CIC has not demonstrated a need to

have these branches designated pursuant to paragraph 77(1)(f) of the ATIA. CIC has not discharged its burden to demonstrate that, in the absence of the designation, it will be unable:

1) to obtain information necessary for the effective discharge of its investigative functions and/or

2) to protect sensitive investigative records from disclosure under the ATIA.

CIC admits that it can protect sensitive investigative records without referral to paragraph 16(1)(a) of the ATIA and it has failed to provide any evidence that the absence of designation under paragraph 77(1)(f) of the ATIA has resulted in refusals by other investigative bodies to share needed information. The evidence provided by CIC demonstrates, at best, that there have been refusals by others to share personal information with CIC in the absence of a designation pursuant to paragraph 77(1)(d) of the *Privacy Act* (and even then, only insofar as that section relates to paragraph 8(2)(e) of the *Privacy Act*).

During our meeting, CIC officials referred to refusals by the RCMP to provide addresses to CIC of individuals subject to a removal order. This example, if true, supports the need for designation under paragraph 77(1)(d) of the *Privacy Act* (as it relates to paragraph 8(2)(e) of the *Privacy Act*) but not under paragraph 77(1)(f) of the ATIA--the latter having an entirely different purpose from the former.

We understood from comments made by both the CIC and Justice officials, that there is a “status” aspect to this request: CIC wants to be part of the “club” of investigative bodies with which it works in administering Canada's immigration, refugee and citizenship rules. In our view, the “why not us?” argument has no merit for the purposes of paragraph 77(1)(f) of ATIA and should be given no weight. It is up to senior officials and ministers responsible for coordinating federal investigative efforts to ensure that all federal institutions--designation or no designation--share among themselves (to the extent permitted by the *Privacy Act*) the information necessary to get the job done. We were surprised to learn that senior level intervention for the purpose of ensuring proper inter-agency information sharing has not even been tried. Such a course of action would be effective and less invasive of citizen rights. The fact that it has not been the chosen method for solving the alleged problem leads us to doubt the existence or severity of the problem.

For all these reasons, we recommend that the application by CIC for designation of its Enforcement and Intelligence Branches under paragraph 77(1)(f) of the *Access to Information Act* be denied.

Appendix B

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Canada Customs and Revenue Agency

Status report on access requests in a deemed-refusal situation

1. BACKGROUND

To the credit of Canada Customs and Revenue Agency (CCRA) and its management, staff in the Access to Information and Privacy Division and staff in the Offices of Primary Interest (OPI), CCRA has achieved a grade of A. The grade denotes ideal compliance with the statutory time requirements of the *Access to Information Act.*

These results are extremely encouraging. Few departments have achieved ideal compliance with the time requirements of the *Access to Information Act.* The measures taken by CCRA over the years to make improvements could be adapted by other departments seeking similar improvements.

In the 1999 Report Card issued by the Office of the Information Commissioner, CCRA's compliance with the statutory time requirements of the *Access to Information Act* was rated as a red alert grade of F with an 85.6% new request to deemed-refusal ratio.

In January 2000, the Office of the Information Commissioner reported on the status of the recommendations made in the Report Card and made further recommendations for measures to reduce the number of requests in a deemed-refusal situation. At that time, the statistics showed that from April 1 to November 30, 1999, the deemed-refusal ratio for access requests improved to 51.5%, although still a grade of F.

In January 2001, the Office of the Information Commissioner reviewed and reported on the progress of CCRA to come into compliance with the time requirements of the *Access to Information Act.* At that time, CCRA was in "borderline compliance" with the Act (for the period of April 1 to November 30, 2000) with a grade of C.

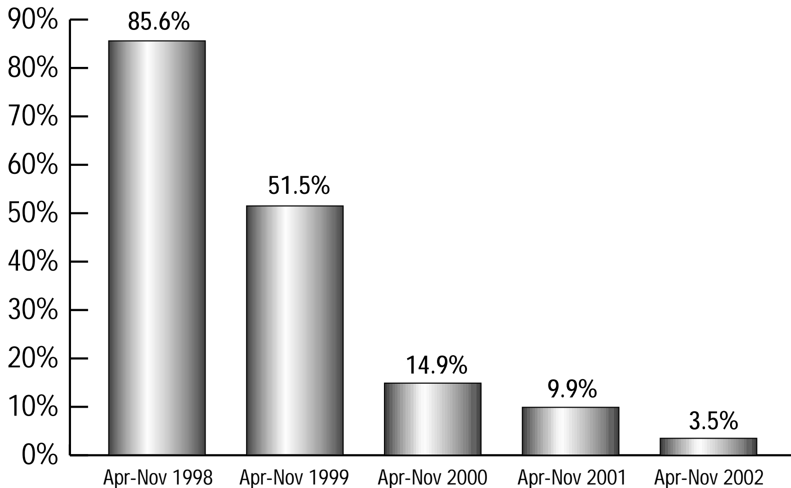
In January 2002, CCRA continued to make impressive progress in reducing the deemed-refusal situation. For the period of April 1 to November 30, 2001, the Agency achieved a grade of B. The grade was maintained for the 2001-2002 year with a 6.8% new request to deemed-refusal ratio.

This report reviews the progress of the Agency to come into ideal compliance with the time requirements of the *Access to Information Act* since the January 2002 Status Report. In addition, this report contains information on the status of the recommendations made in the January 2002 report.

2. CURRENT STATUS AND FURTHER RECOMMENDATIONS

Excellent results have been achieved by CCRA in reducing the number of access requests in a deemed-refusal situation.

For the reporting period of April 1 to November 30, 2002, CCRA achieved a grade of A that denotes "ideal compliance" in meeting the time requirements of the *Access to Information Act.* The new request to deemed-refusal ratio for the period was 3.5%. The continuous improvement over the years in reducing the number of access requests in a deemed-refusal situation was made in an Agency that receives approximately 1,000 access requests annually. Chart 1 illustrates the improvement in the reduction of the



percentage of access requests in a deemed-refusal situation over the past five years.

The Director of the Access to Information and Privacy Division identified a number of activities that occurred during 2002 that contributed to the continuous improvement in reducing the number of access requests in a deemed-refusal situation. These activities included:

- The refinement of the administrative process for processing access requests. The Division has moved away from completing briefing notes on issues related to access requests. Rather, the Directorate provides factual information on what information will be released so that other functions in the Agency can carry out their responsibilities in relation to access requests.
- The identification of information disclosed through access requests over a twelve-month period. The next step is to complete an analysis of the information to determine if there are opportunities for disclosure of information on a routine basis rather than through an access request.
- A national two-day conference for CCRA staff involved with access to information activities.

The following recommendations are made to support the continued efforts of CCRA to process access requests within the statutory time requirements of the *Access to Information Act.*

2.1 Sustain Achievement

The maintenance of ideal compliance with the time requirements of the *Access to Information Act* requires constant attention to the access process. The Agency is encouraged to continuously improve its access process activities, build on its achievements and devote the resources needed to maintain ideal compliance with the *Access to Information Act.*

Recommendation # 1

CCRA is encouraged to maintain ideal compliance with the time requirements of the *Access to Information Act*.

2.2 Informal Access

The Agency has identified the information that was disclosed through access requests over a twelve-month period. An analysis of the information has not been completed. This analysis may identify opportunities for making information routinely available to the public rather than through the access process. CCRA is encouraged to complete the analysis and provide a copy to the Office of the Information Commissioner. There may be results in the CCRA analysis that could be shared with other departments to encourage "best practices".

In December 2002, the Commission d'accès à l'information du Québec in its five-year review report of the Quebec access and privacy legislation *Reforming Access to Information: Choosing Transparency* recommended that ministries adopt an Information Publication Plan to promote increased access to information. The plan would contain categories of information or documents for which distribution would be mandatory upon their creation. The plan would enable citizens to know what categories of information are routinely distributed. There may be information in the Commission's report that would assist CCRA with its efforts to increase informal access.

Recommendation #2

CCRA is encouraged to complete the analysis of information disclosed through access requests to determine if there are opportunities to routinely make information publicly available.

2.3 Transparency

In coordination with the analysis of information disclosed through access requests, CCRA will review the Transparency Guidelines presently in place in various branches of the Agency. The purpose of the Guidelines is to ensure that clients understand the reasons behind decisions made by individual business lines and to improve the exchange of information and documents during the decision-making process.

The purpose of the ATIP review is to determine whether linkages exist between the types of information requested under the *Access to Information Act* and the types of administrative disclosures permitted by existing business line-based Transparency Guidelines.

Recommendation #3

CCRA is encouraged to proceed with the analysis and promotion of Transparency Guidelines to provide employees with instructions on what information can routinely be released to clients and the public.

3. STATUS OF 2002 RECOMMENDATIONS

In January 2002, recommendations were made to CCRA on measures to further reduce the number of access requests in a deemed-refusal situation. The action taken on each recommendation is described below following the text of the recommendation.

Previous Recommendation # 1

CCRA investigate methods of providing informal access to information to the public and provide a copy of the report to the Office of the Information Commissioner.

Action Taken on Previous Recommendation # 1: CCRA completed the first phase of activities inherent in this recommendation to determine if there are opportunities to routinely disclose information to the public as an alternative to making a

request under the *Access to Information Act*, by reviewing access requests received over a twelve-month period to identify the categories of information typically asked for by applicants under the Act. The results of this analysis will be compared to existing administratively based Transparency Guidelines to determine the nature and extent of correlations between the two of them that have the potential to increase opportunities for informal disclosure of information.

Previous Recommendation # 2

CCRA continue the resource and senior management commitment to continuously improve the time taken to respond to access requests under the *Access to Information Act* to maintain substantial compliance with the time requirements of the Act.

Action Taken on Previous Recommendation # 2: CCRA has achieved a grade of A that denotes substantial compliance with the time requirements of the *Access to Information Act*. The ATIP Directorate has established an ATIP page on the Agency intranet site. The page includes direct links to Treasury Board Secretariat Policy material, Department of Justice jurisprudence, and forms and other information to support CCRA staff who require information on the *Access to Information Act* or the access process. There are plans to add an on-line training component to the intranet site. The vision is to build an intra-Agency electronic ATI service.

Previous Recommendation # 3

CCRA is encouraged to develop an ATI Training Program widely available to agency staff through the innovative use of technology.

Action Taken on Previous Recommendation # 3: The ATIP Directorate held a national Agency two-day conference in June 2002 on ATIP for approximately 150 Agency staff involved as OPIs in the processing of ATIP requests. The conference focussed on the application of ATIP legislation and related administrative requirements at all stages through the life cycle of a request.

The ATIP Director has also established an internal ATIP Directorate training function to directly and proactively increase the ATIP knowledge of his own staff. An experienced senior operational ATIP manager has been dedicated full-time to the development and delivery of detailed and practically focussed ATIP training to all staff in a programmed and systematic fashion. The increased short-term demand (budgetary and operational) brought about as a result are anticipated to be more than offset by increased knowledge, confidence and understanding of ATIP legislation and its practical application to CCRA records by Directorate managers, analysts and support staff.

4. QUESTIONNAIRE AND STATISTICAL REPORT

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act*			
Part A:	Requests carried over from the prior fiscal period.	Apr. 1/01 to Mar. 31/02	Apr.1/02 to Nov. 30/02
1.	Number of requests carried over:	181	142
2.	Requests carried over from the prior fiscal — in a deemed-refusal situation on the first day of the new fiscal:	24	11
Part B:	New Requests — Exclude requests included in Part A.	Apr. 1/01 to Mar. 31/02	Apr. 1/02 to Nov. 30/02
3.	Number of requests received during the fiscal period:	1009	780
4.A	How many were processed within the 30-day statutory time limit?	646	348
4.B	How many were processed beyond the 30-day statutory time limit where no extension was claimed?	35	5
4.C	How long after the statutory time limit did it take to respond where no extension was claimed?		
	1-30 days:	24	5
	31-60 days:	8	0
	61-90 days:	3	0
	Over 91 days:	0	0
5.	How many were extended pursuant to section 9?	250	326
6.A	How many were processed within the extended time limit?	173	100
6.B	How many exceeded the extended time limit?	23	16
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	13	11
	31-60 days:	7	3
	61-90 days:	1	2
	Over 91 days:	2	0
7.	As of November 30, 2002, how many requests are in a deemed-refusal situation?		6

EXCERPT FROM CCRA COMMISSIONER'S RESPONSE TO STATUS REPORT

"I have read your latest status report with great interest and I am glad to see your confirmation that our Agency proudly reached grade A, which is afforded to only those institutions having processed, within the statutory time limits set out in the Act, over 95% of their requests received under the *ATIA*.

We have noted your further recommendations and I can assure you that they will be addressed throughout this fiscal year. I thank you for recognizing our achievement in compliance with the time requirements of the *ATIA*."

Citizenship and Immigration Canada

Status report on access requests in a deemed-refusal situation

1. BACKGROUND

Citizenship and Immigration Canada (CIC) joins a select group of departments who have achieved a grade of A that denotes ideal compliance with the statutory time requirements of the *Access to Information Act*. For the period from April 1 to November 30, 2002, the new request to deemed-refusal ratio was 3.8%. This constitutes a significant achievement by CIC departmental staff and management dealing with the access-request process. The department is highly commended for its efforts and encouraged to maintain this performance.

In early 1999, the Office of the Information Commissioner issued a Report Card on the department's compliance with the statutory time requirements of the *Access to Information Act*. In the 1999 Report Card, the department received a red alert grade of F with a 48.9% request to deemed-refusal ratio.

In January 2000, the Office of the Information Commissioner reviewed the status of the recommendations made in the Report Card and made further recommendations for measures to reduce the number of access requests in a deemed-refusal situation. From April 1 to November 30, 1999, the deemed-refusal ratio for access requests improved to 23.4%.

In January 2001, the commissioner's office again reviewed the department's progress in reducing the number of access requests in a deemed-refusal situation and issued a Status Report. The department had an objective in 2000-2001 of completing 70% of access requests within the timelines of the Act. The view of the Office of the Information Commissioner was that the objective fell short of what was needed to comply with the time requirements of the Act. The actual performance of the department for 2000-2001 was a 19.6% new request to deemed-refusal ratio resulting in a Grade of D denoting "below standard performance".

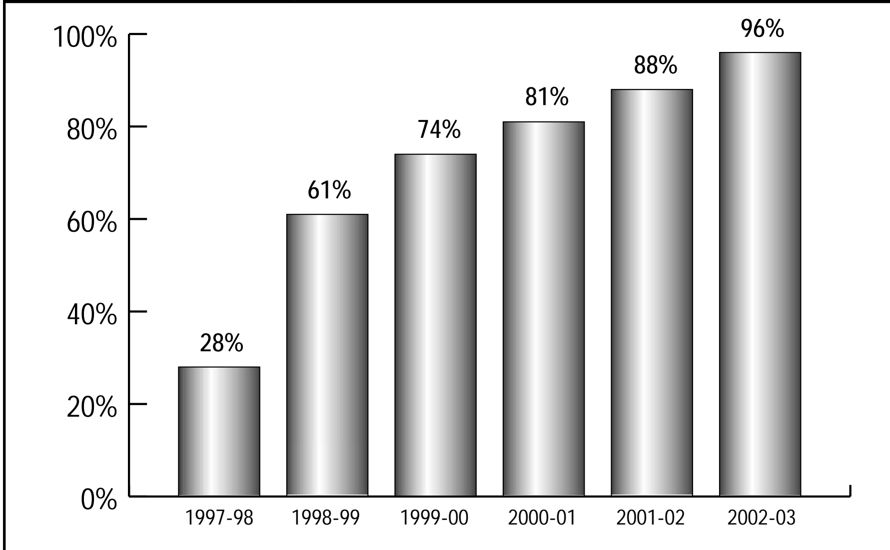
In January 2002, the commissioner's office issued another Status Report and recommendations. For the period of April 1 to November 30, 2001, the new request to deemed-refusal ratio was reduced to 13% denoting a grade of C. The momentum was sustained for the fiscal year 2001-2002. The department achieved a grade of C with a new request to deemed-refusal ratio of 12%.

This report reviews the progress of the department to come into ideal compliance with the time requirements of the *Access to Information Act* since the January 2002 Status Report. In addition, this report contains information on the status of the recommendations made in the January 2002 report.

2. CURRENT STATUS AND FURTHER RECOMMENDATIONS

The attainment of ideal compliance with the time requirements of the *Access to Information Act* is a noteworthy achievement for CIC. CIC has made steady progress in reducing the number of access requests in a deemed-refusal situation as illustrated in Chart 1.

The Director, Public Rights Administration Directorate (PRAD), identified the following activities that contributed to the successful reduction



in the number of deemed-refusal access requests.

Clarification of Requests

CIC encourages requesters to narrow or clarify requests in order to reduce volume and speed up the retrieval of records.

Treasury Board Secretariat (TBS) Funding

As part of the Program Integrity Fund Initiative, CIC ATIP activities received significant funding for the 2001-2002 and 2002-2003 fiscal years. CIC has prepared a report on the 2001-2002 funding achievements.

PRAD Functions

ATIP policy responsibilities were centralized into one work area in PRAD rather than being disbursed as a part-time activity among a number of staff responsible for processing access requests. PRAD is reviewing information disclosed through access requests and other means to determine if there are options to routinely disclose more information.

International Region Access Requests

CIC is taking extensions when warranted under section 9 of the *Access to Information Act.* Previously, the extensions may have been missed or the extension could not be taken because the request was already in a deemed-refusal situation. Couriers are now used to transfer some files from overseas missions. Previously, the diplomatic pouch process that has some built-in delay factors was used.

The following recommendations are made to assist the department in its continuing efforts to reduce deemed-refusal access requests.

2.1 Sustain Achievement

CIC is encouraged to sustain ideal compliance with the time requirements of the *Access to Information Act.* Sustainability requires a commitment by management and staff who are involved in the access process to meet or exceed their responsibilities in the process.

Recommendation # 1

CIC make a commitment to maintain ongoing ideal compliance with the time requirements of the *Access to Information Act.*

2.2 Continuous Improvement

CIC has made excellent progress in reducing the time taken to respond to an access request once the request is in a deemed-refusal situation as illustrated in Tables 1 and 2. CIC is encouraged to identify the reasons that specific requests ended in a deemed-refusal situation for the period April 1 to November 30, 2002, to determine if further systemic measures can be taken to sustain ideal compliance.

Recommendation # 2

CIC is encouraged to determine through an analysis of the reasons for requests in a deemed-refusal situation if there are systemic measures to be taken to assist in maintaining ideal compliance.

2.3 Engage Senior Management

The Director, PRAD, provides a monthly report of ATIP activities to the Director General, Executive Services. The Director General submits the report to her Assistant Deputy Minister.

A periodic report on ATIP activities is not made available or reviewed by CIC's Senior Management Committee. A semi-annual report on ATIP activities--particularly those that are needed to maintain ideal compliance with the time requirements of the *Access to Information Act*--would keep senior

Table 1: Time to Respond to Non-Extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where no extension was taken	Apr. 1999-Nov. 1999	Apr. 2000-Nov. 2000	Apr. 2001-Nov. 2001	Apr. 2002-Nov. 2002
1-30 days	270	180	197	76
31-60 days	60	68	79	12
61-90 days	40	28	26	4
Over 91 days	18	30	26	0

Table 2: Time to Respond to Extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where an extension was taken	Apr. 1999-Nov. 1999	Apr. 2000-Nov. 2000	Apr. 2001-Nov. 2001	Apr. 2002-Nov. 2002
1-30 days	126	123	75	32
31-60 days	58	55	43	12
61-90 days	16	36	18	1
Over 91 days	10	27	7	1

management engaged in the resolution of departmental-wide ATIP issues.

Recommendation # 3

A semi-annual ATIP report be provided to the CIC Senior Management Committee to engage management in the maintenance of ideal compliance with the time requirements of the *Access to Information Act.*

3. STATUS OF 2002 RECOMMENDATIONS

In January 2002, recommendations were made to CIC on measures to further reduce the number of access requests in a deemed-refusal situation. The action taken on each recommendation is described below following the text of the recommendation.

Previous Recommendation # 1

CIC set a target of 10% or better for the new request to deemed-refusal ratio for 2002-2003.

