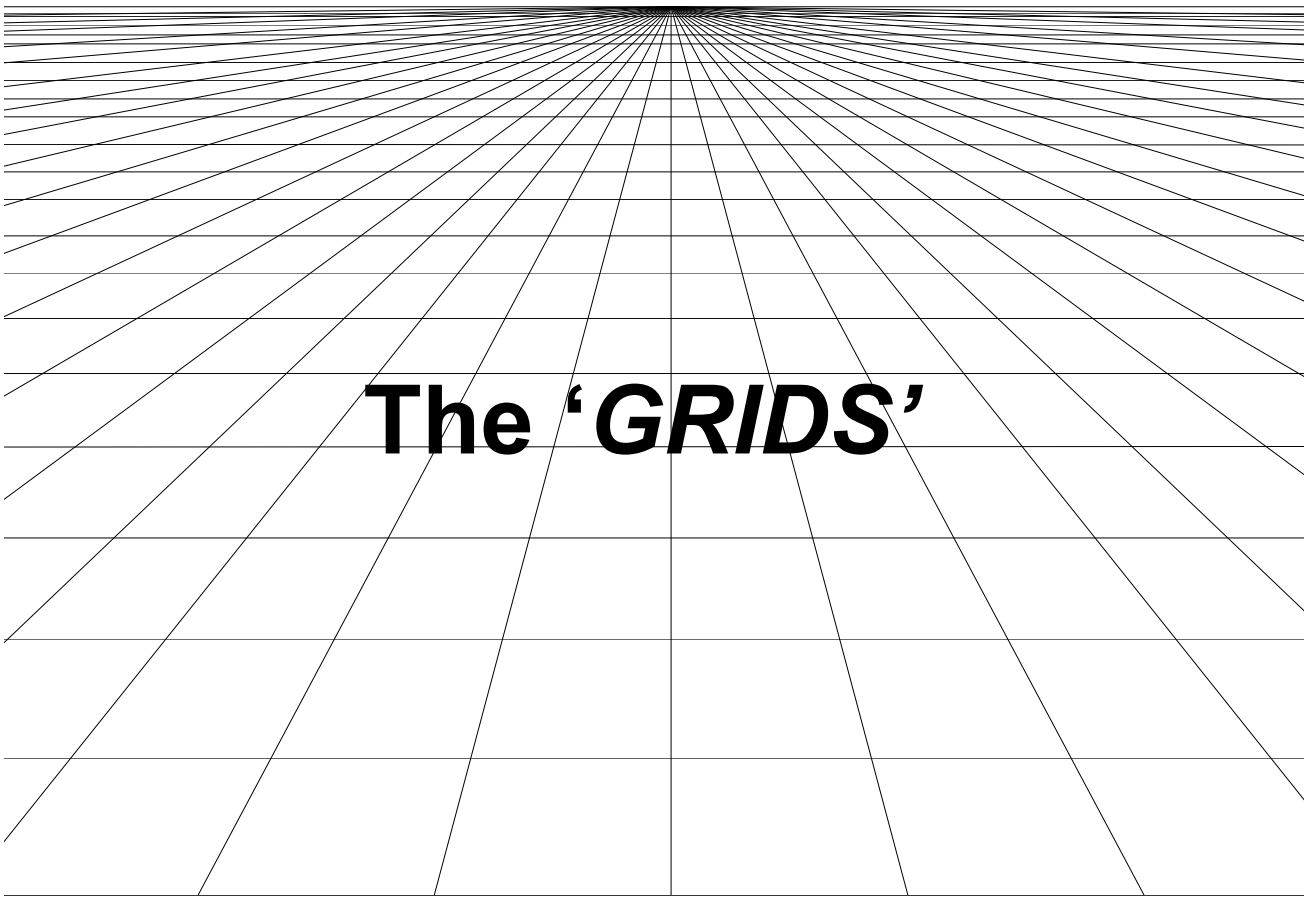

The '*GRIDS*'

November 2006

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N.B. La jurisprudence dans ce document est à jour jusqu'à novembre 2006.

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Discretion (General)

The Provision:

This grid applies to discretion in general.

Preliminary matters:

The *Access to Information Act*, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizen or permanent resident within the meaning of the *Immigration Act* and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, the Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under section 68 or 69.

The Act contains two types of exemptions, commonly referred to as mandatory and discretionary exemptions. The consequence of a mandatory exemption (those beginning "*the head of a government institution shall refuse to disclose...*") is that once it has been determined that the exemption applies, disclosure of the information must be refused. As a result, unless any override applies (see below) the government institution in control of the information will be under a legal obligation to refuse access. The consequence of a discretionary exemption (those beginning "*the head of a government institution may refuse to disclose...*") is to permit an institution to refuse disclosure. Once it has been determined that the exemption applies, the institution has the option to rely on the exemption or not.

The discretion to disclose or withhold information can only be exercised by the head of a government institution or by an individual that the head has designated in writing for this purpose.

When reviewing the application of a discretionary exemption, it is important to remember that the government institution has the evidentiary burden of showing not only that the information falls within the scope of the exemption, but that the head of the institution or his/her delegate properly exercised their discretion in deciding not to disclose the information.[1] If there is no evidence establishing that the institution head considered whether or not to disclose information subject to a discretionary exemption, or if the evidence about why they decided to refuse disclosure indicates the head relied on irrelevant or unreasonable factors or on improper considerations or that the decision is not consistent with the objects of the Act (that of extending disclosure of government information subject to limited and specific exemptions), then it is open to our office, and to the Federal Court on a review, to question or reject the decision to refuse disclosure.

Discretionary Exemptions:

Discretion must be exercised under the following exemptions in the Act:

- 14 Federal-Provincial Affairs
- 15 (1) International Affairs and Defence
- 16 (1) Law Enforcement & Investigations
- 16 (2) Security
- 17 Safety of individuals
- 18 Economic Interests of Canada
- 21 Advice/Recommendations
- 22 Testing or Audits
- 23 Solicitor/client privilege
- 26 Information to be published

Claiming a discretionary exemption requires a two-step process. First, the head must determine whether the record comes within the description that is contemplated by the statutory exemption invoked in the particular case. Second, if it does, the head must determine whether the record should nevertheless be disclosed.[2] The Federal Court of appeal has now confirmed that the burden of proof on a government institution to show an exemption applies contained in section 47 of the Act encompasses both the burden of proving that the conditions of the exemption are met and that the discretion conferred on the head of the government institution was properly exercised.[3]

The Exercise of Discretion:

The exercise of discretion is fundamental to achieve intention of the *Access to Information Act*. The guiding principles of the Act are set out in section 2, the purpose clause:

- that government information should be available to the public;
- that necessary exceptions to the right of access should be limited and specific; and,
- that decisions on the disclosure of government information should be reviewed independently of government.

The Supreme Court of Canada has characterized the underlying purpose of the *Access to Information Act* in the following way, stating that the overarching objective of the statute, as well as its principles which are set out in section 2 of the Act, must be taken into account when determining whether an exemption from disclosure should be allowed.

> *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at 432-433 and 450 LaForest J. The Act is concerned with securing the values of participation and accountability in the democratic process. The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry. Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. While the **Access to Information Act** recognizes a broad right of access to any record under the control

of the government, the overarching purposes of the Act must be considered in determining whether an exemption to that general right should be granted.

In the same decision, speaking for the minority, then Mr. Justice LaForest stated that when there are two interpretations open to the Court in deciding to whether or not to exempt a record from disclosure, given Parliament's intention, a court should choose the one that infringes the least on the public's right to access.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403 at 433 LaForest J. (for the minority). In my opinion, all exemptions must be interpreted in light of subsection 2(1). That is, all exemptions to access must be limited and specific. This means that where there are two interpretations open to the Court, it must, given Parliament's intention, choose the one that infringes on the public's right to access the least. It is only in this way that the purpose of the Act can be achieved. It follows that an interpretation of an exemption that allows the government to withhold information from public scrutiny weakens the stated purpose of the Act. It is important to emphasize that this does not mean that the Court is to redraft the exemptions found in the Act in order to create more narrow exemptions. A court must always work within the language it has been given. If the meaning is plain, it is not for this Court, or any other court, to alter it. Where, however, there is ambiguity within a section, that is, it is open to two interpretations, then this Court must, given the presence of section 2, choose the interpretation that infringes on the public's stated right to access to information contained in section 4 of the Act the least.

Ten months later, Mr. Justice LaForest's position was discussed by a unanimous bench at the Federal Court of Appeal in almost identical language:

Rubin v. Canada (Minister of Transport) (1997), 221 N.R. 145 at 152 (F.C.A.) Stone, Linden and McDonald JJ.A. All exemptions should be interpreted in light of this clause. That is, all exemptions to access must be limited and specific. This means that where there are two interpretations open to the court, it must, given Parliament's stated intention, choose the one that infringes on the public's right to access the least. It is only in this way that the purpose of the Act can be achieved. It follows that an interpretation of an exemption that allows the government to withhold information from public scrutiny weakens the stated purpose of the Act.

The purpose of the Act is particularly important when determining whether a discretionary exemption applies.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403 at 432-433 and 450 LaForest J. The Act is concerned with securing the values of participation and accountability in the democratic process. The overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and bureaucrats remain accountable to the citizenry. Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. While the **Access to Information Act** recognizes a broad right of access to any record under the control of the government, the overarching purposes of the Act must be considered in determining whether an exemption to that general right should be granted.

Canada Post Corp. v. Canada (Minister of Public Works), [1995] 2 F.C. 110 at 124 (C.A.) Pratte, Marceau and Létourneau. The Act was enacted as part of a government move towards open government. To achieve open government, to prevent the taking of government decisions behind closed doors, to enhance the public's knowledge of the information and options available to decision makers, to ensure citizens' access to the documentary basis of management and investigation of public problems, it is not necessary to recognize a right of access going beyond documents prepared and information gathered by a government institution in the course of executing official duties.

Noël v. Great Lakes Pilotage Authority Ltd., [1988] 2 F.C. 77 at 80 (T.D.) Dubé J. The purpose of the Act is to extend access to records under the control of government and the absolutely essential exceptions to this right must be specific and limited.

Communauté Urbaine de Montréal (Société de transport) v. Canada (Minister of the Environment), [1987] 1 F.C. 610 at 613 (T.D.) Dubé J. The Act contains a clause setting out the purpose of the legislation. The existence of such a clause is worth emphasizing since it is quite rare and therefore significant.

Davidson v. Solicitor General of Canada, [1987] 3 F.C. 15 at 22-23 (T.D.) Jerome A.C.J; *Canada* (*Information Commissioner) v. Canada (Minister of Employment and Immigration),* [1986] 3 F.C. 63 at 69 (T.D.) Jerome A.C.J. The purpose of the Act is to codify the right of access to information held by government. It is not to codify the government's right of refusal. Access should be the normal course. Exemptions should be exceptional and must be confined to those specifically set out in the statute.

Canada (Information Commissioner) v. Canada (Minister of Employment and Immigration), [1986] 3 F.C. 63 at 69 (T.D.) Jerome A.C.J. The purpose of the Act is to codify the right of access to information held by the government. It is not to codify the government's right of refusal. Access should be the normal course. Exemptions should be exceptional and must be confined to those specifically set out in the statute.

Therefore, when an institution head exercises his or her discretion to apply a discretionary exemption or to invoke one of the overrides, the head must consider the object of the Act as a whole and the limited purpose of the exemption itself in relation to the circumstances at hand. It is simply not enough for a government institution to broadly categorize the requested information as subject to a discretionary exemption; rather the head must consider whether, in the light of the object and purpose of the statute and the exemption per se, if the information should be disclosed even though the exemption applies.

The exercise of discretion allows the head of a government institution to demonstrate that the institution is operating in the spirit of the legislation. It is not simply a formality where the head considers the issues before routinely saying no. The head must show that the relevant factors were considered and, if the decision is to withhold the information, that there were compelling reasons to support the decision. In exercising discretion, the head of the public body may also want to consult with other public bodies that may have an interest in the requested records.

The discretion given to the institutional head is not unfettered. It must be exercised in accordance with recognized legal principles. It must also be used in a manner which is in accord with the conferring statute (i.e., in exercising his discretion, the head must be governed by the principles that information should be available to the public and that exemptions to access should be limited and specific). Accordingly, it is incumbent upon the institutional head to have regard to the policy and object of the *Access to Information Act* when exercising his or her discretion.

Some factors must generally be considered when exercising discretion. These include:

- the general purpose of the legislation;
- the wording of the discretionary exemption and the interests which the exemption attempts to protect;
- whether the requester's request could be satisfied by severing the record and by providing the requester with as much information as reasonably practicable;

- the historical practice of the institution with respect to the release of similar types of records (i.e., the Act is not intended to limit in any way access to the type of government information that is normally available to the public);
- the age of the record;
- the public interest in disclosing the record; and

In recognition of this principle, the discretionary exceptions require the head of a government institution to determine whether harm is likely to result from release of information that falls within the exception. If no harm is apparent, a government institution should release the information in keeping with the spirit and intent of the Act. On occasion, government institutions may wish to release the information even though it technically qualifies for exemption. This could happen in cases where the benefits of disclosure outweigh the harm or where a combination of factors makes the harm negligible. Other factors which the institution should take into account include the degree of public interest in the information, whether disclosure would assist or shed light on issues under public discussion, whether disclosure of the information would benefit an individual or group, whether there are compassionate grounds for disclosure or whether the circumstances surrounding the request are such that disclosure would be merited. The Grid on Investigating the Use of Discretionary Exemptions and Grids for each discretionary exemption and for each section subject to an override set out areas where specific factors or considerations relevant to the exercise of each discretion may apply.

Following consideration of these factors and any other relevant circumstances, the head decides whether or not to disclose part or all of the requested information that falls under the exemption, bearing in mind that the goal is to release as much information as possible without causing harm. If harm from the release of certain information outweighs any benefit, that information may be severed and the rest released. The process of severing plays an integral part in the proper exercise of discretion in the spirit of the legislation.

The Overrides:

A mandatory exemption can be partially or completely overridden in the following defined circumstances:

- 13 (2) Information obtained in confidence
- 19 (2) Personal information
- 20 (5) Third party - Consent
- 20 (6) Third party - Public interest

Each of the above overrides provide that in given circumstances, the head of a government institution '*may*' disclose information if these circumstances are met. The Supreme Court of Canada has characterized the decision of an institution head to invoke the override as discretionary in nature.[4]

Institution heads should first determine whether there is enough evidence to suggest that one of the overrides would apply before claiming sections 13, 19, and 20. It is not sufficient for a department to merely state that they are unaware or that they just don't know if the override applies. Rather, the department should be in a position to state what activities

were undertaken in this regard.[5] The institution must show, for example, that it has made reasonable efforts to obtain consent, to determine the public availability of a record, and that the head has exercised his/her discretion properly in relation to the public interest override.[6]

Questioning the Exercise of Discretion by an Institution:

Courts will require institution heads to exercise their discretion in good faith, without bias and for purposes rationally connected to the purposes of the legislation.[7] In a related recent judgement interpreting section 19 of the Act, the Federal Court of Appeal emphasized the need for the heads of institutions to make their discretionary decision in good faith.

> *Canada (Information Commissioner of Canada) v. Canada (Commissioner of the Royal Canadian Mounted Police),* 2001 FCA 56 Décary, Létourneau, Noel. JJ.A. The second type of decision is purely discretionary. In my view in reviewing such a decision the court should not itself attempt to exercise the discretion de novo but should look at the document in question and the surrounding circumstances and simply consider whether the discretion appears to have been exercised in good faith and for some reason which is rationally connected to the purpose for which the discretion was granted.

When reviewing discretionary decisions, the Courts have typically limited their assessment to these factors (good faith, without bias, for reasons consistent with the purpose of the statute) and to ensuring that the institution head has turned his or her mind to the issue of whether to disclose the information or apply the exemption. (This approach is gradually evolving[8]. For example, the Federal Court of Appeal has now confirmed that government institutions have the burden of proof in showing that the institution head properly exercised his/her discretion to refuse disclosure, reversing prior findings that the requester must raise a prima facie case that the discretion had been exercised improperly before a Court will review an institution head's decision on these grounds.[9] Nevertheless, it is likely that the Courts will still limit the circumstances in which they will interfere with the determination made by an institution head under the exercise of his or her discretion).

The role of the office of the Information Commissioner is different than that of a reviewing Court. Investigators are not subject to the restrictions of a reviewing Court in relation to the exercise of discretion. It is squarely within the Commissioner's mandate to look carefully at the manner in which discretion was exercised and to urge a different decision on the institution head where circumstances warrant it.

Investigators should therefore not only ensure that institutions have considered whether to disclose information subject to a discretionary exemption, but also whether a decision to refuse disclosure is reasonable given: (1) the circumstances of each case, (2) the purposes of the Act, and (3) the purposes of the exemption. In reviewing a decision, investigators should be aware that the relevant time for consideration is the date when the Head of the institution made his decision. The head of a department can only exercise his discretion on the facts and circumstances that are known to him as of the date he makes his decision.[20] In addition, the complaint report of the Information Commissioner is given serious weight by the Courts.[10] If the report sets out and assesses the factors relevant to the exercise of discretion in a particular situation, it is likely to enhance a Court's assessment of the exercise of discretion by the institution head.

When reviewing complaints relating to discretionary exemptions, the Commissioner can take the following actions:

- institutions can be required to provide the factors that were considered in the exercise of discretion;
- the Commissioner can insist that discretion be exercised where there is no evidence that the responsibility was taken seriously.
- where the head has not properly considered all the factors relevant to the circumstances of the case, the Commissioner may request the head to reconsider his or her exercise of discretion.

Case Law

1) Federal

Discretion in general

Canada (Information Commissioner) v. Canada (The Prime Minister), [1993] 1 F.C. 427 (T.D.): Before claiming a discretionary exemption, two decisions are necessary: first, does the record come within the description that is contemplated by the statutory exemption invoked in a particular case; and second, if it does, should the record nevertheless be disclosed:

> "*The Act contains two types of exemptions, mandatory (sections 13, 19, 20, 24) and discretionary (sections 14, 15, 16, 17, 18, 21, 22, 23). In the case of mandatory exemptions the only decision to be made is whether the records come within the description that the Act requires be exempted from disclosure. In the case of discretionary exemptions such as that under section 14, two decisions are necessary: first, does the record come within the description that is contemplated by the statutory exemption invoked in a particular case; and second, if it does, should the record nevertheless be disclosed.*"

Ruby v. Canada (Solicitor General RCMP), [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.): The Federal Court of Appeal overturned a finding of the Trial Division that certain records in personal information banks pertaining to security investigations were exempt pursuant to paragraph 22(1)(a) of the *Privacy Act* [16(1)(a) *Access to Information Act*], on grounds that the Trial Judge had not reviewed the exercise of discretion by the institution head under the paragraph 22(1)(a) exemption. In the *Ruby* case, the government institution had invoked subsection 16(2) of *the Privacy Act*, the equivalent of subsection 10(2) of the **Access** *to Information Act*, to refuse to confirm or deny the existence of records responsive to the request. The Court noted that, in these and similar circumstances under the Act where the requester has no access to the records in question, and no knowledge of their contents, it would be unfair to impose an evidentiary burden on the requester to show that the head's discretion had not been exercised properly. The Court held that a requester need not show reasons or proof that the institution head had exercised his/her discretion improperly, and that

the onus was instead on the institution to show 1) that the discretion to refuse disclosure was in fact exercised, i.e., that the head had considered whether to refuse or allow disclosure of the information once it was determined the records fell within the scope of the exemption, and 2) that it was exercised in accordance with proper principles.

Rubin v. Canada (CMHC), [1989] 1 F.C. 265; 52 D.L.R. (4th) 671; 19 F.T.R. 160; 86 N.R. 186 (C.A.); See also *Bland v. Canada (National Capital Commission)*, [1991] 3 F.C. 325; 41 F.T.R. 202; 4 Admin L.R. (2d) 171; 36 C.P.R. (3d) 289 (T.D.).: The Federal Court has the power to order the head to exercise his/her discretion in respect of exemptions. Where the head has not properly considered all the factors, the Court may order the head to reconsider his/her exercise of discretion. Institutions that do not provide the factors that were considered in the exercise of discretion can be ordered to do so.

Information Commissioner of Canada v. Canada (Minister of Environment), 2006 FC 1235: In this case, the Commissioner claimed that the Minister's discretion was unreasonably exercised because the Minister refused to release passages containing the same information found in portions of the released material. The Commissioner further argues that the Minister failed to exercise his discretion in accordance with the principle cited by the Federal Court of Appeal in *Rubin v. Canada Mortgage and Housing Corp.*, [1989] 1 F.C. 265 at 274:

> «Accordingly, it is incumbent upon the institutional head (or his delegate) to have regard to the policy and object of the *Access to Information Act* when exercising the discretion conferred by Parliament pursuant to the provisions of subsection 21(1). When it is remembered that subsection 4(1) of the Act confers upon every Canadian citizen and permanent resident of Canada a general right to access and that the exemptions to that general rule must be limited and specific, I think it clear that Parliament intended the exemptions to be interpreted strictly».

The Court agreed with the Commissioner and ordered disclosure on the basis that the confidential cross-examination of the Deputy Minister did not provide any rationale for non-disclosure in relation to the public interest except for the publicly stated reason that the records were not being disclosed because MMT is an active file. There is no indication that the Deputy Minister was aware of the case law governing the interpretation and application of section 21, and it is unclear whether she appreciated the principles relevant to her exercise of discretion. The Deputy Minister must consider whether disclosure is possible without impairing the effectiveness of government.

The Court also found in scrutinizing the Minister's "weighing" process on a standard of reasonableness, that there were insufficient reasons provided in support of the Minister's refusal to disclose.

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403:The discretion given to the institutional head is not unfettered. It must be exercised in accordance with recognized legal

principles. It must also be used in a manner which is in accord with the conferring statute. Accordingly, it is incumbent upon the institutional head (or delegate) to have regard to the policy and purpose of the *Access to Information Act* when exercising his discretion.

In *Ruby v. Royal Canadian Mounted Police*, [2004] F.C. 594 (F.C.T.D.), von Finckenstein J., the Applicant, in separate requests under the *Privacy Act,* asked that CSIS and Department of Foreign Affairs provide him with information allegedly being held in information banks. In reviewing the department's decision, the Court found :

> "*The relevant time for consideration is the date when the Head of the DEA made his decision, namely 1990. It would be absurd to review his decision from today's perspective i.e. 14 years later. The head of a department can only exercise his discretion on the facts and circumstances that are known to him as of the date he makes his decision."*

In *Thurlow v. Canada (Solicitor General*), [2003] F.C. 1414, 242 F.T.R. 214 (F.C.T.D.), O'Keefe J., the Applicant made request to RCMP pursuant to Privacy Act for information relating to investigations by RCMP into certain activities of applicant – RCMP advised applicant that some of requested information was exempt from disclosure pursuant to ss. 22(1)(a)(i), 22(1)(b) and 26 of the *Privacy Act*. In reviewing the Department's decision not to disclose, the Court found that:

> *"The four contextual factors to be applied in determining the standard of review are: (1) presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purpose of the legislation and the provision in particular; and (4) the nature of the question - - law, fact or mixed law and fact.*
>
> "*Under factor 1, there is no statutory right of appeal and no privative clause, although the Act does grant a statutory right of review;*
>
> *"With respect to factor 2, the greater expertise of the respondent than the Courts with respect to the matters in issue is recognized.*
>
> *"Under factor 3, I note that the Act imposes no limits or guidelines on the respondent's exercise of discretion. Parliament has left the determination to the respondent within the policy boundaries of the Act. This favours deference to the respondent's determination.*
>
> *"Under factor 4, the Court found that this question is a question of mixed law and fact."*

After weighing all of the factors as they relate to the respondent's discretionary decision-making the Court found that a standard of review of reasonableness *simpliciter* should apply.

Canadian Council of Christian Churches v. Canada (Minister of Finance), *supra. Kelly v. Canada (Solicitor General)*, (April 1, 1992), T-948-91 (F.C.). [PRIVACY DECISION]. *Dagg v. Canada, supra*. But see the commentary in footnote 4 regarding *Baker v. Minister of*

Immigration, [1999] S.C.R. and assessment of the exercise of discretion on a standard of reasonableness: As long as there is nothing improper or inappropriate in the exercise of the decision-maker's discretion, the Courts will generally not second-guess the head's discretion. While giving deference to the head's decision, the Court will look at the document and the surrounding circumstances. The Court will then consider whether the discretion was exercised in good faith and for a reason which was rationally connected to the purpose for which the discretion was granted. The Courts have held, however, that the report of the Information Commissioner (on the applicability of an exemption, the exercise of discretion or the applicability of an override) should be given serious weight given the expertise of the Commissioner and the review the Commissioner's office conducts through investigation of complaints about a refusal to disclose.

Canada (Information Commissioner) v. Canada (Minister of Industry), [2001] F.C.J. No. 1327, 2001 FCA 254 (Fed. C.A.) Strayer, Décary and Evans JJ.A.: In reviewing the refusal of a head of a government institution to disclose a record, the Court must determine on a standard of correctness whether the record requested falls within an exemption. However, when the Act confers on the head of a government institution a discretion to refuse to disclose an exempted record, the lawfulness of its exercise is reviewed on the grounds normally available in administrative law for the review of administrative discretion, including unreasonableness.

Imperial Consultants Canada Ltd. V. Canada (Minister of Citizenship and Immigration), [2001] F.C.J. No. 1516, 2001 FC T 1107 (Fed. T.D.) Hansen J. This was an application for judicial review pursuant to section 41 of a decision of the Minister exempting certain records from release. In refusing to disclose the records, the Minister had relied on the following provisions of the Act, either alone or in combination: sections 13(1)(a) and (c), 14, 15, 16(1)(a)(b)(c), 19(1), 20(1)(c), 21(1)(a) and (b), and 23. The Court opened by reiterating that in *Canada (Information Commissioner) v. Canada (Minister of Industry),* [2001] F.C.J. No. 1327, Evans J.A. had elaborated on the appropriate standard of review in cases such as this: "In reviewing the refusal of a head of a government institution to disclose a record, the Court must determine on a standard of correctness whether the record requested falls within an exemption. However, when the Act confers on the head of a government institution a discretion to refuse to disclose an exempted record, the lawfulness of its exercise is reviewed on the grounds normally available in administrative law for the review of administrative discretion, including unreasonableness."

Override

X v. Canada (Minister of National Defence), [1992] 1 F.C. 77, 46 F.T.R. 206 (T.D.): While some difficulties may be encountered in attempting to ascertain whether an override applies, it is not sufficient for the head of a government institution to merely state that they are unaware or that they just don't know if the exceptions apply. Rather, they should be in a position to state what activities and initiatives were undertaken in this regard.

Ruby v. Canada (Solicitor General RCMP), [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.): A request for personal information subject to the consent override in section 19(2) *Privacy Act* [section 13(2) *Access to Information Act* "includes a request to the head of a government

institution to make reasonable efforts to seek the consent of the third party who provided the information." (Emphasis added). The government institution has the evidentiary burden of showing that the exception for consent does not apply given the inability of the requester to know who to ask for consent or what the information consists of.

In *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R, the Supreme Court of Canada majority held that the Minister of Finance abused the discretion conferred by subsection 19(2) of the Act by placing the burden of showing why personal information should be disclosed under the public interest override on the requester. The Court majority held that subsection 19(2) contains no such direction and that the Minister himself should have undertaken the weighing of the public interest in disclosure against the privacy interests of the individuals concerned as directed by sub-paragraph 8(2)(m)(i) of the *Privacy Act*.

In *Ruby v. Canada (Solicitor General RCMP)*, [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.), the Federal Court of Appeal confirmed that where sub-paragraph 8(2)(m)(i) of the *Privacy Act* applies, the institution head must undertake a weighing of the competing interests behind the public interest override, but the manner in which the weighing of interests is conducted is within the discretion of the head of the institution. As it was unclear whether the government institution had conducted any kind of discretionary balancing of public interest and privacy under sub-paragraph 8(2)(m)(i), the matter was remitted to the Trial Judge to determine whether the exemption from disclosure that was subject to the override had been properly applied.

C*anada Packers Ltd. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47; 53 D.L.R. (4th) 246; 32 Admin. L.R. 178; 26 C.P.R. (3d) 407; 87 NR. 8 (C.A.): Before claiming an exemption, the head of a government institution should first determine whether there is enough evidence to suggest that one of the overrides would apply. If there is enough evidence, the head must decide whether or not he/she will exercise discretion to disclose. This discretion cannot be exercised in the first instance by the Court (but as the *Dagg v. Canada* and *Rubin v. CHMC* case demonstrates, the Court can order the head to exercise his/her discretion):

> *"A decision under subsection 20 (1) is not, however, the end of the matter. If a report were sufficiently negative as to give rise to a reasonable probability of material financial loss to a third party, a Minister of the Crown would then have to take his/her responsibility under subsection 20 (6) by determining whether 'the public interest as it relates to public health, public safety or protection of the environment ... clearly outweighs in importance any financial loss' to the third party. This is not, as I have held, a discretion which can be exercised in the first instance by a Court. No such further questions, however, arise at this stage of these cases..."*
>
> See also *Hunter v. Canada (Consumer & Corporate Affairs)*, (1990) 29 C.P.R. (3d) 321; 35 F.T.R. 75 (F.C.T.D.).

Information Commissioner of Canada v. Canada (Minister of Environment), 2006 FC 1235

The competing public interest in disclosure was described by Evans J., as he then was, in *Canadian Council of Christian Charities v. Canada (Minister of Finance) (T.D.)*, [1999] 4 F.C.

245*, supra*, at paragraph 32:

> On the other hand, of course, democratic principles require that the public, and this often means the representatives of sectional interests, are enabled to participate as widely as possible in influencing policy development. Without a degree of openness on the part of government about its thinking on public policy issues, and without access to relevant information in the possession of government, the effectiveness of public participation will inevitably be curbed.

TABLE OF AUTHORITIES

Canada

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R.

Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] F.C.J. No. 983, 4 F.C. 245, 99 D.T.C. 5408, [1999] C.T.C. 45 (F.C.T.D.) Evans J.

Canada (Information Commissioner) v. Canada (The Prime Minister), [1993] 1 F.C. 427 (F.C.T.D.)

Canada (Information Commissioner) v. Canada (Minister of Employment and Immigration), [1986] 3 F.C. 63 at 69 (T.D.) Jerome A.C.J.

Canada (Information Commissioner) v. Canada (Minister of Industry), [2001] F.C.J. No. 1327, 2001 FCA 254 (Fed. C.A.) Strayer, Décary and Evans JJ.A.

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), [1997] 1 F.C. 164 (F.C.T.D.) Richard J.

Canada Post Corp. v. Canada (Minister of Public Works), [1995] 2 F.C. 110 at 124 (C.A.) Pratte, Marceau and Létourneau.

Canada (*Information Commissioner) v. Canada (Minister of Employment and Immigration),* [1986] 3 F.C. 63 at 69 (T.D.) Jerome A.C.J.

Canada (Information Commissioner of Canada) v. Canada (Commissioner of the Royal Canadian Mounted Police), 2001 FCA 56 Décary, Létourneau, Noel. JJ.A

Communauté Urbaine de Montréal (Société de transport) v. Canada (Minister of the Environment), [1987] 1 F.C. 610 at 613 (T.D.) Dubé J

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403

Davidson v. Solicitor General of Canada, [1987] 3 F.C. 15 at 22-23 (T.D.) Jerome A.C.J;

Imperial Consultants Canada Ltd. V. Canada (Minister of Citizenship and Immigration), [2001] F.C.J. No. 1516, 2001 FC T 1107 (Fed. T.D.) Hansen J.

Information Commissioner of Canada v. Canada (Minister of Environment), 2006 FC 1235

Noël v. Great Lakes Pilotage Authority Ltd., [1988] 2 F.C. 77 at 80 (T.D.) Dubé J.

Rubin v. Canada (Canada Mortgage and Housing Corporation), [1987] F.C.J. No. 103, (1987), 8 F.T.R. 230, 36 D.R.C. (4th) 22, 14 C.P.R. (3d) 176 (F.C.T.D.) reversed (1988) [1989] F.C.J. No. 610, 52 D.L.R. (4th) 671, 86 N.R. 186, 21 C.P.R. (3d)1, 19 F.T.R. 160n, (F.C.A.) Rothstein J

Ruby v. Canada (Solicitor General), [2000] 3 F.C. 589, F.C.J. No. 779. (F.C.A.) Létourtneau, Robertson and Sexton JJ.A

Ruby v. Royal Canadian Mounted Police, [2004] F.C. 594 (F.C.T.D.), von Finckenstein J.

Stevens v. Canada (Minister of National Defence), [1992] 1 F.C. 77; 46 F.T.R. 206 (F.C.T.D.) Rothstein J.

Thurlow v. Canada (Solicitor General), [2003] F.C. 1414, 242 F.T.R. 214 (F.C.T.D.), O'Keefe J.

X v. Canada (Minister of National Defence), [1992] 1 F.C. 77; 46 F.T.R. 206 (F.C.T.D.) Strayer J.

Investigating discretionary exemptions

INVESTIGATING GENERAL DISCRETIONARY EXEMPTIONS
Statement of test to be met for discretionary exemption
This Grid provides general lines of questioning that may assist in the investigation of any discretionary exemption. Please refer to the grids for each exemption for lines of questioning on the factors relevant to the exercise of discretion under each particular exemption. Note that in the investigation of any discretionary exemption or exemption with an override, it is first necessary to determine whether the information falls within the exemption itself.

Relevant Questions	Departmental Response	Assessment
Has the institution considered the issue of whether to disclose or refuse to disclose information subject to a discretionary exemption.		
Was the purpose of the Act taken into account, i.e. that of promoting disclosure of government records.		
Are the reasons for refusing to disclose consistent with the purpose of the exemption.		
Did the institution head consider factors which are relevant and consistent with the provisions of the exemption.		
Is the outcome reasonable in all of the circumstances.		
Has the institution considered whether to disclose or refuse disclosure.		
Ask why the institution decided to refuse disclosure.		
When did the institution decide to refuse to disclose?		
If they say it was because the exemption applied, ask whether the institution considered whether the information could be disclosed using the discretion to disclose conferred by the exemption.		
If not, point out that they are required to consider the issue of whether the information should be disclosed or withheld, notwithstanding that it falls within the exemption.		

Relevant Questions	Departmental Response	Assessment
Have some relevant considerations ready to assist discussion.		
Was the purpose of the Act taken into account		
Did the institution consider disclosing the information at all?		
Assess whether there is public interest in the information, i.e. public debate.		
Would disclosure assist or advance public discussion of the issues described in the information.		
Would disclosure shed light on an issue of public interest?		
Does the information concern issues/matters affecting a large number of people,		
- if so, there is an interest favouring disclosure.		
Would disclosure shed light on government decision-making?		
Would disclosure assist individuals or groups to participate in government decision-making?		
Would disclosure benefit a group or individual?		
- Assist a group or individual to obtain a benefit from government.		
- Assist a group or individual in relations with government.		
Would disclosure inform a group or individual about an issue of historical interest?		
Would disclosure inform a group or individual about policy considerations or issues impacting on policy or government decisions?		
Are there compassionate or humanitarian reasons favouring disclosure.		
Have similar records been released in the past.		
Is the information or related information publicly available		

Relevant Questions	Departmental Response	Assessment
Are the reasons to refuse disclosure consistent with the purpose of the exemption		
What harm or prejudice would flow from disclosure of the information in question.		
How significant a degree of harm is expected?		
Is the harm described consistent with the language of the exemption?		
- If not, the institution may be considering irrelevant matters.		
Does the harm described relate to the reasons for confidentiality which the exemption addresses.		
Is the harm expected by the institution reasonable in nature given:		
- the age of the record;		
- the use to which the record is likely to be put, if disclosed.		
Point out that refusing disclosure of information which is relatively innocuous or not harmful if disclosed implies the institution is hiding information which <u>is</u> harmful to disclose.		
Did the institution consider relevant factors		
Did the institution exercise the discretion itself?		
Ensure that institution does <u>not</u> base its decision on no reason being brought forward as to why there should be disclosure, institution must itself assess the alternatives.		
Did the institution identify interests consistent with the exemption in exercising discretion to refuse disclosure?		
Point out that if the reasons for refusing disclosure are not connected to the provisions in the exemption, the reasons are based on irrelevant considerations.		
Examples of irrelevant factors:		
- Release would be embarrassing to the institution or government (for reasons unrelated to the exemption).		

Relevant Questions	Departmental Response	Assessment
- Release would set a precedent and require other documents to be released.		
- Release would require a review of a large number of documents, or would require severance.		
Is the decision to refuse disclosure reasonable in all the circumstances.		
Assess the public interest in disclosure (see questions under Purpose of Act, above).		
Weigh against the harm or reasons identified by institution for refusing disclosure.		
- Assess relevance in relation to the exemption.		
Does one outweigh the other?		
- If the public interest in disclosure outweighs the reasons for refusing disclosure:		
- Assess whether the institution has adequately considered the reasons favouring disclosure.		
- Ask the institution to reconsider based on the reasons favouring disclosure.		

Endnotes

1. See *Ruby v. Canada (Solicitor General, RCMP)*, [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.).

2. In *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403, Cory J. in the Supreme Court of Canada majority decision stated, in relation to the discretionary public interest override in subsection 19(2):

> … I agree with LaForest J.'s conclusion that a Minister's discretionary decision under s. 8(2)(m)(i) [of the *Privacy Act*] is not to be reviewed on a *de novo* standard of review. Perhaps it will suffice to observe that the Minister is not obliged to consider whether it is in the public interest to disclose personal information. However, in the face of a demand for disclosure, he is required to exercise that discretion by at least considering the matter. If he refuses or neglects to do so, the Minister is declining jurisdiction which is granted to him alone. [Emphasis added]
>
> In *Canadian Jewish Congress v. Canada (Minister of Employment & Immigration),* [1996] 1 F.C. 268 (T.D.) the Federal Court Trial Division set out the two-step decision necessary for discretionary exemption as follows (this test was adopted by LaForest J. in his decision in the Supreme Court of Canada in *Dagg*):
>
> > When reviewing decisions made under permissive provision the Court must decide not only whether the information falls within that described in the relevant provision, but also, if it does, whether the head of the government institution lawfully exercised the discretion not to disclose it. [Emphasis added]
>
> In *Information Commissioner v. Canada (Minister of Public Works and Government Services),* [1997] 1 F.C. 164, the Federal Court Trial Division ordered an institution head to disclose personal information based, in part, on inadequate consideration by the institution head of whether to invoke the public interest override in subsection 19(2) of the **Access to Information Act**. In that case the Minister relied on legal advice stating that, "in cases involving personal information … the benefit of the doubt [should be given to] protecting the information." The Court found that by simply relying on this advice the Minister had failed to turn his mind to the weighing of competing interests which is required to make a decision to invoke or not to invoke the override.
>
> See also *Stevens v. Canada (Prime Minister)*[1998] 4 F.C. 89, where the Federal Court of Appeal confirmed in relation to section 23 that once it is determined that requested information falls within the exemption as being subject to solicitor-client privilege, this does not end the matter, as section 23 is discretionary and the institution head is also obliged to consider whether to disclose the information in any event.

3. See *Ruby v. Canada (Solicitor General, RCMP)*, [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.), supra, paragraph 30.

4. *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 403

5. *Dagg v. Canada. Ibid.* See also cases under endnote 1.

6. In *Ruby v. Canada (Solicitor General, RCMP)*, [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.), supra, the Court stated that a request for information subject to the *Privacy Act* exemption [section 13 **Access to Information Act**] "includes a request to the head of a government institution to make reasonable efforts to seek the consent of the third party which provided the information." (Emphasis added). The Court also considered the duty of the institution head to consider whether the public interest override in sub-paragraph 8(2)(m)(i) applied and concluded that, because it was unclear whether the government institution (in this case CSIS) had conducted any kind of discretionary balancing of public interest and privacy interests, the matter should be remitted to the Trial Judge to determine whether the exemption from disclosure had been properly applied:

> Having said all this, however, we confess that we are unable to ascertain from the decision of the reviewing judge whether in fact CSIS conducted any kind of discretionary balancing of public interest and privacy. In other words, it is unclear whether CSIS took any consideration of subparagraph 8(2)(m)(i) when it refused to disclose information relating to third parties and whether, therefore, it properly applied the exemption it claimed pursuant to section 26 of the [**Privacy**] Act. Nor are we able to determine whether the reviewing judge was satisfied that the exemption had been considered by CSIS, or that he considered it himself.

In the circumstances, there should be a new review of the personal information requested in banks 010 and 015 for the purpose of determining whether the exemption in section 26 has been properly applied by CSIS. (At paragraph 124- 125).

7. *Dagg v. Canada, supra, per* LaForest, J.

8. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 an immigration case, the Supreme Court of Canada set out new criteria for reviewing the discretionary decisions of public officials. The Court replaced the old analysis (used in *Dagg v. Canada*, supra) which required good faith, fair procedure and considerations relevant to the purpose of the legislation, with a new approach based on assessing what the appropriate degree of oversight by a Court should be, given factors like the degree of expertise in the decision-maker, whether the statute contains a provision which protects decisions from being overridden or reviewed by Courts and the kind of decision involved (i.e. policy decisions or decisions involving individual rights). The Court in *Baker* concluded that the exercise of discretion in that case should be reviewed based on whether it was "reasonable", as opposed to "incorrect" or "patently unreasonable". There are good reasons to support a similar approach to the review of discretionary decisions under the *Access to Information Act* and to conclude that the criteria for review of such decisions will become whether the institution head's decision to exercise discretion not to disclose a record was "reasonable".

9. *Ruby v. Canada (Solicitor General, RCMP)*, [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.), supra. The Court based its conclusion that the institution and not the individual bears the burden of proof in relation to the exercise of discretion on the following factors:

> Where accessibility to personal information is the rule and confidentiality the exception, where an applicant has no knowledge of the personal information withheld, no access to the record before the court and no adequate means of verifying how the discretion to refuse disclosure was exercised by the authorities, and where section 47 of the Act clearly puts on the head of a government institution the burden of establishing that it was authorized to refuse to disclose the personal information requested and, therefore, that it properly exercised its discretion in respect of a specific exemption it invoked – an applicant cannot be made to assume an evidential burden of proof.

10. See *Canadian Council of Christian Churches v Canada (Minister of Finance),* Federal Court Trial Division, May 19, 1999 (Court File T-2144-97), paras. 13-14.

TIME LIMITS AND DELAYS

	Purpose	Wording
Section 7	Notice where access is requested	Within 30 days after the request is received, the head must give written notice as to whether or not access to the record will be given.
Subsection 8(1)	Transfer of request	Within 15 days after the request is received, the head may transfer the request to another institution and give written notice of the transfer.
Section 9	Extension	Within 30 days after the request is received, the head must give notice of an extension of the time limit, for a reasonable period, set out in section 7 or subsection 8(1).
Subsection 10(1)	Deemed refusal	Where the head fails to give access to a record within the time limits set out in sections 7 or 8, he shall be deemed to have refused to give access.
Subsection 19(1)	Disclosure of personal information authorized	Twenty years after the death of an individual, his personal information may be released.
Subsection 27(1)	Notice to third parties	Within 30 days after the request is received , the head must give notice to third parties of the fact that the head intends to disclose the record or part thereof.
Subsection 28(1)	Representations of third parties	Within 20 days after notice is given, the third party is given the opportunity to make representations to the institution.
Section 31	Written complaint	Within one year from the time after the request was received, the complainant may file a complaint with the Information Commissioner.
Section 38	Annual Report to Parliament by Commissioner	Annually, within three months after the [termination] of the fiscal year, the head will submit to Parliament an annual report.
Section 41	Application by any person to the Federal Court for review	Within 45 days after the time the results of the investigation have been made to the complainant, any person may apply to the Court for a review of that decision.
Section 42	Application by the Commissioner to the Federal Court for review	Within 45 days after the time the results of the investigation have been made to the complainant, the Commissioner may apply to or appear in the Court on behalf of any person who has applied for review under section 41.
Section 44	Application by any third party to the Federal Court for review	Within 20 days after receiving notice required under paragraph 28(1)(b) or subsection 29(1) apply to the Court for a review.
Subsection 69(3)	Confidences	After 20 years of existence, confidences of the Queen's Privy Council of Canada are no longer exempted under subsection 69(1). After four years have elapsed, discussion papers about which decisions have not been made public can be released.

Subsection 72(1)	Report to Parliament by institution	Annually, within three months after the [commencement] of the fiscal year, the head will submit to Parliament an annual report. If the House is not then sitting, on any of the fifteen days next thereafter that it is sitting.

Case Law

Section 7

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 45 C.P.R. (3d) 390 at 396-398 (F.C.A.) Mahoney, Stone and Robertson JJ.A. The appellant contended that the respondent was under a mandatory duty to give notices pursuant to subsections 7(a), 9(1), 27(1) within the stipulated time-limits because of the presence of the word "shall" in the relevant provisions, and that failure to do so has rendered the decisions in question void and of no legal effect. While there is a presumption that the word "shall" in a statute is mandatory in nature, there is no general rule to that effect. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done. The statutory notice provisions clearly involve the performance of public duties by the respondent. There is no sanction or penalty provided in the Act for a failure to give the notices in time. The object of the notice provisions is to provide a defined time-frame within which a request for information should be processed, and to allow the requester to file a complaint with the Information Commissioner. To interpret the notice provisions as mandatory, would result in a denial of the release of the information to the requesters and would only cause the filing of a second request and timely compliance. This would not promote the main object of these provisions. Furthermore, the requesters, through no fault of their own, would be penalized by the error of the respondent notwithstanding that they do not object to their own late notices.

Vienneau v. Canada (Solicitor General), [1998] 3 F.C. 336 at 340 (T.D.) Jerome A.C.J. The purpose of the notice provided by sections 7 and 10 is to advise the requester whether his right will be granted, and, if not, why it will be denied. Paragraph 10(1)(b) requires that the notice state the specific provision of the Act on which the refusal is based. It is clear from the terms of sections 7 and 10 that what is required from an institution which refuses access is a written notice to the requester of all the provisions of the Act relied upon in refusing the request. The relevant section numbers are to be provided in the letter of notice. There is no indication in the statute that these be linked to specific deletions and certainly nothing requiring that they be written directly on the released document. The government institution is sufficiently tied down to a basis for the refusal by the list of sections provided in the section 7 notice. However, while not strictly required by the statute, the practice of providing section numbers next to deletions is a highly commendable one. Such a practice is in keeping with the basic purpose of the Act which is to provide citizens with as much information about their government as possible. Where there is no danger of revealing the substance of protected information, institutions should continue to provide the relevant section numbers for each deletion.

Section 9

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1989] 1 F.C. 3 at 12 (T.D.) Jerome A.C.J. Where the application is based on an alleged unauthorized extension under section 9, the enquiry consists of determining whether the extension was properly taken or whether it amounted to a deemed refusal pursuant to subsection 10(3). The Court must be able to review the extension itself and the reasons given therefore.

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 514 at 526 (T.D.) Muldoon J. In order to show that extensions are for *"a reasonable period of time"* pursuant to subsection 9(1), the department must state cogent, genuine reasons for the extension, and for its length.

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 514 at 525-526 (T.D.) Muldoon J. The 120-day extensions of time invoked in response to the requesters' access requests were not justified under section 9. The respondent's department acted unreasonably in processing the access requests with only the extended deadlines in mind, rather than processing them, and each and every one of them as expeditiously as possible, and it thereby breached the requirements of section 9. It also breached the requirements of section 9 by invoking the same 120-day extensions for all the access requests, even though the records were being processed at the same time. Also, they breached section 9 by withholding records ready for release until all records had been processed rather than releasing the records as they became available. The department acted negligently and ignorantly outside the spirit of the Act by obfuscating (without malice) the reasons for the delays in responding to the access requests during the course of the Information Commissioner's investigation. Being unjustified pursuant to section 9, the 120-day extensions amounted to deemed refusals to disclose the requested records pursuant to subsection 10(3).

X v. Canada (Minister of National Defence) (1990), 41 F.T.R. 16 at 42 Dubé J. - A 90-day extension of the usual time limit for producing records was ordered under paragraph 9(1)(b) of the Act. The applicant did not receive the records until two months after the expiry of the extended limitation period. He sought an explanation for the delay, and claimed that the failure to produce the records in time should be deemed to be a refusal under subsection 10(3) of the Act. The Court cannot award a judgement as, at the time of the hearing, no actual refusal remains to be addressed as the deemed refusal was followed by performance, albeit delayed performance. The Court noted, however, that it would not countenance dilatoriness on the part of any government institution. Even where a request may appear to be of limited importance and of low priority to a department official, that request must still be satisfied within the delay provided under the Act. In the instant case, the department official did not even extend to the applicant the courtesy of an explanation within the extended delay.

X v. Canada (Minister of National Defence), [1991] 1 F.C. 670 at 676 and 678-679 (T.D.) Strayer J. The Court does not have a mandate to second-guess decisions by the head of an institution under subsection 9(1) to extend the time limit for responding to a request for access to a record. It is clear by subsection 9(1) that an extension of time for response by the head of an institution is not a refusal to disclose. It is obviously not on its face a refusal to disclose. It only leads to a "deemed refusal" under subsection 10(3) if no decision is taken within the extended time period and no disclosure is made.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 45 C.P.R. (3d) 390 at 399 (F.C.A.) Mahoney, Stone and Robertson JJ.A. Notice of an extension of time under section 9 must contain a statement that the requester has a "*right to make a complaint to the Information Commissioner about the extension"* and the Commissioner must be given notice of the extension.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 45 C.P.R. (3d) 390 at 396-398 (F.C.A.) Mahoney, Stone and Robertson JJ.A. The appellant contended that the respondent was under a mandatory duty to give notices pursuant to subsections 7(a), 9(1), 27(1) within the stipulated time-limits because of the presence of the word "shall" in the relevant provisions, and that failure to do so has rendered the decisions in question void and of no legal effect. While there is a presumption that the word "shall" in a statute is mandatory in nature, there is no general rule to that effect. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done. The statutory notice provisions clearly involve the performance of public duties by the respondent. There is no sanction or penalty provided in the Act for a failure to give the notices in time. The object of the notice provisions is to provide a defined time-frame within which a request for information should be processed, and to allow the requester to file a complaint with the Information Commissioner. To interpret the notice provisions as mandatory, would result in a denial of the release of the information to the requesters and would only cause the filing of a second request and timely compliance. This would not promote the main object of these provisions. Furthermore, the requesters, through no fault of their own, would be penalized by the error of the respondent notwithstanding that they do not object to their own late notices.

Canada (Information Commissioner) v. Canada (Minister of National Defence), [1999] F.C.J. No. 522 (F.C.A.) (QL), Desjardins, Décary and Noël JJ.A. Using the provisions of section 9 of the Act, the government institution extended by 120 days the time limit of 30 days set out in the Act for notifying the complainant "as to whether or not access to the record or a part thereof w[ould] be given" (subsection 7(a) of the Act). At the expiration of the time limit, the institution had still not made its decision known. The complainant complained to the Information Commissioner on the ground that the institution had not met the deadline it had given itself . When he was informed of the institution's continuing failure to respect its commitments, the Commissioner initiated two new complaints on his own behalf pursuant to subsection 30(3) of the Act. At the time the proceeding was filed, the institution was still in default with respect to 155 of the 1,204 pages of the Gauthier report. Twenty days after the application was filed in the Federal Court, the institution informed the complainant of its final decision refusing to give access to the final 22 pages of the requested record. In dismissing the review application on the ground it was premature, the trial judge held that the decision of the government institution did not constitute a deemed refusal to disclose based on the government institution's continuing failure to give access, but rather a final disclosure out of time. A disclosure out of time did not necessarily nullify the government institution's right to avail itself of the exemptions and exceptions provided by the Act, as the Commissioner still had the opportunity to consider the merits of the exemptions and exceptions and to solicit the comments of the government institution. As soon as the

institution failed to comply with the time limit, the Commissioner could have initiated his investigation as if there had been a true refusal. He does have powers to investigate including, at the beginning of an investigation, the power to compel the institution to explain the reasons for its refusal.

Subsection 10(1)

X v. Canada (Minister of National Defence), [1991] 1 F.C. 670 at 676 and 678-679 (T.D.) Strayer J. The Court does not have a mandate to second-guess decisions by the head of an institution under subsection 9(1) to extend the time limit for responding to a request for access to a record. It is clear by subsection 9(1) that an extension of time for response by the head of an institution is not a refusal to disclose. It only leads to a "deemed refusal" under subsection 10(3) if no decision is taken within the extended time period and no disclosure is made. The Court can entertain an application by a private party only under section 41, and then only where the Court finds a refusal to disclose a record. Such a remedy is not available if disclosure has already taken place. Refusal to access being a condition precedent to an application under section 41.

Vienneau v. Canada (Solicitor General), [1998] 3 F.C. 336 at 340 (T.D.) Jerome A.C.J. The purpose of the notice provided by section10 is to advise the requester whether and why his right will be denied. Paragraph 10(1)(b) requires that the notice state the specific provision of the Act on which the refusal was based. It is clear from the terms of section 10 that what is required from an institution which refuses access is a written notice to the requester of all the provisions of the Act relied upon in refusing the request. The relevant section numbers are to be provided in the letter of refusal. There is no indication in the statute that these be linked to specific deletions and certainly nothing requiring that they be written directly on the released document. The government institution is sufficiently tied down to a basis for the refusal by the list of sections provided in the section 7 notice. However, while not strictly required by the statute, the practice of providing section numbers next to deletions is a highly commendable one. Such a practice is in keeping with the basic purpose of the Act which is to provide citizens with as much information about their government as possible. Where there is no danger of revealing the substance of protected information, institutions should continue to provide the relevant section numbers for each deletion.

Canada (Attorney General) and Canada (Information Commissioner), [2002] F.C.J. No. 177, 2002 FCT 136 (Fed. T.D.) Kelen J. According to the Court, Parliament clearly has provided for "deemed refusals" in subsection 10(3), but not elsewhere in the Act. Noted the Court, a "deemed refusal" is when the department fails to give access to the record within the time limits set out in the Act, i.e. either 30 days as provided in section 7 or an extended time limit under section 9. In this case, held the Court, the extended time limit had not expired so that there can be no "deemed refusal" to give access. Under the Act there is no provision for the respondent to deem an unreasonable extension of time as a refusal. The respondent made such a report with his findings and recommendations in this case on December 20, 2000. According to the Court, that was the end of the respondent's jurisdiction with respect to the investigation of the requester's complaints. Accordingly, concluded the Court, the respondent did not have the jurisdiction to self-initiate a complaint with respect to a "deemed refusal", and did not have the jurisdiction to issue the second subpoena in relation to the second investigation. If the second investigation is illegal so is the second subpoena.

Subsection 27(1)

Pride Beverages Ltd. v. Canada (Minister of Agriculture), [1996] F.C.J. No. 720 (F.C.T.D.) (QL), McKeown J. By the time, however, Pride had made submissions objecting to the release of the records it believed were intended to be disclosed, Pride had received notice of Agriculture Canada's decision to disclose the records. The twenty-day period for comments provided on the notice of June 16, 1995, had expired. Agriculture Canada did not notify Pride that it had a right to make submissions objecting to the disclosure of the reports of analysis and the certificate of analysis. While the notice provisions of the Act are directive, in my view, the government must provide a third party with an opportunity to provide the government with its views on all the records sought to be released. This does not mean the government must provide the third party with a full copy of the records but it must provide a reasonable description of the contents of each and every record sought to be disclosed.

Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare) (1992), 45 C.P.R. (3d) 390 at 397-398 (F.C.A.) Mahoney, Stone and Robertson JJ.A. The respondent conceded at trial that notices, though given, were not given within the statutory time-limits. The requesters raised no objection to their receiving late notices while the appellant contended that the respondent was under a mandatory duty to give these notices within the stipulated time-limits because of the presence of the word "shall" in the relevant provisions, and that failure to do so has rendered the decisions in question void and of no legal effect. It relies on s. 11 of the *Interpretation Act*, R.S.C. 1985, c. I-21. Satisfied that this doctrine applied in the present case, the Court held that while there is a presumption that the word "shall" in a statute is mandatory in nature, there is no general rule to that effect and it has often been interpreted to be directory when certain conditions are present. Noting that the statutory notice provisions of the Act clearly involve the performance of public duties by the respondent, there is, however, no sanction or penalty provided in the Act for a failure to give the notices in time. The object of the notice provisions is to provide a defined time-frame within which a request for information should be processed, and to allow the requester to file a complaint with the Information Commissioner. To interpret the notice provisions as mandatory, would result in a denial of the release of the information to the requesters and would only cause the filing of a second request and timely compliance. This would not promote the main object of these provisions. Furthermore, the requesters, through no fault of their own, would be penalized by the error of the respondent notwithstanding that they do not object to their own late notices.

Matol Botanical International Ltd. v. Canada (Minister of National Health and Welfare), [1994] A.C.F. No. 860 (Fed. T.D.) Noël J. (paragraphs 37, 38 and 39) The Court emphasizes that subsection 28(1) requires that the institution in question invite a third party within thirty days upon receipt of an access to information request. An extension of time may be applicable but, under no circumstances, can it exceed the time limit applicable pursuant to subsection 9(1). Finally, subsection 28(1) requires that the institution in question invite a third party who has been given notice under subsection 27(1) to submit representations within twenty days after the notice is received and requires the institution in question to make its decision as to whether or not to disclose the information within thirty days after the notice is given. While these time limits are not mandatory, the Act nonetheless provides for a very precise decision-making process which must, on its face, result in a single decision.

Hydro-Quebec v. Canada (National Energy Board), [1997] F.C.J. No. 510, (Fed. T.D.), Morneau, Proth. Despite the various deficiencies for which the Board is responsible, observed the Court, both the Board and Hydro-Quebec have complied with the substance and objective of the consultation process provided for by sections 27, 28 and 44 of the Act. Accordingly, the Court was not prepared to find that because of these deficiencies the Board's decision must be considered to have been made outside the substantive framework of the Act and that Hydro-Quebec was not in a position to proceed under section 44 of the Act to have that decision reviewed. In *Sawridge Indian Band v. Canada* (1987), 10 F.T.R. 48, to which the Council referred, the Court found that proceedings could not be brought under section 44 of the Act since it was clear that the government institution in question had reached its decision to disclose the information requested without offering the third party in question, within twenty days after the notice was given, an opportunity to make representations as to why the record should not have been disclosed, in accordance with subsections 27(1) and 28(1) of the Act. In the present situation, noted the Court, the consultation between the government institution, the Board, and the third party, Hydro-Quebec, certainly took place despite the deficiencies referred to supra.

Subsection 28(1)

Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare) (1992) 45 C.P.R. (3d) 390 at 397-398 (F.C.A.) Mahoney, Stone and Robertson JJ.A. The Court held that while there is a presumption that the word "shall" in a statute is mandatory in nature, there is no general rule to that effect and it has often been interpreted to be directory when certain conditions are present. Noting that the statutory notice provisions of the Act clearly involve the performance of public duties by the respondent, there is, however, no sanction or penalty provided in the Act for a failure to give the notices in time. The object of the notice provisions is to provide a defined time-frame within which a request for information should be processed, and to allow the requester to file a complaint with the Information Commissioner. To interpret the notice provisions as mandatory, would result in a denial of the release of the information to the requesters and would only cause the filing of a second request and timely compliance. This would not promote the main object of these provisions. Furthermore, the requesters, through no fault of their own, would be penalized by the error of the respondent notwithstanding that they do not object to their own late notices.

Hydro-Quebec v. Canada (National Energy Board), [1997] F.C.J. No. 510, (Fed. T.D.), Morneau, Proth. Despite the various deficiencies for which the Board is responsible, observed the Court, both the Board and Hydro-Quebec have complied with the substance and objective of the consultation process provided for by sections 27, 28 and 44 of the Act. Accordingly, the Court was not prepared to find that because of these deficiencies the Board's decision must be considered to have been made outside the substantive framework of the Act and that Hydro-Quebec was not in a position to proceed under section 44 of the Act to have that decision reviewed. In *Sawbridge Indian Band v. Canada* (1987), 10 F.T.R. 48, to which the Council referred, the Court found that proceedings could not be brought under section 44 of the Act since it was clear that the government institution in question had reached its decision to disclose the information requested without offering the third party in question, within twenty days after the notice was given, an opportunity to make representations as to why the record should not have been disclosed, in accordance with subsections 27(1) and 28(1) of the Act. In the present situation, noted the Court, the consultation between the government

institution, the Board, and the third party, Hydro-Quebec, certainly took place despite the deficiencies referred to supra.

Section 31

Jaylynn Enterprises Ltd. v. Canada (Minister of National Revenue), [2002] F.C.J. No. 400, 2002 FCT 299 (Fed. T.D.) Pinard J. Indeed, it is clear from the application that two different complaints were made under two different statutes to the Information Commissioner of Canada and the Privacy Commissioner respectively. The applicants, noted the Court, remain at liberty to serve and to file two separate applications for judicial review of the two decisions provided they have first sought and obtained from this Court any necessary extension of time.

Section 41

Clearwater v. Canada (Minister of Canadian Heritage) (1999), 177 F.T.R. 103, Cullen J. Pursuant to section 41, the clock begins "after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant" and runs for forty-five days. The applicant filed his Notice with the Court approximately four hundred and twenty-five days later overshooting the forty-five day deadline by over a year. Noting that there are no cases addressing the principles which govern the discretion to extend the limitation period given to the Court by section 41 of the Act, the judge observed that section 18.1(2) of the *Federal Court Act*, R.S.C. 1985, c. F-7 contains wording, however, that is similar to that found in section 41 of the Act and the former's jurisprudence is persuasive authority for the principles which the Court is looking for. Using the criteria developed in *Grewal v. M.E.I*, [1985] 2 F.C. 236 (C.A.) Thurlow C.J., Mahoney and Marceau JJ.A., (a. whether the applicant intended to apply to the Court within the limitation period; b. the length of the period for which an extension would be required; c. whether any and what prejudice to an opposing party would result from an extension being granted.). The Court examined also a fourth criterion: whether the applicant had an arguable case before concluding that there was very little evidentiary basis to his claim for a breach of section 11. The Court held that as the applicant never intended to apply to the Court within the limitation period set out in section 41 of the Act and as a year's extension would be required, this was not an occasion for the Court to exercise its discretion under section 41.

Section 44

J.M Schneider Inc. v. Canada (1986), 12 C.P.R. (3d) 90 at 91 (T.D.) Strayer J. The applicant applied in writing ex parte under former Rule 324 of the *Federal Court Rules*, for an extension of time for the filing and service of an application under section 44. The Court rejected the application for different reasons including the inadequacy of supporting material, the absence of authority for granting such an extension and for applying ex parte, and the fact that the statute makes no provision for the Court extending the time prescribed in subsection 44(1).

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 at 120-121 (T.D.) Mackay J. The ultimate purpose of the Act is to provide access to information when requested, except for specified exceptional cases, in a timely fashion, to the requester. In view of that purpose of the Act, the procedures established to deal with objections by a third party, to whom the information sought by a requester relates,

must serve the purpose of providing a reasonable but limited time for the third party to object and for consideration of objections received, before a final determination about disclosure of the information. If the main purpose of the Act is to be served, the time limit fixed by subsection 44(1) must, in the ordinary course, be construed as it was by Strayer J., in *J.M. Sneider v. R.* (1986), 12 C.P.R. (3d) 90 (T.D.) that is, the time limit is to be strictly applied. The Court has no discretion under the Act to extend the time for filing or to consider the application filed late. Except possibly in an extraordinary case, where application is made later than the 20 days limited by subsection 44(1), the matter sought to be reviewed cannot be considered properly within the jurisdiction of the Court.

*SNC-Lavalin Inc. v. Canada (Minister of Public Works) (*1994), 79 F.T.R. 113 at 122 (T.D.) Mackay J. In my opinion, the absence of provision in the Act for extending the time to file an application under subsection 44(1) for a review of a decision to disclose information, is not an absolute bar in an appropriate case to consideration of an application filed late, or to a later application to amend an application made within the prescribed time. If authority is needed, I would find it under the *Federal Court Act*, R.S.C. 1985, c. F-7, as amended. In such a case, the Court acting in accord with rule 5, the so-called "gap rule", may provide for an extension of time, by analogy to what it may do in regard to a regular application for judicial review under subsection 18.1(2) of the *Federal Court Act* and Rule 1614 of the *Federal Court Rules*. Similarly, in an appropriate case, the Court may allow an amendment to the original application under subsection 44(1), by analogy to the provisions set out in Rules 424 and 427.

Bearskin Lake Air Service v. Canada (Department of Transport) (1996), 119 F.T.R. 282 at 284 (F.C.T.D.) Richard J. This was an application for leave for judicial review by Bearskin Lake of a decision made under the Act that denied some information to it. The issue was whether the court could extend the time within which to make a court application to review a decision to disclose a record or a part of it, pursuant to subsection 44(1) of the **Access to Information Act**. Bearskin Lake received notice of the decision under paragraph 28(1)(b) of the Act on March 13, 1996. Pursuant to subsection 44(1) it had to file its application for review by April 2, 1996 but did not file the application until April 11. The Court dismissed the application noting that the statutory period under subsection 44(1) was strict and there was no jurisdiction in the court to waive or extend the time.

Hydro-Quebec v. Canada (National Energy Board), [1997] F.C.J. No. 510, (Fed. T.D.), Morneau, Proth. Despite the various deficiencies for which the Board is responsible, observed the Court, both the Board and Hydro-Quebec have complied with the substance and objective of the consultation process provided for by sections 27, 28 and 44 of the Act. Accordingly, the Court was not prepared to find that because of these deficiencies the Board's decision must be considered to have been made outside the substantive framework of the Act and that Hydro-Quebec was not in a position to proceed under section 44 of the Act to have that decision reviewed. In *Sawbridge Indian Band v. Canada* (1987), 10 F.T.R. 48, to which the Council referred, the Court found that proceedings could not be brought under section 44 of the Act since it was clear that the government institution in question had reached its decision to disclose the information requested without offering the third party in question, within twenty days after the notice was given, an opportunity to make representations as to why the record should not have been disclosed, in accordance with subsections 27(1) and 28(1) of the Act. In the present situation, noted the Court, the consultation between the government

institution, the Board, and the third party, Hydro-Quebec, certainly took place despite the deficiencies referred to supra.

Merck Frosst Canada & Co. v. Canada (Minister of National Health) (1999), 179 F.T.R. 291 at 293 (F.C.T.D.) Blais J. In my opinion, the delay to subsection 44(1) is a strict delay and the Court has no jurisdiction to set aside or extension it.

Subsection 69(3)

Canada (Information Commissioner) v. Canada (Minister of the Environment), 2001 FCT 277 (T.D.) Blanchard J. Given that paragraph 69(3)(b) of the Act and paragraph 39(4)(b) of the **Canada Evidence Act** are almost identical, the same logic applies to both sections. The extrinsic evidence points to the existence of information the purpose of which is to provide background explanations, analyses of problems, or policy options within the documents at issue. Such information, therefore, cannot be withheld pursuant to ss. 39(1) of the **Canada Evidence Act** and should be disclosed since it is excepted pursuant to subparagraph 39(4)(b)(i) of the **Canada Evidence Act**. It follows that a certificate issued under ss. 39(1) of the **Canada Evidence Act** cannot be invoked to withhold information that is excepted by virtue of subparagraph 39(4)(b)(i). Parliament intended that background explanations, analyses of problems, or policy options be made public after the decisions to which that information relates are made public or after four years have elapsed. To interpret paragraph 39(3)(b) of the Act or paragraph 39(4)(b) of the **Canada Evidence Act** narrowly and accept that since no documents are entitled “discussion papers’ then background explanations, analyses of problems, or policy options cannot be released would be to give no meaning at all to those provisions.

Section 13

The Provisions:

13(1) *Subject to subsection (2), the head of a government, institution **shall refuse** to disclose any record requested under this Act that contains information that was **obtained in confidence** from*

*(a) the **government of a foreign state** or an **institution** thereof;*
*(b) an **international organization of states** or an **institution** thereof;*
*(c) the **government of a province** or an **institution** thereof;*
*(d) a **municipal or regional government** established by or pursuant to an Act of the **legislature of a province** or an **institution** of such a government; or*
(e) an aboriginal government.

13(2) *The head of a government institution **may disclose** any record requested under this Act that contains information described in subsection (1) if the government, organization or institution from which the information was obtained*

*(a) **consents** to the disclosure; or*
*(b) makes the **information public**.*

13(3) *Definition of 'aboriginal government' – The expression' aboriginal government in paragraph (1) means Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the* **Nisga'a Final Agreement Act.**

Preliminary matters:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizen or permanent resident within the meaning of the *Immigration Act* and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, our Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under section 68 or 69.

Generally speaking, the Department of External Affairs as the entity responsible for Canada's foreign relations, will be able to answer conclusively whether the entity in question is the government of a foreign state or an international organization of states, because it will be a question of whether Canada has formally recognized the entity. However, there is no obligation on us to accept without question the position of that department in the case of whether an entity is an institution of the government of a foreign state or an international

organization of states except where Canada has clearly taken a step which recognizes the entity as such an institution.

It is important to note there is some overlap between the paragraphs 13(1)(a), (b), and section 15 exemptions. While section 13 covers information obtained in confidence from foreign governments or institutions, it does not cover information transmitted by Canadian government institutions to foreign institutions. An exchange of information between Canadian government institutions and foreign government institutions or international organizations is more properly assessed in relation to section 15 of the Act, which refers in paragraph 15(1)(g) to present or future international negotiations and in paragraph 15(1)(h) to diplomatic correspondence. This overlap becomes relevant in an investigation because section 13 is a mandatory class exemption, while section 15 is discretionary and requires that a reasonable expectation of injury to the conduct of international affairs be shown before the records can be exempt under this exemption. (*Do-Ky v. Canada (Minister of Foreign Affairs & International Trade),* [1999] F.C.J. No. 673 affirming [1997] 2 F.C. 907 (F.C.T.D.).

The "Test":

At the present time, there have been only a few decisions from the Federal Court of Canada on the criteria to be met in order for this provision to apply, the last of which occurred in 2003 *(Cemerlic v. Canada (General Solicitor), [2003] F.C.J. No. 191, Kelen J.)*

Subsection 13(1) is a mandatory class exemption since disclosure of the information does not have to cause any harm. (*Ruby v. Canada (Royal Canadian Mounted Police*), [1998] 2 F.C. 351 (F.C.T.D.) paragraph 46) Consequently, once the Head determines that a record or part thereof contains certain information which falls within the class enunciated in the exemption, he or she must then refuse to grant access to the requested information unless either of the exceptions in subsection 13(2) applies, namely: 1. the government from whom the information was obtained consents to the disclosure 2. the government from whom the information was obtained makes the pertinent information public.

There are four requirements that must be met in order for the information to fall within subsection 13(1):

Primary

a. The information was obtained <u>from</u> a foreign, provincial , regional, municipal <u>government</u> or <u>institution</u> thereof or from an international organization of states or an institution thereof;

b. The information was obtained <u>in confidence</u>;

Derivative

c. Where applicable, there is no dispute about the legal standing of the government or international organization;

d. Where applicable, there is no dispute that the institution is a bona fide institution of the government or international organization.

1) **Obtained in confidence:**

The purpose of section 13 is to protect information obtained in confidence from other governments since disclosure of such information could impair or even destroy the relationship between Canada and such governments if they lost confidence in the ability of the Government of Canada to protect their confidences. The requirements of section 13 (i.e., that the information be '*obtained*' in confidence) differ from those in paragraph 20(1)*(b)* (i.e., that the confidential information be '*supplied*' by a third party) and must be distinguished. For the purpose of section 13, the information must have been directly provided by the other government. In the case of paragraph 20(1)*(b)*, it can originate through other means. For example, confidential commercial information about a third party could be supplied in confidence to the government by another third party.

The requirements of section 13 also differ from those in paragraph 20(1)*(b)* due to the fact that paragraph 20(1)*(b)* requires that information be exempted only when it is objectively confidential and treated consistently in a confidential manner by the government institution and the third party submitting the information. Section 13 only requires that the information be obtained in confidence by a government institution. This section **does not require** that:

- the information in itself be confidential information;
- the information has been treated consistently in a confidential manner by the (Canadian) government institution;
- the information was treated consistently in a confidential manner by the government organization etc. submitting the information.

NOTE: Subsection 13(2) constitutes an exception to b) and c) above. Accordingly, it is implicit that the foreign government must not have made the information public at the time it asked Canada to hold it in confidence. As soon as there is evidence that the other government has made the information public or agrees to the disclosure, there is no longer a confidentiality requirement on the part of the Canadian government and the exemption no longer applies. For further details on the application of this override, see subsection 13(2) below.

The key to the exemption is to satisfy ourselves as to the terms and conditions under which the information was transmitted and received. The Federal Court Trial Division in one case has stated that the Court should be satisfied that information obtained from a foreign government institution was stipulated by the foreign government to be confidential (*Steinhoff v. Canada (Minister of Communications*) (1998), 10 Admin L.R. (3rd) 232, (1998), 83 C.P.R. (3rd) 380. This view does not reflect the reasoning in other decisions and a better view is to assess whether confidential transmission of information from foreign government institutions can be implied, where this is claimed by a government institution, from the evidence and circumstances in each case. For the purpose of subsection 13(1), information can be obtained in confidence from another government, organization or institution, in one of the following ways:

- The government providing the information explicitly supplied the information on the basis that it will be held by the Canadian institution in confidence. In order for the exemption to apply, the entity supplying the information and the person receiving it must have each had the requisite authority to accept/transmit the information and to conduct relations on behalf of their respective government. Similarly, the information must be supplied during the course of such relations.

- The information was communicated through a formal channel of confidential communications established for the purpose of intergovernmental relations (for example, an information sharing agreement or pursuant to written policies, treaties, etc.). In such circumstances, confidentiality may sometimes be implied but only where it is clear that both parties (both governments) understood there would be restrictions placed on the information.

- The information supplied was objectively and inherently confidential, to such an extent that the official supplying the information would have known that it would be treated in confidence and the recipient of the information could have no doubt whatsoever that it was received in confidence. Once again, in order for the exemption to apply, the entity supplying the information and the person receiving it must have each had the requisite authority to accept/transmit the information and to conduct relations on behalf of their respective government. Similarly, the information must be supplied during the course of such relations. This would rarely happen and it would normally be expected that where there was a previous history of this type of information being transmitted and then held in confidence, then all of the facts showing how the Canadian government treated the information would reflect that it was being treated in confidence.

The Department has the burden of proving that the exemption applies (*Société Gamma Inc. v. Canada (Secretary of State)* 79 F.T.R. 42 (F.C.T.D.). The burden of proof required to establish the exemption is that of the balance of probabilities. (*Tridel Corp. v. Canada (C.M.H.C.),* (1996) 115 F.T.R. 184 at 196 (C.F.T.D.) As usual, we must make our findings on a case-by-case basis having regard for all the surrounding circumstances. For example, the fact that the requested information was not consistently treated in a confidential manner by the department may not affect the application of the exemption where it can otherwise be objectively proven that the information was received under an obligation to hold it in confidence.

However, we would have great difficulty in circumstances where a department is claiming as the (only basis) for the exemption the fact that the information was implicitly received in confidence. For example, if the record is not classified, not handled in a secure way and/or not passed on to the other governmental entities without appropriate warnings etc; it would be very difficult for us to accept that the information was originally obtained in confidence.

2) **<u>The government of a foreign state or an institution thereof</u>:**

Dictionary definitions can be considered in determining the ordinary meaning of a provision when the suggested meaning in the dictionary is consistent with the purpose of the Act. But that is not the case here - i.e., in trying to understand the meaning of "*... or an institution thereof*".

The terms '*government*' and '*institution*' are defined as follows in the *Concise Oxford Dictionary*, 8th ed. (Oxford University Press, 1991):

- **Government:** *"2. the system by which a State or Community is governed...."*

- **Institution:** *"2. a society or organization founded spp. for charitable, religious, educational, or social purposes".*

These terms are further defined as follows in the *Black's Law Dictionary*, 5th ed. (West Publishing Co., 1979):

- **Government:** *"...the machinery by which the sovereign power in a state expresses its will and exercises its functions; or the framework of political institutions, departments, and offices, by means of which the executive, judicial, legislative, and administrative business of the state is carried on.... "*

- **Institution:** *"2. ...An establishment, especially one of eleemosynary or public character or one affecting a community...".*

Other legislation can also assist in determining the meaning of these terms. The legislature is deemed to enact statutes on a given subject that are coherent in their formulation. When a statute is drafted, its author supposedly takes into account legislation already in force, particularly that dealing with the same subject matter. A statute will be drafted so as to integrate it into existing legislation, from the point of view of both form and content. This explains why related prior legislation, as part of the legal environment of the new act, can help to clarify its meaning.[1]

These terms are further defined as follows in the *Black's Law Dictionary* 7th edition (West Group) 1999):

- **Government**: "2. The sovereign power in a nation or state. 3. An organization through which a body of people exercise political authority; the machinery by which sovereign power is expressed <the Canadian government>. In this sense, the term refers collectively to the political organs of a country regardless of their function or level, and regardless of the subject matter they deal with.

- **Institution:** "An established organization, esp. one of public character..."

The following definition can be found in the *Custom Tariff Act*, R.S. 1997, c. 36:

53. (1) The definitions in this subsection apply in this section.

"government", in respect of a country other than Canada, includes

(*a*) a provincial, state, municipal or other local or regional government in the country;

(*b*) a person, agency or institution acting on behalf of, or under the authority of a law or other enactment passed by, the government of the country or a provincial, state, municipal or other local or regional government of the country; and

(*c*) an association of sovereign states of which the country is a member.

The following definitions can be found in the *State Immunity Act*, R.S. 1985, c. S-18

2. In this Act,

"agency of a foreign state" means any legal entity that is an organ of the foreign state but that is separate from the foreign state;

"foreign state" includes

(*a*) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,

(*b*) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and

(*c*) any political subdivision of the foreign state;

Noting that many Acts, including the **Access to Information Act**, contain definitions or lists of federal institutions that expressly or by implication exclude the departments and institutions of the Territories, in *Fédération Franco-ténoisev. Canada (C.A.)* 2001 FCA 220. the Court of Appeal stated that Parliament has done whatever it could under the Constitution to give the Northwest Territories a status close, but not equal to that of the provinces. Therefore, although not specifically listed at subsection 13(1), a territorial government, and its institutions, can be deemed to be covered by this provision.

[39] Constitutionally, the Territories do not have the same status as provinces. They cannot gain provincial status without an amendment to that effect to the Canadian Constitution, in accordance with the method provided by the Constitution.

[40] Legislatively, the Parliament of Canada has invested the Territories with the attributes of a genuine responsible government and given this government the plenary executive, legislative and judicial powers that the country's Constitution allowed Parliament to delegate, stopping just short of the plenary powers associated with a

sovereign responsible government, those powers being limited by the Constitution to the Government of Canada and the provincial governments.

During the legislative review of section 13 of Bill C-43, some comments were made about the meaning of '*government ... institution*'. While according to Interpretation principles these opinions are not binding on Courts, they nevertheless constitute a persuasive authority as to the meaning of a statute.[2]

- **Mr. Fox:** "*...We have included the word "institution" here for greater clarity. In our country, I suppose, the Cabinet can be said to constitute the government of the country and we did not want to limit Schedule I Clause 13 to information received from provincial cabinets or the cabinets of foreign countries; otherwise, you would have to go through cabinets every time.*"[3][Emphasis added]

- **Mr. Robert Auger (Legislation and House Planning Secretariat, Privy Council Office):** "*The word institution was inserted alongside to governments or provincial governments in order to be more precise as to what we meant. The intent of the bill was not to cover information provided in confidence only by provincial cabinets or by the governments or cabinets of foreign countries. We felt that by adding institution we would make it clear that if a particular department of a foreign government or a provincial government was submitting information in confidence it should be protected...*"[4][emphasis added]

Based on the above, it would appear that in the context of paragraph 13(1)*(a)* the term '*or an institution thereof*`'would refer to any agency or institution of the national government which in the circumstances was acting for, on behalf of, or under the authority of the (national) government of that country. Where there is any doubt as to whether the entity is a constituent part of the foreign government, what is important to consider for the purpose of this exemption is whether the entity who supplied the requested information had the requisite authority to transmit the information and to conduct relations on behalf of its respective government. For example, information sent by the tax department of the State of New York to Revenue Canada in a taxpayer/tax collector relationship would not be covered by the exemption.[5] While it is possible to argue differently, we have adopted the Treasury Board's interpretation that paragraph 13(1)*(a)* does not include constituent parts of foreign states (e.g., state governments in the United States).[6]

3) **An international organization of states or an institution thereof:**

The **Vienna Convention On The Law Of Treaties Between States And International Organizations Or Between International Organizations** (21 March 1986) and the Vienna Convention on the *Law of Treaties* (22 May 1969) defines '"international organization" as an intergovernmental organization. On the other hand, an "international organization of states" means any organization with members representing and acting under the authority of the

governments of two or more states. Generally, these organizations are created by treaties or international agreements of a contractual character creating legal rights and obligations between the parties. Examples of such organizations are: NATO, the United Nations, the International Court of Justice, the World Bank, the International Monetary Fund, the World Health Organization, the International Federation of Red Cross and Red Crescent.

Agencies or entities that are constituent parts of such international organizations are also covered by the exemption. If there is any doubt as to whether it is such an institution, what is important to consider for the purpose of this exemption is whether the entity who supplied the requested information had the requisite authority to transmit the information and to conduct relations on behalf of the particular international organization of states. For example, UNESCO is an institution of the United Nations.

If there has been no consultation with the Department of External Affairs by the government institution that processed the access request, it is important to encourage them to do so. We normally rely on External Affairs to advise us whether Canada has formally recognized an entity as an '*international organization of states*.'

4) **The government of a province or an institution thereof:**

The **Interpretation Act**, R.S. 1985, c. I-21 which governs the interpretation of statutes and regulations in Canada, defines the word “province” as meaning “a province of Canada, and includes the Yukon territory, the Northwest Territories and Nunavut.” Accordingly, for the purpose of paragraph 13(1)(c), information received from any province or the above territories can be covered by the exemption. However, at this point in time, the **Interpretation Act** does not treat any aboriginal organizations as separate entities for the purposes of section 13. Consequently, these organizations are normally third parties for the purposes of the Act.

Institutions of provincial governments are also covered. Accordingly, any provincial or territorial entity having the requisite authority to transmit the information and to conduct relations on behalf of its respective government, could also transmit information in a way that it could be protected under section 13.

To determine whether an agency is an institution of the government of a province, it is important to ensure there is consultation with the federal provincial office at PCO.

5) **A municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government:**

Municipal information is also covered by the exemption. For example, the National Capital Commission could receive confidential information from a municipality, a municipal government, or an institution thereof competent to conduct relations and transmit information for a municipality or a municipal government.

In *Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)* (1996), 116 F.T.R. 37, the applicant argued that section 13 of the Act ought to be

interpreted so as to include band councils, or that equal protection for band council governments ought to be read into the section. The applicant submitted that a band council should be "read into" section 13 of the Act, as being analogous to a municipal government. The Court found that paragraph 13(1)(d) clearly defines what constitutes a municipality for the purposes of non-disclosure of information a government established by or pursuant to an Act of the legislature of a provincial government. The Court found, therefore, that a "band council" may not be read into the language of section 13. Since that decision, the Act has been amended to make specific additional provision for 'aboriginal government' which for the time being is restricted to the Nishga'a nation.

6) **Where Canadian government institution being investigated is not original obtainer:**

It may well arise that the government institution with whom you are dealing obtained the information in question from another Canadian government institution which had obtained it in confidence from one of the entities referred to in subsection 13(1). The fact that the institution received the information indirectly makes no difference provided that you ensure that the above requirements (of section 13) were complied with by the obtaining institution and that the institution being investigated obtained the information on a confidential basis and treated it as such.

7) **Where disclosure permitted:**

Subsection 13(2) states that the head of a government institution may disclose any record that would fall within the ambit of subsection 13(1) if the government, organization or institution from which the information was obtained consented to disclosure or made the information public.

Our Office position is that the presence of either of these two circumstances creates a duty to disclose unless some other exemption applies. Our position relies on the decision of Mr. Justice Jerome, ACJ, in *Information Commissioner v. Minister of Employment and Immigration*, [1986] 3 F.C. 63 (T.D.). That case involved a similar override of the mandatory exemption in subsection 19(1) with respect to personal information. Pursuant to subsection 19(2), the head '*may*' disclose personal information in several situations, one being when the individual to whom the information relates has consented. The individual had approved disclosure but the head of the institution nonetheless purported to exercise its discretion and decided not to release the information. The court held that '*may*' meant '*must*' since that interpretation was necessary to give effect to the requester's right to information conferred by the **Access to Information Act**. The institution was, therefore, ordered to satisfy the personal information request. However it should be noted that the duty to disclose is not 100% mandatory. The words "shall disclose" would mean mandatory. Since it is '*may*' disclose, it is directory. In other words, where one of the exceptions in subsection 19(2) applies, the head is directed to disclose unless some other exemption applies.

An institution has a duty to consider the override in the following circumstances:

- **13(2)*(a)*:** This override applies where the government, organization or institution to whom the information relates consents to disclosure. This provision logically requires that there be some possibility that consent would be given before consent would be sought. It is our position that unless the government, organization or institution etc. has made it clear in the past or on the record that it will never consent, the possibility that it will consent is there - i.e., it is presumed that consultation should take place. It is not sufficient (i.e., as an excuse for not consulting) for the head of the Canadian institution to state that they don't know if the third party would consent. In such a case, they must take positive action to determine if the other government, organizations or institutions would consent: see also *X v. Minister of National Defence*.[7]

- The Federal Court of Appeal has stated in the context of a request for personal information under the **Privacy Act** that a request by an applicant for information subject to section 19 of the **Privacy Act** (the parallel to section 13 of the **Access to Information Act**) "includes a request to the head of a government institution to make reasonable efforts to seek the consent of the third party [other government or international organization of states] which provided the information (Emphasis added). (*Ruby v. Canada (Solicitor General, R.C.M.P.),* [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.)). The Court noted that the evidentiary burden lies on the government institution to show that the exception in subsection 19(2) [subsection 13(2)] for consent does not apply given the inability of the requester to know who to ask for consent or what the withheld information consists of. The test enunciated by the Court with respect to the application of paragraph 19(2)(a) [paragraph 13(2)(a) of the **Access to Information Act**] was whether the government institution has made reasonable efforts to seek the consent of the other government or institution. The Court recognized that political considerations, or the nature or volume of the requested information may not always make it possible or practical to seek consent on a case-by-case basis, in which case it may be necessary to establish protocols for determining consent in advance "which respect the spirit and intent of the Act and of the exemption."

- **13(2)*(b)*:** This override applies where the information requested was made public **by the government, organization or institution which submitted the information**.[8] When a department is asking another government, organization or institution whether they would consent to disclosure, it should also remember to ask whether it has made the information public. However, in cases where the other government (etc.) has made it clear in the past that it will never give consent for such information to be disclosed, the paragraph 13(2)*(b)* override must be considered when it is self evident from the request, the requested information, the complaint or the complainant's representations that the information requested has been (or probably had been) made public by the foreign government, organization or institution. Unless it is self evident from the records, the requester must demonstrate a *prima facie* case that the information has probably been made public.

Case Law

General:

With respect to this section of the Act, the Court noted in *Grand Council of the Crees (of Quebec) v. Canada (Minister of External Affairs and International Trade)* (June 27, 1996), T-1681-94, (F.C.T.D.), that once the head of a government institution has met the burden of establishing that the information not disclosed was obtained in confidence under subsection 13(1), the onus shifts to the party claiming an exception pursuant to subsection 13(2) to establish that exception. No such exception was established in this case, the Court noted. See *also Do-Ky v. Canada (Minister of Foreign Affairs & International Trade)*, [1997] 2 F.C. 907 (F.C.T.D.).

Cemerlic v. Canada (General Solicitor), [2003] F.C.J. No. 191, Kelen J. : In this case, the Court found that the purpose of this exemption is to prevent an inadvertent disclosure of information obtained in confidence from foreign governments or institutions. According to the Court, this is vital in preserving the present supply of intelligence information received from foreign sources

1) **Obtained in confidence:**

- As noted above, for the purpose of section 13 it is not necessary, in order to claim the exemption, that the department have obtained the information on a specific request of confidence.[1] In reviewing decisions not to disclose pursuant to this mandatory exemption, the Court's role is to determine whether the head of the government institution erred in the factual determination that the requested information falls within the exemption.[2] Given the fact that section 13 deals with intergovernmental communications, confidentiality can sometimes be assumed when the information was communicated through a formal channel of communication.[3]As noted in *Rubin v. Canada (Canada Mortgage and Housing Corporation)*, [1989] 1 F.C. 265 (F.C.A.) at 272, the opinion of the Commissioner is a factor for the Court to consider when determining whether the information should be disclosed.[4]

- *Sherman v. Canada (Minister of National Revenue),* [2003] F.C.A. [2002] : What is significant for the purpose of paragraph 13(1)(a) is not so much the source of the record to which access is sought as both the confidential nature and the source of the information it contains. In other words, the record sought is not to be confused with the information that it contains. The record may be Canadian, but the contents American.[5]

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1 See for example subsection 16(3) of the Access to Information Act . (See page 1). Read also paragraph 24(b) of the *Privacy Act.*

2 *Sherman v. Canada (Minister of National Revenue),* 2002 FCT 586 (F.C.T.D.)

3 *Kelly v. Canada (Solicitor General)*, (April 1, 1992), T-948-91 (F.C.T.D.) [Hereafter Kelly]

4 *Sherman v. Canada (Minister of National Revenue),* 2002 FCT 586 (F.C.T.D.)

5 *Sherman v. Canada (Minister of National Revenue),* [2003] F.C.A. [2002]

- A foreign government can make an express request/claim for confidentiality after the information was communicated to the Canadian government if it can be implied that the information was originally communicated in confidence.

- *Sherman v. Canada (Minister of National Revenue),* [2003] F.C.A. [2002] : In this case, the Federal Court of Appeal held that to fall within the parameters of paragraph 13(1)(*a*), the records must reveal the contents of the information received in confidence from a foreign government. For example statistics generated by the Canadian government from the confidential information it received from a foreign government, which would reveal for example that 50 requests for assistance relating to the *Excise Tax Act* and 105 such requests regarding the *Income Tax Act* were made by the IRS is not disclosure of information itself obtained in confidence from an institution of a foreign government which triggers the application of paragraph 13(1)(*a*).

- There is no discretion to read into the provision a requirement that there be a continuing confidentiality about the material at issue. For example, if the information had been leaked, disclosed by another department etc., would the exemption still apply? The head of a government institution must simply determine whether the information was obtained in confidence under subsection 13(1) and, if so, the head must still refuse to disclose the information unless one of the overrides contained in subsection 13(2) applies. The mandatory nature of this exemption, therefore, is set aside only where the other government or organization consents to disclosure or has itself made the information public. As well, unlike paragraph 20(1)*(b)* of the Act which specifically provides for a consideration of whether the information has maintained its confidential nature, section 13 simply requires a consideration of whether the information at issue, when it was received, was obtained in confidence.

- *Sherman v. Canada (Minister of National Revenue),* [2003] F.C.A. [2002] : In this case, the Court found that information, whether in statistical form or not, generated by Canadian authorities which would contain information obtained in confidence from a foreign government would fall under the scope of the mandatory exemption. The Court gave the following example: “For example, a letter written by the minister, but containing information provided by the United States in confidence or referring to such information in a manner revealing its contents, is a Canadian record containing, in part or in its entirety, information falling within the parameters of the exemption in paragraph 13(1)(*a*).”

- In Order P-293, the Ontario Commissioner found that section 15 requires that the expectation that disclosure of a record could prejudice the conduct of intergovernmental relations or reveal information received in confidence by the institution from another government or its agencies, must not be fanciful, imaginary or contrived, but rather one that is based on reason.

- In Order P-552, the Ontario Information and Privacy Commissioner held that subsection 15(b) of the Ontario FOI Act, which deals with information, the

disclosure of which would reasonably be expected to reveal information received in confidence from another government or its agencies, applied to exempt information which would permit the drawing of accurate inferences with respect to information received from another government or one of its agencies, for example internal memoranda from an Ontario Ministry commenting on confidential information received from a federal government agency.

2) **Institution:**

- In Order P-270 (upheld in PO-1927-1), the Ontario Commissioner found that while the Atomic Energy of Canada Ltd. (AECL) and Ontario Hydro are not governments, they are capable of conducting inter-governmental relations on behalf of their respective governments. Intergovernmental relations can be understood as the ongoing formal and informal discussions and exchanges of information as the result of joint projects, planning and negotiations between various levels of government.

  As a Crown corporation, AECL exercises its powers only as an agent of the Crown. Similarly, Ontario Hydro is a Crown corporation and an agent of the Ontario government. Where they conduct business through a joint committee of representatives, information received by Ontario Hydro from AECL may be covered by subsection 15*(b)* of the *FIPPA*. Commissioner Wright refused however to exempt from disclosure portions of records which consisted of administrative detail on the grounds that disclosure could not reasonably be expected to prejudice intergovernmental relations, nor that disclosure would cause the AECL and Ontario Hydro to cease their exchange of information.

- In Order P-263, Commissioner Wright stated that while subsection 15*(b)* of the *FIPPA* is intended to protect the free flow of information from other governments or their agencies to Ontario institutions who are carrying out their respective '*governmental*' functions, it does not apply to records provided by Revenue Canada to the institution where the relationship was that of tax collector and taxpayer.

3) **Where disclosure permitted:**

- The fact that some of the information received in confidence from a foreign government has otherwise been disclosed by the Canadian government has no bearing on the application of paragraph 13(2)*(b)*.

- The fact that the information requested has lost its confidential nature has no bearing on the application of the exemption. The exemption is set aside only where the other government, organization or institution consents to disclosure or has itself made the information public.

- In *Ruby v. Canada (Solicitor General, R.C.M.P.),* [2000] F.C.J. No. 779*,* the Federal Court of Appeal overruled the Trial Division finding at [1998] 2 F.C. 351 that there is no requirement to seek consent from a foreign government or institution to the disclosure of information to which section 19 of the **Privacy Act** (section 13 of the **Access to Information Act***)* applies. The Federal Court of Appeal held that the exception in subsection 19(2) **Privacy Act** (subsection 13(2) **Access to Information Act**) must be read "in the overall context of the Act, which favours access to the information held." The Court stated that a request by an applicant for information subject to section 19 of the **Privacy Act** (section 13 **Access to Information Act**) "includes a request to the head of a government institution to make reasonable efforts to seek the consent of the third party [other government or international organization of states] which provided the information". (Emphasis added). The Court noted that the evidentiary burden lies on the government institution to show that the exception in subsection 19(2) [subsection 13(2)] for consent does not apply, given the inability of the requester to know who to ask for consent or what the withheld information consists of. The test enunciated by the Court with respect to the application of paragraph 19(2)(a) [paragraph 13(2)(a) of the **Access to Information Act**] was whether the government institution has made reasonable efforts to seek the consent of the other government or institution. The Court recognized that political considerations, or the nature or volume of the requested information may not always make it possible or practical to seek consent on a case-by-case basis, in which case it may be necessary to establish protocols for determining consent in advance "which respect the spirit and intent of the Act and of the exemption."

- In *Cemerlic v. Canada (General Solicitor)*, [2003] F.C.J. No. 191, Kelen J., while the language of the provision is permissive in nature, subsection 13(2) creates a consent requirement. Accordingly, the authority who claims the benefit of the exemption has to ensure that the third party who provided the information is not consenting to disclosure. However, the government institution may not seek consent if it is acting pursuant to an established protocol that respects the spirit and the letter of the Act and the exemption. The government institution must do more than simply assert that the information was received in confidence.

- In*Ruby v. Royal Canadian Mounted Police*, [2004] F.C. 594 (F.C.T.D.), von Finckenstein J., department and CSIS both refused to disclose the information invoking section 19 of the *Privacy Act* (the equivalent of section 13 of the *Access to an information Act*). The Court of Appeal directed a new review by the Trial Division of whether or not this section was properly invoked by CSIS stating that the head of that government institution must make a reasonable effort to seek the consent of the third party who provided the information. The Court of Appeal found however that political and practical considerations pertaining, among others, to the nature and volume of the information may make it impractical to seek consent on a case-by-case basis and lead to the establishment of protocols which respect the spirit and the letter of the Act and the exemptions. After reviewing Ms. Jalbert's Public Affidavit stating that these bodies were consulted in a manner consistent with established protocols but refused to grant the applicant disclosure of the information and Ms. Jalbert's Supplementary

Confidential Affidavit which confirms the names of the bodies in question and sets out the nature of the consultations which occurred, the Trial Division found that reasonable efforts were made to seek the consent of the third party who provided the requested information.

TABLE OF AUTHORITIES

Canada

Cemerlic v. Canada (General Solicitor), [2003] F.C.J. No. 191, Kelen J.
Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs) (1996), 116 F.T.R. 37
Kelly v. Solicitor General, (April 1, 1992), T-948-91, (F.C.T.D.).
X v. Minister of National Defense, [1992] 1 F.C. 77, 46 F.T.R. 206 (T.D.).
Information Commissioner v. Minister of Employment and Immigration, [1986] 3 F.C. 63 (T.D.).
Shepherd v. Solicitor General, [1990] 36 F.T.R. 222 (T.D.).
Grand Council of the Crees (of Quebec) v. Canada (Minister of External Affairs and International Trade) (June 27, 1996), T-1681-94, (F.C.T.D.)
Hien Do-Ky v. Canada (Minister of Foreign Affairs & International Trade), (1992), 241 N.R. 308 (F.C.A.) affirming [1997] 2 F.C. 907 (F.C.T.D.).
Ruby v. Canada (Solicitor General, R.C.M.P.), [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.) overturning [1998] 2 F.C. 351.
Sherman v. Canada (Minister of National Revenue), 2002 FCT 586
Société Gamma Inc. v. Canada (Secretary of State), [1994] 79 F.T.R. 42
Tridel Corp. v. Canada (C.M.H.C.), [1996] (115) F.T.R. 184
Fédération Franco-ténoise v. Canada, 2001 FCA 220 (F.C.A.)
Rubin v. Canada (C.M.H.C.), [1989] 1 F.C. 265 (F.C.A.)
Ruby v. Royal Canadian Mounted Police, [2004] F.C. 594 (F.C.T.D.), von Finckenstein J.
Sherman v. Canada (Minister of National Revenue), [2003] F.C.A. [2002]

Institution

Ontario

Orders #P-263, P-270, P-293, P-1619, PO-1927-I,

United States

Fensterwald v. CIA, 443 F. Supp. 667 (D.D.C. 1978)).
Fisher v. United States DOJ, 772 F. Supp. 7 (D.C. Col. August 15, 1991).
Founding Church of Scientology, Inc. v. NSA, 197 App. D.C. 305, 610 F.2d 824, 831-32 (D.C. Cir. 1979).
Simmons v. Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986).
Sirota v. CIA, 3 G.D.S. para. 83, 261 (S.D.N.Y. 1981).

The Questions

Section -- 13
Statement of Test to be Met
NOTE: As per Do-Ky v. Canada (Minister of Foreign Affairs and International Trade), [1997], 2 F.C. 917, the information requested should not be seen in bulk. Instead, each distinct record must be considered on its own and in the context of all the documents requested for release. Mandatory exemption Information must be obtained from: a) government of a foreign state b) international organization of states c) provincial government (includes territories) d) municipal, regional government under provincial legislation e) an aboriginal government

Relevant Questions	Departmental Response	Assessment
Who or what body provided the information in the record? - what government, organization or institution? - what entity or institution?		
What is the relationship between the institution and the government, organization or institution?		
Did Canada recognize the government of the foreign state at the time the record was created?		
Has Canada recognized the organization of foreign states at the time the record was created?		
Has Canada recognized the state or organization since? - is such recognition pending?		

Statement of Test to be Met
Or an institution thereof: - must be part of the government organization state - not a private body - not courts or other independent institutions - could include state or provincial level governments of a foreign country

Relevant Questions	Departmental Response	Assessment
Is the institution a government agency?		
What function does it perform?		
Is the institution independent of the government?		
Does the institution act on behalf of the foreign government?		
Does the institution act under the authority or direction of the government?		
If not, how is the institution accountable to the government?		
Is the institution an independent (constitutionally recognized) level of government within a foreign state?		

Statement of Test to be Met
The information: - must be obtained from the institution - not enough to be in the possession of the institution

Relevant Questions	Departmental Response	Assessment
Ask to see the letter of transmittal.		
Is the government, organization or institution providing its own information?		
Does the information originate with the government, organization or institution or from somewhere else? - if somewhere else, from where?		

Relevant Questions	Departmental Response	Assessment
Did the government, organization or institution add anything to the information or simply pass it along?		

Statement of Test to be Met

- Government, organization or institution must have authority to transmit the information

Relevant Questions	Departmental Response	Assessment
What was the reason the government, organization or institution transmitted the information?		
If an institution provided the information: - was the institution acting on behalf of its government, organization or institution when it sent the information? - was the institution acting under the authority of the government, organization or institution when it sent the information? - who/what body authorized the institution to send the information?		
- Was the information transmitted pursuant to a treaty or other agreement or written policy? - describe/provide		
- Had the federal government requested the information from the government, organization or institution? - under what arrangement?		

Statement of Test to be Met

- Information must have been obtained in confidence

Relevant Questions	Departmental Response	Assessment
Ask to see the letter of transmittal or any covering letters.		
Was there an express request that the information be treated in a confidential manner?		

Relevant Questions	Departmental Response	Assessment
Was the information stamped 'confidential' when it was received?		
Did a federal government office make any notes, memoranda indicating that the material was being provided on a confidential basis?		
Do these notes indicate a source for such a request?		
Is there a history of treating the information sent in a confidential manner? - What are the reasons for this?		
- How long has the arrangement been in place?		
Has the information been treated confidentially at the request of the foreign government, institution?		
Is the government institution acting pursuant to an established protocol?		
Does this protocol respect the spirit and the letter of the Act?		
Does this protocol respect the spirit and the letter of the exemption?		
Is the foreign government aware the information is being maintained on a confidential basis?		
Is the information treated confidentially by the federal government, organization or institution? - describe measures. - to whom is it disclosed?		
Is the government, organization/institution aware it is disclosed in this way? - have they objected?		

Statement of Test to be Met

- Information may be released on consent

Relevant Questions	Departmental Response	Assessment
Does the government, organization/institution consent to disclosure of the information?		

Relevant Questions	Departmental Response	Assessment
Has the federal government, organization or institution asked the foreign government, organization or institution if it consents to disclose the information? - ask to see the request. - if not, why not?		
Is there explicit direction from the government, organization/institution that consent will not be provided?		
Is there a treaty provision or provision in an agreement for transmittal of the information that it is to be held in confidence?		

Statement of Test to be Met

- Information may be released if government, organization/institution makes the information public.

Relevant Questions	Departmental Response	Assessment
Has the government, organization/institution released the information to others? - who?		
Has it published the information?		
Has it consulted with others about the subject matter of the information? - who? - for what purpose/reason?		
How is the information treated internally by the government, organization/institution?		

Statement of Test to be Met

Note: if paragraphs 13(1)(c) or (d) are claimed:

- must be a provincial government (including territories)
- must be established by provincial legislation
- inapplicable to aboriginal local or regional governments unless recognized provincial/territorial legislation (except as provided in subsection 13(3)
- inapplicable to other aboriginal governments (except as provided in subsection 13(3)

Relevant Questions	Departmental Response	Assessment
Is the municipality or regional government established by or pursuant to a provincial legislation? - Specify.		
Is there provincial legislation recognizing the establishment of the local government?		
If established by by-law or subordinate legislation, was the regional or other government passing the by-law itself created by provincial legislation?		

Endnotes

1. P.A. Côté, *The Interpretation of Legislation in Canada*, Les Éditions Yvon Blais, Cowansville, 1984, at 270-71.

2. P.A. Côté, *The Interpretation of Legislation in Canada*, Les Éditions Yvon Blais, Cowansville, 1984, at 439.

3. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, Issue No. 42, June 17, 1981 at 31.

4. *Ibid*, Issue No. 43, June 18, 1981 at 11.

5. By analogy we would rely on **Ontario Order P-263.**

6. *Treasury Board Manual: Access to Information Volume, Treasury Board of Canada*, December 1, 1993, Chap. 2-8 at 1.

7. [1992] 1 F.C. 77; 46 F.T.R. 206 (T.D.). In this case, Mr. Justice Denault stated:

"With the above in mind, information must clearly fit within and not be exempted by the relevant paragraphs of section 3 of the *Privacy Act* or subsection 19(2) of the Act before it can be withheld. In fact, subsection 19(1) provides that in such circumstances, it 'shall' be withheld. The Act does not provide for a discretion to release information on the basis of how long ago it was obtained. It does not say that a document ought to be revealed after 30 years or if the applicant has a good reason for requesting the information. The fact that Yardley has been dead now for 35 years and the circumstances of his dismissal almost 50 years ago are simply not relevant to the question of whether personal information concerning individuals other than Yardley should be disclosed unless that individual has been dead for more than twenty years or has consented to the release of the information. I recognize the difficulty that may be presented in attempting to ascertain whether these exceptions apply. However, in my opinion, it would not be sufficient for the head of a government institution to simply state that they are unaware or that they do not know if the exceptions apply. Rather, they should be in a position to state what activities and initiatives were undertaken in this regard." [Emphasis added].

8. *Fisher v. United States DOJ*, 772 F. Supp. 7 (D.C. Col. August 15, 1991): In this case, the plaintiff's primary complaint was that much of the requested information allegedly had been released to the news media, and he contends that therefore he is entitled to this information. However, the plaintiff failed to provide evidence that the media coverage was the result of a release of the requested information by the government to the Press. Nor did the plaintiff demonstrate that any of the withheld information has been the subject of publicity so widespread as to warrant disclosure under the FOIA. See *Founding Church of Scientology, Inc. v. NSA*, 197 App. D.C. 305, 610 F.2d 824, 831-32 (D.C. Cir. 1979). Moreover, the Court found that even assuming that some of the withheld information has appeared in the Press, the

disclosure was not proper because a disclosure from an official source of information previously released by an unofficial source would confirm the unofficial information and therefore cause harm to third parties. *See Simmons v. Dep't of Justice*, 796 F.2d 709, 712 (4th Cir. 1986) ("*release from an official source naturally confirms the accuracy of the previously leaked information*"). Furthermore, public disclosure of some information does not necessitate the disclosure of additional information that is otherwise properly exempt from disclosure. *Sirota v. CIA*, 3 G.D.S. para. 83,261 (S.D.N.Y. 1981) (citing Fensterwald v. CIA, 443 F. Supp. 667 (D.D.C. 1978).

Section 14

The Provision:

14. *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 conduct by the Government of Canada of **federal-provincial affairs**, including, without restricting the generality of the foregoing, any such information*

*(a) on **federal-provincial consultations or deliberations**; or*

*(b) on **strategy** or **tactics adopted or to be adopted by the Government of Canada relating** to the conduct of federal-provincial affairs.*

Preliminary matters:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizen or permanent resident within the meaning of the *Immigration Act* and any individual or any corporation present in Canada, a right (of access) to most records under the control of the Federal Government. More specifically, our Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or parts thereof) are excluded under section 68 or 69.

Section 14 is a discretionary exemption which is based on an injury test to a particular class of records. But it is also one of a handful of exemptions (the others are section 15, paragraphs 16(1)*(c)* or *(d)* and 18*(d)*) where the scope of review conducted by the court under section 50 is different from the scope of review carried out under section 49 for all of the remaining exemptions. However, there is no difference in the power of the court to make an order. In either case - i.e. under section 49 or 50 - the court has the power to order records disclosed (or withheld). The difference is in the test - i.e. the extent that the court needs to be satisfied.

In section 50, the bottom line is that if the head has reasonable grounds to believe that a record, or a part thereof contains certain information of the type referred to in the exemption he may then determine, by exercising his discretion, whether to disclose the information.

Notwithstanding the higher standard for interference with a head's decision under section 50, it is very much part of the role of our office to determine the reasonableness of the head's conclusion that disclosure would lead to the injury set out in the exemptions subject to section 50 review. *Ruby v. Canada (Solicitor General, R.C.M.P.)*, [2000] F.C.J. No. 779, June 8, 2000, was a case concerning paragraph 22(1)(b) of the **Privacy Act**, (the parallel provision

to paragraph 16(1)(c) of the **Access to Information Act***)*, which is in turn subject to review under section 49 of the **Privacy Act** (section 50 **Access to Information Act**). In the *Ruby* case the Federal Court of Appeal overturned the Trial Judge's conclusion that he could not substitute his views on injury for the decision of the institution head and instead directed a closer scrutiny of the reasonableness of the institution's determination that the injury described in the exemption would be caused by disclosure:

> Furthermore, the reviewing judge concluded at page 36 of his decision that "the Court cannot substitute its views for that of CSIS, or the Solicitor General, about the assessment of the reasonable expectation of probable injury." We would add, however, that it is very much part of the Court's role under section 49 [section 50 **Access to Information Act**] to determine the reasonableness of the grounds on which disclosure was refused by CSIS. That being the case, the reviewing judge, in our view, should have scrutinized more closely whether the release of information, particularly information that is over 20 years old, could reasonably be expected to be injurious to specific efforts at law enforcement and detection of hostile activities, and, therefore, whether CSIS had a reasonable ground to refuse to disclose. (Emphasis added).

The "Test":

1) **<u>Preamble</u>:**

This exemption recognizes that it may be necessary to protect the role that the government has in national affairs. It is designed to enable the head of the institution to withhold records that "*... contain information the disclosure of which could reasonably be expected to ...*" be injurious to federal-provincial relations.

The class of records is clear - it applies to records which contain information relating to the role the government plays in conducting federal provincial operations. The examples given in the exemption are the two types Parliament envisaged might cause harm, but not necessarily. This is <u>not</u> a mandatory exemption.

It is a discretionary exemption based on an injury test, therefore to invoke the exemption requires a two-step process:

- Review the records to determine if there are any parts which contain information, the disclosure of which could reasonably be expected to be injurious to the government's conduct/role in federal-provincial matters.

NOTE: The determination by the institution of the reasonable likelihood of probable harm does not have to be absolute. The head does not have to establish - on a balance of probabilities - that disclosure would be likely. We need only have reasonable grounds to believe that the disclosure of the information in question

would cause the harm. In other words, the test is not whether the head is right in his belief about the injury, the test is whether a court would agree that there were reasonable grounds to reach that conclusion - i.e. that a reasonable person could have reached the same conclusion as the head. The issue is could (not would) an average person have reached that conclusion. To put the matter in the opposite perspective, the head is only going to be wrong where it can be established that the head had no reasonable grounds to justify his conclusion.

- The second step is to weigh the public interest in the disclosure of this type of information against the probable injury that has been identified and determine whether discretion should be exercised to exempt the information.

These two steps are different and both require documentation. In each case, to justify the withholding of particular information, the department must be able to demonstrate the probable injury and why there is a reasonable probability that injury would occur. The Department must, at the same time, show the factors that were taken into consideration by the Head of the Institution in exercising his/her discretion to refuse disclosure of the information.

When reviewing the application of a discretionary exemption like section 14, it is important to remember that the government institution has the evidentiary burden of showing not only that the information falls within the scope of the exemption, but that the head of the institution or his/her delegate properly exercised their discretion in deciding not to disclose the information.[1] If there is no evidence establishing that the institution head considered whether or not to disclose information subject to a discretionary exemption, or if the evidence about why they decided to refuse disclosure indicates the head relied on irrelevant or unreasonable factors or on improper considerations or that the decision is not consistent with the objects of the Act (that of extending disclosure of government information subject to limited and specific exemptions), then it is open to our office, and to the Federal Court on a review, to question or reject the decision to refuse disclosure.

