Information Commissioner of Canada

Commissaire à l'information du Canada

Annual Report Information Commissioner

2006-2007

Annual Report
Information Commissioner
2006-2007

"Knowledge is the most democratic source of power."

Alvin Toffler, "The Democratic Difference" (1990)

The Information Commissioner of Canada
112 Kent Street, 22nd Floor
Ottawa ON K1A 1H3

(613) 995-2410
1-800-267-0441 (toll-free)
Fax (613) 947-7294
(613) 947-0388 (telecommunications device for the deaf)
general@infocom.gc.ca
www.infocom.gc.ca

Cat. No. IP1/2007
ISBN 978-0-662-69794-7

"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

May 2007

The Honourable Noël A. Kinsella
The Speaker
Senate
Ottawa ON K1A 0A4

Dear Mr. Kinsella:

I have the honour to submit the annual report of the Information Commissioner to Parliament, covering the period from April 1, 2006 to March 31, 2007.

My term as Information Commissioner commenced on January 15, 2007, thus for most of the period covered by this report, I was not the Commissioner. As a result, I cannot claim this to be "my" annual report except in the legal sense. However, as is always the case, such reports reflect the work of an institution, not a person, and it is with pride and humility that I present it, through you, to the Senate.

Yours sincerely,

Robert Marleau

May 2007

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

Dear Mr. Kinsella:

Dear Mr. Milliken:

I have the honour to submit the annual report of the Information Commissioner to Parliament, covering the period from April 1, 2006 to March 31, 2007.

My term as Information Commissioner commenced on January 15, 2007, thus for most of the period covered by this report, I was not the Commissioner. As a result, I cannot claim this to be "my" annual report except in the legal sense. However, as is always the case, such reports reflect the work of an institution, not a person, and it is with pride and humility that I present it, through you, to the House of Commons.

Yours sincerely,

Robert Marleau

TABLE OF CONTENTS

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

The Year in Review

Changing the Guard

In this reporting year, the term of Canada's third, and longest serving, Information Commissioner, the Hon. John M. Reid, P.C., came to an end. During his thrice-extended term of office, from July 1, 1998 to September 30, 2006, Mr. Reid earned a reputation for courage and tenacity in the enforcement of the *Access to Information Act* (the Act). Canadians owe him a debt of gratitude. Indeed, for this new Commissioner, whose term commenced on January 15, 2007, it is humbling and inspiring to follow in the footsteps of his three predecessors, Inger Hansen, John Grace, and John Reid, all of whom earned reputations for integrity and professional excellence.

Especially, it is a privilege to be entrusted with the institutional obligation to nurture and enforce such an important pillar of our democracy – the right to know! The courts refer to this right as "quasi-constitutional"; the report of the first Parliamentary review termed it of "similar significance" to the Canadian Charter of Rights and Freedoms as instruments with which to strengthen Canadian democracy.

Since the Act came into force on July 1, 1983, the right of access has become more and more entrenched in the operations of government. There is more transparency and, hence, accountability in government. No, it is not always easy for Canadians to stomach what they see through the windows into government opened by the access law, nor for public officials to govern in a fishbowl. Yet excessive secrecy would be even harder to digest; our democracy is all the more vibrant for the legally enforceable right we Canadians have to go behind the "stories" governments choose to tell us, to obtain source documents, and to explore the stories which all governments store in dark corners.

Despite much progress since 1983, there remain impediments to the full realization of Parliament's intent as expressed in the Act. Too often, responses to access requests are late, incomplete, or overly-censored. Too often, access is denied to hide wrongdoing, or to protect officials or governments from embarrassment, rather than to serve a legitimate confidentiality requirement. Year after year, in the pages of these reports, information commissioners recount what is going wrong and offer views on how to make it right.

This Commissioner is pledged to assisting governments to do better, and requesters to fare better, when administering and using the Act. He is also pledged to assisting Parliament in playing its vital role of holding ministers and officials to account for the good administration of the Act, and of keeping the Act itself effective and up-to-date.

Amending the *Access to Information Act*

In this reporting year, for only the second time since the Act came into force, changes were made to the Act at the government's initiative. The first was in 1992 when the government amended subsection 12(3) of the Act to provide persons with sensory disabilities with a right to request access to records in alternative formats. This year's changes were included in Bill C-2, An *Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability* (the *Federal Accountability Act*), which received royal assent on December 12, 2006.

In April of 2006, the former Information Commissioner submitted a Special Report to Parliament setting out his concerns about the access amendments contained in Bill C-2. Those concerns will not be repeated here; overall, however, the Special Report expressed the view that the amendments, requiring some previously accessible records to be, henceforth, kept secret (i.e. records relating to reports of wrongdoing and internal audits), were not justifiable. As well, it expressed the view that the special exemptions and exclusions designed for newly added institutions are unjustifiably broad. Indeed, a bill intended to reduce the scope of secrecy authorized by the *Federal Accountability Act* (Bill S-223) has already been introduced in the Senate, on February 15, 2007, by a Liberal Senator (Senator Lorna Milne).

History has shown that the care and nurturing of the Act falls largely to Senators and MPs who are not in Cabinet. That is understandable. Governments of all political stripes find it a challenge to wield power (and keep power) without keeping secrets – or, at least, without maintaining control over the timing and "spin" of information disclosures. It is no surprise, then, that the only "muscle" added to the Act since 1983 came by way of Colleen Beaumier's private member's bill, introduced in 1997, to make it an offence to destroy, alter, or conceal records (or to counsel such activities) for the purpose of thwarting the right of access. And, too, it is no surprise that no government has proposed any significant reform bill for access to information – it fell to two backbench MPs, John Bryden and Pat Martin, to champion comprehensive reforms. Through their diligence, and the broad support for access reform they generated, it now seems more likely than ever that government will introduce a comprehensive reform bill.

Some may say: Be careful what you wish for! A government's access reform bill might weaken access, not strengthen it! From a government's perspective, reform might entail making it easier to justify secrecy, making it more expensive to use the Act, weakening the power of oversight, removing classes of records from the Act's coverage, and so forth. The government's discussion paper on access reform (released on April 11, 2006) did little to allay such fears.

Happily, the Standing Committee on Access to Information, Privacy and Ethics has held the government's feet to the fire (both a Liberal and a Conservative government). In this reporting year, the Committee investigated an incident of alleged improper disclosure within government of the identity of an access requester. In its report, the Committee offered constructive guidance to public officials concerning their obligation to restrict dissemination of requester identities and to be "blind" to requester identities when making decisions about the timing and content of disclosures.

As well, in this reporting year, the Committee called senior officials to appear from government institutions that received a failing grade on the "report card" reviews conducted by the Office of the Information Commissioner. Being forced to give public explanations for poor performance to a parliamentary committee captured the attention of government. Detailed remedial plans were ready when officials appeared to give their evidence, and those plans are being implemented in the knowledge that this Commissioner and the Committee are keenly interested onlookers.

Most important, the Committee has insisted, in a report to Parliament, that the government come forward with a bill to comprehensively reform the Act.

The previous Information Commissioner, at the request of the Committee, prepared a draft access reform bill drawing from modern access legislation in other jurisdictions, previous private members' bills, the results of the statutorily mandated three-year review of the Act by a House of Commons committee, and the experience of the Office of the Information Commissioner over 23 years. It offers members of Parliament and the public a yardstick against which to measure any reforms brought forward by government.

This Commissioner, too, stands ready to assist the government and Parliament as they carry out their respective roles of proposing and disposing of legislation. He has, in this regard, offered the collaborative assistance of his office to the Minister of Justice and President of the Treasury Board, in the development of any legislative initiative to reform the Access Act - better to address areas of disagreement before the fact, if at all possible.

Administrative Improvements

Many of the initiatives required to make the Act more efficient and effective do not require legislative change. Indeed, a good blueprint for administrative reform was set out in the 2002 report of the government's Access to Information Review Task Force: "Access to Information: Making it Work for Canadians".

In this regard, too, this Commissioner has offered to the President of the Treasury Board (the minister designated to ensure the effective administration of the Act throughout government) cooperation in the realization of that blueprint.

Administrative renewal must make it a priority to professionalize and support the unsung heroes of government transparency – the Access to Information and Privacy (ATIP) administrators. Their role should now be recognized as a unique profession and be acknowledged as a specific element of accountability in our system of government.

Key deputy ministers, especially those whose departments can't seem to respect consistently their obligations to answer access requests within statutory deadlines, are now recognizing that there is a system-wide problem in recruiting and retaining qualified ATIP officers. This problem was clearly identified in the 2002 Task Force Report: "Access to Information: Making it Work for Canadians", as follows:

> "Dedicated, qualified, motivated access professionals are crucial to the effective provision of access to information. Attracting and retaining skilled staff is now a significant challenge for ATI units as the demand for qualified employees far exceeds the supply. This situation will worsen as experienced access officials retire, move to other positions, or leave the public service. This has unfortunately led to a practice of access units "poaching" staff from each other, and the overuse of contractors in some departments. While the use of contractors is appropriate when needed to meet unplanned demand or temporary staffing shortages, it cannot be a long-term strategy or a viable approach to the day-to-day delivery of the access program.
>
> Recruitment, retention and succession planning are now an urgent necessity, and must be addressed on a government-wide basis. Among the successful measures that some institutions are using to bring people into the access community is the creation of developmental positions, or internships, in access units. Through such positions they recruit staff to the access unit from other parts of the institution or from outside the public service, applying a philosophy of "growing our own" through on-the-job staff development.

There are several initiatives that could help make working in ATI or an attractive career choice:

- Enhancing career mobility by classifying access officials within a broader grouping of professionals with related skills and impact (for example, in some institutions, access units are located with the compliance and rights-based processes, while in others, they are with strategic areas such as planning, communications or executive services, or with information management officials);
- Standardizing statements of qualifications for ATIP Coordinator positions, as well as for other access staff positions, along with suggested tools to assess the qualifications; and
- Reviewing classification standards within the access to information community, examining and rationalizing the levels of Access to Information Coordinator, analyst and staff positions across the government."

These same challenges are being experienced throughout Canada in provincial and municipal governments, and there is a widespread recognition of the need for national professional standards for ATIP administrators.

An exciting step was taken this year towards establishing a new profession of information rights (i.e. access to information and privacy) administrators in Canada. Two of Canada's associations of access and privacy administrators (CAPA and CAPAPA) came together to spearhead an initiative to develop core competencies and a certification process for the new profession. The initiative is supported by a grant from the Office of the Privacy Commissioner of Canada, and the salary of the initiative's national director is being borne by the Office of the Information Commissioner of Canada. Office space, and administrative and technical support for the national director, is provided by the Office of the Information and Privacy Commissioner of Alberta.

As well, an advisory working group of nine recognized access to information and privacy rights experts from across Canada, chaired by the Information and Privacy Commissioner of Alberta, was formed to oversee the development of national professional standards and to propose a process for certifying and overseeing the new profession. The Quebec association of ATIP professionals (l'Association sur l'accès et la protection de l'information) has lent its support to this initiative and is represented on the working group.

The first phase of the initiative is complete; a set of professional competencies, or standards, has been developed and approved by the working group of experts. Those standards, along with a detailed description of the project and information about how interested parties may learn more and provide comment, are available from the Information Commissioner's website.

The second phase of the project, the development of a professional certification and governance process, is ongoing, with a target date of completion by November 30, 2007.

In the coming months, a concerted effort will be made to encourage governments and private sector employers to commit to reflecting professional standards for information and privacy administrators in their hiring, promotion, and continuing education activities. For its part, this office will encourage the Treasury Board of Canada to take a leadership role in professionalizing the federal ATIP workforce.

University of Alberta IAPP Certificate Program

The Office of the Information Commissioner of Canada continued its tangible support, this reporting year, for Canada's only university-based, comprehensive, on-line, post-secondary level education program for access and privacy administrators. Located in the Faculty of Extension, University of Alberta, this award-winning course of study, begun in 2000, is known as the Information Access and Protection of Privacy (IAPP) Certificate Program. Courses are offered in English and French.

Beginning in 2003, this office began investing financial and intellectual capital in the program to facilitate the development of new courses and to enable course materials to be developed in the French language. In the Fall of 2004, one of this office's legal counsel, Marc-Aurèle Racicot, was loaned to the University of Alberta to serve as manager of the IAPP Certificate Program and as an Assistant Adjunct Professor. This assignment came to an end on March 31, 2007, when Mr. Racicot returned to take up new challenges with this office.

This Commissioner looks forward to continued collaboration with the University of Alberta IAPP program. The program's registrations are growing every year (388 were registered in 2006-07), with students from all geographic areas of Canada and, increasingly, from other countries. New investigators in this office will continue to be required to have, or obtain, IAPP certification, and this Commissioner has encouraged the President of the Treasury Board to ensure that federal ATIP administrators have access to the kind of education which the University of Alberta IAPP certificate program provides.

Starting at Home

The Office of the Information Commissioner of Canada is endeavoring to "practice what it preaches" when it comes to ensuring an effective human resources plan for recruiting, training, and retaining highly competent access to information investigators.

Recognizing the system-wide difficulties in recruiting experienced investigators (PM-05 level), this office has established a program to hire junior officers and provide them with a structured program of progression to middle and senior-level investigator positions. The program involves individual coaching, training, tutoring, developmental assignments, and testing, all designed to provide career progression from a PM-02 to PM-05 level without intervening competitions. Twelve to 18 months, approximately, will be required at each level. Before progression to the PM-05 level, investigator trainees must, as indicated previously, successfully complete the IAPP certificate program. A more detailed Investigator Training Program description is available from the Information Commissioner's website.

This Commissioner urges the heads of other government institutions to consider a similar approach to "home growing" its ATIP administrators rather than continuing to tolerate the destructive practice of "poaching", along with the related practices of intentional over-classification, tolerance of inadequate knowledge and skills, and the excessive (and demoralizing) reliance on consultants.

Continuous Education

It will also be part of this Commissioner's mission to urge government to provide the resources and opportunities to government institutions for continuous learning in what is the rapidly evolving field of ATIP administration. Here, too, it is important to walk the talk. To that end, this Commissioner has decided to make available to all other government institutions, and interested members of the public, his office's manual used to train and guide investigators in understanding the exemptions contained in the Act and assessing whether or not they have been properly invoked by government institutions.

This manual is a compendium of the law pertaining to each of the Act's exemptions and sets out strategies and questions to assist investigators in investigating complaints that exemptions were improperly invoked by government institutions. Even though the manual's content does not bind the Information Commissioner as to how the Act will be applied in individual cases,

and even though there is a risk that out-of-date content may be disseminated before the annual update is completed, this manual will assist ATIP administrators across government. It will assist them to be more knowledgeable of the law's requirements and, hence, be better able to deliver the access to information program effectively. That is this Commissioner's hope. (The manual is titled GRIDS and is available from the Information Commissioner's website.)

Right to Know Week

For the first time, events were held across Canada to recognize "Right to Know Day". Canada is a bit late in joining this international movement, which began in Sofia, Bulgaria, on September 28, 2002. On that date, a group of openness-in-government advocates from three dozen countries formed a coalition known as the "Freedom of Information Advocates Network." They declared that every September 28th would be an international day to symbolize the global movement for the promotion of the individual right of access to information and open transparent governance. The day, or week, is celebrated around the world in many of the more than 70 countries that have right to know statutes.

Over the years, there have emerged certain principles that form the core of the right to know. They are expressed well by the Open Society Justice Initiative, formed with other organizations in honour of the Right to Know Day celebrations in 2003. These ten principles are:

1. Access to information is a right of everyone.

2. Access is the rule – secrecy is the exception!

3. The right applies to all public bodies.

4. Making requests should be simple, speedy, and free.

5. Officials have a duty to assist requestors.

6. Refusals must be justified.

7. The public interest takes precedence over secrecy.

8. Everyone has the right to appeal an adverse decision.

9. Public bodies should proactively publish core information.

10. The right should be guaranteed by an independent body.

Canada has come a long way to fulfill these principles.

It was the information commissioners in all Canadian jurisdictions who took the lead in "kicking off" Canada's first Right to Know celebrations. Their goal was to help Canadians be more aware of the existence of the right of access in Canada and to better appreciate how essential this right is to a healthy democracy.

Right to Know Week 2006 in Canada was a good start; there is comforting evidence that the various events across the country attracted considerable public attention and enthusiasm for making this an annual event. For a brief description of various events throughout Canada, please visit the Information Commissioner's website.

Collaboration Among Officers of Parliament

In the reporting year, the Officers of Parliament continued their collaborative efforts to ensure that they find ways to be good "corporate citizens" within the governmental structure, without compromising the appearance and reality of independence from government.

The first, and most important, step in this regard was the establishment of a pilot project (for FY 2006-07 to 2008-09) for funding Officers of Parliament, which involved the establishment, by the Martin government, of an ad hoc, all party advisory panel of MPs, chaired by the Speaker of the House of Commons. The advisory panel's role is to consider funding requests from Officers of Parliament and to recommend funding levels to the Treasury Board. Under the terms of the pilot project, Treasury Board ministers agreed to give the advisory panel's funding recommendations significant weight.

The Harper government has decided to maintain the pilot project. This innovative mechanism has addressed the apparent compromise of independence that arises when the government of the day decides on the level of funding available to Officers of Parliament – whose role it is to investigate government and government officials. As well, the ad hoc advisory panel serves, along with the substantive standing committees to which the Officers of Parliament report, as a mechanism of accountability for the Officers of Parliament.

There are, as well, other issues, besides funding, that raise the potential for compromising the independence of Officers of Parliament from government. Being in compliance with a wide range of government rules concerning, for example, human resources, reporting, compensation, and audit and evaluation may give rise to the appearance or actuality of interference by central agencies with the independence of Officers of Parliament.

The government has a good understanding of the concerns of the Officers of Parliament in this regard, and the Treasury Board has agreed to participate in reviewing its policies and directives to ensure that they are tailored to take account of this independence concern.

The first Treasury Board policy to be reviewed was the policy on internal audit that originally included Officers of Parliament in the same manner as large departments of government. The Officers of Parliament could not accept having appointees of the Comptroller General sitting on their audit committees, having access to their investigative records, or dictating their audit priorities. However, Officers of Parliament were committed to ensuring that they had vibrant, effective, accountable internal audit capacities, including external representation on audit committees. The Officers of Parliament proposed a modified internal audit approach for them, which was presented to the Treasury Board, and which has been accepted as an appropriate approach to respecting government audit policy without compromising the independence of the Officers of Parliament (the tailored internal audit policy is available from the Information Commissioner's website).

As well, the Officers of Parliament have developed, for discussion with central agencies, a set of principles to guide the review of the other central agency policies which, heretofore, have been applied to Officers of Parliament as if they were no different than other government institutions. Those principles are as follows:

Working Principles

Introduction

Officers of Parliament share the view that each of their organizations should respect the principles and objectives of central agency policies related to the management and accountability of government institutions, but in a manner that respects their need to protect and maintain their independence from government and accountability to Parliament.