Action taken on Previous Recommendation # 1: CIC has achieved a grade of A for the period of April 1 to November 30, 2002, with a new request to deemed-refusal ratio of 3.8%. CIC management and staff involved with the access process are to be congratulated on this significant achievement.

Previous Recommendation # 2

An ATI Improvement Plan be developed to include milestones, tasks, targets, deliverables and responsibilities for achieving substantial compliance with the time requirements of the *Access to Information Act.*

Action taken on Previous Recommendation # 2: PRAD developed a Strategic Plan as part of the 2003-2004 budget process.

Previous Recommendation # 3

All OPIs and senior management receive information on a periodic basis on the planned versus actual time taken to process access requests.

Action taken on Previous Recommendation # 3: PRAD extensively tracks and monitors access requests at the program level through ATIPflow. PRAD staff have responsibilities that include "ownership and accountability" for designated access requests. The close monitoring has significantly reduced the number of occasions when an access request that could potentially end up in a deemed-refusal situation requires the attention of the Director General in the program OPI.

Routine reports are provided to the International Region and a number of CIC Branches.

4. QUESTIONNAIRE AND STATISTICAL REPORT

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act*			
Part A:	Requests carried over from the prior fiscal period.	Apr. 1/01 to Mar. 31/02	Apr.1/02 to Nov. 30/02
1.	Number of requests carried over:	814	859
2.	Requests carried over from the prior fiscal — in a deemed-refusal situation on the first day of the new fiscal:	150	132
Part B:	New Requests — Exclude requests included in Part A.	Apr. 1/01 to Mar. 31/02	Apr. 1/02 to Nov. 30/02
3.	Number of requests received during the fiscal period:	6557	4971
4.A	How many were processed within the 30-day statutory time limit?	3908	2861
4.B	How many were processed beyond the 30-day statutory time limit where no extension was claimed?	446	96
4.C	How long after the statutory time limit did it take to respond where no extension was claimed?		
	1-30 days:	251	76
	31-60 days:	100	12
	61-90 days:	57	4
	Over 91 days:	57	4
5.	How many were extended pursuant to section 9?	1756	1325
6.A	How many were processed within the extended time limit?	1199	726
6.B	How many exceeded the extended time limit?	214	46
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	107	32
	31-60 days:	57	12
	61-90 days:	27	1
	Over 91 days:	23	1
7.	As of November 30, 2002, how many requests are in a deemed-refusal situation?		48

EXCERPT FROM DEPUTY MINISTER'S RESPONSE TO STATUS REPORT

"Your commendation with respect to my department's compliance with response deadlines under the Act is gratifying. I, too, am pleased with CIC's continued progress toward a very high degree of legislative compliance, particularly in view of the volume of access to information requests processed. We are both aware that CIC remains the most frequently accessed department in government. The achievements of the past year are even more impressive when viewed in this context.

Looking to the future, I generally support the recommendations contained in your status report. I welcome Recommendation #3, which suggests that a semi-annual access to information report be provided to CIC Senior Management. My staff will put such a reporting structure into place this fiscal year.

In the past, I have mentioned that CIC's ability to sustain and improve upon the timeliness of access to information responses over the past two years has depended to a substantial degree on the Treasury Board's funding assistance to that program. In the absence of such funding this year, CIC has made several key strategic investments in the program and is now researching ways of streamlining processes in order to minimize the cost burden while ensuring legislative compliance.

In that context, and with respect to your recommendation #2, I should point out that at CIC, analysis of access to information and privacy process issues is an ongoing activity throughout the fiscal year cycle and is a key part of long-term planning. When systemic measures are identified that can assist in maintaining or improving substantial compliance, they are implemented. You may be interested in knowing that imaging technology within CIC's Public Rights Administration Division will soon be introduced, with the objective of managing better the increasing volumes of records that are requested and reviewed each year. This process change will also streamline processes for some of CIC's more complex access to information requests and enhance CIC's client service to the public."

Department of Foreign Affairs and International Trade

Status report on access requests in a deemed-refusal situation

1. BACKGROUND

The Department of Foreign Affairs and International Trade (DFAIT) continues to make progress in reducing the number of requests that are answered beyond the time requirements of the *Access to Information Act.* DFAIT has now achieved a grade of B with a new request to deemed-refusal ratio of 7.9% for the period from April 1 to November 30, 2002. This grade represents substantial progress by the department. DFAIT is encouraged to continue improving and achieve ideal compliance.

In early 1999, the Office of the Information Commissioner issued a Report Card on DFAIT's compliance with the statutory time requirements of the *Access to Information Act.* The Report Card contained a number of recommendations on measures that could be taken to reduce the number of requests in a deemed-refusal situation. In the 1999 Report Card, the department received a red alert grade of F with a 34.9% request to deemed-refusal ratio for access requests received from April 1 to November 30, 1998.

In December 1999, the Office of the Information Commissioner reviewed the status of the recommendations made in the Report Card and made further recommendations for measures to reduce the number of requests in a deemed-refusal situation. At that time, the statistics showed that from April 1 to November 30, 1999, the deemed-refusal ratio for access requests improved to 27.6%. For the comparable period in 2000-2001, the deemed-refusal ratio moved back to 29.3%, or a red alert grade of F.

In December 1999, as part of the review of the recommendations contained in the Report Card, the Director, ATIP Division, stated that:

> "Compliance with the Act has been identified by the ADM as the #1 priority of the 2000-2001 Public Diplomacy Business Plan. In spite of a more than 40% increase in requests over last year, the processing improvements and significant streamlining introduced this year have ensured that the 'deemed-refusal' rate has not had a corresponding increase."

The progress in reducing the number of requests in a deemed-refusal situation regressed for the 2000-2001 fiscal year with a new request to deemed-refusal ratio of 31.3%.

A further Status Report was issued in January 2002. The report noted that DFAIT made substantial progress in meeting the time requirements of the *Access to Information Act* for the period from April 1 to November 30, 2001. The new request to deemed-refusal ratio improved to 17.7% that represented a grade of D. Subsequently, the percentage of requests in a deemed-refusal situation increased to 22% for the 2001-2002 fiscal year that again constituted a grade of F.

This report reviews the progress of the DFAIT to come into substantial compliance with the time requirements of the *Access to Information Act* since the January 2002 Status Report. In addition, this report contains information on the status of the recommendations made in the January 2002 Status Report.

2. CURRENT STATUS AND FURTHER RECOMMENDATIONS

For the period April 1 to November 30, 2002, DFAIT achieved a grade of B with a new request to deemed-refusal ratio of 7.9%. The Commissioner's Office encourages DFAIT to continue to maintain its achievement of substantial compliance with the time requirements of the *Access to Information Act* for the entire fiscal year 2002-2003.

In 2001-2002, DFAIT made a number of substantial improvements to serve as building blocks for reducing the number of access requests in a deemed-refusal situation. Among the improvements, senior management commitment was secured through the approval of various financial measures to support the ATIP Business Plan, *The Road to Improvement.*

In 2002-2003, the Director, Access to Information and Privacy Division, identified the following initiatives to reduce the number of access requests in a deemed-refusal situation:

- file management was changed. In the past, the OPI was responsible for retrieving records and providing a "first cut" at what information might be exempted/released. Now, the OPI is responsible for retrieving records and the ATIP Division provides a package of what information is proposed for release to the requester.
- A complete review of the access process was initiated within the ATIP Division. The review eliminated some duplication of effort and provided a common understanding of each step in the process. In addition, the process was focused on ATIPflow to ensure consistency.
- There is more personal contact by ATIP Division staff with OPIs early in the access process. The contact is used to clarify and scope the access request to determine precisely what the requester is asking for.

Tables 1 and 2 illustrate the progress made in reducing the number of requests in a deemed-refusal situation.

This report makes the following recommendations to assist DFAIT in its efforts to maintain its progress in meeting the time requirements of the *Access to Information Act.*

2.1 Compliance Objective

Last year, the Commissioner's Office recommended that DFAIT set an objective of achieving a grade of B that constitutes substantial compliance with the time requirements of the *Access to*

Table 1: Time to Respond to Non-Extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where no extension was taken	Apr. 1999-Nov. 1999	Apr. 2000-Nov. 2000	Apr. 2001-Nov. 2001	Apr. 2002-Nov. 2002
1-30 days	54	22	19	0
31-60 days	4	7	4	1
61-90 days	3	6	5	0
Over 91 days	1	1	0	0

Table 2: Time to Respond to Extended Requests in a Deemed-Refusal Situation				
Time taken after the statutory time limit to respond where an extension was taken	**Apr. 1999-Nov. 1999**	**Apr. 2000-Nov. 2000**	**Apr. 2001-Nov. 2001**	**Apr. 2002-Nov. 2002**
1-30 days	4	15	5	6
31-60 days	2	6	7	3
61-90 days	0	1	0	0
Over 91 days	0	1	0	1

Information Act. Setting an objective and communicating the objective is one method of encouraging teamwork on the part of DFAIT staff involved in the access process. The department is encouraged to maintain substantial compliance with the time requirements of the *Access to Information Act* for the fiscal year 2002-2003 and achieve ideal compliance in 2003-2004.

Recommendation # 1

DFAIT set an objective of achieving ideal compliance with the time requirements of the *Access to Information Act* for 2003-2004.

2.2 Deemed Refusals

While DFAIT has shown significant improvement in reducing access requests in a deemed-refusal situation, there are further measures that might be taken to come into ideal compliance with the time requirements of the *Access to Information Act.* An analysis of the reasons for deemed refusals where an extension under section 9 of the Act is claimed may lead to measures that will support DFAIT's achievements to date.

DFAIT has undertaken a review of consultations with foreign governments and identified some trends and problem areas that can be analysed to determine whether the current processes and procedures in place are the most efficient. DFAIT is encouraged to extend the analysis to all extensions taken under section 9 of the *Access to Information Act.*

Recommendation #2

DFAIT conduct an analysis to determine the specific reasons for each request in a deemed-refusal situation where an extension under section 9 of the Act was taken for the period April 1 to December 30, 2002, to determine if measures can be instituted to achieve ideal compliance in 2003-2004.

2.3 OPI Retrieval of Records

ATIPflow was not able to produce meaningful data on OPI actual versus allocated time for records retrieval.

The Director, ATIP Division, is of the view that the primary reason for the delay situation at DFAIT is that OPIs are not providing records within the required timeframe. The access process has changed. Now the OPI retrieves the records, but does not complete a first cut of what information may be exempt from disclosure or may be disclosed. This change assists OPIs because it reduces their time taken to process requests. The departmental senior management should ensure that OPIs make a commitment to provide records within the allocated timeframe to the ATIP Division. This report suggests that senior management communicate to OPIs that records

retrieval for access requests is a departmental priority.

Recommendation # 3a

Senior management at DFAIT confirm a commitment to maintain and build on substantial compliance with the statutory time requirements of the *Access to Information Act* by communicating to OPIs that records retrieval for access requests is a priority of the department.

Recommendation # 3b

DFAIT review the ATIPflow process for file control and data entry to determine how OPI information on allocated versus actual time taken to retrieve records can be routinely reported to OPIs and senior management.

3. STATUS OF 2002 RECOMMENDATIONS

In January 2002, recommendations were made to DFAIT on measures to further reduce the number of access requests in a deemed-refusal situation. The action taken on each recommendation is described below following the text of the recommendation.

Previous Recommendation # 1

DFAIT set a target of 10% or better for the new request to deemed-refusal ratio for 2002-2003.

Action Taken on Previous Recommendation # 1: DFAIT achieved a grade of B for the period from April 1 to November 30, 2002. This grade represents an achievement of 7.9% and constitutes substantial compliance with the time requirements of the *Access to Information Act.*

Previous Recommendation # 2

DFAIT conduct an analysis to determine the specific reasons for each request in a deemed-refusal situation for the period April 1 to November 30, 2001, and then develop a plan to reduce the future number of requests in a deemed-refusal situation.

Action Taken on Previous Recommendation # 2:
An analysis of requests for 2001-2002 in a deemed-refusal situation identified several pressures:

- Slowness in obtaining records from OPIs;
- Spikes in workload volume created by multiple requests received on one day;
- Work crisis situations involving OPIs;
- Growing need for consultation on access requests due to the increasing horizontal nature of work among government departments and the complexity of records subject to access requests.

Slowness in OPI response to DFAIT tasking memos was identified as the most frequent cause for delays. After a snapshot review of affected files and discussions with ATIP officers and OPIs, it was noted that delays frequently resulted from OPI workload pressures outside the control of either the ATIP office or the OPI (for example, travel demands, crisis situations, visits of foreign ministers and summit events).

The ATIP Division reviewed a sample of files and, after analysis and consideration of file pressures, introduced a new approach to file processing. The new approach reversed the order of review and

permitted OPI time to be focussed only on a proposed release package, rather than all records initially retrieved.

The ATIP Division is now provided with all responsive documents without review of OPIs. These records are reviewed in the ATIP Division for scope, duplication and sensitivity. A proposed release package is prepared and returned to the OPI for final review. In many instances, this final review is conducted with the OPI officer in the ATIP Division offices to allow an immediate resolution of any issues. This new approach to processing has resulted in reduced processing times overall.

Previous Recommendation # 3

DFAIT conduct an analysis to determine if informal access measures to certain departmental information can be instituted.

Action Taken on Previous Recommendation # 3: DFAIT moved some regularly requested information to the departmental library for easier informal access and encouraged the development of departmental websites for internet access. DFAIT also continued the screening program to move historical files over to National Archives. As well, the department posts summaries of previous releases of information obtained through access requests on the DFAIT website and regularly refer requesters to the site.

4. QUESTIONNAIRE AND STATISTICAL REPORT

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act*			
Part A:	Requests carried over from the prior fiscal period.	Apr. 1/01 to Mar. 31/02	Apr.1/02 to Nov. 30/02
1.	Number of requests carried over:	125	143
2.	Requests carried over from the prior fiscal — in a deemed-refusal situation on the first day of the new fiscal:	30	32
Part B:	New Requests — Exclude requests included in Part A.	Apr. 1/01 to Mar. 31/02	Apr. 1/02 to Nov. 30/02
3.	Number of requests received during the fiscal period:	496	347
4.A	How many were processed within the 30-day statutory time limit?	182	119
4.B	How many were processed beyond the 30-day statutory time limit where no extension was claimed?	36	1
4.C	How long after the statutory time limit did it take to respond where no extension was claimed?		
	1-30 days:	21	0
	31-60 days:	4	1
	61-90 days:	6	0
	Over 91 days:	5	0
5.	How many were extended pursuant to section 9?	225	201
6.A	How many were processed within the extended time limit?	103	70
6.B	How many exceeded the extended time limit?	41	10
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	18	6
	31-60 days:	12	3
	61-90 days:	9	0
	Over 91 days:	2	1
7.	As of November 30, 2002, how many requests are in a deemed-refusal situation?		16

EXCERPT FROM DEPUTY MINISTER'S RESPONSE TO STATUS REPORT

"The department recognizes and takes seriously its legal obligations under the *Access to Information Act*. I was gratified to see that the improvement in the department's response rate moved up from a grade of D last year to a B this year. Our Access to Information and Privacy Protection Division, with the assistance and co-operation of all departmental colleagues, has worked hard to achieve this level of performance. I very much appreciate your recognition of these efforts in your letter. We will give your current recommendations careful consideration and continue to take steps to improve our departmental response rate."

Fisheries and Oceans Canada
Status report on access requests in a deemed-refusal situation

1. BACKGROUND

Fisheries and Oceans Canada (F&O) has achieved a very significant turnaround in its performance results for access requests in a deemed-refusal situation. For the period from April 1 to November 30, 2002, a grade of A was achieved and that constitutes ideal compliance with the time requirements of the *Access to Information Act.* The accomplishment is a credit to the efforts of the staff in the Access to Information and Privacy (ATIP) Secretariat, the ATIP liaison staff in the Offices of Primary Interest (OPI) and senior management of the department. Ideal compliance requires the cooperation of all staff involved in the access process and that cooperation is evident in the results achieved by F&O.

In January 2001, the Office of the Information Commissioner issued a Report Card on F&O's compliance with the statutory time requirements of the *Access to Information Act.* The Report Card contained a number of recommendations on measures to reduce the number of access requests in a deemed-refusal situation at F&O.

In the Report Card, F&O's compliance with the statutory time requirements of the *Access to Information Act* was rated as a red alert grade of F with a 32.8% new request to deemed-refusal ratio for the period April 1 to November 30, 2000. For the 2000-2001 fiscal year, the percentage increased to 38.7%.

A Status Report was issued by the commissioner's office in January 2002. The new request to deemed-refusal ratio increased to 42.2% for the period from April 1 to November 30, 2001. The Status Report made a number of recommendations to the department to assist with the achievement of substantial compliance with the *Access to Information Act's* time requirements.

This Status Report reviews the progress of the department to come into substantial compliance with the time requirements of the *Access to Information Act* since the previous report. In addition, this report contains information on the status of the recommendations made in the Status Report of January 2002.

2. CURRENT STATUS AND FURTHER RECOMMENDATIONS

The department achieved a remarkable turnaround in the deemed-refusal situation over the past three years resulting in ideal compliance with the time requirements of the *Access to Information Act.* The new request to deemed-refusal ratio improved to 4.2% for the period from April 1 to November 30, 2002.

After the Report Card was received in January 2001, the department developed a two-phase ATIP Strategy to deal with the deemed-refusal situation.

With senior management support and additional resources, the infrastructure for dealing with the access process was put in place. This included:

- ATIP staff recruitment and retention program;
- An ATIP Office reorganization and streamlining of the access process;
- A national training program for headquarters and regional staff and OPIs;

- The introduction of new access request processing technology.

The second phase of the ATIP Strategy included:

- A reduction in the use of consultants to process access requests;
- A classification review of the ATIP Office staff;
- The implementation of a new electronic tracking and case management system to track and control due dates for various parts of the access process.

At the same time, the ATIP Secretariat is implementing various initiatives to build awareness of the *Access to Information Act* including:

- The delivery of National Awareness Sessions;
- The introduction of e-memos to OPIs on due dates;
- The introduction of a report (on a regular basis) to the Deputy Minister on the deemed- refusal situation by Sector;
- An ATIP Awards program.

The ATIP Secretariat has a PowerPoint presentation available on the ATIP Strategy and results achieved.

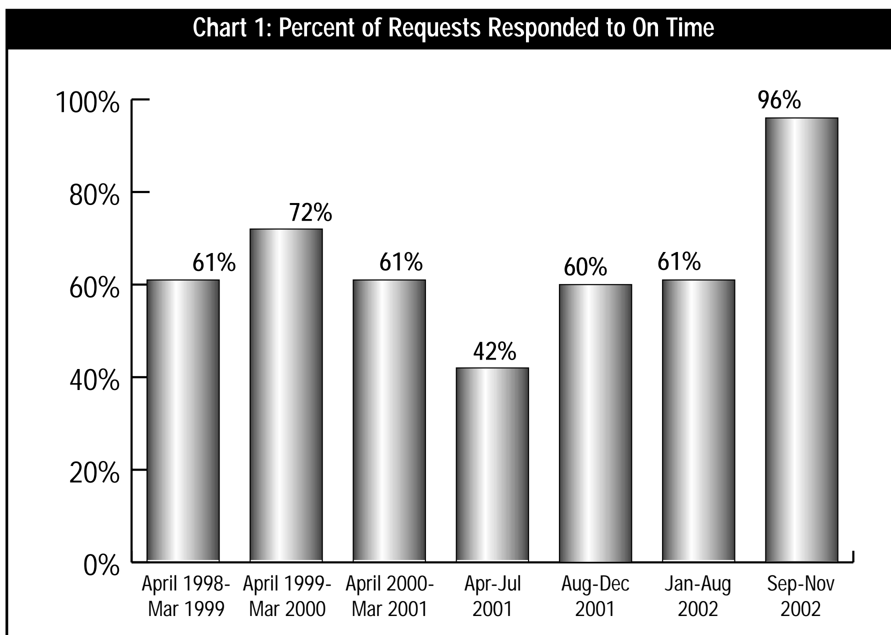
As illustrated in Chart 1, the efforts of the department have resulted in an exemplary improvement in the deemed-refusal situation in a relatively short period of time.