2) **The Criteria:**

The key to the provision is to determine whether any of the records contain "*... information the disclosure of which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs ...*". At the present time, there has been only one decision from the Federal Court of Canada on the criteria to be met in order for the provision to apply. However, there has been jurisprudence, from other jurisdictions that could be applied by analogy to the *Federal Act* and the following will summarize the office interpretation of the provision.

Since we are dealing with the prejudice exemption, there are really two tests to be met. Firstly, what constitutes a reasonable expectation of harm for the purpose of prejudice exemptions generally and what is the meaning of '*reasonable expectation of harm*' test in federal-provincial affairs. Secondly, does the reasonable expectation of harm constitute a threat to the conduct by the Government of Canada of federal-provincial affairs. For a better definition of the term «reasonable expectation of harm», please refer to the lexical section of the Grids.

a) Where disclosure could reasonably be expected**:**

For an exhaustive definition of these terms, please refer to the lexical.

b) Injury to the Conduct by the Government of Canada - of Federal-Provincial Affairs:

In order for the exemption to apply, the record must relate to negotiations between a province and Canada. Accordingly, the exemption does not cover negotiations with any third party but only to the extent that a province is covered. The term '*province*' is defined in the *Interpretation Act* as a province of Canada, and includes the Yukon, Northwest Territories and Nunavut.

This section is intended only to protect the conduct of federal-provincial affairs in the carrying out of governmental functions. Therefore, a prerequisite for this exemption to apply is that the institutions of the federal and provincial levels must have the capacity to carry out governmental functions. If either institution lacks this ability, then the exemption could not apply. Similarly, even in a case where an institution has the capacity to carry out governmental functions, the exemption could not apply when the institution was carrying out functions other than its governmental function. It would not, for example, apply to records provided by Revenue Canada to a province where the relationship was one of tax collector and taxpayer.[2]

Case Law

1) Federal:

The Court in this case found that since the information in which the governments ought to keep confidential was already in the public realm, from other sources, the release of the same or similar information would be less likely to cause harm. If there were harm from disclosure, that harm could reasonably be expected to have arisen from prior disclosure by others. *Canada (Information Commissioner) v. Canada (Prime Minister)* [1993] 1 F.C. 427 (T.D.)

In this case, the Court found that the government institution made only a general inference to the requested records and that there was little evidence linking a reasonable expectation of harm to the content of the specific pages. For these reasons, the Court found itself unable to conclude that there were reasonable grounds for confidentiality with respect of this information since there was no clear specific and understandable linkage between the allegation of harm and disclosure of the relevant information.

2) Ontario:

(Orders #87, 210, P-270, P-293, P-388, P-435, P-630)

- A record that discloses the fact that a company will engage in negotiations with the federal government does not relate to intergovernmental relations between the province and the federal government. Also, the disclosure of a record containing an undertaking by the province to negotiate with the federal government cannot reasonably be expected to prejudice intergovernmental relations.

(Order #P-630)

- A settlement proposal received by the provincial government between the Algonquins of the Golden Lake First Nation (AGL) and the Government of Canada and the Government of Ontario was held to be exempt under this provision. The Commissioner was satisfied that the process was sensitive and confidential and that prejudice between Ontario and Canada would result from untimely disclosure. In addition, the Commissioner ruled that the negotiations between Ontario and Canada are intergovernmental in nature.

(Order #P-236)

- Disclosure of correspondence between counsel at the Ministry of the Attorney General and the British Lord Chancellor's Department in respect of the Hague Convention on the Civil Aspects of International Child Abduction could reasonably be expected to prejudice intergovernmental relations.

(Order #123)

- Correspondence between the senior justice officials of two governments that deal with highly sensitive and controversial issues may be exempt.

(Order #P-388)

- The fact that disclosure of the records would prejudice the relationship between the mining industry and the federal and provincial governments is not sufficient to satisfy this provision. It is intergovernmental relations that must be prejudiced in order to satisfy this exemption.

(Order #P-435)

- The possibility that disclosure of the record would prejudice the relationship between the private sector and the government is not covered by this exemption. The prejudice must be to intergovernmental relations.

(Order #P-263)

- Paragraph 15*(b) [FIPPA]* is intended to protect the free flow of information from other governments or their agencies to Ontario institutions which are carrying out their respective '*governmental*' functions. It does not apply to records provided by Revenue Canada to the institution where the relationship was that of tax collector and taxpayer.

(Orders #P-304, M-128, M-221, P-627)

- This provision may be satisfied where information is received implicitly in confidence. Nevertheless, the institution must provide sufficient evidence that the information was received in confidence.

(Order #P-368)

- Records compiled by the Royal Canadian Mounted Police (RCMP) regarding arson and fraud investigations of a requester are provided in confidence to the provincial police force. The records are then given to the Ministry of the Attorney General for the prosecution. This exemption is satisfied because the RCMP is an agency of another government and the records were received in confidence. The expectation of confidence continued when the police provided the documents to the ministry.

(Order #M-151)

- Records provided by the Department of National Defence (ND) to a City to plan for a public display of military equipment were not exempt under this provision. At the time the records were provided to the City, no reference to confidentiality was made. The records were provided in respect of previous events and had, at one time, been distributed to members of the public who were involved in

planning the previous events. Even though an expectation of confidentiality was alluded to in subsequent meetings with ND, the Commissioner found that the '*in confidence*' test had not been met.

(Orders #M-128, M-363)

- Computer printouts of the criminal history of the appellant were obtained electronically from the Canadian Police Information Centre (CPIC). The information in CPIC is comprised of information originally entered in the system by various law enforcement agencies, including non-federal sources. The Royal Canadian Mounted Police (RCMP), while responsible for the administration and maintenance of the system, is only one of the contributors of information. The mere fact that the RCMP administers and maintains CPIC does not make the RCMP the source of all information that resides in the system. Only the retrieval of information originally supplied to CPIC by the RCMP can be considered to be '*received*' from the RCMP. In this case, the information received from CPIC was originally supplied by the local police force itself. As a result, this exemption does not apply.

(Order #M-202)

- Confidential records received by the police from various agencies of the government of Canada, Ontario and the United States were exempt under this provision. The records were derived from the Royal Canadian Mounted Police, the Federal Department of External Affairs and the Department of Justice, the ministries of the Solicitor General and the Attorney General in Ontario, and United States police agencies.

Order P-859

- For the section 15(a) exemption to apply, however, the relations in question must be intergovernmental (that is between various levels of government) rather than between agencies of the same government.

Order P- 876

- The introductory portion of section 15 contains the words “could reasonably be expected to”. Section 15 requires that the expectation that disclosure of a record could prejudice the conduct of intergovernmental relations or reveal information received in confidence by the institution from another government or its agencies, must not be fanciful, imaginary or contrived, but rather one that is based on reason (Orders P-270 and P-293). The Ministry explains that since all the tax owing by a company which operates in several provinces must be divided up or allocated between the provinces, confidentiality is critical to maintain the free-flow of intergovernmental discussions. In addition, it is the Ministry's position that premature disclosure of the information would not only be unfair to other

taxpayers but would also have a "chilling effect" on the participation of both the attending governments and future attendees. In this manner, disclosure of the record could give rise to an expectation of prejudice to the conduct of intergovernmental relations. The representations of the affected parties support the position put forward by the Ministry.

Order P- 908

- Given the sensitive and complex nature of land claim negotiations generally and the particular circumstances in this appeal, including the need for ongoing negotiations to implement the agreement which was reached, I am persuaded that disclosure of the records at issue could reasonably be expected to prejudice intergovernmental relations between Ontario and Canada. Therefore, the records are exempt from disclosure pursuant to subsection 15(a) of the Act.

Order P-949

- Indian and Northern Affairs Canada states that the records are part of confidential land claim negotiations and that the release of the records could have an injurious effect on the subject land claim and on all land claims which are the subject of negotiations between the federal government and the Province of Ontario. It states that disclosure of the records would prejudice the conduct of intergovernmental relations with the Province of Ontario, as Canada would be less willing in the future to share material with Ontario, which is related to the negotiation and settlement of land claims. The ICO submits that due to the sensitivity of the issues involved, the integrity of the negotiating process would be seriously prejudiced if the records were to be disclosed and a chilling effect would be the immediate outcome in terms of intergovernmental relations and land claim negotiations. Based on my review of the records and the representations of the parties, I am satisfied that, in the circumstances of this appeal, disclosure of the records at issue could reasonably be expected to prejudice intergovernmental relations between Ontario and Canada.

Order P-961

- It is important to recall the broader context of these records. That is, the continuing discussions between Ontario and Canada on Aboriginal fishing rights. In many instances, each party to such negotiations will have different interests in the relationship which it seeks to protect. One party may wish the negotiations to proceed in a certain manner, with specific issues as priorities. The other party may well have its own negotiating agenda and strategy. Thus, while disclosure of certain information may be beneficial or not affect the position of one of the parties, it could negatively affect that of the other which, in turn, could prejudice the relationship between the two parties. Moreover, it is not only the interests in

the negotiating relationship which may differ between the parties, but also the policy considerations which each brings to the negotiating table. Again, because the policy agendas of the negotiating parties may not coincide, disclosure of certain information could negatively impact on one party and not on the other. This, in turn, could result in prejudice to the relationship between the parties. In my view, the fact that the DFO and the Department of Justice have consented to the disclosure of certain of the records is not determinative of the issue of whether disclosure of these documents could give rise to a reasonable expectation of prejudice to the conduct of intergovernmental relations between Ontario and Canada. It is the position of the Ministry that disclosure of the records could prejudice intergovernmental relations between the province and the federal government with respect to their continuing discussions on how to address the issue of Aboriginal fishing rights in Ontario. Given the sensitive and complex nature of Aboriginal fishing rights generally, and the particular circumstances of this appeal, I am persuaded that disclosure of all the records at issue could reasonably be expected to prejudice the conduct of intergovernmental relations between Ontario and Canada. Therefore, the records are exempt from disclosure pursuant to subsection 15(a) of the Act.

Order P-1291

- The members of the CBA (Canadian Blood Agency) are the provincial/territorial Health Ministers, each of whom appoint a representative to the CBA Board of Directors. Having reviewed the role and function of both the CBA and its predecessor, I find that, while there are various structural differences between the two bodies, the mandate of the CBA clearly requires its members to act in accordance with their respective Health Ministers in regulating the publicly-funded National Blood Supply Program. In my view, such a body must have some degree of public accountability. The CBA itself addressed this issue in its minutes of September 25, 1991. Under the heading, "Item 12 - Policy on Access to Information", the following resolution was approved:

(1) Access to the working documents and records of the Canadian Blood Agency may be granted if a written request is submitted and is expressly approved by the Executive Committee.

(2) The Agency will maintain a frank, open communications posture with the public and media, designed to foster a climate of mutual trust, encourage dialogue and disclose as much information as is necessary or appropriate to the circumstances, so that the Canadian public will gain a better understanding of the blood system.

As a result, I find that the release of those portions of the minutes which contain the carried motions of the CBA, and reflect the decisions of the Agency in relation to the regulation of the National Blood Supply Program, would be in accordance with the above-noted policy and would not, therefore, prejudice the conduct of intergovernmental relations.

Order P-1398

- In this case, the records set out detailed analyses of contracts and other relations with the government of Quebec, with suggested Ontario positions in the event of a "Yes" victory in a referendum on Quebec independence. This is standard practice in the development of government policy, and analyses of this kind are frequently the basis of such policies. I am satisfied that, in the event of a "Yes" victory, disclosure of Records 1-7 and Record 9 would be prejudicial to the Ontario government's position in negotiations between Ontario and Quebec which would undoubtedly occur as a result of this development.

  Moreover, it is not only the interests in the negotiating relationship which may differ between the parties, but also the policy considerations which each brings to the negotiating table. Again, because the policy agendas of the negotiating parties may not coincide, disclosure of certain information could negatively impact on one party and not on the other. This, in turn, could result in prejudice to the relationship between the parties. I find that, in the event of Quebec independence, or a "Yes" victory in a referendum on that subject, harm to Ontario's negotiating position could reasonably be expected to prejudice the relationship between the governments of Ontario and Quebec.

  A remaining question is whether there is a reasonable expectation that such negotiations will ever occur; if they do not, the harm envisaged by the Ministry as a result of disclosure will not take place. It is not possible to predict, with certainty, whether or not Quebec will ever vote "Yes", or become independent, and thus trigger the negotiations to which the Ministry has referred. However, in the circumstances, my assessment is that if the records were disclosed, there would be a reasonable expectation of prejudice to intergovernmental relations between Ontario and Quebec.

Order. P-1441

- The Ministry states that the negotiations involve many complex and detailed historical, legal and policy issues, which the parties view and interpret differently. The Government of Canada has disclosed a number of records to the appellant, and has provided its consent to the Ontario Government to disclose certain records to the appellant. However, the Ministry maintains that disclosure of the records at issue could compromise the integrity of the negotiations by adding to the already considerable pressures it faces and will result in the failure of current and future negotiations. Given the complexity and sensitivity of the negotiations, I find it reasonable to expect that disclosure of the records could adversely affect the negotiations and that there is a reasonable expectation of prejudice to the conduct of intergovernmental relations. Accordingly, I find that the second part of the subsection 15(a) test has been satisfied in the circumstances of this appeal and the exemption applies.

Order P-1620

- Given the sensitive and complex nature of the issues surrounding the occupation of Ipperwash Provincial Park, including the need for ongoing communications regarding this and other related matters, I am persuaded that disclosure of the severed information could reasonably be expected to prejudice intergovernmental relations between Ontario and Canada.

Order P-1891

- The Ministry has provided detailed and convincing evidence to establish a reasonable expectation of probable harm, under subsection 15(a), to the conduct of relations between the Government of Ontario and the federal government and the other provinces and territories participating in discussions concerning amendments to the hate crime provisions of the *Criminal Code*. I am satisfied that disclosure of these records could reasonably be expected to inhibit any further co-operative ventures among the federal, provincial and territorial governments with respect to these and other issues requiring national cooperation and consultation.

Order P-1915

- The records at issue here were not created in the context of a co-operative venture between the City and the Ministry respecting legislative amendments. Clearly, the City does not play a comparable role to that of the provincial, territorial and federal governments in regards to the administration of justice and the *Criminal Code*, as discussed in these records, and it is not alone sufficient that the record may have found its way into the Ministry's hate crime amendment files. Under subsection 15(b), the Ministry and the City have not provided me with the necessary detailed and convincing evidence to establish that disclosure of these records would reveal information the Ministry received “in confidence” from the City, either expressly or by implication. I accept that the records address sensitive criminal justice and race relations issues. However, this does not mean that the City's position on these issues is necessarily sensitive, and I see nothing in the records to suggest that the information contained in them is inherently confidential.

Order P-1927

- Hydro appears to base its argument concerning the prejudice to the conduct of intergovernmental relations not so much on the disclosure of the records themselves, but on the impact of disclosing records without notifying the foreign governments. I do not accept this position. In order to establish the requirements

of subsection 15(a), Hydro must provide detailed and convincing evidence that disclosure of the records themselves could reasonably be expected to result in the harm described in that section. On appeal, Hydro bears the onus of establishing the requirements of these exemption claims, and my decisions in that regard are based on a consideration of the evidence and arguments put forward by Hydro and my independent review of the records. Having reviewed the records and considered Hydro's representations, I find that I do not have the type of "detailed and convincing" evidence necessary to establish that disclosure of any of the records for which Hydro has claimed subsection 15(a) could reasonably be expected to prejudice the conduct of intergovernmental relations.

(**Reconsideration Order #R-970003, rescinding Order #P-1406)**

- Relations between Canada and Ontario which are reflected in records relating to a land claim settlement or negotiations with aboriginal groups were found to be intergovernmental in nature in this case. The exemption for records the disclosure of which could reasonably be expected to prejudice the conduct of intergovernmental relations applies to records relating to such negotiations notwithstanding that the federal government may not have originated or received the records. The Inquiry Officer found there would be prejudice to the conduct of intergovernmental relations if records relating to land claim negotiations were disclosed because the assumption of confidentiality underlying the negotiations would be compromised, with a resulting "chilling effect" on future land claim negotiations and on the willingness of the other parties to the negotiations to share information related to land claims with the Ontario government. (See also Interim Orders P-1620 and 1621, October 7, 1998)

Disclosure could reasonably be expected

Federal

Canada (Information Commissioner) v. Canada (Prime Minister), (1992) [1992] 1 F.C. 427, [1992] F.C.J. No. 1054, 57 F.T.R. 180, 12 Admin L.R. (2d), 81, 49 C.P.R. (3d) 79 (F.C.T.D.)

Ruby c. Canada (Solliciteur général), [2000] 3 C.F. 589, [2000] A.C.F. n^{o} 779 (8 juin 2000) (C.A.)

Ontario

Orders #87, 123, 210, P-236, P-270, P-263, P-293, P-304, P-368, P-388, P-435, P-627, P-630, M-128, M-151, M-202, M-221, M-363
Orders 859, 949, 961, 1291, 1398, 1441, 1620, 1891, 1915, 1927

The Questions

Section -- 14
Statement of Test to be Met
GENERAL: Discretionary Injury Test Exemption Examples of information which might lead to injury: a) federal-provincial consultations, deliberations b) strategy/tactics adopted/to be adopted by Government of Canada in the conduct of federal provincial affairs General category of injury: to the conduct by the Government of Canada of federal provincial affairs

Relevant Questions	Departmental Response	Assessment
Is the information described in paragraph (a) or (b)? - determine applicability of these paragraphs.		
If not described by paragraphs (a) or (b), is it similar in nature to information described in these paragraphs? - specify how.		
If not similar in nature, describe how the information relates to the conduct by the Government of Canada of federal-provincial affairs.		
Determine applicability of s. 14(1) general language.		

Statement of Test to be Met
Injury Test - reasonable expectation of probable harm Discretionary Exemption

Relevant Questions	Departmental Response	Assessment
If information relates to the conduct of federal-provincial affairs or is described in (a) or (b), describe how disclosure of the information is likely to be injurious to the conduct of federal-provincial affairs by the Government of Canada.		

Relevant Questions	Departmental Response	Assessment
Assess whether there is a reasonable expectation of probable harm.		
If there is a reasonable expectation of probable harm, should the record nevertheless be disclosed.		
Assess the grounds used by the government institution in its exercise of discretion to exempt the information from disclosure.		
What is the subject matter of the information exempted?		
Does the information relate to federal-provincial consultations or deliberations?		
Which governments are involved?		
Which departments within the federal and provincial governments are conducting the consultations/deliberations?		
At what level are the consultations/deliberations being carried out? - high level? - low level?		
What is the subject matter of the consultations or deliberations?		
What is the objective of the consultations or deliberations?		
Do the consultations or deliberations involve routine or administrative matters?		
Do they relate to constitutional matters: • Division of powers between the federal government and the provinces/territories? • Charter of Rights and Freedoms?		
Do they relate to taxation matters?		
Do they relate to public finances (fiscal or financial matters)? Do they relate to a specific policy initiative of the federal government? • Has the policy change or initiative been announced		

Relevant Questions	Departmental Response	Assessment
or heralded in the Speech from the Throne or in a Statement by a Minister in the legislature? • Has the change or initiative been implemented as a policy by the government? • Is there an agreement by the federal government to consult or engage in deliberations with the province on this matter?		
Is there agreement by the province to consult/ deliberate?		
Is agreement to consult/deliberate being considered?		
If no agreement to consult or deliberate, what is the basis of the claim that they are consulting or deliberating?		
Have the consultations or deliberations begun? - when?		
Have they concluded? - when?		
Are they ongoing? - with what frequency? - what schedule is contemplated?		
If concluded, will they resume? - when?		
What is or was the result of the consultations or deliberations?		
Have they or did they result in agreement or disagreement?		
Describe any reasons for disagreement.		
If they have resulted in agreement, how will the agreement be implemented? - when?		
Has there been public announcement about the consultations or deliberations? - about any agreement achieved? - about any disagreement? - about the subject matter of the consultations or deliberations?		
Any questions, answers or announcements in the House of Commons, Senate, Parliamentary Committees?		

Relevant Questions	Departmental Response	Assessment
Has (have) the province(s) involved made any announcements or statements on the consultations or deliberations? - about the subject matter of the consultations or deliberations. - describe. - ask to see.		
If the consultations or deliberations have concluded, do they impact in any way on current consultations or deliberations? - on current negotiations, consultations or deliberations? - on current federal-provincial affairs? - on future negotiations or consultations on federal-provincial affairs? - describe how.		
How would disclosure add to this impact?		

Statement of Test to be Met -- 14(b)

- Strategy or tactics adopted / to be adopted by the Government of Canada in the conduct of federal-provincial affairs.

Relevant Questions	Departmental Response	Assessment
Does the information relate to federal strategy or tactics in the conduct of federal-provincial affairs?		
Do the strategy or tactics take into account the risk to Canadian unity acknowledging the threat, potential or real, of negotiating with a separatist government in Quebec? Does the strategy or tactics take into account the risk to Canadian unity acknowledging the threat, potential or real, of western alienation of Western Canadians? Does it relate to potentially divisive issues for the federation ie. language rights?		
Which governments are involved?		
Which departments within the federal government are		

Relevant Questions	Departmental Response	Assessment
involved?		
Does the information concern negotiations between a federal and provincial government?		
What is the subject-matter of the negotiations?		
Does it relate to routine or administrative matters?		
Does it relate to constitutional matters?		
Does it relate to fiscal matters?		
Does it relate to specific policy initiatives of the federal or provincial government? - describe.		
At what level are the negotiations being carried out? - high level? - low level?		
At what stage are the negotiations currently being conducted? - are they over? - when were they over? - are they ongoing? - with what frequency? - is there a schedule for meetings?		
Is it publicly known the negotiations are/were taking place?		
Is there controversy associated with the negotiations?		
Is the controversy known publicly?		
What was the outcome of the negotiations? - agreement?		
Is the agreement publicly known?		
If there was agreement, would disclosure have an impact on future negotiations? - how?		
Does the information describe federal strategy or tactics relating to matters other than federal- provincial negotiations? - describe what the strategy or tactics relate to.		
Are the strategy or tactics necessitated by a federal-		

Relevant Questions	Departmental Response	Assessment
provincial controversy? - differing points of view? - disagreement? - describe.		
Is the controversy, difference or disagreement publicly known?		
Is it a current matter?		
Does the information assess the effectiveness of current strategy, or assess strategic alternatives?		
Does the information relate to current strategy or tactics?		
Does it relate to strategy or tactics employed in the past?		
What was the result of past strategy or tactics? - agreement? - ongoing differences?		
How would disclosure of past tactics impact on current federal-provincial affairs?		
Would it jeopardize past/current agreements? - how?		
Would it hinder current discussion? - why?		
Would disclosure limit current or future federal strategic or tactical options? - how?		

Statement of Test to be Met

General category - information relating to the conduct of federal-provincial relations

Relevant Questions	Departmental Response	Assessment
Is the information similar to that described in paragraphs 14(a) or (b)?		
If not, could release of the information have a negative impact on discussions, deliberations or federal strategy or		

Relevant Questions	Departmental Response	Assessment
tactics?		
- describe how.		
- how does the information relate to the conduct of federal-provincial affairs?		
- does the information directly concern a matter of federal-provincial interest?		
- if not, is it included in a context that relates to a matter of federal-provincial interest or concern?		
- describe the connection.		
- does the information relate to an issue that is being addressed in a federal- provincial forum or federal-provincial discussions or negotiations?		
- does the information concern a position taken by the federal government on a federal-provincial matter?		
Does the information assess positions taken by the federal government in a federal-provincial matter?		
Are the federal positions publicly known?		
Does the information assess provincial positions with respect to federal-provincial matters?		
Are the provincial positions publicly known?		
If the information does not directly concern a federal-provincial matter, could its disclosure have a negative impact on the conduct of federal-provincial relations? - describe how.		

Statement of Test to be Met
Injury Test - Reasonable expectation of probable harm to the conduct of federal-provincial relations. - Must be specific injury.

Relevant Questions	Departmental Response	Assessment
Specify the harm to the conduct of federal-provincial affairs likely to arise from disclosure.		
Is the harm specific in nature?		
Does it relate to specific negotiations?		
Does it relate to specific discussions or deliberations?		
Will it have a negative impact on the resolution of a particular issue?		
Does the information relate to events, discussions, negotiations that are already made public? - by the government. - in the press. - by the provinces. - in the House of Commons, Senate.		
If so, what additional injury is expected from disclosure?		
Why would this harm occur?		
Is the subject matter generally well-known?		
If so, has the information been publicly confirmed or acknowledged to be true?		
Is the publicly-known information based on speculation or rumours?		
If so, specify the harm that would occur if the information were confirmed to be true or false (as the case may be)?		
Has similar information been disclosed in the past?		
Did injury to the conduct of federal-provincial affairs occur as a result? - describe the injury. - detail why it would occur.		

Relevant Questions	Departmental Response	Assessment
Are the discussions, issues, negotiations or strategies current?		
If not, are they concluded?		
Are they stale, surpassed by events?		
Must be specific injury.		
How would disclosure cause injury in these situations?		
Is the information available elsewhere?		
If so, why would its release cause injury?		
Would existing agreements, understandings or relations be re-opened or disrupted? - specify how/why.		
Would disclosure have a negative impact on current discussions, issues, etc.? - are they similar in nature to the information withheld? - describe injury that would occur. - detail why it would occur.		
Is there anything about the context in which the information appears that would create injury to federal-provincial affairs? - specify how/why.		
Is (are) the provincial government(s) concerned already aware of the information?		
What further injury would be caused by disclosure?		
What use would be made of the information upon its disclosure? • By opposition parties in the legislature • By provincial governments • By professional associations and unions including such groups as the Canadian Bar Association, the Canadian Medical Association etc. • By interest groups.		
Why would such use cause injury to the conduct of federal-provincial affairs?		
What kind of injury is anticipated?		

Relevant Questions	Departmental Response	Assessment
Is the information inherently susceptible of misinterpretation? - why? - how would such misinterpretation be harmful to the conduct of federal-provincial affairs?		
Would disclosure generate public debate about a federal-provincial matter?		
If so, why would this debate harm the conduct of federal-provincial affairs?		
Could the information be released with an explanatory note to minimize misinterpretation or reduce the potential harm to federal-provincial affairs? - if not, why not?		
Are there any communications or public relations measures the federal government could take to eliminate injury to federal-provincial affairs upon disclosure? - if not, why not?		
Review as well questions above under paragraphs 14(a), (b) and the general category under section 14.		

Statement of Test to be Met

Discretion

The government institution is required to

1. Consider disclosing the record notwithstanding it is described by section 14
2. To consider disclosure in light of
- the kind of injury identified in the text of the section
- the intent of the section
- the intent of the Act

Relevant Questions	Departmental Response	Assessment
Has the [head of the] government institution considered disclosing the record? - why was it decided not to disclose? - this assessment must go beyond concluding that the information is described in section 14.		

Relevant Questions	Departmental Response	Assessment
See also grid on Discretionary Exemptions.		
Relevant factors in this assessment by a head could include:		
Whether there has been disclosure in the past.		
Whether disclosure could have the effect of stabilizing situations, reassuring the public.		
The degree of injury arising from disclosure. - if it is minimal, disclosure could be considered.		
Whether there are special circumstances giving rise to the request that merit disclosure.		
Disclosure as a means of enhancing public awareness of issues related to federal-provincial affairs.		
Whether disclosure would add to or assist in public debate surrounding a federal-provincial issue.		
Whether there is a public interest in knowing the information that exceeds the injury to the federal position that would be caused by disclosure. - in the province concerned. - in the rest of the country.		
Whether there is evidence that the exemption is being used only to address real and probable injury and not merely to protect the federal government from embarrassment, inconvenience, or unwelcome disclosure. [Grand Council of the Crees (of Quebec) v. Canada (Minister of External Affairs & International Trade), [1996] F.C.J. 903.		

Endnotes

1. See *Ruby v. Canada (Solicitor General, R.C.M.P.),* [2000] F.C.J. No. 779 (June 8, 2000)(F.C.A.).

2. *Ontario Order* P-263.

Section 15

The Provision:

15(1) *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 **conduct** of **international affairs**, the **defence of Canada** or any **state allied or associated** with Canada or the **detection**, **prevention** or **suppression** of **subversive or hostile activities**, including, without restricting the generality of the foregoing, any such information*

*(a) relating to **military tactics** or **strategy**, or relating to **military exercises** or **operations** undertaken in **preparation for hostilities** or in connection with the **detection**, **prevention** or **suppression** of **subversive or hostile activities**;*

*(b) relating to the **quantity**, **characteristics**, **capabilities** or **deployment** of **weapons** or other **defence equipment** or of anything being **designed**, **developed**, **produced** or **considered for use** as weapons or other **defence equipment**;*

*(c) relating to the **characteristics**, **capabilities**, **performance**, **potential**, **deployment**, **functions** or **role** of any **defence establishment**, of any **military force**, **unit or personnel** or of any **organization or person responsible for** the **detection**, **prevention** or **suppression** of **subversive or hostile activities**;*

*(d) **obtained or prepared** for the purpose of **intelligence** relating to*

*(i) the **defence of Canada** or any **state allied or associated** with Canada, or*

*(ii) the **detection**, **prevention** or **suppression** of **subversive or hostile activities**;*

*(e) obtained or prepared for the purpose of **intelligence** respecting **foreign states**, **international organizations** of states or citizens of foreign states used by the Government of Canada in the process of **deliberation** and **consultation** or in the conduct of **international affairs**;*

*(f) on **methods** of, and **scientific or technical equipment** for, **collecting**, **assessing** or **handling** information referred to in paragraph (d) or (e) or on sources of such information;*

*(g) on the **positions adopted or to be adopted** by the Government of Canada, governments of **foreign states** or **international organizations***

*of states for the purpose of **present or future international negotiations**;*

*(h) that constitutes **diplomatic correspondence** exchanged with **foreign states** or **international organizations** of states or **official correspondence** exchanged with **Canadian diplomatic missions** or **consular posts abroad**; or*

*(i) relating to the **communications** or **cryptographic systems** of Canada or foreign states used*

*(i) for the conduct of **international affairs**,*
*(ii) for the **defence of Canada** or any state **allied or associated with** Canada, or*
*(iii) in relation to the **detection**, **prevention** or **suppression** of **subversive or hostile activities**.*

15(2) *In this section,*

***"defence of Canada or any state allied or associated with Canada"** includes the efforts of Canada and of foreign states toward the detection, prevention or suppression of activities of any foreign state directed toward actual or potential attack or other acts of aggression against Canada or any state allied or associated with Canada;*

***"subversive or hostile activities"** means*
a) espionage against Canada or any state allied or associated with Canada,
b) sabotage,
c) activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or foreign states,
d) activities directed toward accomplishing government change within Canada or foreign states by the use of or the encouragement of the use of force, violence or any criminal means,
e) activities directed toward gathering information used for intelligence purposes that relates to Canada or any state allied or associated with Canada, and
f) activities directed toward threatening the safety of Canadians, employees of the Government of Canada or property of the Government of Canada outside Canada.

Preliminary matters:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizens or permanent resident within the meaning of the *Immigration Act* and any individual or any corporation present in Canada a right (of access) to most records under the control of the

Federal Government. More specifically, our Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under section 68 or 69.

Section 15 is a discretionary injury exemption. This is a two step process. First, the head must determine whether disclosure of the (information in) a record or part thereof could reasonably be expected to cause the prejudice enunciated in the exemption. In this case, it is important to note that there are three distinct types of injury contemplated by this provision. It must be asked whether disclosure could reasonably be expected to be injurious to:

- the conduct of international affairs;
- the defence of Canada or any state allied or associated with Canada; or
- the detection, prevention or suppression of subversive or hostile activities.

The department must indicate on exempting information under this provision which of the three types of injury is the basis upon which they are claiming the exemption and this must have been identified in the notice sent to the requester. Secondly, he/she must also exercise his/her discretion whether to exempt or disclose the information.

Secondly, he/she must also exercise his/her discretion whether to exempt or disclose the information, taking into consideration the objects of the Act and the exemption (see grid on Discretionary Exemptions). When reviewing the application of a discretionary exemption like section 15, it is important to remember that the government institution has the evidentiary burden of showing not only that the information falls within the scope of the exemption, but that the head of the institution or his/her delegate properly exercised their discretion in deciding not to disclose the information.[1] If there is no evidence establishing that the institution head considered whether or not to disclose information subject to a discretionary exemption, or if the evidence about why they decided to refuse disclosure indicates the head relied on irrelevant or unreasonable factors or on improper considerations or that the decision is not consistent with the objects of the Act (that of extending disclosure of government information subject to limited and specific exemptions), then it is open to our office, and to the Federal Court on a review, to question or reject the decision to refuse disclosure.

The section 15 exemption is jucidially reviewed under section 50 of the Act which provides that:

- "*Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate*".

In *X v. Canada (Minister of National Defence),* [1992] 1 F.C. 77 at 106, Denault J, the Court, in interpreting this section, stated that the provision authorizes the Court to "disclose information if the head of the government institution . . . did not have reasonable grounds upon which to refuse disclosure." However, in a later ruling in *X v. Canada (Minister of National Defence),* (1992), 58 F.T.R. 93 [F.C.T.D.] Strayer J., the Court noted that it is not entitled to order disclosure simply because it would have reached a conclusion different from that of the head of the government institution. Further, in *Ruby c. Canada (Solicitor General),* [2000] F.C.J. 779 [F.C.A.], the Court of Appeal made it clear that in an application for review , it is the Court's function "to ensure that the discretion given to the administrative authorities" has been exercised within the proper limits and on proper principle. "This is why the reviewing Court is given access to the material in issue . . ."

> Furthermore, the reviewing judge concluded at page 36 of his decision that "the Court cannot substitute its views for that of CSIS, or the Solicitor General, about the assessment of the reasonable expectation of probable injury." We would add, however, that it is very much part of the Court's role under section 49 [section 50 **Access to Information Act**] to determine the reasonableness of the grounds on which disclosure was refused by CSIS. That being the case, the reviewing judge, in our view, should have scrutinized more closely whether the release of information, particularly information that is over 20 years old, could reasonably be expected to be injurious to specific efforts at law enforcement and detection of hostile activities, and, therefore, whether CSIS had a reasonable ground to refuse to disclose. (Emphasis added).

Therefore, in determining whether the exemption under section 15 is justified, we must determine whether the head had reasonable grounds to believe that the release of the information exempted could lead to the particular harm. Notwithstanding the higher standard for interference with a head's decision under section 50, it is very much part of the role of our office to determine the 'reasonableness' of the conclusion reached by the head of the institution as to whether disclosure would, or not, lead to the injury set out in the exemptions subject to a section 50 review.

Therefore, in determining whether the exemption under section 15 is justified, we must determine only whether the head had <u>reasonable grounds to believe</u> that the release of the information exempted could lead to the particular harm. What this means is could (not would) a reasonable person, based on the information available to the head, have come to the same conclusion. We don't have to determine whether the head was right in reaching that conclusion. Thus, while we might reach a different conclusion than the head, provided the head's decision was reasonable, we cannot legally find any fault with it.

It is important to note that there is some overlap between the section 15 and the paragraphs 13(1)(a) and (b) exemptions. While section 13 covers information obtained in confidence from foreign governments or institutions it does not cover information transmitted by Canadian government institutions to foreign institutions. An exchange of information

between Canadian government institutions and foreign government institutions or international organizations is more properly assessed in relation to section 15 of the Act, which refers in paragraph 15(1)(g) to present or future international negotiations and in paragraph 15(1)(h) to diplomatic correspondence. This overlap becomes relevant in an investigation because section 13 is a mandatory class exemption, while section 15 is discretionary and requires that a reasonable expectation of injury to the conduct of international affairs be shown before the records can be exempted under this exemption. (*Do-Ky v. Canada (Minister of Foreign Affairs and International Trade)*, (1999), 241 N.R. 308 (F.C.A.) affirming [1997] 2 F.C. 907 (F.C.T.D.)).

The Criteria

The key to the provision is to determine whether any of the records contain "*... information the disclosure of which could reasonably be expected to be injurious to the conduct by* the conduct of international affairs; the defence of Canada or any state allied or associated with Canada; the detection, prevention or suppression of subversive or hostile activities. At the present time, there has been only a few decisions from the Federal Court of Canada on the criteria to be met in order for the provision to apply. However, there has been jurisprudence, from other jurisdictions that could be applied by analogy to the *Federal Act* and the following will summarize the office interpretation of the provision.

Since we are dealing with the prejudice exemption, there are really two tests to be met. Firstly, what constitutes a reasonable expectation of harm for the purpose of prejudice exemptions generally and what is the meaning of '*reasonable expectation of harm*' test in international affairs. Secondly, does the reasonable expectation of harm constitute a threat to the conduct by the Government of Canada of internationals affairs. For a better definition of the term «reasonable expectation of harm», please refer to the lexical section of the Grids.

Injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada, or the detection, prevention or suppression of subversive or hostile activities:

Now starts the part of the grid where we will apply the '*reasonable expectation of harm*' test in an injury to the conduct of international affairs situation to determine whether the test in section 15 is met.

The use of '*including*' at the end of subsection 15(1) means that the list which follows (paragraphs *(a)* to (i) provides examples of the types of information, the release of which could likely create the types of prejudice contemplated by this section. At one point, it was thought that unless the type of information fell into one of the categories enumerated in paragraphs (a*)* to (i) this provision could not apply. It has been established that this was not a requirement of the provision.

However, the fact that information belongs to one of the categories listed is not sufficient in itself to establish that it meets the harm test set out in subsection 15(1). Although there is a possibility that the disclosure of information in these categories would create one of the prejudice contemplated, the head of the government institution must have reasonable grounds

to expect harm in order to apply the exemption. One must not forget that the test under this provision is one of injury or probable injury and that the descriptive sections which follow are illustrative only. They are non-exhaustive descriptions of the kinds of documents the disclosure of which might be found to be injurious to the specific interests listed.

The list does not cover every type of information which could reasonably be expected to cause such harm. Information not explicitly listed but which is similar in type to the information listed and meets the harm test set out in subsection 15(1), would be covered by the exemption. The more remote the similarity to the examples in 15(1), the greater the difficulty to prove that disclosure would meet the test in 15(1).

The following will summarize the types of prejudice that were contemplated by the legislator when enacting this provision.

a) Injurious to the conduct of international affairs:

Dictionary definitions can be considered in determining the ordinary meaning of a provision when the suggested meaning in the dictionary is consistent with the purpose of the Act.

The terms '*injurious*', '*conduct*', '*international*' and '*affair*' are defined as follows in the *Concise Oxford Dictionary*, 8th ed. (Oxford University Press, 1991):

Black's Law Dictionary Seventh Edition	**TERMS**	**Oxford Concise Directory 8th Edition**
	Affairs	1. A concern; a business; a matter to be attended to . . ."
A nation tied to another by treaty or alliance	Ally	
A union or association of two or more states or nations formed by league or treaty, esp. for jointly waging war or mutually protecting against and repelling hostile attacks	Allied	1a. united or associated in an alliance. b. of or relating to Britain or her allies in the wars of 1914-18 or 1939-45
	Alliance	
	Associated	1. joined in companionship, function, or dignity. 2. allied; in the same group or category . . ."
Personal behaviour, whether by action or inaction; the manner in which a person behaves	Conduct	2. the action or manner of directing or managing (business, war . . ."
	Detect	2. discover or perceive the existence or presence of . . .
The act of discovering or revealing something that was hidden, esp. to solve a crime	Detection	1a. the act of an instance of detecting . . ."
Harmful, tending to injure	Injurious	hurtful
The violation of another's legal right, for which the law provides a remedy; a	Injury	1a. a physical harm or damage . . ."

Black's Law Dictionary Seventh Edition	TERMS	Oxford Concise Directory 8th Edition
wrong or injustice.		
	International	1. existing, involving, or carried on between two or more nations. . ."
To hinder or impede	Prevent	1. stop from happening or doing something; hinder; make impossible . . .
To put a stop to, put down, or prohibit; to prevent (something) from being seen, heard, known, or discussed	Suppression	1. end the activity or existence of

While it is not possible to define the parameters / describe the scope of the provision, some examples of the types of information in appropriate circumstances might be considered to require protection under this part of subsection 15(1) are:

- information which if disclosed could be shown (i.e. how and why) to be detrimental to the current or future conduct of Canada's foreign relations or would impede current or future diplomatic negotiations with another country or with an international organization;

- information which would inhibit the functioning of Canadian diplomatic personnel and missions abroad or place them in physical insecurity or jeopardy;

- information which would reveal the confidential assessments prepared by Canadian diplomatic missions abroad on the situations within the countries or international organizations to which they are accredited, or on the leading political and other personalities in these countries, or international organizations;

- information which would undermine the confidence of specific foreign governments and international organizations in the Canadian government;

- information which would give needless offence to other nations or citizens of other countries;

- information which would adversely affect the conduct of another country's foreign policy vis-à-vis a third power;

- information that is restricted pursuant to an agreement or arrangement made between the Government of Canada and any other government or international organization in confidence, the release of which would be considered to be a breach of faith on the part of the Government of Canada;

- information provided to the Government of Canada by another government or international organization classifying and withholding such information from the public domain for a definite period of time or until other stipulated conditions for its public release may have been satisfied;

- information which could cause the disruption of Canada's relations with another country or have an adverse effect on Canada's national security or on alliance arrangements in which Canada participates. Such information would: reveal intelligence material or defence plans or technical defence material affecting another country or obtained from another country; reveal diplomatic plans and negotiations; reveal plans and programs relating to current international security affairs which would adversely affect the conduct of current or future Canadian foreign policy;

- information relating to sensitive matters (for example, Canadian sovereignty in the Arctic) for the country.

b) Injurious to the defence of Canada or any state allied or associated with Canada:

Subsection 15(2) further defines the term '*defence of Canada*' by the following:

- **"*Defence of Canada or any state allied or associated with Canada*"** includes the efforts of Canada and of foreign states toward the detection, prevention or suppression of activities of any foreign state directed toward actual or potential attack or other acts of aggression against Canada or any state allied or associated with Canada.

The intent of the legislator can also be found in this statement of Mr. Francis Fox:

- **Mr. Fox:** "*The term 'allied' would refer to states with which we have formal alliances; and "associated" states could be a country associated with Canada in a venture of some kind without having a formal alliance.*"

- **M. Stollery:** "*Mr. Chairman, I guess that does not help particularly. An 'associated' state is a state that could be a country associated*."

- **Mr. Fox:** "*No. Basically, I am trying to explain what the concept is. I think it is quite clear that an 'allied' state is a state that has a form of alliance. I can see that the words 'allied' and 'alliance' come back, but we all understand that probably we are talking about treaties. I suppose a state that is allied to Canada would be like the United States is in NORAD. Like the NATO countries would be allied.*

I assume that there are outside countries of NATO with whom we share certain interests. There are more states with whom we have a relationship for fishing purposes or what have you without necessarily having an alliance with them."[2]

As noted above, it is not possible to define the parameters / describe the scope of the provision. Some matters which could be considered to require protection under this part of subsection 15(1) could be:

- tactical and strategic defence plans, operations or exercises, including the characteristics of equipment and techniques, and the scale, movement and placement of forces, except where the considered and authorized release of such information would assist in the deterrence or prevention of warlike action;

- internal and external intelligence and security plans, operations or exercises, including the characteristics of equipment and techniques, and the scale, movement and placement of personnel, except where the considered and authorized release of such information would assist in the deterrence or prevention of actions, whether internally or externally inspired, calculated to displace democratic institutions or procedures by force of violence;

- diplomatic plans and negotiations whose essential purpose is the maintenance of the safety and security of the nation.

c) Injurious to the detection, prevention or suppression of subversive or hostile activities:

Further to the dictionary definitions provided above, in *Qu v. Canada (Minister of Citzenship & Immigration)*, [2000] 4 F.C. 71 [F.C.T.D.', the Court engaged into a discussion to the effect that a number of statutes enacted by Parliament have already defined the concepts of 'espionnage', 'sedition', 'threats to the security of Canada", 'subversion" and, in the case of the Act , "subversive or hostile activities" which is defined at subsection 15(2) as

- Espionage against Canada or any state allied or associated with Canada,
- Sabotage
- Activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or foreign states,
- **...**

As noted above, it is not possible to draw the parameters / describe the scope of the provision. Some matters which could be considered to require protection under this part of subsection 15(1) could be:

- Security assessments and plans to ensure the security of designated Canadians [i.e. members of the Royal Household, Her Majesty's Canadian representatives, Heads of governments, Ministers of the Crown, members of the judiciary, witnesses, personnel appointed to sensitive posts i.e. Chief of the Defence Staff, or foreign nationals [i.e. Members of the diplomatic and consular corps or visiting signatories] who are deemed to require state protection;
- Details, including identities of personnel in sensitive intelligence, military and security appointments;
- Information and intelligence relating to security clearance procedures and investigations;
- Immigration, refugees and citizenship applications;
- Details on heads of state visits;
- Information on intelligence gathering methods and results;

- Intelligence on terrorism, espionage, subversion, sabotage and other potential threat to the security of Canadians and Canada;
- Plans for the protection of vital points and other essential public facilities (legislatures facilities, key departmental facilities, secured communications sites, radio/TV transmission towers, water supply installations, bridges, airports, seaports, fuel storage facilities and fuel supplies, gas distribution facilities, power lines and power generation facilities, food inspection techniques and standards), including defence establishments (particularly, command and control facilities, ammunition dumps, cantonments), during times of emergency;
- Inspection reports, or equivalents, on the efficacy and shortcomings of security measures;
- Plans and procedures for protecting against signals interference, interruption and interception;
- Information received confidentially under international agreements or arrangements.

Case Law

1) <u>15(1) Generally</u>:

- The reasonable expectation of injury from the release of the requested information must be assessed taking into consideration all of the relevant circumstances in existence <u>at the time of the application for access</u>. This assessment is distinct from any reason underlying the collection of the information in question.[3]

- Although subsection 10(1) requires the head of a government institution to state the specific provisions of the Act on which his refusal is based, there is no obligation upon a government institution to state the specific category of document listed in the sections - i.e., the particular section relied on as an example does not need to be cited. More specifically, what is required in the context of section 15 is that the requester be given notice as to whether the reason for refusal is because a disclosure would be (1) injurious to the conduct of international affairs, (2) injurious to the defence of Canada or any state allied or associated with Canada, or (3) injurious to the detection, prevention or suppression of subversive or hostile activities.[4] One or more of the three must be given in the notice as the basis for the exemption.

NOTE: The judicial review by the Federal Court of the decision of a department not to disclose requested information on the grounds of national security, defence, or injury to the detection, prevention or suppression of subversive or hostile activities is very different to the powers conferred to the courts in the United States. In the States, courts must defer to the expertise of deponents having broad experience in the intelligence field. Such expert testimonies are worthy of great deference given the magnitude of these interests and the potential risks at stake. In other words, the U.S. courts have traditionally accepted the position taken by the departmental experts. However, unlike the legislation in the U.S., the **Access to Information Act** does not give the head of a government

institution absolute discretion to withhold documents. The task of the Federal Court (and by inference the Information Commissioner) is to review the material, submissions and evidence to determine whether the decision to withhold under section 15 was reasonable. While expert opinions are useful, the Court and the Commissioner are required to form their own opinion to determine whether the explanations provided for refusing to disclose are reasonable (i.e. whether the department had reasonable grounds to withhold the information).[5]

Cemerlic v. Canada (General Solicitor), [2003] F.C.J. No. 191, Kelen J. : In this case, the exempted information concerns internal procedures used par CSIS. The exempted information concerns internal procedures used by CSIS to categorize and assess information, such as file numbers and cross-referencing methods and results. It also contains information on CSIS's cryptographic and computer systems. If the information was disclosed, it would provide insight into CSIS's functions and hamper its ability to carry out its mandate.

2) <u>Injurious to the conduct of international affairs</u>:

- The reasonable expectation of injury from the release of the requested information must be assessed taking into consideration all of the relevant circumstances in existence <u>at the time of the application</u> for access. In one case, the Court refused to exempt records obtained during WW2 (keys and records pertaining to the keys used in the German communications between Germany and Latin America) on the basis that it was unreasonable to conclude that disclosure of such records could reveal anything pertinent to the conduct of Canada's international relations and its national defence over 50 years later in time of peace.[6]

- Many Ontario decisions describe that it is important to identify the parties to the negotiations who could be compromised by disclosure of the requested information before determining whether the exemption applies. For example, the Ontario Commission stated that the fact that a record discloses that a <u>company</u> will engage in negotiations with the federal government does not relate to intergovernmental relations between the province and the federal government (i.e. a company cannot engage in intergovernmental relations). Similarly, the Commission held that the fact that disclosure of the records would prejudice the relationship between the mining industry and the federal and provincial governments is not sufficient to satisfy this provision. In the case of the Ontario legislation, it is intergovernmental relations that must be prejudiced in order to satisfy this exemption. Under the Access law, international affairs must be prejudiced.[7]

In order for the exemption to apply, the entities concerned must have the capacity of conducting the international affairs on behalf of their respective governments. In Order P-270, Commissioner Wright stated: "*International relations can be understood as the ongoing formal and informal discussions and exchanges of information as the result of joint projects, planning and negotiations between various levels of government*".

(Order P- 210)

- The timing of the conduct of the affairs is also important. For example, in one case the Commission found that disclosure of a record containing an undertaking by the province to negotiate with the federal government cannot reasonably be expected to prejudice intergovernmental relations.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (1999), 173 D.L.R. (4th) 515, (F.C.A.), affirming [1997] 2 F.C. 907.

- Foreign Affairs and International Trade (Foreign Affairs) decided that the diplomatic notes requested under the Act by Do-Ky and exchanged between Canada and another country could not be released under s. 15(1) of the Act as the release of the documents might reasonably be expected to be injurious to Canada's international relations. The Court agreed with Foreign Affairs.

- Three of the notes at issue were sent from the Canadian government to the government of the foreign state (Country D). The last note in issue was sent from Country D to the Canadian government in response to one of the three notes mentioned above. The note from Country D was determined to have been obtained in confidence and was therefore originally not disclosed according to the terms of paragraph 13(1)(a) of the Act. Do-Ky submitted that the note from Country D should be released because the information in it had been made public. The Court found, however, that Do-Ky had failed to establish the source of that information and whether that information was truly "public" or only within his personal knowledge. The Court further concluded that there was no evidentiary burden on the Canadian government to establish that the diplomatic note sent to Canada was not public. Furthermore, noted the Court, in the case of information received from a foreign State and made public by that State, the head of the Canadian government institution called upon to apply this Act may still avail him or herself of the other provisions of the statute.

- The Federal Court of Appeal confirmed that there is no "class exemption" for diplomatic notes, which at paragraph 15(1)(h) is one of the types of records enumerated in subsection 15(1), and that there must be evidence that disclosure of the notes in question could reasonably be expected to be injurious to the conduct of international affairs for the exemption to apply. The Court found that where the documents contain information which casts doubt on the commitment of another country to honour its international obligations and where that other country objects to the disclosure of the document, the injury test in s. 15(1) was met and the case for exemption made out.

- In the same case, the Federal Court Trial Division [1997] 2 F.C. 907 held that paragraph 15(1)(h) differed from other paragraphs enumerated under subsection 15(1) in that it referred to information which "constitutes" diplomatic notes, as opposed to information "relating to or" obtained or "prepared for the purpose of" diplomatic correspondence. The Trial Division found that this language provided

grounds to exempt all diplomatic notes as a class, without reference to the information they contained. The Federal Court of Appeal overruled the Trial Division on this point by confirming that there must be evidence of likely injury to the conduct of international affairs from disclosure based on the content of the notes.

- The Court finally examined whether the government had satisfied its burden of proving that the head of the institution which refused to disclose the notes in issue had 'reasonable grounds' for doing so, as section 50 requires. The Court found that Foreign Affairs had demonstrated the specific injury which could reasonably be expected to occur if these notes were released. On the basis of this evidence the learned Trial Judge was satisfied that the criteria stipulated in s. 50 had been met.

Ruby v. Royal Canadian Mounted Police*,* [1998] 2 F.C. 351

- the Federal Court Trial Division held that section 21 of the **Privacy Act**, the provision which parallels section 15, required a reasonable expectation of probable harm. The Court assessed the institution's use of section 21 based on the **Privacy Act** provision for judicial review (section 49) which, similar to section 50 of the **Access to Information Act***,* specifies that the Court may order disclosure if the head of the institution did not have "reasonable grounds" on which to refuse disclosure. The Court confirmed that the standard for intervention by the Court set out in this provision was more stringent (i.e. it required more deference to the institution's decision) than the standard under the **Privacy Act** equivalent of section 50 of the **Access to Information Act**, which permits the Court to order disclosure where the head of the institution was "not authorized" to refuse disclosure.

- The more stringent standard for intervention in section 49, however, does not mean that the Information Commissioner or the Federal Court cannot review or substitute their own views on the assessment of the reasonable expectation of probable injury. In its decision in the *Ruby* case (above), the Federal Court of Appeal overturned the Trial Judge's conclusion on this point.

- Furthermore, the reviewing judge concluded at page 36 of his decision that "the Court cannot substitute its views for that of CSIS, or the Solicitor General, about the assessment of the reasonable expectation of probable injury." We would add, however, that it is very much part of the Court's role under section 49 [section 50 **Access to Information Act**] to determine the reasonableness of the grounds on which disclosure was refused by CSIS. That being the case, the reviewing judge, in our view, should have scrutinized more closely whether the release of information, particularly information that is over 20 years old, could reasonably be expected to be injurious to specific efforts at law enforcement and detection of hostile activities, and, therefore, whether CSIS had a reasonable ground to refuse to disclose[8].

3) Injurious to the defence of Canada or any state allied or associated with Canada:

***Ruby v. Canada (Solicitor General, R.C.M.P.)*, [2000] F.C.J. No. 779 (June 8, 2000)(F.C.A.).**

- The reasonable expectation of injury from the release of the requested information must be assessed taking into consideration all of the relevant circumstances in existence at the time of the application for access. As noted above, the Court refused to exempt records obtained during WW2 (keys and records pertaining to the keys used in the German communications between Germany and Latin America) on the basis that it was unreasonable to conclude that disclosure of such records could reveal anything pertinent to the conduct of Canada's international relations and its national defence over 50 years later in time of peace.[9]

4) Injurious to the detection, prevention or suppression of subversive or hostile activities:

***X v. Minister of National Defence*, (November 4, 1992), T-2648-90 (F.C.T.D.).**

The Federal Court has permitted the exemption under this provision the following information:

- the names or identities of human sources utilized by the RCMP and CSIS as well as any information from which the identity of human sources could be derived;
- technical sources used by the Security Service;
- identification of both groups and individuals who were investigated by the Security Service and, in some cases, who continue to be investigated by CSIS;
- information which would clearly reveal the extent to which the Security Service was aware of the activities of targets and the scope of its interest in them;
- the depth, development and sophistication of the resources employed, as well as the degree of expertise of the Security Service;
- the effectiveness of Security Service investigations;
- internal procedures used by the Security Service to maintain, correlate and transmit information such as, file numbers and categories; cross-referencing methods; extracting methods; methods of constructing reports; process of assessing raw information; and cryptographic systems used for communication.[10]

CSIS employees generally fit into two categories: those involved in covert activities, and those not so involved. In one case, CSIS agreed to disclose the names of non-covert

employees which were already known to the requester by virtue of the processing of his employment security clearance.[11]

***Ternette v. Solicitor General*, [1992] 2 F.C. 75; 49 F.T.R. 161; 39 C.P.R. (3d) 371 (T.D.).;**

***Ruby v Canada (Solicitor General R.C.M.P.)*, [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.)**

The case involving paragraph 22(1)(b) of the **Privacy Act** (paragraph 16(1)(c) **Access to Information Act***)*, the Federal Court of Appeal rejected the allegation that the age of records relating to security investigations does not preclude injury arising from disclosure, given the cumulative impact disclosure of such records would have in prejudicing the investigative process generally. The Court held that the notion of injury to the conduct of an investigation set out in paragraph 22(1)(b) (paragraph 16(1)(c) **Access to Information Act**) does not extend beyond specified investigations, either actual or to be undertaken, and that a refusal to disclose under paragraph 22(1)(b) (paragraph 16(1)(c)) was not authorized "simply because disclosure could have a chilling effect on the investigative process in general." Although this decision related to the paragraph 16(1)(c) exemption, the records at issue in this case were generated in the course of a security investigation. The *Ruby* decision is important because the Court rejected reasons for refusing disclosure often used in connection with both section 15 and paragraph 16(1)(c) that the mosaic effect and cumulative impact of disclosure or future investigations would prejudice the investigative process. Rather, the Court of Appeal ordered the Trial Judge to reconsider the evidence of injury and the issue of "whether the release of information, particularly information that is over 20 years old, could reasonably be expected to be injurious to specific efforts at law enforcement and detection of hostile activities, and, therefore, whether CSIS had a reasonable ground to refuse to disclose."