The Officers of Parliament have also agreed, as part of the Framework for the Pilot Project for a revised funding and oversight mechanism for Officers of Parliament, to continue to operate in a manner consistent with the Treasury Board Management Accountability Framework and the Treasury Board policies, directives, and guidelines.

There is an opportunity to collectively address the working relationships between Officers of Parliament and central agencies, as the Treasury Board has launched its "Policy Suite Renewal" and is involving Officers of Parliament in the consultation process. In addition, Officers of Parliament

recently developed an approach in dealing with the new Internal Audit Policy, and reached an agreement with the Office of the Comptroller General in its application, while respecting the spirit and intent of the new policy and at the same time, protecting their independence from government and maintaining their accountability to Parliament.

The purpose of this document is to present a set of working principles whereby Officers of Parliament meet the spirit and intent of central agency policies, while maintaining their unique status of independence from government.

The tradition in Canada, at least at the federal level, has been to use the term "Officers of Parliament" to refer to those independent agencies created to assist Parliament in holding government accountable and in protecting various kinds of rights of individual Canadians, or to carry out certain functions independent of the executive.

The traditional Officers of Parliament are the ones with which we are concerned. They are:

- The Auditor General (established 1878)
- The Chief Electoral Officer (established 1920)
- The Official Languages Commissioner (established 1970)
- The Information Commissioner (established 1983)
- The Privacy Commissioner (established 1983)

Identified Principles

Officers of Parliament adhere to sound management principles and practices and fully support the notion of strengthening the culture of accountability.

The working principles are:

1. Respect the spirit and intent of government policies

Officers of Parliament respect the principles and objectives of central agency policies related to the management and accountability of government institutions, while respecting their need to protect and maintain their independence from government and accountability to Parliament.

2. Independence

By law, Officers of Parliament must discharge their functions in a manner which is, in reality and appearance, independent from government.

3. Accountability

Officers of Parliament are accountable directly to Parliament. Parliamentary forums of accountability for Officers of Parliament include appropriate standing committees of the House and Senate, and the Advisory Panel of the House of Commons on the Funding of Officers of Parliament.

4. Transparency

Officers of Parliament conduct their operations as transparently as possible, except where precluded by legislation.

5. Reporting

In order to meet central agency requirements to report on the whole of government, Officers of Parliament provide aggregate information that is as compliant as possible with government requirements without compromising their independence and management autonomy.

Summing Up

As a new Information Commissioner pays tribute to his predecessors, and looks towards the horizon seven years away, what is most striking is the awesome responsibility to safeguard that essential building block of democratic freedom – the ability of citizens, as of right, to obtain access to government-held records. Throughout the world, the lesson of history is consistent: Openness is the oxygen of democracy because, to mix a metaphor, sunshine is the best disinfectant. Courageous parliamentarians and governments fought for and gave Canadians the *Access to Information Act*. The challenge is to make a good law better and help our excellent public officials become even more comfortable with ever increasing degrees of transparency.

CHAPTER II

Assessing the Access to Information Performance of Government Institutions (Report Cards)

For almost nine years, the Office of the Information Commissioner has been pro-actively reviewing and grading the performance of government institutions in respecting the *Access to Information Act* (the Act). Those reviews, which have come to be known as "report cards", play several roles:

First, they help the Information Commissioner appreciate the entirety of an institution's performance in administering the access to information program rather than being limited to the narrower perspective that comes from investigating specific complaints.

Second, they serve to encourage government institutions to put access to information performance higher on their list of priorities. Ministers and Deputy Ministers don't want to receive grades that reflect poorly on their leadership.

Third, report cards create and disseminate a wealth of information across government about "best practices" in administering the access to information program, as they are focused on encouraging government institutions to achieve success through sound administrative processes, training, and work tools, as well as sufficient staff.

Fourth, report cards assist Parliament in playing a more targeted and focused oversight role. For example, the Standing Committee on Access to Information, Privacy and Ethics has called senior officials from the institutions which received failing grades to respond to the report cards and explain their plans to get better grades in future.

Finally, since the inception of the report card reviews, the number of complaints of delay received by the Information Commissioner has dropped from in excess of 50% of the office's workload in 1997 to a low of 14.5% in 2003-2004. In this reporting year, some 23% of complaints related to delay.

As a result of the report card process, there has been a significant new infusion of resources for the access to information program in many institutions, an improvement in the timeliness of responses to access requests, and more knowledgeable application of the law's exemptions so as to keep the zone of secrecy in government to the minimum authorized by the Act.

Grading Scale

The grade given to an institution is based on the percentage of access requests it answers late. The Act establishes mandatory response deadlines and deems a request to have been denied if the answer is late. Grades are based on the following standards:

% of Deemed Refusals	Comment	Grade
0-5%	Ideal Compliance	A
5-10%	Substantial Compliance	B
10-15%	Borderline Compliance	C
15-20%	Below Standard Compliance	D
More than 20 %	Red Alert	F

In this reporting year, report card reviews were conducted on 17 institutions. The results are set out in the following table, and the percentage of requests deemed to have been refused (late) includes requests received in the previous fiscal year that were carried over in this fiscal year.

GRADING FROM 1998 TO 2006 (for the period April 1 to November 30)

	1998	1999	2000	2001	2002	2003	2004	2005	2006
AAFC	-	-	-	-	-	-	F 21.9%	F 38.7%	A 3.8%
CBSA	-	-	-	-	-	-	-	-	F 69.0%
CIC	F	F	D	C	A	D	C 13.8%	D 15.3%	B 7.9%
DFAIT	F	F	F	D	B	D	F 28.8%	F 60.1%	D 17.2%
Fin	-	-	-	-	-	-	-	C 11.9%	B 7.9%
F&O	-	-	F	F	A	A	B 5.2%	C 12.7%	B 5.9%
HCan	F	A	-	-	A	B	D 18.2%	D 18.9%	F 21.9%
IC	-	-	-	-	-	F	D 16.2%	B 5.9%	B 8.1%
IRB	-	-	-	-	-	-	-	F 39.1%	A 0.0%
Jus	-	-	-	-	-	-	F 43.5%	F 38.8%	F 37.3%
LAC	-	-	-	-	-	-	F 70%	F 55.5%	A 3.8%
ND	F	F	D	C	B	B	B 9.5%	C 14.8%	B 8.7%
PCO	F	A	-	-	D	A	F 26.5%	F 31.9%	F 25.3%
PS (PSEPC)	-	-	-	-	-	-	-	F 21.1%	D 18.9%
PWGSC	-	-	-	-	F	C	D 17.7%	B 7.3%	B 9.7%
RCMP	-	-	-	-	-	-	-	F 79.0%	F 67.0%
TC	-	F	F	C	D	D	B 7.2%	B 9.2%	D 16.6%

From "F" to "A"

Nine institutions improved their grade over last year – Agriculture and Agri-Food Canada (AAFC), Citizenship and Immigration Canada (CIC), Department of Foreign Affairs and International Trade (DFAIT), Finance Canada (Fin), Fisheries & Oceans Canada (F&O), Immigration and Refugee Board (IRB), Library and Archives Canada (LAC), National Defence (ND), and Public Safety Canada (PS). Of those, three moved from "F" to "A"– kudos to AAFC, IRB, and LAC for rising to the challenge and for making it a priority in their institutions to do what is necessary to answer access requests in a timely way.

The other six institutions showing improved grades (CIC, DFAIT, Fin, F&O, ND, and PS) have more work to do, but they have solid plans in place to bring them into ideal compliance in the near future.

No Change

Five institutions showed no change in their grade over last year (Industry Canada (IC), Justice Canada (Jus), Privy Council Office (PCO), Public Works and Government Services Canada (PWGSC), and the Royal Canadian Mounted Police (RCMP)). Of these, three institutions (Jus, PCO, and RCMP) have, again, received failing grades; indeed, Justice and PCO have received failing grades for three years in a row.

Senior officials from two of these three institutions (Jus and PCO) were called before the Standing Committee on Access to Information, Privacy and Ethics in October 2005 to discuss their failing grade on the Commissioner's 2004-2005 report cards. PCO promised to solve its delay problem by March 31, 2006; Jus promised to do so by March 31, 2008.

It is particularly important, as a matter of leadership example to all other government institutions, that the Prime Minister's department and the department of the Minister who is responsible for the *Access to Information Act* succeed in getting an "A". The magnitude of the administrative challenges they face is modest by comparison with other institutions which have moved themselves in relatively short order from an "F" to an "A".

Justice - There is reason to be optimistic that Justice Canada will succeed in improving its grade by next year. The department has put the necessary resources and processes in place, and senior management is closely monitoring progress.

Privy Council Office - The problems seem more serious at PCO, despite improvements in process and increases in resources. The chronic inability of PCO to answer a modest workload of access to information requests (less than 600 per year) has much to do with a burdensome and unusual approval process. PCO's ATIP Coordinator does not hold a full delegation of authority to answer access requests. For example, the ATIP Coordinator, since September 2005, may invoke mandatory exemptions. However, delegation to apply the Act's discretionary exemptions rests with ADM-level and higher officials (some 16 positions). Senior officials make the discretionary decisions on disclosure of the records for which they are functionally responsible. As well, senior officials have no special training or expertise with respect to the requirements of, or their obligations as decision-makers under, the Act.

This top-heavy approach – virtually unique in government – not only slows the process, but also means that the deciders are not prone to playing a meaningful challenge function for openness.

A random file review indicated no evidence that any discretion was exercised by senior officials applying discretionary exemptions. Most of the files contained no documentation as to whether any factors pro- and con-disclosure were considered or the weight assigned to them. Indeed, some senior officials seemed entirely unfamiliar with the legal concept of "discretion" and the obligations to be discharged by decision-makers when making a discretionary decision about individual rights.

This anomaly in PCO's delegation of authority runs counter to representations made by PCO senior officials, in the Fall of 2005, to the Standing Committee on Access to Information, Privacy and Ethics. PCO officials stated that a full delegation of decision-making authority would be made to the ATIP Coordinator. That same undertaking was made to the Information Commissioner and formed part of the basis on which the Commissioner authorized PCO to inform the Standing Committee that the Commissioner supported PCO's action plan to solve its delay problem.

Royal Canadian Mounted Police - The RCMP is floundering badly. It does not have a coherent plan in place with specific deliverables and target dates. It is experiencing resourcing difficulties in recruiting, training, and retaining qualified analysts. Operational needs in other areas of the RCMP are routinely given priority over the ATIP program, and senior management has not taken a hands-on interest in monitoring performance. While it is true that the RCMP has a large workload of access requests with which to cope, it can, and must, do better.

For all five of the "stalled" institutions, the Office of the Information Commissioner has made specific recommendations to assist these institutions in kick-starting their efforts. Details of the report card findings and recommendations can be viewed on the Information Commissioner's website.

Getting Worse

Two institutions (Health Canada (HCan) and Transport Canada (TC)) received a lower grade this year than last year. HCan went from a grade of "D" at 18.9% to an "F" at 21.9%, and TC went from a grade of "B" at 9.2% to a grade of "D" at 16.6%, which is almost doubled from last year.

The departments explain their results as being due to a significant increase in the number of requests received from the previous year and a shortage of staff at the time (35% for HCan and 50% for TC). As well, TC is still faced with a staffing shortfall problem while HCan indicated its difficulty with records retrieval, the consultation process, and the approval process.

This office will work with both departments to develop a plan to come into ideal compliance without undue delay.

First Report Card

This year, for the first time, the Canada Border Services Agency (CBSA) was the subject of a report card review and received a failing grade. Some 69% of the access requests it received from April 1 to November 30, 2006, were answered late.

A number of factors account for this poor record, including the fact that the institution was only recently created, it faces resource shortfalls in many areas, it received an unexpected volume of access requests, and experienced difficulties in recruiting, training, and retaining ATIP analysts.

The good news is that CBSA management has reacted swiftly, constructively, and forcefully to address the problem of delay. Significant additional resources have been devoted to the ATIP program, an action plan has been developed with the assistance of Consulting and Audit Canada, and careful monitoring of progress has been implemented by the President and his executive committee.

CBSA expects all aspects of its action plan to be in place by March 31, 2009, and there is reason to believe that the problem of late responses may be resolved earlier than that. The Commissioner is confident that CBSA will be a good news story in next year's annual report.

CHAPTER III

Investigations and Reviews

The primary, legislated function of the Information Commissioner is to receive and investigate complaints from persons, including corporations, who believe that their access to information rights have not been respected by government institutions. The Commissioner has no discretion to refuse to investigate a complaint pursuant to subsection 30(1) of the Act. Complaints may allege improper refusal to disclose requested records, undue delay in providing records, inadequate searches for requested records, excessive fees, unreasonable time extensions, refusal to translate requested records, or any other matter relating to requesting or obtaining access to records under the *Access to Information Act* (the Act).

The law requires that investigations be thorough and fair. While there is no deadline set by law within which investigations must be completed, the office has adopted a service standard policy under which a target of 120 days is set for the completion of investigations of complaints of improper denials of access and 30 days for completing investigations of administrative complaints, such as excessive delay, unreasonable extensions, and excessive fees.

In addition to the investigation of complaints made by individuals, the Commissioner has the authority to initiate the investigation of complaints on his own motion when he is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under the Act. It is pursuant to this authority (contained in subsection 30(3) of the Act) that the Commissioner initiates investigations aimed at addressing systemic problems, such as chronically late responses, improper management of extensions, large backlogs of unanswered requests, and administrative practices that may result in certain classes of requesters (such as media, political, or legal) receiving slower or less forthcoming answers to access requests. The Commissioner's report card reviews fall within this group of systemic investigations.

As well, individual requesters may cause a systemic investigation by complaining about the same matter against several government institutions or against the government as a whole. In this latter regard, one such investigation, against 21 government institutions, continued in this reporting year as a result of a complaint made by the Canadian Newspaper Association alleging that the government treats access requests from members of the media in a special manner that negatively affects the access rights of this group of requesters.

Workload Profile

The total workload of investigations that the office faced in this reporting year is reflected in Table 1 and totalled some 3,500 investigations (Table 6 shows the distribution of complaints from individuals by province/territory).

Table 1 also shows that the office was able to complete 1,863 investigations and reviews, and will carry over to next year 1,417 complaints from individuals, plus 237 systemic complaints.

As can be seen from Table 2, delay-related complaints (deemed refusals and time extensions) account for 43% of complaints received, exceeding complaints about refusals to disclose, which accounted for 40% of complaints received. Moreover, as reflected in Table 3, 92% of complaints in the deemed-refusal and time-extension categories had merit – as compared with 64% of refusal to disclose complaints (discontinued complaints are ignored in the calculation of these percentages since the Commissioner had not decided on the merit of those cases).

These results suggest that excessive secrecy by government institutions is not as significant a problem as is failure to respect the 30-day response period or properly manage the provisions in the statute that offer institutions the opportunity to extend the 30-day deadline. It would appear that the most serious compliance problem in the system is one of process.

Put another way, government institutions have it within their control to significantly reduce the number of complaints made to the Information Commissioner, merely by properly managing the "process" elements of the access to information program. With respect to the "judgement" elements (i.e. whether or not to invoke exemptions to justify refusals to disclose), institutions appear to be doing relatively well.

It is for this reason that this Commissioner will make it a priority to encourage, and work with, the President of the Treasury Board to implement solutions to the process-related problems that appear to be the main impediments to the full realization of the rights contained in the Act.

Table 4 provides a breakdown of the complaints completed this year by government institution. The "top ten" list of institutions against which complaints with merit were made is:

1.	Royal Canadian Mounted Police	109 of 132
2.	Canada Border Services Agency	50 of 52
3.	National Defence	42 of 74
4.	Health Canada	40 of 50
5.	Privy Council Office	37 of 56
6.	Public Works and Government Services Canada	32 of 57
7.	Department of Foreign Affairs and International Trade	31 of 38
8.	Canada Revenue Agency	28 of 389
9.	Transport Canada	21 of 27
10.	Environment Canada	20 of 31

A comparison of this "top ten" list of institutions with the list of the poorest performing "report card" institutions (see page 25) reveals a remarkably close parallel – as would be expected. This confirms the view that the basis of the report card grades (percentage of requests received in deemed refusal) is a remarkably good indicator of overall departmental performance under the Act.

Backlog Reduction Plan

Of the 1,417 complaints from individuals that will be carried over to next year, 1,052 are considered to be in "backlog" status because they were not completed within service standards. Last year, of the 1,427 investigations carried forward, 1,298 were in "backlog" status. The office, thus, was able this year to halt the growth of the backlog and reduce it by 246 investigations.

While it is true that the office has had some success this year in reducing its backlog of incomplete investigations, it was not able to fully implement its backlog reduction plan, for which additional investigators were approved in January 2006, for fiscal years 2006-07 to 2009-10. The reason for the delay in fully implementing the plan was a delay, outside the Commissioner's control, in securing the office accommodation necessary to house the new investigators.

The backlog reduction plan will become fully operational in 2007-08, as the required additional accommodation will be made available to the Commissioner, by Public Works and Government Services Canada, for occupancy by August/September 2007. The Commissioner remains confident that, by March 31, 2010, there will be no backlog of investigations, and incoming

complaints will be investigated within service standards. Until that time, however, investigation completion time statistics will continue to exceed service standards as old cases are closed and their lengthy duration are reflected in these statistics – as can be seen in Table 5.