The measures both planned and instituted by the department have resulted in a significantly improved performance.

The following recommendations are made to support the efforts of F&O to sustain ideal compliance with time requirements of the *Access to Information Act* for the remainder of this fiscal year and beyond.

2.1 Objective for 2003-2004

The department has shown a commitment to make changes to support the reduction of access requests in a deemed-refusal situation



and achieve ideal compliance with the time requirements of the *Access to Information Act.* F&O is encouraged to maintain a grade of A and set an objective for 2003-2004 of maintaining a new request to deemed-refusal ratio of 5% or less.

Recommendation #1

F&O set an objective for 2003-2004 to maintain ideal compliance with the time requirements of the *Access to Information Act.*

2.2 Informal Access

F&O has started to identify and analyze situations where records may be provided as a matter of routine rather than through a request under the *Access to Information Act.* The department is encouraged to continue its review to identify records that may be provided to clients through informal access procedures without recourse to the access process under the *Access to Information Act.*

Recommendation #2

F&O is encouraged to complete its investigation of methods of providing informal access to information to the public.

3. STATUS OF 2002 RECOMMENDATIONS

In January 2002, Status Report recommendations were made to F&O on measures to reduce the number of access requests in a deemed-refusal situation. The action taken on each recommendation is described below following the text of the recommendation.

Previous Recommendation # 1

F&O should establish an objective to come into substantial compliance with the Act's deadlines no later than March 31, 2003.

Action Taken on Previous Recommendation # 1: A target was set by the ATIP Secretariat to reach a 90% compliance rate by the March 31, 2003, timeline. The department exceeded the objective for the period from April 1 to November 30, 2002, with a new request to deemed-refusal ratio of 4.2% that constitutes ideal compliance with the time requirements of the *Access to Information Act.* Performance has improved significantly, rising from a low of 42% in June of 2001 to 95.8% by the end of November 2002.

Previous Recommendation # 2

F&O should conduct an analysis to determine the specific reasons for each request in a deemed-refusal situation for the period April 1 to November 30, 2001, and then develop a plan to reduce the future number of requests in a deemed-refusal situation.

Action Taken on Previous Recommendation # 2: A review was conducted and the review identified the departmental sectoral and regional OPIs that were not returning records within the 10 days allocated in the access process to records retrieval. A number of initiatives were implemented as described in the ATIP Strategy that resulted in substantial improvement.

Previous Recommendation # 3

If an extended date will not be met, the ATIP Unit should routinely contact the requester to indicate it will be late, to provide an expected response date and of the right to complain to the Information Commissioner. This will not impact the deemed-refusal status once the extension date is missed; however, it will alleviate some of the requester's frustration and perhaps avert a complaint.

Action Taken on Previous Recommendation # 3: ATIP Secretariat staff now maintain personal contact with requesters to keep them informed of the status of their requests. The ATIP Secretariat Director believes this measure has contributed to the reduction in the number of complaints to the Office of the Information Commissioner from 86 in 2000-2001 to 31 in 2001-2002 to 22 in 2002-2003 (to November 30, 2002).

Previous Recommendation # 4

F&O institute a reporting system to OPIs and departmental management that provides information on the actual versus planned time taken for the functions involved in the access process.

Action Taken on Previous Recommendation # 4: The ATIP Secretariat undertook a workflow review as part of an ATIP Work Improvement Process. The workflow review identified the current process flow and made recommendations to improve the process. A new computerized reporting system (ATIPconsole) has been implemented and training is due to start. ATIPconsole will allow senior departmental managers to track the status of requests within their areas.

Previous Recommendation # 5

F&O investigate methods of providing informal access to information to the public.

Action Taken on Previous Recommendation # 5: The department now posts on the F&O website Marshall agreements once all of the negotiations have been finalized. The department has made it a practice to informally release requests that have already been closed and posted to the Coordination of Access to Information Requests System. Other options are currently being reviewed as part of the strategic communications plan but no firm decisions have been made to date.

4. QUESTIONNAIRE AND STATISTICAL REPORT

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act*			
Part A:	Requests carried over from the prior fiscal period.	Apr. 1/01 to Mar. 31/02	Apr.1/02 to Nov. 30/02
1.	Number of requests carried over:	126	113
2.	Requests carried over from the prior fiscal — in a deemed-refusal situation on the first day of the new fiscal:	69	49
Part B:	New Requests — Exclude requests included in Part A.	Apr. 1/01 to Mar. 31/02	Apr. 1/02 to Nov. 30/02
3.	Number of requests received during the fiscal period:	459	288
4.A	How many were processed within the 30-day statutory time limit?	195	159
4.B	How many were processed beyond the 30-day statutory time limit where no extension was claimed?	98	0
4.C	How long after the statutory time limit did it take to respond where no extension was claimed?		
	1-30 days:	55	0
	31-60 days:	22	0
	61-90 days:	5	0
	Over 91 days:	16	0
5.	How many were extended pursuant to section 9?	135	83
6.A	How many were processed within the extended time limit?	29	31
6.B	How many exceeded the extended time limit?	36	3
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	5	3
	31-60 days:	10	0
	61-90 days:	2	0
	Over 91 days:	19	0
7.	As of November 30, 2002, how many requests are in a deemed-refusal situation?		9

EXCERPT FROM DEPUTY MINISTER'S RESPONSE TO STATUS REPORT

"DFO has every intention of continuing its efforts with respect to the fulfillment of our obligations under the *Access to Information Act*. As you have so correctly stated in your report, this "A" would not have been possible without the contribution of every employee of this Department. I would further add that the cooperation and advice DFO has received from your staff has also contributed to this success."

Health Canada
Report on the status of report card recommendations

1. BACKGROUND

Health Canada (HCan) achieved ideal compliance with the time requirements of the *Access to Information Act* in 1999 and HCan is the only department that has sustained ideal compliance in succeeding years. The maintenance of an A grade for compliance with the time requirements of the *Access to Information Act* in fiscal year 2001-2002 and for the period of April 1 to November 30, 2002, is a credit to the management, ATIP staff and Office of Primary Interest (OPI) staff who deal with access requests.

In the 1999 Report Card, Health Canada received a red alert grade of F with a 51.2% request to deemed-refusal ratio for requests received from April 1 to November 30, 1998. For the complete 1998-1999 fiscal year, the ratio was 61.8%. For requests received from April 1 to November 30, 1999, the ratio improved dramatically 96.9% (3.1% ideal compliance, or an A grade). In addition, the backlog of deemed-refusal requests was entirely eliminated.

The success of the efforts in 1999-2000 to reduce the number of requests that were not processed within the time requirements of the *Access to Information Act* appears to be the result of a combination of factors:

- The department provided additional funding for resources to deal with processing the backlog of request.
- Funding was provided for resources to make improvements to the access to information process including procedure manuals and OPI training.
- The ATIP flow System was implemented, providing the HCan Coordinator and senior management with information and reports that clearly show the status of access requests against planned timelines.
- The HCan Coordinator has developed a clear processing model with timelines for OPIs and other parts of the organization involved in the processing of access requests.

This report provides an update to the January 1999 Status Report on the efforts of the department to sustain ideal compliance with the time requirements of the *Access to Information Act.*

2. CURRENT STATUS

HCan has continued to achieve a grade of A, which signals ideal compliance with the *Access to Information Act*, for both time periods covered by this Report. For the fiscal year 2001-2002, the new request to deemed-refusal ratio was 4.5%. For the period from April 1 to November 30, 2002, the department achieved a 5% ratio.

HCan is the only department that received a grade of A and continues to maintain the grade. This situation demonstrates exemplary performance on the part of departmental staff.

The Director, Access to Information and Privacy Division, identified a number of factors that, in his opinion, contributed to the maintenance of ideal compliance with the *Access to Information Act's* time requirements. Overall, the Director identified constant perseverance to succeed in maintaining a grade of A and teamwork on the part of HCan staff as

requisite ingredients to maintain ideal compliance. In addition, the following factors influenced the department's ability to process access requests on time.

OPI Communication

It is essential to regularly communicate the time requirements of the access process to OPIs and their responsibility as part of the Access to Information (ATI) team to meet the time requirements. The OPI ATI contact person may change, or their priorities may change. Nonetheless, there is a statutory requirement to meet both legislated and HCan timelines for completing the OPI's part of the access process and this must be conveyed to OPIs on a regular basis.

Request Clarification

When an access request requires communication with the requester to clarify the request, and during this process the request changes in some substantial way, the start date of the request is changed to take into account the fact that it is in effect a new request. This is done as early in the process as possible and the requester is always informed.

ATIP Director's Assistance

At times, the ATIP Director has to become involved in the access process for a request regardless of how much delegation occurs. The Director makes himself available to ATIP staff when staff alert him to a potential delay problem. Focusing on a potential deemed-refusal situation and possible corrective measures a few days before a delay may occur is one method of avoiding a deemed-refusal request.

Fee Estimates

HCan always "stops the clock" when a fee estimate is sent to a requester. The actual days for processing the request do not include the time taken by a requester to respond to a request for a deposit or a fee as provided by the *Access to Information Act* Regulation concerning fees.

Continuous Improvement

It is always possible to make improvements to the access process. For example, previously one OPI contact person would complete a report on the search for records. A report was completed even if records did not exist. The Director General of the area signed the report. Through streamlining, the report has been eliminated and the OPI contact person sends an e-mail directly to the ATIP Division on the result of the search for records.

Contact of the Month Award

In order to recognize excellence, the ATIP Division has established an OPI Contact of the Month Award.

Senior Management Engagement

The ATIP Director provides a weekly report to the Deputy Minister's Office identifying late access requests and reasons that the requests are late.

The following recommendation is made to support the continued efforts of HCan to process access requests within the statutory time requirements of the *Access to Information Act.*

2.1 Sustain Achievement

The maintenance of ideal compliance with the time requirements of the *Access to Information Act* requires constant attention to the access process. HCan is encouraged to continuously improve its access process activities, build on its achievements and devote the resources needed to maintain ideal compliance with the *Access to Information Act.*

Recommendation # 1

HC is encouraged to maintain ideal compliance with the time requirements of the *Access to Information Act.*

3. QUESTIONNAIRE AND STATISTICAL REPORT

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act*			
Part A:	Requests carried over from the prior fiscal period.	Apr. 1/01 to Mar. 31/02	Apr.1/02 to Nov. 30/02
1.	Number of requests carried over:	212	149
2.	Requests carried over from the prior fiscal — in a deemed-refusal situation on the first day of the new fiscal:	13	15
Part B:	New Requests — Exclude requests included in Part A.	Apr. 1/01 to Mar. 31/02	Apr. 1/02 to Nov. 30/02
3.	Number of requests received during the fiscal period:	1474	960
4.A	How many were processed within the 30-day statutory time limit?	969	599
4.B	How many were processed beyond the 30-day statutory time limit where no extension was claimed?	18	19
4.C	How long after the statutory time limit did it take to respond where no extension was claimed?		
	1-30 days:	14	15
	31-60 days:	3	3
	61-90 days:	1	1
	Over 91 days:	0	0
5.	How many were extended pursuant to section 9?	432	226
6.A	How many were processed within the extended time limit?	316	146
6.B	How many exceeded the extended time limit?	34	22
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	18	14
	31-60 days:	11	6
	61-90 days:	4	2
	Over 91 days:	1	0
7.	As of November 30, 2002, how many requests are in a deemed-refusal situation?		7

EXCERPT FROM DEPUTY MINISTER'S RESPONSE TO STATUS REPORT

"Health Canada is extremely proud of the fact that we have been able to maintain an "A" rating for ideal response time compliance again this year and that we are the only department to have maintained this record of performance since the first report cards were completed in 1999. As you indicate in your letter, this must be seen as a credit to the department's management, our personnel in the Access to Information and Privacy Division, as well as all our staff who deal with access requests across the department.

I can assure you that all efforts will be made, together with everyone involved, to meet your recommendation that ideal compliance into the future be maintained."

Human Resources Development Canada

Report on the status of report card recommendations

1. BACKGROUND

Human Resources Development Canada (HRDC) was the first department to achieve a grade of A in its initial Report Card. In January 2000, HRDC reported that all access requests completed between April 1 and November 1, 1999, were processed within the time requirements of the *Access to Information Act.* At that time, the department had in their words a "zero-tolerance policy" for access requests in a deemed-refusal situation.

In fiscal year 2000-2001, two events created an extraordinary volume of access and privacy requests. A *Grants and Contributions Audit Report* generated a large volume of access requests. From a typical volume of approximately 450 requests, an additional approximately 1,300 access requests were received. In addition, events around the Longitudinal Files generated some 70,000 privacy requests. The volume of requests overwhelmed the department's access process and the Access to Information and Privacy Directorate. At one point, 150 additional staff were working in two shifts to process requests.

In fiscal year 2000-2001, the new request to deemed-refusal ratio was 53.4%. In fiscal year 2001-2002, the ratio was 39.5%. In each of these fiscal years, the ratio represented a grade of F.

One response to the high volume of requests and processing time constraints was the creation of a Review Committee to ensure that the information to be disclosed for an access request was consistent with the information requested. Each request was reviewed as part of the access process but independent from the ATIP Directorate for what ended up to be essentially a communications review. The added review resulted in delays to the access process and access requests in a deemed-refusal situation. Recently, the review group, the Analysis Unit, was relocated to the ATIP Directorate.

This year, from April 1 to November 30, 2002, HRDC received a grade of D for a new request to deemed-refusal ratio of 19.7%. This is an improvement from the grade of F for the new request to deemed-refusal ratio for the previous two fiscal years.

This report reviews the progress of the department to return to ideal compliance with the time requirements of the *Access to Information Act.*

2. CURRENT STATUS AND FURTHER RECOMMENDATIONS

The department's access process was changed in response to a crisis situation. Unfortunately, once the crisis was over and the number of access requests returned to a normal level, the access process continued to operate in crises mode. What has happened, among other measures, is that a communications review has been inserted into the access process as an integral part of the decision-making process. The zero-tolerance policy for access requests in a deemed-refusal situation was abandoned during the receipt of an overwhelming number of requests. Even though the number of access requests is back to a normal volume, the zero-tolerance policy has not been reinstituted.

The Director of the ATIP Directorate has generated an ATIP Improvement Plan to put into place corrective measures to improve the deemed-refusal situation. At the time of the

interview for this report, the plan had not yet been reviewed or approved by HRDC senior management. The key components of the plan are:

- Roles and Responsibilities: Provide a consistent set of roles and responsibilities for Office of Primary Interest (OPI) ATIP Liaison Officers;
- Guidelines: Provide consistent guidelines to OPIs for scoping requests;
- Media Lines: Rather than developing media lines for all ATI requests, have a process in place to focus on specific requests for media lines;
- Training: Continue to provide ATI training;
- Reporting: Institute reporting to access process participants on time allocated versus time taken for access process steps;
- Accountability: Provide ATI timeline accountability in performance contracts for senior managers;
- Fast Tracking: Institute a fast tracking process for certain access requests.

The following recommendations are made to support the efforts of HRDC to process access requests within the statutory time requirements of the *Access to Information Act.*

2.1 Leadership

HRDC was the only department of those departments that received a Report Card that enunciated a zero-tolerance policy for access requests in a deemed-refusal situation. To regain an ideal level of compliance will take leadership on the part of the ATIP Director with strong support from senior management. The first recommendation in the 2000 Report Card remains relevant.

Recommendation # 1

The ATIP Director is directly responsible for ensuring compliance with the *Access to Information Act* and should continue to take a strong leadership role in establishing a culture of compliance throughout HRDC. Such a role requires the unwavering support and endorsement of the Minister and the Deputy Minister. The department should reinstate its exemplary "zero-tolerance" policy for deemed refusals.

2.2 ATI Improvement Plan

Uncoordinated efforts to reduce the number of requests in a deemed-refusal situation are likely not as effective as an integrated group of measures established as a result of an analysis of the situation. The Director of the ATIP Directorate has developed a plan to reduce the number of access requests in a deemed-refusal situation. While the plan presents a series of measures that will be useful, an ATI Improvement Plan should have a component that describes the reasons for access requests in a deemed-refusal situation and connects corrective measures to the reasons for the delays. The plan should include targets, tasks, deliverables, milestones and responsibilities to regain ideal compliance.

Recommendation # 2

The ATIP Director provide for senior management's approval an ATI Improvement Plan with an objective of regaining ideal compliance with the time requirements of the *Access to Information Act* in 2003-2004.

2.3 Multiple Sign-offs

An access process that includes multiple sign-offs after access requests are processed by the ATIP Directorate usually creates delays in processing

requests and results in requests in a deemed-refusal situation. The affect of multiple "check points" prior to the release of records is to create an institutional culture of "play it safe".

The 2000 Report Card recommended revising the Delegation Order to clearly show (as indicated by the department) that the ATIP Director and officers have delegated authority without reference to other departmental officials for approval of decisions made under the *Access to Information Act.* The Delegation Order was not changed.

Recommendation # 3

HRDC institute an access process that does not contain multiple sign-offs and revise the Delegation Order to clearly show that the ATIP Director and officers have delegated authority without reference to other departmental officials for decisions made under the *Access to Information Act.*

2.4 Analysis Unit

The Analysis Unit is now part of the ATIP Directorate. Its apparent purpose is to provide a communications function by providing media lines for each access request. In draft material provided for this report on roles and responsibilities, the unit's functions are stated as:

- Reviewing the OPI submission and ensuring relevancy of documents;
- Ensuring consistency of exemptions;
- Assessing the impact of the release of this information on the department's program and policy directions and reviewing for any media impact;
- Ensuring media lines are prepared and respond to the content of the released information;
- Providing information briefings to senior management;
- Providing analysis and sign-off.

The tasks as set out show a "play it safe" institutional culture because of the duplication and checking of some of the work performed by ATIP staff in the Operations Section.

Chart 1 shows the number of working days that are taken to process access requests in the ATIP Directorate. The information contained in the chart is for completed access requests.

Processing by the Analysis Unit takes place in parallel with the sign-off process (see Chart 2) and may overlap somewhat in parallel with the Operations Section. The Analysis Unit is allocated four days to perform their functions.

The Operations Section reviews records and applies the provisions of the *Access to Information Act.* The

Chart 1: ATIP Directorate ATI Request Processing

Average working days taken by the ATIP Directorate to review and analyze documents subject to release.

	Q3	FYTD
Operations Section[1]		
Days taken	17.1	11.7
Objective	17.6	14.9
Analysis Section		
Days taken	6.0	5.9
Objective	4	4

[1] includes extensions

working days shown below includes days where requests are extended under section 9 of the *Access to Information Act.*

Recommendation # 4a

HRDC review the tasks assigned to the Analysis Unit to eliminate any duplication of work within the ATIP Directorate.

Recommendation # 4b

HRDC take measures to reduce the actual time taken to complete communications activities to the allotted time.

2.5 Informal Access

Part of the plan under development by the ATIP Director should include a review to determine if there are ways to increase informal access to HRDC information. The public is well served by the development of approaches to the dissemination of information without resorting to making a request under the *Access to Information Act.* The public would not be prevented from making a request under the Act if dissatisfied with the informal process.

Decisions on informal access require, as one part of the analysis, identification of information that is routinely disclosed through responses to access requests. An analysis can also be conducted on the information needs of HRDC clients. Both Canada Customs and Revenue Agency and Citizenship and Immigration Canada are actively investigating informal access to departmental information.

Recommendation #5

HRDC as a component of an ATI Improvement Plan investigate methods of providing informal access to information to the public and provide a copy of the resulting report to the Office of the Information Commissioner.

2.6 OPI Records Retrieval

ATIPflow provides information on the time allocated versus the time taken for OPIs to retrieve records responsive to an access request. Chart 2 provides information on OPI records retrieval and sign-off. The information contained in the chart is for completed access requests. In the current HRDC access request-processing model, eight working days are allocated to OPI records retrieval and four days to sign-off.

HRDC ATIP Directorate should conduct an analysis using the indicators in Chart 2 to identify the reasons that participants in the access process are not meeting their obligations concerning time allocation. Measures to improve performance can then be included in an ATI Improvement Plan.