15(1) Generally

Canada

Cemerlic v. Canada (General Solicitor), [2003] F.C.J. No. 191, Kelen J.
Information Commissioner of Canada v. Minister of National Defence (1990), 67 D.L.R. (4th) 585 (F.C.T.D.).
Ternette v. Solicitor General, [1992] 2 F.C. 75; 49 F.T.R. 161; 39 C.P.R. (3d) 371 (T.D.).
X v. Minister of National Defence et al.,[1992] 1 F.C. 77; 46 F.T.R. 206 (T.D.).
X v. Minister of National Defence, (November 4, 1992), T-2648-90 (F.C.T.D.)

Do Ky v. Canada (Minister of Foreign Affairs & International Trade), [1997] 2 F.C. 907 (F.C.T.D.)
St John Shipbuilding Ltd. v. Canada (Minister of Supply and Services) (1988), 24 F.T.R. 32 [F.C.T.D.]

Injurious to the conduct of international affairs

Canada

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (February 6, 1997), T-2366-95 (F.C.T.D.)
Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (1999), 173 D.L.R. (4th) 515, (F.C.A.),
Qu v. Canada (Minister of Citizenship and Immigration), [2000] 4 F.C. 71 [F.C.T.D.]
X v. Minister of National Defence, (November 4, 1992), T-2648-90 (F.C.T.D.).

Injurious to the defence of Canada or any state allied or associated with Canada:

Ruby v. Canada (Solicitor General, R.C.M.P.), [2000] F.C.J. No. 779 (June 8, 2000)(F.C.A.).

Ontario

Orders # 87, P-210, P-270, P-293, P-388, P-345
P-1350 and PO-1915

Injurious to the detection, prevention or suppression of subversive or hostile activities

Canada

Al Yamani v. Canada (Minister of Citizenship & Immigration), [2000] 3 F.C. 433 [F.C.A.]
Gold v. M.N.R. et al., (October 15, 1990), T-836-85, T-1335-86 (F.C.T.D.).
Qu v. Canada (Minister of Citizenship and Immigration), [2000] 4 F.C. 71
Ruby v. Canada (Solicitor General, R.C.M.P.), [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.)
Ternette v. Solicitor General, [1992] 2 F.C. 75; 49 F.T.R. 161; 39 C.P.R. (3d) 371 (T.D.).
X v. Minister of National Defence, (November 4, 1992), T-2648-90 (F.C.T.D.).

The Questions

Section -- 15
Statement of Test to be Met
APPLICABILITY: Applicability of paragraphs 15(1)(a) to (i) applicability of 15(1) in general terms and with respect to definitions in s. 15(2)

Relevant Questions	Departmental Response	Assessment
Does the institution rely on a particular section in s. 15(1)?		
Can the institution specify a particular paragraph of s. 15(1)(a) to (i) which describes the information? - If so, determine applicability of the section (see below). - If section applicable, go to injury test section.		
If no, or if section inapplicable, what portion of s. 15(1) is the exemption based on? - Conduct of international affairs. - Defence of Canada or any state allied or associated with Canada. - Note definition in s. 15(2). - Detection, prevention or suppression of subversive or hostile activities.		
Note definition in s. 15(2).		
Has the institution specified to the requester which portion of s. 15(1) is relied on?		
What part of the s. 15(2) definitions applies to the information? - Assess applicability.		

Statement of Test to be Met
INJURY - Assess whether injury could reasonably be expected from disclosure.

Relevant Questions	Departmental Response	Assessment
If 15(1) describes the information, then assess reasonableness of conclusion that disclosure is likely to be		

Relevant Questions	Departmental Response	Assessment
injurious.		

Statement of Test to be Met

DISCRETION
- Assess whether discretion was properly exercised.

Relevant Questions	Departmental Response	Assessment
If conclusion that injury likely appears reasonable, assess whether the discretion of the head of the institution to refuse disclosure is properly exercised.		

Statement of Test to be Met -- 15(1)(a)

Military tactics, strategy is a very broad area and it includes work performed by civilian employees as well as contractors and military personnel i.e. military and civilian teaching staff at military colleges, military and civilian scientists at Defence Research Establisment, military and civilian specialist staff - including intelligence, communications, computer science and quantitative analysis personnel – at National Defence Headquarters, Communications Security Establishment etc.

NOTE. Note that only the English version of the act specifies “military” tactics or strategy. In its purest form, tactics is defined as “the art of disposing military or naval or air forces esp. in actual contact with enemy” and strategy as the “management of an army in a campaign, art of so moving or disposing troops or ships or aircraft to impose upon the enemy the place and time and conditions for fighting preferred by oneself.” Hence, strategy per se is the purview of the high command of the military and its political masters. Strategists, consisting of civilians and military leaders, decide on the mission: who to attack, when to attack, where to attack and how many forces are to be committed for the attack. Tacticians, consisting purely of military leaders in actual combat operations, decide on the best way to accomplish the given mission.

Relevant Questions	Departmental Response	Assessment
Are the records dealing with tactics or strategy generally? Were the tactics or strategy developed in preparation of imminent hostilities or operations – which may include conventional warfare, domestic aid-to-civil power operations or UN peacekeeping/peace restoring operations? Were the tactics or strategy developed in preparation of		

Relevant Questions	Departmental Response	Assessment
operational exercises or other simulated training? Were the tactics or strategy developed in connection of or anticipation of the detection, prevention, or suppression of subversive or hostile activities against Canada or its allies?		

Statement of Test to be Met
Military exercises or operations need not be solely preparatory as they can be undertaken in connection with the detection, prevention or suppression of subversive or hostile activities, i.e. training conducted by Joint Task Force ll whose immediate objective is to develop or test new tactics to suppress subversive activities would be covered. Since both the Interpretation Act and the National Defence Act defines "military" as relating to all or any part of the Canadian Forces, a. are the exercises in question military in nature? b. do the exercises in question have a military vs. say, a police or intelligence purpose?

Relevant Questions	Departmental Response	Assessment
Are the exercises or operations described in the record undertaken or performed by the military? - If not, by whom?		
Are the activities military in nature?		
Do they have a military purpose? - Describe purpose.		
Does the information describe military activities that are in preparation for hostilities? - With whom? - Do the hostilities involve Canada? - How?		
Are the activities for peacekeeping purposes? - If so, are potential hostilities anticipated?		
Are the hostilities domestic? - If so, with whom? - On what basis has the military become involved? - Describe the nature of the military's involvement.		
Does the information relate to preparatory activities?		

Relevant Questions	Departmental Response	Assessment
Have these activities been carried out?		
If so, has information about the activities been made public or been reported on?		
Are the activities at which the military exercises or operations are aimed described in the definition of 'subversive or hostile activities' in s. 15(2)?		
If so, have the military exercises or operations been undertaken for the purpose of - Detecting these activities? - Preventing these activities? - Suppressing these activities? - Describe connection.		

Statement of Test to be Met -- 15(1)(b)

NOTE: In military parlance, three things are required to wage war successfully: men, weapons and ammunition. Normally, the generic all-inclusive name “weapons” includes equipment. Naval weaponry includes surface and sub-surface vessels, air weaponry includes all platforms capable of offensive or defensive operations; land weaponry includes knives and bayonets, pistols and other firearms, electronic warfare equipment, psychological warfare equipment, mines and booby traps, works of demolitions, missiles and other such projectiles, grenades, howitzers, machine guns, and the panoply of nuclear, biological, chemical and nuclear arsenal.

Relevant Questions	Departmental Response	Assessment
Does the information describe or relate to weapons or defence equipment? - Specify what kind of weapons or equipment.		
What are the weapons or equipment used for?		
Are the weapons or equipment used for a defence-related purpose? - If not, on what basis is the exemption in s. 15(1)(b) claimed?		
Does the information relate to weapons or defence equipment being designed, developed or produced? - What state of development or production is it at?		

Relevant Questions	Departmental Response	Assessment
Does the information relate to consideration of items/ materials for use as weapons or as defence equipment? - Describe potential use. - Is the use related to defence.		

Statement of Test to be Met -- 15(1)(b)

Information must relate to:
- Must describe quantity, characteristics, capability or deployment.

Relevant Questions	Departmental Response	Assessment
Does the information describe weapons or: - Describe the characteristics of weapons/equipment. - Describe capability of weapons/equipment (includes performance). - Describe quantities being produced or considered. - Assignment of weapons to military units. - Assign use of the weapons/equipment.		

Statement of Test to be Met -- 15(1)(c)

EITHER:
- Must relate to defence establishment, military force, unit or personnel.
- Must have a role or purpose related to the defence of Canada or any state allied or associated with Canada.

Relevant Questions	Departmental Response	Assessment
Does the information concern a defence establishment? - Name establishment.		
Does the information concern a military force, unit or personnel? - Specify which force, unit or personnel.		
Does the establishment have a role relating to the defence of Canada? - To the defence of any state allied or associated with Canada (see below at s. 15(2)).		

Relevant Questions	Departmental Response	Assessment
- Specify role.		
Is this role described in the record?		

Statement of Test to be Met

NOTE: In a post-11 September 2001 environment, the in fine element of paragraph 15(1)(c) takes on a new meaning. With the emphasis placed on anti-terrorism legislation, as evidenced by S.C. 2001, Chapter 41 An Act to amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and other Acts, and to enact measures respecting the registration of charities, in order to combat terrorism, the war on terrorism takes many forms and involves many government agencies in the detection, prevention or suppression of subversive or hostile activities. These organizations include but are not limited to the CSE, the CSIS, the RCMP, DND, CCRA (Customs), the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) which is an independent agency responsible for the collection, analysis, assessment and disclosure of information in order to assist in the detection, prevention and deterrence of money laundering and financing of terrorist activities in Canada and abroad.

NOTE: The National Defence Act defines 'defence establishment" as any area or structure under the control of the Minister, and the materiel and other things situated in or on any such area or structure.

Relevant Questions	Departmental Response	Assessment
What organization or person is the information concerned with?		
Does this organization or person have responsibilities for the detection, prevention or suppression of subversive or hostile activities (see below at s. 15(2))?		
What are these responsibilities?		
Are the responsibilities explained in the document?		
Does the organization or person also have responsibilities or a role not related to subversive or hostile activities? - i.e., RCMP policing. - CSIS - security clearances in some cases. - intelligence gathering activities for other purposes, are these responsibilities described in the record?		
If so, is the information solely concerned with the role/responsibilities in relation to subversive or hostile activities?		

Relevant Questions	Departmental Response	Assessment
Does the information concern the other responsibilities? - If so, exemption inapplicable.		

Statement of Test to be Met -- 15(1)(c)

Must relate to:

- characteristics, capabilities, performance, potential, deployment, functions or role of these bodies

Relevant Questions	Departmental Response	Assessment
Show how the information relates to factors.		
With respect to functions or role, does the information describe a specific function or role relating to the defence of Canada or the detection, prevention or suppression of subversive or hostile activities.		
If it does not describe a specific role relating to those functions, does it describe a role or function in general terms only?		
(See grid below re: s. 15 injury test and discretion.)		

Statement of Test to be Met -- 15(1)(d)

- Must be obtained or prepared for the purpose of intelligence.

Note: The term “intelligence” is not defined in the Canadian legislation. The Concise Oxford Dictionary defines the term as: “4. information, news persons employed in collecting information esp. of military value.

Relevant Questions	Departmental Response	Assessment
Who prepared the record? - Canadian military? - Other government or organization? - If so, is this other government or organization in a		

Relevant Questions	Departmental Response	Assessment
state allied or associated with Canada? - If not, was the information prepared in a country or by a person who provided the information to the government of Canada?		
Was the information provided by an intelligence-gathering organization in another country?		
How did the institution obtain the information? - agreement/arrangement with other bodies - which bodies? - what is the purpose of the agreement/arrangement?		
For what purpose did the institution obtain or prepare the record?		
Was the information obtained as a result of an intelligence-gathering operation? - Describe.		

Statement of Test to be Met -- 15(1)(d)(i)

Intelligence must relate to defence of Canada or any state allied or associated with Canada.

Relevant Questions	Departmental Response	Assessment
Show how the document provides intelligence relating to the defence of Canada or any state allied or associated with Canada.		
Does the intelligence concern the defence of Canada or another state?		
Is the state allied or associated with Canada? - Under what auspices? - Through the United Nations, NORAD, NATO? - Is peacekeeping by Canadians involved? - What is the purpose of the peacekeeping mission?		
Does the information relate intelligence about a foreign state not allied or associated with Canada - Which state?		
Is this state engaged in or potentially engaged in an attack or other aggression against Canada - Against a state allied or associated with Canada?		

Relevant Questions	Departmental Response	Assessment
Does the intelligence relate to the capability or plans of a foreign state to attack Canada or engage other acts of aggression? - If not, on what basis is the exemption claimed?		
Does the intelligence assess the capability of states allied or associated with Canada to defend Canada or themselves against attack or other acts of aggression?		
Does the intelligence relate to the assessment by other countries of Canada's position on matters relating to its defence? - Which matters?		
Does the information relate to a specific defence matter?		
Is the information general in nature? - If so, how does it add to the government's intelligence about the defence of Canada, i.e., how does it qualify as intelligence?		

Statement of Test to be Met -- 15(1)(d)(ii)

Intelligence must relate to the detection, prevention or suppression of subversive or hostile activities.

Relevant Questions	Departmental Response	Assessment
Show how the intelligence relates to the detection, prevention or suppression of subversive or hostile activities.		
Does the intelligence relate to an activity or potential for an activity set out in the definition of 'subversive or hostile activities' in s. 15(2)(a) to (f)? - See grid below for s. 15(2)(a) to (f).		
Does the intelligence assist in the detection, prevention or suppression of subversive or hostile activities? - How?		
Does the intelligence relate to a specific activity or threat? - To a specific detection, prevention or suppression plan or operation?		
Is the information general in nature?		

Relevant Questions	Departmental Response	Assessment
- If so, how does it add to the information about the activity or operation the government already has, i.e., how can it be regarded as 'intelligence'?		
Refer also to s. 15 Injury and Discretion grids below.		

Statement of Test to be Met -- Paragraph 15(1)(e)

Must be obtained or prepared for the purpose of intelligence.

Relevant Questions	Departmental Response	Assessment

Who prepared the record?
- Canadian government?
- Canadian government institution?
- Foreign state?
- International organization of states?
- Citizen of a foreign state?
- Other body:?
  - Who?
  - Relationship to Canadian government.		

How did the government institution obtain the document?
- From public sources (publications, speeches, newspapers - see below)?
- By agreement or arrangement with other state or body?
  - Which bodies?
  - What is the purpose of the agreement or arrangement?		

For what purpose did the government institution obtain or prepare the document?		
Why did the party who provided the information provide it to the government institution?		
Is the information specific in nature?		
What did it add to the government's information or knowledge about the subject matter?		
If it is general only, what is the basis for the claim that it is 'intelligence'?		

Relevant Questions	Departmental Response	Assessment
If the information was obtained from public sources, what is the basis for the claim that it is intelligence? - Obscure public sources? - Compilation? - Specialized? - Confirms a secondary or independent source? - Official organization of a hostile foreign state?		

Statement of Test to be Met -- 15(1)(e)

Intelligence must concern foreign states, international organizations of states or citizens of foreign states.

Must be used by the Government of Canada in the process of deliberation and consultation or conduct of international affairs.

Relevant Questions	Departmental Response	Assessment
What is the information about?		
Is it about a foreign state? - International organization of states? - Citizens of foreign states? - Specify.		
How did the government apply or use the information? - To deliberate on international affairs? - To develop Canadian position on international affairs? - To consult on international affairs? - With whom?		
Specify how the intelligence was used in the conduct of international affairs.		
Specify the subject matter of any deliberations or consultations.		

Statement of Test to be Met - 15(1)(f)

EITHER:

- Methods of and scientific or technical equipment used for collecting, assessing or handling intelligence or sources of intelligence.

Relevant Questions	Departmental Response	Assessment
Does the information describe how intelligence is gathered, synthesized, analyzed, categorized, evaluated?		
Does the information describe the sources of the intelligence that has been gathered?		
Are these methods special to the intelligence work?		
Is the equipment (hardware or software) unique and special to the intelligence work?		

Statement of Test to be Met -- 15(1)(f)

Sources of intelligence.

Relevant Questions	Departmental Response	Assessment
Does the information reveal or confirm intelligence sources? How does it identify human sources: - By name? - By location? - By occupation? - By nationality? - By codename or nickname?		
Are the human sources identifiable?		
Could the existence of sources (without identification) be generally assumed?		
Is the existence of sources generally assumed?		
Why must the existence of sources (without identifying them) be kept confidential? Would disclosure of their identity present a danger to them, to Canada, to an allied state. Would disclosure of their identity impair or reduce		

Relevant Questions	Departmental Response	Assessment
their future ability to act as a source? - Particularly with respect to s. 15(1)(f).		

Statement of Test to be Met -- 15(1)(g)

Information must reveal a position adopted or to be adopted for the purpose of international negotiations.

Relevant Questions	Departmental Response	Assessment
Does the information reveal a position of the Canadian government, foreign government or international organizations on an issue? - What issue?		
Does the record contain background or descriptions of issues?		
Is there any claim to exempt these portions of the record? - On what basis?		
Is the issue on which a position is revealed a specific issue?		
Is the issue the subject of international negotiations? - Who is party to the negotiations? - What is the purpose of the negotiations?		

Statement of Test to be Met -- Paragraph 15(1)(g)

Negotiations must be present or future - not past negotiations.
Special attention should be paid to the injury and discretion test where this exemption is claimed.

Relevant Questions	Departmental Response	Assessment
Have the negotiations begun?		
Are they finished?		
Has the issue described in the record been dealt with in the negotiations?		

Relevant Questions	Departmental Response	Assessment
If yes, is final resolution of this issue dependent on the outcome of other issues?		
Have these other issues been negotiated?		
If the issue is not dependent on unresolved issues and has been resolved, what is the basis for the claim under s. 15(1)(g)?		
See Injury Test and Discretion portion of grids below.		
If negotiations have not begun, when are they scheduled to begin?		
Has there been an agreement to negotiate? - Is this agreement or schedule recorded? - Ask to see or ask for an outline.		
If negotiations were begun in the past, are they ongoing?		
Were the negotiations stopped at any point?		
Have they resumed?		
If not, are they scheduled to resume?		
If not scheduled to resume, what is the basis for the claim under s. 15(1)(g)?		
Is it publicly known that the negotiations are taking place?		
Has the government enunciated or revealed its objectives with respect to the negotiations?		
Have other governments, international organizations revealed their objectives?		
Has the government / organization made its position public? - Speeches? - Before Parliamentary Committee? - House of Commons? Senate? - News releases? - Publications? - Advice to domestic stakeholders, affected groups from the government?		

Statement of Test to be Met -- 15(1)(h)

Diplomatic correspondence OR
Official correspondence with Canadian diplomatic missions or consular posts.

Without defining the term "diplomatic correspondence", the Foreign Missions and International Organizations Act notes that articles 24 and 27 of the Vienna Convention on Diplomatic Relations proclaims that the archives and documents of a diplomatic mission shall be inviolable at any time and wherever they may be and that official correspondence means all correspondence relating to the mission and its functions.

Relevant Questions	Departmental Response	Assessment
Is the record diplomatic correspondence?		
Does the correspondence concern international affairs?		
What is the subject matter of the correspondence?		
Is the recipient a foreign state or international organization of states?		
Is the subject matter of the correspondence confidential - why?		
Does the correspondence concern a position of the Government of Canada or other matter that is publicly known?		
Is the correspondence directed to a Canadian mission or consular post?		
Is it official in nature?		
Does it deal with specific issues relating to the conduct of international affairs?		
Is it administrative in nature? - If so, what is the basis for the claim under s. 15(1)(h)?		

Statement of Test to be Met -- 15(1)(h)

Special attention should be paid to the injury and discretion tests where this exemption is contained.

Relevant Questions	Departmental Response	Assessment
Does the correspondence concern a position of the Government of Canada that is publicly known?		
Is the content of the correspondence sensitive in nature?		
Is the content of the correspondence time-sensitive in nature? Is the content of the correspondence sensitive to a position adopted or to be adopted by Canada before multilateral bodies such as the World Trade Organization, OECD, World Bank, IMF, International Court of Justice, Commonwealth, Francophonie, United Nations, NATO. Does the foreign country(ies) expect that the information contained in the exchange of correspondence should be kept private and confidential?		
Does the other country make this kind of information public?		
Did the originator and recipient transmit the correspondence for diplomatic purposes or with respect to international relations?		

Statement of Test to be Met -- Subparagraph 15(1)(i)

Communications or cryptographic systems of Canada or foreign state.

Relevant Questions	Departmental Response	Assessment
Does the information describe public communications systems of Canada?		
Are these general “public” facilities?		

Relevant Questions	Departmental Response	Assessment
Do they rely on publicly used telecommunications facilities?		
Are the communications systems dedicated to the uses in 15(1) or are they used for other purposes as well?		
Who has access to or who can use the systems? - Restricted use? - General staff use? - Intelligence and security staff? - Communications specialists?		
Does the information reveal cryptographic systems? - Is the system currently used? - Is the existence of the cryptographic system known?		
How are the communications or cryptographic systems used?		

Statement of Test to be Met – Subparagraph 15(1)(i)

- Must be used for the conduct of international affairs.
- For the defence of Canada or any state allied with Canada.
- In relation to the detection, prevention or suppression of subversive or hostile activities.

Relevant Questions	Departmental Response	Assessment
See definition of subversive or hostile activities in s. 15(2).		
Is the purpose defence-related or civilian?		
Is the system used to communicate with other countries? - With international organizations? - With Canadian missions or consular posts?		
Does it carry subject matter related to international matters?		

Statement of Test to be Met – Subparagraph 15(1)

General applicability

Information relating to :
(1) The conduct of international affairs.

Relevant Questions	Departmental Response	Assessment
If a particular paragraph in 15(1)(a) to (i) does not apply:		
Is the information similar in nature to that described in paragraphs 15(1)(a) - (i)? - how?		
If not similar to 15(1)(a) to (i):		
How does the information relate to the conduct of international affairs?		
Does it describe or analyze Canada's role internationally? - in what respect?		
Does it assess Canada's performance in international matters?		
Does it describe the role of other countries in international affairs?		
Does it assess their domestic or foreign policies?		

Statement of Test to be Met – Subsection 15(1)

(2) the defence of Canada or any state allied or associated with Canada

Relevant Questions	Departmental Response	Assessment
If the information is not similar to a paragraph in 1. 15(1)(a) to (i), how does it relate to the defence of Canada or any state allied or associated with Canada? - Specify.		
Does the information describe government action or policy affecting military positions or activities? - Of Canada?		

Relevant Questions	Departmental Response	Assessment
- Of any state allied or associated with Canada? - Name country - Of other countries?		
If other countries, does the information concern actual or potential attack or other aggression against Canada or an allied/associated state?		
What does the aggression consist of?		
Is it military in nature?		
Does it involve an incursion on Canadian sovereignty?		
Does it involve a show of force or violence?		
Does the information relate to the detection of such attacks or aggression? - To attempted detection?		
Does it relate to the suppression of such attacks or suppression? - To plans for suppression?		
Does it relate to prevention of such attacks or aggression? - Plans for prevention?		
Have the plans been carried out? - Was this done covertly?		
If the plans were carried out in a visible way, were they reported on or described by the military involved?		
Are they generally known by the public?		
If the information is simply descriptive of attacks or other acts of aggression by foreign countries, what is the basis for the claim under ss 15(1) and 15(2)?		
See injury and discretion tests.		

Statement of Test to be Met – Subsection 15(1)

OR:
(3) Subversive or hostile activities:
- Must be described by s. 15(2) definition.
- Must be information relating to the detection, prevention or suppression of these activities.

Relevant Questions	Departmental Response	Assessment
Is the information described in the subsection 15(2) definition, paragraphs (a) to (f) - Which section?		
Does the information relate to the detection of such activities? - to attempted detection? - to plans for detection?		
Does it relate to prevention of these activities? - to a plan for prevention?		
Does it relate to suppression of these activities? - to plans for suppression?		
Have the plans been carried out? - was this a covert operation?		
Did prevention or suppression involve arrests of individuals, court or other public proceedings?		

Statement of Test to be Met -- Subsection 15(1)

(3) Subversive or hostile activities:
- Activities described in paragraph 15(2)(a) to (f) should have subversive or hostile purpose.

Relevant Questions	Departmental Response	Assessment
Did the activities described in paragraphs 15(2)(a) to (f) have a subversive or hostile purpose directed at the government or citizens of Canada - i.e., was sabotage directed at a private commercial enterprise or at the government or public - i.e., were intelligence gathering activities directed at		

Relevant Questions	Departmental Response	Assessment
Canada/allied states for a subversive or hostile purpose against the government or public of Canada/allied state		
Examples of information falling within s. 15(2):		
- The names or identities of human sources utilized by the RCMP and CSIS as well as any information from which the identity of human sources could be derived.		
- Technical sources used by the Canadian Security and Intelligence Service.		
- Identification of either groups or individuals who were investigated by the Security Service and, in some cases, who continue to be investigated by CSIS.		
- Information which would clearly reveal the extent to which the Security Service was aware of the activities of targets and the scope of its interest in them.		
- The depth, development and sophistication of the resources employed, as well as the degree of expertise of the Security Service.		
- The effectiveness of any Security Service investigation.		
- Internal procedures used by the Security Service to maintain, correlate and transmit information such as, file numbers and categories; cross-referencing methods; extracting methods; methods of constructing reports; process of assessing raw information; and cryptographic systems used for communication.		

Statement of Test to be Met – Subsection 15(1)

INJURY
- Disclosure could reasonably be expected to be injurious.
- Must be specific harm.

Relevant Questions	Departmental Response	Assessment
Is the information current?		
How old is the information?		
If not current, does it continue to have any relevance to the present conduct of international affairs, defence of Canada or detection, prevention or suppression of subversive or hostile activities? - Describe how.		
What is the harm (real or potential) that could arise from disclosure?		
Is the harm specific in nature?		
Does the harm relate to a specific activity? - Intelligence-gathering? - Military activity? - Relations with a specific country or international organization? - Counter-subversive/terrorist activity? - Covert action? - Diplomatic undertaking/effort? - Other example?		
How will disclosure be injurious to these events, activities or undertakings?		

Statement of Test to be Met -- 15(1)

INJURY:
- Harm must be caused by disclosure not by a prior event or by prior publicity.

Relevant Questions	Departmental Response	Assessment
Does the information concern positions or activities made public?		

Relevant Questions	Departmental Response	Assessment
- By the government? - By the media? - By other countries?		
If so, what additional injury is anticipated from disclosure?		
Does the information describe subject matter generally known by the public in Canada or in other countries?		
What injury or additional injury arises because of disclosure?		
Has similar information been disclosed in the past?		
Was there injury as a result of such disclosure? - How much? - Describe the injury?		
Look at questions for paragraphs 15(1)(a) to (i) dealing with public nature of military, diplomatic, international activities.		
Stale negotiations or positions?		
In relation to paragraphs 15(1)(a) and (c)		
- Has the operation or exercise concluded?		
- How long ago did it take place?		
- Has the information reporting on the operation/exercises been made public or reported?		
- If the information relates to past operations, how does disclosure prejudice current or future exercises/operations or the defence of Canada?		
In relation to paragraphs 15(1)(b), (c)		
- Is weapon or unit developed, currently in use?		
- If procured from outside the government, assess the degree of publicly available information.		
- If information is publicly available, how would disclosure prejudice deployment or use of the weapon.		
- Assess degree to which unit's role and activities is known.		
In relation to paragraphs 15(1)(d), (e)		

Relevant Questions	Departmental Response	Assessment
- How old is the information?		
- If information is over twenty years old, (i.e. the limit used in section 16), how would disclosure prejudice the gathering of intelligence for the purposes set out in (d) and (e)?		
- Does the information in the records consist of publicly available information – why would injury arise from its disclosure?		
- Is the subject matter still an intelligence target?		
- If not, how would disclosure prejudice ongoing intelligence gathering.		
In relation to paragraph 15(1)(h)		
- Is the content of the correspondence sensitive? Describe why.		
- Has the other country indicated the information is confidential or that they would not consent to disclosure?		
- Was an undertaking of confidentiality given? Is it implied?		
- How would relations with other countries be prejudiced by disclosure?		
- Would disclosure be seen by other countries as a breach by Canada?		
In relation to paragraphs 15(1)(f), (i)		
- Is the equipment, system currently in use?		
- How long has it not been in use?		
- If it is not in use, what prejudice to the use of current equipment, codes, systems, would disclosure create?		
In relation to paragraph 15(1)(g) Paragraph (g) only applies to present negotiations		
- Have the negotiations on this item concluded?		

Relevant Questions	Departmental Response	Assessment
- Has the government made its position in the negotiations public or circulated it to affected stakeholders?		
- If so, what harm arises from disclosure to others?		
- Would disclosure have a chilling effect on the negotiations – how?		
- Are the negotiations premised on confidentiality – why?		

Statement of Test to be Met – Subsection 15(1)

DISCRETION: Section 15 is a discretionary exemption.

The government institution is required to:
1. Consider disclosing the record notwithstanding it is described by s. 15.
2. To consider disclosure in light of :
   - The kind of injury identified in the text of the section.
   - The intent of the section.
   - The intent of the Act.

Relevant Questions	Departmental Response	Assessment
Has the [head of the] government institution considered disclosing the record? - Why was it decided not to disclose? - This assessment must go beyond concluding that the information is described in section 15.		
Relevant factors could include:		
(i) Whether there has been disclosure in the past.		
(ii) Whether disclosure could have the effect of stabilizing situations, reassuring the public, providing the public with historical information about key world events involving Canada's participation.		
(iii) Whether disclosure would have a chilling effect in the supply of similar information to the government from other governments, or international organizations.		
(iv) The degree of injury arising from disclosure.		

Relevant Questions	Departmental Response	Assessment
- If it is minimal, disclosure could be considered. - Would injury be ephemeral or a long-standing nature.		
(v) Whether there are special circumstances giving rise to the request that merit disclosure.		
(vi) Disclosure as a means of enhancing public awareness of issues related to international affairs, defence, detection, prevention, detection of subversive or hostile activities.		
See also grid on Discretionary Exemptions.		

Endnotes

1. See *Ruby v. Canada (Solicitor General, R.C.M.P.)*, [2000] F.C.J. No. 779 (June 8, 2000)(F.C.A.).

2. *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs,* June 18, 1981, Issue # 43 at pp. 37-38.

3. The following statements about the purpose of this provision can be found in the *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs,* June 23, 1981, Issue # 44 at pp. 9-10:

- **Mr. Fox:** *"Basically, in that clause we are talking about the safety of employees and diplomats in our embassies or our diplomatic posts abroad…"*

- Mr. Robert Auger: *"The particular purpose of putting the 'safety of Canadians' there might be to cover people representing Canada who are not technically employees of the Government of Canada. One could imagine very well the Prime Minister or a minister going on a foreign mission abroad. Technically, I do not think you could say that he is an employee of the Government of Canada, yet there are all kinds of plans drawn up for their protection while on their official mission abroad. So that is what we tried to capture there by that."*

4. Ternette v. Solicitor General, [1992] 2 F.C. 75; 49 F.T.R. 161; 39 C.P.R. (3d) 371 (T.D.).; See also *X v. Minister of National Defence*, (November 4, 1992), T-2648-90 (F.C.T.D.) infra.

5. *Information Commissioner of Canada v. Minister of National Defence* (1990), 67 D.L.R. (4th) 585 (F.C.T.D.).

6. *X v. Minister of National Defence et al.*,[1992] 1 F.C. 77; 46 F.T.R. 206 (T.D.).

7. *X v. Minister of National Defence*, (November 4, 1992), T-2648-90 (F.C.T.D.).

8. (Orders #87, P-270, P-293, P-388, P-435).

9. *Ruby v. Canada (Solicitor General, R.C.M.P.)*, [2000] F.C.J. No. 779, June 8, 2000

10. *X v. Minister of National Defence*, (November 4, 1992), T-2648-90 (F.C.T.D.).

11. *Ternette v. Solicitor General*, [1992] 2 F.C. 75; 49 F.T.R. 161; 39 C.P.R. (3d) 371 (T.D.).

12. *Gold v. M.N.R. et al*., (October 15, 1990), T-836-85, T-1335-86 (F.C.T.D.).

Section 16

The Provision:

16(1) *The head of a government institution **may refuse** to disclose any record requested under this Act that contains*

*(a) Information **obtained or prepared** by any government institution, or part of any government institution, that is an **investigative body specified in the regulations** in the course of lawful investigations pertaining to*

*(i) the **detection, prevention** or **suppression** of **crime**,*
*(ii) the **enforcement** of **any law of Canada or a province**, or*
*(iii) activities **suspected** of constituting **threats to the security of Canada** within the meaning of the Canadian Security Intelligence Service Act,*

*If the record came into existence **less than twenty years prior to the request;***

*(b) Information relating to **investigative techniques** or **plans** for **specific lawful investigations**;*

*(c) Information the disclosure of **which could reasonably be expected** to be **injurious** to the **enforcement of any law of Canada or a province** or the conduct of **lawful investigations**, including, without restricting the generality of the foregoing, any such information*

*(i) relating to the **existence or nature** of a particular investigation,*
*(ii) that would **reveal the identity** of a **confidential source of information**, or*
*(iii) that was **obtained or prepared** in the course of an **investigation;** or*

*(d) Information the disclosure of which **could reasonably be expected** to be **injurious** to the **security of penal institutions**.*

16(2) *The head of a government institution **may refuse** to disclose any record requested under this Act that contains information that **could reasonably be expected** to **facilitate the commission of an offence**, including, without restricting the generality of the foregoing, any such information*

*(a) on **criminal methods or techniques**;*
*(b) that is **technical information** relating to **weapons** or **potential weapons**; or*

*(c) on the **vulnerability of particular buildings** or other **structures or systems**, including **computer or communication systems**, or **methods employed to protect such buildings** or other **structures or systems**.*

*16(3) The head of a government institution **shall refuse** to disclose any record requested under this Act that contains information that was **obtained or prepared** by the Royal Canadian Mounted Police while performing **policing services for a province or municipality** pursuant to an arrangement made under section 20 of the Royal Canadian Mounted Police Act, where the Government of Canada has, on the **request** of the province or municipality **agreed not to disclose** such information.*

16(4) For the purposes of paragraphs (1)(b) and (c), 'investigation' means an investigation that

*(a) **pertains** to the **administration** or **enforcement of an Act of Parliament**;*
*(b) is **authorized** by or pursuant to an Act of Parliament; or*
*(c) is within a class of **investigations specified in the regulations**.*

Preliminary matters:

The *Access to Information Act*, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizen or permanent resident within the meaning of *the Immigration Act* and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, our Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under section 68 or 69.

Paragraphs 16(1)(a) and (b) set out is a discretionary class exemption. This is a two-step process. Once the head determines that disclosure of a record or part thereof could reasonably be expected to cause the prejudice enunciated in the exemption, he/she must also exercise his/her discretion following proper principles to disclose the information.

Paragraph 16(1)(c) is a discretionary injury exemption. This is also a two-step process. First, the head must determine whether disclosure of a record (information in) or part thereof could reasonably be expected to cause the prejudice enunciated in the exemption. Secondly, he/she must also exercise his/her discretion following proper principles whether to exempt or disclose the information.

When reviewing the application of a discretionary exemption like section 16, it is important to remember that the government institution has the evidentiary burden of showing not only that the information falls within the scope of the exemption, but that the head of the institution or his/her delegate properly exercised their discretion in deciding not to disclose the information. If there is no evidence establishing that the institution head considered whether or not to disclose information subject to a discretionary exemption, or if the evidence about why

they decided to refuse disclosure indicates the head relied on irrelevant or unreasonable factors or on improper considerations or that the decision is not consistent with the objects of the Act (that of extending disclosure of government information subject to limited and specific exemptions), then it is open to our office, and to the Federal Court on a review, to question or reject the decision to refuse disclosure.

Subsection 16(2) is a discretionary injury exemption. It requires that the institution identify how the information would facilitate the commission of an offence, then exercise his/her discretion, in accordance with the intent of the Act and the provision, to determine whether the information should be withheld from disclosure.

Subsection 16(3) is a mandatory class exemption. The consequence is that once the head determines that disclosure of a record or part thereof would give rise to the prejudice enunciated in this exemption, he/she must then refuse to grant access to the requested information.

Paragraphs 16(1)*(c) & (d)* are exemptions which are judicially reviewed under section 50 of the Act which provides that:

- "*Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraphs 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such order as the Court deems appropriate*".

In *X v. Canada (Minister of National Defence),* [1992] 1 F.C. 77 at 106 Denault J., the Court, in interpreting this provision, stated that the provision authorizes the Court to 'disclose information if the head of the government institution . . . did not have reasonable grounds upon which to refuse disclosure."

However, in a later ruling in *X v. Canada (Minister of National Defence),* (1992), 58 F.T.R. 93 [F.C.T.D.] Strayer J., the Court noted that it is not entitled to order disclosure simply because it would have reached a conclusion different from that of the head of the government institution. Further, in *Ruby v. Canada (Solicitor General),* [2000] F.C.J. 779 [F.C.A.], the Court of Appeal made it clear that in an application for review it is the Court's function "to ensure that the discretion given to the administrative authorities" has been exercised within the proper limits and on proper principle. "This is why the reviewing Court is given access to the material in issue . . ."

Therefore, in determining whether an exemption under paragraphs 16(1)(c) or (d) is justified, we must determine only whether the head had reasonable grounds to believe that the release of the exempted information could lead to the particular harm.

Notwithstanding the higher standard for interference with a head's decision under section 50, it is very much part of the role of this office to determine the reasonableness of the conclusion reached by the head that disclosure would lead to the injury set out in the exemptions subject to a section 50 review.

The "Test":

At the present time, there have been only a few decisions from the Federal Court of Canada on the criteria to be met in order for the section 16 to apply. However, there has been jurisprudence from other jurisdictions that could be applied by analogy to the federal Act. The following summarizes the Office interpretation of this provision.

1) Paragraph 16(1)*(a)*:

In order to be exempted from disclosure, the information must meet all of the following criteria:

- The information was obtained or prepared by a government institution or a part of a government institution that is an investigative body specified in the Access Regulations;

- The information was obtained or prepared in the course of a lawful investigation;

- The lawful investigation pertained to either :
  (i) the detection, prevention or suppression of crime;
  (ii) the enforcement of any law of Canada or a province; or
  (iii) activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*,

a) The information was obtained or prepared by a government institution or a part of a government institution that is an investigative body specified in the regulations:

Section 9 of the *Access Regulations*[1] and Schedule I of these regulations list the investigative bodies for the purpose of paragraph 16(1)*(a)*. They are the following:

1. Canada Ports Corporation Police and Security, Department of Transport
2. Canadian Forces Military Police
2.1 Canadian Security Intelligence Service
3. Director of Investigation and Research, Department of Consumer and Corporate Affairs
4. Intelligence Division, Department of National Revenue (Customs and Excise)
5. Preventive Security Division, Securities Branch, Canadian Penitentiary Service
6. Royal Canadian Mounted Police
7. Special Investigations Division, Department of National Revenue (Taxation)

8. Special Investigations Unit, Department of National Defence

If the records that are exempted were not obtained or prepared by one of the above investigative bodies, the exemption under paragraph 16(1)*(a)* cannot apply.

b) The information was obtained or prepared in the course of a lawful investigation:

A review of the *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*[2] demonstrates that the intent of the legislator when enacting this provision was to give a somewhat narrower meaning than would otherwise be the case by the grammatical method of interpretation.[3] In order to be exempted under this provision, the information must have been obtained or prepared during the course of an investigation which was specifically authorized by statute or regulation (i.e., an investigative power is built into the Act or Regulations). Accordingly, the exemption does not cover investigations made pursuant to some general powers of investigation, or investigations of an administrative nature.[4] In other words, it does not include internal employment-related investigations for other than the violation of a specific law.

When investigating a complaint for a paragraph 16(1)*(a)* exemption, you should request from the Department the investigative powers under which the investigation was conducted, and request a copy of the provision. By a simple glance at the provision, you should be able to determine 1) why i.e., the circumstances under which an investigation may be conducted; 2) how it should be conducted - i.e., the investigative powers; and 3) the limits to the investigation (e.g. the investigation process, including the duties and powers of the Information Commissioner are found in section 30 to 37 of the Act). If you find that the records requested were obtained or prepared outside the scope of the legislative authority, then they are not obtained in the course of a '*lawful*' investigation for the purpose of the Act.

In some instances, you may find an institution did not have authority to conduct an investigation. An example of this was mentioned in the Committee Minutes referred above - apparently, the Department of Transport had conducted an investigation on the air traffic separations while there was no provision in their Act for this type of investigation.

In other circumstances, you may find that while there are powers vested in an institution to investigate a matter, the institution went overboard or the prerequisites to conduct an investigation were not complied with. For example, while Canada Ports Corporation Police 's investigations can be covered by paragraph 16(1)*(a)*, the prerequisites are the following:

- The police constable must be appointed by a Superior Court Judge whose jurisdiction covers a local port where the Corporation is located;
- the investigation must relate to either:
  - the protection of property under the administration of the Corporation;
  - the protection of persons present on premises under the administration of the Corporation (the Corporation has presently jurisdiction on the following harbours: Halifax, Saint John, Saguenay, Québec, Trois-Rivières, Montréal and Vancouver)[5]

An omission of any of these factors is enough to make a finding that the records requested were obtained or prepared outside the scope of the legislative authority, and therefore they were not obtained in the course of a '*lawful*' investigation for the purpose of the Act and 16(1)*(a)* would not apply.

c) The lawful investigation related to either:

- the detection, prevention or suppression of crime;
- the enforcement of any law of Canada or a province; or
- activities suspected of constituting threats to the security of Canada within the meaning of the *Canadian Security Intelligence Service Act*.

In accordance with section 14 of the *Interpretation Act*, marginal notes in an enactment form no part of the enactment, but are inserted for convenience of reference only. Hence, the marginal note/heading in section 16 of the Act suggests that section 16 is restricted to law enforcement matters, this is not so. Other than the detection, prevention or suppression of crime, the exemption also relates to activities suspected of constituting threats to the security of Canada, or the enforcement of any law of Canada or a province thus, it is very broad.

Although a "law of Canada" is not defined in the *Access to Information Act*, in *Quebec North Shore Paper Co. v. Canadian Pacific Ltd*., [1977] 2 S.C.R. 1054 and *McNamara Construction (Western) Ltd. v. The Queen,* [1977] 2 S.C.R. 654, the Supreme Court defined "a law of Canada" as including statute, regulation and common law. Clearly, therefore, as a minimum, it encompasses all the Acts enacted by Parliament of Canada and the regulations issued thereunder. Further, the Canadian Bill of Rights makes it clear that the expression "law of Canada" also includes any order or rule issued under those Acts or regulations. Thus it is a very broad, all-encompassing term.

Similarly, the term '*threats to the security of Canada*' is defined at section 2 of the *Canadian Security Intelligence Service Act,* R.S.C. 1985, c. C-23 as sabotage, espionage, foreign influenced activities, etc. that are detrimental to the interests of Canada; or activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective within Canada; or activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overflow by violence of the constitutionally established system of the Government in Canada. However, it *does not* include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the above activities.

As mentioned above, the main question you must ask yourself when investigating this exemption is: "*under which investigative power was this investigation conducted?*" If the Department can't advance any Acts, Regulations, Orders or Rules in force in any part of Canada and under which the investigation was conducted, the exemption cannot be claimed. Generally speaking you would want to see documentation contemporaneous with the investigation which shows the basis under which it was conducted.

d) The records at issue must have come into existence less that 20 years prior to the request:

The exemption only applies to records, or portions of records, that have been in existence for less than 20 years prior to the date of the request. If they are older - the exemption cannot be claimed.

2) Paragraph 16(1)*(b)*:

In order to be exempted from disclosure, the information must meet both criteria:

- the information must relate to investigative techniques; or plans and,
- the techniques or plans must pertain to specific lawful investigations.

a) The information must relate to investigative techniques or plans:

The purpose of this exemption is to preclude access to information about the application of technology to investigative techniques or plans since such revelation would undermine or jeopardize the effectiveness of law enforcement.

The exemption is designed to protect investigative techniques or plans, irrespective of the consequence of disclosure. However, in circumstances where a plan has been put into operation or a technique has been made public, the Department should be able to substantiate why it would exercise its discretion to exempt the requested information - it must be able to show the adverse consequences that would arise if the plan was disclosed.

b) The techniques or plans must pertain to specific lawful investigations:

For the purpose of this paragraph, the term '*investigation*' is defined at subsection 16(4) as an investigation that:

- pertains to the administration or enforcement of an *Act of Parliament*;
- is authorized by or pursuant to an *Act of Parliament*; or
- is within a class of investigations specified in the regulations.

Note that contrary to paragraph 16(1)(a), paragraph 16(1)(b) cannot be claimed to protect information obtained or prepared during an investigation authorized under the authority of a provincial statute. The term ‘investigation’, for the purposes of paragraphs 16(1)(b) and 16(1)(c) is defined as an investigation which pertains to the administration or enforcement of an Act of Parliament”. In turn, the term ‘Parliament’ is defined in subsection 35(1) of the *Interpretation Act* as the Parliament of Canada.

Accordingly, in order to be exempted under this provision, the information must either pertain to:

- techniques or plans relating to the administration of a *Federal Act* or Regulation; or
- techniques or plans relating to the enforcement of a *Federal Act* or Regulation.

c) Techniques or plans relating to:

i. Investigations by a Fact Finding Board established by the Department of Transport to investigate air traffic control where it has been alleged that owing to a system deficiency:
- flight safety may have been jeopardized; or
- less than the minimum required separation between aircraft may have existed.

ii. Investigations by a Flight Service Station Review Committee established by the Department of Transport to investigate reported occurrences relating to aviation safety where:
- procedures or actions or a lack thereof;
- systems failure; or
- other causes have brought the reliability of the Flight Service Station System into question.

iii. Canadian Forces flight safety accident investigations other than those conducted in the form of a board of inquiry or summary investigation under *the National Defence Act.*

iv. Investigations by or under the authority of the Canadian Forces Fire Marshall for the purpose of determining the cause of a fire, other than those conducted in the form of a board of inquiry or summary investigation under the *National Defence Act.*

v. Investigations by the Special Inquiries Unit of the Inspector General's Branch of the Canadian Penitentiary Service.

3) Paragraph 16(1)*(c)*:

In order to be exempted from disclosure, the information must meet all of the following criteria:

a) Where disclosure could reasonably be expected to:

For an exhaustive definition of this term, please refer to the lexical section of the Grids.

b) Injury to the enforcement of any law of Canada or a province / Injury to the conduct of lawful investigations:

i) Enforcement of any law of Canada or a province:

A '*law of Canada*' is not defined in the *Access to Information Act*. However, **the supreme court of Canada in *Quebec North Shore Paper Co. v. C.P. Ltée, [1977] 2 S.C.R. 1054 and McNamara Construction (Western) Ltd. and al. v. The Queen, [1977] 2 S.C.R. 654 made* it clear that these terms** encompasses all Acts enacted by

the Parliament of Canada together with any regulations issued there under. As well, the *Canadian Bill of Rights* makes it clear that the expression also includes any order or rule issued under those Acts or regulations. Thus, it is a very wide term.

Moreover, while the scope of the provision, at first blush, might appear to be restricted to law enforcement matters, this is not so. By virtue of subsection 16(4), the concept of an investigation has been expanded to include any investigation that pertains to the administration or enforcement of an *Act of Parliament* or is authorized by or pursuant an *Act of Parliament*.

Thus, although there has been little jurisprudence to date on the scope or applications of paragraph 16(1)*(c)*, it is by no means restricted to law enforcement. It would appear that it is designed to protect any information the disclosure of which could reasonably be expected to be injurious to the prevention or detection of activities contrary to an *Act of Parliament*, or the enforcement of any *Act of Parliament* or any order, rule or regulation issued thereunder. It is important to note that the enabling legislation does not need to specifically provide for an investigation in order for this provision to apply.

ii) Conduct of lawful investigations:

This exemption can be claimed in situations where paragraph 16(1)*(a)* does not apply, provided that the reasonable expectation of harm requirement has been met. This could be the case, for example, where information had been obtained or prepared during the course of a lawful investigation but that investigative body was not one of those specified in the regulations. For explanations on the meaning of the term '*lawful investigations*', please refer to the explanation on paragraph 16(1)*(a)*.

In *Ruby v. Canada (Solicitor General)*, [2002] S.C.C. 75 [2002] S.C.J. No. 73, the Supreme Court of Canada stated that the exemption in s. 22(1)(b) of the Privacy Act, which is almost identical to s. 16(1)(c) of the *Access to Information Act*, is not limited to current investigations or an identifiable prospective investigation.

c) Without restricting the generality of the foregoing:

For an exhaustive definition of this term, please refer to the lexical section of the Grids.

4) Paragraph 16(1)*(d)*:

a) Where disclosure could reasonably be expected:

For an exhaustive definition of this term, please refer to the lexical section of the Grids.

b) Injurious to the security of penal institutions:

This provision permits the exemption of records where their disclosure would reasonably be expected to be injurious to the security of penal institutions. The term '*security*' in this subsection means that the primary purpose of keeping prisoners in their restricted environment is not sick or has not been compromised. The security of a building could include

the safety of its inhabitants or occupants including the staff who work there and anyone who enters for business or visiting purposes, but this is primarily a section 17 situation. It could also be the security of a structure which adjoins or connects buildings. For example, information which would facilitate escapes of inmates or hostage taking could fall under this exemption.

The term '*penal institution*' would include all types of institutions in Canada, whether Federal or Provincial, where convicted criminals are incarcerated:

- correctional institutions such as jails, detention centres and correctional centres;
- police cells and lock-ups;
- psychiatric facilities where patients are involuntarily committed to psychiatric institutions under Lieutenant-Governor's warrant or a Court Ordered Psychiatric Assessment;
- federal penitentiaries;
- facilities for the detention of young offenders, such as open and secure custody facilities and temporary detention facilities.

5) Subsection 16(2):

a) Where disclosure could reasonably be expected to:

For an exhaustive definition of this term, please refer to the lexical section of the Grids.

b) Facilitate the commission of an offence**:**

This paragraph is followed by three examples of which the legislator has expressly stated that they do not restrict in any way the application of the exemption. The three examples state that the exemption could cover information relating to criminal methods or techniques; technical information on weapons or potential weapons; or the vulnerability of particular buildings or other structures or systems including computer or communications systems.

While these examples do not restrict in any way the generality of the exemption, it is however subject to the *ajustem generis* rule of interpretation. This rule is designed to assist in ascertaining the true intention of Parliament and operates in such a way that any analogy or extrapolation of the description must be restricted to the specific meaning found in this paragraph. In other words, if the department wants to claim subsection 16(2) in such a way that does not clearly fall within the three illustrated paragraphs, it must be a situation where the information will cause prejudice in facilitating the commission of an offence. Examples of these could be sabotage, forgery, hijacking, interception of communications, kidnapping, hostage-taking, fraud, spying, possession of explosives.

6) Subsection 16(3):

a) Obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province or a municipality:

The task for an investigator when determining whether this part of the test is met is to determine:

- the timeframe during which the records at issue were obtained or prepared;
- whether there was a valid arrangement between the RCMP and the province/municipality at the time;
- whether the purpose for which the records were obtained were consistent with the arrangement under '*b*'; and, whether the arrangement between the RCMP and the province/municipality is still in force, has been revoked, terminated or rescinded.

From time to time we find arrangements between the RCMP and a province stating that:

- "*Information collected or obtained by the RCMP at anytime, either past, present or future, during the performance of contract policing services... not be disclosed under the Federal* Access to Information Act."

In our view, it is not possible for the RCMP to make commitments to a province/municipality not to disclose information obtained during a policing agreement under the *Access to Information Act* for records existing before the making of that promise. In our view, subsection 16(3) only applies if there was a valid agreement in effect at the time these services were rendered, not to disclose information obtained by the RCMP during the course of rendering those policing services.

From time to time, a province/municipality could rescind or terminate the policing agreement. When a party merely terminates an agreement, the effect is that the confidentiality agreement persists with respect to records obtained or created while it was in effect. However, when a party rescinds an agreement the effect is that their contract is declared void and is put to an end as though it had never existed. Thus records obtained or prepared while such an agreement was in effect would become accessible once the agreement was rescinded. At the present time, two provinces have rescinded their agreements with the RCMP. They are British Columbia; and Nova Scotia.

b) Arrangements made under Section 20 of the **Royal Canadian Mounted Police Act**:

Section 20 of the *RCMP Act* reads as follows:

(1) The Minister may, with the approval of the Governor in Council, enter into an arrangement with the government of any province for the use or employment of the Force, or any portion thereof, in aiding the administration of justice in the province and in carrying into effect the laws in force therein.

(2) The Minister may, with the approval of the Governor in Council and the lieutenant governor in council of any province, enter into an arrangement with any municipality in the province for the use or employment of the Force, or any portion thereof, in aiding the administration of justice in the municipality and in carrying into effect the laws in force therein.

(3) The Minister may, with the approval of the Treasury Board, in any arrangement made under subsection (1) and (2) agree on and determine the amount of money to be paid by the province or municipality for the services of the Force.

(4) There may be included in any arrangement made under subsection (1) and (2) provision for the taking over by the Force of officers and other members of any provincial or municipal police force.

(5) The Minister shall cause to be laid before Parliament a copy of every arrangement made under subsection (1) or (2) within fifteen days after it is made or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that either House of Parliament is sitting. R.S., c. R-9 s.20

Accordingly, while the RCMP may enter into an arrangement with a province/municipality in aiding the administration of justice or carrying into effect the laws in force in the province/municipality, it must first receive the approval of the Governor in Council and Lieutenant Governor in Council. Further, a copy of each arrangement made must be laid down before Parliament. Accordingly, if you have any doubt as to whether an arrangement between the RCMP and the province/municipality is valid, look whether this factor has been met.

Case Law

1) <u>Federal</u>:

Paragraph 16(1)*(a)*

***Fuda v. Canada (Royal Canadian Mounted Police)*, [2003] F.C.T. 234, [2003] F.C.J. No. 314 (T.D.),Tremblay-Lamer J.**

- In this case, the applicant made a request to the RCMP for access to all information about him or the companies with which he was associated that it held in its personal information banks. In this request under *the Privacy Act*, two personal information banks were searched and identified as relevant. However, the applicant was denied access to his personal information in bank PPU 005-Operational Case Records. The Court found that exemption was justified as all the information in personal information bank PPU 005 is less than 20 years old and was obtained by the RCMP during lawful investigations of the applicant in organized crime. The Court found accordingly that it was reasonable for the RCMP to refuse to disclose this information to the applicant.

Barta v. Canada (Attorney General), 2006 FC 1152

- In this case, the applicant was subject to a criminal complaint and the RCMP investigated. The Applicant was taken into custody. He was questioned, photographed and fingerprinted. Witness statements were taken. A report was made to Crown counsel. Charges were not pursued.

  The Applicant filed a privacy request in a effort to pursue a civil remedy against witnesses who according to him gave false information to the RCMP. The Department invoked ss. 22(1)a), 22(1)b) and 26 of the *Privacy Act,* the equivalent of ss. 16(1)a), 16(1) c) and 19 of the *Access to Information Act.*

  The Court made no findings on the question as to whether the witnesses gave false information. The Court found that the *Privacy Act* does not provide to the Applicant a right to obtain information from the RCMP that would identify the complainant and those who gave witness statements in support of the complaint.