Table 1 SUMMARY OF WORKLOAD

	April 1, 2005 to Mar. 31, 2006	April 1, 2006 to Mar. 31, 2007
Complaints from the Public		
Pending from previous year	1365	1427
Opened during the year	1381	1257
Completed during the year	1319	1267
Pending at year-end	1427	1417
Commissioner-Initiated Systemic Complaints		
Pending from previous year	0	423
Opened during the year	760	393
Completed during the year	337	579
Pending at year-end	423	237
Report Cards		
Full review	4	3
Follow-up review	12	14

Table 2 COMPLAINTS RECEIVED BY TYPE

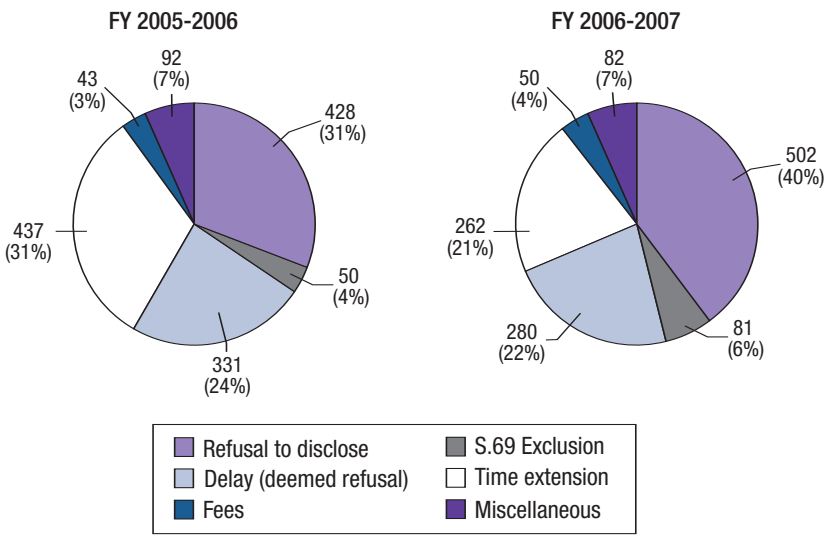

Table 3: COMPLAINT FINDINGS *(April 1, 2006 to March 31, 2007)*

	FINDING					
CATEGORY	**Resolved**	**Not Resolved**	**Not Sub-stantiated**	**Discon-tinued**	**TOTAL**	**%**
Refusal to disclose	227	-	129	59	415	32.7%
S.69 exclusion	14	-	13	4	31	2.4%
Delay (deemed refusal)	277	-	10	13	300	23.7%
Time extension	65	-	20	352	437	34.5%
Fees	12	-	12	5	29	2.3%
Miscellaneous	30	1	8	16	55	4.3%
TOTAL	**625**	**1**	**192**	**449**	**1267**	**100%**
100%	49.3%	0.1%	15.2%	35.4%		

Table 4: COMPLAINT FINDINGS *(by government institution) April 1, 2006 to March 31, 2007*

GOVERNMENT INSTITUTION	**Resolved**	**Not Resolved**	**Not Sub-stantiated**	**Discon-tinued**	**TOTAL**
Agriculture and Agri-Food Canada	14	-	6	-	20
Atlantic Canada Opportunities Agency	2	-	-	-	2
Business Development Bank of Canada	1	-	-	2	3
Canada Border Services Agency	50	-	1	1	52
Canada Council for the Arts	1	-	-	-	1
Canada Firearms Centre	8	-	2	1	11
Canada Mortgage and Housing Corporation	2	-	-	-	2
Canada Revenue Agency	28	-	8	353	389
Canadian Air Transport Security Authority	5	-	-	-	5
Canadian Food Inspection Agency	1	-	2	2	5
Canadian Forces Grievance Board	-	-	1	-	1
Canadian Heritage	8	-	6	3	17
Canadian Human Rights Commission	3	-	2	-	5
Canadian International Development Agency	3	-	1	-	4
Canadian Museum of Civilization	-	-	1	-	1
Canadian Radio-Television & Telecommunications Commission	2	-	-	1	3
Canadian Security Intelligence Service	4	-	1	2	7
Canadian Space Agency	-	-	2	1	3
Canadian Tourism Commission	-	-	1	-	1

Table 4: COMPLAINT FINDINGS *(by government institution) April 1, 2006 to March 31, 2007*

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Cape Breton Development Corporation	1	-	-	-	1
Cape Breton Growth Fund Corporation	1	-	-	-	1
Citizenship and Immigration Canada	15	-	13	1	29
Communications Security Establishment	1	-	-	-	1
Correctional Service Canada	17	-	11	2	30
Department of Foreign Affairs and International Trade	31	-	4	3	38
Enterprise Cape Breton Corporation	1	-	-	-	1
Environment Canada	20	-	9	2	31
Finance Canada	8	-	2	1	11
Fisheries and Oceans Canada	19	-	4	1	24
Hamilton Port Authority	3	-	-	-	3
Health Canada	40	-	4	6	50
Human Resources and Social Development Canada	3	-	1	3	7
Immigration and Refugee Board	12	-	-	-	12
Indian and Northern Affairs Canada	6	-	6	6	18
Indian Residential Schools Resolution Canada	1	-	1	-	2
Industry Canada	5	-	4	1	10
International Centre for Human Rights and Democratic Development	1	-	-	-	1
Justice Canada	17	-	7	7	31
Library and Archives Canada	5	-	12	-	17
Military Police Complaints Commission	1	-	-	-	1
National Capital Commission	1	-	-	-	1
National Defence	42	-	20	12	74
National Gallery of Canada	2	-	-	3	5
National Parole Board	-	-	2	-	2
National Research Council Canada	2	-	1	1	4
Natural Resources Canada	2	-	3	-	5
Office of the Correctional Investigator	1	-	-	-	1
Office of the Superintendent of Financial Institutions	-	-	-	1	1
Old Port of Montreal Corporation Inc.	-	-	-	1	1

Table 4: COMPLAINT FINDINGS *(by government institution) April 1, 2006 to March 31, 2007*

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Ombudsman National Defence and Canadian Forces	1	-	-	-	1
Parks Canada Agency	-	-	1	-	1
Privy Council Office	37	-	12	7	56
Public Safety Canada	17	-	3	1	21
Public Service Commission of Canada	1	-	-	-	1
Public Service Human Resources Management Agency	2	-	1	-	3
Public Works and Government Services Canada	32	-	10	15	57
Royal Canadian Mint	-	-	1	2	3
Royal Canadian Mounted Police	109	-	18	5	132
Service Canada	2	-	-	-	2
Social Development Canada	3	-	-	-	3
Statistics Canada	-	-	1	-	1
Transport Canada	21	-	5	1	27
Transportation Safety Board of Canada	1	-	-	-	1
Treasury Board Secretariat	2	1	2	-	5
Veterans Affairs Canada	1	-	-	1	2
Western Economic Diversification Canada	6	-	-	-	6
TOTAL	**625**	**1**	**192**	**449**	**1267**

Table 5 EFFECT OF BACKLOG ON TURNAROUND TIME

	Backlog Complaints				Recent Complaints				Overall			
	Standard		Difficult		Standard		Difficult		Standard		Difficult	
CATEGORY	Months	%	Months	%	Months	%	Months	%	Months	%	Months	%
Delay (deemed refusal)	7.99	6	10.39	5	3.95	9	5.85	3	4.83	15	8.48	8
Time extension	6.67	1	18.21	29	4.01	3	5.79	2	4.64	4	18.21	31
Fees	7.50	1	17.49	1	5.13	1	6.92	0	6.79	2	14.20	1
Miscellaneous	7.43	2	16.77	1	4.80	1	7.76	0	5.13	3	16.16	1
Subtotal - Admin Cases	7.89	10	18.21	36	4.11	14	5.82	5	4.90	24	18.21	41
Refusal to disclose	17.75	15	24.43	9	6.41	8	8.47	1	13.40	23	24.07	10
S. 69 exclusion	17.33	1	20.32	1	12.16	0	-	-	15.91	1	20.32	1
Subtotal – Refusal Cases	17.75	16	24.26	10	6.44	8	8.47	1	13.51	24	23.59	11
Overall	**13.55**	**26**	**18.21**	**46**	**4.67**	**22**	**5.82**	**6**	**7.89**	**48**	**18.21**	**52**

Notes: 1. Difficult Cases - Cases that take over two times the average amount of investigator time to resolve.
2. Refusal Cases take on average four times as much investigator time to resolve than administrative cases.

Table 6: GEOGRAPHIC DISTRIBUTION OF COMPLAINTS
(by location of complainant) April 1, 2006 to March 31, 2007

	Rec'd	Closed
Outside Canada	6	4
Newfoundland	12	9
Prince Edward Island	0	3
Nova Scotia	28	23
New Brunswick	7	7
Quebec	98	97
National Capital Region	606	463
Ontario	157	147
Manitoba	25	19
Saskatchewan	42	17
Alberta	36	42
British Columbia	185	431
Yukon	0	1
Northwest Territories	55	4
Nunavut	0	0
TOTAL	**1257**	**1267**

Note: Many of the complaints closed were received in previous fiscal years.

CHAPTER IV

Case Summaries

Case 1 – PCO Made Me Do It!

Background

In August of 2006, Finance Canada announced the launch of national web-based consultations on fiscal balance. The site was intended to provide Canadians with the opportunity to communicate their views on restoring fiscal balance to the department.

A requester made an access request in September 2006 to Finance Canada for information generated by the department as a result of the consultation process. Briefing materials, summary reports, analyses, and statistical reviews were encompassed by the request. The requester was not interested in knowing the names of persons who had sent their views to the website.

In response, Finance Canada refused to disclose the requested records because it intended to publish them, within 90 days of receipt of the access request. Section 26 of the *Access to Information Act* (the Act), authorizes government institutions to refuse to disclose requested information: "…if the head of the institution believes on reasonable grounds that the material…will be published by a government institution, agent of the Government of Canada or minister of the Crown within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it."

Taking into account the breadth of the access request, the requester doubted that Finance Canada had any serious intention of publishing all the requested records. He complained to the Information Commissioner.

Legal Issue

Did the delegated head of Finance Canada believe, on reasonable grounds, that the entirety of the requested records would be published within 90 days of the access request, when the decision to refuse disclosure was made?

In examining this issue, the Commissioner's investigator determined that some 13 pages of records had been located in response to the request. Those pages contained summaries of views from certain specific consultations groups.

Next, the investigator examined the content of a report on the consultation process that was published by Finance Canada near the end of January 2007

(some 120 days after the receipt of the access request). The final report did not contain the 13 withheld pages or the information contained in those pages. The final report contained more generalized summaries of the consultation process.

Finally, the investigator examined whether, at the time of the request, the delegated decision-maker believed, on reasonable grounds, that the requested records would be included in the published report and that the report would be published within 90 days.

Finance Canada, as it turns out, never had any intention or plan of its own to publish the withheld records; its officials said they invoked section 26 to refuse disclosure, on the advice of the Privy Council Office (PCO). After receiving the access request, Finance Canada asked for PCO's views, and PCO advised that:

> "…the material in the records will be included in its entirety or in part in an integrated communications report on the results of the fiscal balance consultations to be published by the Government of Canada within the time frame allotted by section 26."

This advice from PCO was followed without question or challenge by Finance Canada, despite the use of the "red flag" phrase in the PCO advice: "in its entirety or in part". That should have caused Finance Canada to question whether there was a reasonable basis for believing that all the withheld records would be published.

Consequently, the Commissioner concluded that section 26 had been improperly invoked by Finance Canada to refuse disclosure and asked the department to disclose the records in their entirety. The records were disclosed on February 1, 2007, some four and a half months after the request.

Lessons Learned

In situations where a government institution has no intention or plan of its own to publish requested records, but relies on assertions by another department that the records will be published, the receiving department bears the burden to do "due diligence" before invoking section 26. That means the receiving institution must determine that there are "reasonable grounds" to believe that the requested records: 1) will be published; 2) in their entirety; and 3) within 90 days of the receipt of the access request (subject to printing and translating).

Case 2 – Retrieving Archived E-Mail

Background

A requester asked the Business Development Bank of Canada (BDC) for copies of all e-mails generated by BDC's Vice-President of Public Affairs during the period May 1, 2000 to May 3, 2001. The BDC refused to retrieve, process, and disclose any of the e-mails, saying that: (1) the request was too unfocussed; (2) the VP's e-mails would likely be exempt from access as "personal information" or as confidential business information; and (3) it would take substantial computer-processing time and resources, involving significant fees to be borne by the requestor.

The requester complained to the Information Commissioner, pointing out that he was seeking access to e-mails generated on a work-related account, that the BDC had provided no specific fee estimate, and that it had made no effort to apply the exemptions contained in the Act, designed to protect any portion of the requested records containing personal information or confidential business information.

Early in the Commissioner's investigation, BDC realized that it had no legal basis for refusing to process the request. It determined that e-mails relevant to four of the twelve months covered by the request were retrievable from the Vice-President's desktop computer. They were processed and disclosed, subject to exemptions. The remaining eight months of e-mails had been electronically archived in a manner which BDC estimated would cost $17,400 and six weeks of work to retrieve.

Part of the technical challenge for BDC was that it had moved from an MS-Mail and Schedule System (Novel operating environment) to Microsoft Exchange and Outlook. In its fee estimate, BDC included the purchase of a computer, server, installation and set-up time, and the cost of a consultant for 31 working days to restore the e-mails from the back-up tapes.

Legal Issues

This case raised two legal issues: First, is a government institution required to retrieve electronically archived e-mails in response to an access request? Second, what costs incurred in retrieving e-mails may a government institution charge to the access requester?

Issue 1

With respect to the first issue, the answer, in the Commissioner's view, depends on whether or not retrieving the e-mails would unreasonably interfere with the operations of the institution. This position flows from the wording of section 3 of the *Access to Information Regulations* (the Regulations) which provides:

> "For the purpose of subsection 4(3) of the Act, a record that does not exist but can be produced from a machine readable record under the control of a government institution need not be produced where the production thereof would unreasonably interfere with the operations of the institution."

The Commissioner dispatched his own computer expert to the BDC to make an independent assessment of the "burden" which would be placed on the BDC were it to be required to retrieve the archived e-mails.

The Commissioner's expert examined the BDC's plan and determined that BDC already possessed all the necessary hardware and software resources to retrieve the e-mails, that all of the hardware used to back-up the e-mail servers were still in existence, and that the technical analyst who had initially installed and configured the MS-Mail and Exchange 5.5 server was still employed with the BDC. The Commissioner's expert estimated that the retrieval of the e-mails could be accomplished in less time than the 31 days estimated by BDC. Consequently, the Commissioner could not accept the BDC's assertion that retrieval of the e-mails would unreasonably interfere with BDC's operations.

Issue 2

With respect to the second issue, the Commissioner informed BDC of his view that the fee estimate was unjustifiably high, not only for the technical reasons just outlined, but for legal reasons, as well.

The Commissioner reviewed the Regulations and could find no authority for charging fees based on labour and capital costs involved in retrieving electronic records. However, the Commissioner concluded that BDC could assess fees to the requester in the amount of $10 per hour of time spent by staff members to retrieve the records, per subsection 7(2) of the Regulations. The Commissioner's view, in this regard, followed comments made by Muldoon J. at para. 21 of his decision in the case of *Blank* v. *Canada (Minister of Environment)* [2000] F.C.J. No. 1620.

BDC Response

With the benefit of the Commissioner's views on these issues, BDC agreed to proceed to retrieve and process the archived e-mails. As well, it recalculated its fee estimate pursuant to subsection 7(2) of the Regulations – it dropped from $17,400 to $2,325.

The Commissioner informed the requester that he considered the revised fee to be reasonable, and the case was resolved on that basis.

Lessons Learned

Access requests requiring institutions to recover archived e-mail pose significant challenges. As a matter of law, it will be very difficult for an institution to simply refuse to retrieve the e-mails, because so doing would unreasonably interfere with the institution's operation. In the *Blank* case (previously cited), for example, it was estimated that retrieval of the e-mails would involve 575 hours of work, yet the institution did not claim unreasonable interference.

Rather, the prudent course is to properly assess fees – yet another challenge. The Regulations do not specifically authorize fees for recovering archived e-mail, and the jurisprudence supports the approach of charging such fees pursuant to subsection 7(2) of the Regulations (which refers to non-computerized records) rather than pursuant to subsection 7(3) (which refers to machine readable records).

As confounding as that may be, the jurisprudence stands uncontradicted and was the Commissioner's guide in this case.

Case 3 – Offender Privacy v. Public Interest Disclosure

Background

The representative of a non-profit advocacy group supporting victims of crime asked Correctional Service Canada (CSC) for access to the report of a Board of Investigation into the release and supervision of an offender who was charged with second-degree murder while on statutory release status. Most of the report was withheld, pursuant to subsection 19(1) of the Act, in order to protect the privacy of the offender.

The requester was surprised by this response as, in the past, Board of Investigation reports into crimes allegedly committed by offenders while on release status had been disclosed on the basis that the public interest in disclosure clearly outweighed any invasion of privacy that could result. The requester complained to the Information Commissioner and asked him to determine why, in this case, the offender's privacy was given primacy over the public interest in disclosure.

Legal Issue

Did CSC properly exercise its discretion to disclose personal information in the public interest, pursuant to the related provisions of paragraph 19(2)(c) of the Act and subparagraph 8(2)(m)(i) of the *Privacy Act*?

Paragraph 19(2)(c) of the Act authorizes government institutions to disclose personal information if disclosure is permitted by section 8 of the *Privacy Act*. Subparagraph 8(2)(m)(i) of the *Privacy Act* provides that personal information may be disclosed:

> "(m) for any purpose where, in the opinion of the head of the institution
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure…"

The Commissioner's investigation determined that CSC had, indeed, disclosed Board of Investigation reports in the past, pursuant to subparagraph 8(2)(m)(i) of the *Privacy Act*. The investigation also determined that, at some point in the Fall of 2002, the then Privacy Commissioner of Canada had written to the Commissioner of CSC, expressing a concern about the disclosure of Board of Investigation reports in the public interest.

In response to the Privacy Commissioner's concerns, CSC revised and restricted its disclosure policy with respect to Board of Investigation reports. CSC adopted a policy, in late November 2002, to authorize disclosure of such reports in the public interest, only if the requester is a victim of crime, an organization acting with the written consent of a victim of crime, or a family member of a victim of crime.

The Information Commissioner was mindful of the fact that the discretion to disclose offender personal information clearly resides with the head of CSC. However, he was concerned that the strict policy governing the application of subparagraph 8(2)(m)(i) of the *Privacy Act* might constitute an improper fettering of the head's discretion.

The Information Commissioner asked CSC to review the facts of this case carefully to ensure that the discretion to disclose in the public interest was exercised on a case-specific basis, taking into account all relevant factors, both pro- and con-disclosure. In other words, the Information Commissioner needed to be satisfied that the discretion had been properly exercised and that the decision had not been dictated by the policy.

CSC agreed to reconsider the matter. Some additional portions of the Board of Investigation report, containing details which had already been reported in the

media, were disclosed. Portions remained withheld, however, to protect the offender's privacy. Secrecy was not maintained solely on the basis of the policy but also because of a specific circumstance of this case – the offender had been apprehended and incarcerated and, hence, no longer posed a danger to the community.

The Commissioner was satisfied that the discretion to disclose (or not disclose) in the public interest, had been properly exercised and found the complaint to be resolved.

Lessons Learned

Institutions have an obligation, before withholding personal information under subsection 19(1) of the Act, to consider the exceptions to the exemption set out in subsection 19(2). One of these exceptions, paragraph 19(2)(c), requires the proper exercise of a discretion, being a decision as to whether or not the public interest in disclosure clearly outweighs any resulting invasion of privacy.

Parliament intended that this provision not become a routine basis for privacy invasion – that is why the phrase "clearly outweighs" appears in subparagraph 8(2)(m)(i) of the *Privacy Act*. Further evidence of Parliament's intention is that the Privacy Commissioner must be notified of any disclosures of personal information in the public interest.