Recommendation # 6

HRDC develop in an ATI Improvement Plan measures to improve the performance of participants in the access process who are not meeting their responsibilities for complying with HRDC's time allocation for processing access requests.

3. STATUS OF 2000 RECOMMENDATIONS

In January 2000, recommendations were made to HRDC as part of the Report Card. A follow-up report on the recommendations was not issued because HRDC received a grade of A in the Report Card. As part of this report, the recommendations in the Report Card were reviewed to determine their status. Action taken on the previous recommendation follows the text of the recommendation.

Chart 2: Time Allocated Versus Time Taken						
Branch / Region	**Number of times subject to an access to information request**		**Average working days to provide documents to the ATIP Directorate**		**Average working days to sign-off on documents subject to release**	
	Q3	**FYTD**	**Q3**	**FYTD**	**Q3**	**FYTD**
Communications	4	12	8.0	8.7	3.0	2.1
Corporate Affairs and Planning	9	19	13.2	10.0	2.5	6.5
Employment Programs	29	95	6.2	6.7	3.4	6.1
Financial and Administrative Services	24	85	9.4	8.3	5.3	6.3
Modernizing Services for Canadians	2	2	-	-	3.5	3.0
Homelessness	1	7	3.0	6.7	4.0	3.0
Human Investment Programs	5	22	16.8	6.7	5.1	4.4
Human Resources	13	31	8.4	7.7	2.7	3.5
Income Security Programs	23	56	20.4	11.9	4.5	3.5
Insurance	8	38	3.9	7.6	4.5	3.5
Labour	3	11	5.5	4.9	1.0	3.0
Service Delivery	0	0	-	-	-	0.5
Strategic Policy	12	67	13.3	7.1	4.0	1.4
Systems	9	31	8.7	7.6	5.0	3.4
British Columbia / Yukon	19	34	8.5	8.6	0	0
Alberta / NWT / Nunavut	1	9	15.0	10.3	5.5	3.8
Saskatchewan	0	8	-	8.5	6.0	3.3
Manitoba	1	5	-	3.8	5.0	2.6
Ontario	22	62	9.3	8.3	4.3	3.8
Quebec	4	24	7.0	6.2	3.5	3.2
New Brunswick	3	17	8.3	6.1	3.4	3.1
Nova Scotia	1	9	12.0	7.1	2.0	6.1
Prince Edward Island	1	6	12.0	7.2	3.7	3.2
Newfoundland	6	12	7.9	6.8	3.4	2.9
HRDC Average	**8.3**	**27.6**	**9.8**	**7.6**	**3.7**	**3.4**
HRDC Objective			**8**	**8**	**4**	**4**

Previous Recommendation # 1

The Coordinator is directly responsible for ensuring compliance with the *Access to Information Act* and should continue to take a strong leadership role in establishing a culture of compliance throughout HRDC. Such a role requires the unwavering support and endorsement of the Minister and the Deputy Minister. The department should continue its exemplary "zero-tolerance" policy for deemed refusals.

Action taken on Previous Recommendation # 1: Although the department had to cope with a crisis in the extraordinary number of requests received in 2000-2001, when the volume of requests returned to a normal level, the zero-tolerance policy was not re-established.

Previous Recommendation # 2

The Delegation Order should be revised to clearly show (as indicated by the department) that the ATI Coordinator and officers have delegated authority without reference to other departmental officials for approval for decisions made under the *Access to Information Act.*

Action taken on Previous Recommendation # 2: The Delegation Order remains unchanged.

Previous Recommendation # 3

The ATI Coordinator should maintain a close watch on the access request process to ensure that the provision of the disclosure package for information purposes does not become a "sign-off" in the process.

Action taken on Previous Recommendation # 3: There appear to be multiple sign-offs in effect at the time of this report.

Previous Recommendation # 4

The ATI Coordinator should continue to monitor the planned versus actual time standards of the department for responding to access requests to maintain the exemplary results of the fiscal year 1999-2000.

Action taken on Previous Recommendation # 4: The ideal compliance with the *Access to Information Act* was not maintained initially due to an extraordinary number of requests. Once the volume returned to normal, the actual versus planned time standards are being monitored and routinely reported to OPIs.

Previous Recommendation # 5

Appraisals of operational managers should place emphasis on good performance in processing access requests.

Action taken on Previous Recommendation # 5: This recommendation was not implemented.

Previous Recommendation # 6

ATI training should be mandatory for all new managers as part of their orientation and for all managers on a refresher basis.

Action taken on Previous Recommendation # 6: Training was increased, but not specifically directed to new managers. Whenever a new OPI Liaison Officer is appointed, the officer will have a session covering the access process and their roles and responsibilities. Each year, a "Call for Training" is sent out to programs. Each new HRDC employee completes an orientation program that includes a section on the *Access to Information Act.*

4. QUESTIONNAIRE AND STATISTICAL REPORT

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act*			
Part A:	Requests carried over from the prior fiscal period.	Apr. 1/01 to Mar. 31/02	Apr.1/02 to Nov. 30/02
1.	Number of requests carried over:	100	65
2.	Requests carried over from the prior fiscal — in a deemed-refusal situation on the first day of the new fiscal:	22	14
Part B:	New Requests — Exclude requests included in Part A.	Apr. 1/01 to Mar. 31/02	Apr. 1/02 to Nov. 30/02
3.	Number of requests received during the fiscal period:	448	345
4.A	How many were processed within the 30-day statutory time limit?	189	187
4.B	How many were processed beyond the 30-day statutory time limit where no extension was claimed?	132	46
4.C	How long after the statutory time limit did it take to respond where no extension was claimed?		
	1-30 days:	104	44
	31-60 days:	24	2
	61-90 days:	3	0
	Over 91 days:	1	0
5.	How many were extended pursuant to section 9?	86	61
6.A	How many were processed within the extended time limit?	31	15
6.B	How many exceeded the extended time limit?	31	9
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	26	7
	31-60 days:	3	2
	61-90 days:	1	0
	Over 91 days:	1	0
7.	As of November 30, 2002, how many requests are in a deemed-refusal situation?		13

EXCERPT FROM DEPUTY MINISTER'S RESPONSE TO STATUS REPORT

"I appreciate your acknowledging the unprecedented number of requests that HRDC's Access to Information and Privacy officials were faced with in recent years. Your understanding and support in this matter is valued.

The department's performance is continuously improving. As indicated in the report card, we have gone from over 50% of Access to Information requests with late responses in 2000-2001 and approximately 40% in 2001-2002, to just under 20% in the period covered in the report.

We believe that your recommendations, in addition to our current improvement plan outlined in the report card, will have a beneficial impact on HRDC's compliance with the response deadlines.

In closing, I would like to assure you that HRDC officials had already implemented many of your recommendations prior to the beginning of the current fiscal year."

Department of National Defence
Status report on access requests in a deemed-refusal situation

1. BACKGROUND

The Department of National Defence (ND) has achieved a grade of B for the period from April 1 to November 30, 2002. The grade constitutes substantial compliance with the time requirements of the *Access to Information Act.* The department has made major improvements to the access process over the past few years. These measures have led to a notable improvement in the departmental deemed-refusal situation.

In early 1999, the Office of the Information Commissioner issued a Report Card on the department's compliance with the statutory time requirements of the *Access to Information Act.* The Report Card contained a number of recommendations on measures that could be taken to reduce the number of requests in a deemed-refusal situation. In the 1999 Report Card, ND received a red alert grade of F with a 69.6% request to deemed-refusal ratio for access requests received from April 1 to November 30, 1998.

In December 1999, the Office of the Information Commissioner reviewed the status of the recommendations made in the Report Card and made further recommendations on measures to reduce the number of requests in a deemed-refusal situation. At that time, the statistics showed that from April 1 to November 30, 1999, the deemed-refusal ratio for access requests improved to 38.9%, although still a grade of F.

In January 2001, the Office of the Information Commissioner provided another Status Report to ND. At that time, ND received a grade of D with a new request to deemed-refusal ratio of 17% for the period April 1 to November 30, 2000. The January 2001 report noted that the trendlines for reducing the number of access requests in a deemed-refusal situation were all in the right direction.

ND continued to improve its performance in meeting the time requirements of the *Access to Information Act.* ND achieved a grade of C with a new request to deemed-refusal ratio of 11.8% for the period from April 1 to November 30, 2001. The improvement was not maintained for the fiscal year. The grade dropped to a C for the fiscal year of 2001-2002 with a ratio of 12.7%. We are informed that this was mostly due to extensive consultations with the Privy Council Office regarding cabinet confidence and security and intelligence matters.

This report reviews the progress of ND to improve the deemed-refusal situation since the January 2001 Status Report. This report also reviews the status of recommendations made in that report.

2. CURRENT STATUS AND FURTHER RECOMMENDATIONS

ND continues to build a solid foundation for an effective access process and to make noteworthy progress in reducing the number of access requests in a deemed-refusal situation. For the period April 1 to November 30, 2002, the new request to deemed-refusal ratio was 9.1% that constitutes substantial compliance, grade B, with the time requirements of the *Access to Information Act.*

ND has committed resources to ATI and has provided strong management support to reduce what was a

significant and burdensome number of access requests in a deemed-refusal situation. The Commissioner's Office encourages ND to continue its progress and to achieve ideal compliance with time requirements of the *Access to Information Act* in 2003-2004.

Time extensions for consultations under paragraph 9(b) of the *Access to Information Act* continue at times to be an impediment to reducing the number of access requests in a deemed-refusal situation. A lack of communication among departments can mean that the length of time selected for a time extension is determined without seeking the input of the department that will review the records. In addition, departments may forward more than one access request at the same time to another department for consultation without prior communication with that department. The department forwarding the records will select the time period for the extension for the review of the records without reference to the department that will carry out the review.

The following recommendations are made to support the continued efforts of ND to process access requests within the statutory time requirements of the *Access to Information Act.*

2.1 Target for 2003-2004

It is now time for the department to make the final effort to come into ideal compliance with the time requirements of the *Access to Information Act* by achieving a new request to deemed-refusal ratio of 5% or less. The ATIP Director has concentrated on building an access process for sustainable achievement in reducing the deemed-refusal situation.

There is an excellent foundation for continued improvement. Recent initiatives by ND include the establishment of an ATIP Advisory Committee to advise the ATIP Division on departmental ATIP policy, training and issues and on Infosource. The ATIP Director has instituted a weekly report that tracks the new requests to deemed-refusal ratio as illustrated in section 5 of this report. The Director has also placed emphasis on relationship management within the department.

Recommendation #1

ND set a target of 5% or better for the new request to deemed-refusal ratio for 2003-2004.

2.2 Management of Time Extensions

The time taken to respond to requests in a deemed-refusal situation above the 30-day or extended time limit is illustrated in Tables 1 and 2 in section 3 of this report. There is still room for improvement to reduce the number of requests that are in a deemed-refusal situation. The highest number of requests that ended in a deemed-refusal situation were requests that were responded to within 30 days after the required timeframe.

ND should review the circumstances that caused the delays and resulted in deemed refusals for the requests in a deemed-refusal situation from April 1 to November 30, 2002. The analysis should lead to a plan and priorities to further reduce the number of requests in a deemed-refusal situation.

Recommendation #2

ND determine the reasons for delays in responding to access requests in a deemed-refusal situation from April 1 to November 30, 2002, to identify improvements that can be made to the access process to reduce future delays.

3. STATUS OF 2002 RECOMMENDATIONS

In January 2002, recommendations were made to ND on measures to further reduce the number of access requests in a deemed-refusal situation. The action taken on each recommendation is described below following the text of the recommendation.

Previous Recommendation # 1

ND set a target of 10% or better for the new request to deemed-refusal ratio for 2002-2003.

Action taken on Previous Recommendation # 1: Although an objective was not set, ND achieved a grade of B for the period of April 1 to November 30, 2002. The new request to deemed-refusal ratio was 9.1%. The Access to Information and Privacy (ATIP) Division worked more closely with the Office of Primary Interest (OPI) community. The focus for the ATIP Division with the OPI community was to meet early after receipt of an access request to discuss complexity and possible consultations. Other factors that assisted ND with achieving a grade of B were:

- Proactive use of ATIPflow. Each Friday a listing is prepared of all access requests due the following week for follow-up;
- Implementation of ATIPimage to assist with the preparation of records for disclosure;
- Annual training after the fall posting of military members to ensure those responsible for ATIP in the field are aware of their responsibilities as soon as possible after their arrival.

Previous Recommendation # 2

ND determine the reasons for delays in responding to access requests in a deemed-refusal situation from April 1 to November 30, 2001, and, based on this analysis, develop a plan with priorities to further reduce the delays in responding to requests.

Action taken on Previous Recommendation # 2: The time taken to respond to requests in a deemed-refusal situation above the 30-day or extended time limit has improved as illustrated in the following two tables.

The continuing problem with meeting the extended time for responding to an access request may relate to a lack of communication among departments or a lack of priority when a government outside of Canada reviews the records.

Table 1: Time to Respond to Non-Extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where no extension was taken	Apr. 1999-Nov. 1999	Apr. 2000-Nov. 2000	Apr. 2001-Nov. 2001	Apr. 2002-Nov. 2002
1-30 days	126	39	25	13
31-60 days	36	1	10	2
61-90 days	12	0	2	0
Over 91 days	5	1	1	0

Table 2: Time to Respond to Extended Requests in a Deemed-Refusal Situation				
Time taken after the statutory time limit to respond where an extension was taken	**Apr. 1999-Nov. 1999**	**Apr. 2000-Nov. 2000**	**Apr. 2001-Nov. 2001**	**Apr. 2002-Nov. 2002**
1-30 days	30	36	31	27
31-60 days	7	12	5	7
61-90 days	2	4	3	2
Over 91 days	2	0	5	1

4. QUESTIONNAIRE AND STATISTICAL REPORT

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act*			
Part A:	Requests carried over from the prior fiscal period.	Apr. 1/01 to Mar. 31/02	Apr.1/02 to Nov. 30/02
1.	Number of requests carried over:	182	222
2.	Requests carried over from the prior fiscal — in a deemed-refusal situation on the first day of the new fiscal:	42	33
Part B:	New Requests — Exclude requests included in Part A.	Apr. 1/01 to Mar. 31/02	Apr. 1/02 to Nov. 30/02
3.	Number of requests received during the fiscal period:	1358	791
4.A	How many were processed within the 30-day statutory time limit?	611	327
4.B	How many were processed beyond the 30-day statutory time limit where no extension was claimed?	59	15
4.C	How long after the statutory time limit did it take to respond where no extension was claimed?		
	1-30 days:	42	13
	31-60 days:	11	2
	61-90 days:	3	0
	Over 91 days:	3	0
5.	How many were extended pursuant to section 9?	632	370
6.A	How many were processed within the extended time limit?	389	163
6.B	How many exceeded the extended time limit?	81	37
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	50	27
	31-60 days:	7	7
	61-90 days:	6	2
	Over 91 days:	18	1
7.	As of November 30, 2002, how many requests are in a deemed-refusal situation?		20

5. WEEKLY REPORT

The following chart shows a section of the form used by ND to track the weekly grade of the new request to deemed-refusal ratio.

Date	31-Aug-02	6-Sep-02	13-Sep-02	20-Sep-02	27-Sep-02	4-Oct-02
Question #	Value	Value	Value	Value	Value	Value
3	436	454	466	487	510	538
4 b)	6	6	6	6	7	7
6 (b)	22	23	27	28	31	31
8 (a)	7	10	10	11	9	9
Score	8.03 %	8.59 %	9.23 %	9.24%	9.22%	8.74 %
Grade	B	B	B	B	B	B

Grade Legend

% of Deemed refusals	Comment	Grade
0-5%	Ideal Compliance	A
5-10%	Substantial Compliance	B
10-15%	Borderline Compliance	C
15-20%	Below std Compliance	D
over 20%	Red Alert	F

EXCERPT FROM DEPUTY MINISTER'S RESPONSE TO STATUS REPORT

“I am pleased that we are receiving the grade of B, which indicates continual improvement over the past several years.

As you have noted, ND takes its responsibilities under the ATIA very seriously, and is committed to an ongoing examination of our processes to ensure the most effective and efficient response times to applicants. To that end, the Directorate of Access to Information and Privacy (DAIP) will be undertaking a statistical and case file review to determine the reasons for delays in responding to access requests over the past fiscal year. In addition, the consultation process has been amended so that communication around timeframes takes place between DAIP and the institution being consulted prior to records being sent.”

Privy Council Office

Report on the status of report card recommendations

1. BACKGROUND

The Privy Council Office (PCO) was one of the first departments to achieve a grade of A in its efforts to comply with the time requirements of the *Access to Information Act.* The purpose of this follow-up report is to determine if PCO was able to maintain this achievement.

In the 1999 Report Card, PCO received a red alert grade of F with a 38.9% new request to deemed-refusal ratio for requests received from April 1 to November 30, 1998. For the complete 1998-1999 fiscal year, the ratio was 47.1%. For requests received from April 1 to November 30, 1999, the ratio improved remarkably to 3.6% and a grade of A.

The achievement was not sustained for the reporting period of this Status Report. During the fiscal year 2001-2002, the new request to deemed-refusal ratio increased to 28.4% that constituted a grade of F. For the period from April 1 to November 30, 2002, the ratio improved to 17.5%, a grade of D constituting below standard performance with the time requirements of the *Access to Information Act.*

This report reviews the progress of PCO to comply with the time requirements of the *Access to Information Act* since April 2001, including the status of the recommendations made in the Status Report issued in January 2000.

2. CURRENT STATUS AND FURTHER RECOMMENDATIONS

PCO received a grade of D for the new request to deemed-refusal ratio for the period from April 1 to November 30, 2002, that constitutes below standard compliance with the time requirements of the *Access to Information Act.*

In the 2000 Status Report, the following comments were made:

> "The success of the work at PCO to reduce the number of deemed-refusal requests appears to rely on a determination to meet the timeline requirements of the Act. Although the approval process has been modified in part, the delegation and approval process remain essentially the same.
>
> The ATI Coordinator did not take a project management approach to the implementation of measures to reduce the number of deemed refusals. Instead, a number of independent initiatives were undertaken to come into compliance with the time requirements of the *Access to Information Act.* These measures have resulted in success in eliminating the delays. It will be of interest to see if the situation can be maintained over the longer term maintaining the current delegation and approval process."

The Coordinator noted for this report that the timelines for processing access requests at PCO are known throughout the organization. The Access to Information and Privacy Office has produced a comprehensive user manual *Access to Information in the Privy Council Office.*

Table 1: Access Process Timeline

ATIP Assessment	OPI Retrieval	ATIP Review	OPI Review	ATIP Prep.	Approval		Response To Applicant
					OPI	Assoc Sec.	
1	2 3 4 5	6 7 8	9 10 11 12 13 14	15 16	17 18	19 20	21

← Working Days →

The access process as illustrated in Table 1 remains a multi-step process with possible opportunities for streamlining the process.

The Coordinator's view is that senior management approval of release packages does not constitute a delay in the process. Her view is that the time allocated to OPI's in the access process is being exceeded and constitutes a major cause for access requests in a deemed-refusal situation. In addition, there are staffing vacancies and an increase in consultations that have contributed to the deemed-refusal situation. Statistical information on actual versus allocated time is not available from ATIPflow for the various components of the access process.

Table 1 illustrates the stages in PCO's access process and time allocated in working days to each stage of the process.

This report makes the following recommendations to assist PCO in its efforts to regain ideal compliance with the time requirements of the *Access to Information Act.*

2.1 Compliance Objective

PCO is encouraged to provide leadership to other departments by regaining ideal compliance with the time requirements of the *Access to Information Act.* PCO is encouraged to set an objective of 5% or better for the new request to deemed-refusal ratio for 2003-2004.

Recommendation # 1

PCO is encouraged to set an objective of 5% or better for the new request to deemed-refusal ratio for 2003-2004.

2.2 ATI Improvement Plan

An overall ATI Improvement Plan is an essential component of a strategy to be in compliance with the time requirements of the *Access to Information Act.* A plan should identify the specific sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve ideal compliance. Uncoordinated efforts to reduce the number of requests in a deemed-refusal situation are likely not as effective as an integrated group of measures established as a result of an analysis of the situation.