Paragraph 16(1)*(b)*

***Ruby v. Canada (Solicitor General R.C.M.P.)*, [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.)**

- The Federal Court of Appeal overturned the finding of the Trial Division that certain records in personal information banks pertaining to security investigation were exempt pursuant to paragraph 22(1)(a) of the *Privacy Act* (16(1)(a) *Access to Information Act*), on grounds that the Trial Judge had not reviewed the exercise of discretion by the institution head under the paragraph 22(1)(a) exemption. In the *Ruby* case, the government institution had invoked subsection 16(2) of the *Privacy Act*, the equivalent of subsection 10(2) *Access to Information Act*, to refuse to confirm or deny the existence of records responsive to the request. The Court noted that, in these and similar circumstances under the Act where the requester has no access to the records in question, and no knowledge of their contents of the records, it would be unfair to impose an evidentiary burden on the requester to show that the head's discretion had not been exercised properly. The Court held that a requester need not show reasons or proof that the institution head had exercised his/her discretion improperly, and that the onus was instead on the institution to show 1) that the discretion to refuse disclosure was in fact exercised, i.e., that the head had considered whether to refuse or allow disclosure of the information once it was determined the records fell within the scope of the exemption, and 2) that it was exercised in accordance with proper principles.

***Rubin v. Canada (Solicitor General), (February 6, 1986)* (T-936-85) (F.C.T.D.)**

- The applicant was provided with a full text of correspondence between the B.C. Ministry of Forest and the Solicitor General. Part of the Schedule attached to the record was deleted on the grounds that it would disclose investigative techniques (which are covered by paragraph 16(1)*(b)* of the Act). In reviewing the exemption, the Court concluded that the exemption claimed by the department fulfilled the requirement of being necessary and specific as those words are used in Section 2 of the Act. As well, on the basis of the affidavit evidence (filed in

confidence and sealed) it held that the information met the test of paragraph 16(1)*(b)*.

Paragraph 16(1)(c)

***Ruby v. Canada (Solicitor General),* [2002] S.C.C. 75 [2002] S.C.J. No. 73**

- In this decision, the Supreme Court of Canada reversed the interpretation of 16(1)(c) made by the Federal Court of Appeal in *Rubin v. Canada (Minister of Transport)*, [1998] 2 F.C. 430. The court in *Rubin* held that the exemption involved was limited to circumstances where a reasonable expectation of harm could be established to a current specific investigation or identifiable prospective investigation. The Supreme Court of Canada disagreed with this interpretation. The exemption in s. 22(1)(b) of the Privacy Act, which is almost identical to s. 16(1)(c) of the *Access to Information Act*, is not limited to current investigations or an identifiable prospective investigation.

Barta v. Canada (Attorney General), 2006 FC 1152

- In this case, the applicant was subject to a criminal complaint and the RCMP investigated. The Applicant was taken into custody. He was questioned, photographed and fingerprinted. Witness statements were taken. A report was made to Crown counsel. Charges were not pursued.

  The Applicant filed a privacy request in a effort to pursue a civil remedy against witnesses who according to him gave false information to the RCMP. The Department invoked ss. 22(1)a), 22(1)b) and 26 of the *Privacy Act,* the equivalent of ss. 16(1)a), 16(1) c) and 19 of the *Access to Information Act.*

  The Court made no findings on the question as to whether the witnesses gave false information. The Court found that the *Privacy Act* does not provide to the Applicant a right to obtain information from the RCMP that would identify the complainant and those who gave witness statements in support of the complaint.

***Canada (Information Commissioner) v. Canada (Immigration and Refugee Board),* (1997), 140 F.T.R. 140 (F.C.T.D.)**

- The Court held that a promise of confidentiality given to interviewed employees by an investigator investigating a leak of information from the institution could not of themselves override specific provisions of the *Privacy* and *Access to Information Acts*.

The Court also held that the reasonable expectation of probable harm set out in paragraph 16(1)(c) implies “a confident belief”, as follows:

> The reasonable expectation of probable harm implies a confident belief. There must be a clear and direct link between the disclosure of specific information and the harm alleged. The Court must be given an explanation as to how or why the

harm alleged would result from the disclosure of specific information. The more specific and substantiated the evidence, the stronger the case for confidentiality. It cannot refer to future investigations generally.

Where the harm foreseen by release of the records sought is one about which there can only be mere speculation or mere possibility of harm, the standard is not met. It must have an impact on a particular investigation, where it has been undertaken or is about to be undertaken. One cannot refuse to disclose information under paragraph 16(1)(c) of the *Access to Information Act* or paragraph 22(1)(b) of the *Privacy Act* on the basis that to disclose would have a chilling effect on possible future investigations. (at paras. 40-45)

The Court found that the evidence supporting injury to the conduct of employment related investigations were speculative and unrelated to any specific investigation. The Court found that the evidence indicated "a well-intentioned attempt to avoid risk rather than a reasonable expectation of probable harm from disclosure" in finding that the institution did not meet the injury test.

***Lavigne v. Canada (Commissioner of Official Languages,)* (1998), 157 F.T.R. 15 (F.C.T.D.)**

- The Court ordered disclosure of personal information gathered about the applicant in the course of an investigation under the *Official Languages Act.* The Court found that the injury claim under paragraph 16(1)(c)/s. 22(1)(b) *Privacy Act,* which was based on the promise of confidentiality given during the investigation, did not meet the reasonable expectation of probable harm test, as follows:

  The respondent has not established that there is a reasonable expectation of probable harm to the conduct of its investigation from such a disclosure. Witnesses to investigations ought to be informed in advance that their testimony about an individual may be disclosed to him. They will be very careful what they say. Proper circumspection will protect the integrity of the investigative process and the right of the individual concerned to be fully informed of the case against him. Promises of confidentiality are not essential as the respondent has the power to issue subpoenas, if necessary. The "personal information" to which the applicant is entitled is defined under section 3 of *the Privacy Act*, that is information about himself that is recorded in any form and included (under subsection 3(g)) views or opinions of other individuals about him. Under the *Privacy Act,* the applicant is not entitled to information other than "personal information". (at para. 36)

***Muller v. Minister of Communications et al.*, (January 9, 1990), (T-484-88) (T.D.)**

- The applicant sought to obtain under the *Privacy Act* the reasons why he had been discharged from the Army in 1960. The record at issue in this case is a report dated November 18, 1964. The report was exempted from disclosure by the department under section 22(1)*(b)* of the *Privacy Act* - i.e., the equivalent of 16(1)*(c)* under our Act. The department argued that since the report was made

when responding to a Ministerial enquiry pursuant to the *National Defence Act*, it was a lawful investigation. Mr. Justice Collier answered in these terms:

"*The submission is, in my view, much too broad an interpretation to put paragraph 22(3)(a). Carried to its logical extreme, it would permit to a Minister, under the guise of administration, to investigate almost any person or any situation he thought necessary.*

The investigation here, in my mind, had nothing to do with the administration of the National Defence Act. It was carried out by the military without lawful authorization."

That decision was subsequently reversed by the Court of Appeal:

"*We are all of the opinion that the learned trial judge erred in basing his conclusion on a finding that the 1964 investigation had not been undertaken on behalf of the Minister of National Defence in the administration of the National Defence Act. The Respondent had written the Department asking for the reasons for his discharge from the Armed Forces in 1960 and an enquiry to permit a response was entirely proper.*"

The Court nevertheless ordered the report to be disclosed on the basis that the Department did not meet the burden of proof in demonstrating that the disclosure of the requested report was reasonably expected to be injurious to the enforcement of any law and the conduct of a lawful investigation.

***Rubin v. Canada (Clerk of the Privy Council)*, [1993] 2 F.C. 391 [T.D.]**

- In this case, the applicant requested from the Clerk of the Privy Council any correspondence/ communications between PCO and the Office of the Information Commissioner recording a complaint made by any other individual. The department claims Section 35 of the Act to refuse communication and, following investigation, the Information Commissioner also indicated that paragraph 16(1)*(c)* was "*a proper means for withholding disclosure*". The Court refused the Commissioner's argument that paragraph 16(1)*(c)* would apply to the records at issue. According to the Court, 16(1)*(c)* is not a procedural provision that justifies confidentiality in respect of the investigative process of the Information Commissioner. According to the Court, to interpret paragraph 16(1)*(c)* as an all encompassing procedural exemption justifying confidentiality in all cases where representations are sought would, to all intent and purposes, render much of Section 35 redundant.[6]

Subsection 16(3)

***Thorsteinson v. Queen* (October 31, 1994) (T-1040-93)**

- In this case, the RCMP. had claimed subsection 22(2) of the *Privacy Act* to exempt information obtained or prepared by the RCMP while performing policing services for British Columbia. One interesting aspect of the case is that the

Crown withdrew its claim of subsection 22(2) because the Province of British Columbia rescinded their agreement. It would therefore appear that the RCMP agrees with an interpretation that if an agreement is rescinded, the records obtained or prepared under the agreement are no longer subject to 16(3).

Subsection 16(4)

***Reyes v. Canada (Secretary of State)*, [December 21, 1984] (T-392-84) (F.C.T.D.)**

- In this case, the applicant sought access to personal information about himself relating to his application for Canadian citizenship. The department exempted some information pursuant to paragraph 22(1)*(b)* of the *Privacy Act.* The Court found that the information related to the existence or nature of a particular investigation since, in accordance with the provision of subsection 3(6) of the Citizenship Regulation, the Under-Secretary of State has a statutory obligation to conduct routine investigations. These investigations are in respect to citizenship applications for the purpose of determining whether the Applicant meets the requirements of the *Citizenship Act and Regulations*. Accordingly, the investigation pertains to the administration or enforcement of an Act of Parliament and is authorized by or pursuant to an Act of Parliament and, therefore, falls within the definition in paragraphs 22(3)*(a)* & *(b)*.

TABLE OF AUTHORITIES

Paragraph (16)(1)*(a)*

Barta v. Canada (Attorney General), 2006 FC 1152
Fuda v. Canada (Royal Canadian Mounted Police), [2003] F.C.T. 234, [2003] F.C.J. No. 314 (T.D.), Tremblay-Lamer J.

Hoogers v. Canada (Minister of Communications) (1988), 83 C.P.R. (3d) 380 [F.C.T.D.]

Muller v. Minister of Communications et al., (January 9, 1990), (T-484-88) (T.D.)

Paragraph 16(1)*(b)*

Rubin v. Canada (Solicitor General), (February 6, 1986) (T-936-85) (F.C.T.D.)

TABLE OF AUTHORITIES (Cont'd)

Canada (Information Commissioner) v. Canada (Minister of National Defence) (1999), *240 N.R. 244 [F.C.A.]*

Davidson v. Canada (Solicitor General), [1989] 2 F.C. 341 (F.C.A.]

Ruby v. Canada (Solicitor General R.C.M.P.), [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.)

Paragraph 16(1)*(c)*

Canada (Information Commissioner) v. Canada (Immigration and Refugee Board) (1997), 140 (F.T.R. 140 (F.C.T.D.)
Lavigne v. Canada (Commissioner of Official Languages) (1998), 157 F.T.R. 15 (F.C.T.D.)
Muller v. Minister of Communications et al., (January 9, 1990), (T-484-88) (T.D.)
Rubin v. Canada (Clerk of the Privy Council), [1993] 2 F.C. 391 [T.D.]
Rubin v. Canada (Minister of Transport), [1998] 2 F.C. 430 (F.C.A.)
Ruby v. Canada (Solicitor General.), [2002] S.C.C. 75 [2002] S.C.J. No. 73

Steinfoff v. Canada (Minister of Communications) (1988) (sub nom Hoogers v. Canada (Minister of Communications) 83 C.P.R. (3d) 380 [F.C.T.D.]

Subsection 16(3)

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Subsection 16(4)

Reyes v. Canada (Secretary of State), [December 21, 1984] (T-392-84) (F.C.T.D.)

Rubin v. Canada (Minister of Transport) (1995), 105 F.T.R. 81 [F.C.T.D.]

Thorsteinson v. Queen (October 31, 1994) (T-1040-93)

The Questions

Section -- 16

RECORD:

Exemption:

16(1) The head of a government institution may refuse to disclose any record requested under this Act that contains

(a) information obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to

(i) the detection, prevention or suppression of crime,
(ii) the enforcement of any law of Canada or a province, or
(iii) activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act,

If the record came into existence less than twenty years prior to the request;

(b) information relating to investigative techniques or plans for specific lawful investigations;

(c) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation,
(ii) that would reveal the identity of a confidential source of information, or
(iii) that was obtained or prepared in the course of an investigation; or

(d) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

16(2) The head of a government institution may refuse to disclose any record requested under this Act that contains information that could reasonably be expected to facilitate the commission of an offence, including, without restricting the generality of the foregoing, any such information

(a) on criminal methods or techniques;

(b) that is technical information relating to weapons or potential weapons; or

(c) on the vulnerability of particular buildings or other structures or systems, including computer or communications systems, or methods employed to protect such buildings or other structures or systems.

16(3) The head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province or municipality pursuant to an arrangement made under section 20 of the Royal Canadian Mounted Police Act, where the Government of Canada has, on the request of the province or municipality agreed not to disclose such information.

16(4) For the purposes of paragraphs (1)(b) and (c), "investigation or enforcement of an Act of Parliament";

(a) pertains to the administration or enforcement of an Act of Parliament;

(b) is authorized by or pursuant to an Act of Parliament; or

(c) is within a class of investigations specified in the regulations. 1980-81-82-83, c.111, Sch. I "16"; 1984, c. 21, s. 70.

Relevant Questions	Departmental Response	Assessment
INITIAL STEPS		
Determine which subsection is claimed:		
- If Subsection 16(1) is claimed, determine which paragraph is claimed?		
- If paragraph 16(1)(a) is claimed, REFER TO SCHEDULE I, Access to Information Regulations?		
- If paragraphs 16(1)(b) or (c) is claimed, REFER TO SUBSECTION 16(4)?		
- If Paragraph 16(4)(c) applies, REFER TO SCHEDULE II, Access to Information Regulations?		
- If Subsection 16(3) applies, REFER TO SECTION 20, RCMP Act and agreements made under this provision?		

Paragraph -- 16(1)(a)
Information obtained or prepared by any government institution, or part of any government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to a) If the record came into existence less than twenty years prior to the request (i) the detection, prevention or suppression of crime, (ii) the enforcement of any law of Canada or a province, or (iii) activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act,.
Statement of Test to be Met
- Must be an investigative body in Schedule I, Access Regulations.

Relevant Questions	Departmental Response	Assessment
First determine who, and, if applicable, what organization acquired or obtained or prepared the record? Was it an investigative body? [An investigator may have acquired or obtained or prepared the record on its own volition and while not acting in an official capacity.] Then confirm if the organization is an investigative body named in Schedule 1 of the Access regulations.		
Investigative bodies named in Schedule I, Access Regulations are:		
(1) Canada Ports Corporation Police and Security, Department of Transport.		
(2) Canadian Forces Military Police.		
(3) Canadian Security and Intelligence Service.		
(4) Director of Investigation and Research, Department of Consumer and Corporate Affairs.		
(5) Intelligence Division, Department of National Revenue (Customs and Excise).		
(6) Preventive Security Division, Securities Branch, Canadian Penitentiary Service.		
(7) Royal Canadian Mounted Police.		
(8) Special Investigations Division, Department of National Revenue (Taxation).		

Relevant Questions	Departmental Response	Assessment
(9) Special Investigations Unit, Department of National Defence.		
Look for an indication on the record or other evidence that document was prepared or obtained by these organizations.		

Statement of Test to be Met

- Record must be prepared or obtained in the course of lawful investigations.

Relevant Questions	Departmental Response	Assessment
What statutory provision authorizes the investigation?		
What are the powers conferred on the investigators?		
Does the record relate to the exercise of one of these powers?		
Has the investigation been conducted in accordance with the powers set out in the statute?		
Have the procedural requirements for conducting the investigation been met?		
Have necessary judicial appointments been made?		
Have necessary search warrants, judicial authorizations been obtained?		
Do other compliance measures exist in the statute?		
Have these measures been taken?		
If these measures have been taken, what activity is now being investigated?		
Is this activity being investigated under the statutory provision set out above?		
Does the statutory power relied on by the Department relate to an investigation for the purposes set out in 16(1)(a)(i)-(iii)?		

Relevant Questions	Departmental Response	Assessment
Does the record relate to information gathering or the conduct of the investigation?		
Was the information or evidence gathered legally?		
Was the conduct of the investigation legal?		
If not, has the information been used in the investigation?		
What does it relate to?		
Has it been excluded by a court or other body?		

Statement of Test to be Met

Investigations must pertain to:
- Detection, prevention or suppression of crime.

Relevant Questions	Departmental Response	Assessment
Does the investigation relate to the detection, prevention or suppression of crime?		
What crime is involved or suspected?		
What are the circumstances giving rise to the investigation?		
What is the activity being investigated and is it criminal activity?		
Is the Criminal Code involved?		

Statement of Test to be Met

Enforcement of any law of Canada or a province

Relevant Questions	Departmental Response	Assessment
What enforcement activity is involved?		

Relevant Questions	Departmental Response	Assessment
What legislative provision is involved: Criminal Code Young Offender Act Crimes Against Humanity and War Crimes Act Controlled Drugs and Substances Act Immigration Act Security Offences Act or Official Secrets Act Bankruptcy and Insolvency Act Income Tax Act Customs Act		
Does this provision authorize enforcement activity?		
If no statutory provision has been breached. On what basis does the Department claim that enforcement activity is taking place?		
Does the record relate to internal matters of the investigative bodies as set out in Schedule I?		
Does it relate to administrative matters of these bodies? - If so, on what basis does the Department claim that enforcement of a law of Canada or a Province is taking place?		
Is the investigation being conducted by the investigative body for its very own internal administrative purposes or in its capacity as an investigative body? If the investigation is internal in nature i.e. in the context of an employer-employee relationship, on what basis is the Department or institution claiming that paragraph 16(1)(a) applies?		

Statement of Test to be Met

- Activities suspected of constituting threats to the security of Canada.

Relevant Questions	Departmental Response	Assessment
Is the activity being investigated described or contained in section 2, Canadian Security Intelligence Service Act?		

CSIS Act, s. 2: "threats to the security of Canada" means:

(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,

(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political objective within Canada or a foreign state, and

(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada.

But does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d). 1984, c. 21, s. 2.

Statement of Test to be Met

- Must be specific investigations.

Relevant Questions	Departmental Response	Assessment
Is a specific investigation being conducted with exact, precise, detailed and explicit objectives, parameters and deliverables. An investigation is a systemic, official inquiry required to carefully study a specific set of facts. (i.e. a specific act of commission or omission) a. Yes. (1) When did it start? (2) When did/will it end? (3) Is it stalled? (4) Does it involve specific criminal activity(ies) or threats to the security of Canada or alleged breaches to other statutes of Canada? b. No. (1) Is the investigation in the nature of on-going intelligence? If so, who is the principal target of such intelligence gathering? Has section 15 been claimed? (2) Is the investigation simply an open-ended, all-encompassing exploration whose aim is to assist in		

Relevant Questions	Departmental Response	Assessment
defining the lines of inquiries or creating investigative opportunities?		

Statement of Test to be Met

- Records can be obtained or prepared

Relevant Questions	Departmental Response	Assessment
For what purpose did the investigative body obtain the record? Did the investigative body obtain the record of use in its investigation or was it simply handed over on an unsolicited basis by say, a management source outside the investigative body? Did the investigative body use the record in the course of its investigation? Is the record of any investigative or probative value to the investigation?		

Statement of Test to be Met

- Record must be obtained or prepared in the course of investigations.

Relevant Questions	Departmental Response	Assessment
When did the investigation begin?		
When was the record prepared?		
Was it prepared during the investigation?		
Was it prepared for use in the investigation?		
Was the record used in other investigations? - When did these investigations begin? - How was the record used during the investigation?		
What institution has control of the record?		
Is that institution an investigatory body in Schedule I,		

Relevant Questions	Departmental Response	Assessment
Regulations?		
If not, how did the institution get the record?		
If it was provided by an investigatory body in Schedule I? - Did the investigatory body obtain or prepare the information for an investigation it was conducting? - Why was it given to the government institution?		

Statement of Test to be Met

20 year limit on the age of the record
- assess age as of the date of the request

Relevant Questions	Departmental Response	Assessment
What date was the record prepared?		
If the record has been used in other investigations, has paragraph 16(1)(c) been claimed?		

Statement of Test to be Met

Discretionary Exemption (see below at text for section 16(1))

Relevant Questions	Departmental Response	Assessment
Has the investigation concluded?		
Have sanctions resulting from the investigation been imposed?		
- Was this made public?		
Was the information made public during court proceedings?		
What harm would result from disclosure now?		

Subsection -- 16(4)

For the purposes of paragraphs (1)(b) and (c), 'investigation' means an investigation that

(a) pertains to the administration or enforcement of an Act of Parliament;

(b) is authorized by or pursuant to an Act of Parliament; or

(c) is within a class of investigations specified in the regulations. 1980-81-82-83, c. 111, Sch. I "16"; 1984, c. 21, s. 70.

Schedule II
(s. 10)
CLASSES OF INVESTIGATIONS

1. Investigations by a Fact Finding Board established by the Department of Transport to investigate air traffic control where it has been alleged that owing to a system deficiency

   (a) flight safety may have been jeopardized; or

   (b) less than the minimum required separation between aircraft may have existed.

2. Investigations by a Flight Service Station Review Committee established by the Department of Transport to investigate reported occurrences relating to aviation safety where

   (a) procedures or actions or a lack thereof;

   (b) systems failure; or

   (c) other causes

   have brought the reliability of a Flight Service Station of the Flight Service Station System into question.

3. Canadian Forces flight safety accident investigations other than those conducted in the form of a board of inquiry or summary investigation under the National Defence Act.

4. Investigations by or under the authority of the Canadian Forces Fire Marshall for the purpose of determining the cause of a fire, other than those conducted in the form of a board of inquiry or summary investigation under the National Defence Act.

5. Investigations by the Special Inquiries Unit of the Inspector General's Branch of the Canadian Penitentiary Service.

Statement of Test to be Met
- Investigative technique or plans for investigations in s. 16(1)(b) must relate to matters set out in s. 16(4)

Relevant Questions	Departmental Response	Assessment
Does the record describe an investigative technique or plans for an investigation?		
If so, is the investigative technique used in investigations described in subsection 16(4)?		
Is the planned investigation an investigation described in subsection 16(4)?		
What paragraph of subsection 16(4) does the investigation fall under?		

Statement of Test to be Met
- Investigations in s. 16(1)(c) must be investigations described in s. 16(4).

Relevant Questions	Departmental Response	Assessment
If paragraph 16(1)(c) is claimed, does the record relate to the enforcement of a law of Canada or the conduct of lawful investigations?		
If it relates to the conduct of lawful investigations, is the investigation one which is described in subsection 16(4)(b) or (c)?		
What paragraph in subsection 16(4) is claimed to apply?		

Statement of Test to be Met
Investigation must pertain to - administration - enforcement or - be authorized by an Act of Parliament

Relevant Questions	Departmental Response	Assessment
Under what statute is the investigation being conducted?		
Is this a federal statute?		
Under what specific statutory provision is the investigation taking place?		
Does this statutory provision confer power to investigate?		
Does the statutory provision confer power on the Minister to take such measures as are necessary to administer a department or program? (i.e., a plenary power)		
If so, what statutory objectives are contained in the legislation?		
Does the investigation relate to one of the statutory objectives?		
What enforcement provision of the legislation is relied on?		
Is the investigation specifically authorized or permitted by a provision in the statute?		
Does the statutory provision limit the investigation in any way? - Does it limit the matter to be investigated? - Does it impose time limitations? - a) after the alleged breach has been committed; and b) to conclude the said investigation. - Does it describe investigatory powers of the agency? - If so, what are these powers? - Has the investigation been conducted in accordance with these powers?		
Is the probing action being taken by the agency 'investigatory' in nature?		
Does the investigation pertain to the ‘enforcement’ of a specific provision of an Act of Parliament? [Enforcement: to give force or effect to a law to compel obedience]. If so, the		

Relevant Questions	Departmental Response	Assessment
activity described or detailed in the legislative provision as such? a. Does the statutory provision make allowance for a sanction in case of a breach? b. What is the sanction? c. Has an Order for Direction under the statute been issued? Obtain a description of the enforcement process. At what stage of the enforcement process is the record pertaining? Does the investigation pertain with the 'administration' of a specific provision of an Act of Parliament? [i.e. the Firearms Registration Act] Does the investigation pertain with the voluntary compliance of a specific provision of an Act of Parliament? Are the voluntary compliance measures being taken actually mandated by the statute?		

Statement of Test to be Met

- Investigation must be conducted in a regulatory capacity.

Relevant Questions	Departmental Response	Assessment
In what capacity is the agency undertaking the investigation?		
Is the agency investigating in its regulatory capacity?		
Is the agency investigating in its capacity as an employer?		
Does the record involve an internal investigation by the Department about an employment-related matter or internal management matter?		
If so, on what basis does the Department claim that subsection 16(4) applies?		
Was the investigation undertaken by the Department in order to respond to a complaint under the Canadian Human Rights Act?		

Relevant Questions	Departmental Response	Assessment
If so, was this investigation taken solely as a result of the complaint?		
Was the investigation undertaken as a result of an internal complaint?		
If the record was created as the result of an internal investigation was it provided to other investigatory bodies? - i.e., Canadian Human Rights Act investigators. - Public Service Commission investigators.		

Statement of Test to be Met

· Investigation must be within a class specified in Schedule II, Access Regulations

Relevant Questions	Departmental Response	Assessment
Does the record relate to an investigation described in Schedule II, Access Regulations?		
If so, what item in Schedule II describes the investigation?		

Statement of Test to be Met

Air traffic control system deficiencies
- must jeopardize air safety
- must involve less than minimum in-flight separation between aircraft

Relevant Questions	Departmental Response	Assessment
Is the investigation conducted by a Fact-Finding Board to investigate the air traffic control system?		
Was the Fact-Finding Board established by the Department of Transport?		
When was it established?		
Under whose direction or order was it established?		
What is the purpose of the investigation?		

Relevant Questions	Departmental Response	Assessment
Has a “system deficiency” in the air traffic control system been alleged? A “system deficiency” means a procedural flaw or insufficiency built into the existing approved system.		
What does the alleged “system deficiency” consist of?		
Has there been an allegation that flight safety may have been jeopardized?		
What does this allegation consist of?		
How does the allegation relate to flight safety?		
Has there been an allegation that less than the minimum required separation between aircraft may have existed?		
Where did this occurrence take place?		
When did it take place?		
Which aircraft were involved?		
Is there a specific instance of jeopardizing flight safety or loss of required separation that is being investigated? - If so, specify the incident. - If not, specify where the air traffic control system deficiency is alleged to have taken place. - Describe how the system deficiency may have jeopardized flight safety or caused a loss of separation.		

Statement of Test to be Met

Flight Service Station Review Investigations
- must be investigating reported occurrences relating to aviation safety
- occurrences must bring into question reliability of Flight Service Station System

Relevant Questions	Departmental Response	Assessment
Does the record relate to an investigation by a Flight Service Station Review Committee?		

Relevant Questions	Departmental Response	Assessment
Was this Committee established by the Department of Transport?		
What was the Committee investigating?		
Was the Committee investigation a reported occurrence relating to aviation safety?		
Where, when, who reported the occurrence?		
What did the occurrence involve?		
Is the Committee examining procedures or actions taken by a Flight Service Station?		
Is the Committee examining a systems failure at a Flight Service Station?		
If not, what aspect of a Flight Service Station operation is the Committee examining?		
How is the reliability of the Flight Service Station or System then brought into question?		

Statement of Test to be Met

Canadian Forces flight safety accident investigations

- must be other than boards of inquiry under National Defence Act

Relevant Questions	Departmental Response	Assessment
Does the record relate to a Canadian Forces Flight Safety Accident Investigation?		
Did the accident involve a CF or allied aircraft? Fixed wing or Rotary?		
Is the Canadian Forces Flight Safety Accident investigating an accident or an incident?		
When did the accident/incident occur? What are the pertinent dates of the flight safety investigation? Is the flight safety investigation completed? Has corrective or remedial action been taken?		

Relevant Questions	Departmental Response	Assessment
Have the findings of the flight safety investigated been communicated to the convening authority? Have the results of the flight safety investigation been promulgated?		
Is there a parallel Military Police or SIU investigation, Board of Inquiry or Summary Investigation? If so, has paragraph 16(1)(a) also been claimed?		

Statement of Test to be Met
Canadian Forces Fire Marshall Investigation

Relevant Questions	Departmental Response	Assessment
Does the record relate to an investigation conducted by or under the authority of the Canadian Forces Fire Marshall for the unique and precise purpose of determining the cause of fire?		
Did the fire involve military installations (buildings), equipment (vessels, weapons), ammunitions, stores, POL (petroleum, oil and lubricants) or natural resources (trees, crops)?		
When did the accident/incident occur? What are the pertinent dates of the CF Fire Marshal investigation? Is the CF Fire Marshall investigation complete? Has corrective or remedial action been taken? Have the findings been communicated to the convening authority?		
Is the CF Fire Marshall investigating arson? If so, is there a parallel Military Police investigation? A Board of Inquiry? A Summary Investigation?		

Statement of Test to be Met
- Special Inquiries Unit, Inspector General Branch of the Canadian Penitentiary Service

Relevant Questions	Departmental Response	Assessment
Does the record relate to an investigation by the Special Inquiries Unit, Inspector General's Branch of the Canadian Penitentiary Service?		
What did this investigation consist of? Is it completed?		
Is there any other statutory provision under which the investigation could take place?		
If so, what is this provision?		

Paragraph --16(1)(b)
- Information relating to investigative techniques or plans for specific lawful investigations;

Statement of Test to be Met
- Investigative techniques must be used for investigations described in s.16(4)

Relevant Questions	Departmental Response	Assessment
Does the record describe an investigative technique or plans for an investigation?		
- If so, is the technique used in investigations described in subsection 16(4)?		
Are the plans specifically directed to an investigation detailed in subsection 16(4)?		
See above for questions relating to subsection 16(4).		

Statement of Test to be Met

- Investigative techniques can relate to investigations in general
- must show technique is used in a type of investigation

Relevant Questions	Departmental Response	Assessment
What investigative technique does the record describe?		
Is the technique used in the conduct of investigations as defined in subsection 16(4)?		
What kind of investigations is the technique used in?		
Has the technique been used in the past?		
For how long has the technique been used?		
Is the technique used currently? Is it likely to be used again?		
How often do the type of investigations for which the technique is used occur?		
When is the last time the technique was used?		
Is the technique being used in any ongoing investigations? - how many? - describe.		

Statement of Test to be Met

Techniques include:

- procedure
- follow-up
- verification
- conduct
- must not be generally known

Relevant Questions	Departmental Response	Assessment
What role does the technique play in the investigation?		
How does the technique advance or assist in the investigation?		

Relevant Questions	Departmental Response	Assessment
Is it used to gather information?		
Is it a technique to determine procedure in investigation?		
Is it used to assist in follow-up?		
Is it used to verify information obtained in an investigation?		
What equipment or systems are employed in the technique?		
Is the technique generally known to the public? - does it involve obvious fact finding activity?		
Does the record describe an investigative technique or does it relate more to a description of what occurred in a particular investigation?		
Will the investigating agency's methodology become known if the document is disclosed?		
Would disclosure result in the agency having less use for the technique? - how?		
If not, what is the basis for asserting that the information relates to a 'technique'?		

Statement of Test to be Met

Investigative Plans
- must have a specific investigation planned
- must be a lawful investigation per subsection 16(4)

Relevant Questions	Departmental Response	Assessment
Does the record describe plans for investigations?		
Is a specific investigation contemplated?		
What is the investigation that is contemplated?		
Does the record relate to plans for an ongoing investigation?		
Is this investigation general or specific in nature?		

Relevant Questions	Departmental Response	Assessment
Does the investigation have a stated objective?		
Does the investigation have targets/suspects? - who or what are these targets?		
Is the investigation authorized or within the powers conferred by the Federal legislation described in subsection 16(4)?		
For questions relating to subsection 16(4) please see above.		

Statement of Test to be Met

- Plan can relate to ongoing or contemplated investigations.
- Must be reasonable basis to conclude investigation will be conducted.

Relevant Questions	Departmental Response	Assessment
Do the plans relate to an ongoing investigation?		
Does the record describe the next steps or plans for advancing the ongoing investigation? - how?		
If the investigation is not ongoing, does the record describe plans for a contemplated investigation?		
When is this investigation contemplated to begin?		
What is preventing this investigation from commencing now: resources? Authorization? Expertise? Equipment? Management directions?		
What will the investigation be about?		
Is there any contingency which may cause the investigation not to take place? - What is this contingency? - What is the likelihood that the investigation will not go ahead?		
When will a decision be made about whether the investigation will proceed?		

Paragraph --16(1)(c)

Information the disclosure of which could reasonably be expect to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information

(i) relating to the existence or nature of a particular investigation;
(ii) that would reveal the identity of a confidential source of information; or
(iii) that was obtained or prepared in the course of an investigation.

Statement of Test to be Met

Includes information injurious to the enforcement of a law of Canada or a province

Relevant Questions	Departmental Response	Assessment
Does the record contain information relating to the enforcement of a law of Canada or the law of a province?		
What legislation is involved?		

Statement of Test to be Met

Information injurious to the conduct of lawful investigations
- [federal laws only]

Relevant Questions	Departmental Response	Assessment
Does the record relate to the conduct of lawful investigations?		
Under what statute was the investigation conducted?		
Is this is a Federal statute?		

Statement of Test to be Met
Enforcement of a law of Canada or a province

Relevant Questions	Departmental Response	Assessment
If the record relates to enforcement of a law of Canada or a province: - What is the subject matter of the enforcement activity? - Does the enforcement activity take place under the statute?		
Will the enforcement activity result in possible imposition of sanctions?		
- What do these sanctions consist of?		
- Who is the target of the enforcement activity?		
If the activity does not result in possible sanctions, on what basis does the government institution claim it is enforcement activity?		
See above under subsection 16(4) for questions relating to enforcement.		
Does the activity relate to seeking voluntary compliance by a regulated person?		
- If so, has the compliance been achieved?		
If voluntary compliance is being sought, what is the basis of the claim that enforcement activity is involved?		

Statement of Test to be Met
Conduct of lawful investigations - must have a specific investigation - investigation must be legal - conduct of investigation must be legal

Relevant Questions	Departmental Response	Assessment
If the record relates to the conduct of investigations, what investigation is involved?		
Under what statute did the investigation take place?		
Did the investigation relate to a particular matter or was it general in nature?		
Was the information used in a number of related investigations?		
What are the statutory powers conferred on the investigating body?		
Were the statutory powers complied?		
Was the investigation conducted legally?		
Does the record relate to information gathering or the conduct of the investigation?		
Was the information or evidence gathered legally?		
Was the conduct of the investigation legal?		
- If not, has the information been used in the investigation?		
What does it relate to?		
Has it been excluded by a court or other body?		

Statement of Test to be Met
Information relating to the existence or nature of a particular investigation

Relevant Questions	Departmental Response	Assessment
If the information relates to the existence or nature of a particular investigation, specify the investigation involved.		
When did the investigation begin?		
What is the current status of the investigation?		
Has the investigation ended?		
When did it end?		
If the investigation has ended, does it have ongoing relevance to other investigations?		
How is it related to these other investigations?		
If the investigation has been completed, did it result in the imposition of sanctions against the target of the investigation?		
Did this take place in an open court proceeding or a proceeding before another tribunal?		
Was the information made public in those proceedings?		

Statement of Test to be Met
Information revealing the identity of a confidential source - source must be confidential in nature

Relevant Questions	Departmental Response	Assessment
Does the record reveal the identity of a source?		
Was the source used in the course of the investigation?		
Was the source used in connection with the enforcement of a federal/provincial statute?		

Relevant Questions	Departmental Response	Assessment
Under what circumstances did the source provide the information?		
Did the source provide information to the investigatory or enforcement agency concerned?		
If not, how was the information obtained?		
Did the source provide the information on the understanding that confidentiality would be maintained?		
Is there any document evidencing this intention?		
Is assurance of such confidentiality a policy of the investigating agency?		
Is confidentiality provided in other investigations of this nature?		

Statement of Test to be Met

- information obtained or prepared in the course of (while doing) an investigation
- record must have been created during and because of the investigation

Relevant Questions	Departmental Response	Assessment
When was the record obtained or prepared?		
Who obtained it?		
Who prepared it?		
Did the investigatory body obtain or prepare it?		
Did the investigatory body obtain or prepare the document during the investigation?		
What role did the information have in the conduct of the investigation?		
What role did the information have in enforcing the statutory provision concerned?		

Relevant Questions	Departmental Response	Assessment
Was the purpose of obtaining or preparing the information to further the conduct of investigation or the enforcement of the statute concerned?		
If the information was obtained during the course of an investigation or enforcement activity, ask who originally prepared it?		
What was the original purpose of the record?		
How was the record relevant to the conduct of the investigation or the enforcement activity?		
Under what arrangements was the record obtained by the investigating or enforcing agency? Was it obtained legally?		

Statement of Test to be Met

Must result directly from disclosure
- publicly

Available information gives rise to a need to show why CONFIRMATION creates injury

Relevant Questions	Departmental Response	Assessment
Is the existence of the investigation or enforcement activity publicly known?		
What degree of circulation was attached to this disclosure? Client-solicitor? Parties only?		
What degree of information has been disclosed publicly about the investigation or enforcement activity?		
Is there a link between the record at issue and the information that has been disclosed publicly?		
- If so, did any injury result from the public knowledge or prior disclosure?		
What degree of injury resulted from the prior disclosure?		
Has that injury been mitigated in any fashion?		

Relevant Questions	Departmental Response	Assessment
- government statements - follow-up explanations - passage of time		
How would disclosure of the information add to the injury, if any, from the prior disclosure?		
Would confirmation that the information played a role in the investigation or enforcement activity create injury to any ongoing court proceedings or proceedings before other tribunals?		
Would confirmation of the information call into question the original result of the investigation or enforcement activity? - if so, discretion to disclose under this section should be considered.		

Statement of Test to be Met

Injury test for COMPLETED INVESTIGATIONS requires
- injury to a related investigation
- injury to specific, contemplated investigations
- ongoing prejudice to existing or future enforcement activity must be very specific, not enough to allege a general "chilling effect"

Relevant Questions	Departmental Response	Assessment
What is the current status of the investigation or enforcement activity?		
Has it been completed? When?		
What was the result of the investigation or enforcement activity?		
Were sanctions imposed?		
Was the matter disposed of in a court or other proceeding?		
Is that proceeding ongoing?		
If that proceeding is finished, have any appeal periods expired?		
How would disclosure now cause injury to any ongoing		

Relevant Questions	Departmental Response	Assessment
investigation or enforcement activity?		
Were there related investigations?		
Was there further enforcement activity contemplated?		
Describe these related or further activities.		
If future enforcement or investigation is contemplated, when will it take place?		
On what basis will it take place?		
How would disclosure of the information relating to the prior investigation prejudice the outcome?		
Are the parties the same or basically alike?		
Is the evidence similar?		
- If not, on what basis is it claimed that harm to the investigation or enforcement activity will occur?		

Statement of Test to be Met

Discretionary Exemption (see below at s. 16(1)).

Relevant Questions	Departmental Response	Assessment
For relevant factors see below under s. 16(1).		
Would disclosure question either the legitimacy or the result of the investigation or enforcement activity?		
Would disclosure reveal the existence of illegal/unethical conduct during the investigation or illegally gathered evidence?		
Would disclosure permit/allow the target of the investigation or enforcement activity to successfully pursue redress from the investigating body or from the government?		
Were the circumstances under which the investigation took place manifestly unfair? Bad faith involved? Malice?		

Relevant Questions	Departmental Response	Assessment
Is the legal basis for the investigation or enforcement activity in question?		

Statement of Test to be Met

- Section 50 applies

Relevant Questions	Departmental Response	Assessment
Did the head of the institution have 'reasonable grounds' on which to refuse disclosure?		
Was the injury test correctly applied?		
Did the head consider disclosure notwithstanding that the injury test was met?		
Was the consideration by the head of the institution reasonable in the circumstances?		
See questions relating to section 16(1)(d) information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.		

Paragraph -- 16(1)(d)

Information the disclosure of which could reasonably be expected to be injurious to the security of penal institutions.

Statement of Test to be Met

- All types of penal institutions qualify (see Note below)

Relevant Questions	Departmental Response	Assessment
Does the information relate to a penal institution?		
What institution does it relate to?		
NOTE: The term “penal institutions” means a federal facility for the confinement of convicted criminals. It is also termed		

Relevant Questions	Departmental Response	Assessment
penitentiary or prison. It does NOT include jails or detention centers. a. Provincial jurisdiction. Jails are generally smaller institutions originally established by counties or municipalities. Detention centres are larger, more modern facilities built to serve the needs of several regions. Jails and detention centres serve as the point of entry into the institutional system, and hold offenders on remand (awaiting trial, sentencing or other proceedings) or offenders sentenced to short terms (approximately 60 days or less); and offenders awaiting transfer to a federal or provincial correctional facility. Correctional centres house sentenced offenders typically serving periods of incarceration from 60 days to two years less-a-day. b. Federal Jurisdiction. The Correctional Service of Canada (CSC) is the federal government agency responsible for administering sentences of a term of two years or more, as imposed by the court. CSC is responsible for managing institutions of various security levels, including prisons and reformatories, and supervising offenders under conditional release in the community. The Prisons and Reformatories Act defines “prison” as a place of confinement other than a penitentiary. The Corrections and Conditional Releases Act defines ‘penitentiary” as a facility of any description, including all lands connected therewith, that is operated, permanently or temporarily, by the Correctional Service for the care and custody of inmates.		

Statement of Test to be Met
Relates to the ability to keep the institution secure against escape or outside infiltration

Relevant Questions	Departmental Response	Assessment
Does the information relate to plans, renovations, access and security systems, or security procedures at penal institutions?		
Would the information facilitate escape from the institution?		
Would the information facilitate infiltration of the institution?		
Would it assist in allowing smuggling of contraband or illicit substances into the institution or out of the institution?		
Would it assist in facilitating unauthorized communications in or out of the institution?		

Statement of Test to be Met
- Information should be relatively detailed - Information should be current

Relevant Questions	Departmental Response	Assessment
How detailed is the information?		
Is the information technical in nature?		

Statement of Test to be Met
- Discretionary exemption (See questions at s. 16(1))

Relevant Questions	Departmental Response	Assessment
How would disclosure of the information add to what could reasonably be observed from inside the institution?		

Relevant Questions	Departmental Response	Assessment
- If not, how would disclosure compromise the security of the institution? Of the staff?		
How current is the information?		
Has the information been superseded?		
If the information related to planned renovations or system changes, were those plans put into effect?		
Is it contemplated they will be put in effect? - If so, when?		
If the information is not current or does not relate to existing plans, how would it compromise the security of the penal institution?		

Paragraph -- 16(2)

The head of a government institution may refuse to disclose any record requested under this Act that contains information that could reasonably be expected to facilitate the commission of an offence, including, without restricting the generality of the foregoing, any such information

(a) on criminal methods or techniques;
(b) that is technical information relating to weapons or potential weapons; or
(c) on the vulnerability of particular buildings or other structures or systems, including computer or communication systems, or methods employed to protect such buildings or other structures or systems.

Statement of Test to be Met

Examples in paragraphs (a) - (c) are non-exhaustive but information should be similar

Relevant Questions	Departmental Response	Assessment
Does the information relate to the potential commission of an offence?		
If the information is not described in paragraphs (a) - (c), is the information similar in nature to those paragraphs?		
- If not, how would disclosure of the information relate		

Relevant Questions	Departmental Response	Assessment
to the commission of an offence?		
What provision of the Criminal Code is involved?		
What provision creating an offence in a provincial statute is involved?		

Statement of Test to be Met

Criminal Methods or techniques
- must be criminal in nature
- must involve a method or technique that would facilitate the commission of an offence
- must be specialized and beyond common public knowledge

Relevant Questions	Departmental Response	Assessment
Does the information describe criminal methods or techniques?		
Describe what the technique or method relates to?		
Is the technique or method commonly involved in criminal activity?		
What offences would be involved?		
Does the information describe a procedure, method, process, routine, system, technical approach, organization, practice, logic structure, route formula, protocol way, blueprint, drawing, design diagram, picture illustration, short cut, trick, computer program, or system for the commission of an offence?		
- Is it specialized?		
- Is it used exclusively in the commission of offences?		
- If not, is it used by the public generally for legal activity?		
If the method or technique is generally known, how would disclosure facilitate the commission of an offence or hinder the security of particular buildings, structures or systems?		
If the information relates to a computer program or		

Relevant Questions	Departmental Response	Assessment
database, is the information general in nature?		
How would such information be used to facilitate a criminal offence?		

Statement of Test to be Met

Technical information relating to weapons or potential weapons
- must be technical or specialized
- would include methods of destruction (bombs, explosives)

Relevant Questions	Departmental Response	Assessment
Does the information relate to weapons or potential weapons?		
Is the information technical in nature?		
Is the information generally known by the public?		
What sector of the public would be aware of this information?		
Does the information describe the technical capability or functioning of a weapon?		
Is this weapon commonly used in the commission of offences?		
Does it describe the technical capability or operation of a potential weapon?		
In what offences could such weapons be used?		
Is the predominant purpose of the weapon for use in illegal activity?		
Does the information describe methods of destruction used in criminal activity?		
Does it describe the use or construction of bombs?		
Does it describe the use of explosives?		
Does it describe materials or other substances that would		

Relevant Questions	Departmental Response	Assessment
cause bodily harm?		

Statement of Test to be Met
Injury Test disclosing - must facilitate commission of an offence - must be specific and detailed enough to facilitate commission of an offence - avoidance of the law not included Discretionary Exemption (see below at s. 16(1) and (2))

Relevant Questions	Departmental Response	Assessment
How would disclosure of the information facilitate the commission of an offence?		
How detailed or specialized is the information?		
If the information is not detailed or specialized, how would it make the commission of a criminal offence easier?		
To what degree is the information known by the public?		
If the information is know by the public, how would a disclosure add to public knowledge about the commission of an offence?		
Who has had access to the information?		
Is this information disclosed in the normal course to employees or others?		
- If so, have offences been committed by people equipped with this knowledge in the past?		
Disclosure controlled?		
What measures are taken to control disclosure?		
Does the information relate to breaking the law?		
Does the information relate to avoiding the law?		
- If so, why is the commission of an offence contemplated?		

Subsection -- 16(1) & (2)

16(1) The head of a government institution may refuse to disclose any record requested under this Act that contains...

16(2) The head of a government institution may refuse to disclose any record requested under this Act that contains information...

Statement of Test to be Met

Discretionary Exemptions
- Disclosure must be considered notwithstanding record is described in 16(1)(a), or (b)

Relevant Questions	Departmental Response	Assessment
Has the head of the institution considered disclosing the records described in s. 16(1)(a) or (b)?		
- If so, what was the reason disclosure was refused?		

Statement of Test to be Met

- Disclosure must be considered notwithstanding injury in s. 16(1)(c) or (d) or 16(2) may occur

Relevant Questions	Departmental Response	Assessment
Did the head of the institution consider disclosing the record notwithstanding the injury described in paragraph 16(1)(c), (d) or 16(2) may occur?		

Statement of Test to be Met
Characterize and quantify the public interest in disclosure of information relating to the investigation/enforcement potential offence.

Relevant Questions	Departmental Response	Assessment
If so, why was it decided not to disclose the record?		
What was the purpose of the investigation or enforcement activity?		
Does that purpose relate to public safety, health or security?		
What was the scope of the investigation?		
Was it national or more local in scope?		
Does the investigation relate to a potential fraud on the public?		
Were measures taken to protect public safety through the enforcement or investigation activity?		
Does the record contain information that may assist in apprehending, or preventing criminal activity?		
Would disclosure of the information assist individuals to avoid becoming victims of criminal activity?		
Does the investigation or enforcement action have historical importance?		
Does it relate to a matter of public concern or interest?		
How old are the records in question?		
If they are under 20 years and paragraph 16(1)(a) is claimed, do the records have any current relevance?		
If paragraph 16(1)(b) is claimed, do the records have any current relevance?		
Would disclosure of the information assist a member of the public in restoring his or her reputation? His or her innocence?		
Would disclosure assist a member of the public in receiving a reparation? Other remedy?		

Relevant Questions	Departmental Response	Assessment
Did the investigatory or enforcement activity involve illegal actions?		
Did the investigatory or enforcement activity involve allegation of illegal unethical conduct?		
Did the investigatory or enforcement activity take place in a context now regarded as manifestly unfair?		

Statement of Test to be Met

- Weigh this against the injury to the investigative, enforcement activity risk to the security of the penal institution.
- the risk of a criminal offence.

Relevant Questions	Departmental Response	Assessment
What is the injury that would occur if disclosure was made of information in paragraphs 16(1)(a) or (b)?		
With respect to paragraphs 16(1)(c) or (d) or 16(2), how serious is the contemplated injury?		
Does the age of the records mitigate against this injury?		
Are there mitigating measures the government could now take in order to reduce the risk from disclosure?		

Statement of Test to be Met

- Factors considered must be relevant
- Must be related to the purpose of the provision

Relevant Questions	Departmental Response	Assessment
Is the reason for refusing disclosure related to protecting the effectiveness of an investigation or protecting the reputation of an investigatory agency and/or any of its personnel?		
If it is the latter, on what basis would the reputation of the agency be called into question?		

Relevant Questions	Departmental Response	Assessment
Is the purpose for not disclosing the information related to avoiding accountability or embarrassment by the investigatory agency, or avoiding potential loss of morale by the investigative agency?		
- If so, how is this related to the purposes of section 16?		

Statement of Test to be Met
Standard of Review s. 50 applies to paragraphs 16(1)(c) and (d).

Relevant Questions	Departmental Response	Assessment
If discretion was exercised by refusing to disclose information described in paragraphs 16(1)(c) or (d), were the grounds for refusing to disclose reasonable?		
Were they related to the purpose of paragraphs 16(1)(c) and (d)?		
Did the head of the government institution still consider disclosure notwithstanding that the injury test was met in paragraphs 16(1)(c) or (d)?		

Statement of Test to be Met
S. 49 applies to paragraphs 16(1)(a), (b) and 16(2)

Relevant Questions	Departmental Response	Assessment
Has the head of the institution justified his exercise of discretion not to disclose records described in paragraphs 16(1)(a), (b) and 16(2)? How?		

Subsection -- 16(3)

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

Statement of Test to be Met

Mandatory Exemption

- Class Test
- Requires an arrangement under section 20 RCMP Act

Section 20 of the Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10 reads as follows:

20(1) Arrangements with the provinces – The Minister may, with the approval of the Governor in Council, enter into an arrangement with the government of any province for the use or employment of the Force, or any portion therof, in aiding the administration of justice in the province and in carrying into effect the laws in force therein.

(2) Arrangement with the municipalities – The Minister may, with the approval of the Governor in Council and the Lieutenant-Governor in Council of any province, enter into an arrangement with any municipality in the province for the use or employment of the Force, or any portion thereof, in aiding the administration of justice in the municipality and in carrying into effect the laws in force therein.

Relevant Questions	Departmental Response	Assessment
Was the information generated by the RCMP in carrying out policing services?		
- If so, were the policing services carried out for a province or municipality?		
Which province or municipality?		
Does the province or municipality have an agreement with the RCMP under section 20 RCMP Act?		
Ask to see a copy of the agreement.		

Statement of Test to be Met
Requires request and consent not to disclose

Relevant Questions	Departmental Response	Assessment
Does the agreement contain a request by the province or municipality that information generated by the RCMP and providing policing services be kept confidential?		
Has the RCMP agreed not to disclose this information?		
If such agreement is not contained in the section 20 agreement, ask to see evidence of the request for confidentiality and agreement not to disclose. - Letters, side agreements - Orders in Council - Statutory instruments - Other		

Statement of Test to be Met
Agreement must be current

Relevant Questions	Departmental Response	Assessment
Is the agreement still in full force and effect? If the agreement is still in effect, is the request by the province or municipality that the RCMP not disclose the information still in effect?		
Is this evident from the agreement itself, or from the original correspondence or other documents establishing confidential treatment?		
- If not, on what basis has the agreement to treat the information in a confidential way been carried on?		

Statement of Test to be Met
Rescission of an agreement has retroactive effect

Relevant Questions	Departmental Response	Assessment
Has the agreement to treat the information in a confidential fashion been rescinded?		
Did this involve mutual consent?		
- If it did not involve mutual consent, which party rescinded the agreement?		
If the province rescinded the agreement, on what date did the rescission take place?		
Has the record in question been generated since the rescission?		
- If not, was the document created while the agreement was in place?		
- If so, subsection 16(3) will not apply.		

Statement of Test to be Met
- Termination means non-renewal agreement applies to date of termination - Look at applicable provincial FOI Legislation

Relevant Questions	Departmental Response	Assessment
Was the agreement to treat the information in a confidential matter terminated or not renewed?		
What date did this come into effect?		
Was the document created after this date? - if so, subsection 16(3) does not apply.		
Was the document created while the agreement was in effect?		
Does the applicable provincial FOI legislation containing a different provision governing disclosure of this information under that statute?		

Relevant Questions	Departmental Response	Assessment
- If so what does that provision require?		
Consider whether this information should be disclosed to the requester.		

Endnotes

1. SOR/84-570, S.1.

2. See debates of June 25, 26 and 30, 1981; (Issues No. 45, 46 & 47).

3. The *Concise Oxford Dictionary,* 8th Edition, defines the term '*lawful*' as: "*conforming with, permitted by, or recognized by law; not illegal or illegitimate*".

4. See for example this statement of Mr. Francis Fox found at issue #47, page 13

"*What he is saying is, yes. What is being said is that our advice is that there are some classes of investigations that are done that are administrative investigations, I gather, which are not specifically authorized by an Act of Parliament. I assume that these must happen rather often. We do not always have investigations under the* **Inquiries Act***. The other side of the coin, the one that you are arguing, is that you can find some general power somewhere in some statute creating the department giving you powers to investigate. But our advice from the various departments at the moment is that there is, indeed, a class of investigation that should be specified in the regulations, because it is not clear that these investigations were done pursuant to the enforcement or the administration of an Act of Parliament.*"

5. See sections 22 and 32 of the *Canada Ports Corporation Act*, R.S.C. 1985, c.C-9.

6. *Canada Packers Inc. v. Minister of Agriculture*, [1989] 1 F.C. 47 (C.A.).

This decision was appealed. Although the decision was reversed in *Rubin v. Canada (Clerk of the Privy Council)* , [1994] F.C.J. No. 316, 113 D.L.R. (4th) 275, 167 N.R. 43, 25 Admin L.R. (2d) 241, 54 C.P.R. (3d) 511, 77 F.T.R. 320 (note) (F.C.A.) which was in turn affirmed by the Supreme Court of Canada, the appellate courts did not address the specifics of paragraph 16(1)(c).

Section 17

The Provision:

17 *The head of a government institution **may refuse** to disclose any record requested under this Act that contains i**nformation** the **disclosure** of which **could** **reasonably be expected** to t**hreaten** the **safety of individuals**.*

Preliminary matters:

The *Access to Information Act*, R.S.C. 1985, c. A-1, (the Act) gives any Canadian Citizen or permanent resident, within the meaning of the *Immigration Act* and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, our Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act, unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under section 68 or 69.

Section 17 is a discretionary injury exemption. Applying a discretionary exemption is a two-step process. First, the head must determine whether disclosure of the information in a record, or part thereof, could reasonably be expected to cause the prejudice enunciated in the exemption. Secondly, he/she must exercise his/her discretion whether to exempt or disclose the information.