Yet, in their efforts not to overuse the public interest override, institutions must take care not to refuse to exercise the discretion Parliament gave to them, or to restrict, or fetter their ability to properly exercise the discretion through the adoption of rigid or narrow policies limiting the situations in which the public interest override will be invoked. Rather, the presence of the discretionary authority, as a matter of law, requires government institutions to exercise the discretion in good faith, on a case-by-case basis, taking into account the specific information at issue and all relevant factors weighing both for and against disclosure.

Case 4 – Who Worked During the Strike?

Background

An individual asked the Canada Revenue Agency (CRA) for the weekly time (attendance) sheets for the employees of CRA's Charities and Registered Pension Plans Directorates, covering a period during which members of the Public Service Alliance of Canada were on strike. The request gave senior officials of

CRA the jitters; two assistant CRA Commissioners decided that the request should be denied, but only after some eleven weeks of internal rumination.

The requester complained to the Information Commissioner, arguing that information about employee attendance is work-related and does not qualify for privacy protection.

Legal Issue

Is information about employee attendance at work during strike periods "personal information" which qualifies for exemption from the right of access under subsection 19(1) of the Act?

The investigation confirmed that CRA had received requests in the past for access to employee time sheets and had always disclosed them, with the exception of employee identification numbers and descriptions of types of leave taken. CRA explained its deviation in this case from usual practice in order to protect the privacy of union employee choice to work during strikes. CRA took the view that reporting for work may be viewed as an expression of the employee's views regarding the need for solidarity between employees during a strike.

The Information Commissioner was guided by the decision of the Supreme Court of Canada in *Dagg* v. *Canada (Minister of Finance)*, 2 S.C.R. 403, in which it was decided that information about an employee's presence in the workplace is not "personal information" for the purposes of subsection 19(1) of the Act, by virtue of paragraph 3(j) of the definition of "personal information" contained in the *Privacy Act*.

Paragraph 3(j) removes from the definition of "personal Information":

> "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 including …"

The Information Commissioner communicated his views to the Commissioner of the CRA. As a result, CRA disclosed the time sheets to the requester, withholding employee identification numbers and descriptions of types of leave taken. The Information Commissioner considered the matter to be resolved.

Lessons Learned

Government employees have less privacy protection under the *Access to Information Act* and *Privacy Act* than do other individuals. Information about an identifiable government employee, which relates to the employee's position or functions, may not be kept secret in order to protect employee privacy. On the

other hand, some evaluative information about the manner in which government employees perform their duties will receive privacy protection.

No access to information issue has had more judicial guidance than has this issue of how much privacy protection can be accorded to information about public officials. The Supreme Court of Canada has decided two cases on this issue. In addition to the Dagg case, cited above, the reader is referred to *Canada* (*Information Commissioner)* v. *Canada (RCMP Commissioner,)* [2003] 1 S.C.R. 66.

Case 5 – Obtaining Access to Expense and Travel Claims of Ministers and Exempt Staffers

Background

Since the coming into force of the Act on July 1, 1983, a number of requests have been made to government institutions seeking access to the travel and expense claim records of Prime Ministers, ministers, and members of ministerial exempt staff. Until March 30, 2001, it was the position of the President of the Treasury Board, as the minister designated to give policy and interpretive guidance to government concerning the Act (see paragraph 70(1)(c)), that subsection 19(1) of the Act could not be relied upon to justify a refusal to disclose the travel and expense claims (reimbursable from public funds) of the Prime Minister, ministers, and members of ministerial exempt staff. Travel and expense claims records were routinely released in the same manner and to the same extent as were travel and expense claim records of all other public servants. Some minor severances were permitted to protect such items of personal information as home telephone numbers and credit card numbers.

That long-standing policy and practice changed as of March 30, 2001, with the issuance by Treasury Board Implementation Report No. 78. Under the new policy, requests for the travel and expense claim records of the Prime Minister, ministers, and ministerial exempt staff were to be denied, while such requests for other public servants were, as before, to be granted. The legal justification for refusal, according to the new policy, is subsection 19(1) of the Act, as a result of a broadened interpretation of "personal information" and a narrowed interpretation as to whether ministers and their exempt staffers are "officers or employees" of the departments over which they preside – the legal view of the previous government being that they are not.

A frequent user of the Act complained to the Information Commissioner that IR No. 78 constitutes an improper interference with the pre-existing right of access to the travel and expense claim records of Prime Ministers, ministers, and ministerial exempt staff.

Legal Issue

Are ministers, and ministerial exempt staffers, officers or employees of departments over which the ministers preside? If so, then IR No. 78 is wrong, and travel and expense claims of ministers should be disclosed under the Act.

The investigation confirmed that the position adopted in IR No. 78, concerning the status of records held in ministers' offices, was a departure from long-standing Treasury Board interpretation policy. Since the access law came into force, the policy has been that the decision, whether or not records held in ministers' offices are subject to the Act, turns on an assessment of the content of the records. If the records contain personal and political (constituency) information relating to the minister, they are not considered to be "departmental" records covered by the Act. All other records held in ministers' offices that relate to the administration or operation of the department are considered to be departmental records and covered by the right of access. This policy is clearly articulated in the 1993 revision of the Treasury Board ATIP manual, Chapter 2-4, page 5. It is also clearly articulated in the January 2001 revision to the Treasury Board's Guidelines for Ministers' Offices, Chapter 10-2.

The true significance of this policy change can only be appreciated when one takes into account ministerial practice of keeping the actual receipts and detailed breakdown of expenses in their offices, while providing "the department" with a bare-bones summary only. This practice stems from a letter from the Minister of Finance dated December 5, 1963, which refers to a Cabinet direction asking ministers to submit to the department, as their travel claim, a statement, on a monthly basis, which includes:

- the period covered by the trip and the places visited;
- transportation expenses; and
- other expenses (such as accommodations and meals), along with a signed certification that the expenditures were incurred on official government business.

Thus, the long-standing practice of keeping expenditure details in the minister's office, together with the new view that no records held in ministers' offices are

covered by the right of access, had the effect of putting a veil of secrecy over the details of ministerial travel expenses.

The Commissioner noted that the blanket of secrecy IR No. 78 placed over ministerial expense claims ran contrary to the Receiver General Directive that requires that ministerial travel expenses be made public in order to "enhance ministerial accountability for travel expenses". Indeed, the Receiver General Directive requires the Treasury Board Secretariat to make public "upon request" the reports concerning ministerial travel expenses. As well, he noted the fact that paragraph 8(2)(a) of the *Privacy Act* authorizes disclosure of personal information without consent "for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose". Since a principal reason for keeping receipts and making claims when public money is spent is to ensure the transparency of the transactions and accountability of the officials, the Commissioner reasoned that, even if privacy rights were at play, disclosure would be authorized by the *Privacy Act*.

This obligation, for reasons of accountability, to be transparent about the use of public funds by ministers is deeply imbedded in government policy and democratic tradition. All the more remarkable, then, that IR No. 78 fails to even mention it or to suggest that there is a strong public interest in disclosure, clearly overriding any privacy interest ministers may have in their expense records. All the more remarkable, too, that IR No. 78 fails to advise government that disclosure without consent is authorized by paragraph 8(2)(a) of the *Privacy Act*.

Officers or Employees

In IR No. 78, the Treasury Board adopts the view that ministers (and their staff) are not "officers or employees" of the government institution over which they preside. This view runs counter to the fundamental design of the British Parliamentary model under which departments are extensions of the authority of the minister and cannot exist apart from the minister. This reality is reflected in the constituent statutes of departments and in the *Financial Administration Act*. The latter statute makes it explicit that a minister of the Crown is included in the definition of "public officer". As well, the *Concise Oxford Dictionary of Current English* includes "a sovereign's minister" within the definition of "officer". Most important, the access law itself stipulates that the minister is the head of the government institution over which he presides for the purposes of the rights and obligations contained therein.

Consent

The Commissioner noted that the restrictive view contained in IR No. 78 proved impossible for governments to justify to taxpayers. Almost one year after this

implementation report was issued, the then Prime Minister told his ministers that they and their staff should not refuse consent for disclosure of their expense claim records. The President of the Treasury Board informed the House of Commons on March 15, 2002, as follows:

> "While respecting the *Access to Information Act* and the *Privacy Act*, the Prime Minister has asked all his ministers and their political staffs to release information related to their expense records."

This unambiguous direction to his ministers meant that IR No. 78 had to be clarified to put emphasis on the process of obtaining consent. An information notice (No. 2002-04, dated March 18, 2002) served this purpose.

The result of all this is that, in some ways, the matter has come full circle – Canadians may make access requests for ministerial expense records, and the records will be disclosed as in the past. However, in other ways, much has changed. Previously, Canadians were given access as a matter of right; now, they are given access only by the grace and favour of ministerial consent. Second, Canadians do not have access to any ministerial expense records that ministers choose to keep in their own offices – an element of caprice that is entirely at odds with the notion of accountability.

Conclusions

The Commissioner concluded that the Treasury Board policy on the disclosure of ministerial expenses is based on an erroneous view of the law. In his view, the proper legal position is that ministerial expense records do not fall within the definition of "personal information" because:

1. they are not about an individual but, rather, about government business; and
2. they fall within 3(j) of the *Privacy Act*.

The Commissioner also concluded that, even if the expense records are "personal", paragraph 19(2)(c) of the Act authorizes disclosure by reference to the public interest override contained in subparagraph 8(2)(m)(i) of the *Privacy Act* and the provisions of paragraph 8(2)(a) of the *Privacy Act* relating to original and consistent uses.

Thus, the Commissioner considered the complaint to be well-founded and recommended to the President of the Treasury Board that IR No. 78 and Information Notice 2002-04 be withdrawn and that a new implementation report be issued in conformity with this finding. The minister has not responded to the recommendation; therefore, this complaint remains unresolved.

Lesson Learned

The issue of whether or not travel and expense claims of ministers and ministerial exempt staff are accessible under the Act, or whether they may only be disclosed with the consent of the claimants, remains unresolved. The Information Commissioner holds one view; the government holds a contrary view.

Cases currently before the courts, concerning the accessibility of records held in ministers' officers, may help resolve the issue. When judicial guidance is given, it will be reported in a future annual report.

Case 6 – Does a "Leak" Open the Door to Access?

Background

A requester made a request to the Canada Border Services Agency (CBSA) for copies of records from its Field Operations Support System (FOSS) containing information about 125 individuals living in Canada, known to have committed, or suspected by CBSA of committing, offences in their country of origin.

Some 650 pages of records were identified by CBSA as responsive to the request. CBSA refused to disclose any indication in the records of the specifics of their concerns about the individuals. As well, it withheld the names, date of birth, departmental identification, and file numbers associated with each individual. CBSA relied on exemptions in the Act designed to protect privacy (subsection19(1)) and investigations (paragraph 16(1)(c)).

The requester felt that he, and other Canadians, had a right to know the names of war criminals in Canada, especially since some such names are already in the public domain, having appeared in a newspaper report. He complained to the Information Commissioner.

Legal Issue

Did CBSA have the legal authority under subsection 19(1) to refuse disclosure of the requested records? The requester did not complain about CBSA's decision to rely on paragraph 16(1)(c) to withhold information to protect ongoing investigations.

The Commissioner's investigator first made efforts to determine whether any of the withheld information was in the public domain. Paragraph 19(2)(b) of the Act authorizes disclosure of personal information if it is publicly available. In fact, some of the withheld information had appeared in the print media. The investigation confirmed, however, that the source was a report leaked from

the CBSA and not released in a lawful manner. The Commissioner did not consider that an unauthorized leak of personal information could justify loss of privacy rights.

Second, the investigation considered whether there might be a public interest in disclosure clearly outweighing any privacy invasion that might result. Some of the individuals were in hiding, being pursued by an Immigration Task Force set up to determine their whereabouts and deport them to face justice in their country of origin. Some of the individuals had outstanding warrants against them. The Commissioner felt, thus, that there was a public interest in disclosure, to facilitate locating individuals who are in hiding from authorities and to assist in protecting the public from individuals who may have committed offences.

However, CBSA argued that the public interest did not "clearly outweigh" the potential negative effects from disclosure. First, some of the outstanding warrants had been issued because the individual missed a hearing or removal date and not because a criminal offence had been committed. Disclosure could subject these individuals to undeserved or unwarranted suspicion. Concern was expressed, too, that disclosure might result in civilian vigilante actions, some of which might be directed towards entirely innocent persons having the same names as those suspected of war crimes. Further, CBSA argued that the individuals do not pose a threat to the safety of Canadians – their efforts in Canada are focused on staying below the law's radar by not committing offences in Canada.

The Information Commissioner agreed that the CBSA had carefully exercised its discretion as to whether or not this personal information should be disclosed in the public interest. On that basis, he found the complaint to be not substantiated.

Lessons Learned

When applying paragraph 19(2)(b), government institutions may consider whether the personal information is publicly available as a result of an unauthorized or improper disclosure. When it comes to protecting privacy, institutions should not exacerbate a privacy invasion resulting from a previous unauthorized disclosure, by making further disclosures under paragraph 19(2)(b) of the Act. Two wrongs do not make a right!

When institutions apply the public interest override (contained in paragraph 19(2)(c) of the Act, by reference to subparagraph 8(2)(m)(i) of the *Privacy Act*), they must exercise their discretion properly by considering and appropriately weighing all relevant factors for and against disclosure. If that is done, the

Commissioner will not attempt to substitute his view as to what the final outcome should be.

Case 7 – Don't Forget to Check the Internet

Background

A requester asked Fisheries and Oceans Canada (F&O) for copies of economic analyses covering the period May 12 to September 15, 2004. F&O disclosed some of the requested records but withheld 205 pages in their entirety under section 21 of the Act. Section 21 permits records to be withheld to protect the internal advice-giving and deliberative processes. The complainant was concerned that so much secrecy had been maintained with respect to economic analysis records, especially without any portion having been released.

Legal Issues

The exemption contained in section 21 is discretionary in nature. Did F&O properly exercise discretion in withholding 205 pages in their entirety? Did F&O withhold factual and background information under section 21 and, if so, was it authorized to do so?

With respect to these issues, the Commissioner's investigator first reviewed whether any of the information withheld was already in the public domain. Many of the records withheld in their entirety were found on F&O websites and had been posted on the web prior to the department's receipt of the access request and its response to the access request. One 48-page document, which had been withheld, was found on the Organization for Economic Cooperation and Development website.

The investigation also determined that most of the withheld information was purely factual – revealing no advice, recommendations, accounts of consultations/deliberations, negotiation positions, or plans.

The Commissioner took the view that most of the withheld information did not qualify for exemption under section 21 of the Act, and that, even if it did, there was no evidence that F&O had properly exercised its discretion nor made serious effort to determine what portions of the withheld records had already been disclosed to the public.

In response to the Commissioner's views, most of the 205 withheld pages were disclosed by F&O. The Commissioner agreed that 37 pages could remain withheld in their entirety, and portions of eight pages could remain secret.

On that basis, the investigation was concluded and the complaint recorded as resolved.

Lessons Learned

Before withholding records under section 21, to protect the confidentiality of the internal advice-giving and deliberative processes, government institutions must ensure that purely factual and background information is severed and disclosed. Even then, with respect to the non-factual material, the discretion contained in the provision must be properly exercised. One important factor to be considered and weighed, in the exercise of the discretionary power to refuse access, is whether any of the information is already in the public domain. Departments should not ignore this step, or wait to perform it, until after a complaint is made to the Commissioner.

Case 8 – When Informal Access is More Expensive than Formal

Background

An individual asked Library and Archives Canada (the Archives) for access to the World War II records of two servicemen killed in action. The Archives denied the request on the basis that the records were available through the Archives' Research Services Division (subject to payment of a photocopying charge). In the Archives' view, section 68 of the Act excludes from the right of access records which are otherwise available to the public.

The requester was not satisfied with the Archives' position. In his view, he should have the right to obtain the records under the Act, within the 30-day response period, for a fee of $5, a photocopy charge of $0.20 per page, and only pay for the pages the requester is interested in. He objected to going through the Research Services Division, where there is no response deadline, the photocopy charges are $0.40 per page for regular service and $0.80 per page for rush service, and where the requester must pay for all records in the file.

Legal Issue

May the Archives deny, under section 68 of the Act, requests for access to records which have been moved to its Research Services Division, for disclosure upon payment of a fee, set by Order-in-Council, which is higher than the fee permitted by the Act's Regulations?

The investigation determined that the Archives' intentions were honourable – it wished to restrict the formal access process to information that requires review against the Act's exemptions before disclosure. Any other records that have been previously reviewed and found not subject to any restrictions on disclosure (such as the "Killed in Action" files) would be provided to the public informally, through the Archives' normal services for reference and consultation, at set fees for copies.

The Commissioner had to be guided by the words of section 68, which provide that the Act does not apply to "published material or material available for purchase by the public".

The Commissioner did not consider that the "Killed in Action" files had been "published" when transferred to the Archives' Research Services Division. As well, he did not consider that the photocopy charges met the test of "available for purchase by the public". In coming to this position, the Commissioner took into account the purpose section of the Act (section 2), which specifically states that no portion of the Act (including section 68) is intended to limit "in any way" access to the type of information that is normally available to the general public. He also took into account that the fee regulations under the Act have set out the permitted charge for photocopies; he considered that it would be inconsistent with this scheme to allow government institutions to set a high photocopy charge for classes of records and, thereby, remove those classes of records from the coverage of the Act.

The Commissioner applauded the Archives' efforts to make access as informal and routine as possible, yet, he concluded that the access requester retained the choice to have his access request processed formally under the Act.

While the Archives respectfully disagreed with the Commissioner's legal interpretation, it provided a copy of the requested records to the requester, free of charge. On that basis, the Commissioner recorded the matter as resolved.

Lessons Learned

The Commissioner encourages government institutions to explore ways to disclose records informally, outside the *Access to Information Act*. However, institutions are cautioned against doing so in ways which make access more expensive, or reduce the level of service which would have been available, if the request had been formally processed under the Act.

Case 9 – What Did CSIS Spend in Dealing with the Maher Arar Matter?

Background

An individual asked the Canadian Security Intelligence Service (CSIS) for records showing how much CSIS had spent on the Maher Arar matter. In response, CSIS denied the request pursuant to subsection 15(1) of the Act, which provides:

> "The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to the ... detection, prevention or suppression of subversive or hostile activities ..."

The requester could not understand why CSIS would withhold information that taxpayers have a right to know; he appealed to the Information Commissioner.

Legal Issue

Could disclosure of the requested records "reasonably be expected" to be injurious to the work of CSIS? Determining the answer to this question required the Commissioner to obtain an explanation from CSIS, on whom the legal burden rests for justifying reliance on subsection 15(1).

CSIS argued that giving any details as to how it allocates its resources could give insight into its operational priorities. In CSIS' view, a potential hostile agency might determine, through a series of access requests, the level of resources deployed to particular areas of counter-terrorism activity.

Given the general nature of the records at issue, the very public context of the O'Connor inquiry, and the detailed information already public about CSIS activities with respect to Maher Arar, the Commissioner was not persuaded that the injury test contained in the exemption had been met. CSIS reconsidered the matter in light of the Commissioner's concerns and decided to disclose the previously withheld records.