Recommendation #2

PCO develop an ATI Improvement Plan based on an analysis of deemed-refusal access requests to bring the department into ideal compliance with the time requirements of the *Access to Information Act* by April 1, 2004.

2.3 OPI and the Access Process

PCO has an access process that has three stages of OPI involvement as illustrated in Table 1. The first stage is retrieval of the records by the OPI. Once the records are reviewed by the OPI and then reviewed in the ATIP Office, the records are returned to the OPI for review. The reviewed records

are returned to the ATIP Office and prepared for release. The release package is then sent back to the OPI for approval before it is sent to the Associate Secretary for approval. In the view of the Commissioner's Office, reference to the OPI on three distinct occasions constitutes a burdensome feature of the PCO access process.

Recommendation # 3

PCO investigate how the access process can be streamlined to prevent multiple referrals to OPIs.

2.4 Access Process Management Information

PCO utilizes ATIPflow to control and report on case files. Because of the many stages in the PCO access process, ATIPflow is not able to produce management information on the performance of those functions involved in the access process. Allocated versus actual time taken cannot be provided by the system for each of the present seven processing steps.

The Coordinator states that a Case Action Report for each OPI is sent to senior management on a weekly basis indicating where OPI action is still required—1)anticipated but not late and 2) late. What is needed is a proactive approach that focusses specifically on potential delays and deals with the situation before it results in a deemed-refusal situation.

Recommendation # 4 (a)

PCO undertake to have ATIPflow produce performance management statistical information on the access process.

Recommendation # 4 (b)

The ATIP Office distribute a performance report on allocated versus actual time taken in the access process to OPIs and to senior management.

3. STATUS OF 2000 RECOMMENDATIONS

In January 2000, recommendations were made to PCO on measures to sustain ideal compliance with the time requirements of the *Access to Information Act.* The action taken on each recommendation is described below following the text of the recommendation.

Previous Recommendation # 1

PCO should continue its exemplary performance in meeting the time requirements of the *Access to Information Act*.

Action taken on Previous Recommendation # 1: PCO did not maintain ideal performance with the time requirements of the *Access to Information Act.*

Previous Recommendation # 2

PCO consider further elimination where possible of the two-stage OPI search and records review.

Action taken on Previous Recommendation # 2: PCO maintains a three-stage access process with OPIs. Stage one of the process requires the OPI to retrieve records in response to an access request. Once the records are reviewed by the ATIP Office, a recommendation for release/withholding information is provided to the OPI for review.

Previous Recommendation # 3

PCO should monitor the planned versus actual time for the various stages of the process to respond to access requests to maintain the exemplary results currently in place.

Action taken on Previous Recommendation # 3: A weekly report listing all outstanding access requests and their status (including allocated and actual time requirements for various steps in the access process) is circulated widely within PCO.

Previous Recommendation # 4

The Prime Minister should give written direction that response times should not be missed solely to complete the senior approval process.

Action taken on Previous Recommendation # 4: The Coordinator states that the senior management approval process is not a cause of delay.

Previous Recommendation # 5

Performance contracts with operational managers should require compliance with internal and legislated response times.

Action taken on Previous Recommendation # 5: The Coordinator states that ATIP performance in PCO is considered among the Assistant Secretaries' ongoing managerial accountabilities (although there is no documentation that describes their accountability in this matter).

Previous Recommendation # 6

A less complex and diffused Delegation Order should be adopted wherein the Coordinator, rather than an operational official, is given authority to fully process, apply exemptions and answer access requests.

Action taken on Previous Recommendation # 6: The Delegation Order has not been revised.

Previous Recommendation # 7

ATI training should be mandatory for all new managers and for existing managers on a refresher basis.

Action taken on Previous Recommendation # 7: There is a one-day information management and information technology training for all new staff, part of which includes access to information.

4. QUESTIONNAIRE AND STATISTICAL REPORT

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act*			
Part A: Requests carried over from the prior fiscal period.		Apr. 1/01 to Mar. 31/02	Apr.1/02 to Nov. 30/02
1.	Number of requests carried over:	72	66
2.	Requests carried over from the prior fiscal — in a deemed-refusal situation on the first day of the new fiscal:	11	30
Part B: New Requests — Exclude requests included in Part A.		Apr. 1/01 to Mar. 31/02	Apr. 1/02 to Nov. 30/02
3.	Number of requests received during the fiscal period:	299	240
4.A	How many were processed within the 30-day statutory time limit?	146	114
4.B	How many were processed beyond the 30-day statutory time limit where no extension was claimed?	23	5
4.C	How long after the statutory time limit did it take to respond where no extension was claimed?		
	1-30 days:	12	4
	31-60 days:	4	1
	61-90 days:	4	0
	Over 91 days:	3	0
5.	How many were extended pursuant to section 9?	117	99
6.A	How many were processed within the extended time limit?	36	28
6.B	How many exceeded the extended time limit?	32	13
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	10	10
	31-60 days:	6	3
	61-90 days:	6	0
	Over 91 days:	10	0
7.	As of November 30, 2002, how many requests are in a deemed-refusal situation?		24

EXCERPT FROM DEPUTY MINISTER'S RESPONSE TO STATUS REPORT

"I am well aware of the grade PCO received and that it is a set back to that received in 1999/2000. The year 2002/2003 reviewed by your office has in fact been our busiest ever, with 384 requests and 514 consultations received, as contrasted with 331 requests and 199 consultations in the initial report card period.

We are fully committed to improving our timeliness in replying to Access to Information requests and have taken action on many of your recommendations. Indeed we have already installed improved ATIP Flow software that will allow us to do the performance reporting and analysis so key to accountability of the PCO and its managers.

We find also your recommendation to develop an ATI Implementation plan useful. Our Coordinator and her staff are already profiting from internal discussions and will prepare a draft plan for senior management's review.

Further, we are committed to implementing your recommendations and do believe it an opportune time to put into action a culture of change.

With regard to our setting an objective of 5% or better, we will do our best to meet all requirements of the *Access to Information Act*, from timeliness to proper application of exemptions."

Transport Canada
Status report on access requests in a deemed-refusal situation

1. BACKGROUND

In this Status Report, Transport Canada (TC) received a grade of D that denotes below standard compliance with the time requirements of the *Access to Information Act.* The new request to deemed-refusal ratio for the period of April 1 to November 30, 2002, was 19%. This grade reflects a set back to the department's previous progress in improving its compliance with the time requirements in the access process.

In early 2000, the Office of the Information Commissioner issued a Report Card on Transport Canada's compliance with the statutory time requirements of the *Access to Information Act.* In the Report Card, the department received a red alert grade of F for its compliance with the statutory time requirements of the Act. The grade represented a 30.6% new request to deemed-refusal ratio for access requests received from April 1 to November 30, 1999.

In January 2001, a Status Report was provided to the department by the Commissioner's Office on progress since the Report Card. The report reviewed the department's progress during 2000 in meeting the time requirements of the Act. Between April 1 and November 30, 2000, the new request to deemed-refusal ratio improved to 23.7%, but still grade F.

In January 2002, a further Status Report reviewed the progress of the department to come into substantial or ideal compliance with the time requirements of the *Access to Information Act* since the January 2001 Status Report. To the department's credit at the time, TC achieved a grade of C for the period April 1 to November 30, 2001. Subsequently, the grade dropped to a D for the fiscal year 2001-2002.

This report reviews the progress of the department to comply with the time requirements of the *Access to Information Act* since the January 2002 Status Report including the status of the recommendations made in that Report.

2. CURRENT STATUS AND FURTHER RECOMMENDATIONS

The TC Report Card was issued in January 2000 and, with this Status Report, there are now three reviews of the progress TC has made since the Report Card. The Report Card identified three major issues that, in the view of the Information Commissioner's Office, contributed to the inability of the department to comply with the time requirements of the *Access to Information Act.* The issues were and continue to be:

- An inability to delegate decisions under the Act to the individuals in the department with the skill and knowledge to make decisions under the Act;
- An approval process that is cumbersome and designed to encompass multiple approvals;
- The inclusion of the communications function as a sequential part of the access process.

Recommendations have been made to the department to assist in resolving these issues. While the department has not made any attempt to accept and implement the recommendations of

the Commissioner's Office, neither has the department taken the initiative to introduce other process measures to come into at least substantial compliance with the Act's time requirement.

The achievement of at least substantial compliance with the time requirements of the *Access to Information Act* requires a commitment by senior management that is reflected in the delegation of decisions and an access process that involves value added steps. Multiple reviews do not reflect a decision-making environment where individuals with the necessary knowledge and skill make decisions. It is worth noting the following comment from the 2000 Report Card:

> "Although various words such as "review" and "concur" are used to describe steps in the approval process, the effect of multiple "check points" prior to the release of records is to create an institutional culture of "play it safe". The addition of many steps to "sign-off" contributes to delays in the process."

On a positive note, the ATIP Coordinator has provided extensive training and ATIPimage is being implemented. The retrieval of records on time in response to an access request has increased from an overall average of 87% for 2001-2002 to 91% from April 1 to November 30, 2002.

The recommendations made in this report are in part a repeat of previous recommendations. It is the view of the Commissioner's Office that it is finally time to take measures that will allow the department to comply with legislated requirements. The Commissioner's Office encourages TC to take measures to rectify what are by now obvious problems inherent in the access process model used by TC.

2.1 Delegation of Authority

The ATIP Coordinator has not been delegated any decision-making authority under the *Access to Information Act* with the exception of certain administrative decisions and decisions under sections 7 and 19. Experience in other departments shows that delegation of decision-making to the individual with the knowledge to make decisions under the Act reduces the time taken to respond to requests. Other departments have delegated routine administrative decisions to officers reporting to the Coordinator. The Department of National Defence and Canada Customs and Revenue Agency are examples of this approach to delegation.

Recommendation #1

The department provide further delegation to the ATIP Coordinator and officers for decision-making under the *Access to Information Act.*

2.2 Approval Process

The department's process for approving a response to an access request continues to be cumbersome and in need of streamlining. As noted in the Report Card:

> "If the request was one that the Deputy Minister checked on the weekly summary of requests, then the Briefing Note, a Sign-off Sheet and the requested records are sent to the Deputy Minister's Office via the ATI Office for a decision.
>
> When the ADM/RDG concurs with the recommendation of the ATI Coordinator, then the Briefing Note, Sign-off Sheet and the requested records are sent via the ATI Office to the Director General of Executive Services for a decision.

> If the ADM/RDG does not concur with the recommendation of the ATI Coordinator, then the Briefing Note, Sign-off Sheet and the requested records are sent via the ATI Office to the Deputy Minister's Office for a decision.
>
> Although various words such as "review" and "concur" are used to describe steps in the approval process, the affect of multiple "check points" prior to the release of records is to create an institutional culture of "play it safe". The addition of many steps to "sign-off" contributes to delays in the process."

The above process has been modified in the following manner:

> "If the request was one that the Minister's Office checked on the weekly summary of requests as being sensitive, then the Briefing Note, a Sign-off Sheet and the requested records are sent by the ATIP unit to the RDG (if the region was involved in the retrieval of records) for concurrence to the ATIP Coordinator's recommendations, then to the responsible ADM, then to the Deputy Minister's Office for final review.
>
> When the request is not on the sensitive list, and RDG concurs with the recommendation of the ATI Coordinator (if the region was involved in the retrieval of records), then the Briefing Note, Sign-off Sheet and the requested records are sent via the ATI Office to the responsible ADM for approval of exemptions."

Transport Canada has a processing model that allots days available to each part of the department involved in processing an access request. Of the 20 working days available in the model, 4 days are allocated to approval of NHQ records and 2 days are allocated to NHQ communications review of sensitive files.

In 2000-2001, 138 requests or 29% of the 473 ATI requests received were on the sensitive list and, in 2001-2002, 39% of the ATI requests received were on the sensitive list. This year between April 1 and November 30, 2002, 56% of requests were on the sensitive list.

For records retrieved from regions, 6 days are allocated to approval that includes regional communications review. The total of 6 days for NHQ files and 6 days for regional files represents 30% of the time available to process an access request. This allocation of time for review, concurrence and/or approval is excessive in the view of the Commissioner's Office.

Table 1 illustrates if a request to retrieve records was completed on time by the Region/Branch that the request was sent to and if the internal consultation (concurrence) was achieved on time. Table 1 also provides information on how other departmental participants in the access process fared in meeting their allocated time requirements.

Recommendation #2

The department process map and review the access request process to identify stages in the process that can be handled in parallel rather than sequentially and/or that can be eliminated because value is not added to the decision-making required under the *Access to Information Act.*

2.3. Communications Function

Briefing notes and other material from the communications function may be required when information is to be released or withheld in response to an access process designated as sensitive.

TABLE 1: PERFORMANCE REPORT ATI REQUESTS FISCAL YEAR 2002-2003 - As of November 30, 2002						
	Retrieval Requests			Internal Consultation		
REGION/BRANCH	TOTAL	ON-TIME	% ON-TIME	TOTAL	ON-TIME	% ON-TIME
Atlantic	47	43	91%	19	13	68%
Quebec	39	36	92%	10	8	80%
Ontario	91	79	87%	26	23	88%
Prairie & Northern	53	53	100%	17	17	100%
Pacific	58	46	79%	23	19	83%
Communications	6	6	100%	119	93	78%
Corporate Services	138	129	93%	70	68	97%
Policy	84	62	74%	26	8	31%
Programs & Divestiture	50	49	98%	14	11	79%
Safety & Security	189	181	96%	94	76	81%
ATIP Directorate's Review				377	340	90%
Deputy Minister's Office Review				158	12	13%

In Transport Canada, the communications function is part of the sequential steps in processing access requests. The time allotted to Communications was increased from one day to two days since the last Status Report. The result is that approximately 10% of the access request process time is allocated to the communications function. Even with the increased time allotment, the communications function only met the allocation for 78% of the requests.

Other departments have successfully handled the communications function parallel to the access process. This approach was discussed in the Transport Canada Report Card. The Office of the Information Commissioner continues to find it problematic that the communications function is a sequential part of the process.

Recommendation #3

The communications requirements associated with the access request process be completed in parallel with the overall process.

2.4 ATI Improvement Plan

An overall ATI Improvement Plan is an essential component of a strategy to be in substantial compliance with the time requirements of the *Access to Information Act.* A plan should identify the specific sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial and then ideal compliance. Uncoordinated efforts to reduce the number of requests in a deemed-refusal situation are likely not as effective as an integrated group of

measures established as a result of an analysis of the situation.

Fisheries and Oceans Canada (F&O) received a Report Card in January 2001, one year after TC. Both F&O and TC received an F grade in their Report Card. Many of the causes of access requests in a deemed-refusal situation at F&O were similar to TC. F&O received a grade of A in this year's Status Report. TC may want to review the F&O ATIP Strategy to identify potential ways for improvement.

Recommendation #4

TC develop an ATI Improvement Plan based on an analysis of deemed-refusal access requests to bring the department into substantial compliance with the time requirements of the *Access to Information Act* by April 1, 2004.

3. STATUS OF 2002 RECOMMENDATIONS

In January 2002, recommendations were made to Transport Canada on measures to reduce the number of access requests in a deemed-refusal situation. The action taken on each recommendation is described below following the text of the recommendation.

Previous Recommendation # 1

The department consider further delegation to the ATIP Coordinator and officers for decision-making under the *Access to Information Act.*

Action taken on Previous Recommendation # 1: The ATIP Coordinator has not been delegated any decision-making authority under the *Access to Information Act* with the exception of certain administrative decisions and decisions under sections 7 and 19. Experience in other departments shows that delegation of decision-making to the individual with the knowledge to make decisions under the Act reduces the time taken to respond to requests. Other departments have delegated routine administrative decisions to officers reporting to the Coordinator. The ATIP Coordinator has not been provided with any further delegation under the *Access to Information Act.*

Previous Recommendation # 2

The department process map and review the access request process to identify stages in the process that can be handled in parallel rather than sequentially and/or that can be eliminated because value is not added to the decision-making required under the *Access to Information Act.*

Action taken on Previous Recommendation # 2: A study has not been conducted to process map and review the access process to eliminate duplication of effort or determine steps in the process that can be handled in parallel rather than sequentially. It is worth commenting on the TC access process again. It is a process that is cumbersome in its approval stages. The TC model is a process never used in departments that have achieved substantial compliance with the time requirements of the *Access to Information Act.* The process includes the following steps:

- If the request was one that the Minister's Office checked on the weekly summary of requests as being sensitive, then the Briefing Note, a Sign-off Sheet and the requested records are sent by the ATIP unit to the RDG (if the region was involved in the retrieval of records) for concurrence to the ATIP Coordinator's recommendations then to the responsible ADM, then to the Deputy Minister's Office for final review.

- When the request is not on the sensitive list, and RDG concurs with the recommendation of the ATI Coordinator (if the region was involved in the retrieval of records), then the Briefing Note, Sign-off Sheet and the requested records are sent via the ATI Office to the responsible ADM for approval of exemptions.

Previous Recommendation # 3

The communications requirements associated with the access request process be completed in parallel with the process.

Action taken on Previous Recommendation # 3: The communications function continues to be part of the access process as a sequential step. Other departments have successfully handled the communications function as a parallel process to the access process. This approach was discussed in the Transport Canada Report Card issued in 2000. The Office of the Information Commissioner continues to find it problematic that the communications function is a sequential part of the process.

Previous Recommendation # 4

TC should develop an ATI Improvement Plan based on an analysis of deemed-refusal access requests to bring the department into substantial compliance with the time requirements of the *Access to Information Act* by April 1, 2003. The plan should include the identification of the sources of delays and include tasks, targets, deliverables and responsibilities.

Action taken on Previous Recommendation # 4: The ATIP Coordinator reports that TC is in the process of contracting a firm to review the delegation of authority, identify and make recommendations on resource issues and ATIP processes. As part of this review, parallel processes for the sign-off by ADMs and the communications function will be considered.

4. QUESTIONNAIRE AND STATISTICAL REPORT

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act*			
Part A: Requests carried over from the prior fiscal period.		Apr. 1/01 to Mar. 31/02	Apr.1/02 to Nov. 30/02
1.	Number of requests carried over:	114	92
2.	Requests carried over from the prior fiscal — in a deemed-refusal situation on the first day of the new fiscal:	29	13
Part B: New Requests — Exclude requests included in Part A.		Apr. 1/01 to Mar. 31/02	Apr. 1/02 to Nov. 30/02
3.	Number of requests received during the fiscal period:	362	410
4.A	How many were processed within the 30-day statutory time limit?	165	165
4.B	How many were processed beyond the 30-day statutory time limit where no extension was claimed?	16	27
4.C	How long after the statutory time limit did it take to respond where no extension was claimed?		
	1-30 days:	13	22
	31-60 days:	1	4
	61-90 days:	0	1
	Over 91 days:	2	0
5.	How many were extended pursuant to section 9?	147	179
6.A	How many were processed within the extended time limit?	65	52
6.B	How many exceeded the extended time limit?	27	17
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	16	9
	31-60 days:	5	5
	61-90 days:	3	2
	Over 91 days:	3	1
7.	As of November 30, 2002, how many requests are in a deemed-refusal situation?		34

Part C: Contributing Factors	
8.	**Use this area to describe any particular aspect about a request or type of request that may impact on the difficulty or time necessary to complete a request:**
	As of Nov 30/02, the number of requests received increased by 13% over the total requests received in f/y 2001-2002. By Nov 30/02, 410 requests have been received for this f/y as compared to 239 requests received by Nov 30/01 in the last fiscal year, which is a 72% increase in the ATI workload this year over last year.
	As of Nov 30/02, the total number of pages reviewed was 59,638 or a monthly average of 7,455 pages. In f/y 2001-2002, the total number of pages reviewed was 87,343 or a monthly average of 7,279 pages.
	As of Nov 30/02, 230 requests of the 410 received were deemed sensitive = 56% In f/y 2001-2002, 140 of the 362 requests received were deemed sensitive = 39%
	In order to improve responses of OPIs, an intensive ATI training program was implemented. Significant training was provided to all regions and the Safety and Security Group this f/y; while training of this type was not provided last fiscal year. Of the approximate 400 participants, the overall course evaluation was as follows: Excellent – 25%, Very Good – 60%, Good - 15%. Comments received: This course should be mandatory for all employees. More exercises needed. Who would have thought ATIP was so interesting. A lot of info in a short time but very helpful. I learned a lot and realize I had a few misconceptions. As well, the ATIP division provided awareness sessions to numerous inspectors/minister's observers and new employees both years (in and around NHQ).
	In order to develop an ATIP improvement plan this fiscal year, TC is in the process of contracting a firm to review the delegation of authority, identify and make recommendations on resource issues and ATIP processes. As part of this review, parallel processes for the sign off by ADMs and Communications will be considered.
	In f/y 2002-2003, the ATIP unit is operating with 11 ongoing ftes and 2 additional ftes for 1 year only (this includes salary costs for I fte absent during the entire fiscal year) and O&M for personal service contracts in the amount of $137K. In f/y 2001-2002, the ATIP unit operated with 11 ongoing ftes and O&M for personal service contracts in the amount of $199K.
	On top of the increased workload and greater complexity in processing the security related requests, resource requirements for the implementation of the Privacy Impact Assessment policy has caused a significant draw on resources this f/y. Therefore, Service Line Plans for 2003-2004 include a request for 3 ongoing ATIP resources.
	Specific ATIP targets are included in the management accords of the Director General responsible for this activity as well as that of the ATIP Coordinator.
	THANK YOU FOR COMPLETING THIS QUESTIONNAIRE

EXCERPT FROM DEPUTY MINISTER'S RESPONSE TO STATUS REPORT

"As noted in your report, unfortunately TC has had a decrease in meeting the time requirements of the Act. In part, this was due to the unpredictable 72% increase in workload for the reporting period as compared to last year's results for the same time period.