When reviewing the application of a discretionary exemption like section 17, it is important to remember that the government institution has the evidentiary burden of showing not only that the information falls within the scope of the exemption, but that the head of the institution or his/her delegate properly exercised their discretion in deciding not to disclose the information.[1] If there is no evidence establishing that the institution head considered whether or not to disclose information subject to a discretionary exemption, or if the evidence about why they decided to refuse disclosure indicates the head relied on irrelevant or unreasonable factors or on improper considerations or that the decision is not consistent with the objects of the Act (that of extending disclosure of government information subject to limited and specific exemptions), then it is open to our office, and to the Federal Court on a review, to question or reject the decision to refuse disclosure.

The "Test":

What are the tests to be applied in determining whether information in a record may be exempted under section 17? At the present time, there has been no decision from the Federal Court of Canada on the criteria to be met in order for the provision to apply. However, there has been jurisprudence from other jurisdictions that could be applied by analogy to the *Federal Act*. The following will summarize the Office's interpretation of that provision.

Since we are dealing with a prejudice exemption, there are really two tests to be met. Firstly, what constitutes a reasonable expectation of harm for the purpose of prejudice exemptions generally and what is the meaning of a '*reasonable expectation of harm*' test in a personal safety situation. Secondly, does the reasonable expectation of harm constitute a threat to the safety of individuals.

a) Where disclosure could reasonably be expected to:

For an exhaustive definition of this term, please refer to the Lexical section of the Grids.

While there have been only a few Federal Court decisions on the interpretation of this provision, there has been jurisprudence dealing with the prejudice portion of the test required under paragraphs 20(1)*(c)* & *(d)* which contains the same wording.

It should be noted that courts interpreting the parallel provisions of the Ontario Act have held that harm to an individual under [section 17/*Ontario FOIA* equivalent] need not be "probable" although it must be reasonable. The Court noted that the injury criteria developed in the *Canada Packers* case was developed in a case where personal safety was not an issue, and was too stringent in light of the purpose of the section 17 exemption. *Ontario (Minister of Labour) v. Holly Big Canoe*, (2 December 1999, unreported, Ontario C.A.). The Court set out the injury test in relation to Ontario is section 17 equivalent follows:

> Harm to an individual need not be probable for a government institution to successfully rely on the exemption provisions in s. 14(1)(e) and 20 of the *FOI*. The probable harm test was developed in a context where personal safety was not in issue [*Canada Packers*].

The expectation of harm must be reasonable, but it need not be probable. … Similarly [to s.14(1)(e)], s. 20 [section 17 *Access to Information Act*] calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, it not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes ss. 14(1)(e) or 20 to refuse disclosure.

Description of possible harm, even in substantial detail, is often insufficient in itself. At a minimum, there must be a clear linkage between the disclosure of specific information and the harm alleged. We must be given an explanation of how and why the harm alleged would result from disclosure of specific information. However, if it is self-evident that as a result of disclosure of the record:

- harm will be done;

- how (and when) it will be done; and
- why it will be done, little explanation need to be given.[2]

What you want is a clear, logical and believable explanation of the harm that could be expected if the information is disclosed and the connection between the disclosure and the harm - i.e., the logical link.

Where inferences must be drawn, or the answers to any of these questions are not clear, then more explanation would be required. The more specific and substantiated the evidence, the stronger the case for the exemption. The more general the evidence or the less plausible (believable) the result, the more difficult it would be to be satisfied as to the linkage between disclosure of particulars documents and the harm alleged - i.e., the more difficult it will be to conclude that the test has been met.

The context surrounding the disclosure of the information is also relevant. The jurisprudence has established certain specific conditions that could be taken into consideration when determining whether a reasonable expectation of harm would result from disclosure:

- **Use of the information:** You must assume that the information would be used in assessing whether its disclosure would give rise to a reasonable expectation of harm.[3] For example, what use would likely be made of the information by a competitor is a relevant factor to be considered. In what way would this use likely lead to harm? For example, what use would likely be made by the requester or might be made by the requester? These are relevant factors in determining how use could lead to the specific harm.

- **Availability of the information:** It is relevant to consider if the information sought to be kept confidential is already available from sources otherwise available to the public and whether it could be obtained by observation or independent study by a member of the public acting on their own.[4] For example, where the information requested is already available elsewhere to the public, there may be need for exemption under this exemption.[5] The party alleging that the information is publicly available (i.e., even if it's us) has the burden of proof. Not only must the party prove that the withheld information is otherwise publicly available, but if it is government information, that the information was released from an official source.[6]

- **Press coverage:** Press coverage of a confidential record is relevant to the issue of expectation of probable harm from its disclosure.[7] When the same or similar information has already been disclosed and received press coverage, no additional harm could be expected from the release of the requested information. Note, however that a third party cannot claim that media would misinterpret the requested information and would cause prejudice to the third party. This argument has been found purely speculative.[8]

- **Time:** Evidence of the period of time between the date of the confidential record and its disclosure is relevant.[9] In some cases, the older the record, the less likely an injury could occur.

- **Other relevant documents:** Each document must be considered on its own merit and in the context of all the documents requested for release since the total contents of the release may have a considerable bearing on the reasonable consequences of its disclosure.[10] On the other hand, a single record may cause harm when disclosed but disclosure may result in no harm when disclosed in full context or with an explanation.[11]

It is the probable consequences of disclosure which are most significant in determining whether a document or a portion thereof may be exempted under this section, not the nature of the document or the nature of the information contained in the document.

b) Threaten the safety of individuals:

Once you are satisfied that disclosure of the requested information might well result in a reasonable expectation of harm, the second step is to determine whether that harm constitutes a threat to the personal safety of individuals.

Dictionary definitions can be considered in determining the ordinary meaning of a provision when the suggested meaning in the dictionary is consistent with the purpose of the Act.

The terms '*threaten*' and '*safety*' is defined as follows in the Concise Oxford Dictionary, 8th ed. (Oxford University Press, 1991):

- **Threaten:** "1. *Make a threat or threats against. 2. be a sign or indication of (something undesirable)*.... "

- **Threat:** "1b. *... a menace of bodily hurt or injury, such as may restrain a person's freedom of action...3. a person or thing as a likely cause of harm, etc*."

- **Safety:** "1. *The condition of being safe; freedom from danger or risks.*"

Case law from other jurisdictions can also help us assess the scope of this exemption. In the United States, exemption 7*(f)*, 5 U.S.C. @ 552*(b)*(7)*(f)*, justifies withholding of law enforcement investigatory records if disclosure "*could reasonably be expected to endanger the life or physical safety of any individual.*" But under the U.S. Law, the records must be law enforcement investigatory records. Section 17 of the Act does not make this a requirement. The records may be those under the control of any government institution, and it does not matter where the records originated.

It would appear from the U.S. jurisprudence that certain specific factors may be taken into consideration when determining whether a reasonable expectation of harm to an individual would result from disclosure. These are:

c) Nature of the requester:

- **Mental health:** Where requester has a history of mental or emotional difficulties and that disclosure of the information could worsen or aggravate his/her condition to the point that he/she could harm someone.[12]

- **Violent behaviour:** Where requester has a history of violent behaviour, disclosure of the identity of informants who assisted the government in its case against the requester could endanger the safety of the informants.[13]

It is fair then to look at the probable effect of disclosure from the perspective of the requester - i.e., what use might this specific requester likely make of the requested information? What, in view of what is known about the requester, might the requester do to him/herself or someone else if the information is disclosed?

d) Nature of other individuals:

- **Nature of job:** Individuals performing certain jobs can be subject to an enhanced danger when their identity is revealed.[14]

- **Unidentified individuals:** In some cases, the risk to the public arising from the disclosure of the requested information is so obvious that it is not necessary in order to exempt the requested information or to clearly identify the individuals whose safety would be threatened.[15]

Equally, it is fair to look at the potential effect that disclosure might have on other individuals if the information was disclosed. Also, where the information requested is already available elsewhere to the public, there may be no need for exemption under section 17 of the Act.

The exemption permits a government institution to refuse access to information the disclosure of which "*could reasonably be expected to threaten the safety of individuals*". While there could be exceptions, physical safety is the normal interpretation to be given to "*safety of an individual*".

The use of the plural, '*individuals*' does not mean that the safety of at least two individuals must be threatened before the exception will apply. This would lead to illogical results. The real intent of the legislator can be found in this statement of Mr. Francis Fox:

- "*I suppose the clause is there and it is intended to ensure that information, the disclosure of which could physically endanger an individual, is not disclosed under the legislation. It will apply primarily to protect informers, and criminal, quasi criminal, narcotics and security areas, and persons providing information about inmates... . I do not think there is any responsible group or individual who would advocate the release of information that could harm another person. Physical safety is the normal interpretation of 'safety of individuals'...*"[16] [Emphasis added.]

Normally, the test will be met when the institution can show logically and clearly:

- A real risk to the personal safety of an individual (or type of individual);
- how and when this risk may reasonable be expected to occur; and
- why the risk would exist.

Case Law

Ontario

P-169 Access to the contents of annual reports of the total number of every species of animal used for research in commercial research facilities was denied under S.14(1)(e)and (i) and S. 20 because the type of information contained in the reports has been used by radical groups and individuals to target research facilities and their employees for acts of violence. The affected parties and the institution indicated serious concerns that disclosure of the records could reasonably be expected to result in threats to employees and the security of their facilities from extremists in the animal rights movement. These concerns were both immediate and future and related to building security, theft of property, theft of privileged/ confidential information, violent occupation of buildings and vandalism of buildings, their contents and computer installations among other things. The tribunal shared the concerns of the institution and the affected parties that should the records be disclosed they would be in the public domain and therefore available to all of the individuals and groups who are involved in the animal rights movement, including those who may elect to utilize acts of vandalism and property damage to promote their cause.

P-391. The record at issue formed part of the an "Inquiry" ordered by the Ministry under section 25 of the Police Services Act, into the conduct and performance of the Belleville Police Force and the Belleville Police Services Board. The Ministry provides detailed representations in support of the position that release of this information could reasonably be expected to endanger the lives and/or physical safety of the law enforcement personnel employed by the Belleville Police Force. The tribunal was satisfied that it has provided sufficient evidence to establish that disclosure of the information could reasonably be expected to result in the type of harm identified in section 14(1)(e). Therefore, it found that the severances qualified for exemption under this section. However, it did not agree with the information severed relating to the types of firearms, and training in their use, provided to the members of the Belleville Police Force as, in the tribunal's mind, disclosure of this information would not reveal any information that has not already been discussed publicly in relation to police forces across the province.

P-460. The Ministry of Correctional Services received a request for access to the requester's institution file from the Whitby Jail. The Ministry granted access to most of the records but denied access to some records, either entirely or in part, pursuant to subsection 14(1)(e). Due to the nature of the information contained in this occurrence report the Ministry felt that disclosure of this record could reasonably be expected to endanger the life and safety of our correctional staff. Apart from simply stating that disclosure of the records at issue could reasonably be expected to endanger correctional staff, the Ministry provided no evidence to support its position, nor was there anything on the face of the records which could connect their disclosure to a reasonably foreseeable harm to the correctional staff or any other person. Therefore, the Tribunal ruled that the Ministry had not established that the exemption in section 14(1)(e) applies to the records.

P-1747. The Ministry of Health and Long-Term Care received a request for access to the following information: the number of obstetricians/gynaecologists billing the Ontario Health Insurance Plan each of 1993, 1994, 1995, 1996 and 1997; the number of obstetricians/gynaecologists billing OHIP for one or more therapeutic abortions in each of the years listed above; and the number of therapeutic abortions billed to OHIP in each of the years listed above. On the basis of the exemptions at section 14(1)(e), the Ministry denied access to two records: 1. One which states the total number of "therapeutic abortion" claims paid in each of the requested fiscal years. 2. The other being a report which states the total number of "therapeutic abortion" claims paid in each of the requested fiscal years. Based on past and continuing events, the Ministry argued that disclosure of the requested information could endanger the life or physical safety of various individuals as well as endangering the security of the facilities where abortions are performed, and, in the course of violent demonstrations, the security of public buildings such as the Queen's Park legislative or other government buildings. The Ministry went on to refer to several violent incidents involving abortion service providers and facilities in the United States and Canada which took place during the 1990s. Noting that the information at issue consisted of general statistical information on a province-wide basis, the Tribunal held that this information cannot be linked to any individual facility or person involved in the provision of abortion services and hence ordered their disclosure.

P-1867 . The appellant submitted a request to the Ontario Human Rights Commission for access to "the complete name, title, company name and address of the anonymous writer of the statement...". This request referred to the OHRC's "letter of December 10, 1997, furnishing me an anonymous and partially blacked-out statement from the respondent, who is conceivably a law professional." The OHRC advised the appellant that it was refusing to disclose the information at issue based on "the detailed and convincing evidence provided to the Adjudicator at the [IPC] by the OHRC and the lawyer." The OHRC further stated to the appellant that inn light of the latter's history of exhibiting behaviour that could endanger those whom you perceive have not treated you fairly and in light, it believed that reliance on the provision of section 14(1)(e) of the *Act* was appropriate in these circumstances. The tribunal was satisfied that the head had taken appropriate considerations into account in exercising his discretion not to disclose the information to the appellant.

P-1973. The Ministry of Transportation received a request for access to the contract signed between the province and named companies. The Ministry granted partial access to the requester concerning the Highway 407 Concession and Ground Lease Agreement but access to one of the diagrams contained in Police Services Agreement was denied pursuant to section 14(1)(e). According to this agreement, 407 ETR is responsible for providing a satellite facility either on or in close proximity to Highway 407. The Ministry explained that the diagram shows in detail the building floor plan, which will act as an operational Detachment for the OPP. The Detachment will house OPP officers and civilian staff on rotating shifts with varied number of personnel at the facility at any given time. The Ministry went on to explain that the Detachment is used to house various items gathered during law enforcement activities and submits that disclosing the floor plan of the detachment could endanger the life or physical safety of law enforcement officers or other persons as there is a constant concern of retaliation or efforts to impede ongoing investigations. The tribunal was satisfied that disclosure of this record could reasonably be expected to endanger the life or physical safety of the OPP officers and civilian staff working within this Detachment.

TABLE OF AUTHORITIES

Disclosure could reasonably be expected

Canada

Air Atonabee v. Canada (Minister of Transport) (1989), 27 F.T.R. 194 (T.D.).
Canada Packers Inc. v. Minister of Agriculture (1988), [1989] 1 F.C. 47 (C.A.).
Information Commissioner of Canada v. Prime Minister of Canada, [1993] 1 F.C. 427 (T.D.).
Matol Botanique International Inc. v. Canada (Department of National Health and Welfare) (June 3, 1994), T-2916-90 (F.C.T.D.):
Merck Frosst Canada Inc. v. Minister of Health & Welfare, (1988), 22 C.P.R. (3d) 177; 20 F.T.R. 73; 20 C.I.P.R. 302 (T.D.)
Northern Cruiser Company Limited v. R. (September 12, 1991) No.T-109-90 (F.C.T.D.); confirmed by F.C.A. (August 28, 1995), A-1039-91.
Ottawa Football Club v. Minister of Fitness and Amateur Sports, [1989] 2 F.C. 480, 24 F.T.R. 62, 23 C.P.R. (3d) 297 (F.C.T.D.).
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Ruby v. Canada (Solicitor General, R.C.M.P.), [2000] F.C.J. No. 779, June 8, 2000, (F.C.A.).

United States

Fensterwald v. CIA, 443 F. Supp. 667 (D.D.C. 1978).
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Sirota v. CIA, 3 G.D.S. para. 83,261 (S.D.N.Y. 1981).
State v. City of Cleveland, Civil No. 59571 (Ohio App. Aug. 27, 1992).

Threaten the safety of individuals

Canada

No Cases Relevant

Ontario

P-169, P-391, P-460, P-1545, P-1747, P-1867, P-1963

United States

Albuquerque Pub. Co. v. Dep't of Justice, 726 F. Supp. 851 (D.D.C. 1989).
Atkins v. Dep't of Justice, No. 88-842, slip. op. at 10 (D.D.C. Feb. 26, 1990).
Barkett v. United States DOJ, Civil No. 86-2029 (SS) (D.C. Col. July 18, 1989).
Docal v. Bennsinger, 543 F. Supp. 38, 48 (M.D. Pa. 1981)
Durham v. United States DOJ, 829 F. Supp. 428 (D.C. Col. August 17, 1993).
EPPS v. United States DOJ, 801 F. Supp. 787 (D.C. Col. September 15, 1992).
Manchester v. DEA, Civil No. 91-2498, 823 F. Supp. 1259 (D.C. Pen. June 11, 1993).
Nunez v. DEA, 497 F. Supp. 209, 211 (S.D.N.Y. 1980).
Pfeffer v. Director, United States Bureau of Prisons, Civil no. 89-899 (D.C. Col. April 18, 1990).
Sanders v. Department of Justice, Civil no. 91-2263-O (C.D. Ark. April 21, 1992).

The Questions

Section – 17
Statement of Test to be Met

Threaten the safety of individuals
- individuals (can be one or more individuals)
- disclosure of information to
- could reasonably be expected to threaten
- Assess how direct the links are between disclosure and threats to safety
  - Need to show a logical progression of events from disclosure to the threat
  - the progression of events should be reasonable and plausible

Relevant Questions	Departmental Response	Assessment
Whose safety could be threatened by disclosure of the information?		
What kind of threat or harm to the individual(s) could be expected from disclosure?		
Is it physical harm or risk of physical harm, or integrity of the person?		
Is there a risk of confinement, or of depriving the individual of freedom of movement?		
Depriving the individual of existing security or protection?		
How could disclosure of the information create this risk?		

Statement of Test to be Met
Does the information itself concern the safety of individuals? - how will disclosure lead to a threat to safety?

Relevant Questions	Departmental Response	Assessment
Does the information reveal existing or planned security measures? - i.e., in a government building - i.e., provided to employees or other individuals - measures taken for the security of (an) individual		

Relevant Questions	Departmental Response	Assessment
Does the information reveal lapses or deficiencies in safety or security systems that could be exploited?		
Does the information reveal how to harm oneself or others?		
Does the information reveal how to obtain weapons, conceal weapons, or other information contemplating use of weapons?		
Does the information reveal how to avoid or neutralize security or protection measures?		
How could the information be used so as to put the individual at risk?		

Statement of Test to be Met

Characteristics of requester

- note that these characteristics must establish a predisposition or motivation to use the information in a way resulting in a threat to the safety of the requester or others

Relevant Questions	Departmental Response	Assessment
Is there anything about the requester record, past behaviour, experience, that gives rise to a concern about how the information will be used?		
Does the requester have a history of violent behaviour? - Is this documented? By whom?		
Does the requester have a history of aggressive or antisocial behaviour? - Is this documented?		
Does the requester have a history of emotional or mental instability? - Is this documented? - Is it combined with a history of threats to others, violence, stalking, reprisals? - Is it combined with a history or harming him or herself?		

Relevant Questions	Departmental Response	Assessment
Is there a medical risk to the requester by reason of the information being disclosed? - What is the degree of risk? - Is it documented?		
Could the medical risk result in physical harm or risk to the requester?		
Could the requester have a motive for using the information in a way that threatens the safety of another person or others? - What is this motivation?		
Why does the department view the requester as likely to follow through with intent to harm another or put them at risk?		

Statement of Test to be Met

- Contact between requester and subject matter of requested information.
- Note this information can often contain personal information.

Relevant Questions	Departmental Response	Assessment
Is the requester acting for someone else who might have a past contact and the subject matter?		
Is there a relationship or past contact between the requester and the subject matter of the information requested?		
Is there past contact between the requester and any person or organization identified in the record?		
Could this past contact give the requester a motive to harm the individuals?		
Does the information in the record consist of or contain personal information?		

Statement of Test to be Met
- Informants/witnesses

Relevant Questions	Departmental Response	Assessment
Does the information requested reveal the identity of an informant or a witness?		
- If so, has the identity of the informant/witness been revealed before? - i.e., by testifying at a trial or discovery?		
Is the identity of the informant/witness known to the requester? If so, has it been confirmed?		
- If so, would disclosure add to the threat to the individual's safety? - i.e., disclosure of whereabouts, particulars of information provided by the informant/witness		
Have other measures been taken to protect the identity of the individual or the information they provided? - i.e., witness protection programs, in-camera proceedings, publication bans ordered by a court		

Statement of Test to be Met
- Is the expectation of a threat to safety reasonable in nature?

Relevant Questions	Departmental Response	Assessment
How old is the information?		
Has the passage of time reduced the threat to safety?		
How current is the medical history of the requester or the history of violent/antisocial behaviour in the requester?		
Were the incidents giving rise to the concern isolated or part of a pattern? Have these incidents given rise to a disciplinary or criminal proceeding?		

Relevant Questions	Departmental Response	Assessment
Is the information of such a nature that disclosure to a requester with no known motivation or an unknown purpose still causes concern about it being used to threaten the safety of others?		
Would disclosure of the information facilitate the commission of a crime against another person?		

Statement of Test to be Met

Discretion to disclose: - government must

1. Consider disclosure notwithstanding that the information in the record is described in section 17
2. Consider disclosure in light of
   - the kind of injury identified in the section
   - the intent of the section
   - the intent of the Act

Relevant Questions	Departmental Response	Assessment
Are safety concerns addressed in section 17 used by the institution as a shield or a sword against the requester? i.e. Are there instances of personal animosity or professional jealousy between members of the institution resisting disclosure and the requester? Would the pertinent records be disclosed in a court proceedings? If so, would the institution insist that they only be disclosed under a seal of confidentiality?		
Assuming disclosure could reasonably be expected to threaten the safety of an individual, is there a countervailing public interest to be met by disclosing the information that outweighs the potential for injury guarded against in this section? i.e. Does the information consists of personal information about the requester?		
Does the requester have a stated use for the information unrelated to a threat to safety? i.e. The information concerns the requester and is required for medical diagnosis, treatment, for		

Relevant Questions	Departmental Response	Assessment
employment reasons, for historical/biographical reasons to rehabilitate his/her reputation.		
How does the reasonable expectation of a threat to the safety of an individual weigh against this interest in disclosing for a positive interest?		
While there may be a reasonable expectation of a threat to safety, is the threat of a minor nature?		
Is the threat to safety related to the requester himself or herself or to others?		
Note the test in s. 28 Privacy Act, information concerning the physical or mental health of requester - whether disclosure would not be in the best interests of the requester - this mandates an examination of the purposes to which the information would be put.		
The interest of the requester has in disclosure may outweigh the threat to his or her own safety that could arise from disclosure.		

Endnotes

1. *Ruby v. Canada (Solicitor General, R.C.M.P.),* [2000] F.C.J. No. 779, June 8, 2000, (F.C.A.).

2. *Information Commissioner of Canada v. Prime Minister* [1993] 1 F.C. 427 (T.D.).

3. *Air Atonabee Ltd. v. Minister of Transport*, (1989), 27 F.T.R. 194 at 216.

4. *Ibid.*

5. *State v. City of Cleveland,* Civil No. 59571 (Ohio App. Aug. 27, 1992): Section 149.43 *(a)*(2)*(d)* of the *Ohio Public Records Act* exempts information, which would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness or a confidential information source. The respondents claimed this exemption for records relating to the identity of police informants. The court recognized that incarcerated informants incur a high degree of risk to their physical safety after providing information to the police. However, if an informant discloses his identity by testifying at trial, then it is doubtful that redacting the records relating to that informant will enhance his security.

6. *Fisher v. United States DOJ,* 772 F. Supp. 7 (D.C. Col. August 15, 1991): In this case, the plaintiff's primary complaint was that much of the requested information allegedly had been released to the news media, and he contended that therefore he is entitled to this information. However, the plaintiff failed to provide evidence that the media coverage was the result of a release of the requested information by the government to the press. Nor did the plaintiff demonstrate that any of the withheld information has been the subject of publicity so widespread as to warrant disclosure under the FOIA. See *Founding Church of Scientology, Inc. v. NSA*, 197 App. D.C. 305, 610 F.2d 824, 831-32 (D.C. Cir. 1979). Moreover, the Court found that even assuming that some of the withheld information has appeared in the press, the nondisclosure was not proper because a disclosure from an official source of information previously released by an unofficial source would confirm the unofficial information and therefore cause harm to third parties. See *Simmons v. Dep't of Justice*, 796 F.2d 709, 712 (4th Cir. 1986) ("*release from an official source naturally confirms the accuracy of the previously leaked information*"). Furthermore, public disclosure of some information does not necessitate the disclosure of additional information that is otherwise properly exempt from disclosure. *Sirota v. CIA*, 3 G.D.S. para. 83,261 (S.D.N.Y. 1981) (citing Fensterwald v. CIA, 443 F. Supp. 667 (D.D.C. 1978).

The plaintiff also contended that during the sixteen-week trial in which he was a co-defendant, information withheld by the defendants was disclosed. However, the plaintiff failed to reference a single document withheld by the defendants in whole or in part which might fall within this category, and has not demonstrated that any of the withheld information has been so publicized as to warrant disclosure under the *FOIA.* See *Founding Church of Scientology*, 610 F.2d at 831-32.

7. See *Canada Packers Inc. v. Minister of Agriculture*, [1989] 1 F.C. 47 (C.A.) where the Court found that the evidence did not sustain the appellant's fear of unfair press coverage or its impact, rejecting evidence of previous press reports which related to products rather that on the condition of the plants which was the subject of the report at issue. See also *Ottawa Football Club v. Minister of Fitness and Amateur Sports,* [1989] 2 F.C. 480, 24 F.T.R. 62, 23 C.P.R. (3d) 297 (F.C.T.D.) where the Court found that since most of the information contained in the requested documents already made press coverage, no additional harm could be expected from the release of the requested information.

8. See *Matol Botanique International Inc. v. Canada (Department of National Health and Welfare)* (June 3, 1994), T-2916-90 (F.C.T.D.): While the Court found that sometimes the media is biased in the way it informs the public, it could not infer bad faith upon the media without any evidence to this effect.

9. *Ottawa Football Club,* supra where the judge considered that the record was three years old when assessing the likelihood of harm resulting from disclosure.

10. *Canada Packers Inc. v. Minister of Agriculture*, [1989] 1 F.C. 47 (C.A.).

11. For example, records relating to the clinical evaluation of persons who, at some stage or other, have been diagnosed as having psychiatric difficulties. Typically, the records at issue would be doctors' notes, psychiatric assessments, notes of interviews with family members and collateral information relating to the treatment of the individual patient.

12. *Sanders v. Department of Justice,* Civil no. 91-2263-O (C.D. Ark. April 21, 1992): In this case, the defendant had invoked exemption 7 *(f)* to withhold mental health records of the plaintiff, identities of medical personnel who prepared the mental health records of the plaintiff, and the identity of a custodian of records at a medical facility who furnished information about the plaintiff to the FBI. In support of each of these withholdings, the defendant argued that the plaintiff has a history of mental and emotional difficulties and that disclosure of the information could worsen or aggravate her condition to the point that she could harm someone involved in the investigation. In light of the information disclosed about the plaintiff's prior behaviour, the court agreed that disclosure of the withheld information could reasonably be expected to endanger the personal safety of individuals who released information to the FBI. Accordingly, the court found that the defendant properly invoked exemption 7*(f)*. See also *Fisher v. Dep't of Justice,* 772 F. Supp. 7, 11 (D.D.C. 1991).

13. For example, see *1985-86 Annual Report* of the Privacy Commissioner at p. 33 where the Commissioner found that based on the requester's history of violent behaviour, "*the department fear of reprisals was a reasonable expectation"* and dismissed the requester's complaint. See also *Durham v. United States DOJ,* 829 F. Supp. 428 (D.C. Col. August 17, 1993): In this case, the Defendant invoked exemption 7*(f)* to delete the names of, and information that may be used to identify, third parties. The Defendant alleged, and the Plaintiff did not refute, that these third parties had knowledge about the crime in which the Plaintiff was involved, and that some have requested placement in the *Federal Witness Protection Program*. Given the Plaintiff's past violent behaviour, the Court agreed with the Government

that disclosure of the identity, or information enabling identification, of the individuals who assisted the government in its case against the Plaintiff could reasonably endanger their lives or physical safety. Accordingly, the Court found that this material was properly withheld by the Defendant pursuant to exemption 7*(f)*. See also *EPPS v. United States DOJ*, 801 F. Supp. 787 (D.C. Col. September 15, 1992): The plaintiff filed a suit under the *Freedom of Information Act* (FOIA) to compel disclosure of documents relating to his federal prosecution and resulting conviction. The Court found that the information could be withheld under exemption 7*(f)* to protect against risk of personal injury. According to the Court, since the plaintiff and his associates have demonstrated violent tendencies, revealing the identities of federal agents and other law enforcement personnel could expose those people to harassment or physical injury. These names and/or initials can be withheld to protect the safety of those involved in the Epps investigation.

14. Law enforcement officials investigating drug activity may well be subject of physical attack, the danger of which can only be enhanced when their identity is revealed. See, e.g., *Docal v. Bennsinger,* 543 F. Supp. 38, at 48 (M.D. Pa. 1981): *Nunez v. DEA,* 497 F.Supp. 209, at 211 (S.D.N.Y. 1980): *Barkett v. United States DOJ*, Civil No. 86-2029 (SS) (D.C. Col. July 18, 1989); Covert agents associated with violators who are armed and have known violent tendencies: *Manchester v DEA,* Civil No. 91-2498, 823 F. Supp. 1259 (D.C. Pen. June 11, 1993) (according to the Court, past release of agents' identities "*has resulted in several instances of physical attacks, threats, harassment, and attempted murder of DEA personnel.*" Id. DEA, therefore, believes that disclosure in this instance "*could reasonably be expected*" to result in "similar abuse.) see also *Atkins v. Dep't of Justice*, No. 88-842, slip. op. at 10 (D.D.C. Feb. 26, 1990); *Albuquerque Pub. Co. v. Dep't of Justice*, 726 F. Supp. 851 (D.D.C. 1989); Medical personnel who prepared records relating to requester who had a history of mental and emotional difficulties: *Sanders v. Department of Justice,* Civil no. 91-2263-O (C.D. Ark. April 21, 1992).

15. *Pfeffer v. Director, United States Bureau of Prisons,* Civil no. 89-899 (D.C. Col. April 18, 1990): In this case, the withheld pages contained information about escape plans formulated by, or involving plaintiff. Included in these plans were methods and means of smuggling weapons and contraband into the federal penitentiary at Lewisberg. All of the information in these pages was obtained from a confidential informant. The Court found that the documents were also properly withheld pursuant to FOIA exemption 7 *(f)* since the smuggling of weapons into prisons could reasonably be expected to endanger the physical safety of some individual.

16. *Minutes of Proceedings and Evidence of the standing Committee on Justice and Legal Affairs,* June 30, 1981, Issue # 47 at 24.

Section 18

The Provision:

18 *The head of a government institution **may refuse** to disclose any record requested under this Act that contains*

*(a) **Trade secrets** or **financial**, **commercial**, **scientific** or **technical** information that **belongs to** the **Government of Canada** or a **government institution** and has **substantial value** or is **reasonably likely to have substantial value**;*

*(b) information the disclosure of which could **reasonably be expected** to **prejudice** the **competitive position** of a government institution;*

*(c) **scientific** or **technical** information obtained through **research** by an **officer or employee** of a government institution, the disclosure of which could **reasonably be expected** **to deprive** the officer or employee of priority of publication; or*

*(d) information the disclosure of which could **reasonably be expected** to be **materially injurious** to the financial interests of the Government of Canada or the **ability** of the Government of Canada to **manage the economy** of Canada or could reasonably be expected to result in an **undue benefit** to any person, including, without restricting the generality of the foregoing, any such information relating to*

*(i) the **currency**, **coinage** or **legal tender** of Canada,*
*(ii) **a contemplated change** in the **rate of bank interest** or in **government borrowing**,*
*(iii) **a contemplated change** in **tariff rates**, **taxes**, **duties** or any **other revenue source**,*
*(iv) a **contemplated change** in the **conditions of operation** of **financial institutions**,*
*(v) a **contemplated sale** or **purchase of securities** or of **foreign or Canadian currency**, or*
*(vi) a **contemplated sale** or **acquisition of land** or **property**.*

Preliminary matters:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizen or permanent resident within the meaning of the *Immigration Act* and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, our Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a

specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under section 68 or 69.

Paragraph 18*(a)* is a discretionary class exemption. This is a two step process. Once the head determines that the record or part thereof falls within the class described in the exemption, he/she must also exercise his/her discretion whether to disclose the information.

Paragraphs 18*(b)*, *(c)*, *& (d)* are discretionary injury exemptions. Applying these exemptions is also a two step process. First, the head must determine whether disclosure of the information in a record, or part thereof, could reasonably be expected to cause the prejudice enunciated in the exemption. Secondly, he/she must exercise his/her discretion whether to exempt or disclose the information.

The "Test":

At the present time, there has been only a handful of decisions of the Federal Court dealing with section 18 none of which, however, detailing the criteria to be met in order for this provision to apply. On the other hand, there has been a plethora of jurisprudence on section 20 which, by analogy, can be applied to this provision. The following summarizes the Office's interpretation of section 18.

1) Paragraph (a)

a) Trade secrets:

The expression "trade secrets' is not yet a term of art in Canadian law nor is it defined in the *A*ct. Generally speaking, however, a trade secret is information acquired by a party which a third party agrees, knows or ought reasonably to know, is confidential and which is not generally known. Any information, formula, pattern, device process, tool, mechanism, compound or compilation of information that a company or its employees produces or acquires for the purposes of the company's business can constitute a trade secret or, at least, confidential information. Some common examples of trade secrets are chemical formulas and secret processes. Examples of confidential information which has been protected by Canadian Courts are customer, supplier and employee lists.

The term ''Trade secrets'' in paragraph 18(a) has the same meaning has in paragraph 20(1)(a). Therefore case law found for paragraph 20(1)(a) is relevant to the interpretation of paragraph 18(a).

The claim for exemption under 20(1)*(a)* has been made on three occasions, it has been rejected in a summary like manner. In *Intercontinental Packers Limited v. Minister of Agriculture* (1987), 14 F.T.R. 142 the Federal Court briefly rejected the claim for exemption by stating that a general allegation that such secrets existed were not enough to establish the exemption. Similarly, the decision in *Merck Frosst Canada Inc v. Minister of Health & Welfare*, (1988), 22 C.P.R. (3d) 177; 20 F.T.R. 73; 20 C.I.P.R. 302 (T.D.), provides the guidance that when the alleged trade secret has already been disclosed, the exemption is not applicable.

More recently, Mr. Justice Strayer in *Société Gamma Inc. v. Department of the Secretary of State*, (April 27, 1994), T-1587-93 & T-1588-93 (F.C.T.D.) attempted to illustrate the difficulty as follows:

- "*One can, I think, conclude that in the context of subsection 20(1) trade secrets must have a reasonably narrow interpretation since one would assume that they do not overlap the other categories: in particular, they can be contrasted to "commercial...confidential information supplied to a government institution...treated consistently in a confidential manner..." which is protected under paragraph (b). In respect of neither (a) nor (b) is there a need for any harm to be demonstrated from disclosure for it to be protected. There must be some difference between a trade secret and something which is merely 'confidential' and supplied to a government institution. I am of the view that a trade secret must be something, probably of a technical nature, which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure.*"

i) The Treasury Board Guidelines[1] defines the term 'trade secret' as follows:

"*For a record to qualify under this paragraph as a trade secret, it must satisfy all of the criteria contained in the following list*:

- *it must consist of information;*
- *the information must be secret in an absolute or a relative sense (i.e., known only by one or a relatively small number of persons);*
- *the possessor of the information must demonstrate that he has acted with the intention of treating the information as secret;*
- *the information must be capable of industrial or commercial application; and*
- *the possessor must have an interest (e.g. an economic interest) worthy of legal protection."*

The Treasury Board's interpretation is consistent with the one formulated in 1986 by the Alberta Institute of Law Research Reform (see definition below).[2] However, the one formulated by Mr. Justice Strayer is much closer, if not indistinguishable[3]. At that time, the Institute of Law Research Reform made public a new proposal for the protection of trade secrets. It recommended a new legislation be enacted to give better defined legal protection to trade secrets. The Institute's proposed definition for trade secrets is often described as a comprehensive summary of the elements necessary for a finding of a trade secret in Canada.

ii) The Institute defined the term 'trade secret' as follows:

"*Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique or process, or information contained or embodied in a product, device or mechanism which*

(i) is or may be used in trade or business,

(ii) is not generally known in that trade or business,
(iii) has economic value from not being generally known, and
(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

According to the Institute, there are four elements of trade secret protection:

- **Specificity:** The information must be specific and ascertainable. For instance, general information on an area of technology does not constitute a trade secret.

- **Secrecy:** To protect secrecy, any disclosure made of the trade secret must be restricted and contained. The owner must treat the information as confidential and it must always be clear that the owner regards the information as a secret. If the owner discloses the information under contract, it must be on appropriate terms and conditions as to secrecy protection and confidentiality. Consequently, the ease with which discovery is possible by those not in a contractual, confidential or fiduciary relation with the owner bears on the question of secrecy.

  The extent of employee knowledge also bears heavily on this question of secrecy. If there is unrestricted access to secret information by employees, the owner has probably failed to maintain the necessary element of control. If the access to the information is restricted to designated employees and there are appropriate safeguards in place, there is a greater chance of achieving trade secret status.

- **Commercial value:** The trade secret must have a certain value which, in the hands of a competitor, would remove a competitive advantage enjoyed by the owner.

- **Not generally known to the public:** This does not mean that the information be novel or that it be suitable subject matter for patent or copyright protection. It can be information that could be acquired from materials available to the public with the expenditure of time and effort.

iii) The institute also described four categories of trade secrets:

- **Secret formulae and processes:** Take, for example, the recipe formulae for Coke or Pepsi. In such cases the formula/recipe is secret. Only a small number of persons know the formula.

- **Technological Secrets:** Every business uses a combination of labour, energy, and raw materials to produce some product or service. Faced with soaring costs for all three items, contemporary businesses rely on technology to reduce costs and increase productivity. The ability of an enterprise to do well or even survive in today's highly competitive climate is directly related to its success in acquiring, protecting and using modern technology. Knowledge of these processes is usually referred to as technological '*know-how*'. If this know-how becomes

available to other industry members, the enterprise is not necessarily lost, but its market competitiveness will be reduced. For example, some factories do not permit visitors to view assembly lines for fear of technological espionage.

- **Strategic business information:** Business spends a good deal of time and money preparing internal marketing studies, industry forecasts, etc. This inside information forms the raw data on which other decisions, such as financing or marketing may be based. Disclosure of such information might alert competitors to a particular business strategy, or save them valuable start-up time or costs in assembling the information.

- **Compilations and Collations:** This category relates to information as a product in and of itself. The value of the information lies in the collation, not the individual items, which can be publicly available. Secrecy in such cases is something of a misnomer. It applies because no one else has the equipment or know-how to collate the relevant information or has invested the time and resources required to do so.

b) Case Law:

The following constitutes an illustration of how trade secrets are interpreted in other jurisdictions:

British Columbia

Order 02-06, January 31, 2002

The applicant requested access to records respecting the "investment holdings and transactions since January 1, 1999" of the Insurance Corporation of British Columbia. ICBC refused, under s. 17(1) – equivalent to s.18 - to disclose any responsive information on the basis that it would reveal details of its investment strategy that could harm its financial interests, lead to undue loss to it and undue gain to its competitors. The report disclosed the issuers of securities held by ICBC, the class or type of each security held (*e.g.*, common shares), the number or par values of each security held, bond maturity date, bond interest rates, mortgage interest rates and maturity dates, and the market value of each holding. The report covered all internally and externally managed ICBC investments. ICBC argues that the requested information qualifies as a "trade secret" of ICBC for the purposes of s. 17(1)(a) because it is "information with respect to its investment strategy" and its disclosure could reasonably be expected to cause it harm as contemplated by s. 17(1). This is because, ICBC said, once its "investment strategy" is disclosed, its "ability to continue to achieve high levels of return on its investment would be compromised by direct competition and possible 'front running' of ICBC's investment activity". It cites Order No. 285-1998, [1998] B.C.I.P.C.D. No. 80, in arguing that the information is a "trade secret". ICBC also argues that "information with respect to its investment transactions and strategy" is covered by s. 17(1)(b) because it has "a monetary value in its own right" . The tribunal noted that

disclosure of the Record would give ICBC competitors an unfair advantage in the competition for the whole optional coverage market and the top end of the insurance market. Accordingly, release will harm ICBC's economic interests and its ability to compete for business with private sector service providers. The Tribunal was not satisfied that that the requested information constitutes, or if disclosed would reveal, an ICBC "**trade secret"** within the meaning of s. 17(1)(a) of the Act. The evidence of the ICBC "investment strategies" said to be involved here is simply not specific enough to show that they qualify as a "trade secret" as defined in Schedule 1 of the Act. The Tribunal was also not satisfied that the requested information fell under s. 17(1)(b). It is financial or commercial information that belongs to ICBC within the meaning of that section, but the evidence does not establish that it is reasonably likely to have independent monetary value. The s. 17 exception might nonetheless apply on the basis of the opening words of s. 17(1), because the requested information is information the disclosure of which could **reasonably be expected to harm** ICBC's financial or economic interests, or because under s. 17(1)(d) its disclosure could reasonably be expected to result in undue financial loss or gain to a third party (in this case, ICBC's competitors or other investors). The Tribunal concluded, however, that ICBC had established a reasonable expectation of harm, within the meaning of s. 17(1), if the details of its specific securities transactions were disclosed contemporaneously with, or in recent proximity, to the transactions. It was persuaded that, armed with knowledge of existing and anticipated market conditions generally and of the market for a particular issuer's securities, a knowledgeable person – whether an ICBC competitor or someone else – could use the prices, purchase dates, amounts of units bought or sold in order to copy or act in anticipation of ICBC's investment activity. This may or may not involve direct harm or loss to ICBC. There was enough evidence to establish, under these conditions, a likely benefit to the ICBC competitor or other person which would be an **undue gain** within the meaning of s. 17(1)(d) of the Act.

Ontario

(Orders #M-29, M-37, M-65, P-418, P-420, M-94, P-500, P-561).

- Subsections 17(1) of the *Ontario Freedom of Information Act*, R.S.O. 1990, Ch. F.31 is the equivalent to our paragraph 20(1)*(a)*. In interpreting this provision, the Ontario Commissioner adopted the definition of 'trade secret' from the Institute of Law Research and Reform.

The following illustrates the application of this definition.

(Order 222)

- The request involved information on bids of all contracts awarded by the Ministry. The Ministry of Culture and Communications exempted work plans, costing and overall proposal structures on the grounds that they constituted trade secrets. In his decision, Assistant Commissioner Tom Wright stated that while he agreed that the requested information constituted technical and commercial information, he could not agree that the information could constitute 'trade secrets'.

(Order M-29)

- The requester requested from the Etobicoke Board of Education any "*information purchased by the institution from a research company*". In his decision, Commissioner Wright stated that the research company did not provide sufficient information to support the position that the information was the subject of efforts which were reasonable to maintain its secrecy - which is a necessary element of the definition of '*trade secret*'.

(Order M-65)

- The Hamilton Board of Education received an access request to a proposal that was developed in conjunction with Apple Canada for an advanced technology secondary school. The records identified were a four-page document which outlined the conceptual framework for the development of a possible project and a one page '*letter of Intent*'. The inquiry officer refused to qualify the information as trade secret since the connection between the information contained in the records and the commercial activities of Apple Canada was too remote.

(Order P-561)

- The Commission found that information concerning the construction of the retractable roof of SkyDome was '*trade secret*' information. The records showed unique construction processes and techniques together with testing procedures for the roof seals. The information represented an acquired body of knowledge, experience and skill relating to the development of certain techniques, methods and processes unique to the construction of the SkyDome structure. The Commission found that the knowledge base or learning curve, conferred proprietary rights on its owners. The information had economic value and was subject to efforts to keep it confidential. While the information was circulated to a construction management group, it was done so on express terms that it be kept confidential.

Quebec

Section 23 of *An Act Respecting Access to Documents held by Public Bodies and the Protection of Personal Information also refers to the notion of industrial secrets*... . That section reads as follows:

- "23. *No public body may release industrial secrets of a third person or confidential industrial, financial, commercial, scientific, technical or union information supplied by a third person and ordinarily treated by a third person as confidential, without his consent*."

At the present time, only one decision is worth discussion for the purpose of this grid. In *Récupération Portneuf Inc. c. Ministère de l'Environnement*, [1991] C.A.I. 269 (C.Q.), the Commission stated that the fact that a document had inadvertently been misplaced in a public

registry does not restrain the application of section 23 - i.e., the mistake does not affect the qualitative nature of the document.

While the decision demonstrate that the qualitative nature of a trade secret may not be inadvertently lost, we feel that in such circumstances it would be more difficult to substantiate that it was still a trade secret.

United States

In the United States, exemption 4, 5 U.S.C. @ 552*(b)*(4), justifies withholding of trade secrets. 4. This exemption applies to "*trade secrets and commercial or financial information obtained from a person and privileged or confidential*".[4] Here again, there is not very much guidance as to the meaning of the term '*trade secret*'.

In *Public Citizen Health Research Group v. FDA*, 704 F. 2d 1280, 1288 (D.C. Cir. 1983), the Court of Appeal for the District of Columbia Circuit has adopted a narrow '*Common Law*' definition of the term trade secret that differs from the broad definition used in the restatement of torts (i.e., that trade secret is a broad term extending to virtually any information that provides a competitive advantage). The D.C. Circuit's decision in that case represented a distinct departure from what until then had been almost universally accepted by the courts. The narrow definition provided described 'trade secrets' as "*a secret, commercially valuable plan formula, process, or device that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort*". This definition requires that there be a '*direct relationship*' between the trade secret and the productive process.

The Court of Appeal for the tenth Circuit has expressly adopted the D.C. Circuit's narrow definition, finding it "*more consistent with the policies behind the FOI than the broad Restatement definition*."[5] In so doing, the Court of Appeal noted that the adoption of the broader Restatement definition "*would render superfluous*" the remaining category of exemption 4 information because there would be no information falling within the latter category that would be outside the reach of the trade secret category.

b) <u>Financial, commercial, scientific or technical information</u>:

For the purpose of this section, it is sufficient that the information <u>relate or pertain</u> to matters of finance, commerce, science or technical matters, as those terms are <u>commonly understood</u> (see *Air Atonabee Ltd. v. Minister of Transport* (1989), 27 F.T.R. 194 (T.D.). Further, as M. Justice Rothstein explained in *Canada Post Corporation v. Minister of Public Works et al*. (June 3, 1993), T-2059-91, dictionary definitions can be considered in determining the meaning of a provision when the suggested meaning in the dictionary is consistent with the purpose of the Act.

These terms are defined as follows in the *Concise Oxford Dictionary*, 8th ed. (Oxford University Press, 1991):

- **Finance:** "1. *the management of (esp. public) money. 2. monetary support for an enterprise. 3. (in pl.) the money resources of a State, company, or person....*"

- **Financial:** "1. *of finance... .*"

- **Commerce:** "1. *financial transactions, esp. the buying and selling of merchandise, on a large scale... .*"

- **Commercial:** "1. *of, engaged in, or concerned with, commerce. 2. having profit as a primary aim rather than artistic etc. value; philistine....*"

- **Science:** "*1. a branch of knowledge conducted on objective principles involving the systematized observation of and experiment with phenomena, esp. concerned with the material and functions of the physical universe... .*"

  "2a. *systematic and formulated knowledge, esp. of a specified type or on a specified subject... .*"

  "2b. *the pursuit or principles of this.*"

  "3. *an organized body of knowledge on a subject*."

  "4. *skilful technique rather than strength or natural ability.*"

  "5. *archaic knowledge of any kind*."

- **Scientific:** "1a. *according to rules laid down is an exact science for performing observations and testing the soundness of conclusions*."

  "1b. *systematic, accura*te."

  "2. <u>used in, engaged in, or relating to science.</u>"

  "3. *assisted by expert knowledge*."

- **Technic:** "1a. *technology*."

  "1b. *technical terms, details, methods, etc.*"

  "2. *technique*."

- **Technical:** "1. *of or involving or concerned with the mechanical arts and applied sciences*."

  "2. *of or relating to a particular subject or craft etc. or its techniques... .*"

  "3. *using technical language; requiring special knowledge to be understood... .*"

c) Belongs to the Government of Canada or a government institution.

This exemption indicates that the exemption provides for protection of proprietary information of the Government of Canada. It may include information that is patentable or that the government may want to license or that the government owns the copyright. In order for the provision to apply, the institution claiming the proprietary interest must furnish proof of ownership or some similar legal right to the information. For example, section 12 of the *Copyright Act*, states that, the government owns the copyright of any work that has been prepared or published by or under the direction or control of any government department.

> (1) **Government.** Paragraph 18(a) does not apply to trade secrets or financial, commercial, scientific or technical information of a third party. Such information may, however, be covered by section 20. The effect of that different treatment would be that non-schedule I institutions would be subject to the 'product or environment testing override' [subsection 20(2)] as well as the 'public interest override' while Schedule I institutions would not.
>
> > Definition: According to Black Law's Directory, 7th ed., the term 'government' means: ". An organization through which a body of people exercise political authority; the machinery by which sovereign power is expressed <the Canadian government>"

d) Has substantial value or is reasonably to have substantial value

This part of the text requires us to consider the classes or types of records based on their content – i.e. the intrinsic value of the information itself. It must be substantial. What is important is not how much it costs to produce the information but its current value. [A computer system might have cost millions and millions to produce involving years of intellectual work by hundreds of consultants and computer experts. The advent of a revolutionary automated program in the marketplace could render the computer obsolete, almost overnight rendering it almost valueless.

A marginal or nominal value would not be sufficient. What is required for that exemption to apply is that the information must have - or is likely to have, substantial value. We have not yet been able to identify any case law or doctrine that would help identify the meaning of 'substantial'. This meaning will probably vary with the circumstances.

The term 'value' itself is not defined in the Act. Without restricting the scope of the exemption, the '*value*' referred in this provision could be of commercial, market or monetary value, etc. For example, a research paper could be said to have monetary value if it is going to be published and sold or if it was key to a patent application.

This exemption may not be applied when the information is in the public domain through a *bona fide* publication by the media.[6] As such, it is presumed that the information would lose its financial value when it becomes accessible to the public.

2) Paragraph *(b)*:

a) Where disclosure could reasonably be expected to:

For an exhaustive definition of this term, please refer to the Lexical section of the Grids.

b) Prejudice the competitive position of a government institution:

This test has now been interpreted by the Federal Court.

It is our view that in order to be covered by this exemption, the government institution must have a defined market or business which would be adversely affected by the disclosure. The Royal Canadian Mint, the Canada Mortgage and Housing Corporation are examples of institutions that could be affected by disclosure of some information.

The injury does not have to be translatable into monetary value. Unlike the other tests under this exemption, the prejudice is not qualified - i.e., the Act does not say materially prejudice. Therefore, the only requirement is to show a reasonable probability that the disclosure of the requested information would cause some identifiable harm to the competitive position of a government institution. For example, perhaps an institution could show prejudice by proving that the institution enjoys a competitive advantage by the possession of the requested information.

There could be some situations where, for example, it is possible to perceive a prejudice but it is not possible to translate it in a monetary value. (e.g. the expertise of the employees of a government institution; the quality of products / services used, etc.). Such information is also covered by 18*(b)*.

c) CASE LAW – Paragraph 18(b):

Hutton v. Canada (Minister of Natural Resources), (1997), 137 F.T.R. 110 (F.C.T.D.). Applicant requested access to records relating to studies conducted by the Canadian Explosive Research Laboratory on behalf of an outside company. The Court accepted the application of paragraph 18(b) and 20(1)(c), (d) to the records based on its finding that the C.E.R.L. made an express undertaking of confidentiality to the company and would be prejudiced in seeking outside revenues if it became known that they were unable to assure confidentiality to clients. The Court also applied paragraphs 20(1)(c) and (d) to the records based on the fact that the company for whom the report was done was involved in significant litigation and settlement negotiations which could be directly impacted by disclosure of the report.

3) Paragraph *(c)*:

- **Scientific or technical:** See sub-paragraph *(a)*(ii) above.

- **Obtained through research:** The term '*research*' means the systematic investigation into and study of material or sources in order to establish facts and search new conclusions.

- **Officer or employee of a government institution:** The exemption does not cover researchers employed under contract with a government institution or researchers from organizations not covered by the Act.

- **Disclosure could reasonably be expected:** Here again, it is the consequences of disclosure which are most significant in determining whether a document is exempt under paragraph *(c)*, and not the nature of the document or the information contained in the document. For further explanations, see sub-paragraph *(b)* (i) above where this test was further defined.

- **Deprive of priority of publication:** Information obtained through research by a researcher may only be expected if the researcher intends to publish the information and disclosure would deprive the research of priority of publication.

4) Paragraph *(d)*:

a) Disclosure could reasonably be expected:

For an exhaustive definition of this term, please refer to the Lexical section of the Grids.

Here again, it is the consequences of disclosure which are most significant in determining whether a document is exempt under paragraph *(d)*, and not the nature of the document or the information contained in the document. While it may be expected that information relating to one or more of the matters referred to in sub-paragraphs (i) to (vi) would, at least if prematurely disclosed, result in a consequence within paragraph *(d)*, whether this would be so in a particular case would depend upon such factors as the nature of the information, whether it related to decisions already taken or yet to be taken and the external circumstances. For further explanations, see sub-paragraph *(b)*(i) above where this test was further defined.

b) Materially injurious:

To meet the test in paragraph *(d)*, the disclosure of the document must be expected to have the effect of hindering or defeating government economic or financial policies or to make it more difficult to put those policies into effect or to continue with those policies. The exemption may apply to information of a purely factual character, as well as to information dealing with plans or policies.

Paragraph *(d)* is primarily concerned with circumstances where the premature disclosure of information would likely have one or more of the consequences referred to in that paragraph; i.e.:

- "1. *injury to the financial interests of the government*."
- "2. *injury to the ability of the government to manage the economy*" or
- "3. *result in an undue benefit to any person*."

There are three alternative tests in this provision, and it would be sufficient for the government to meet one of the tests for the exemption to apply. For example, the premature disclosure of a document which would suggest some change in the rate of bank interest would, if disclosure under the Act to a person in a position to take advantage of the information, give that person an undue advantage over others who did not obtain access to the information, under the **Access to Information Act**. Paragraph *(d)* may also apply to information of a factual kind where, for example, the assembling of certain factual information would reasonably lead to point to the direction of thinking in terms of policy.

c) Financial interests of the government of Canada:

The term 'Financial interests' refers to the financial position of the government of Canada. It includes the management of assets and liabilities, and the ability of the government to protect its own interests in financial transactions with third parties. The financial interests of the government also include the ability to collect taxes, generate revenues, etc. Harm to the financial interests of the government could involve monetary loss, or loss of assets with a monetary value.

In *Canadian Council of Christian Charities v. Canada (Minister of Finance),* [1999] 4 F.C. 245 at 246-248 (F.C.T.D.) the court held that, the words "injurious to the financial interest of the Government of Canada" should not be interpreted as including revenue loss resulting from an increase in legitimate claims to deductions under the *Income Tax Act.* The Court observed that if disclosure encourages taxpayers to claim the benefit of a deduction to which they are entitled, the resulting benefit to them will not be "undue" within paragraph 18(d). The Court went on to note, however, that documents that contained analyses of various options for amending the statute were exempt under subparagraph 18(d)(iii) on the ground that the information therein related to a "contemplated change in ... taxes". Disclosure of such information may be refused if it would cause a loss of revenue to the government or would unduly benefit particular individuals.

d) Ability of the Government of Canada to manage the economy of Canada:

This part of the exemption refers to broader interests of the government in managing the production, distribution, and consumption of goods and services. Harm to the ability of the government to manage the economy would damage or cause detriment to the economic policies or activities for which the government is responsible.

The government of Canada is responsible for managing many aspects of the country's economic activities in the interests of the citizens of Canada, by ensuring that an appropriate economic infrastructure is in place and by felicitating and regulating the activities of the marketplace.