On that basis, the Commissioner recorded the matter as resolved.

Lesson Learned

There are many government institutions engaged in security, intelligence, policing, and enforcement activities, and they often have legitimate concerns about releasing any information which would give insight into their operational plans, priorities, and capabilities.

However, these agencies must be alert to their obligation to remain accountable through as much transparency as possible. Thus, when requests are received about the expenditure of public funds, these institutions should not follow an inflexible policy of denial; rather, they should consider all such requests on a case-by-case basis. And when subsection 15(1) is being considered as a basis for saying "no", it must be borne in mind that speculative fears of possible injury from disclosure are insufficient. There must be a reasonable expectation, at the level of a probability, that injury to the intelligence or enforcement activity will result.

Index of the 2006-2007 Annual Report Case Summaries

Section of the Act	Case No.	Description
4(3)	(02-06)	Retrieving Archived E-Mail
11	(02-06)	Retrieving Archived E-Mail
15(1)	(09-06)	What Did CSIS Spend in Dealing with the Maher Arar Matter?
19(1)	(03-06)	Offender Privacy v. Public Interest Disclosure
	(04-06)	Who Worked During the Strike?
	(05-06)	Obtaining Access to Expense and Travel Claims of Ministers and Exempt Staffers
	(06-06)	Does a "Leak" Open the Door to Access?
21	(07-06)	Don't Forget to Check the Internet
26	(01-06)	PCO Made Me Do It!
68	(08-06)	When Informal Access is More Expensive than Formal

A cumulative index of Annual Report case summaries from 1993-1994 on is available on request or from the Information Commissioner's website.

CHAPTER V

The *Access to Information Act* in the Courts

A fundamental principle of the *Access to Information Act* (the 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. No such application for review was filed by the Information Commissioner in this reporting year.

A. Cases Completed

1) *Canada (Attorney General)* v. *H.J. Heinz Co. of Canada Ltd. and Canada (Information Commissioner)*

2006 SCC 13, Supreme Court of Canada, Majority Judgement: Deschamps J. (Binnie, Fish and Abella JJ.) Dissent: Bastarache J. (McLachlin C.J.C. and LeBel J.), April 21, 2006 (See Annual Report 2005-2006, p. 69 for more details)

Nature of Proceedings

This was an appeal brought by the Attorney General of Canada of a judgement of the Federal Court of Appeal, which upheld the decision of the Application Judge and allowed a third party, H.J. Heinz Co. (Heinz), to raise an exemption, other than section 20 (commercial confidentiality), in the context of a proceeding brought pursuant to section 44 of the Act. The Information Commissioner was an intervener before the Federal Court of Appeal and, again, before the Supreme Court of Canada.

Factual Background

On June 16, 2000, a request for information was made to the Canadian Food Inspection Agency (CFIA). Pursuant to section 27 of the Act, CFIA advised the third party, Heinz, of its intention to disclose information requested under the Act

and, after receiving representations from Heinz, informed Heinz of its intention to disclose requested records, subject to certain redactions.

In turn, Heinz applied for judicial review of CFIA's decision to release the requested records pursuant to section 44 of the Act. In its Notice of Application, the sole exemption raised by Heinz was the purported application of section 20 of the Act. Subsequently, and after obtaining a broad confidentiality order, Heinz made written and oral arguments raising, in addition to section 20, the personal information exemption found at section 19.

The Application Judge concluded that portions of the records intended to be disclosed be redacted based on subsection 20(1) of the Act. However, more notable, is the Application Judge's conclusion that a third party may invoke section 19 as a basis for refusal within the context of a section 44 proceeding. In reaching this conclusion, the Application Judge reasoned that the decision in *Siemens Canada Ltd.* v. *Canada (Minister of Public Works and Government Services)* (2002), 21 C.P.R. (4th) 575 (F.C.A.) was binding.

On appeal, Nadon J.A. refused to overturn the decision in Siemens, deciding that the decision was not "manifestly wrong" [para. 56]. He therefore dismissed the appeal.

Issues Before the Court

At issue is whether a third party, within the meaning of the Act, may raise an exemption other than subsection 20(1) within the context of a section 44 application for judicial review.

Findings

The majority decision, in a 4:3 split, determined that a third party may raise the "personal information" exemption in the context of a proceeding commenced under section 44 of the Act. In reaching this decision, Justice Deschamps, for the majority, rejected both the Information Commissioner's and the Attorney General's arguments that the review mechanism in section 44 of the Act is limited to a review of a government institution's decision to release information which the "third party" contends ought not to be released because it consists of "business information".

The Information Commissioner's and Attorney General's position was based inter alia on the fact that the special notice given to third parties under section 27 of the Act arises only as a result of the possible application of subsection 20(1) to records intended to be released by the head of a government institution. It was argued that the scope of review in a section 44 proceeding ought to similarly be limited to

the issue of whether records ought to be withheld based on subsection 20(1) of the Act. Moreover, as was pointed out by the Attorney General, to allow third parties to raise the section 19 exemption in a proceeding commenced under section 44 would afford greater rights to "third parties" receiving notice pertaining to the possible application of subsection 20(1), than parties who are not deemed "third parties" under the Act.

Although Justice Deschamps acknowledged that "the right to notice accorded to third parties follows logically from the specific nature of the confidential business information exemption . . .", she held that the right to notice " . . . does not limit the right of review provided for in section 44" [para. 56]. She reasoned that, because sections 28, 44, or 51 of the Act do not explicitly state that a third party is precluded from raising extra-section 20 exemptions, a third party must be capable of raising other exemptions in a section 44 application for review. Justice Deschamps stated:

> "What matters is not how the reviewing court became aware of the government's wrongful decision to disclose personal information, but the court's ability to give meaning to the right to privacy. A reviewing court is in a position to prevent harm from being committed and the statutory scheme imposes no legal barrier to prevent the court from intervening" [para. 2].

Stressing the mandatory nature of the subsection 19(1) exemption and the inadequacy of other avenues of challenging a government institution's decision to disclose "personal information", the Court concluded that a section 44 proceeding is "the only direct access to the effective protection afforded by a reviewing court" [paras. 45 - 46]. Justice Deschamps held:

> "Where it has come to the attention of a third party that a government institution intends to disclose information which will violate the statutorily mandated, quasi-constitutional privacy rights of an individual, the third party must have the right to raise this concern upon judicial review. A contrary ruling would force individuals to wait until the personal information has been disclosed and the (potentially irreversible) harm done before looking to the Privacy Commissioner and the courts for a remedy" [para 63].

In the dissenting opinion, Justice Bastarache noted that a section 44 proceeding constitutes the sole exception to a legislative scheme which establishes the Information Commissioner's investigation as a requisite first step in a two-tiered level of independent review of government decisions concerning the disclosure of records requested under the Act [para. 80]. It is only in the context of a section 44 proceeding that ". . . a third party who has received notice that the government institution intends to disclose the record can apply directly to the court . . ." The notice, in turn, is based exclusively on the possibility that confidential business information [subsection 20(1) information] is contained in records intended to be

disclosed: "[t]here is no notice provision prior to the disclosure of a requested record that might contain exempted personal information".

Justice Bastarache's interpretation of the scope of section 44 is based on a review of the *Access to Information Act* and *Privacy Act* as a whole. He states:

> "The structure of the Access Act and of the Privacy Act suggests that Parliament intended that the protection of personal information be assured exclusively by the Office of the Privacy Commissioner. Equally important is Parliament's desire to have all judicial reviews under the Acts preceded by an impartial investigation conducted by the Information Commissioner. The only exception provided in the statutory scheme is where confidential business information potentially appears in the requested record" [para. 97].

Although Justice Bastarache acknowledges that neither the Information Commissioner nor the Privacy Commissioner have the decision-making or remedial capacity to prevent the unlawful disclosure of a requested record (para. 104), he concluded that this did not warrant circumventing Parliament's intent that judicial review of decisions to disclose records under the Act be limited to the application of third-party business information. As an aside, Justice Bastarache noted the possibility that a third party might be able to raise the section 19 exemption for personal information under section 18.1 of the *Federal Courts Act*.

Judicial Outcome

The appeal was dismissed with costs.

2) *Canada (Minister of Justice)* v. *Blank, the Attorney General for Ontario, the Advocates' Society and Canada (Information Commissioner)*

2006 SCC 39, Supreme Court of Canada, September 8, 2006 (See Annual Report 2005-2006, pp. 69-72 for more details)

Nature of Proceedings

This was an appeal to the Supreme Court of Canada from the decision of the Federal Court of Appeal in *Blank* v. *Canada (Department of Justice)*, 2004 FCA 287.

Factual Background

The proceedings before the Supreme Court of Canada arose as a result of a refusal by the Minister of Justice (hereafter, "the Crown") of a request for records, pertaining to the Crown's prosecution of regulatory charges laid against the access requester, Mr. Sheldon Blank, the owner and operator of a pulp and paper mill, and his company, Gateway Industries.

In 1995, the Crown had laid thirteen (13) charges against Mr. Blank and his company for regulatory offences under the *Fisheries Act*. These charges were subsequently quashed in 1997 and 2001. In 2002, the Crown laid new charges by way of indictment. However, these charges were stayed prior to trial, whereupon the Crown declared that it would no longer pursue the prosecution. As a result of the Crown's prosecution, Mr. Blank and his company sued the federal government for damages for alleged fraud, conspiracy, perjury, and abuse of prosecutorial powers.

Mr. Blank, both in the penal proceedings and under the *Access to Information Act*, attempted to obtain all records pertaining to the prosecutions of himself and his company. In response, the Crown furnished only some of the requested information. The basis for the Crown's refusal to disclose the records sought included a claim that the records were subject to "solicitor-client" privilege and therefore exempted under section 23 of the Act.

After a complaint to the Information Commissioner concerning the Crown's response to his access requests, some of the withheld information was released to Mr. Blank. Further information, however, continued to be withheld, primarily based on the Crown's continued contention that non-disclosure was justified under section 23 of the Act. The Information Commissioner recommended to the Crown that portions of these records also be released and, upon the Crown's refusal to heed that recommendation, advised Mr. Blank that the Information Commissioner would, with his consent, pursue the matter in the Federal Court pursuant to section 42 of the Act. In the alternative, the Information Commissioner advised Mr. Blank of his right to seek judicial review of the Crown's access refusal on his own behalf pursuant to section 41 of the legislation. Mr. Blank opted for the latter means of recourse. On November 8, 2000, he filed his Notice of Application for judicial review of the Crown's access refusal pursuant to section 41.

The Federal Court upheld most of the claimed exemptions (see: *Blank* v. *Canada (Department of Justice)*, 2003 FCT 462), yet ordered that documents claimed by the Crown to be subject to "litigation privilege" and therefore protected under section 23 of the Act should be released as the litigation to which the records related had ended. The Crown appealed this aspect of the Federal Court's judgment.

On appeal, the Federal Court of Appeal was divided on the duration of litigation privilege. The majority, however, agreed with the Federal Court Judge's decision. According to the majority, section 23 of the Act includes litigation privilege but that, unlike legal advice privilege, litigation privilege is of limited duration, expiring at the end of the litigation that gave rise to the privilege, "subject to the possibility of defining . . . litigation . . . broadly" ([2005] 1 F.C.R. 403, at para. 89). As the documents in issue had been created for the dominant purpose of a

criminal prosecution which had subsequently ended, the majority determined that litigation privilege no longer applied to exempt the records from disclosure under section 23 of the Act. However, the dissenting Judge stated that, in his view, litigation privilege need not end with the termination of the litigation that gave rise to the privilege and that, in this instance, the privilege ought to have been upheld.

The Crown sought leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada. Upon being granted leave, the Attorney General of Ontario, the Advocates' Society, and the Information Commissioner were granted intervener status before the Supreme Court.

Issues Before the Court

The narrow issue before the Court was whether documents once subject to litigation privilege remain privileged when the litigation ends.

The Court's determination of this narrow issue hinged upon the Court's consideration of the following preliminary issues:

(a) Does "solicitor-client privilege" encompass both legal advice privilege and litigation privilege?

(b) What is the distinction between legal advice privilege and litigation privilege?

(c) What is the scope and duration of litigation privilege?

(d) Did Parliament intend, when enacting section 23 of the Act, to extend the protection afforded to litigation privilege at common law?

Findings

The Majority's Reasons for Judgment

(a) Does "solicitor-client privilege" encompass both legal advice privilege and litigation privilege and, if so, are they "branches" of the same privilege?

Justice Fish, writing the reasons for judgment of the majority (on behalf of five (5) of seven (7) members of the Court), accepted the parties' interpretation that "solicitor-client privilege" as a matter of statutory interpretation encompasses both legal advice privilege and litigation privilege, yet rejected the contention by the Federal Crown and, intervener, Attorney General of Ontario, that legal advice privilege and litigation privilege should be viewed as two "branches" of "the same tree". While, at an overarching level, both privileges facilitate "[t]he secure and effective administration of justice according to law" [para. 31], legal advice privilege and litigation privilege are based on different rationales. They are not, as

argued by the Crown, premised on the common objective of promoting candour in the solicitor-client relationship. Instead, the majority, agreeing with the respondent, Mr. Blank, and the interveners, the Information Commissioner of Canada and the Advocates' Society, determined that "legal advice privilege" and "litigation privilege" are distinct concepts and that, as a result, they do not warrant analogous protection.

(b) What is the distinction between legal advice privilege and litigation privilege?

"Legal advice privilege", the majority explained, is a concept intended to promote the relationship between a solicitor and his/her client based on the notion that the effective administration of justice depends for its vitality on full, free, and frank communication between those who need legal advice and those who are best able to provide it. "Litigation privilege", in contrast, is intended to facilitate the adversarial trial process based on the notion that the efficacy of the adversarial process is advanced by ensuring that parties to litigation are afforded a "zone of privacy" within which they are left to investigate and prepare their case for trial without adversarial interference or fear of premature disclosure [paras. 26-28].

The majority went on to recognize additional distinctions, pointed out by the Information Commissioner and the Advocates' Society, between legal advice privilege and litigation privilege. Notably, for example, litigation privilege ". . . arises and operates even in the absence of a solicitor-client relationship; it applies indiscriminately to all litigations, whether or not they are represented by counsel" [para. 32], and confidentiality, the sine qua non of legal advice privilege, is not an essential component.

Having determined that legal advice privilege and litigation privilege are based on distinct rationales, the majority went on to reject the Crown's contention that the two privileges must be afforded analogous protection [para. 33]. The majority made clear that jurisprudence that speaks of the primacy of solicitor-client privilege, its evolution from a rule of evidence to a rule of substantive law, and its near-absolute protection, including permanency, is limited to "legal advice privilege" and not "solicitor-client privilege" in general. Therefore, while [legal advice privilege] has been strengthened, reaffirmed and elevated in recent years, litigation privilege has been eroded by trends towards mutual and reciprocal disclosure which is the hallmark of the judicial process [para. 61].

(c) What is the scope and duration of litigation privilege and how does that compare to the scope and duration of legal advice privilege?

The majority, agreeing with the position advanced by the respondent, the Information Commissioner, and the Advocates' Society, held that "litigation privilege, unlike the solicitor-client privilege, is neither absolute in scope nor

permanent in duration" [para. 37]. Rather, the majority explained, "[i]n each case, the duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation of the adversarial process" [para. 41].

In most instances, the majority held, once the litigation ends, so too does the purpose of the privilege. Therefore, in general, litigation privilege will expire with the litigation of which it was born [para. 34]. Nonetheless, the majority did acknowledge the possibility that litigation may be defined "more broadly than the particular proceeding which gave rise to the claim" [para. 38]. Whether or not the privilege can extend beyond the litigation of which it was born will hinge on whether or not the privilege retains its purpose, namely "the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" [para. 40]. The majority stated that examples of when "litigation" would be defined more broadly, include: ". . . separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). . . [and] [p]roceedings that raise issues common to the initial action and share its essential purpose . . ." [para. 39].

The majority went on to consider whether an extended definition of litigation privilege was warranted in the case at bar. The majority concluded that it did not. More specifically, the majority noted that the documents for which privilege was claimed were prepared for the dominant purpose of a criminal prosecution that had ended. The majority held that Mr. Blank's subsequent civil action against the government in relation to the manner in which the government conducted the criminal prosecution sprung from a different juridical source and, in that sense, was unrelated to the litigation of which the privilege claimed was born [para. 43].

As an aside, the majority noted that, in any event, "litigation privilege would not protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct". A court, the majority held, may review documents claimed to be privileged where a prima facie actionable misconduct is shown in relation to the proceeding with respect to which the privilege is claimed [paras. 44-45].

Also as an aside, the majority observed that, in the case at bar, the Crown had failed to disclose information to which Mr. Blank had been constitutionally guaranteed [paras. 55-56]. In doing so, the majority dismissed the Ontario Attorney General's argument that litigation privilege is not waived in a civil proceeding when, in a preceding criminal case, documents "favourable to an accused" are disclosed in accordance with the "innocence at stake" exception. The majority stated that it would be ". . incongruous if the litigation privilege were found in civil proceedings to insulate the Crown from the disclosure it was bound but failed to provide in criminal proceedings that have ended" [para. 57].

As for the scope of the privilege, in keeping with the modern trend favouring increased disclosure, the majority agreed with the Information Commissioner and the Advocates' Society; litigation privilege should only attach to documents created for the dominant purpose of litigation [para. 59]. The majority, however, refrained from deciding whether documents gathered or copied, but not created, for the purpose of litigation could be equally protected [paras. 62-64].

(d) Did Parliament intend when enacting section 23 of the Act to extend the protection afforded at common law to litigation privilege claimed by the government as litigant?

Although, the majority did recognize that the purpose of litigation privilege within the context of section 23 of the Act must take into account the nature of much government litigation [para. 40], the majority rejected the contention by the Federal Crown and Attorney General of Ontario that the government's status as a "recurring litigant" could justify a litigation privilege that outlives its common law equivalent [para. 46].

The majority noted that nothing in the Act suggests that this was Parliament's intent [paras. 51-52]. Moreover, such an interpretation would not be in keeping with the scheme of the Act, nor would it be consonant with the permissive language of section 23 which promotes disclosure by encouraging heads of government institutions ". . . to refrain from invoking the privilege unless it is thought necessary to do so in the public interest. And it thus supports an interpretation that favours *more* government disclosure, not *less*" [para. 52].

Still, the majority noted that access to the government lawyer's brief upon the conclusion of the subject proceeding would not be automatic because of the possibility that litigation may be defined "more broadly than the particular proceeding which gave rise to the claim" [para. 38]. Similarly, disclosure would not be uncontrolled in that many documents within a litigation file will be covered, not only by litigation privilege, but legal advice privilege and, therefore, "will remain clearly and forever privileged" [paras. 49-50].