Prior to receiving the Status Report, TC's Access to Information and Privacy (ATIP) office underwent a process review. The most important finding was that, despite the low performance rating, there were no major process problems uncovered. The consultants' report on the review indicates that TC has indeed initiated many improvements and has kept pace with other departments in taking advantage of best practices and other efficiencies in a positive spirit of pursuing continuous improvement objectives. They also noted that the importance of preserving "quality" as a highly desirable product of work efforts, an element that permeates TC's safety conscious environment, was very evident. It is unfortunate that this factor is not currently accounted for in your Report Card.

However, the consultants made recommendations for improvements, and some are similar to those provided by your office. These recommendations are currently being taken into consideration to determine which changes need to be implemented in order to improve the ATIP process.

I wish to assure that TC is committed to ensuring compliance with the legislation and we will make a serious effort to implement improvements in the coming year."

Correctional Service Canada

Report card on compliance with response deadlines under the *Access to Information Act*

I. Background

For several years, the Office of the Information Commissioner has received complaints from requesters about requests in a deemed-refusal situation. It is likely that, across government, the number of complaints on requests in a deemed-refusal situation represents only a portion of the actual number of requests processed outside of the time requirements of the *Access to Information Act.* The unacceptable high level of requests in a deemed-refusal situation has been illustrated in previous Report Cards issued since 1999 by the Commissioner's Office.

As part of the proactive mandate of the Commissioner's Office, each year a department (or departments) is selected for review. The review is conducted to determine the extent to which the department is meeting its responsibilities for complying with the statutory timeframes for processing access requests established by the *Access to Information Act.*

Correctional Service Canada (CSC) was one of two departments selected this year for review. The department has been one of a number of institutions subject to review because of evidence of chronic difficulty in meeting response deadlines. When the Commissioner's Office receives a high number of deemed-refusal complaints about a department, it may be symptomatic of a greater response-deadline problem within the department.

II. Grading Standard

This Report Card contains the results of the Information Commissioner's review of CSC's performance statistics from April 1 to November 30, 2002.

Since Canadians have a right to timely access to information (i.e. 30 days or within extended times under specified conditions), a delayed response is equivalent to a denied response. Parliament articulated this "timeliness" requirement in subsection 10(3) of the Act, which states:

> 10.(3) 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.

As a result, the Information Commissioner has adopted the following standard as being the best measure of a department's compliance with response deadlines: percentage of

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

On this grading scale, CSC rates **F***. Its performance is unacceptable. [This fiscal year to November 30, 2002, the new request to deemed-refusal ratio is 312:158 = 50.6%.]

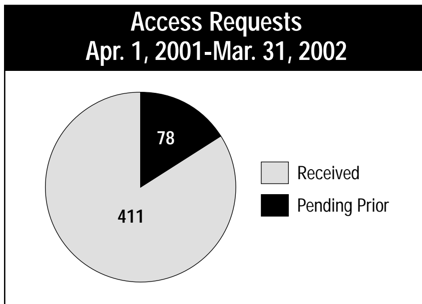
* This grade solely reflects on the department's performance in meeting response deadlines to November 30, 2002. It is not a measure of the department's performance in the application of exemptions. In general, CSC applies the exemption provisions of the Act professionally and with restraint.

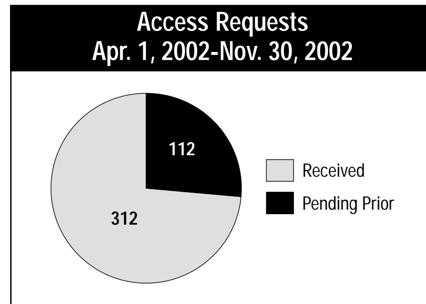
requests received which end as deemed refusals. CSC is assessed in this Report Card against the following grading standard:

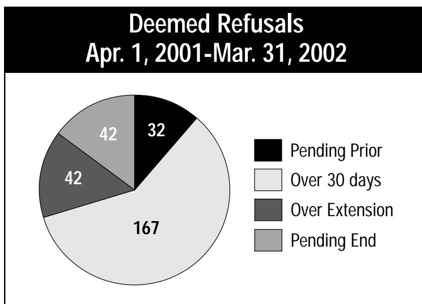
Part A of the report consists of:

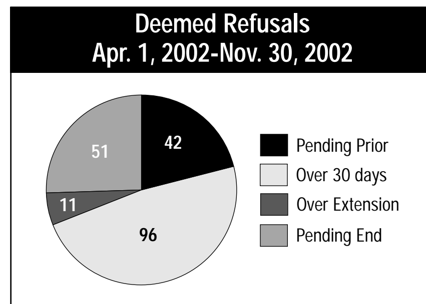
- an analysis of the statistical data;
- an explanation of the reasons for the performance record;
- a description of the steps being taken by management to improve performance;
- a set of recommendations to assist the department.

Attached to the report are the various questionnaires and responses which formed the basis for the grading, observations and recommendations in this Report Card.









III. Statistical Information

1. Requests

The charts above present a graphic representation of CSC's request backlog.

At the outset of the 2001-2002 fiscal year, CSC's ATIP Division had 78 outstanding requests of which 32 (41.0%) were already in a deemed-refusal situation. The 2002-2003 fiscal year shows an increasing backlog at the start of the year with 112 outstanding requests of which 42 (37.5%) are in a deemed-refusal situation.

With 411 new requests received in the 2001-2002 fiscal period and 312 new requests received in 2002-2003 to November 30, a trend of an increasing backlog of requests in a deemed-refusal situation at the start of the year represents a burden to the ATIP Division. Non-compliance considerations aside, this backlog must be eliminated.

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

- In 2001-2002, processing times for 167 requests completed beyond

the 30-day statutory limit without an extension were:

- 67 (40.1%) took an additional 1-30 days to complete
- 34 (20.4%) took between 31 to 60 additional days
- 19 (11.4%) took between 61 to 90 additional days
- 47 (28.1%) were completed in over 90 additional days.

■ From April 1 to November 30, 2002, additional processing times for 96 non-extended new requests were:

- 57 (59.4%) took an additional 1-30 days
- 24 (25.0%) took between 31 to 60 additional days
- 3 (3.1%) took between 31 to 90 additional days
- 12 (12.5%) were completed in over 90 additional days.

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

In 2001-2002, of the 60 time extensions, 42 (70.0%) exceeded the extension of time as follows:

- 11 (26.2%) took an additional 1-30 days
- 8 (19.0%) took between 31-60 additional days
- 3 (7.1%) took between 61-90 additional days
- 20 (47.7%) were completed in over 90 additional days.

■ For completed requests received from April 1, to November 30, 2002, 11 (15.7%) exceeded the extension of time as follows:

- 6 (54.5%) took an additional 1-30 days
- 3 (27.3%) took between 31-60 additional days
- 1 (9.1%) took between 61-90 additional days
- 1 (9.1%) were completed in over 90 additional days.

As of November 30, 2002, 51 unfinished new requests were in a deemed-refusal situation. The duration of time beyond the time requirements of the Act for these outstanding requests is unknown.

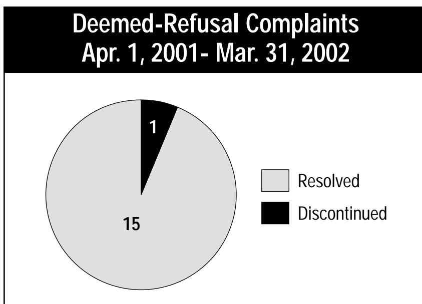
2. Complaints—Deemed Refusals

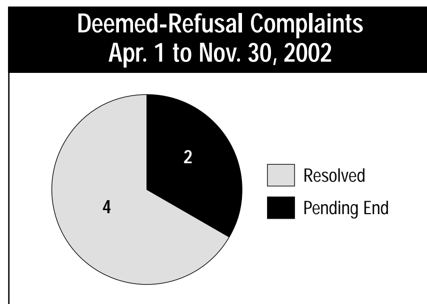
In 2001-2002, the Office of the Information Commissioner received 16 deemed-refusal complaints against CSC of which 15 (93.7%) were upheld (resolved).

From April 1 to November 30, 2002, the Information Commissioner's Office received 6 deemed-refusal complaints. Of the 4 completed complaints, all (100.0%) were upheld (resolved).

3. ATI Office—Staff

The processing of access requests is the responsibility of the ATIP Division under the direction of the ATIP Director. The office is also responsible for processing requests under the *Privacy Act.* The staff of the division is comprised of 31 other employees--a Deputy Coordinator, 22 officer-level





and 8 support staff. Of the total ATIP staff, 1 senior analyst, 7 analysts and 1 clerk are staff dedicated to ATI. Another analyst will be added in April 2003. The ATIP Director believes that one more analyst is needed to manage the ATI workload.

4. ATI Office—Budget

The ATIP Division salary budget for 2002-2003 is $2,011,411. The 2001-2002 budget was $1,063,963 with an actual expenditure of $1,536,020. The 2000-2001 budget was $944,983 with an actual expenditure of $908,552. CSC no longer incorporates person-years in the budget.

The ATIP Division operating budget for 2002-2003 is $49,000. For previous years, the 2001-2002 budget expenditure was $157,814 and the budget expenditure for 2000-2001 was $75,140.

In 2001-2002, $4,376.67 was spent on ATIP Division training and $1,574.14 was spent in 2000-2001. The figures on training do not include ATIP Division salary expenditures.

5. Allotted Times for Request Processing

The 30-day statutory time limit in the *Access to Information Act* allows 20 working days for processing access requests where an extension is not claimed. CSC's current planned turnaround times are listed below. The CSC processing model conforms to the Act's time requirements and allows 20 working days to respond to a request (without an extension).

IV. Sources of Delay

There appear to be a number of factors that contribute to the delay problem at CSC. The result of the delays is that access requests are processed beyond the statutory time requirements of the *Access to Information Act.*

This Report Card was completed on the deemed-refusal situation as it existed in December 2002. CSC has implemented or plans to implement a number of measures to come into compliance with the time requirements of the *Access to Information Act.* A comparison of statistical information on deemed refusals on the Questionnaire for Statistical Analysis Purposes (Section B II) indicates that these measures are starting to produce positive results.

1. Management Information Lacking

There are varied reasons why delays occur in responding to access requests within the timeframes established by the *Access to Information Act.* All of the participants in the access process have a responsibility to perform their function in the access process within the allocated time. When information is not available to inform participants about their performance, it is difficult to take remedial action to make improvements. Without factual information on performance, it is also difficult to engage senior management in measures to resolve the delay problem. Ideally, each step in the access process that has been allocated time and each participant in that step should be the recipient of routine

Area	Turnaround Time in Days
Receipt ATIP Division	1
Retrieval OPIs	7
Processing ATIP Division*	11
Delegated ATIP Division Director Approval and Mail-Out ATIP Division	1

* The ATIP Division processing consists of 5 days for information analyst review, 2 days for senior analyst review and 2 days for the deletion process. In addition, there are 2 more days allocated, if required, for consulting with Parliamentary Relations and Communications--this affects approximately 50% of access requests.

performance reporting. Senior management should also be informed through periodic reporting of the progress in reducing the number of requests in a deemed-refusal situation.

There are plans to redevelop ATIPflow to obtain case management and control information related to performance measurement. At the present time, there are no reports or statistics that can be produced for this Report Card to track performance or to analyze access requests in a deemed-refusal situation in order to identify potential reasons.

2. Senior Management Awareness

Senior management must be aware when the number of requests in a deemed-refusal situation starts to increase and accumulate in an unacceptable backlog of delayed responses to requesters. Senior management also needs to be informed of the remedial measures that can be taken to reduce the number of requests in a deemed-refusal situation. The remedial plan can only be organized after the department analyzes the causes of the delays.

To maintain effective oversight of the access process, senior management should receive routine reports on the status of requests, including adherence to the statutory timelines.

Currently, there is no routine reporting to senior management on the delay problem along with the success of measures to reduce the number of access requests in a deemed-refusal situation.

3. Approval Delegation

The CSC Delegation Order establishes the authority and process for making recommendations and decisions on access requests. The Delegation Order is currently being revised to provide to the Deputy Director (a new position), ATIP Division, the same delegated authority as the Director. The current and new Delegation Order provide senior analysts within the ATIP Division with delegated authority to make administrative decisions under the Act. Examples of administrative decisions include fee estimates and extensions of time under section 9 of the Act.

The Commissioner's Office encourages CSC to review the Delegation Order for further delegation within the ATIP Division in conjunction with the process mapping of the access process. There may be efficiencies to be gained through the re-engineering of activities in conjunction with increased delegation.

4. Communications Function

The CSC approval process allocates 13 working days to activities in the ATIP Division. The activities include:

The Director states that the consultation with Parliamentary Relations and Communications is done in parallel with the request processing. The Chart in the draft *User's Guide for OPIs* indicates that two days of the 20 working days allocated to the access process are set aside for the consultation (when required).

Activity	Days Allocated
Receipt of the access request	1
Information analyst review of the records	5
Senior analyst review of the Information analyst recommendations	2
Deletion process and preparation of the release package	2
Consult on sensitive release with Parliamentary Relations and Communications (approximately 50% of access requests)	2
Final review and signature by ATIP Director (including mail-out)	1

Information is not available in a routine manner from ATIPflow to determine if this step in the access process causes delays. Under the current arrangements, the Director "keeps track of all requests that require the involvement of Parliamentary Relations and Communications and follows-up on a daily basis" to keep track of turnaround times.

The Commissioner's Office recognizes that there may be a need to have communications material prepared in parallel with the access process. However, in the view of the Commissioner's Office, it is not a good practice to allocate 10% of the time in the access process to the preparation of communications and briefing material. The communications requirement should be met as a parallel function to, rather than as a sequential step in, the access process.

5. ATIP Office

The access process includes a number of steps in the ATIP Division that consist of reviews of previous work. The information analyst makes recommendations and the recommendations are then reviewed by the senior analyst. The senior analyst provides the records to a clerk who prepares the records by severing exempt information and preparing a release package. The records are then provided to the Director for final approval.

The processing of records subject to an access request appears to move through a number of steps that may entail a duplication of effort or may not result in value added. CSC is encouraged to process map the ATIP Division access process (in conjunction with a review of the Delegation Order) to determine if the process can be re-engineered to reflect value-added operational steps with maximum delegation to staff.

There also appears to be a need to clarify roles, responsibilities and data entry procedures and definitions for ATIPflow within the ATIP Division.

6. ATI Improvement Plan

To its credit, CSC has taken or plans to take measures to reduce the number of access requests in a deemed-refusal situation and a comparison of the statistics for the fiscal year 2001-2002 with the period from April 1 to November 30, 2002, indicate positive results.

CSC should approach the time delay problem by establishing an overall plan to manage the tasks necessary to come into substantial then ideal compliance with the Act's deadlines. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve ideal compliance. Uncoordinated efforts to reduce the number of requests in a deemed-refusal situation are likely not as effective as an integrated group of measures established as a result of an analysis of the situation.

7. Operational Areas (OPIs)

OPIs are required to search for and retrieve records to respond to access requests. The OPIs are required to provide records to the ATIP Division within 7 working days. The Director, ATIP Division, believes that the major reason for the delay problem at CSC is the inability of OPIs to meet the required timeframe.

At the present time, ATIPflow cannot provide information on OPI allocated versus actual time to retrieve records. CSC had data downloaded from a legacy system into ATIPflow in late 2000 with poor results in terms of data quality. The ATIP Division is currently preparing for the implementation a new version of ATIPflow in 2003.

CSC ATIP Division should plan on using ATIPflow data to identify OPIs who are not meeting their responsibility of providing records the ATIP Division within the allocated timeframe. From this information, the reasons for the delays can be determined through discussions with OPIs. Remedies can then be instituted.

Other departments have found that it is useful to have included in performance contracts for operational managers their responsibilities for processing access requests. The responsibilities should be stated in a way that can objectively be measured for performance. The Access to Information Review Task Force in its report *Access to Information: Making It Work* recommended that responsibilities related to access to information and information management be included in the job descriptions of officers and managers.

8. Training

For OPIs to complete their part of the access process, ATI training and documented procedures including timelines are required. ATIP Division staff also need to keep current on developments in the interpretation of the *Access to Information Act.* The expenditure on training for ATIP Division staff has been minimal.

OPIs expect strong support from the ATIP Division in training to understand precisely what their responsibilities are under the *Access to Information Act*, particularly with respect to timelines and extensions. In addition, the OPIs need procedural and instructional information on how to carry out tasks assigned to them as part of the process for responding to access requests. The ATIP Division has produced a draft of a *Users Manual for OPIs* for the *Access to Information Act.* The department is encouraged to complete the manual and to introduce it as part of an ATI Training Plan.

Training is an essential component of ATI operations. A properly planned and delivered ATI training program will provide OPIs with the ability to fulfill their responsibilities in the access process. A planned approach will maximize the training expenditure.

The ATIP Division should develop a Training Plan that includes priorities, the identification of staff benefiting from new or additional training, the number and location of sessions and ATIP divisional responsibilities for delivery of the training.

The ATIP Division is in the best position to identify training priorities. The Division understands the level of knowledge of OPIs on the *Access to Information Act* through interaction on access requests including reasons for deemed-refusal situations. The Division is aware of complaints about problems in meeting the requirements of the Act and is aware of departmental issues that may impact on the Act.

The ATIP Division should also develop a Training Plan for staff in the Division. The plan could be based on an assessment of the work requirements of the Division in dealing with access requests and complaint results from the Office of the Information Commissioner to identify skill gaps.

V. Management Response to the Problem of Delay

The ATIP Director believes that CSC has demonstrated a strong commitment to addressing the department's reasons for the access to information request delay situation.

The department is channelling more financial resources into staffing in the ATIP Division.

The ATIP Director has a goal for his Division's performance which is that, within six months (July 2003), the Division should be close to full compliance with their processing timeframe for files in their control. There may be elements that may prevent the Division from becoming fully compliant, but the goal is July 2003.

Significant achievements have been realized in the following areas as the department seeks to reduce the backlog of access requests and reduce the number of access requests in a deemed-refusal situation:

- Weekly meetings between the ATI Liaison Officer and Sector OPIs are held to discuss new access requests and status of active access requests as well as signed-off requests.
- ATIP presentations have been delivered to educate staff of CSC on the requirements of the *Access to Information Act*.
- A new Deputy Director position has been staffed.
- There is a weekly monitoring of ATI workload by the ATIP Division.
- The ATIP Division is revisiting the access process to identify potential improvements.
- The ATIP Division has developed the first draft of an ATI User Manual.

Management has asked all operational areas to give a higher priority to processing access requests. The request was made at the Assistant Deputy Minister's morning meetings that are a regular feature of the CSC management process.

There are other changes in development or planned that are expected to result in improved performance and a reduction in the number of access requests in a deemed-refusal situation. These are:

- The ATIP Division will finalize the ATI User Manual which should improve consistency, ensure adherence to CSC ATI policies, and speed the learning program for new staff.
- The ATIP Division plans to institute formal training sessions on a regularly scheduled basis (for HQ, Field and ATIP staff depending on the level of resource allocations).
- The ATIP Division plans to prepare written guidelines for use by all ATI personnel that are updated as policies or procedures are changed.
- The ATIP Division plans to establish a continuing education and training program to educate ATIP Division personnel in the application of exemptions and the criteria that must be met to justify recommendations.

There is one contributor to the deemed-refusal situation that the department has not been able to resolve. Under section 19 of the *Access to Information Act*, if personal information is to be disclosed in accordance with section 8(2)(m) of the *Privacy Act*, the Privacy Commissioner is notified. The department waits for a response from the Privacy Commissioner's Office prior to the release of the records. The waiting time means that the process exceeds the 30-day time allowance for processing the access request. However, the department cannot identify any provision in the *Access to Information Act* that would allow for an extension of the processing time. In 2001-2002, this process resulted in approximately 30 access requests in a deemed-refusal situation.

VI. Recommendations

There are a number of departments that have found themselves in an F grade, red alert situation, with regard to the new access request to deemed-refusal ratio. Through deliberate commitment, well-planned and executed measures and in timeframes as short as two years, other departments have attained substantial and ideal compliance. With these possibilities in mind, this review recommends the following:

1. **The ATIP Director is directly responsible for ensuring compliance with the *Access to Information Act* and should take a strong leadership role in establishing a culture of compliance throughout CSC. Such a role requires the unwavering support and endorsement of the Minister and the Deputy Minister. Senior management support for the development and monitoring of an ATI Improvement Plan is one method of making a commitment to comply with the time requirements of the Act.**

2. **Routine reporting on planned versus actual time taken to process access requests and the status of measures taken to reduce requests in a deemed-refusal situation should be instituted. The reports will provide senior management, OPIs and the ATIP Division with information needed to gauge overall departmental compliance with the Act's and department's time requirements for processing access requests.**

3. **The ATIP Division should develop an ATI Training Plan for 2003-2004 for OPIs and ATIP Division staff and incorporate the introduction of the User Manual into the training provided to OPIs.**

4. **The Minister should direct the ATIP Director, in writing, to exercise the delegation to answer requests within deadlines whether or not the approval process has been completed.**

5. **The approval process should be process mapped and reviewed to remove steps that do not add value to the process, particularly the allocation of time in the process to the Parliamentary Relations and Communications review. At the same time, the Delegation Order should be reviewed to determine if further delegation is appropriate within the ATIP Division.**

6. **The department should develop an ATI Improvement Plan. The plan should identify the sources of the delays in responding to access requests and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance in 2003-2004 and ideal compliance in 2004-2005. The Senior Management Committee of the department should monitor the plan.**

7. **The specific reasons for the requests in a deemed-refusal situation from April 1 to November 30, 2002, should be identified and remedial measures developed for subsequent years for incorporation into the ATI Improvement Plan.**

8. **Documentation should be developed to clarify definitions, roles and data entry procedures for ATIPflow within the ATIP Division.**

9. **A Fee Policy should be developed for use by the department in determining when to waive fees under the *Access to Information Act.***

10. **If an extended date will not be met, the ATIP Division routinely contacts the requester to indicate it will be late. As part of the communication with the requester, the ATIP Division should provide an expected response date for the request. This action may alleviate some of the requester's frustration and perhaps avert a complaint.**

11. **Responsibilities for access to information should be included in the job description of officers and managers, and performance contracts should measure to what degree the responsibilities are met.**

12. **ATI training should be mandatory for all new managers as part of their orientation, and periodic training updates should be provided to all managers.**

BASIS OF REPORT

I. Interview with CSC's ATIP Director

On January 8, 2003, CSC's ATIP Director and Deputy Director were interviewed for the purpose of this Report Card.

II. CSC—PRE-INTERVIEW SELF-AUDIT QUESTIONNAIRE

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act*			
Part A:	Requests carried over from the prior fiscal period.	Apr. 1/01 to Mar. 31/02	Apr.1/02 to Nov. 30/02
1.	Number of requests carried over:	78	112
2.	Requests carried over from the prior fiscal — in a deemed-refusal situation on the first day of the new fiscal:	32	42
Part B:	New Requests — Exclude requests included in Part A.	Apr. 1/01 to Mar. 31/02	Apr. 1/02 to Nov. 30/02
3.	Number of requests received during the fiscal period:	411	312
4.A	How many were processed within the 30-day statutory time limit?	158	143
4.B	How many were processed beyond the 30-day statutory time limit where no extension was claimed?	167	96
4.C	How long after the statutory time limit did it take to respond where no extension was claimed?		
	1-30 days:	67	57
	31-60 days:	34	24
	61-90 days:	19	3
	Over 91 days:	47	12
5.	How many were extended pursuant to section 9?	60	70
6.A	How many were processed within the extended time limit?	18	59
6.B	How many exceeded the extended time limit?	42	11
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	11	6
	31-60 days:	8	3
	61-90 days:	3	1
	Over 91 days:	20	1
7.	As of November 30, 2002, how many requests are in a deemed-refusal situation?		51

III. CSC—REVIEW QUESTIONNAIRE (DECEMBER 2002)

(available from the Office of the Information Commissioner)

EXCERPT FROM CSC COMMISSIONER'S RESPONSE TO STATUS REPORT

"As you have indicated, CSC generally applies the exemption provisions of the Act professionally and with restraint. With respect specifically to the non-compliance with response timeframes, you have also noted that the changes we have made over recent months are starting to produce positive results. This is not insignificant. In addition to providing you with our action plans, I believe it is important to highlight some of the action we have taken to date, and the results which have ensued.

One of the most important components of an effective Access function is a sufficient complement of well-trained staff. For the first nine months of the reporting period, only five analysts were assigned to the Access function. Three had no previous Access experience. The staff complement was increased to seven analysts in January 2002 and eight on April 1, 2003. In addition, a second senior analyst and a Deputy Director were added to the Access staff complement. Training of the new and existing staff members is ongoing. I believe these developments will effectively contribute to a continuing reduction in the rate of non-compliance over the next months.

You have noted the importance of dealing with the backlog of outstanding Access requests. The backlog of older outstanding cases has almost been eliminated. You will note...that significant progress continues to be made towards meeting our objectives for your next review.

I think you will agree that the steps we have taken as noted above, in combination with our plans for the future, will serve us well in working towards the attainment of a positive level of service for those citizens who request information from our department."

Public Works and Government Services Canada

Report card on compliance with response deadlines under the *Access to Information Act*

I. Background

For several years, the Office of the Information Commissioner has received complaints from requesters about requests in a deemed-refusal situation. It is likely that, across government, the number of complaints on requests in a deemed-refusal situation represents only a portion of the actual number of requests processed outside of the time requirements of the *Access to Information Act.* The unacceptable high level of requests in a deemed-refusal situation has been illustrated in previous Report Cards issued since 1999 by the Commissioner's Office.

As part of the proactive mandate of the Commissioner's Office, each year a department (or departments) is selected for review. The review is conducted to determine the extent to which the department is meeting its responsibilities for complying with the statutory timeframes for processing access requests established by the *Access to Information Act.*

Public Works and Government Services Canada (PWGSC) was one of two departments selected for review this year. The department has been one of a number of institutions subject to review because of evidence of chronic difficulty in meeting response deadlines. When the Commissioner's Office receives a high number of deemed-refusal complaints about a department, it may be symptomatic of a greater response-deadline problem within the department.

II. Grading Standard

This Report Card contains the results of the Information Commissioner's review of PWGSC's performance statistics from April 1to November 30, 2002.

Since Canadians have a right to timely access to information (i.e. 30 days or within extended times under specified conditions), a delayed response is equivalent to a denied response. Parliament articulated this "timeliness" requirement in subsection 10(3) of the Act, which states:

> 10.(3) 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.

As a result, the Information Commissioner has adopted the following standard as being the best measure of a department's compliance with response deadlines: percentage of requests received which end as deemed refusals. PWGSC is assessed in this Report Card against the following grading standard:

Part A of the report consists of:

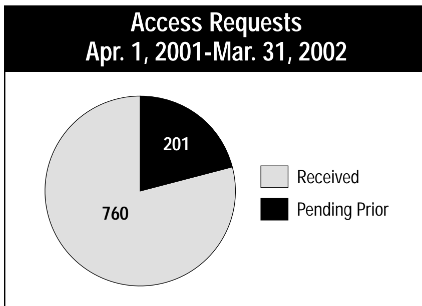
- an analysis of the statistical data;
- an explanation of the reasons for the performance record;

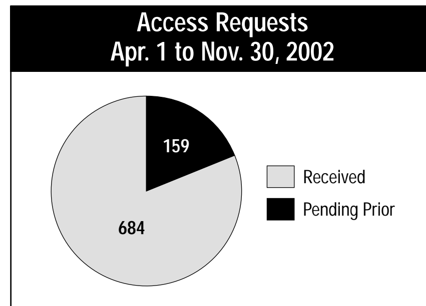
% of Deemed Refusals	Comment	Grade
0-5 percent	Ideal compliance	A
5-10 percent	Substantial compliance	B
10-15 percent	Borderline compliance	C
15-20 percent	Below standard compliance	D
More than 20 percent	Red alert	F

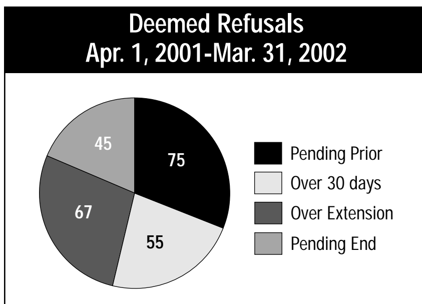
On this grading scale, PWGSC rates **F**[1]. Its performance is unacceptable. [This fiscal year to November 30, 2002, the new request to deemed-refusal ratio is 684:180=26.3%.]

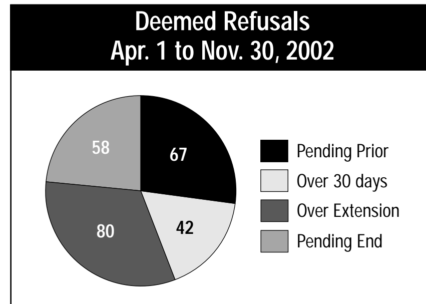
- a description of the steps being taken by management to improve performance;
- a set of recommendations to assist the department.

Attached to the report are the various questionnaires and responses that formed the basis for the grading, observations and recommendations in this Report Card.









III. Statistical Information

1. Requests

The charts above present a graphic representation of PWGSC's request backlog.

At the outset of the 2001-2002 fiscal year, PWGSC's Access to Information and Privacy (ATIP) Directorate had 201 outstanding requests, of which 75 (37.3%) were already in a deemed-refusal situation. The 2002-2003 fiscal year shows a continuing backlog at the start of the year with 159 outstanding requests, of which 45 (28.3%) were in a deemed-refusal situation.

[1] This grade solely reflects on the department's performance in meeting response deadlines to November 30, 2002. It is not a measure of the department's performance in the application of exemptions. In general, PWGSC applies the exemption provisions of the Act professionally and with restraint.

With 760 new requests received in the 2001-2002 fiscal period and 684 new requests received to November 30th in 2002-2003, a trend of a continuing backlog of requests in a deemed-refusal situation at the start of the year represents a burden to the ATIP Directorate. Non-compliance considerations aside, this backlog must be eliminated.

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

- In 2001-2002, processing times for 55 requests completed beyond the 30-day statutory limit without an extension were:
  - 47 (85.5%) took an additional 1-30 days to complete
  - 7 (12.7%) took between 31 to 60 additional days
  - 1 (1.8%) took between 61 to 90 additional days.
- From April 1 to November 30, 2002, additional processing times for 42 non-extended new requests were:
  - 20 (47.6%) took an additional 1-30 days
  - 9 (21.4%) took between 31 to 60 additional days
  - 6 (14.3%) took between 31 to 90 additional days
  - 7 (16.7%) were completed in over 90 additional days.
- For extensions taken and not met, the following time delays occurred:

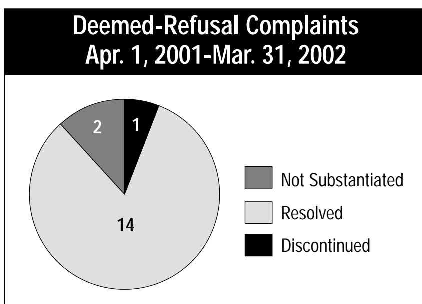
  In 2001-2002, of the 324 time extensions, 67 (20.7%) exceeded the extension of time as follows:
  - 20 (29.8%) took an additional 1-30 days
  - 10 (13.4%) took between 31-60 additional days
  - 16 (25.4%) took between 61-90 additional days
  - 21 (31.4%) were completed in over 90 additional days.
- For completed requests received this fiscal year, 80 (23.4%) exceeded the extension of time as follows:
  - 38 (47.4%) took an additional 1-30 days
  - 29 (36.6%) took between 31-60 additional days
  - 10 (12.4%) took between 61-90 additional days
  - 3 (3.6%) were completed in over 90 additional days.

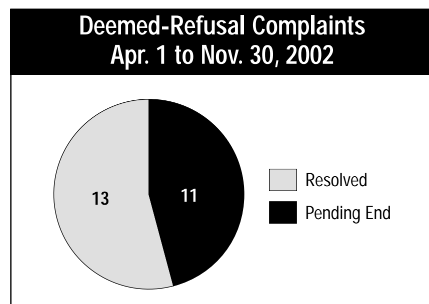
As of November 30, 2002, 58 unfinished new requests were in a deemed-refusal situation. The duration of time that the requests have been in a deemed-refusal situation was not part of the response requested by the Commissioner's Office.

2. Complaints—Deemed-Refusals

In 2001-2002, the Office of the Information Commissioner received 17 deemed-refusal complaints against PWGSC, of which 14 (82.4%) were upheld (resolved).

From April 1 to November 30, 2002, the Information Commissioner's Office received 24 deemed-refusal





complaints. Of the 13 completed complaints, 13 (100%) were upheld (resolved).

3. ATI Office—Staff

The processing of access requests is the responsibility of the ATIP Directorate under the direction of the ATIP Director. The Directorate is also responsible for processing requests under the *Privacy Act*. The staff of the ATIP Directorate allocated to ATI activities is comprised of 26 employees — 5 Team Leaders, 13 officer-level, 5 support staff, 1 student plus 2 employees who are on secondment. In addition, 3 consultants are also working in the ATIP Directorate on ATI. The ATI Director is of the view that the number of staff is not sufficient to meet the ATI processing needs of the department (in particular, because 5 staff were recently moved from ATI request processing to privacy request processing).

4. ATI Office—Budget

The ATI salary budget for 2002-2003 for the access to information program is $886,000 for 17 person years. On November 29, 2002, an additional $311,800 was allocated for 9 staff on a temporary basis to deal with the workload associated with access requests related to the sponsorship program. The ATI salary budget for 2001-2002 was $1,270,222 for a utilization of 23.5 person years. The 2000-2001 budget was $921,700 for 20 person years.

The ATI operating budget for 2002-2003 is $187,000. On November 29, 2002, an additional $251,200 was allocated to ATI. The ATI operating budget for 2001-2002 was $285,793. For previous years, the 2000-2001 budget was $373,874 and the budget for 1999-2000 was $138,884.

The portion of the budget allocated for training in 2002-2003 is $11,600. For 2001-2002, the amount was $21,010, for 2000-2001 $10,855 and for 1999-2000 $8,612.

5. Allotted Times for Request Processing

The 30-day statutory time limit allows 20 working days for processing an access request without an extension under section 9 of the Act. PWGSC's current planned turnaround times are listed below. The PWGSC processing table allows 30 calendar days to respond to a request (without an extension).

IV. Sources of Delay

There appear to be a number of reasons for the delay problem at PWGSC. The result of the delays is that access requests are processed beyond the statutory time requirements of the *Access to Information Act*.

1. Senior Management Support

There are varied reasons why delays occur in responding to access requests within the timeframes established by the *Access to Information Act*. Senior management must be aware when the numbers of requests in a deemed-refusal situation start to increase and accumulate to an unacceptable backlog of delayed responses to requesters. Senior management also needs to be

Area	Turnaround Time
Receipt ATIP Division	Day 1-2
Retrieval OPIs	Day 2-12
Processing ATIP Directorate	Day 13-30
Review of Release Package[2]	Day 23-30

[2] There is a form attached to a release package for "interesting" requests. All "interesting" requests are reviewed by the Deputy Minister's and Minister's Offices.

informed of the remedial measures that can be taken to reduce the number of requests in a deemed-refusal situation. The remedial plan can only be organized after the department analyzes the causes of the delays.

To maintain effective oversight of the access process, senior management should receive routine reports on the status of requests, including adherence to the statutory timelines. The PWGSC ATIP Directorate does have extensive information in the form of various reports that keep track of the due dates for various stages in the access process. Reminders are also sent to the Minister's and Deputy Minister's Offices when the time allocation to review release packages for interesting requests are coming due.

The department could benefit from more focused and proactive reporting for access requests either in or to be in a deemed-refusal situation. The deemed-refusal situation is a problem that should be recognized and dealt with through the support of senior management. To be part of the solution, senior management requires summary information on actual versus allocated time performance for all parts of the organization involved in the access process.

Routine reporting allows senior management to gauge how the overall department is performing against planned performance measures. This type of reporting will also provide senior management with the information necessary to monitor actions taken to reduce the number of requests in a deemed-refusal situation.

2. Approval Delegation

The PWGSC Delegation Order establishes the authority and process for making decisions on access requests. The Delegation Order delegates all decision responsibilities under the *Access to Information Act* to the Director, ATIP Directorate. Five ATIP Team Leaders sign, on behalf of the Director, time extension and section 27 notices. All ATIP officers sign, on behalf of the Director, all consultation notices sent to government departments. The signing authority on behalf of the Director is not vested in the Delegation Order.

Other departments have found that delegation of administrative decisions under the Act and decision-making on certain exemptions provides efficiencies in the access process. For example, decisions about fee estimates might be delegated within the ATIP Directorate.

3. Approval Process

The Delegation Order provides full delegation for decision-making under the Act to the ATIP Director.

For "interesting" access requests, there is a senior management review process. The review process entails providing the release package to a number of PWGSC officials. In 2001-2002, 18.5% of access requests were considered "interesting". In 2002-2003, to November 30, 15% of requests were considered "interesting"[3].

Seven calendar days are allocated to the senior management review process if media lines are required, while three days are allocated when media lines are not required. A "release package" is provided for the senior management review. At the same time, a second release package is provided to the OPI program and to the Communications Branch.

The forms used for the review process indicate that a number of officials sign-off on the release package.

[3] The percentages are based on the number of requests that were reviewed by senior management. A higher percentage of requests was initially designated as "interesting", but the designation was removed prior to senior management review for various reasons.

For "interesting" access requests with media lines, there is a maximum of three signatures at the Branch level and one by Communications Branch signifying the date the package was received for the purpose of a review.

In addition, and in parallel, a separate release package is sent to the Deputy Minister's and Minister's Offices with a "date received" and "by whom" for each office. The transmittal form indicates that the release package is sent for the purpose of a review.

Any "interesting" access requests without media lines follow the part of the procedure dealing with the Deputy Minister's and Minister's Offices described above.

Each participant in the access process is allocated a planned time to complete their part of the process. The senior management review process may or may not have been the cause of any given deemed-refusal situation. Table 1 illustrates senior management's allocated versus actual time taken to complete their part of the review.

Out of a total of 95 access requests received by senior management, 24% were reviewed within the allocated time.