The majority went on to observe that, although the protection afforded to litigation privilege, in practice, may prove less effective for the government than for private litigants because of the Act, i.e. because the government may be required to disclose information once the original proceedings have ended and related proceedings are neither pending nor apprehended, this, the majority held, "is a matter of legislative choice and not judicial policy" [para. 53].

The Minority Reasons

Justice Bastarache, writing on behalf of two members of the Court, concurred with the results of the majority judgment, agreeing that the Crown's claim of litigation privilege failed in the case at bar, because the privilege expired after the termination of the litigation giving rise to the claim of privilege [para. 74]. However, Justice Bastarache proposed to clarify the scope of section 23 by offering separate reasons.

Justice Bastarache clarified that the Act imposes a statutory duty on government institutions to disclose records subject to limited exceptions. As a result, Justice Bastarache reasoned that, faced with a request under the Act, the government cannot refuse to disclose records by claiming litigation privilege at common law [para. 68]. That said, Justice Bastarache went on to state that section 23 creates an exemption for records that are subject to "solicitor-client privilege" and that this must be interpreted as encompassing both legal advice privilege and litigation privilege [para. 69].

In contrast to the majority judgment, Justice Bastarache accepted the view that litigation privilege is a branch of solicitor-client privilege [paras. 70-71]. However, he observed that, unlike legal advice privilege, which stands against the world, litigation privilege is protection only against the adversary, and only until termination of the litigation [para. 72]. Thus, the effect of section 23 is that it enables a government institution to refuse disclosure, not only to an adversary, but to any requester, so long as the privilege is found to exist [para. 72].

Judicial Outcome

The Supreme Court of Canada dismissed the appeal. It was unanimously agreed that litigation privilege, unlike legal advice privilege, expires at the end of the litigation that gave rise to the privilege, subject to the possibility of defining "litigation" broadly.

3) *Canada (Information Commissioner)* v. *Canada (Canadian Transportation Accident Investigation and Safety Board), NAV Canada and Canada (Attorney General)*

2006 FCA 157 (Court files: A-165-05, A-304-05), May 1, 2006 (See Annual Report 2005-2006, pp. 64-65 for more details)

Nature of Proceedings

This was an appeal of the Federal Court's decision in *Canada (Information Commissioner)* v. *Canada (Canadian Transportation Accident Investigation and Safety Board et al.)*, [2006] 1 F.C.R. 605 wherein Justice Snider dismissed four (4) applications for judicial review commenced by the Information Commissioner pursuant to paragraph 42(1)(a) of the Act.

Factual Background

Access requests were made for recordings and/or transcripts of air traffic control communications (ATC communications) pertaining to four air occurrences that were the subject of distinct investigations and public reports by the Transportation Accident Investigation and Safety Board (TSB). These communications were recorded by NAV Canada but subsequently put under the control of the TSB.

The Executive Director of the TSB refused to disclose the requested ATC communications based on the purported application of section 19 of the Act (the "personal information" exemption). The Information Commissioner commenced four applications for judicial review of the Executive Director's access refusals. NAV Canada intervened in the proceedings, arguing that the records ought to be exempted based on paragraph 20(1)(b) of the Act.

The applications were heard by the Federal Court on January 18, 2005, and, on March 18, 2005, Justice Snider rendered her decision. Here, Justice Snider dismissed the applications for review, ruling that the requested ATC communications were "personal information" exempted from disclosure under section 19 of the Act.

The Information Commissioner appealed the Federal Court's decision.

Issues Before the Court

The issues before the Court were as follows:

(a) Did the Federal Court err when determining that the ATC communications are "personal information" within the meaning of section 3 of the *Privacy Act* and, therefore, exempted under subsection 19(1) of the Act?

(b) If ATC communications are not "personal information", are they, nonetheless, exempted from disclosure under paragraph 20(1)(b) of the Act?

Findings

(a) Did the Federal Court err when determining that the ATC communications are "personal information" within the meaning of section 3 of the *Privacy Act* and, therefore, exempted under subsection 19(1) of the Act?

The Federal Court of Appeal began its analysis by considering the meaning of the opening words of the definition of "personal information" set out in section 3 of the *Privacy Act*. This definition stipulates that, in order to qualify as "personal information," the information must be both "about" an individual and also permit or lead to the possible identification of that individual.

The Court held that the word "about", in context, must be ascribed a meaning that coincides with values underlying the notion of privacy. Citing a number of decisions rendered by the Supreme Court of Canada, the Federal Court of Appeal surmised that the notion of privacy connotes concepts of intimacy, identity, dignity, and integrity of the individual. These concepts, the Court stated, must be borne in mind when determining whether or not particular information is "about" an individual, as opposed to being "about" something else.

The Federal Court of Appeal then considered the content of the ATC communications in issue and whether the subject matter of these communications engaged individuals' rights to privacy. The Court observed that the content of the ATC communications is limited to the safety and navigation of aircraft, the general operation of the aircraft, and the exchange of messages on behalf of the public. This, the Court held, ". . . are not subjects that engage the right to privacy of individuals". As a result, the Court concluded that the ATC communications could not be said to be "about" an individual.

The Court noted that the information contained in the records was of a professional non-personal nature. Although the Court acknowledged that it was possible that the information might permit or lead to the identification of a person and/or assist in a determination as to how an individual performed a task, the Court held that this possibility did not suffice to render the information "personal information". The possibility that the records, when combined with other information, might be used to evaluate an individual's performance could not transform the communications into personal information when the information in and of itself had no personal content.

Thus, the Federal Court of Appeal concluded that the ATC communications did not fit within the *Privacy Act*'s definition of "personal information" and were

therefore not exempted under subsection 19(1) of the Act. Having so determined, the Court observed that it was not necessary to consider the discretion to release "personal information" set out in subsection 19(2) of the Act.

(b) Are the ATC communications exempted under subsection 20(1) of the Act?

Having rejected the application of subsection 19(1) of the Act, the Federal Court of Appeal then considered the alternative issue raised by NAV Canada, namely, the application of paragraph 20(1)(b) of the Act. In order to qualify for exemption under this provision, it must be established that: 1) the information is financial, commercial, scientific, or technical information; 2) the information is confidential; 3) the information is supplied to a government institution by a third party; and 4) the information has been treated consistently in a confidential manner by a third party.

Turning to the first of these criteria, the Court considered whether, as alleged by NAV Canada, the ATC communications could be deemed to be either "commercial" or "technical" in nature. The Court rejected NAV Canada's contention that, simply because NAV Canada provides air navigation services for a fee, the information could be deemed "commercial" in nature. Instead, the Court reasoned that the term "commercial" requires that the information in itself pertain to trade (or commerce). Although the Court noted that portions of the ATC communication might qualify as "technical" in nature, there was no basis for characterizing the entire record in this manner.

The Court then considered whether the second requirement, that of confidentiality, could be met. To this end, the Court noted that NAV Canada bore the burden of persuasion that the ATC communications were, in fact, confidential. Moreover, the Court made clear that that confidentiality must be assessed on an objective standard.

Upon reviewing the evidence filed by NAV Canada on this issue, the Court determined that NAV Canada had failed to discharge its burden. More specifically, the Court held that NAV Canada had not established, on a balance of probabilities, that the records in issue were, objectively, confidential.

Thus, the Court determined that the first two criteria for establishing that the requested records warrant exemption under paragraph 20(1)(b) of the Act had not been met. The Federal Court of Appeal, therefore, concluded it was not necessary to consider whether NAV Canada could satisfy the further requirements (that the information was supplied by NAV Canada to the TSB and treated consistently in a confidential manner by NAV Canada) under paragraph 20(1)(b).

Judicial Outcome

The appeals were allowed. The Federal Court of Appeal set aside the Federal Court's decision, which dismissed the applications for review, and ordered, instead, that the TSB disclose the ATC communications to the access requesters.

Action Taken

On June 30, 2006, the applicants, the Executive Director of the TSB and NAV Canada, filed an application for leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada. Leave to appeal was refused (Supreme Court file 31528, April 5, 2007).

4) *Canada (Information Commissioner)* v. *Canada (Minister of Transport)*

T-55-05, Federal Court, Blais, J., September 15, 2006, (See Annual Report 2005-2006, pp. 65-66 for more details)

Nature of Proceeding

This was an application for review under section 42 of the Act in relation to the Minister of Transport's refusal to disclose "an electronic copy of the CADORS (Civil Aviation Daily Occurrence Reporting System) database table(s)" being information requested under the Act.

Factual Background

On June 12, 2001, a request was made under the Act for access to "an electronic copy of the CADORS database table(s) which track(s) aviation occurrences; a paper printout of the first 50 records, a complete field list, and information on any codes needed to interpret data in the tables." CADORS is a national database consisting of approximately 36,000 safety reports of individual aviation "occurrences" and is compiled by Transport Canada, which receives these reports from a variety of sources, including NAV Canada, the Transportation Safety Board, and aerodromes.

On August 9, 2001, Transport Canada responded by providing the requester with a copy of the record layout which lists the fields of information found in the CADORS database, but, otherwise, refused to provide the requested records in their entirety. Initially, this access refusal was based on the contention that the database could not be severed and reproduced. Subsequently, during the course of the Information Commissioner's investigation, Transport Canada acknowledged that the database could, in fact, be copied, and, if necessary, severed. Still, Transport Canada withheld 33 of the 51 fields of information which comprise the CADORS database based on subsection 19(1) of the Act (the "personal information" exemption).

Transport Canada conceded that the information in and of itself did not constitute personal information, yet maintained that the release of CADORS information would amount to disclosure contrary to subsection 19(1) of the Act because of what is referred to as the "mosaic-effect" (a concept used in relation to information pertaining to security and intelligence in the context of assessing a reasonable expectation of injury). Specifically, Transport Canada stated that it was possible that CADORS information might be linked with other information publicly available to reveal "personal information" concerning identifiable individuals.

The Information Commissioner, for his part, maintained that the information contained in the database pertained to aircraft and air occurrences, not individuals, such that section 19 of the Act did not apply. The Minister refused to accept the Information Commissioner's recommendation that the requested records be disclosed. On January 14, 2005, the Information Commissioner of Canada filed an application for judicial review of the Minister's access refusal.

After the Information Commissioner had filed his Memorandum of Fact and Law in support of the application for review, but before the oral hearing, the Minister of Transport released additional portions of the database to the access requester. This information consisted of data pertaining to air occurrences involving "commercially operated" aircraft. Thus, by the time of the oral hearing, the portions of the requested records that continued to be withheld consisted of thirty-three (33) electronic fields of information contained in CADORS reports that pertain to "air occurrences" in which the "Operator Type" field was either marked "Private" or contained no information. These reports included reports pertaining to "air occurrences" involving aircraft "privately" operated by corporations, businesses, organizations, government, and other entities, in addition to aircraft operated by individuals, as well as reports in which no aircraft were involved in the occurrence.

The oral hearing took place on February 9, 2006. At the close of oral arguments, the presiding Judge opined that a case pending before the Federal Court of Appeal *(Canada (Information Commissioner)* v. *Canada (Canadian Transportation Accident and Investigation and Safety Board) et al.* [hereafter, the NAV Canada case]), might impact upon the disposition of the issues in dispute. The Judge, therefore, adjourned the hearing until such time as the Federal Court of Appeal had rendered its decision in the NAV Canada case.

The Federal Court of Appeal rendered its decision in the NAV Canada case on June 2, 2006, whereupon, the Judge presiding over the CADORS case directed the parties to make supplementary submissions concerning the effect of the NAV Canada case on the issues raised in the application for review.

Issues Before the Court

At issue, therefore, was:

(a) What impact, if any, does the Federal Court of Appeal's decision in the NAV Canada case have on the determination of whether the CADORS database, in its entirety, must be released under the Act?

The Information Commissioner's Supplementary Submissions were filed on May 17, 2006. In these submissions, the Information Commissioner argued inter alia that the information in issue in the NAV Canada case was analogous to that in issue in the case at bar in that, in both instances, the requested information related to "air occurrences". As the Federal Court of Appeal had determined that information "about" air occurrences is not information "about" an individual, the Information Commissioner maintained that the CADORS information could not be exempted under subsection 19(1) of the Act.

The Information Commissioner also argued that the Federal Court of Appeal's determination in the NAV Canada case equally addressed the Minister of Transport's "mosaic effect" argument with respect to the CADORS database. To this end, the Information Commissioner pointed out that, in NAV Canada, the Federal Court of Appeal had rejected the contention that non-personal information pertaining to air occurrences could be transformed into "personal information" simply because it was possible that the information, when combined with other sources, might be used to identify an individual or to evaluate an individual's performance with respect to air occurrences.

Thus, the Information Commissioner maintained that the Federal Court of Appeal's ruling in the NAV Canada case had disposed of the issue of whether information about air occurrences could be exempted under section 19 of the Act. Having found that information about air occurrences is not information about an identifiable individual, even where a cross-reference with other information is possible, the Information Commissioner submitted that the Federal Court in the case at bar was bound by the higher Court's ruling.

Transport Canada did not file responding submissions. Instead, the Court was advised of the Minister of Transport's intention to release the CADORS database in its entirety to the access requester. Thereafter, the Court directed that the proceedings be postponed to allow the parties to conduct discussions with the view of settling the matters in dispute.

Findings

The records in issue in the application were released in their entirety to the access requester on September 14, 2006, whereupon the Information Commissioner agreed to discontinue the application for review. An order acknowledging the discontinuance of the application with details of settlement was issued by the Court on September 15, 2006.

5) *Canada (Information Commissioner)* v. *Canada (Minister of Environment)*

2006 FC 1235 (Court File T-555-05), Federal Court, Kelen J., October 17, 2006
(See Annual Report 2005-2006, p. 66 for more details)

Nature of Proceedings

This was an application for judicial review of the refusal of the Minister of Environment Canada to disclose portions of the analysis section of a Memorandum to Cabinet, dated March 1995, regarding Methylcyclopentadienyl Manganese Tricarbonyl (MMT). This refusal was based on the discretionary exemptions from disclosure provided for under paragraphs 21(1)(a) and (b) of the Act, which deal with operations of government.

Factual Background

The original access to information request in this case was made on behalf of Ethyl Canada Inc. on September 16, 1997. It requested discussion papers on MMT presented to Cabinet. In response, the Minister identified four records, but denied Ethyl access to them on the grounds that they were Cabinet confidences and were therefore excluded from the Act.

Ethyl filed a complaint with the Information Commissioner, who investigated and recommended the Minister disclose the portion of the requested records that was termed "Analysis", as it fell within the scope of discussion paper material identified in paragraph 69(1)(b) of the Act.

The Minister rejected the Commissioner's recommendation. The Commissioner applied to the Federal Court for a review of the Minister's decision.

The case was reviewed by both the Federal Court *(Canada (Information Commissioner)* v. *Canada (Minister of Environment)* [2001] 3 F.C. 514) and the Federal Court of Appeal *(Canada (Information Commissioner)* v. *Canada (Minister of the Environment)*, 2003 FCA 68), who both ruled that the analysis section of the Memorandum to Cabinet was a discussion paper as contemplated by paragraph 69(1)(b) of the Act. The Court of Appeal added that this analysis section had to

be returned to the Minister so that he be given the opportunity to invoke any exemption that might apply to the information under the Act.

Issues Before the Court

(a) Did the disputed passages properly fall into the exemptions provided for in paragraphs 21(1)(a) and (b) of the Act ?

The analysis on this point was subdivided as follows:

1) The interplay between section 21 and section 69 of the Act

Section 21 of the Act provides for a discretionary exemption of "certain records containing advice provided to the government," while section 69 "provides that, as a general rule, the Act does not apply to Cabinet confidences" but carves out an exception to this rule for discussion papers, when the decision on the issue they pertain to has been made public or after four years have passed since a decision on the issue was taken but not made public.

Using the modern approach to statutory interpretation proposed by Driedger and adopted by the Supreme Court of Canada, Justice Kelen determined that "[b]oth a plain reading of sections 21 and 69 and a review of the Access Act's legislative history" led him to dismiss the Information Commissioner's argument that any records falling within the scope of the section 69 carve out could not fall under the exemption contemplated by section 21.

2) Applicability of paragraph 21(1)(a) of the Act: do the disputed passages contain "advice or recommendations"?

Justice Kelen turned to previous case law that determined the scope of this exemption and explained that "[h]aving reviewed the material, I conclude that some portions of the Disputed Passages are subject to the discretionary exemption under paragraph 21(1)(a)" [para. 53].

Justice Kelen reviewed the applicability of this "advice and recommendations" exemption to each of the paragraphs from the document for which the exemption had been claimed. In those portions of the record that he found "purely factual information" or "largely factual" information, as opposed to opinion, he ruled that the exemption could not apply. In one case, Justice Kelen described the withheld passage as containing "information that is entirely speculative in nature" that was "characterized more accurately…as explanatory than as an opinion on a policy matter" which he was not satisfied constituted "advice or recommendations" within the paragraph's meaning [para. 61].

3) Applicability of paragraph 21(1)(b) of the Act: do the disputed passages contain an "account of consultations or deliberations"?

Noting that there had been "relatively little judicial consideration of paragraph 21(1)(b)" [para. 64], Justice Kelen was guided by the interpretive comments in one case and the interpretation suggested by a Treasury Board Manual on Access to Information Policy and Guidelines. He agreed "that the terms 'account', 'consultation' and 'deliberations' should be given their ordinary and usual meaning as reflected in the Treasury Board Manual". He determined that "[i]t follow[ed] from the definitions above that factual information must generally be excluded from the scope of paragraph 21(1)(b)" and concluded accordingly that the portion of the disputed passages that he had previously identified as containing largely factual information could not be exempt under paragraph 21(1)(b) [paras. 67-68].

Recognizing that "[i]n the context of a Memorandum to Cabinet, it is apparent that there may be considerable overlap between the scope of records covered by each of paragraphs 21(1)(a) and (b)," Justice Kelen was satisfied that, in this case, "the portions of the Disputed Passages that [he] ha[d] identified as falling within the scope of paragraph 21(1)(a) are also exempt under paragraph 21(1)(b)" [para. 68].

He concluded that the section 21 exemptions applied to a portion of, but not all, the passages for which they had been claimed.

(b) Did the Minister lawfully exercise his discretion to refuse to disclose the disputed passages to which the section 21 exemptions applied?

Justice Kelen reiterated that "…the Minister bears the burden of satisfying this Court that the exercise of discretion was reasonable" [para.70].

It was apparent to Justice Kelen from the record that the Minister's refusal to release the disputed passages was "primarily because the MMT issue remained an active policy file for the government." The material filed did not disclose any further reasons for the Minister's refusal to release the disputed passages. He added that "[i]n conducting the requisite balancing of interests for and against disclosure, the Minister's designate considered the 'active' status of the MMT file as the overriding factor in refusing disclosure" [paras. 73 and 75].