The Commissioner's Office recognizes that it is helpful for any part of the organization that may be affected by the release of information through an access request to be informed of the released information. Having information on the release package as opposed to a multi-party review of the release package--record by record--creates a culture of "playing it safe". Multiple reviews also delay the access process and undoubtedly result in access requests in a deemed-refusal situation.

The access process should be reviewed to eliminate the need for multiple sign-offs.

4. Communications Function

An institution has 30 calendar days to respond to an access request unless a time extension is taken under section 9 of the Act. When an access request is received by PWGSC, "interesting" requests will be identified by the OPI and the ATIP Director will be notified.

The communications function will be notified if media lines are required. If media lines are required, the release package will be sent to Communications seven calendar days prior to release. At the same time, the senior management review process takes place (with another release package). Once the release package has been completed, there would appear to be minimal processing left.

The ATIP Directorate does not track the actual time taken by the Communications Branch. The Directorate states that, whether or not

Table 1: Interesting Requests
April 1 to November 30, 2002

With Media Lines – 7 Days Allocated			Without Media Lines – 3 Days Allocated		
Days Taken	# of Requests	% of Total	Days Taken	# of Requests	% of Total
7 or less	21	31	3 or less	2	7
8 - 15	28	42	4 – 6	7	25
16 - 23	8	12	7 - 9	11	40
24 - 30	2	3	10 - 12	4	14
31+	8	12	13+	4	14
TOTAL	**67**	**100**		**28**	**100**

media lines are completed by the Communications Branch, the records will be released.

5. Operational Areas (OPIs)

OPIs are required to search for and retrieve records in order to respond to access requests. The OPIs are required to provide records to the ATIP Directorate within ten calendar days of receipt of the request from the ATI Office.

The time taken to respond to the ATIP Directorate request to retrieve records is illustrated in Table 2. Table 2 includes requests for consultations that were received from other government departments.

Table 2 points to one reason why responses to access requests may be delayed and end up in a deemed-refusal situation. The reason is that, in many cases, OPIs are not meeting their responsibility to retrieve records subject to an access request within the time established by PWGSC.

One method of reinforcing responsibilities for access to information is to include the responsibilities in the job description of officers and managers and then to have performance contracts measure to what degree the responsibilities are met.

6. ATI Improvement Plan

PWGSC has taken or plans to take measures to reduce the number of access requests in a deemed-refusal situation. A comparison of the statistics for the fiscal year 2001-2002 with the period from April 1 to November 30, 2002, indicates a probable increasing backlog of access requests in a deemed-refusal situation for a year-to-year comparison. In addition, the time taken beyond the statutory time requirement to process access requests continues to be problematic as illustrated in Tables 3 and 4.

Uncoordinated efforts to reduce the number of requests in a deemed-refusal situation are likely not as effective as an integrated group of measures established as a result of an analysis of the situation. PWGSC should approach the time delay

Table 2: OPI Retrieval Performance
April 1 to November 9, 2002

				Number of days late					
Branch (Level 1)	**#Times tasked**	**#on time**	**% on time**	**1-5**	**6-10**	**11-20**	**21-30**	**31-40**	**41**
SOS	486	330	67.9	82	28	41	2	2	1
Pacific	11	6	54.0	4	0	0	0	1	0
Communi-cations	34	19	55.8	2	4	0	3	1	5
Quebec	27	14	51.8	7	2	4	0	0	0
GOS	111	55	49.6	33	10	11	0	0	2
Real	48	28	58.3	15	4	1	0	0	0
HRB	18	10	55.5	2	2	3	1	0	0
Ontario	18	11	61.1	4	1	2	0	0	0
Trans	2	2	100.0	0	0	0	0	0	0
Western	12	7	58.3	5	0	0	0	0	0
AEB	51	14	27.5	9	6	9	4	1	8
Atlantic	28	17	60.7	5	5	1	0	0	0
CAC	11	4	36.3	4	0	1	0	0	2
GTIS	15	5	33.3	3	2	2	1	0	2

problem by establishing an overall plan to manage the tasks necessary to come into substantial then ideal compliance with the Act's deadlines. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve ideal compliance. Senior management should regularly monitor the plan.

7. ATIP Directorate

The ATIP Directorate maintains the ATIPflow System to manage the access request caseload. The system is capable of providing numerous reports to manage and report on the caseload. The ATIP Directorate is providing a number of routine reports to various parts of PWGSC on the status of their access requests and timelines. In addition, the ATIP Directorate has numerous reports within their office on the access process scheduled versus allocated timelines.

ATIP Directorate staff have *ATIP Desk Procedures*, a comprehensive administrative guide for processing access requests. The *ATIP Desk Procedures* were revised in November 2002 and are revised on an ongoing basis as required.

The ATIP Directorate currently employs three consultants to process access requests. Consultants (or contractors) are useful for peak periods in the workload. When the workload trend is increasing in the longer term, the long-term use of consultants does not represent value for money. Funding for a consultant will cost considerably more than funding for an employee. In addition, any knowledge about the organization's records and access process will disappear with the end of the consultant's contract.

The department does not have a documented fee policy for access request processing. The ATIP Directorate should develop a fee policy to support transparency in decision making for fee waivers.

8. Training and Process Documentation

For OPIs to complete their part of the access process, ATI training and documented procedures including timelines are required. During 2002-2003, the ATIP Directorate OPI and other training will consist of briefings held on an "as needed" basis.

OPIs expect strong support from the ATI Office in training in order to understand precisely what their responsibilities are under the *Access to*

Table 3: Time Taken Beyond Statutory Time Allowance – Without Extension		
Time taken	**2001-2002**	**April 1 – November 30, 2002**
1-30 Days	47	20
31-60 Days	7	9
61-90 Days	1	6
Over 91 Days	0	7

Table 4: Time Taken Beyond Statutory Time Allowance – With Extension		
Time taken	**2001-2002**	**April 1 – November 30, 2002**
1-30 Days	20	38
31-60 Days	10	29
61-90 Days	16	10
Over 91 Days	21	3

Information Act, particularly with respect to timelines and extensions. In addition, the OPIs need procedural and instructional information on how to carry out tasks assigned to them as part of the process for responding to access requests.

PWGSC has a draft of a recent update to the comprehensive *Handbook for PWGSC ATIP Liaison Officers and OPI Managers.* The department also has the *Departmental ATIP Policy* available on the intranet. The policy includes procedures and describes roles and responsibilities of managers and employees. ATIP Liaison Officers in programs have briefings from and regular contact with the ATIP Directorate.

Training is an essential component of ATIP operations. A properly planned and delivered ATI training program will provide OPIs with the ability to fulfill their responsibilities in the access process. As well, a planned approach will maximize the training expenditure. There is a need for a Training Strategy for OPIs in PWGSC particularly since there have been many changes in OPI ATIP liaison personnel.

The ATIP Directorate should develop an ATI Training Strategy for 2002-2003. The strategy should include training priorities, staff identified as benefiting from new or additional training, number and location of sessions and ATI responsibilities for delivery of the training and implementation of the handbook. The ATIP Directorate is in the best position to identify training priorities. The office understands the level of knowledge of OPIs on the *Access to Information Act* through interaction on access requests. The Directorate is aware of complaints about problems in meeting the requirements of the Act and is aware of departmental issues that may impact on the Act.

9. Third-Party Process

Section 27 of the *Access to Information Act* provides a process for a department to follow when an access request may contain certain third-party information that is exempt under the Act. The process includes notifying the third party to determine if the third party has any views on the release or non-release of the information. The process has a timeline that includes providing the third party with 20 calendar days to provide representations to the department.

The ATIP Director states that a large proportion of access requests received by PWGSC involve third-party notices under section 27. These requests may involve multiple notices. The following issues all hinder that department's ability to meet the Act's time requirements when dealing with notices under section 27 of the Act:

- the number of consultations;
- the complexity of some issues;
- the need to educate and negotiate with third parties;
- the logistical issues in tracking multiple notices for the same request.

The ATIP Directorate has introduced a number of measures to reduce the number of access requests in a deemed-refusal situation. These measures are described in the Management Response section of this report.

The department conducts a high percentage of consultations under paragraph 9(b) of the Act.

The ATIP Directorate should review the access requests that were subject to third-party intervention or

consultation and ended in a deemed-refusal situation to determine if there were any systemic reasons for the delays. If so, measures can be identified and implemented as part of the ATI Improvement Plan to reduce the number of delays.

V. Management Response to the Problem of Delay

PWGSC has experienced a growing number of access requests for sponsorship information. The number and complexity of these requests has placed severe constraints on the ATIP Directorate's ability to respond in a timely fashion.

Additional information on causes of delays is contained in Section B.II, Part C: Contributing Factors of the Report Card.

PWGSC has instituted a number of measures to deal with the deemed-refusal situation.

1. Request Tracking

The ATIP Directorate has extensive reporting in place to track request timelines in the access process.

ATIPflow has an icon that alerts the ATIP Directorate and Team Leaders that a request deadline is approaching. Since ATIPflow is viewed on a daily basis, an Officer and/or Team Leader will note any cases coming due.

ATIP Officers use ATIPflow reports. Officers generate these reports to determine the status of their ongoing cases and identify those that are coming due or overdue. Officers also produce a Deadline List Report and a Situation Report.

ATIP Officers prepare action plans for various ATI requests that are in danger of becoming overdue or are overdue. The plans are intended to clearly outline the milestones and key dates for each access request and serve as a guide to the ATIP Officer when processing the request. The preparation of the action plans is also a coaching tool and serves as a basis for discussion between the Officers and Team Leaders about progress, training requirements and performance issues.

The support staff prepare weekly reports that they send electronically to all ATIP Directorate staff. The information is derived from ATIPflow and is intended to remind ATIP Officers of their cases coming due and cases that are overdue.

A Files Coming Due Report is prepared and sent to staff each Wednesday. It identifies the routine files that are coming due within the next 8 days as well as the "interesting" requests coming due in the next 15 days.

A Files in Senior Management Review Process Report is prepared on a weekly basis and is sent to all Team Leaders. It identifies the "interesting" request release packages that have been sent to the Deputy Minister's and Minister's Offices for senior management review. The report includes the text of the request, the date the request was sent and the expected review completion date. The report is intended to prompt Team Leaders to follow up when the expected completion date of the release package is near or has been exceeded.

2. ATIP Funding

Funding has been increased significantly year over year for the ATIP Directorate. Staffing has also increased. In 1999-2000, 11.89 person-years were allocated to the ATIP Directorate. This allocation increased to 23.5 person-years for the 2001-2002 fiscal year.

3. Review Process

There have been a number of measures taken to streamline the reviews in the access process. The ATIP Directorate is continuing discussions to streamline

the process. For example, only two Branch Assistant Deputy Ministers are now involved in the senior management review process.

4. ATI Training and Awareness

The ATIP Directorate is planning to hold regular meetings with ATI liaison officers in the 2003-2004 fiscal year. The revised *Handbook for PWGSC ATIP Liaison Officers and OPI Managers* will be distributed to departmental ATIP liaison staff in early 2003.

5. Third-Party Delays

The department has implemented a number of measures to reduce the number of access requests in a deemed-refusal situation. The letter which is included with the package sent to third parties under section 27 of the Act can be sent back to the ATIP Directorate of PWGSC by facsimile to authorize disclosure of the records subject to the third-party notice.

An ATIP Officer will contact the third party shortly after the notice is transmitted. The purpose of the communication is to confirm receipt of the notification and to explain the third-party notification process under the Act.

VI. Recommendations

The department is to be commended on the quality of the substantial documentation provided to support information in the Review Questionnaire. This indicates that a solid foundation for improvement exists.

There are a number of departments that have found themselves in an F grade, red alert situation, with regard to the new access request to deemed-refusal ratio. Through deliberate commitment, well-planned and executed measures and in timeframes as short as two years, other departments have attained substantial and ideal compliance. With these possibilities in mind, this review recommends the following:

1. **The ATIP Director is directly responsible for ensuring compliance with the *Access to Information Act* and should take a strong leadership role in establishing a culture of compliance throughout PWGSC. Such a role requires the unwavering support and endorsement of the Minister and the Deputy Minister. Senior management support for the development and monitoring of an ATI Improvement Plan is one method of making a commitment to comply with the time requirements of the Act.**

2. **Routine reporting to senior management on planned versus actual time taken to process access requests and the status of measures taken to reduce requests in a deemed-refusal situation should be instituted. The reports will provide senior management, OPIs and the ATIP Directorate with information needed to gauge overall departmental compliance with the Act's and department's time requirements for processing access requests.**

3. **The Delegation Order should be revised to reflect any delegation of decision-making within the ATIP Directorate. The department is encouraged to delegate administrative decisions under the Act to ATIP Team Leaders and Officers and to review whether or not decisions about any exemptions can also be delegated.**

4. **The Minister should direct the ATIP Director, in writing, to exercise the delegation to answer requests within deadlines, whether or not the approval process has been completed.**

5. **The approval process should be reviewed to remove multiple review stages within the process.**

6. **PWGSC should develop an ATI Improvement Plan. The plan should identify the sources of the delays in responding to access requests and include targets, tasks, deliverables, milestones and responsibilities. The Senior Management Committee of the department should monitor the plan.**

7. **The specific reasons for the access requests in a deemed-refusal situation for this fiscal year up to November 30 should be identified and remedial measures developed for incorporation into the ATI Improvement Plan.**

8. **A Training Strategy should be developed for 2003-2004 that includes priorities, PWGSC staff identified as benefiting from new or additional training, number and location of sessions and ATIP responsibilities for delivery of the training.**

9. **PWGSC should set an objective of coming into substantial compliance with the Act's time requirements for 2003-2004 and an ideal compliance objective for 2004-2005.**

10. **ATI training should be mandatory for all managers, including new managers as part of their orientation.**

11. **The use of consultants to provide processing resources for long-term increases in the ATI workload should be reviewed to determine what the best value for money is for staffing.**

12. **The department should develop a Fee Policy in determining when to waive fees under the *Access to Information Act.***

13. **Responsibilities for access to information should be included in the job description of officers and managers where relevant. Performance contracts should measure to what degree the responsibilities are met.**

BASIS OF REPORT

I. Interview with PWGSC's ATIP Director—January 7, 2003

On January 7, 2003, PWGSC's ATIP Director was interviewed for the purpose of this Report Card.

II. PWGSC—PRE-INTERVIEW SELF-AUDIT QUESTIONNAIRE

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act*			
Part A:	Requests carried over from the prior fiscal period.	Apr. 1/01 to Mar. 31/02	Apr.1/02 to Nov. 30/02
1.	Number of requests carried over:	201	159
2.	Requests carried over from the prior fiscal — in a deemed-refusal situation on the first day of the new fiscal:	75	45
Part B:	New Requests — Exclude requests included in Part A.	Apr. 1/01 to Mar. 31/02	Apr. 1/02 to Nov. 30/02
3.	Number of requests received during the fiscal period:	760	684
4.A	How many were processed within the 30-day statutory time limit?	350	254
4.B	How many were processed beyond the 30-day statutory time limit where no extension was claimed?	55	42
4.C	How long after the statutory time limit did it take to respond where no extension was claimed?		
	1-30 days:	47	20
	31-60 days:	7	9
	61-90 days:	1	6
	Over 91 days:	0	7
5.	How many were extended pursuant to section 9?	324	342
6.A	How many were processed within the extended time limit?	129	82
6.B	How many exceeded the extended time limit?	67	80
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	20	38
	31-60 days:	9	29
	61-90 days:	17	10
	Over 91 days:	21	3
7.	As of November 30, 2002, how many requests are in a deemed-refusal situation?		58

Part C: Contributing Factors

8. **Use this area to describe any particular aspect about a request or type of request that may impact on the difficulty or time necessary to complete a request:**

The Average PWGSC ATI Request:

On average, each request is associated with the retrieval of 315 pages of records and requires consultations with two government departments and two third parties. Each ATIP Officer handles roughly 15 access requests simultaneously.

ATI Consultations from Other Government Departments:

A notable trend is the increase in the number of incoming ATI consultations from other government departments, commensurate with a near doubling of the volume of records to be reviewed. In FY 2000-2001, 169 consultations were received, associated with 6,722 pages of records; in FY 2001-2002, 186 consultations were received, associated with 13,751 pages; and between April 1 and November 30, 2002, 151 consultations were received, associated with 13,080 pages of records.

The ATIP Office must balance the need to respect the legislated timelines of other government departments who are consulting with PWGSC on an increasing number of records at the same time as it strives to respect the timelines associated with its own ATI requests.

Third-Party Notification Process Set Out in Section 28 of the ATI Act:

Refer to section 15(b) of the Questionnaire.

As a common service agency, PWGSC processes a large volume of ATI requests associated with procurement and real estate activities managed on behalf of other government departments. These activities range in complexity from the simple procurement of office supplies to the procurement of crown projects, such as helicopters and jets.

In FY 2001-2002, the ATIP Office conducted 710 third-party consultations. In general, compliance with section 28 of the ATI Act is a logistically and legalistic process that causes delays in meeting timelines. Time is spent:

- Ensuring that each third party is consulted only once;
- Ensuring that only the appropriate documents are sent to each third party;
- Educating third parties on the process in order to avoid unnecessary litigation;
- Following up with third parties to ensure that their rights are respected and that the appropriate information is protected; and
- Keeping requesters informed when problems arise.

Outgoing Consultations with Other Government Departments:

In FY 2001-2002, the ATIP Office conducted 417 consultations in relation to the information it held relating to the business of other government departments.

In general, 60-day time extensions are taken by the PWGSC ATIP Office for the purpose of consulting with other government departments, including consultations relating to cabinet confidences.

Although most consultations are completed with 30 days after the notice has been sent, consultations

with the Privy Council Office frequently require additional time. This is complicated by the fact that PWGSC frequently consults PCO with respect to information held in portions of documents. Since not all cabinet confidences are readily identifiable, several consultations notices may be sent on the same request, and some notices have been be sent late in the process.

Siemens Canada Limited* v. *Canada (Minister of PWGSC) 2001, FCT 1202:

On November 5, 2001, the Federal Court Trial Division ordered that all third-party information obtained by virtue of section 16 of the *Defence Production Act* (DPA) is subject to a mandatory exemption under section 24 of the ATI Act (section 30 of the DPA).

In light of the judicial decision, discussions ensued between the PWGSC ATIP Office and Justice Canada concerning the procedural implications and the new content of third-party notices. As these discussions were conducted over several months, there were significant delays in processing more than 30 DPA-related requests during FY 2001-2002.

Sponsorship Requests:

Since FY 1999-2000, the number of ATI requests associated with sponsorship requests has increased dramatically. Between April 1 and September 1, 2001, 18% of ATI requests received were sponsorship-related. Between April 1 and November 30, 2002, 31% of ATI requests received by PWGSC were sponsorship-related.

As a result, delays were incurred in processing all ATI requests due to the:

- Shear volume of sponsorship requests received in a short period of time;
- Need to establish effective linkages with other sectors within PWGSC and with Communication Canada to respond to the Minister's and department's communication needs and to ensure a consistent approach was taken in the processing of similar ATI requests;
- Need to reassign existing ATI staff and consultants to specialize in the handling of these requests; and the
- Need to hire and train new ATI staff.

These factors significantly impacted the compliance timelines of sponsorship-related requests and, for a short interval, the compliance timelines of all other ATI requests.

III. PWGSC—REVIEW QUESTIONNAIRE (FEBRUARY 2003)

(available from the Office of the Information Commissioner)

EXCERPT FROM DEPUTY MINISTER'S RESPONSE TO STATUS REPORT

"The Minister and I fully support the department's Access to Information program and it is our continuing objective to improve its timeline performance. As you noted, the Access to Information and Privacy (ATIP) Directorate has a solid foundation upon which an improvement plan may be developed over the course of this fiscal year.

Of the thirteen recommendations made by your office, I am pleased to report that we have streamlined our "Interesting" request approval process, have examined the sources of delay within the department and are developing the improvement plan. Further, the ATIP Directorate will be increasing the number of information awareness sessions to be delivered throughout the fiscal year and is developing timeline compliance reports which will be communicated to Branch management on a regular basis.

Please be assured that PWGSC will study and give careful consideration to each of your recommendations when determining the best courses of action required to achieve an improved timeline compliance rate."