Turning to the case law on the matter, Justice Kelen concluded that it "addresses the need for the Minister to consider the public interest for and against disclosure and weigh these competing interests with the purposes of the Act in mind" [para. 76].

In this case, Justice Kelen found that "[t]he confidential cross-examination of the Deputy Minister [did] not provide any rationale for non-disclosure in relation to the public interest" except that MMT was an active file. It was unclear whether the Deputy Minister had "appreciated the principles relevant to her exercise of discretion" that is, whether disclosure was possible without impairing the effectiveness of government [para. 79].

He went on to make the following finding:

> "In scrutinizing the Minister's 'weighing' process on a standard of reasonableness, I find that there are insufficient reasons provided in support of the Minister's refusal to disclose. In my view, the Deputy Minister's analysis was somewhat capricious. Portions continued to be released even after the Deputy Minister determined disclosure would impair government action despite no appreciable change in circumstances. As well, much of what the Deputy Minister withheld based on impairment concerns do not, in this analysis, fall under section 21 in any event."

Justice Kelen also pointed out he had not been shown any evidence supporting the Minister's decision that the release of the disputed passage would compromise future government action on the MMT issue [para. 81].

The Minister's decision to withhold the disputed passages could not "…withstand a probing examination" and was "unreasonable in the circumstances" [para. 82].

Findings

The application was allowed.

The Court ordered the Minister to disclose to the requestor the portions of the disputed passages which were not subject to the section 21 discretionary exemptions. For those portions to which section 21 did apply, the Court ordered their return to the Minister to re-determine with reasons whether disclosure to the requestor was warranted, having regard to the public interest in favour of releasing information and in protection the internal processes for effective government.

The Minister appealed the decision to the Federal Court of Appeal, and the Information Commissioner filed a cross-appeal.

B. Cases in Progress - Commissioner as Applicant

1) *Canada (Information Commissioner)* v. *Canada (Minister of National Defence)*

T-210-05, Federal Court (See Annual Report 2005-2006, pp. 66-67 for more details)

This is an application, commenced pursuant to paragraph 42(1)(a) of the Act, for judicial review of the refusal by the Minister of National Defence to disclose records requested under the Act pertaining to "M5 meetings" for 1999. The issue is whether records held in the office of the Minister of Defence, which relate to the Minister's duties as Minister of Defence, are subject to the right of access.

It is anticipated that this matter will be heard by the Court in the Fall of 2007.

2) *Canada (Information Commissioner)* v. *Canada (Prime Minister)*

T-1209-05, Federal Court (See Annual Report 2005-2006, p. 67 for more details)

This is an application, commenced pursuant to paragraph 42(1)(a) of the Act, for judicial review of the refusal by a former Prime Minister to disclose records requested under the Act pertaining to the Prime Minister's agenda books for January 1994 to June 25, 1999. The issue is whether or not the agendas, held in the Prime Minister's Office, are subject to the right of access.

It is anticipated that this matter will be heard by the Court in the Fall of 2007.

3) *Canada (Information Commissioner)* v. *Canada (Commissioner of the Royal Canadian Mounted Police)*

T-1210-05, Federal Court (See Annual Report 2005-2006, pp. 67-68 for more details)

This is an application, commenced pursuant to paragraph 42(1)(a) of the Act, for judicial review of the refusal by the Commissioner of the RCMP to disclose records requested under the Act pertaining to the agenda of the former Prime Minister Chrétien covering the period of January 1, 1997 to November 4, 2000. The issues are whether or not the agendas qualify for exemption, in their entirety, for reasons of privacy (section 19) or for reasons of safety (section 17).

It is anticipated that this matter will be heard by the Federal Court in the Fall of 2007.

4) *Canada (Information Commissioner)* v. *Canada (Minister of Transport)*

T-1211-05, Federal Court, (See Annual Report 2005-2006, p. 68 for more details)

This is an application, commenced pursuant to paragraph 42(1)(a) of the Act, for judicial review of the refusal by the Minister of Transport to disclose records requested under the Act pertaining to Minister Collenette's agenda for the period June 1, 1999 to November 5, 1999. The issue is whether these records, held in the Minister's office, are subject to the right of access.

It is anticipated that this matter will be heard by the Court in the Fall of 2007.

C. Cases in Progress - Commissioner as Respondent

1) *Canada (Attorney General)* v. *Canada (Information Commissioner)*

T-531-06, Federal Court (See Annual Report 2005-2006, p. 68 for more details)

On March 23, 2006, an application for judicial review was brought by the Attorney General of Canada against the Information Commissioner, under section 18.1 of the *Federal Courts Act*. The application for review relates to the lawfulness of decisions issued by the Information Commissioner's delegate, requiring counsel and various witnesses to keep confidential the questions asked, answers given, and exhibits used during the taking of evidence under oath of various witnesses who appeared under subpoena before the Information Commissioner's delegate in a matter concerning the investigation of a complaint made pursuant to the Act against the head of Indian and Northern Affairs Canada.

A hearing is set to be heard on April 26, 2007. The outcome will be reported in next year's annual report.

2) *Canada (Minister of Industry)* v. *Canada (Information Commissioner)*

A-107-06, Federal Court of Appeal

The Minister of Industry appealed the Federal Court decision in the case *Canada (Information Commissioner)* v. *Canada (Minister of Industry)*, 2006 FC 132, T-421-04, February 13, 2006, Kelen J. (See Annual Report 2005-2006, pp. 59-64 for more details) wherein the Federal Court ordered that the Chief

Statistician disclose certain census records from 1921, 1931, and 1941 in eight specific districts that had been requested under the Act in November 2001, on behalf of three Aboriginal bands, for the exclusive purpose of researching or validating their Aboriginal claims.

The appeal was heard by the Federal Court of Appeal on March 27, 2007. The decision is under advisement and will be reported in next year's annual report.

3) *Canada (Minister of Environment)* v. *Canada (Information Commissioner)*

A-502-06, Federal Court of Appeal

Appeal and cross-appeal of the Federal Court decision in *Canada (Information Commissioner)* v. *Canada (Minister of Environment)*, 2006 FC 1235, T-555-05 (October 17, 2006), Kelen, J.

D. Cases in Progress - Information Commissioner as an Intervener

1) *SNC Lavalin Inc.* v. *Canada (Minister of International Cooperation and Minister of Foreign Affairs) and Canada (Information Commissioner)*

A-309-03

Nature of Proceedings

The Information Commissioner is an intervener in this appeal from the judgment rendered by Justice Gibson of the Federal Court in *SNC Lavalin Inc.* v. *Canada (Minister for International Co-operation and the Minister of Foreign Affairs)*, 2003 FCT 681, T-387-01, 30 May 2003.

Factual Background

The access request was received by the Canadian International Development Agency (CIDA) on December 15, 2000. The requester wanted to obtain "[a]uditors' working papers, including all records used by their auditors and by CIDA in the auditing process, for the Comprehensive Audit (Feb. 99) of the River Nile Protection and Development project." The requester also stated he had read the audit and that the audit had found, among other things, problems with project objectives.

As required by section 27 of the Act , CIDA made available to SNC Lavalin some documents that were responsive to the request, so that it could make representations about the intended disclosure. SNC Lavalin made representations as to why the records or parts thereof should not be disclosed. The head of CIDA decided to release the records or parts thereof.

SNC Lavalin applied for a review by the Federal Court, pursuant to section 44 of the Act, claiming that the records contained information that should properly be exempted pursuant to sections 20 (third-party confidential business information) and 19 (personal information). The Federal Court dismissed SNC Lavalin's application.

SNC Lavalin appealed the judgment. Its grounds for appeal included a contention that the Application Judge had erred in law in concluding that a third party was not entitled to seek an exemption of records pursuant to section 19 of the Act and that the judge had erred in fact in concluding that no further exemptions pursuant to section 19, beyond those identified by the Minister, were warranted.

The Information Commissioner brought a motion to the Federal Court of Appeal, requesting to intervene in the matter and was granted leave to intervene with full party status.

At the request of SNC Lavalin, the Federal Court of Appeal issued an order on September 4, 2003, holding the appeal in abeyance until there was a final disposition in the Heinz case *(Attorney General of Canada* v. *H.J. Heinz Company of Canada*, Court file No. A-161-03). The Heinz case also involved the issue of whether a third party applying for a review of a government decision to disclose records pursuant to section 44 could raise section 19 of the Act. The final judgment in Heinz was rendered by the Supreme Court of Canada on April 21, 2006, with the majority deciding that a third party could raise the exemption for personal information set out in section 19 of the Act.

Following this judgment, the SNC Lavalin case was resumed, with all parties filing their memorandum of fact and law. The Information Commissioner's submissions were limited to the section 19 issue and invited the Federal Court of Appeal to offer further guidance on questions arising from third parties raising the personal information exemption, such as which party would bear the burden of proving that no exceptions applied to allow the release of personal information, if the records were found to include such information.

Issues Before the Court

The primary issue on appeal regards the applicability of paragraphs 20(1)(b), (c), and (d) of the Act to the materials the Minister intends to release to the access requester. SNC Lavalin claims the Federal Court made errors in determining that there was insufficient proof to apply these exemptions. The Minister is arguing that the Federal Court judgment should be upheld. The Information Commissioner has made representations regarding only the section 19 aspect of the case, submitting that the appellant has failed to show that there is further personal information in the record, beyond that acknowledged by the Federal Court.

Findings

The Federal Court found that a third party who is entitled to make representations pursuant to section 28 of the Act is not entitled to seek exemption of the records by virtue of section 19 of the Act [para. 24]. SNC Lavalin could not rely on the mandatory exemption provided for in section 19 of the Act in responding to the notice provided to it in the matter under section 27 of the Act [para. 27].

Despite this finding, the Federal Court considered the records at issue, the relevant elements of the definition of 'personal information', and the basic principles of interpretation of the Act, and was "satisfied that no exemptions pursuant to section 19 of the Act beyond those […] proposed on behalf of the Respondent Ministers […] [were] warranted" [para. 27].

On the question of the applicability of the section 20 exemption, the Court applied the analysis proposed in *Air Atonabee Ltd.* v. *Canada (Minister of Transport)*, 27 F.T.R. 194. The Court was satisfied that "certain of the information reflected in the records proposed to be disclosed [was] of a financial nature"; that "certain of the information [was] confidential in the eyes of the Applicant"; that "such information was supplied to CIDA by the Applicant"; and that this information had been "treated consistently in a confidential manner by the Applicant".

However, the Court was not satisfied that the information was confidential on an objective standard. The paragraph 20(1)(b) exemption therefore did not apply [para. 35].

As for paragraph 20(1)(c) of the Act, the Court concluded the applicant's evidence was too speculative to demonstrate a reasonable expectation of financial loss and prejudice to its competitive position if the records were disclosed [para. 36].

Finally, on the question of the applicability of the paragraph 20(1)(d) exemption, the Court was again of the view that the evidence was insufficient to demonstrate a reasonable expectation that the release of the records would harm the applicant's contractual or other negotiations [paras. 37-38]. The Court concluded that the applicant had failed to meet the burden of proof required to apply the section 20 exemption and dismissed the application [paras. 39-40].

Judicial Outcome

The application was dismissed. SNC Lavalin appealed the judgment.

Action Taken / Future Action Contemplated

The appeal hearing will be scheduled shortly.

CHAPTER VI

Legislative and Regulatory Changes to the *Access to Information Act*

A. Changes to the Act

(i) Changes further to the Enactment of the *Federal Accountability Act*

The Government public Bill C-2, entitled An *Act providing for conflict of interest rules, restrictions on election financing and measures respecting administrative transparency, oversight and accountability* (the *Federal Accountability Act*), received Royal Assent on December 12, 2006 [S.C. 2006, c. 9] and caused or will cause the following amendments:

SECTION	DESCRIPTION
Royal Assent : December 12, 2006	
3	Definitions Designated Minister Head Record
3.2	Power to Designate Minister
22.1	Exemption for Internal Audits
31	Written Complaint: Delay
35(2)(c)	(French version only) Right to make Representations
36(3)	Evidence in Other Proceedings
54(1)(2)(4)	Appointment of Information Commissioner
58(2)	(French version only) Technical Assistance
59(2)	Investigations relating to International Affairs & Defence
70(c.1)(1.1)	Duties and Functions of Designated Ministers
72.1	Report of Expenses
77(1)(i)	Regulations: Criteria for Schedule I

SECTION	DESCRIPTION
March 1, 2007	
3.01	For greater certainty: Specifics on Crown Corporations
21(1)(b)	Advice Etc.
21(2)(b)	Exercise of a Discretionary Power or an Adjudicative Function
47(2)	Disclosure of an Offence Authorized
63(2)	Disclosure of an Offence Authorized
April 1, 2007	
16.1	Exemptions for: the Auditor General of Canada, the Commissioner of Official Languages for Canada, the Information Commissioner, and the Privacy Commissioner
16.3	Exemption for the Chief Electoral Officer
18(b)(d)	Economic Interests of Canada
April 15, 2007	
16.4	Exemption for the Public Sector Integrity Commissioner
16.5	Exemption for records related to the *Public Servants Disclosure Protection Act*
September 1, 2007	
3	Definition Government Institution
3.1	For greater certainty: Information Related to General Administration
4(2.1)	Responsibility of Institution: Duty to Assist and Provide Timely Access
18.1	Specific exemptions for some Crown Corporations
20.1	Specific exemption: Public Sector Investment Board
20.2	Specific exemption: Canada Pension Plan Investment Board
20.4	Specific exemption: National Arts Centre Corporation
68.1	Specific exclusion: Canadian Broadcasting Corporation
68.2	Specific exclusion: Atomic Energy of Canada Limited
77(1)(a)(a.1)	Regulations: Format

(ii) Changes further to the Enactment of the Other Acts

The Government Bill C-34, entitled An *Act to provide for jurisdiction over education on First Nation lands in British Columbia* received royal assent on December 12, 2006 (2006, c. 10), will come into force on proclamation, and will cause the following changes:

Adds paragraph 13(3)(e) to the Act:

(e) the council of a participating First Nation as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act*.

Amends paragraph 8(2)(f) of the *Privacy Act*:

(f) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the council of the Westbank First Nation, the council of a participating First Nation — as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act* —, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;

Adds paragraph 8(7)(e) of the *Privacy Act*:

(e) the council of a participating First Nation as defined in subsection 2(1) of the *First Nations Jurisdiction over Education in British Columbia Act*.

B. Proposed Changes to the Act

(i) Proposed Changes further to Bill C-12

The Government Bill C-12 (previous session Bill C-78) entitled An *Act to provide for emergency management and to amend and repeal certain Acts* (Received First Reading in the Senate on December 11, 2006, Debates at 2nd Reading on March 1st, 2007) proposes to amend the following sections of the Act:

Added to subsection 20(1):

(b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the *Emergency Management Act* and that concerns the

vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems [section 8].

Amends subsection 20(6):

(6) The head of a government institution may disclose all or part of a record requested under this Act that contains information described in any of paragraphs (1)(b) to (d) if (a) the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment; and (b) the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party, any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations [subsection 8(2)].

Amends subsection 27(1):

27. (1) If the head of a government institution intends to disclose a record requested under this Act that contains or that the head has reason to believe might contain trade secrets of a third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by a third party, or information the disclosure of which the head can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party, the head shall make every reasonable effort to give the third party written notice of the request and of the head's intention to disclose within 30 days after the request is received [section 9].

Amends paragraph 35(2)(c):

(c) a third party if

(i) the Information Commissioner intends to recommend the disclosure under subsection 37(1) of all or part of a record that contains — or that the Information Commissioner has reason to believe might contain — trade secrets of the third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by the third party or information the disclosure of which the Information Commissioner can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of the third party, and

(ii) the third party can reasonably be located.

However no one is entitled as of right to be present during, to have access to or to comment on representations made to the Information Commissioner by any other person [section 10].

Section 12 of Bill C-12 provides for a coordinating amendment with Bill C-2 as follows:

> If Bill C-2, introduced in the 1st session of the 39th Parliament and entitled the *Federal Accountability Act*, receives Royal Assent, then, on the later of the day on which section 154 of that Act comes into force and the day on which section 1 of this Act comes into force — or, if those days are the same day, then on that day — paragraph 35(2)(c) of the French version of the *Access to Information Act* is replaced by the following:
>
> c) un tiers, s'il est possible de le joindre sans difficultés, dans le cas où le Commissaire à l'information a l'intention de recommander, aux termes du paragraphe 37(1), la communication de tout ou partie d'un document qui contient ou est, selon lui, susceptible de contenir des secrets industriels du tiers, des renseignements visés aux alinéas 20(1)b) ou b.1) qui ont été fournis par le tiers ou des renseignements dont la communication risquerait, selon lui, d'entraîner pour le tiers les conséquences visées aux alinéas 29(1)c) ou d).

(ii) Proposed Changes further to Bill S-223

The Senate Private Bill S-223 entitled *An Act to amend the Access to Information Act* (Received First Reading on February 15, 2007 and received Second Reading on March 1, 2007) proposes the following:

> Amends subsection 16.1 (1) of the Act:
>
> **16.1** (1)The following heads of government institutions shall refuse to disclose any record requested under this Act that contains information that was obtained or created by them or on their behalf in the course of an investigation, examination or audit conducted by them or under their authority:
>
> (a) the Auditor General of Canada;
> (b) the Commissioner of Official Languages for Canada;
> (c) the Information Commissioner; and
> (d) the Privacy Commissioner.
>
> (2) However, the head of a government institution referred to in any of paragraphs (1) (a) to (d) shall not refuse under subsection (1) to disclose any record that contains information that was created by or on behalf of the head of the government institution in the course of an investigation or audit conducted by or under the authority of the head of the government institution once the investigation or audit and all related proceedings, if any, are finally concluded [section 1].

Amends subsection 22.1 (2) of the Act:

(2) However, the head of a government institution shall not refuse under subsection (1) to disclose a draft report of an internal audit of a government institution or any related audit working paper if a final report of the audit has been published or if a final report of the audit is not delivered to the institution within two years after the day on which the audit was first commenced [section 2].

Adds section 26.1 of Act:

26.1 Despite any other provision on this Act, the head of a government institution may disclose all or part of a record to which this Act applies if the head determines that the public interest in the disclosure clearly outweighs in importance any loss, prejudice or harm that may result from the disclosure. However, the head shall not disclose under this section any information that relates to national security [section 3].

(iii) Proposed Changes further to Bill S-216

The Private Senate Bill S-216, entitled An *Act providing for the Crown's recognition of self-governing First Nations of Canada* received Second Reading and was referred to Committee (Aboriginal Peoples) on December 13, 2006. The Committee met on February 27 and 28, 2007. The Bill will amend section 8 of the *Privacy Act* by adding to subsection 8(6):

(e) a recognized First Nation under the *First Nations Government Recognition Act*.

C. Changes to Schedules I and II

(i) Institutions Added to Schedule I

The following institutions were added to Schedule I:

- Office of the Director of Public Prosecutions / Bureau du directeur des poursuites pénales [section 129 of the *Federal Accountability Act*]
- Corporation for the Mitigation of Mackenzie Gas Project Impacts / Société d'atténuation des répercussions du projet gazier Mackenzie [section 210 of the *Act to implement certain provisions of the budget tables in Parliament on May 2, 2006*, S.C. 2006, c. 4; came into force on November 10, 2006 (SI/2006-0132)]

- Office of the Administrator of the Ship-source Oil Pollution Fund /Bureau de l'administrateur de la Caisse d'indemnisation des dommages dus à la pollution par les hydrocarbures causée par les navires [SOR/2006-0217; September 21, 2006]

- Public Appointments Commission Secretariat / Secrétariat de la Commission des nominations publiques [SOR/2006-70; May 17, 2006]

- First Nations Financial Management Board / Conseil de gestion financière des premières nations ; First Nations Statistical Institute / Institut de la statistique des premières nations ; First Nations Tax Commission / Commission de la fiscalité des premières nations [section 147 of the *First Nations Fiscal and Statistical Management Act*, S.C. 2005, c. 9, came into force on April 1st, 2006; SI/2006-0059]

- Assisted Human Reproduction Agency of Canada / Agence canadienne de contrôle de la procréation assistée [section 72 of the *Assisted Human Reproduction Act*, S.C. 2004, c. 2; came into force on January 12, 2006 (SI/2005/42)]

- Canadian Wheat Board /Commission canadienne du blé

- Asia-Pacific Foundation of Canada / Fondation Asie-Pacifique du Canada

- Canada Foundation for Innovation / Fondation canadienne pour l'innovation

- Canada Foundation for Sustainable Development Technology / Fondation du Canada pour l'appui technologique au développement durable

- Canada Millennium Scholarship Foundation / Fondation canadienne des bourses d'études du millénaire

- The Pierre Elliott Trudeau Foundation / La Fondation Pierre-Elliott-Trudeau

- Office of the Auditor General of Canada / Bureau du vérificateur général du Canada

- Office of the Chief Electoral Officer / Bureau du directeur général des élections

- Office of the Commissioner of Official Languages / Commissariat aux langues officielles

- Office of the Information Commissioner / Commissariat à l'information

- Office of the Privacy Commissioner / Commissariat à la protection de la vie privée

  [sections 165 to 171 of the *Federal Accountability Act*]

- Office of the Public Sector Integrity Commissioner / Commissariat à l'intégrité du secteur public; Registry of the Public Servants Disclosure Protection Tribunal / Greffe du Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles [section 221 of the *Federal Accountability Act*]

- Canadian Centre for the Independent Resolution of First Nations Specific Claims / Centre canadien du règlement indépendant des revendications particulières des premières nations [section 78 of the *Specific Claims Resolution Act*, S.C. 2003, c. 23]

(ii) Institutions Struck Out from Schedule I

Schedule I to the Act was amended by striking out the following:

- Canadian Firearms Centre / Centre canadien des armes à feu [SOR/2006-99; May 17, 2006; the program was transferred to the RCMP]

- Office of the Registrar of Lobbyists / Bureau du directeur des lobbyists and add: Office of the Commissioner of Lobbying / Commissariat au lobbying [sections 90 and 91 of the *Federal Accountability Act*]

Since the *Federal Accountability Act* provides for a new definition of "government institution", when that section comes into force (on September 1st, 2007), the Crown Corporations and their wholly-owned subsidiaries will be struck out from Schedule I as they will be included by part (b) of the definition.

(iii) Changes to Schedule II

The following changes were made to Schedule II:

- Add: *Export Development Act* / *Loi sur le développement des exportations* and a corresponding reference to "section 24.3" [sections 172 and 179 of the *Federal Accountability Act*]

Section 24.3 provides that all information obtained in relation to a customer is privileged and must not be communicated except for the administration or enforcement of the Act, for prosecution of an offence, or to the Minister of National Revenue for the purpose of administrating or enforcing the *Income Tax Act* or the *Excise Tax Act*, or with the consent of the person.

- Amendment: *Softwood Lumber Products Export Charge Act / Loi sur le droit à l'exportation de produits de bois d'œuvre* and the corresponding reference to "section 20" was struck out and replaced by *Softwood Lumber Products Export Charge Act, 2006 / Loi de 2006 sur les droits d'exportation de produits de bois d'œuvre* and a corresponding reference in respect of that Act to "section 84" [sections 118 and 119 of *Softwood Lumber Products Export Charge Act*, 2006; S.C., 2006, c.13, came into force or are deemed to have come into force on October 12, 2006].

Section 84 provides that any information of any kind and in any form that relates to one or more persons and that is obtained by or on behalf of the Minister for the purposes of this Act, and any information that is prepared from such information, shall not be disclosed. There are some exceptions such as for administration or enforcement of this Act or other such as the *Customs Act*; for criminal proceedings; any legal proceedings under an international agreement relating to trade before a court; the Minister may provide to appropriate persons any confidential information relating to imminent danger of death or physical injury to any individual; with the consent of the person. Also, despite any other Act of Parliament or other law, no official shall be required, in connection with any legal proceedings, to give or produce evidence relating to any confidential information.

- Amendment: Section 241 of the *Income Tax Act*, already listed in Schedule II

Section 241 was amended to allow the Canada Revenue Agency to disclose to the Financial Transactions and Reports Analysis Centre of Canada, the Royal Canadian Mounted Police, and the Canadian Security Intelligence Service information about charities suspected of being involved in terrorist financing activities. The changes to section 241 provide that an official may disclose some information in specific circumstances for the purposes of the administration and enforcement of the *Charities Registration (Security Information) Act* [*Act to amend the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and the Income Tax Act and to make a consequential amendment to another Act*, S.C. 2006, c. 12; came into force on February 10, 2007 (SI/2007-18)].

- Add: *First Nations Fiscal and Statistical Management Act / Loi sur la gestion financière et statistique des Premières nations* and a corresponding reference to "section 108" [section 148 of the *First Nations Fiscal and Statistical Management Act*; S.C. 2005, c. 9, came into force on April 1st, 2006; (SI/2006-0059)]

Section 108 provides that identifiable individual returns shall not be examined except by person employed by the Institute or in some circumstances such as for the conduct of a prosecution, or in accordance with an agreement made under

section 106. Also, the First Nations Chief Statistician may authorize the disclosure of some specific information.

- Amendment: Section 17 of the *Statistics Act*, already listed in Schedule II

The Act to amend the *Statistics Act* (S.C. 2005, c. 31) came into force on Royal Assent on June 29, 2005, and added the following to the *Statistics Act*, affecting section 17:

> **18.1** (1) The information contained in the returns of each census of population taken between 1910 and 2005 is no longer subject to sections 17 and 18 ninety-two years after the census is taken.
>
> (2) The information contained in the returns of each census of population taken in 2006 or later is no longer subject to sections 17 and 18 ninety-two years after the census is taken, but only if the person to whom the information relates consents, at the time of the census, to the release of the information ninety-two years later.
>
> (3) When sections 17 and 18 cease to apply to information referred to in subsection (1) or (2), the information shall be placed under the care and control of the Library and Archives of Canada.

It should be noted that a mandatory review is provided for the administration and operation of subsection 18.1(2) [section 2].

- Add: *Canada Elections Act / Loi électorale du Canada* and a corresponding reference to "section 540" [section 172.01 of the *Federal Accountability Act*]

Section 540 provides that no election documents or documents related to the Register of Electors can be inspected or produced except by order of a judge. There are two exceptions: inspection for the purpose of an inquiry under section 510 or a prosecution for an offence under the Act.

- Add: *Specific Claims Resolution Act / Loi sur le règlement des revendications particulières* and a corresponding reference to "section 38 and subsections 62(2) and 75(2)" [section 79 of the *Specific Claims Resolution Act* (S.C. 2003, c. 23)]

Section 38 and paragraphs 62(2) and 75(2) provides that information related to a specific claim cannot be disclose unless the parties to the claim consent, that

hearings are public except when necessary, and that the Commission or the Tribunal can take any measures to keep confidential documents filed confidential in some circumstances.

D. Proposed Changes to Schedules I and II

In legislation before Parliament, it is proposed that the following institutions be added to Schedule I:

- Canada Fisheries Tribunal /Office des pêches du Canada [section 216 of Bill C-45, An *Act respecting the sustainable development of Canada's seacoast and inland fisheries*, received Second Reading on February 23, 2007]

- Registrar of the Breast Implant Registry / Directeur du Registre des implants mammaires [section 19 of Bill C-312, An *Act to establish and maintain a national Breast Implant Registry*, received First Reading on May 29, 2006]

The following changes are proposed for Schedule II:

- Amendment: Replace the reference to "subsections 4.79(1) and 6.5(5)" opposite the reference to the *Aeronautics Act* with a reference to "subsection 4.79(1), sections 5.392 and 5.393, subsections 5.394(2), 5.397(2), 6.5(5), 22(2) and 24.1(4) and section 24.7" [Government public Bill C-6, entitled An *Act to amend the Aeronautics Act and to make consequential amendments to other Acts*, referred to the Transport, Infrastructure, and Communities Committee on November 7, 2006]

The new sections proposed provide that, if a holder of a Canadian aviation document has a management system with a process that requires or encourages its employees to disclose to it any thing or circumstance that could present a risk to the safety of aeronautical activities, that information is confidential, and the Minister shall not disclose it or make it available except in some circumstances. Also, if an operator of an aircraft has a management system with a process for the collection, analysis and use of information derived from a flight data recorder, then any information collected under the process that comes into the Minister's possession or information disclosed under an agreement for that process, is confidential, and the Minister shall not disclose it or make it available except in some circumstances. Moreover, every on-board recording is privileged and shall not be communicated.

- Amendment: Section 241 of the *Income Tax Act*, already listed in Schedule II

According to a proposed amendment to section 241 of the *Income Tax Act* [Government Bill C-33 entitled An *Act to amend the Income Tax Act, including*

amendments in relation to foreign investment entities and non-resident trusts, and to provide for the bijural expression of the provisions of that Act, received First Reading on November 22, 2006], the Minister of Canadian Heritage may disclose taxpayer information in respect of a Canadian film or video production certificate to specific persons such as employees whose mandate includes the provision of assistance in respect of films or video production for the purpose of administrating or enforcing the program.

- Add: *Excise Act, 2001 / Loi de 2001 sur l'accise* and a corresponding reference to "section 211" [section 134 of Government Bill C-40 entitled An *Act to amend the Excise Tax Act, the Excise Act, 2001 and the Air Travellers Security Charge Act and to make related amendments to other Acts*, received Second Reading on January 30, 2007 and referred to committee (Finance)]

According to section 211, information obtained under that Act cannot be disclosed except in circumstances such as for the purpose of enforcing and administrating the Act, to specific officials for enforcement of various Acts, or with the consent of the person.

- Add: *Breast Implant Registry Act / Loi sur le Registre des implants mammaires* and a corresponding reference to "section 11" [section 20 of Private Member's Bill C-312, entitled An *Act to establish and maintain a national Breast Implant Registry*, received First Reading on May 29, 2006]

Section 11 provides that information contained in the Registry can only be communicated with the consent of the person, and the person needs to be informed of the purpose for which the consent is sought. The Registrar may disclose information for the purpose of enforcing the Act, the administration of health care insurance plans, or for the purpose of disciplinary proceedings. Also, unidentifiable information may be disclosed for scientific research or statistical purposes, or when the disclosure is necessary to address the risk to the health of the person.

E. Amendments to Heads of Government Institutions Designation Order

The schedule to the *Access to Information Act* Heads of Government Institutions Designation Order is amended by adding the following in numerical order: (SI/2006-112, in force September 21, 2006)

Item	Column I Government Institution	Column II Position
71.1	Office of the Administrator of the Ship-source Oil Pollution Fund	Administrator

The portion of item 71 of the schedule to the *Access to Information Act* Heads of Government Institutions Designation Order in column II is replaced by the following: (SI/2006-114, in force September 21, 2006)

Item	Column I Government Institution	Column II Position
71	…	Chairperson

The schedule to the Order is amended by adding the following in numerical order:

Item	Column I Government Institution	Column II Position
47.001	Gwich'in Land and Water Board	Chairperson
47.002	Gwich'in Land Use Planning Board	Chairperson
52.01	Mackenzie Valley Environmental Impact Review Board	Chairperson
52.02	Mackenzie Valley Land and Water Board	Chairperson
71.1	Nunavut Surface Rights Tribunal	Chairperson
71.2	Nunavut Water Board	Chairperson
91.31	Sahtu Land and Water Board	Chairperson
91.32	Sahtu Land Use Planning Board	Chairperson
104.2	Yukon Environmental and Socio-Economic Assessment Board	Chairperson
104.3	Yukon Surface Rights Board	Chairperson

Item 20 of the schedule to the *Access to Information Act* Heads of Government Institutions Designation Order is repealed (SI/2006-65, in force May 3, 2006).

The schedule to the *Access to Information Act* Heads of Government Institutions Designation Order is amended by adding the following in numerical order: (SI/2006-20, in force February 22, 2006)

Item	Column I Government Institution	Column II Position
84.01	Public Appointments Commission Secretariat	Executive Director

The schedule to the *Access to Information Act* Heads of Government Institutions Designation Order is amended by adding the following in numerical order: (SI/2006-13, in force February 22, 2006)

Item	Column I Government Institution	Column II Position
75.21	Office of the Registrar of Lobbyists	Registrar

Item 34.2 of the schedule to the *Access to Information Act* Heads of Government Institutions Designation Order is repealed.

CHAPTER VII

Corporate Services

Corporate Services provides financial, human resources, information management/information technology, and general administrative services to support the work of the Office of the Information Commissioner. As well, Corporate Services oversees systems of management control and accountability.

During the reporting year, Corporate Services took steps to develop an internal audit capacity and to put in place a plan for coming into compliance with new responsibilities contained in the *Federal Accountability Act*.

Internal Audit

The Treasury Board of Canada's responsibilities and powers under the Financial Administration Act, as amended by the *Federal Accountability Act*, now includes all matters relating to internal audit in the federal public administration.

The Treasury Board of Canada's new Policy on Internal Audit (the Policy) came into effect on April 1, 2006, and requires that its implementation be phased in between April 1, 2006 and April 1, 2009. The objective of the Policy is to strengthen public sector accountability, risk management, resource stewardship, and good governance by reorganizing and bolstering internal audit on a government-wide basis.

The Policy requires that the Information Commissioner, for the first time, establish an internal audit function, establish an independent audit committee, appoint a chief audit executive, and approve an internal audit plan. The Commissioner will comply.

Consequently, the Commissioner's office is preparing a Treasury Board Submission for additional funding associated with this initiative.

Federal Accountability Act Compliance

The Office of the Information Commissioner (OIC) was advised, on February 22, 2007, by the President of the Treasury Board, that it, as well as the other Officers of Parliament, would be subject to the *Access to Information Act* and the *Privacy Act* as of April 1, 2007.

The legal and operational requirements necessary to comply with both Acts have been put in place. An Access to Information and Privacy Coordinator has been appointed, with full delegation to answer access requests.

As well, the OIC has established a process whereby complaints under the Act against the Information Commissioner can be independently investigated. Former Supreme Court of Canada Justice, the Hon. Peter Corey, has agreed to undertake the role.

Upon implementation of the above-named Acts, the OIC will also become subject to the *Library and Archives of Canada Act*. Arrangements are being made to meet the requirements of the National Librarian and Archivist on the management of information. OIC Personal Information Banks are being registered with the Treasury Board.

Consequently, the Commissioner's office is preparing a Treasury Board Submission for additional funding associated with this initiative.

Financial Performance and Tables

The tables in the following section contain summaries of financial information under the following headings:

- **Main Estimates** – the OIC budget levels as set out in the 2006-2007 Main Estimates;
- **Planned Spending** – the planned spending at the beginning of the fiscal year as set out in the 2006-2007 Report on Plans and Priorities;
- **Total Authorities** – for the 2006-2007 reporting cycle, the "total authorities" column refers to total spending authorities received during the fiscal year; as well as funding received from 2006-2007 Supplementary Estimates;
- **Actual** – the column refers to what is printed in the Public Accounts of Canada for the same fiscal year.

Please note that, in all four of the following tables, the 2006-2007 figures for Total Authorities and Actual Spending do not include final year-end adjustments.

Table 1: Comparison of Planned-to-Actual Spending (including FTEs)

This table offers a comparison of the Main Estimates, planned spending, total authorities, and actual spending for the most recently completed fiscal year, as well as historical figures for actual spending.

($ thousands)	Actual 2004–2005	Actual 2005-2006	2006-2007			
			Main Estimates	Planned Spending	Total Authorities	Actual
Assess, investigate, review, pursue judicial enforcement, and provide advice	5 556	5 891	8 181	8 181	8 270	6 652
Total	**5 556**	**5 891**	**8 181**	**8 181**	**8 270**	**6 652**
Plus: Cost of services received without charge	882	831	1 137	1 137	1 137	820
Total Departmental Spending	**6 438**	**6 722**	**9 318**	**9 318**	**9 407**	**7 472**
Full Time Equivalents	**52**	**53**	**78**	**78**	**78**	**54**

Table 2: Resources by Program Activity

The following table provides information on how resources are used for the most recently completed fiscal year.

($ thousands)	2006-2007	
	Budgetary	
	Operating	Total
Assess, investigate, review, pursue judicial enforcement, and provide advice		
Main Estimates	8 181	8 181
Total Planned Spending	*8 181*	*8 181*
Total Authorities	8 270	8 270
Total Actual Spending	*6 652*	*6 652*
Total		
Main Estimates	8 181	8 181
Total Planned Spending	*8 181*	*8 181*
Total Authorities	8 270	8 270
Total Actual Spending	*6 652*	*6 652*

Table 3: Voted and Statutory Items

This table explains the way Parliament votes resources to the department and basically replicates the summary table listed in the Main Estimates. Resources are presented to Parliament in this format. Parliament approves the voted funding, and the statutory information is provided for information purposes.

($ thousands)		2006-2007			
Vote or statutory item	Truncated Vote or Statutory Wording	Main Estimates	Planned Spending	Total Authorities	Actual
40	Operating Expenditures	7 188	7 188	7 277	5 917
(S)	Contributions to Employee Benefit Plans	993	993	993	735
Total		**8 181**	**8 181**	**8 270**	**6 652**

Table 4: Services Received Without Charge

This table is designed to show the actual costs of services received without charge by a department.

($ thousands)	2006-2007
Accommodation provided by Public Works and Government Services Canada	430
Contributions covering employers' share of employees' insurance premiums and expenditures paid by the Treasury Board of Canada	303
Office of the Auditor General - audit services	87
Total 2006-2007 Services Received Without Charge	**820**