The ability of the government of Canada to manage the economy, depends on a range of activities, including fiscal and economic policies, taxation, economic and business development initiatives.

e) Undue benefit to any person:

The term 'undue' is defined as follows in the Concise Oxford Dictionary, 8th ed. (Oxford University Press, 1991):

- **undue:** "*not owed or suitable, excessive, disproportionate*".

This exemption cannot be relied upon where the harm would not result from the disclosure of the records, but rather from the potential misuse of the records on disclosure. (See Ontario Orders #154, M-117.)

f) Including, without restricting the generality of the foregoing:

For an exhaustive definition of this term, please refer to the Lexical section of the Grids.

The use of 'including' means that the list which follows (sub-paragraphs (i) to (vi)) provides examples of the types of information, the release of which could likely be harmful to the financial and economic interests of the government of Canada, or expected to result in an undue benefit to a person.

The list does not cover every type of information which could reasonably be expected to cause such harm. Information not explicitly listed but which is similar in type to the information listed and meets the harm test set out in paragraph 18*(d)*, would be covered by the exemption. For example, economic forecasts are not in the paragraph *(d)* list but may, in certain circumstances, be exempt under section 18, where it can be shown that their disclosure would, or could reasonably be expected to have the substantial adverse effect referred to in that section.

The fact that information belongs to one of the categories listed is not sufficient in itself to establish that it meets the harm test set out in paragraph *(d)*. Although there is a possibility that the disclosure of information in these categories would harm the financial or economic interests of Canada, the head of the government institution must have reasonable grounds to expect harm in order to apply the exemption. One must not forget that the test under this provision is one of injury or probable injury and that the descriptive paragraphs which follow are illustrative only. They are non-exhaustive description of the kinds of documents the disclosure of which might be found to be injurious to the specific interests listed.

g) **Review Under Section 50**

The paragraph 18(1)(d) exemption is judicially received under section 50 of the Act which provides that:

- "*Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d), the Court shall, if it determines that the head of the institution did not have reasonable grounds on which to refuse to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such order as the Court deems appropriate*".

In *X v. Canada (Minister of National Defence)*, [1992] 1 F.C. 77 at 106, Mr. Justice Denault, in interpreting this section, has stated that it authorizes the Court to "*disclose information if the head of the government institution ... did not have reasonable grounds upon which to refuse disclosure*".

Therefore, in determining whether the exemption under section 15 is justified, we must determine whether the head had reasonable grounds to believe that the release of the information exempted could lead to the particular harm.

Notwithstanding the higher standard for interference with a head's decision under section 50, it is very much part of the role of our office to determine the reasonableness of the head's conclusion that disclosure would lead to the injury set out in the exemptions subject to section 50 review. *Ruby v. Canada (Solicitor General, R.C.M.P.),* [2000] F.C.J. No. 779, June 8, 2000, was a case concerning paragraph 22(1)(b) of the **Privacy Act**, (the parallel provision to paragraph 16(1)(c) of the **Access to Information Act**), which is in turn subject to review under section 49 of the **Privacy Act** (section 50 **Access to Information Act**), the Federal Court of Appeal overturned the Trial Judge's conclusion that he could not substitute his views on injury for the decision of the institution head and instead directed a closer scrutiny of the reasonableness of the institution's determination that the injury described in the exemption would be caused by disclosure:

> Furthermore, the reviewing judge concluded at page 36 of his decision that "the Court cannot substitute its views for that of CSIS, or the Solicitor General, about the assessment of the reasonable expectation of probable injury." We would add, however, that it is very much part of the Court's role under section 49 [section 50 **Access to Information Act**] to determine the reasonableness of the grounds on which disclosure was refused by CSIS. That being the case, the reviewing judge, in our view, should have scrutinized more closely whether the release of information, particularly information that is over 20 years old, could reasonably be expected to be injurious to specific efforts at law enforcement and detection of hostile activities, and, therefore, whether CSIS had a reasonable ground to refuse to disclose. (Emphasis added).

TABLE OF AUTHORITIES

Trade secrets

Canada

Intercontinental Packers Limited v. Minister of Agriculture (1987), 14 F.T.R. 142.
Merck Frosst Canada Inc. v. Minister of Health & Welfare, (1988), 22 C.P.R. (3d) 177;
Société Gamma Inc. v. Department of the Secretary of State, (April 27, 1994), T-1587-93 & T-1588-93 (F.C.T.D.) .

Ontario

Orders #M-29, M-37, M-65, P-222, P-418, P-420, M-94, P-500, P-561.

Quebec

Récupération Portneuf Inc. c. Ministère de l'Environnement, [1991] C.A.I. 269 (C.Q.).

United States

Anderson v. HHS, 907 F. 2d 936, 944 (10th Cir. 1990).
Public Citizen Health Research Group v. FDA, 704 F. 2d 1280, 1288 (D.C. Cir. 1983).

Financial, commercial, scientific or technical information

Canada

Air Atonabee Ltd. v. Minister of Transport (1989), 27 F.T.R. 194 (T.D.).

Has substantial value or is reasonably likely to have substantial value

Ontario

Orders # 87, P-270.

Injurious to the financial interest of the Government of Canada

Canada

Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] 4 F.C. 245 at 256 (T.D.) Evans J.

Disclosure could reasonably be expected

Canada

Air Atonabee v. Canada (Minister of Transport) (1989), 27 F.T.R. 194 (T.D.).
Canada Packers Inc. v. Minister of Agriculture, [1989] 1 F.C. 47 (C.A.).
Information Commissioner of Canada v. Prime Minister of Canada, [1993] 1 F.C. 427 (T.D.).
Matol Botanique International Inc. v. Canada (Department of National Health and Welfare) (June 3, 1994), T-2916-90 (F.C.T.D.):
Merck Frosst Canada Inc. v. Minister of Health & Welfare, (1988), 22 C.P.R. (3d) 177; 20 F.T.R. 73; 20 C.I.P.R. 302 (T.D.)
Northern Cruiser Company Limited v. R (September 12, 1991) No.T-109-90 (F.C.T.D.); confirmed by F.C.A. (August 28, 1995), A-1039-91.
Ottawa Football Club v. Minister of Fitness and Amateur Sports, [1989] 2 F.C. 480, 24 F.T.R. 62, 23 C.P.R. (3d) 297 (F.C.T.D.).
Piller Sausages and Delicatessens Limited v. Minister of Agriculture at al. (1987), 14 F.T.R. 118 (T.D.)
Hutton v. Canada (Minister of Natural Resources) (1957) 137 F.T.R. 110 (F.C.T.D.).

Review under Section 50

X v. Canada (Minister of National Defence), [1992] 1 F.C. 77, 46 F.T.R. 206 (TD).
Ruby v. Canada (Solicitor General, R.C.M.P.), [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.).

United States

Fensterwald v. CIA, 443 F. Supp. 667 (D.D.C. 1978).
Fisher v. Dep't of Justice, 772 F. Supp. 7, 11 (D.D.C. 1991).
Founding Church of Scientology, *Inc. v. NSA*, 197 App. D.C. 305, 610 F.2d 824, 831-32 (D.C. Cir. 1979).
Simmons v. Dep't of Justice, 796 F.2d 709, 712 (4th Cir. 1986).
Sirota v. CIA, 3 G.D.S. para. 83,261 (S.D.N.Y. 1981).
State v. City of Cleveland, Civil No. 59571 (Ohio App. Aug. 27, 1992).

Undue benefit to any person

Canada

Canadian Council of Christian Charities v. Canada (Minister of Finance), (1999) 4 F.C. 245 [F.C.T.D.]

Ontario

Orders #154, M-117

The Questions

Paragraph -- 18(a)
Statement of Test to be Met
Trade Secrets Record: - must describe a formula, pattern, compilation, programme, method, technique, process that has commercial or industrial application and economic value from not being known - must be secret - reasonable efforts must be taken to maintain its secrecy

Relevant Questions	Departmental Response	Assessment
Identify what the record describes.		
Does the information in the record represent a [method/formula/technique/process] of making a product?		
Where did the information in the record come from?		
If it is a compilation of information from various sources, ask: - What the sources of the information are? - How did the institution get permission to use the source? - Are the sources available to others? - Has the information ever been compiled in this manner before (to their knowledge)?		
What does the government institution do with the compilation or use it for? - Does it distribute, circulate the compilation to others? - Who? - For what purpose? - Does it sell it?		
How can the [method, formula, compilation, technique, process] be used or applied?		
What is the market for the process or product? - Who uses it? - What is it used for? - Does the government institution sell this product? - Are there private sector organizations, Crown corporations or universities which generate similar products? - Are the methods they use known?		

Relevant Questions	Departmental Response	Assessment
Does the government institution participate or collaborate in groups with organizations/ individuals outside the government in this area? - What kind of participation? - Does the government institution exchange information with such groups? - What kind of information?		
Does the government institution make similar or other products/compilations than the ones described in the record?		
Is the information describing the methods used for making these products or compilations distributed?		
To whom are these agreements attaching conditions to the use of this information? - ask to see agreements		
Is the government institution or officer applying for patent, trademark, industrial design or copyright protection with respect to the [method, process, and technique] described in the record?		
Where does the institution keep the records?		
Are they separate from other records?		
What security measures are in place with respect to storage, copying, processing, of records?		
If the records are computer accessible, how can they be accessed? By whom? Is a register of access maintained?		
Have there been previous requests for access to the records? Have they been granted? Any licenses?		
What response was given to such requests?		
Has the method or technique been described or otherwise covered in other documents, and professional or scientific papers? - If so, ask to see the papers. - Who was in attendance at conference? - What market is the publication directed at?		

Statement of Test to be Met
Financial, commercial, scientific or technical information

Relevant Questions	Departmental Response	Assessment
Financial/Commercial - what does the record describe?		
Commercial - what activity of the government institution does the information relate to?		
- Is this a sales or money-making activity?		
- Is it a revenue generating activity? Profit-sharing?		
- Does it relate to purchasing, tendering, licensing or leasing activity by the government institution?		
- Does it relate to government guarantees provided to lending institutions?		
- Does it relate to lending activity by the government institution?		
- Does it represent the administration of grants or assistance by the government institution?		
- Has any security been taken in respect of the activity described?		
Scientific/Technical - what does the record describe?		
What type of work or activity is involved?		
What is the subject matter of this work or activity?		
Where is the work performed? - in a lab - in a production facility - a research facility - university		
What is the purpose or objective of the government institution (i.e., statutory purpose) [investigator to assess whether it relates to scientific/technical]?		

Statement of Test to be Met
Information must belong to the Government of Canada or a government institution - institution must show legal ownership of the information - information in the public domain loses its incidents of ownership

Relevant Questions	Departmental Response	Assessment
Has the Government of Canada or government institution applied for the following types of protection of the information against use by others: - trademark registration - patent registration - copyright registration - industrial design registration - medical devices approval - Integrated circuit topography - Plant Breeders' Right		
Food and Drug Act registration/approvals		
Does the Government of Canada/government institution licence others to use the information?		
Does the Government of Canada/government institution licence others to carry out the [sale, lease, manufacturing, purchase, etc] activity to which the information relates?		
Ask to see licence or other such agreements.		
Has the information been used for - seminars - publication in journals, periodicals, papers - speeches?		
Has there been any media or magazine reporting about the activity represented by the information? - [ask to see such paper records of proceedings, transcripts, and articles]		
With respect to financial/commercial information		
- Does this information get included in the annual report of the institution?		
- Is it included in the Estimates?		

Relevant Questions	Departmental Response	Assessment
- What was the spending authority for the expenditures represented in the record?		
- Was this information provided to any House of Commons committee?		
- Is the information available to third parties (stakeholders, etc.)?		
Where was information generated/who generated it? - in government facilities - in university facilities - by government institution or by a third party (i.e., Indian Band)		
Was information generated pursuant to a contract with a third party? - If so, ask to see contract.		
Does contract confer proprietary rights? - To whom?		
Was information generated by outside party and provided to government institution?		
Was there a delegation of authority requiring the outside party to generate the information?		
Was the outside party required to generate the information under terms of funding, loans, grants, etc.?		

Statement of Test to be Met
Has or is reasonably likely to have substantial value?

Relevant Questions	Departmental Response	Assessment

What can the government institution do with the information?
- Does it sell it?
  - How much annual revenue is received?
- Does it licence use of the information?
  - How much annual revenue is received?		

Can the institution quantify the value to it of use of the information?		

Relevant Questions	Departmental Response	Assessment
Does possession of the information create a competitive or commercial exclusory advantage for the government institution? - Describe the advantage.		
Does the institution presently contemplate marketing the information or activity described? - Is there a marketing plan? - Is there approval or statutory authority?		
Are there forecasts of revenue to be generated from the activity? - How much revenue is forecast?		
What revenue does the institution generate from other activities, if any? - [Compare these numbers to determine whether the value is substantial]		

Paragraph -- 18(b)
Statement of Test to be Met
Government institution must have a 'competitive position'. Government institution must be the entity prejudiced by disclosure: - Ensure that the entity who claims the prejudice is a government institution (not a Crown corporation or private body)

Relevant Questions	Departmental Response	Assessment
What kind of activity does the information describe or relate to?		
What activity is the government institution engaged in?		
What are the purposes or objects of the government institution?		
Are there others outside government that engage in similar activities?		
Does the government institution sell products or offer services also offered by others? - In the same areas? - To the same customers/buyers?		

Relevant Questions	Departmental Response	Assessment
Where does the government institution get its funding for the activity described or related to the information?		
Are there others who also receive funding for this activity by government? - Who?		
What is the market for the activity related to the information?		
Are others providing or selling goods or services in this market?		
Can the government institution describe what resources (i.e., funding people, research contracts, consulting contracts, audit work) it competes for in this market?		
Does the government institution provide services or goods to other institutions or the private sector under contract? - Do others compete with the institution to do so?		
Is the government institution currently engaged in contractual negotiations with respect to the activity described/related to the information?		
What is the status of those negotiations?		
How does the information relate to the negotiations?		

Statement of Test to be Met

- The competitive position of the government must be prejudiced by disclosure.
- There must be a reasonable expectation that such prejudice will occur.
- Investigator must assess reasonableness of the assertion of harm caused by disclosure.

Relevant Questions	Departmental Response	Assessment
How would the information assist a competitor?		
How would it assist a contractor or 'customer' of the institution?		
How will this harm the position of the government institution?		
Has the government institution given an undertaking of		

Relevant Questions	Departmental Response	Assessment
confidentiality or exclusivity to an outside client or customer?		
Is the confidentiality undertaking required given the nature of the services being performed i.e. opinion evidence, expert reports, etc.?		
Why is the confidentiality undertaking necessary to the relationship between the government institution and its client?		
Assess the content of the information against the claim for confidentiality – is the information sensitive, insightful in nature?		
Has it been referred to in papers, publications, and speeches, in the media?		
Has it been disclosed to contractors/suppliers/ trade associations?		
Are there any examples of prior disclosure? - What prejudice/harm did these disclosures create?		
Is the requester a potential competitor or contractor with the government institution? - Describe why/in what respect?		
Describe how disclosure could assist or provide an undue advantage to a requester in its dealings with the government institution.		
Would a competitor/requester/contractor be assisted with this information on its own or would other information be required? - If so, what kind of other information?		
- Is the other information contained in annual reports or other public documents, House of Commons Committees, estimates, etc.?		
- Is the other information disclosed to those outside the institution? - Who? - For what purpose? - Do those persons maintain it in confidence?		

Paragraph -- 18(c)
Statement of Test to be Met
- Scientific or technical information obtained through research by an officer or employee of a government institution.

Relevant Questions	Departmental Response	Assessment
Scientific/Technical - what does the record describe?		
What type of work or activity is involved?		
What is the subject matter of this work or activity?		
Where is the work performed? - in a lab (private, public) - in a production facility - a research facility - university/college		
Obtained through research		
Does the information represent the results of a study or research activity? Does the Crown own the copyright to the research?		
Ask to see a research proposal or monograph relating to the information.		
What was the source of funding for the research/what was the purpose of the funding program [assess whether the funding program was for scientific or technical research]?		
What did the research relate to?		
Who did the research? Was assistance provided by outside sources?		
Are they employed or appointed as an officer of the government institution during said research? Have they a security classification?		
What position do they have? - How long have they been in this position? - Did they hold any other position while doing this research? - What position?		
Was the research performed in premises owned by the		

Relevant Questions	Departmental Response	Assessment
government? - Where?		
If not, where was it performed?		
What arrangement was put in place with X to perform the research? - Ask to see proposal/agreement.		
Was the researcher seconded to this other institution, on interchange or did they assume a chair or other position (visiting professor, etc.) while performing the research?		

Statement of Test to be Met

Disclosure would deprive the officer or employee of priority of publication.
- Publication must be planned.

There is a reasonable expectation that this will occur.
- Investigator must assess the reasonableness or likelihood of this happening.

Relevant Questions	Departmental Response	Assessment
Is the research being done for a particular publication or class of publication?		
Does the researcher intend to seek publication of the research? - Where? - When? - As part of his academic credentials, i.e. PhD, Thesis		
Who will author the article or published material? Is there a publishing agreement?		
What stage is the research at?		
Is it close to the stage where it would be eligible for publication?		
Has it been accepted for publication? Has an abstract been prepared? Has it been published?		
Has it had peer vetting/examination? - When?		

Relevant Questions	Departmental Response	Assessment
- Is this planned/completed? - Where was this done/who did it?		
Are there others performing research on the same matter? - Where?		
What stage is their research (if known)? - Could they use the results of this research? - How?		
Has there been prior release of these research results? - Manuscript form? - Symposia, seminars, presentations? - To whom? - Deposit in university archives?		
Has the research been used in other publications? - If so, where (ask to see it)? - By the government employee? - By others?		
Has patent, industrial design or copyright protection been sought relating to the research by the employee or government institution?		
Where is the research material information kept?		
Are there measures to keep it locked, separate from other files?		

Paragraph -- 18(d)

Financial Interest of Government of Canada.

Statement of Test to be Met

- Disclosure could be injurious to financial interest of Government of Canada or to ability of the Government of Canada to manage the economy

Relevant Questions	Departmental Response	Assessment
How does the information relate to the economic, financial or monetary policies of the Government of Canada?		
How does it relate to the government's financial interests?		

Relevant Questions	Departmental Response	Assessment
Whose financial interests are concerned - Government or third party?		
Is a contemplated expenditure involved?		
Does the information concern assets or liabilities of the government? - Describe these.		
Does the information relate to taxation measures, revenue collection measures? - How?		
Does the information relate to transactions or negotiations in which the government is involved? - Specify, are these current or concluded?		

Statement of Test to be Met

- Disclosure could be injurious to financial interest of Government of Canada or to ability of the Government of Canada to manage the economy.

Ability of the Government of Canada to manage the economy of Canada.

Relevant Questions	Departmental Response	Assessment
How does the information relate to management of the economy?		
Are there impending economic or fiscal measures described in the record? - What are these?		
Does the document deal with contemplated changes or allocations in the social security system, tax and revenue system, and regional development/equalization payments?		
Does the record relate to changes in economic indicators and measuring indexes?		
Does the government generate this information?		

Statement of Test to be Met

- disclosure would be injurious
- injury must be material
- is there a reasonable expectation this will occur?

Relevant Questions	Departmental Response	Assessment
What harm is anticipated from disclosure?		
How will this affect the financial interests of the government/ or the government's ability to manage the economy (per above)?		
Does the information relate to implementation of Budget measures? - Ask to see description of measures contained in the Budget.		
Have the measures been discussed in other documentation/form? - Industry/other consultations - Shareholder communications/correspondence - Contained in tender documents, RFPs - Speeches		
Has there been disclosure in the past of this kind of information?		
What harm resulted?		
To whom has the information been circulated? - Anyone outside government? - Anyone in foreign government?		
Are the transactions to which the information relates concluded? - At what stage are they?		
How current is the information?		
Has the measure, policy or transaction been discussed in: - Annual reports? - Estimates? - House of Commons committees?		
Have there been superseding measures (Budgets, change in government, changes in legislation introduced)? - Do these 'date' the information? - Is the subject matter being actively considered?		

Relevant Questions	Departmental Response	Assessment
What is the value of the assets involved?		
What amounts of money are involved?		
What is the amount of potential liability?		
What is the potential financial impact?		
Will disclosure hinder implementation of a policy or measure? - How?		
What benefit could be derived by those outside government from disclosure of the information?		
Note that information revealing the existence or identity of a legitimate tax deduction will not meet the injury test.		
If the information is related to a transaction: - Has there been disclosure in tender documents, RFPs? - Are there ongoing negotiations? - Is there a bidding process or competition among suppliers/vendors/purchasers dealing with the government? - How much money is involved in the transaction?		
Is the measure or policy referred to in the information aimed at an individual company or entity?		
Have there been prior consultations concerning the measure/policy? Disclosure to lobbyists?		
How would disclosure enhance the position of a person/entity?		
How would disclosure to one disadvantage others subject to the measure or policy?		
Is the transaction subject to notification requirements (i.e., bankruptcy, seizures)?		

Statement of Test to be Met

Does the information relate to:
(i) currency, coinage, legal tender of Canada?
(ii) contemplated change in rate of bank interest, in government borrowing?
(iii) contemplated changes in tariff rates, taxes, duties or other revenue sources?

(iv) contemplated change in conditions of operation of financial institutions?
(v) contemplated sale/purchase of securities or of foreign or Canadian currency?
(vi) contemplated sale or acquisition of land or property?

Relevant Questions	Departmental Response	Assessment
Are any of sub-paragraphs (i) through (vi) being relied on by the institution?		
Does the information refer to a change in the matters referred to in sub-paragraphs (ii), (iii) (iv)? - What is the change? - When is it intended to take place? - Has the change been decided upon? - What level of approval has been obtained? - Is the change one of a number of options? - Are these still being considered? [see questions in consultations above]		
If information relates to a contemplated sale or purchase (as in sub-paragraphs (v) or (vi): - Has a decision been taken to complete the transaction? - What stage is the transaction at?		
See above for questions relating to material injury or undue benefit resulting from disclosure.		

Paragraph – 18

Statement of Test to be Met

Section 18 is a discretionary exemption.

The government institution is required to:
1. Consider disclosing the record notwithstanding it is described by section 18.
2. To consider disclosure in light of
   - The kind of injury identified in the text of the section.
   - The intent of the section.
   - The intent of the Act.

Relevant Questions	Departmental Response	Assessment
Has the [head of the] government institution considered disclosing the record? - Why was it decided not to disclose?		

Relevant Questions		Departmental Response	Assessment
- Has the institution considered whether sub-paragraphs (i), (ii) (iii) or (v) could apply (as relevant) favouring disclosure? - This assessment must go beyond concluding that the information is described in section 18.			
Relevant factors in this assessment by a head could include:			
(i)	Whether there has been disclosure in the past.		
(ii)	Whether there has been disclosure to some groups, excluding others to the detriment.		
(iii)	Whether disclosure could have the effect of stabilizing, reassuring markets or would have a neutral impact in current circumstances.		
(iv)	Whether disclosure would have a chilling effect in the supply of similar information to the government from other governments, or third party.		
(v)	Whether disclosure would encourage the reciprocal supply of information, e.g. from universities doing similar research to the benefit of the government institution.		
(vi)	Whether disclosure would discourage government employees doing research from trying to obtain publication or doing other research.		

Endnotes

1. *Treasury Board Manual Access to Information Volume, Treasury Board of Canada*, December 1, 1993, Chap 2-8 at 26.

2. *The Institute of Law Research and Reform, Alberta and a Federal-Provincial Working Party, Trade Secrets,* (Report No. 46, July 1986).

3. The interpretation of the Institute (and of Mr. Justice Strayer) is much narrower than the Treasury Board's interpretation and is preferred by this office. For example, The T.B. interpretation does not require the trade secret to have obtained its economic value from not being generally known, nor does it require that the efforts taken to protect the information be reasonable under the circumstances.

4. 5 U.S.C. § 552.

5. *Anderson v. HHS*, 907 F. 2d 936, 944 (10th Cir. 1990).

6. For example, see **Ontario Orders # 87 & P-270.**

Section 19

The Provision:

19(1) ***Subject to subsection*** *(2), the head of a government institution* ***shall refuse*** *to disclose any record requested under this Act that* ***contains*** ***personal information*** *as defined in section 3 of the* **Privacy Act***.*

19 (2) *The head of a government institution* ***may disclose*** *any record requested under this Act that contains* ***personal information*** *if*

(a) the individual to whom it relates ***consents*** *to the disclosure;*

(b) the information is ***publicly available****; or*

(c) the disclosure is ***in accordance*** *with* ***section 8 of the*** **Privacy Act.**

Preliminary matters:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizens or permanent resident within the meaning of the *Immigration Act* and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, the Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under section 68 or 69.

Subsection 19(1) is a conditional mandatory class exemption. The condition is that once the Head determines that a record or part thereof contains certain information which falls within the class enunciated in the exemption, he/she must then refuse to grant access to the requested information unless one of the exceptions contained in subsection 19(2) applies. The exemption process under subsection 19(1) is not completed until this determination is made.

The "Test":

There have been a considerable number of decisions from the Federal Court of Canada, and now one from the Supreme Court of Canada, on the criteria to be met in order for section 19 to apply. However, since the term '*personal information*' covers a wide area of information, time and further jurisprudence will be needed to get a better understanding of the section 19 exemption. Until then, jurisprudence from other jurisdictions can also assist us in that determination.

The determination as to whether section 19 applies to requested information is a multi-step process. Each step should be followed carefully in order to avoid undesirable mistakes. The following will summarize the steps you should follow:

1) Step I:

Determine whether the requested information constitutes personal information for the purpose of the **Access to Information Act**. To do so, you must:

- Determine whether the requested information falls within the definition of '*personal information*' as defined in section 3 of the **Privacy Act**; and
- determine whether the requested information is excluded pursuant to paragraph 3*(j)* to 3*(m)* of the **Privacy Act**.

2) Step II:

Determine whether the requested information falls within subsection 19(2) of the **Access to Information Act**. This subsection excludes from the exemption information where:

- the individual to whom the information relates consents to disclosure;
- the information is publicly available; or
- the disclosure is in accordance with section 8 of the **Privacy Act**.

3) Both of these steps will be explained further below:

a) Determination as to whether the requested information constitutes personal information for the purpose of the **Access to Information Act**:

Determination as to whether the information requested falls within the definition of '*personal information*' as defined in section 3 of the **Privacy Act**.

i) Section 3 of the **Privacy Act** *reads as follows:*

> (3) *'Personal information' means* ***information about an identifiable individual that is recorded in any form*** *including, without restricting the generality of the foregoing,*
>
> *(a) information relating to the* ***race****,* ***national*** *or* ***ethnic origin****,* ***colour****,* ***religion****,* ***age*** *or* ***marital status*** *of the individual,*
> *(b) information relating to the* ***education*** *or the* ***medical****,* ***criminal*** *or* ***employment history*** *of the individual or information relating to* ***financial transactions*** *in which the individual has been involved,*
> *(c) any* ***identifying number****,* ***symbol*** *or* ***other particular assigned to the individual****,*
> *(d) the* ***address****,* ***fingerprints*** *or* ***blood type*** *of the individual,*

(e) *the **personal opinions** or **views** of the individual except where they are **about another individual** or **about a proposal for a grant**, an **award** or a **prize to be made** to another individual by a government **institution** or a **part of** a government institution **specified in the regulations**,*

(f) ***correspondence** sent to a **government institution** **by the individual** that is **implicitly** or **explicitly** of a **private** or **confidential nature**, and **replies** to such correspondence that would **reveal the contents** of the **original correspondence**,*

(g) *the **views** or **opinions** of **another individual** **about the individual**,*

(h) *the **views** or **opinions** of **another individual** about a **proposal for a grant**, an **award** or a **prize to be made** to the individual by an **institution** or a **part of an institution** referred to in **paragraph (e)**, but excluding the **name** of the other individual where it **appears** with the **views** or **opinions** of the **other individual**, and*

(i) *the **name** of the **individual** where it appears with **other personal information** relating to the individual or where the disclosure of the name **itself** would **reveal information** **about the individual**,*

The key factor in the definition of personal information is that the individual must be identifiable. Generally, to determine whether an individual could be identified from the disclosure of the requested information, you look at it from the perspective of a reasonably informed person. In applying this criteria, one should not consider the particular knowledge of the requester but, rather, whether any member of the public could determine who the individual referred to in the record is[1] - i.e. the fact that a particular person might be able to identify the individual is not enough to meet the test. However, if we are dealing with a particular requester and have objective evidence that he could identify the individual to whom the information relates, in this case the particular knowledge of the requester would be important in the assessment of subsection 19(1). Subject to that exception, what you must look at is whether the average person could identify the individual.

In determining whether an individual is identifiable, numerous factors can be used in conjunction with one another. This effect, (called the 'mosaic' effect) is particularly important in the context of personal information. For example, in some instances the references in the record about a specific geographic area could constitute personal information if the particular nature of the information requested could lead to the identity of the persons concerned. Similarly it could be possible in some circumstances that information about a small group of people would constitute personal information if the individuals to whom the information relates could be identifiable from the content of the record. Generally, before accepting an exemption of personal information based on the mosaic effect this office will require a very convincing argument on the part of the department claiming the information to be personal information. What will be required from the department is a clear linkage between the individual concerned and the information which is alleged to be covered by the exemption.

It is also important to consider that for the purpose of the **Access to Information Act**, the definition of personal information knows no national boundaries. It applies to any

identifiable individual anywhere in the world regardless of their nationality, domicile, country of residence, etc.

The definition of 'personal information' contained in section 3 of the **Privacy Act** is not exhaustive. The definition includes any information about an identifiable individual. The definition is followed by 9 examples of what could constitute personal information. These specific examples are not in any way exhaustive and only serve to illustrate the principal types of material the legislator had in mind when creating the provision. It is very important to remember that these paragraphs are examples only and do not in any way guarantee that the information is necessarily personal information. For example, the blood type of an individual is an example of personal information contained in paragraph 3*(d)* of the **Privacy Act**. But there are millions of people that have the same blood type thus, if there is a record which contains the name of a person and his blood type, it clearly constitutes personal information about that person. However, by removing the personal identifier which links the blood type to the individual, the blood type ceases to be personal information because it no longer relates to an identifiable individual. On the contrary, some types of personal information, by themselves, could be exemptible. For example, the S.I.N. of an individual is unique and, through it alone, can lead to the identity of an individual.

ii) Determination as to whether the requested information is excluded pursuant to paragraphs 3(j) to (m) of the **Privacy Act***:*

Paragraphs 3*(j)* to *(m)* reads as follows:

*(j) 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:*

*(i) the **fact** that the individual **is or was** an **officer** or **employee** of the **government institution**,*

*(ii) the **title**, **business address** and **telephone number** of the individual,*

*(iii) the **classification**, **salary range** and **responsibilities** of the **position** held by the individual,*

*(iv) the **name** of the individual on a document **prepared by the individual** in the **course of employment**, and*

*(v) the personal **opinions** or **views** of the individual **given** in the **course of employment,***

(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services;

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

(m) information about an individual who has been dead for more than twenty years.

When deciding as to whether something constitutes personal information, one must not forget that the intent of subsection 19(1) and its incorporation of section 3 of the **Privacy Act** is to protect the privacy or identity of individuals who may be mentioned in releasable material. The subject of the two Acts read together is that information must be provided to the public except where it relates to personal information about identifiable individuals.[2]

Because the purpose of the **Privacy Act** is to protect the privacy of personal information, the general rule is that information about identifiable individuals is personal information and only if a specific exception contained within paragraphs 3(j) to (m) applies, would such information not be personal information[3]. Accordingly, before exempting any information under subsection 19(1) the head of a government institution must satisfy himself to the effect that none of these exceptions apply. It is not sufficient for the head of a government institution to simply state that he is unaware or that he just doesn't know if the exceptions apply. Rather, he or she should be in a position to state what activities and initiatives were taken in this regard.[4] This is particularly important considering the fact that the presence of any of these exceptions would render subsection 19(1) inapplicable.

b) Determination as to whether the information requested falls within subsection 19(2) of the **Access to Information Act**:

- Determination as to whether the individual to whom the information relates, consents to disclosure.
- Determination as to whether the information is publicly available.
- Determination as to whether disclosure is in accordance with Section 8 of the **Privacy Act**.

Section 8 reads as follows:

8(1) *Personal information **under the control** of a **government institution** **shall not**, without the **consent** of the **individual to whom it relates**, be **disclosed** by the institution **except** in **accordance** with this section.*

8(2) *Subject to any other **Act of Parliament**, personal information **under the control of a government institution** may be disclosed*

*(a) for the **purpose for which** the information was **obtained** or **compiled** **by the institution** or **for a use consistent** with that purpose;*

*(b) for any purpose in **accordance** with any **Act of Parliament** or any **regulation made thereunder** that **authorizes** its disclosure;*

*(c) for the purpose of **complying** with a **subpoena** or **warrant issued** or **order made** **by a court**, **person** or **body with jurisdiction** to **compel** the **production** of information or for the purpose of **complying** with **rules of court** relating to the production of information;*

*(d) to the **Attorney General** of Canada for use in **legal proceedings** involving the **Crown in right of Canada** or the **Government of Canada**;*

(e) *to an **investigative body specified in the regulations**, on the **written request** of the **body,** for the **purpose of enforcing** any **law of Canada** or a **province** or **carrying out** a **lawful investigation**, if the **request specifies** the **purpose** and **describes** the **information to be disclosed;***

(f) *under an **agreement** or **arrangement** between the **Government of Canada** or an **institution** thereof and the **government of a province**, 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**;*

(g) *to a **member of Parliament** for the purpose of **assisting** the individual to whom the information relates in **resolving** a **problem**;*

(h) *to **officers or employees** of the **institution** for **internal audit** purposes, or to the **office of the Comptroller General** or any other **person** or **body specified in the regulations** for audit **purposes**;*

(i) *to the **National Archives** of Canada for **archival purposes**;*

(j) *to any **person** or **body** for **research** or **statistical purposes** if the head of the government institution*

(i) *is **satisfied** that the **purpose** for which the information is disclosed **cannot reasonably be accomplished** unless the information is **provided in a form** that would **identify** the individual to whom it relates, and*

(ii) ***obtains** from the **person** or **body** a **written undertaking** that **no subsequent disclosure** of the information will be made in a **form** that **could reasonably be expected** to **identify** the individual to whom it relates;*

(k) *to any **association of aboriginal people**, **Indian band**, **government institution** or part thereof, or to any **person** **acting on behalf** of such association, band, institution or part thereof, for the **purpose** of **researching** or **validating** the **claims**, **disputes** or **grievances** of **any of** the **aboriginal peoples** of Canada;*

(l) *to any government institution for the purpose of **locating** an individual in order to **collect** a **debt** owing to **Her Majesty in right** of Canada **by that individual** or **make** a **payment owing to that individual** by Her Majesty in right of Canada; and*

(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, or*

(ii) *disclosure would **clearly benefit** the individual **to whom the information relates**.*

8(3) *Subject to any other **Act of Parliament**, personal information under the **custody or control** of the **National Archivist of Canada** that has been **transferred** to the National Archivist **by a government institution** for a**rchival** or **historical purposes** may be disclosed in accordance with the*

regulations *to any* ***person or body*** *for* ***research*** *or* ***statistical purposes****.*

8(4) *The head of a government institution* ***shall*** *retain a copy of* ***every request*** *received by the government institution under paragraph (2)(e) for such period of time as may be* ***prescribed by regulation****, shall keep a* ***record of any information disclosed*** *pursuant to the* ***request*** *for such* ***period of time*** *as may be* ***prescribed by regulation*** *and shall, on the request of the Privacy Commissioner, make those copies and records available to the Privacy Commissioner.*

8(5) *The head of a government institution shall notify the Privacy Commissioner in writing of any disclosure of personal information under paragraph (2)(m) prior to the disclosure where reasonably practicable or in any other case forthwith on the disclosure, and the Privacy Commissioner may, if the Commissioner deems it appropriate, notify the individual to whom the information relates of the disclosure.*

8(6) *In paragraph (2)(k), "Indian band" means*

(a) a band, as defined in the **Indian Act***;*
(b) a band, as defined in the **Cree-Naskapi (of Quebec) Act***; or*
(c) the Band, as defined in the **Sechelt Indian Band Self-Government Act***, chapter 27 of the Statutes of Canada, 1986.*

Before exempting information pursuant to subsection 19(1) of the Act, the institution head must first make the determination as to whether any of the conditions enumerated in subsection 19(2) are present. Once any of these conditions are fulfilled, the head of the government institution is required to disclose the requested information.[5]

The head of a government institution has the duty to determine whether these conditions are present (determining whether the information has been made publicly available, whether the individual concerned would consent to disclosure), or whether the public interest override applies) in each case where the conditions could reasonably be fulfilled. In a case involving a consent override in the **Privacy Act** (section 19(2) **Privacy Act** section 13(2) **Access to Information Act**)), for example, the Federal Court of Appeal stated that the request for information itself "*includes* a request to the head of a government institution to make reasonable efforts to seek the consent of the third party which provided the information." (Emphasis added). The Court noted that the evidentiary burden lies on the government institution to show that the exception in subsection 19(2) of the **Privacy Act** (subsection 13(2) **Access to Information Act**) for consent does not apply given the inability of the requester to know who to ask for consent or what the withheld information consists of. The test enunciated by the Court with respect to the application of the consent override in subsection 19(2)(a) (subsection 13(2)(a) of the **Access to Information Act**) was whether the government institution has made reasonable efforts to seek the consent of the other government or institution. See: *Ruby v. Canada (Solicitor General)* (2000) 3 F.C. 589, [2000] F.C.J. 779, 187 D.L.R. (4th) 675, 256 N.R. 278, 6 C.P.R. (4th) 289, leave to appeal to the Supreme Court allowed, [2000] S.C.C.A. No. 353 (S.C.C.)

ADVISORY NOTE

This is a seminal case. However, the decision by the Federal Court of Appeal is currently under appeal in the Supreme Court. That decision, which is expected to be published on or before December 31, 2002, will provide the definite answer as to how to assess the discretionary balancing of public interest and privacy considerations. In the meanwhile, any and all references to the Court of Appeal decision in *Ruby* needs to keep this caution in mind.

In the *Ruby*[6] case the Federal Court of Appeal also considered the duty of the institution head to decide whether the public interest override in sub-paragraph 8(2)(m)(i) of the **Privacy Act** applied. The Federal Court of Appeal held that the institution head must undertake a weighing of the competing interests behind the public interest override, but that the manner in which the weighing of interests is conducted is within the discretion of the head of the institution. In the *Ruby* case, the Federal Court of Appeal concluded that it was unclear whether the government institution (CSIS) had conducted any kind of discretionary balancing of public interest and privacy under subparagraph 8(2)(m)(i), and remitted the matter back to the Trial Judge to determine whether the exemption from disclosure that was subject to the override had been properly applied:

> Having said all this, however, we confess that we are unable to ascertain from the decision of the reviewing judge whether in fact CSIS conducted any kind of discretionary balancing of public interest and privacy. In other words, it is unclear whether CSIS took any consideration of subparagraph 8(2)(m)(i) when it refused to disclose information relating to third parties and whether, therefore, it properly applied the exemption it claimed pursuant to section 26 of the [*Privacy*] Act. Nor are we able to determine whether the reviewing judge was satisfied that the exemption had been considered by CSIS, or that he considered it himself. In the circumstances, there should be a new review of the personal information requested in banks 010 and 015 for the purpose of determining whether the exemption in section 26 has been properly applied by CSIS. (at paragraphs 124-125).

Case Law:

1. ACCESS TO INFORMATION ACT - SUBSECTION 19(1)

a. Quasi-constitutional mission of the Privacy Act

Lavigne v. Canada (Commissioner of Official Languages), 2002 SCC 53 at para. 24 Justice Gonthier, for the Court, wrote that the **Privacy Act** is fundamental in the Canadian legal system and that it has two major objectives. Its aims are, first, to protect personal information held by government institutions and second, to provide individuals with a right of access to personal information about themselves (s. 2). Until 1983, the core elements of the legal guarantees of the confidentiality of personal information were set out in Part IV of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33. Part IV of the *Canadian Human Rights Act* was repealed (S.C. 1980-81-82-83, c. 111 (Sch. IV, s. 3)) and replaced by the **Privacy Act** (S.C. 1980-81-82-83, c. 111, Sch. II). In view of the quasi-constitutional mission of the Act, the courts have recognized its special nature [see *Canada v. Canada (Labour Relations Board)*, [1996] 3 F.C. 609 at 652]. The **Privacy Act** is a reminder of the extent to which the protection of privacy is necessary to the preservation of a free and democratic society [see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at p. 434 below]. The **Privacy Act** is closely linked to the values and rights set out in the Constitution, and this explains the quasi-constitutional status that the Supreme Court has recognized it as having. However, that status does not operate to alter the traditional approach to the interpretation of legislation. The quasi-constitutional status of the **Privacy Act** is one indicator to be considered in interpreting it, but it is not conclusive in itself. The only effect of this Court's use of the expression "quasi-constitutional" to describe the Act is to recognize its special purpose.

Canada (Privacy Commissioner) v. Canada (Labour Relations Board), [1996] 3 F.C. 609 (Fed. T.D.) aff'd [2000] F.C.J. No. 617 (F.C.A.) The Court noted that it was well established that the provisions of the *Access Act* and of the **Privacy Act** must be afforded a broad and purposive interpretation. The broad, purposive approach afforded by the Court to the interpretation of both the *Access Act* and **Privacy Act** originates in part from this legislation's particular status. Subsection 4(1) of the *Access Act* provides that the Act applies "notwithstanding any other Act of Parliament," lending it a quasi-constitutional status. The enactment by Parliament of Part IV of the **Canadian Human Rights Act**, later replaced by the **Privacy Act**, illustrated its recognition of the importance of the protection of individual privacy. A purposive approach to the interpretation of the **Privacy Act** is thus justified by the statute's quasi-constitutional legislation roots. The Court also noted that it had been held on several occasions by the Court that the *Access Act* and the **Privacy Act** must be interpreted together.

b. Access and Privacy statutes forms an ensemble and a seamless code

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403. This appeal involves a clash between two competing legislative policies --access to information and privacy with the appellant and respondent having opposing views as to which of these policies

should prevail in this case. Recognizing the conflicting nature of governmental disclosure and individual privacy, the Court noted that Parliament attempted to mediate this discord by weaving the **Access to Information Act** and the **Privacy Act** into a seamless code. According to the Court, while the two statutes do not efface the contradiction between the competing interests -- no legislation possibly could --they do set out a coherent and principled mechanism for determining which value should be paramount in a given case.

The Court also noted that it is clear that the **Access to Information Act** and **Privacy Act** have equal status, and that courts must have regard to the purposes of both statutes in considering whether a government record constitutes "personal information".

According to the Court, the two statutes should be considered conceptually distinct and that the right to access should be the paramount consideration under the access legislation.

As already noted, the **Access to Information Act** and the **Privacy Act** are parallel statutes, designed to work in concert to restrict the federal government's control over certain kinds of information. The **Access to Information Act** gives individuals a right of access to government information. The **Privacy Act** permits them to gain access to information about themselves held in government data banks, and limits the government's ability to collect, use and disclose personal information.

Additionally, both statutes regulate the disclosure of personal information to third parties. Section 4(1) of the **Access to Information Act** states that the right to government information is "[s]ubject to this Act". Subsection 19(1) of the Act prohibits the disclosure of a record that contains personal information "as defined in section 3 of the **Privacy Act**". Section 8 of the **Privacy Act** contains a parallel prohibition, forbidding the non-consensual release of personal information except in certain specified circumstances. Personal information is thus specifically exempted from the general rule of disclosure. Both statutes recognize that, in so far as it is encompassed by the definition of "personal information" in s. 3 of the **Privacy Act**, privacy is paramount over access. This interpretation, the Court noted, is buttressed by the legislative history of the Acts.

The Court further observed that the **Access to Information Act** and **Privacy Act** have equal status, and that courts must have regard to the purposes of both statutes in considering whether a government record constitutes "personal information". Yet, that the two statutes should be considered conceptually distinct and that the right to access should be the paramount consideration under the access legislation. The Court hastened to note that this parallel interpretation model is NOT inherently contradictory or necessarily leads to inconsistent results. The **Access to Information Act** clearly provides that "personal information" is not to be disclosed except in certain specified circumstances. Of course, the determination of what constitutes "personal information" involves a balancing of competing values. Such a balancing process, where mandated by legislation, cannot be avoided simply because it might be easier to apply a clear, bright-line rule that favours one interest over another. By employing the considerations set out in the **Privacy Act**, courts are perfectly capable of developing a jurisprudence

that achieves consistency in principle. The determination of what constitutes "personal information" is an interpretive exercise; an exercise that will inevitably require a consideration of the competing values of access and privacy.

According to the Supreme Court in *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), [2006] 1 S.C.R. 441*, it is apparent from the scheme and legislative histories of the *Access Act* and the *Privacy Act* that the combined purpose of the two statutes is to strike a careful balance between privacy rights and the right of access to information. However, within this balanced scheme, the Acts afford greater protection to personal information:

> *«…the intimate connection between the right of access to information and privacy rights does not mean, however, that equal value should be accorded to all rights in all circumstances. The legislative scheme established by the Access Act and the Privacy Act clearly indicates that in a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation»*[1].

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), [1997] 1 F.C. 164 (Fed. T.D.) As explained by Chief Justice Isaac, as he then was, in the *Dagg v. Canada (Minister of Finance)* case: The *Access Act* and the **Privacy Act** were enacted by Parliament as schedules to *An Act to enact the* **Access to Information Act** *and the* **Privacy Act**...and came into force at the same time. Their purposes are not obscure. The purpose of the *Access Act*, stated in subsection 2(1) of the Act, is to afford to the public access to information under the control of the Government of Canada in accordance with the principles expressed in the legislation and subject to the limited and specific exceptions contained therein. Section 19 of that Act, which relates to "personal information", describes only one of many such "limited and specific exceptions" contained in the Act. Similarly, the purpose of the **Privacy Act** is expressly stated in section 2 thereof in plain and unambiguous language. It is two-fold: to protect the privacy of individuals with respect to "personal information" about themselves held by an institution of the Government of Canada and to provide those individuals with a right of access to that information. It is obvious that both statutes are to be read together, since section 19 of the Access Act does incorporate by reference certain provisions of the **Privacy Act**. Nevertheless, there is nothing in the language of either statute which suggests, let alone compels, the conclusion that the one is subordinate to the other. They are each on the same footing. Neither is pre-eminent. There is no doubt that they are complementary and must be construed harmoniously with each other according to well-known principles of statutory interpretation in order to give effect to the stated parliamentary intention and in order to give effect to ensure the attainment of the stated parliamentary objectives.

[1] Paragraph 26

c. Intent and purpose

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), [1997] 1 F.C. 164 (Fed. T.D.) Richard J. As explained by Chief Justice Isaac, as he then was, in the *Dagg v. Canada (Minister of Finance)* case: the *Access Act* and the **Privacy Act** were enacted by Parliament as schedules to *An Act to enact the* **Access to Information Act** *and the* **Privacy Act**...and came into force at the same time. Their purposes are not obscure. The purpose of the *Access Act*, stated in subsection 2(1) of the Act, is to afford to the public access to information under the control of the Government of Canada in accordance with the principles expressed in the legislation and subject to the limited and specific exceptions contained therein. Section 19 of that Act, which relates to "personal information", describes only one of many such "limited and specific exceptions" contained in the Act. Similarly, the purpose of the **Privacy Act** is expressly stated in section 2 thereof in plain and unambiguous language. It is two-fold: to protect the privacy of individuals with respect to "personal information" about themselves held by an institution of the Government of Canada and to provide those individuals with a right of access to that information. It is obvious that both statutes are to be read together, since section 19 of the *Access Act* does incorporate by reference certain provisions of the **Privacy Act**. Nevertheless, there is nothing in the language of either statute which suggests, let alone compels, the conclusion that the one is subordinate to the other. They are each on the same footing.

Neither is pre-eminent. There is no doubt that they are complementary and must be construed harmoniously with each other according to well-known principles of statutory interpretation in order to give effect to the stated parliamentary intention and in order to give effect to ensure the attainment of the stated parliamentary objectives.

d. Onus of proof

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3. F.C. 527 (Fed. T.D.) Rothstein J. The purpose of the **Privacy Act** is to protect the privacy of "personal information", the general rule is that information about identifiable individuals is "personal information" and only if a specific exception applies, would such information not be "personal information". It follows that a party wishing to demonstrate that information about an identifiable individual is not "personal information" must show that an exception applies.

e. Definitions - General

Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration), 2002 FCA 270 (Fed. C.A.) Décary, Noël and Evans JJ.A. Stating the obvious the Court observed that when a definition uses the words "including, without restricting the generality of the foregoing", such as that contained in section 3 of the **Privacy Act**, that definition is "undeniably expansive" and is not limited to the matters thereafter specially enumerated. In saying that "if a government record is captured" by

the opening words, “it does not matter that it does not fall within any of the specific examples”. When a specific example excludes a certain type of information from the definition of “personal information”, the exclusion cannot be ignored on the ground that the example is merely an illustration, and that what is excluded by the example is nevertheless captured by the opening words.

Canada (Information Commissioner) v. Canada (Royal Canadian Mounted Police), 2001 FCA 56, Décary, Létourneau and Noël JJ.A. Noting that the definition of personal information in section 3 of the **Privacy Act** is extremely broad, the Court of Appeal held that this effectively militate against giving the exception in paragraph 3(j) a broad interpretation.

Thurlow v. Canada (Solicitor General), [2003] F.C. 1414, 242 F.T.R. 214 (F.C.T.D.), O’Keefe J. : Applicant made request to RCMP pursuant to *Privacy Act* for information relating to investigations by RCMP into certain of his activities. The RCMP advised applicant that some of requested information was exempt from disclosure pursuant to ss. 26 of the *Privacy Act* – the equivalent of section 19(1) of the *Access to information Act*. In reviewing the Department’s decision, the Court found that "personal information" should be given a broad meaning as opposed to a narrow construction

Canada (Privacy Commissioner) v. Canada (Labour Relations Board), [1996] 3 F.C. 609 (Fed. T.D.) aff’d [2000] F.C.J. No. 617 (Fed. C.A.) Noël J. The Court noted that the term “personal information” is given a very wide meaning. Its definition encompasses “information” of a personal nature as that word is commonly understood including that which relates to matters enumerated in section 3, but also extends to the “views” or “opinions” held by an individual about someone else. Despite this far reaching definition, it is doubtful that anything expressed by a decision maker in the course of consultations or deliberations can be regarded as “personal information” about an individual. This is because nothing that is recorded by a decision maker in the course of deliberations is intended to inform. Furthermore, whatever the “views” or “opinions” expressed by a decision maker about someone in the course of deliberations, these cannot be said to be the “views” or “opinions” of the decision maker unless and until they find their way into the reasons which are eventually given for the decision.

Accounts of consultations and deliberations do not lend themselves to notations and corrections. They do not purport to be and cannot reasonably be viewed by anyone as “accurate”, “up-to-date” or “complete” as to what they may reveal. Indeed, it is very doubtful that the complainant in this matter had any privacy concerns when he initiated his request for information. In his letter to the Privacy Commissioner he made it clear that he needed the information in order to assist him in pursuing his prolonged and involved litigation before the courts pertaining to the alleged violation of his rights under the Code. In this respect, the appeal process provided the complainant with an effective opportunity to correct any error of fact or opinion which might have been harboured by the Board in reaching its decision.

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), [1997] 1 F.C. 164 (Fed. T.D.) Richard J. The Court observed that paragraphs 3(a) through 3(i) of the **Privacy Act** broadly define “personal information” as being “information about an identifiable individual that is recorded in any

form". Paragraphs 3(j) through 3(m) provide exceptions to what is included in the definition of "personal information" for the purposes of sections 7, 8 and 26 of the **Privacy Act** and section 19 of the *Access Act*.

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3. F.C. 527 (Fed. T.D.) Rothstein J. The phrase "researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada" appears to contemplate formal claims or disputes brought by aboriginal peoples in their capacity as aboriginal peoples. The Court did not read these words to apply to any or all disputes between individuals of aboriginal descent. If that were the case, paragraph 8(2)(k) of the **Privacy Act** would allow for disclosure of "personal information" in disputes involving individuals of aboriginal descent but not in disputes involving individuals from other ethnic communities or disputes where the issue of race is irrelevant. Such distinction clearly was never intended by the **Privacy Act**.

Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs), [1990] 1 F.C. 395 (Fed. T.D.) at 400 Dubé J. The French and English versions of paragraph 3(k) differ in that the English version refers to information about an individual who was "performing services under contract", whereas the French text refers to an individual "qui a conclu un contrat". Obviously for the Court, the French version is narrower as it limits the exclusion to an individual who has personally concluded contractual arrangements with the government, whereas the English text relates to an individual who was performing services for the government, whether it be directly or indirectly through a personnel agency. The Court concluded that there was nothing in the scheme of the Act which would provide more privacy to the individual who is hired by the government through a personnel agency. The French text "qui a conclu un contrat de prestation de services" is, in the Court's view, merely bad translation.

Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs), [1990] 1 F.C. 395 (Fed. T.D.) at 400 Dubé J. Clearly, security classification pertains to a position and not to the individual who applied for that position or who eventually filled it. Personal information as defined in section 3 of the **Privacy Act** means information relating to an individual whether it be his race, colour, religion, personal record, opinion, etc. The Court went on saying that nowhere does security classification fall within the heads of personal information listed under section 3 of the **Privacy Act**. Even paragraph 3(c), which deals with identifying numbers, symbols or other particulars, limits such particulars to the individual, not to the position held by the individual. The Court noted that even if it was personal information, it fell under the exclusion provided by 3(k).

Bombardier v. Canada (Public Service Commission), [1990] F.C.J. No. 573 (Fed.T.D.) Addy J. The Court noted that the expression "personal information" is defined in general terms in s. 3 of the **Privacy Act** as being information recorded in any form about an identifiable individual. In accordance with the provisions of s. 12 of the *Interpretation Act*, the sections of this Act must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

(1) Definition of "personal information" includes views/opinions of another

Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration), 2002 FCA 270 (Fed. C.A.) Décary, Noël and Evans JJ.A. The principal issue was whether the names of individuals interviewed in the course of an administrative review, who expressed views or opinions about a senior officer of the Department of Citizenship and Immigration (the Department), and portions of their interviews which would identify them, are exempted from disclosure as their "personal information" as defined in paragraph 3(*i*) of the **Privacy Act**. The Court of Appeal noted that the Applications Judge had found that paragraph 3(i) of the **Privacy Act** warranted non-disclosure of the names and opinions of the interviewees, but determined, as a result of the exception found in paragraph 3(j), the information could nevertheless be disclosed. Justice Décary, for the Court, reached the conclusion that paragraph 3(i) of the **Privacy Act** does not apply, or does not prevail in that case, and that disclosure was mandated pursuant to paragraphs 3(e) and 3(g).

Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration), 2002 FCA 270 (Fed. C.A.) Décary, Noël and Evans JJ.A. The Court observed that the definition of 'personal information' at section 8 of the **Privacy Act**, uses the words "including, without restricting the generality of the foregoing". That definition is "undeniably expansive" and is not limited to the matters thereafter specially enumerated and its intent seems to be to capture any information about a specific person, subject only to specific exceptions. When, as it was the case before the Court, a specific example excludes a certain type of information from the definition of "personal information", the exclusion cannot be ignored on the ground that the example is merely an illustration, and that what is excluded by the example is nevertheless captured by the opening words. Paragraph 3(*e*) makes it clear that the personal opinions of an individual (an interviewee) are his "personal information" except when they are about another individual (Mr. Pirie) in which case paragraph 3(*g*) provides that they become the "personal information" of Mr. Pirie. Paragraph 3(*h*), on the other hand, resolves any doubt as to whether paragraph 3(*e*) included the identity of the holder of the opinions or views in the words "personal opinions or views of an individual". Only when the views concern a proposal for a grant, an award or a prize, is the identity of their holder excluded. From the legislative history of the definition of "personal information" in the **Privacy Act**, that paragraph 3(*h*) was added to "clarify that these assessments will be available to the individuals whose proposals have been assessed, but the identity of the assessor would not be available" (the Hon. Francis Fox, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs on Bill C-43 (1980-83) at 94:171-172). Had Parliament intended this "clarification" to apply to the whole of paragraph 3(*e*), it would surely have said so and simply added the clarification to the end of that paragraph. In using the word "clarification", the Hon. Fox confirms, in the Court's view, that the very notion of "opinion or belief of an individual" (my emphasis) would otherwise contemplate the source of that opinion or belief, i.e. the identity of the individual holding it. An opinion presumes an opinion-holder. Contrary to

the Applications Judge, the Court of Appeal concluded that the name and identity of interviewees were as much the personal information of Mr. Pirie, pursuant to paragraph 3(*g*), as was the substance of the opinions or views expressed.

Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration), 2002 FCA 270 (Fed. C.A.) Décary, Noël and Evans JJ.A. Paragraph 3(*i*) applies where the disclosure of the name itself would reveal information about the individual. Where the name does not appear, the information does not fall under paragraph 3(*i*) (see *Dagg*, at para. 82). The Court of Appeal concluded that both the private interest of Mr. Pirie and the public interest, mandate the disclosure of the names of the interviewees. The Court noted that this conclusion was consistent with comments made by Privacy Commissioner Grace in his testimony before the Standing Committee on Public Accounts in 1989 and with administrative interpretation of the **Privacy Act** given in a Treasury Board Manual.

Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration), [2001] F.C.J. No. 429 (F.C.T.D.) (QL) Dawson J. At issue is whether portions of the notes of interviews and names of interviewees who expressed views and opinions about the added respondent during an administrative review of the Case Processing Centre in Vegreville, Alberta were properly exempted from disclosure under sections 19 and 20 of the Act. Noting that paragraphs 3(e) and (g) of the **Privacy Act***,* while dealing with the substance of an individual's opinions or views, are silent as to the fact that it is the view or opinion of an identifiable individual, the Court observed that this did not mean that the information is not personal information. The fact that the information is not captured by one of the specified examples found in the definition is irrelevant if the information is otherwise captured by the broad opening words of the definition at section 3 of the **Privacy Act**.

(2) Past positions of an employee of a government institution is part of employment history - Subsection 19(1) and paragraph 3(j) of the Privacy Act

Canada (Information Commissioner) v. Canada (Royal Canadian Mounted Police), 2001 FCA 56, Décary, Létourneau and Noël JJ.A. Noting that the definition of personal information in section 3 of the **Privacy Act** is extremely broad, the Court of Appeal held that this effectively militate against giving the exception in paragraph 3(j) a broad interpretation. Further, the Court of Appeal emphasized that neither paragraph 3(j) or subparagraph 3(j)(i) require an interpretation which restrict the release of information about an individual's current position; that subparagraph is merely concerned with establishing whether an individual was or still is an employee of the government. The very fact of employment, past or present, can be revealed and, indeed is essential to a citizen in determining whether his request for disclosure is addressed to the appropriate authority and is worth pursuing. However, in contrast to a request about a position or a category of positions which may reveal the name of the incumbents, a request about a named individual's position, especially in respect to the past positions held, has to be specific as to time, scope and place. It cannot be a fishing expedition about all or numerous positions occupied by an

individual within the Government over the span of his employment as it becomes, in fact, a request about that individual's employment history. Requiring the entire list of historical postings of an individual is nothing less than requiring, with respect to his place of work, part of his employment history.

(3) Name of individual may not be "personal information" - Subsection 19(1)

Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration), [2001] F.C.J. No. 429 (F.C.T.D.) (QL) Dawson J. At issue is whether portions of the notes of interviews and names of interviewees who expressed views and opinions about the added respondent during an administrative review of the Case Processing Centre in Vegreville, Alberta were properly exempted from disclosure under sections 19 and 20 of the Act. Noting that paragraph 3(i) of the **Privacy Act** deals expressly with an individual's name, the Court held that the name of an individual is personal information in one of two situations: first, when the name appears with other personal information relating to the individual; second, where disclosure of the name would reveal information (not necessarily personal information) about the individual. By analogy with *Dagg*, in which the Supreme Court found that the disclosure of names on a sign-in sheet would reveal personal information about identifiable individuals, the Court held that the disclosure of the names of interviewees would reveal personal information about these individuals so as to fall within the second branch of paragraph 3(i) of the **Privacy Act**. Given that not all individuals employed at the CPC participated in the review, the information revealed would be that such individuals participated in the administrative review.

Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration), [2001] F.C.J. No. 429 (F.C.T.D.) (QL) Dawson J. At issue is whether portions of the notes of interviews and names of interviewees who expressed views and opinions about the added respondent during an administrative review of the Case Processing Centre in Vegreville, Alberta were properly exempted from disclosure under sections 19 and 20 of the Act. In considering the applicability of paragraph 3(j), the Court concluded that a distinction must be drawn between the views of those employees who were managers with certain responsibilities and functions, and those who were not. On the evidence, the Court concluded that with respect to the names and opinions of individuals at the CPC in Vegreville with responsibility to prevent harassment in the workplace or to otherwise administer a harassment policy, the Minister had failed to meet the onus of proving that such information did not fall within paragraph 3(j) of the **Privacy Act**. With respect to employees without responsibility for preventing harassment, the Court concluded that their names are not information attaching to their position or function, but rather are information relating primarily to the individuals themselves. For this class of non-management employees, therefore, the requested information does not fall within paragraph 3(j) of the **Privacy Act**.

f. Further definitions applicable to section 3 of the Privacy Act

(1) Corporation is not "an identifiable individual" - Paragraphs 3(a)(b)(c)(d) and (e)

Tridel Corp. v. Canada Mortgage & Housing Corp., [1996] F.C.J. No. 644 (Fed. T.D.) Campbell J. Relying on *Montana Band of Indians v. Canada* (1988) 18 F.T.R. 15 where it is said that "information about small groups may, in some cases, constitute personal information...", Tridel Corporation tried to argue that information about corporations can constitute personal information. Justice Campbell observed that the small group referred to in *Montana* were composed of people and the comment was made in the context of an argument that Band financial statements should be considered personal information of each member of the Band. The Court had no doubt that "an identifiable individual" is a human being, since it is only a human being that can possess all the very personal characteristics and experiences enumerated in subsections 3(a), (b), (c), (d) and (e) of the **Privacy Act**.

(2) Recording and/or transcripts of air traffic control communications recorded by NAV CANADA

Canada (Information Commissioner) v. Executive director of the Canadian Transportation Accident Investigation and Safety Board 2006 FCA 157: the requesters sought access to recordings and/or transcripts of air traffic control communications recorded by NAV CANADA and now under the control of the Safety Board.

The Court found that the information at issue was not "about" an individual, since the content of the communications was limited to the safety and navigation of aircraft the general operation of the aircraft and the exchange of messages on behalf of the public. They contain information about the status of the aircraft, weather conditions, matters associated with air traffic control and the utterances of the pilots and controllers. These are not subjects that engage the right to privacy of individuals. The Court also found that the information contained in the records at issue is of a professional and non-personal nature. The information may have the effect of permitting or leading to the identification of a person. It may assist in a determination as to how he or she has performed his or her task in a given situation. But the information does not thereby qualify as personal information. It is not about an individual, considering that it does not match the concept of "privacy" and the values that concept is meant to protect. It is non-personal information transmitted by an individual in job-related circumstances.

(3) Financial statement of Indians Bands - Paragraph 3(b)

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3. F.C. 527 (Fed. T.D.) Rothstein J. *Prima facie*, the names of persons who owe money to the Band, or who are owed money by the Band, or for whom the Band guarantees a loan, or whose salary is individually set out, come within the

opening words of the definition of “personal information” and the words “information relating to financial transactions in which the individual has been involved” in paragraph 3(b).

Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs), [1989] 1 F.C. 143 (Fed. T.D.) Jerome A.C.J. Seven Indians Band sought to prevent disclosure under the **Access to Information Act** of their audited financial statement. The applicant alleged that although no individuals are named or otherwise identified in most of the statements (where such information does appear, the respondent has conceded it may be withheld), since the number of members of each Band is known, a simple per capita division of the asset information in the statements would reveal the entitlement of each individual member. It is alleged that for this reason, all the statements must be considered personal information. The Court rejected this argument. First, on the facts of the case, the Court was not satisfied that information about identifiable individuals can be obtained from the general data in the financial statement. The statements themselves do not provide for the calculation suggested by the applicants. Nothing in these records indicates how an individual member’s net worth is connected to the overall Band figures. Second, even if such information could be extracted from the statements, to protect them from disclosure on that basis would be an unwarranted extension of s. 19. While the Court did not rule out the possibility that information about small groups may, in some cases, constitute personal information, the mere fact that one can divide the group’s assets by the number of its members does not support such a finding. To hold otherwise would be to distort the intention of the personal information exemption.

(4) Personal opinions or views - Paragraphs 3(c) and (e)

Robertson v. Canada (Minister of Employment and Immigration), [1987] F.C.J. No. 713 (Fed. T.D.) Jerome A.C.J. In the context of making a required submission on behalf of a union of employees, the author had responded by making general comments that were quite appropriate under the circumstances and should be made public. He signed the letter as a Union official and directed further inquiries on the Union position to another Union official whose name and telephone number he has provided. However, the Court found that in the Union submission, the author had included two paragraphs, clearly indicated as distinct from the rest of the letter by use of the word “personally”, in which he expressed his own observations based on personal experiences and opinions. The Court concluded that these paragraphs constituted personal, confidential information about the author pursuant to s. 3(e). The Court noted that they could be severed from the rest of the letter and that they were precisely the kind of information the **Privacy Act** was enacted to protect. In light of this conclusion, since the author’s name no longer appeared with other personal information relating to him, and since the other identifying “particulars” related solely to the author’s authority to write on behalf of the Union, ss. 3(c) and (i) did not provide justification for refusing access to the complimentary closing of the letter in issue.

(5) Opinions on the adequacy of the training and experience of employees (appraisals and evaluations of individuals) - Paragraph 3(g)

Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551(Fed. T.D.) at 558, Jerome A.C.J. The author's opinions about specified individuals and their training, personality, experience or competence must be deleted as constituting personal information.

(6) Views or opinions of 'other individuals' given during an investigation - Paragraph 3(g)

Lavigne v. Canada (Commissioner of Official Languages), 2002 SCC 53 at paras. 50-58 Lavigne had filed four complaints with the Commissioner of Official Languages alleging that his rights in respect of language of work, and employment and promotion opportunities, had been violated. During its investigation, the Commissioner questioned some employees of the Department, giving assurances that the interviews would remain confidential within the limits of ss. 72, 73 and 74 of the **Official Languages Act**. After the Commissioner's report was submitted, Lavigne applied to the Federal Court, Trial Division for a remedy from the Department under Part X of the **Official Languages Act**. While those proceedings were going on, Lavigne made an initial request to the Commissioner for disclosure of the personal information contained in the files on the complaints he had made to him. Some information was withheld under the exemption set out in s. 22(1)(b) of the **Privacy Act**. Justice Gonthier, for the Court**,** confirmed the decision of the lower courts which ordered the respondent to disclose all the personal information to which Lavigne was entitled, that is, information about himself and views or opinions of other individuals about him. The Court also held that, under the **Privacy Act**, the applicant is not entitled to information other than "personal information".

Lavigne v. Canada (Commissioner of Official Languages), [1998] F.C.J. No. 1527 (Fed. T.D.) aff'd [2000] F.C.J. No. 1412 (Fed. C.A.) aff'd 2002 SCC 53 Dubé J. The "personal information" to which the applicant is entitled is defined under section 3 of the **Privacy Act**, that is information about himself that is recorded in any form and includes (under subsection 3(g)) views or opinions of other individuals about him. Under the **Privacy Act**, the applicant is not entitled to information other than "personal information".

Lee v. Canada (Armed Forces, Chief of Defence Staff), [1992] F.C.J. No. 145 (Fed. T.D.) Cullen J. The Court noted that paragraph 3(g) specifically includes as personal information "the views or opinions of another individual about [identifiable] individual" and therefore views or opinions of another individual about that individual are exempt and cannot be released without the individual's consent.

(7) Names of interviewees - Balancing of interests - Paragraph 3(i) –

Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration), 2002 FCA 270 (Fed. C.A.) Décary, Noël and Evans JJ.A. In balancing the private interests of both Mr. Pirie and the interviewees, as well as the public interest in disclosure and in non-disclosure, respectively, the Court made the following findings: (1) The private interest of the interviewees is in hiding the fact that they participated in the inquiry and keeping confidential conversations they had with an investigator (the Court noted, however, that the managers who were interviewed were not given any promise of confidentiality and cannot allege that private interest). Preserving their anonymity would ensure that their working or personal relationship with Mr. Pirie is not jeopardized and, more importantly, would protect them from any possible legal action that Mr. Pirie could bring on the basis of the views expressed. This private interest was minimal. The fact that the interviewees participated in the inquiry has, in itself, little significance and, to the extent that they can justify the views they expressed, they should not fear the consequences of the disclosure, although, obviously, there may be some. To the extent that they cannot justify their views, they might have reason to fear. The fear, however, is caused not by the disclosure but by the fact that the views were expressed in the first place and that, perhaps, they were not justifiable. (2) The public interest in the non-disclosure which is alleged by the Minister is that of the chilling effect the disclosure might have on future investigations, coupled with the fact that promises of confidentiality made by (or on behalf of) a government institution will not be given effect. The Court rejected this argument. (3) The private interest of Mr. Pirie, on the other hand, was significant. Implicit, if not explicit in the report and in the action taken by the Department as a result of the publication of the report, was the fact that he bear some responsibility for the problems which were found to exist at the Centre. Surely, he must be given the opportunity to know what was said, and by whom, against him, if only to exercise his right under subsection 12(2) of the **Privacy Act** to clear his name in the Department's archives. (4) The public interest in the disclosure is to ensure fairness in the conduct of administrative inquiries. Whatever the rules of procedural propriety applicable in a given case, fairness will generally require that witnesses not be given a blank cheque and that persons against whom unfavourable views are expressed be given the opportunity to be informed of such views, to challenge their accuracy and to correct them if need be. The Court of Appeal, therefore, concluded that both the private interest of Mr. Pirie and the public interest mandate the disclosure of the names of the interviewees. The Court noted that this conclusion was consistent with comments made by Privacy Commissioner Grace in his testimony before the Standing Committee on Public Accounts in 1989 and with administrative interpretation of the **Privacy Act** given in a Treasury Board Manual. (The Manual is at best an aid to the interpretation of the **Privacy Act**, that it represents only the opinion of the Treasury Board or the officials and they are not binding on government institutions and even less so on the courts. Yet the convergent view of the main and competing actors involved in this type of dispute, i.e. the Treasury Board, the Information Commissioner and the Privacy Commissioner, may offer “persuasive opinion on the purpose or meaning of legislation”.)

(8) Names of Former Members of Parliament in Receipt of Pension Benefits - Paragraph 3(i)

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), [1997] 1 F.C. 164 (Fed. T.D.) Richard J. Dealing with an application for review of the government institution's refusal to disclose the names of MPs receiving pension benefits, the Court concluded that the requested information is personal information which is excluded from disclosure. However, further in its analysis the Court concluded that the head of the government institution had improperly exercised his discretion by withholding the requested information pursuant to the public interest override contained in subparagraph 8(2)(m)(i) of the **Privacy Act**.

(9) Names of medical practitioners who have had their prescribing privileges restricted or revoked - Paragraph 3(i)

Mackenzie v. Canada (Department of National Health and Welfare), [1994] F.C.J. No. 1746 (Fed. T.D.) Wetston J. The Department of National Health and Welfare refused to disclose records containing the names of those medical practitioners who have had their prescribing privileges restricted or revoked. The respondent submitted that the information requested fell within both the opening words of section 3 of the **Privacy Act**, and specifically within subsection 3(i). The Court noted that an individual's name is not necessarily personal information; however, in this case, revealing the physicians' names necessarily reveals that a particular individual has had their prescription writing privilege restricted or revoked. The Court added that this was a necessary conclusion because only individuals whose privileges have been restricted appear on the lists.

(10) Name of witnesses who gave information to the RCMP – Paragraph 3(i)

Barta v. Canada (Attorney General), 2006 FC 1152: In this case, the applicant was subject to a criminal complaint and the RCMP investigated. The Applicant was taken into custody. He was questioned, photographed and fingerprinted. Witness statements were taken. A report was made to Crown counsel. Charges were not pursued. The Applicant filed a privacy request in a effort to pursue a civil remedy against witnesses who according to him gave false information to the RCMP. The Department invoked ss. 22(1)a), 22(1)b) and 26 of the *Privacy Act,* the equivalent of ss. 16(1)a), 16(1) c) and 19 of the *Access to Information Act.*The Court made no findings on the question as to whether the witnesses gave false information. The Court found that the *Privacy Act* does not provide to the Applicant a right to obtain information from the RCMP that would identify the complainant and those who gave witness statements in support of the complaint.

(11) Disclosure of only the names of individuals - Paragraph 3(i)

Noël v. Great Lakes Pilotage Authority Ltd., [1988] 2 F.C. 77 (Fed. T.D.) Dubé J. The applicant was seeking the names of masters and deck watch officers who are not subject to compulsory pilotage on the Great Lakes. The Information Commissioner argued that the information requested was confidential under ss. 19(1) of the Act and the definitions contained in s. 3 of the **Privacy Act**, since in his submission the list of masters and deck watch officers contains personal information on the individuals in question, in particular, information regarding their employment history, and merely disclosing their names would reveal information about them. The Commissioner pointed out that these individuals are not government employees and do not work under a contract with a government institution. Their names are supplied to the Authority by letters from shipowners, which contain more than each individual's name. They also indicate the occupation, name of employer, name of ship and the fact that he has completed at least ten passages, which is employment history. The Court did not think that this first concern of the Commissioner was wholly valid. An individual's name does not constitute personal information unless, as provided in s. 3(i) of the **Privacy Act**, disclosure of the name itself would reveal (personal) information about the individual. In that case, the Court found that the Authority could simply have used the severance mentioned in s. 25 of the Access Act and given only the names of the individuals in question, without further detail. This would of course mean that persons with these names are masters or deck watch officers who meet the requirements of the subparagraph. Disclosure of the names alone would not reveal any employment history, apart from the fact that the individuals in question had made at least ten passages in the Great Lakes pilotage area during the three years in question.

Geophysical Service Inc. v. Canada-Newfoundland Offshore Petroleum Board, [2003] F.C.J. No. 665, Gibson J.: In this case, the Applicant made an access request for the names and addresses of third parties who had, over the course of preceding months, requested and been granted access to information concerning or provided by the Applicant, together with details of the information provided. The Court found no basis to conclude that the names of the requesters linked to the information requested would constitute personal information. The Court found that if the requesters are corporations or unincorporated bodies, they are not "identifiable individuals". If the requesters are "identifiable individuals" and are acting only as employees of corporations or the like, and nothing more than their position or title with the corporation or other organization is identified, that disclosure does not constitute disclosure of "personal information". The Court found also that the title or job identifier of an individual employed by a corporation or other organization does not, if disclosed, amount to disclosure of "personal information" in and of itself.

(12) Offence committed by a Canadian Forces member. Paragraph 3(j)

Terry v. Canada (Minister of National Defence), [1994] F.C.J. No. 1679 (Fed. T.D.) Rouleau J. The applicant was seeking access to (1) a transcript of the charge; (2) a copy of the subsequent disposition; and (3) a copy of the punishment, concerning an offence committed by a soldier while on service in

Croatia. The applicant was denied a copy of the requested records because they were exempt pursuant to subsection 19(1) of the **Access to Information Act**. After review, it was clear for the Court that the information being sought was "personal information" under s. 3 of the **Privacy Act**. However, the applicant submitted that since the individual, whose personal information was presumed to be protected, was a Non-Commissioned Officer in the Canadian Armed Forces, then paragraph 3(j) of the **Privacy Act** should apply. The Court concluded that the exceptions found in paragraph 3(j) of the **Privacy Act** are very specific and should be interpreted narrowly. Further, in reply to the applicant's submission, the Court did not see how the requested information could be of any public interest and should be released pursuant to section 8 of the **Privacy Act**.

(13) Monetary remuneration of GIC appointees - Paragraph 3(j)

Rubin v. (Clerk of the Privy Council), [1993] F.C.J. No. 287(Fed. T.D.) Muldoon J. The applicant was seeking disclosure of specific remuneration of Governor in Council appointees. The Court held that personal information shall not be disclosed except what is specified in subparagraph 3(j)(iii); officer's or employee's classification, salary range [but not the specific salary] and responsibilities of the position held by that individual. It noted that not being listed among the exceptions, specific salary, monetary remuneration paid per diem, and monthly or yearly salary remain within the overall category of "personal information." The Court reiterated that there is a statutory exception to the foregoing statutory imperative. The exception to the disclosure of personal information (apart from the individual's consenting to disclosure) is elaborately set out in subsection 8(2) of the **Privacy Act**. The only exception following items (a) through (l) is the double discretion (m)(i) "for any purpose where, in the opinion of the head of the institution, the public interest in disclosure clearly outweighs any invasion of privacy which could result from the disclosure". Parliament had declared specific salary sums and daily remuneration rates to be personal information which shall not be disclosed, unless the public interest in disclosure clearly [not "barely" nor yet "presumably"] outweighs any invasion of privacy which could result from the disclosure. The Court further held that the non-monetary non salarial remuneration conferred upon a Governor in Council appointee is not specified salary or specific per diem. For the Court, it is a "discretionary benefit of a financial nature" (s. 3(l)) because it confers a financial benefit without being financial or pecuniary in fact, but rather in nature. But even if this benefit be slightly outside that rubric, noted the Court, it is surely that which extends "salary range", and without which "salary range" would be confined entirely to the merely monetary remuneration.

(14) Names on building access sign-in logs are "personal information". Paragraph 3(j)

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403 Justice Cory, for the majority, agreed with Justice La Forest speaking for the minority, that the names on sign-in logs are "personal information" for the purposes of s. 3 of the **Privacy Act**. However, the majority arrive at a different conclusion with respect to the application of s. 3 "personal information" (j) of that Act. The Court unanimously was of the opinion that the names on the sign-in logs did not fall under s. 3(j)(iv) of the **Privacy Act**. The Court noted that it would be difficult to conclude that the sign-in logs were "prepared by" employees, as that expression is commonly understood. The majority was of the view that both the opening words of s. 3(j) and the specific provisions of s. 3(j)(iii) of the **Privacy Act** were sufficiently broad to encompass the information sought by the appellant.

Justice Cory agreed with La Forest who held that the purpose of s. 3(j) and s. 3(j)(iii) of the **Privacy Act** is to exempt only information attaching to positions and not that which relates to specific individuals. Information relating to the position is thus not "personal information", even though it may incidentally reveal something about named persons. Conversely, information relating primarily to individuals themselves or to the manner in which they choose to perform the tasks assigned to them is "personal information". Moreover, they agreed that "generally speaking, information relating to the position will consist of the kind of information disclosed in a job description, such as the terms and conditions associated with a particular position, including qualifications, duties, responsibilities, hours of work and salary range.

(15) Number of hours spent at the workplace by employees. Paragraph 3(j)

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. The majority of the Court held that the number of hours spent at the workplace is generally information "that relates to" the position or function of the individual, and thus falls under the opening words of s. 3(j). It is no doubt true that employees may sometimes be present at their workplace for reasons unrelated to their employment. Nevertheless, the Court was prepared to infer that, as a general rule, employees do not stay late into the evening or come to their place of employment on the weekend unless their work requires it. Ordinarily the workplace cannot be mistaken for either an entertainment centre or the setting for a party. The sign-in logs therefore provide information which would at the very least permit a general assessment to be made of the amount of work which is required for an employee's particular position or function.

For the same reason, added the Court, the information in the sign-in logs is related to "the...responsibilities of the position held by the individual" and falls under the specific exception set out at s. 3(j)(iii) of the **Privacy Act**. Although this information may not disclose anything about the nature of the responsibilities of the position, it does provide a general indication of the extent of those responsibilities. Generally, the more work demanded of the employee, the longer will be the hours of work required to complete it in order to fulfil the "responsibilities of the position held by the individual". Nothing in s. 3(j)(iii) of the

Act indicates that the information must refer to "responsibilities" in a qualitative, as opposed to quantitative, sense.

(16) "Views of the individual given in the course of employment" - Paragraphs 3(j) and (v)

Mislan v. Canada (Minister of Revenue), [1998] F.C.J. No. 704 (Fed. T.D.) Rothstein J. In that case the information at issue was personal information about both the applicant and another individual. The information was contained in a report involving a sexual harassment complaint. While the applicant was not referred to in each and every excerpt of the confidential information, there was no doubt the information was about him. With respect to the other individual (and in a few instances yet a third individual) there was no doubt, for the Court, that each excerpt referred to that individual and was personal information about that individual. Applicant's counsel suggested that some of the excerpts were "views of the individual given in the course of employment" and therefore, by definition not personal information by reason of subparagraph (j)(v) in the definition of personal information in section 3. The Court held that the information was not "given in the course of employment". What is referred to in subparagraph (j)(v) would be views respecting matters within the scope of employment of employees of the Department of National Revenue. Views of a person respecting a sexual harassment complaint in which he or she is involved clearly qualify as personal information.

(17) Postings of an individual - Paragraph 3(j)

Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), [2003] SCC 8, [2003] S.C.J. No. 7 : In this case, the Court noted that the purpose of s.3(j) is to ensure that the state and its agents are held accountable to the general public and accepted the Information Commissioner's argument that s.3(b) and (j) reflect Parliament's intention that public officials should enjoy a lesser degree of privacy protection.

Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), [2003] SCC 8, [2003] S.C.J. No. 7 : In this case, the requester sought the historical list of postings, occupied by four named RCMP officers, including their status during the postings and the relevant dates for the same; the list of ranks, and the dates they achieved those ranks; their years of service and their anniversary date of service. The RCMP refused to disclose the requested information taking the position that this information relates to the "employment history" of individuals. The Supreme Court of Canada rejected the claim for exemption based on the fact that the list of examples provided in the exception to "personal information" set out in s.3(j) is not exhaustive and further noted that there was no basis for imposing a time restriction on its scope. Accordingly, the Supreme Court of Canada held that s.3(j) is necessarily retroactive and "should be read as applicable to multiple position". The Court

ultimately determined that "section 3(j) should apply only when the information requested is sufficiently related to the general characteristics associated with the position or functions held by an officer or employee of a federal institution".

Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), [2003] SCC 8, [2003] S.C.J. No. 7 : In this decision, the Supreme Court of Canada gave some examples of what would remain inaccessible, under s.3(j), including evaluations and performance reviews of federal employees, on the basis that these do not relate to the position or functions of the individual, "but are linked instead to the competence of the employee to fulfil his task". Then the Supreme Court of Canada left open the possibility that subjective information concerning a federal employee's current or historic positions may be subject to the right of access.

(18) Evaluations of employees' performance, training or competence – Paragraph 3(j)

Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551(Fed. T.D.) at 557, Jerome A.C.J. The requester sought to have access to a publicly-funded report on the Food Services Operations at the Regional Psychiatric Centre. Some portions of the report contained the author's opinion about specific employees. The Court did not agree with the argumentation that the effect of paragraph 3(j) of the **Privacy Act** is to create an exception to the general rule of privacy where government employees are concerned. The specific examples of releasable employment information listed in subparagraphs (i) through (v), while not exhaustive, serve to illustrate the sort of material the legislators had in mind when they exempted "information...that relates to the position or functions of [government employees]". Except for subparagraph (v), (the individual's own views or opinions given in the course of employment), all the examples are matters of objective fact. There is no indication that qualitative evaluations of an employee's performance were ever intended to be made public. Indeed, the Court noted, it would be most unjust if the details of an employee's job performance were considered public information simply because that person is in the employ of the government. The Court concluded that while the study may be disclosed, the author's opinions about specified individuals and their training, personality, experience or competence must be deleted as constituting personal information.

Van Den Bergh v. Canada, [2003] F.C. 1116, 2003 F.T.R. No. 1407 (F.C.T.D.), O'Reilly J. : This was an application for judicial review of the NRC's refusal to provide the names of all of the employees who had been awarded performance bonuses in the year 2000. In reviewing the exemptions claimed by the Department, the Court determined that the exception in s. 3(l) of the *Privacy Act* applied to the information requested. Clearly, the employees who have been awarded bonuses have received a financial benefit. As to the discretionary nature of the benefit, the Court distinguished between pension schemes based on precise eligibility criteria, which are not discretionary in nature and would not

fall under the exception, and a bonus program that the NRC established of its own initiative. The NRC's bonus program was found to be entirely discretionary. The Federal Court ultimately determined that the NRC cannot prohibit disclosure of the information requested by Ms. Van Den Berg as that information does not reveal the performance evaluations of its employees nor their salary range. As a result, there is no tension between s. 3(j) and 3(l) and there is no basis for concluding that s. 3(l) cannot apply to public employees.

(19) Security classification of individual hired by government agency – Paragraph 3(k)

Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs), [1990] 1 F.C. 395 (Fed. T.D.) at 400 Dubé J. Clearly, security classification pertains to a position and not to the individual who applied for that position or who eventually filled it. Personal information as defined in section 3 of the **Privacy Act** means information relating to an individual whether it be his race, colour, religion, personal record, opinion, etc. The Court said that nowhere does security classification fall within the definition of personal information listed under section 3 of the **Privacy Act**. Even paragraph 3(c), which deals with identifying numbers, symbols or other particulars, limits such particulars to the individual, not to the position held by the individual. The Court noted that even if it was personal information, it fell under the exclusion provided by 3(k).

(20) Information relating to the granting of a licence or permit - Paragraph 3(l)

Canada (Information Commissioner) v. Canada (Minister of Fisheries and Oceans), [1989] 1 F.C. 66 (Fed. T.D.) at 68, 72-74, Denault J. The Minister refused to disclose the names of the recipients of permits to observe the seal hunt. The question was, whether the words "the granting of a licence or permit" extends the term "discretionary benefit of a financial nature", or whether they were intended as a specific illustration of a type of benefit intended to be encompassed by the exception. The Court held that it was clear from the structure of the section that the phrase following "including" is intended to extend the phrase which appears immediately before it, namely "discretionary benefit of a financial nature." This is even clearer with the French version which uses the word "notamment" which translates as "notably", "especially" or "particularly". This construction does not result in a redundancy. The words "licence or permit" are not synonymous with discretionary financial benefit. There are licences and permits which are not of a financial nature, and it is not immediately obvious that the granting of any licence will, in itself, result in a financial benefit to the holder. The use of the phrase to clarify the extent of the exemption is understandable. Finally, the Court concluded that information relating to the grant of a licence or permit will only fall under paragraph 3(l) if the licence or permit constitutes a discretionary benefit of a financial nature. In this case, the licences in question were not of that nature.

(21) Pension benefits under the *Member of Parliament Retiring Allowances* - Paragraph 3(l)

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), [1997] 1 F.C. 164 (Fed. T.D.) Richard J. The Minister refused to disclose the names of MPs receiving pension benefits. Noting that the **MPRA Act** entitles all retired MPs who meet the six-year requirement to a pension, the Court observed that a recipient under the **MPRA Act** is no longer an MP, but a private citizen who, like all other Canadian citizens, is entitled to the pension programme he or she has paid into. There is nothing discretionary about who receives a pension benefit under the *MPRA Act*. There are two requirements an MP must meet before he or she can receive a pension: he or she must be retired, and he or she must have six years of service. If those two qualifications are met, then a pension benefit is issued. If those two qualifications are not met, then no pension benefit is received. Accordingly, the Court concluded, the discretionary benefit exception set out in paragraph 3(l) of the **Privacy Act** does not apply and the requested information is personal information which is excluded from disclosure. However, further in its analysis, the Court concluded that the head of the government institution had improperly exercised his discretion by withholding the requested information pursuant to the public interest override contained in subparagraph 8(2)(m)(i) of the **Privacy Act**.

(22) Specific remuneration of chairs, heads, and presiding officials – Paragraph 3(l)

Rubin v. (Clerk of the Privy Council), [1993] F.C.J. No. 287(Fed. T.D.) Muldoon J. The applicant was seeking disclosure of specific remuneration of Governor in Council appointees. The Court held that personal information shall not be disclosed except what is specified in subparagraph (j)(iii). That specification is finely sculpted, being a government institution's officer's or employee's classification, salary range [but not the specific salary] and responsibilities of the position held by that individual. Not being listed among the exceptions, specific salary, monetary remuneration paid per diem, monthly or yearly salary remain within the overall category of "personal information. The Court noted that there is a statutory exception to the foregoing statutory imperative. The exception to the disclosure of personal information (apart from the individual's consenting to disclosure) is elaborately set out in subsection 8(2) of the **Privacy Act**. The only exception following items (a) through (l) is the double discretion (m)(i) "for any purpose where, in the opinion of the head of the institution, the public interest in disclosure clearly outweighs any invasion of privacy which could result from the disclosure". Parliament had declared specific salary sums and daily remuneration rates to be personal information which shall not be disclosed, unless the public interest in disclosure clearly [not "barely" nor yet "presumably"] outweighs any invasion of privacy which could result from the disclosure. The Court further held that the non-monetary non-salarial remuneration conferred upon a Governor in Council appointee is not specified salary or specific per diem.

For the Court, it is a "discretionary benefit of a financial nature" (s. 3(l)) because it confers a financial benefit without being financial or pecuniary in fact, but rather in nature. But even if this benefit be slightly outside that rubric, noted the Court, it is surely that which extends "salary range", and without which "salary range" would be confined entirely to the merely monetary remuneration.

(23) Performance bonus – Paragraph 3(l)

Van Den Bergh v. Canada, [2003] F.C. 1116, 2003 F.T.R. No. 1407 (F.C.T.D.), O'Reilly J. : This was an application for judicial review of the NRC's refusal to provide the names of all of the employees who had been awarded performance bonuses in the year 2000. In reviewing the exemptions claimed by the Department, the Court determined that the exception in s. 3(l) of the *Privacy Act* applied to the information requested. Clearly, the employees who have been awarded bonuses have received a financial benefit. As to the discretionary nature of the benefit, the Court distinguished between pension schemes based on precise eligibility criteria, which are not discretionary in nature and would not fall under the exception, and a bonus program that the NRC established of its own initiative. The NRC's bonus program was found to be entirely discretionary. The Federal Court ultimately determined that the NRC cannot prohibit disclosure of the information requested by Ms. Van Den Berg as that information does not reveal the performance evaluations of its employees nor their salary range. As a result, there is no tension between s. 3(j) and 3(l) and there is no basis for concluding that s. 3(l) cannot apply to public employees.

(24) Discretionary benefit conferred by someone other than government - Paragraph 3(l)

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3. F.C. 527 (Fed. T.D.) Rothstein J. The Court held that subsection 19(l) does not contemplate discretionary benefit of a financial nature not granted by a government institution (in that case an Indian Band). The Court concluded that even if paragraph (l) in the definition of "personal information" in section 3 of the **Privacy Act** includes information about discretionary benefits of a financial nature between private parties that comes under the control of a government institution, the evidence did not satisfy the Court that the information at issue fell under this exception. The Court found that the information was personal information.

(25) Names, addresses and rental charges of tenants - Paragraph 3(l)

Bland v. Canada (National Capital Commission), [1991] 3 F.C. 325 (Fed. T.D.) Muldoon J. The following were questions at issue in the case: (1) What is "personal information" as defined in section 3 of the **Privacy Act**; (2) Are the tenants' names and rent charged for their premises personal information? (3) If it is established that the rent payable to NCC by the residential tenants is less than fair market rent, does that reduction constitute "information relating to any

discretionary benefit of a financial nature...conferred on an individual, including the name of the individual and the exact nature of the benefit"? The Court stated that the prime factor is a "discretionary" benefit, but not a "gratuitous" benefit, nor yet an "exclusive" benefit, or even a cut-rate, or "bargain basement" benefit. Any of those imagined adjectives would narrow down paragraph 3(l)'s purview. The statute mentions only the conferring of a discretionary benefit from the government institution's point of view. It is so composed that it does not need to mention the *quid pro quo*, because the conferred benefit is not so narrowly contemplated as to be gratuitous nor yet exclusive or cut-rate. The wording is sufficient to cover all of those narrower notions, so long as the benefit be conferred upon the discretion of a government institution, official or employee and is of a financial nature. The exacting of rent money from a tenant is "of a financial nature" just as surely as the according to the tenant of quiet, exclusive occupation of the premises during the term of the lease is conferring a "discretionary benefit". The Court found that to have the advantage of a government contract or lease for reasonable, and especially for favourable consideration - the presumed *quid pro quo* exchanged by the parties - is to have a discretionary benefit of a financial nature. *Prima facie* evidence of a quantifiable benefit surely brings the information sought into the contemplation of paragraph 3(l) of the **Privacy Act**, but so also does the primary relationship of the individual with the government institution. When the parties are free to engage in contractual relations, the benefit conferred is a discretionary benefit. The Court concluded that because of their contractual relationships with the NCC, its residential tenants have had conferred upon them, each individually, a "discretionary benefit of a financial nature". In addition, the Court held that the public interest in disclosure which had been extensively described and reviewed in the decision, in terms of non-disclosure generating the corrosion of public trust, and generating suspicion and public cynicism in a free and democratic society which is gravely, if not mortally, wounded by public cynicism. It was abundantly clear in such circumstances, noted the Court, that the public interest in disclosure clearly, vastly outweighs any invasion of privacy which could result from such disclosure.

(26) Information contained in Customs and Excise E-311 form

Smith v. Canada (Attorney General), CUB 44824, decision dated May 27, 1999; aff'd [2000] F.C.J. No. 174, (Fed. C.A.); aff'd 2001 SCC 88, at para. 37 Rothstein J. (Umpire) The Court noted that the fact that the individual travels by air means that his travel practices are known by at least one airline. In travelling aboard a commercial aircraft, the individual knows that he or she is seen by dozens, if not hundreds of other people. This is hardly information of a "personal and confidential nature" as describe by Sopinka J. in *Plant*. The Court was satisfied that the E-311 information disclosed by Customs to the Commission was not "personal and confidential in nature" such that it reveals "intimate details of the lifestyle and personal choices of individuals" as stipulated by Sopinka J. in *R. v. Plant*, [1993] 3 S.C.R. 281.

f. Further definitions applicable to section 8 of the Privacy Act

(1) Generally

Mackenzie v. Canada (Department of National Health and Welfare), [1994] F.C.J. No. 1746 (Fed. T.D.) Wetston J. The Department of National Health and Welfare refused to disclose records containing the names of those medical practitioners who have their prescribing privileges restricted or revoked. The Court noted that pursuant to subsection 8(1) of the **Privacy Act**, as a general rule, absent consent from an individual to whom the information relates, "personal information" under the control of a government institution shall not be disclosed. However, subsection 8(2) enumerates thirteen (13) situations where otherwise personal information may be disclosed.

Ternette v. Canada (Solicitor General), [1992] 2 F.C. 75 (Fed. T.D.) MacKay J. The information contained in the file concerning the applicant related not only to him but also to other groups and individuals. In so far as it relates to other individuals the respondent is obliged by section 8 of the **Privacy Act** not to disclose that information without consent of those others.

Lee v. Canada (Armed Forces, Chief of Defence Staff), [1992] F.C.J. No. 145 (Fed. T.D.) Cullen J. The applicant requested details of the allegations against him and copies of the investigative reports. He was provided with edited versions of the investigative reports through the **Access to Information** and **Privacy Acts**, but only after his grievance was dismissed. The Court found that there was a duty owed to the applicant and that in the circumstances he was entitled to basic fairness, which was far from what he had received. This unfairness stemmed from the failure of the Forces to follow their own grievance procedure, the inordinate delay for the grievance to be dealt with, the entire way the applicant was treated throughout by the investigation and by his superior officers culminating in the manner in which the redress was handled, including the lack of response to the applicant's requests for information, the fact that decisions were made prior to receiving the applicant's submissions, and that information was finally received under the **Privacy Act** as opposed to under the grievance procedure. Fairness requires, at a minimum, notice of the accusations against one and an opportunity to respond BEFORE a decision is made. This includes being provided with information so that the applicant can respond in a meaningful and informed manner. In response to the respondents' argument that section 8 of the **Privacy Act** prevented them from releasing the information requested by the applicant, the Court, relying in part on *Gough v. National Parole Board*, agreed that the information was not being sought for "idle curiosity" and that the applicant did face serious consequences in terms of his livelihood, even though his liberty was not at stake. The Court added that as noted by counsel for the respondents the liberty interest in *Gough* was so high that the level of disclosure was correspondingly high and therefore it did not avail to plead the provision of the **Privacy Act**. The Court observed that the interest in the Lee case may be lower and as such the reliance on the **Privacy Act** may have been

justified but it was not satisfied that on the particular facts the information the applicant was given was sufficient to protect his fairness rights.

(2) Unemployment Records . Subsections 8(1) and (2)

Rafferty v. Power, [1993] B.C.J. No. 173 (B.C.S.C.) Master Brandreth-Gibbs .In a motor vehicle accident claim the defendants applied, pursuant to Rules 26(1), 26(8), 26(10) and 26(11), for the production of the plaintiff's records that were in the possession of the Unemployment Insurance Commission. The responsible Minister advised that he would release the records on the condition that the plaintiff consented to such disclosure. The Minister took this position because he relied upon sections 8(1) and 8(2) of the **Privacy Act**. Since the plaintiff did not consent, the defendants applied to compel the disclosure of this information. The Minister argued that none of the subsections, 8(2)(b), (c), (m) overcome the opening provision of s. 8(2) "Subject to any other Act of Parliament", which, in this matter was the **Unemployment Insurance Act.** The Minister stated that the court was not permitted to force disclosure of information in the possession of the Unemployment Insurance Commission unless the Minister "deem(s) it advisable" as the Minister is not "compellable". The Minister deemed it advisable, conditionally, upon consent of the plaintiff, as required by s. 8(1) and (2) of the **Privacy Act**. On this application, the Court held that, the language of s. 96 of the **Unemployment Insurance Act** clearly stipulates that the Minister is not compellable unless he "deem(s) it advisable". The Minister required the consent of the plaintiff as a condition precedent to deeming it advisable to release the information pertaining to her. This was due to the provisions of the **Privacy Act** requiring consent to the release of personal information. The Court did not have the power to order the plaintiff to experience a voluntary change of will. No authority was cited to the Court for the proposition that it did. As the Court did not have the power to order consent, the condition precedent to the Minister's release of the records could not be met.

(3) Consistent use- Subsections 8(1) and (2)

AB v. Canada (Minister of Citizenship and Immigration), [2002] F.C.J. No. 610 (Fed. T.D.) O'Keefe J. The Immigration and Refugee Board, Convention Refugee Determination Division decided to release the applicant's Personal Information Form, as well as the transcript, reasons and exhibits, from the applicant's refugee hearing and submit them into evidence at the hearing of another refugee claimant. The applicant submitted that the Board erred in law in making the decision to release the applicant's personal information, and specifically the Board erred in interpreting the **Privacy Act**. The Court was of the view that the record of the applicant's refugee claim qualified as personal information under the control of a government institution. As such, unless the consent of the individual concerned is granted (as required by subsection 8(1)), one of the paragraphs in subsection 8(2) must be invoked to justify disclosure. In this case, the purpose for which the information was obtained was the

determination of the applicant's claim for Convention refugee status. In order for the disclosure of the applicant's personal information to be justified under this section, the use of that information must be consistent with the purpose for which the information was collected.

The Court did not find that the determination of the refugee claim of the other applicant was consistent with the purpose of determining the applicant's claim for Convention refugee status. Counsel had not directed the Court to any Act of Parliament or any regulation made thereunder that authorizes the disclosure of the applicant's personal information contained in his refugee record, therefore paragraph 8(2)(b) does not apply. Provisions from the Convention Refugee Determination Division Rules and the **Immigration Act**, were considered but did not provide satisfactory authority for the disclosure of the personal information.

Subparagraph 8(2)(m)(ii) did not apply in the case since the disclosure of the applicant's refugee record to a subsequent refugee claimant would not clearly benefit the applicant. Subparagraph 8(2)(m)(i) would only apply if the head of the institution provides an opinion that the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure. The head of the institution is a defined term in the **Privacy Act**, and in this situation, it refers to the Minister of Citizenship and Immigration. There was no indication that the Minister of Citizenship and Immigration had engaged in weighing the interests in subparagraph 8(2)(m)(i), so this provision does not apply to authorize the disclosure of the applicant's personal information. In conclusion, the Court found that the Board's decision to release the applicant's personal information to another refugee claimant, under the circumstances of the case, was not permitted under the **Privacy Act**.

(4) Prior consent - Subsections 8(1) and (2)

Rafferty v. Power, [1993] B.C.J. No. 173 (B.C.S.C.) Master Brandreth-Gibbs. In a motor vehicle accident claim the defendants applied, pursuant to Rules 26(1), 26(8), 26(10) and 26(11) for the production of the plaintiff's records that were in the possession of the Unemployment Insurance Commission. The responsible Minister advised that he would release the records on the condition that the plaintiff consented to such disclosure. The Minster took this position because he relied upon sections 8(1) and 8(2) of the **Privacy Act**. Since the plaintiff did not consent, the defendants applied to compel the disclosure of this information. The Minister argued that none of the subsections, 8(2)(b), (c), (m) overcome the opening provision of s. 8(2) "Subject to any other Act of Parliament", which, in this matter was the **Unemployment Insurance Act**. The Minister stated that the court was not permitted to force disclosure of information in the possession of the Unemployment Insurance Commission unless the Minister "deem(s) it advisable" as the Minister is not "compellable". The Minister deemed its advisable, conditionally, upon consent of the plaintiff, as required by s. 8(1) and (2) of the **Privacy Act**. On this application, the Court held that, the language of s. 96 of the **Unemployment Insurance Act** clearly stipulates that the Minister is not

compellable unless he "deem(s) it advisable". The Minister required the consent of the plaintiff as a condition precedent to deeming it advisable to release the information pertaining to her. This was due to the provisions of the **Privacy Act** requiring consent to the release of personal information. The Court did not have the power to order the plaintiff to experience a voluntary change of will. No authority was cited to the Court for the proposition that it did. As the Court did not have the power to order consent, the condition precedent to the Minister's release of the records could not be met.

(5) Disclosure of information to another section within same department - Subsection 8(2)

Gauthier v. Canada (Minister of Consumer and Corporate Affairs), [1992] F.C.J. No. 1040 (Fed. T.D.) Reed J. The applicant was seeking a review of a decision made by the Privacy Commissioner in which he found that: "Sections 7 and 8 of the **Privacy Act** provide that information about an individual cannot be used or disclosed without the individual's consent. The Court held that there are certain exceptions to this general rule, however. Section 8(2) provides that information about an individual can be disclosed without consent if the information is used for a purpose consistent with the purpose for which the information was obtained. According to the Court, CCAC met the requirements of this provision when information about the applicant was given to the Director General, Corporation Branch (as the Minister's representative) to respond to his correspondence.

(6) Notification of collection purpose not required prior to disclosure of information – Subsection 8(2)

Smith v. Canada (Attorney General), CUB 44824, decision dated May 27, 1999; aff'd [2000] F.C.J. No. 174, (Fed. C.A.); aff'd 2001 SCC 88, at para. 110 Rothstein J. (Umpire) The Immigration Commission, as recipient of information in accordance with paragraph 8(2)(b) of the **Privacy Act** was not the collector of information and therefore section 5 was not applicable to the Commission. However, Customs did collect the information and therefore, section 5 applied to Customs. Pursuant to subsection 5(2), Customs was required to inform returning Canadian residents of the purpose for which E-311 information was being collected. However, when the information was collected there had been no agreement between Customs and the Commission for the disclosure of E-311 information, and it was clear that E-311 information was not, at that time, being collected for unemployment insurance purposes. The Court did not think that section 5(2) could be interpreted so as to preclude disclosure of information for a purpose other than that for which it was collected and not known at the time it was collected, i.e., that there can be no disclosure of information collected prior to notice first being given. The Court noted that subsection 5(2) operates as a requirement on the government institution collecting personal information to notify individuals of the purpose for which their information is being collected. It is forward-looking. However, that would be a requirement arising from

subsection 5(2) and not from subsection 8(2), the disclosure provision. Subsection 8(2) provides for a number of instances in which personal information already under the control of the government institution may be disclosed. By contrast with subsection 5(2), it is not forward-looking but rather, deals with the disclosure of information already collected. Subsection 8(2) is not stated to be subject to subsection 5(2). Therefore, there is nothing express that provides that notification is a general requirement before information is disclosed under subsection 8(2).

(7) Use consistent with Immigration purposes - Paragraph 8(2)(a)

Parnian v. Canada (Minister of Citizenship and Immigration), [1995] F.C.J. No. 777 (Fed. T.D.) Wetston J. Counsel for the applicant took issue with the Board's use of notes taken by an immigration official at the port of entry to impugn the applicant's credibility. He argued that the admission of those notes into evidence violates the applicant's rights under the **Privacy Act**. The respondent conceded that port of entry notes constitute protected information within the meaning of the **Privacy Act**, in that the Act provides that information, under the control of a government institution, shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with the conditions set out in subsection 8(2). However, in the respondent's submission, paragraph 8(2)(a) of the **Privacy Act** specifically allows the disclosure of information without the consent of the individual in the case where the release of information is: (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose. Relying on *Rahman* and *Igbinosun*, the Court held that the port of entry notes, in that instance, were collected for a consistent immigration purpose. Accordingly, with respect to the applicant's **Privacy Act** argument, the Court was of the opinion, for the reasons given in *Rahman*, that there was no basis to conclude that the port of entry notes were improperly before the Board.

Rahman v. Canada (Minister of Employment and Immigration), [1994] F.C.J. No. 2041 (Fed. T.D.) Denault J. The Convention Refugee Determination Division (CRDD) of the Immigration and Refugee Board found the applicant not to be a Convention refugee. The applicant was seeking an order setting aside the members' decision and referring the matter back to a differently constituted panel. One of the issues raised by counsel for the applicant concerned the disclosure of the border documents and the tribunal's reliance on these documents in their reasons for the decision. Counsel for the applicant maintained that these documents were inadmissible because they were protected by the **Privacy Act**, and that the proper procedure for its disclosure pursuant to the **Access to Information Act**, was not allowed. The question of the timeliness of the disclosure of the border documents was not an issue before the Court. The Court observed that subsection 8(1) provides that personal information may only be disclosed without the consent of the individual concerned in the circumstances prescribed by section 8. Paragraph 8(2)(a) provides that such information may be disclosed provided that the purpose of the

disclosure is the same as the purpose for which the information was obtained. No specific procedure is provided for in this section nor in the Act except in respect of persons seeking disclosure of personal information about themselves.

At issue were the border documents, specifically, the "examination sheet" of an immigration officer who examined the applicant at the port of entry. The Court noted that the exception in paragraph 8(2)(a) provides that personal information under the control of a government institution which otherwise must be protected may be disclosed "for the purpose for which the information was obtained... or for a use consistent with that purpose." The purpose for which the information was collected may be expressed as general immigration purposes or, more specifically, as admissibility and refugee determination purposes. Under either interpretation, the use by the Convention Refugee Determination Division of the information for the purpose of determining whether the applicant is a Convention refugee may be considered for the same purpose or, in the alternative, a consistent purpose. The Court concluded that since the section does not mandate a particular procedure for disclosure, nor does the Act or the **Access to Information Act**, it would be unreasonable to impose an intervening process, other than timely disclosure to the applicant, between the Canada Employment and Immigration Commission (the institution which collected the information) and the Immigration and Refugee Board. The application was dismissed.

Igbinosun v. Canada (Minister of Citizenship and Immigration), [1994] F.C.J. No. 1705 (Fed. T.D.) McGillis J. The Immigration and Refugee Board found that the applicant was not a refugee, on the basis that he lacked credibility. The decision was challenged principally on the basis that the Board had improperly admitted into evidence a telex from the Canadian High Commission in Lagos, Nigeria containing information which varied from statements made by the applicant in his personal information form. The Court held that subsection 8(1) of the **Privacy Act** provides that personal information controlled by a government institution " ... shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section". The circumstances in which personal information may be disclosed without consent are outlined in subsection 8(2) of the **Privacy Act**. In particular, paragraph 8(2)(a) of the **Privacy Act** permits the disclosure of personal information "for the purpose for which the information was obtained ... or for a use consistent with that purpose."

In that case, the Court found that the evidence established that the identity of the applicant was disclosed to Nigerian police officials to determine whether he had been charged with the offence of murder. There was no evidence to indicate that any confidential information given by the applicant in his personal information form was disclosed. Objection to the admissibility of the telex on the basis that the **Privacy Act** was violated has been advanced in the absence of a proper evidentiary framework and, as a result, must be rejected. Alternatively, even if Canadian officials did provide confidential information from the applicant to the Nigerian police, the disclosure was made for the purpose of permitting the Minister to formulate an opinion as to whether the claim of the applicant raised a matter within the exclusionary provision in subsection F(b) of Article 1 of the

Convention. [See subparagraph 69.1(5)(a)(ii) of the **Immigration Act**.] Since the applicant provided the information for immigration purposes, its use, if any, by the Minister or his representatives was clearly "for a use consistent with that purpose" within the meaning of paragraph 8(2)(a) of the **Privacy Act**. [See also *Rahman v. M.E.I.*, decision dated June 10, 1994, F.C.T.D., No. IMM_2078_93].

(8) Fairness - Process - Paragraph 8(2)(a)

Puccini v. Canada (Director General, Corporate Administrative Services, Agriculture Canada), [1993] 3 F.C. 557 (Fed. T.D.) at 561, 573-574 Gibson J. The applicant was seeking, among other things, to be immediately provided with certain material detailed in the originating notice of motion and relating to the matter under judicial review. The materials requested on behalf of the applicant, appeared to the Court, to be materials obtained or compiled specifically for the purpose of this harassment complaint. If this is right, added the Court, they fall squarely within the terms of paragraph 8(2)(a) of the **Privacy Act** and may, and in the Court's opinion should, if they are to be used by the respondent in further consideration of the harassment complaint, be released to both parties to that complaint. The Treasury Board policy cannot be relied on as a defence to full sharing of information proposed to be used by a person such as the respondent in reaching a final disposition of the complaint. It is true that the policy provides that parties have the right to be kept informed throughout the process "subject to both the **Access to Information Act** and the **Privacy Act**" but Justice Gibson interpreted that to mean subject to all of the provisions of those Acts including paragraph 8(2)(a) of the **Privacy Act**.

(9) Disclosure of employee information to bargaining agent

Public Service Alliance of Canada v. Canada (Treasury Board), 161-2-791 and 169-2-584, decision rendered April 26, 1996, PSSRB (before I. Deans, M. Korngold Wexler and Y. Tarte). Respondents argued that they were precluded by the **Privacy Act** to disclose to the bargaining agent the names and addresses of employees. The Board concluded that, in failing to provide the requested information to the bargaining agent, the Secretary of the Treasury Board was interfering in the representation of employees by the bargaining agent contrary to subsection 8(1) of the **Public Service Staff Relations Act**. The Board also concluded that the release of such information to the bargaining agent would not violate the provisions of the **Privacy Act** as this was a use which was consistent with the purpose for which the information had been obtained.

(10) Financial information of Indian Band

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3. F.C. 527 (Fed. T.D.) Rothstein J. With respect to paragraph 8(2)(a) of the **Privacy Act**, disclosure of names of individuals who have financial transactions with the

Band is not a purpose for which the financial statements and other financial information of the Band were originally supplied to the Government by the Band. The information was supplied to enable the Government to arrange to fund the Band. Nothing in that case suggested that disclosure of personal information to the applicant was a use consistent with that purpose. The "personal information" at issue did not therefore fall under paragraph 8(2)(a) of the **Privacy Act**.

(11) Datamatch authorized under the Customs Act - Paragraph 8(2)(b)

Privacy Act *(Can.) (Re)*, [2000] 3 F.C. 82 (Fed. C.A.) affirmed 2001 SCC 89, at pp. 86, 90, 91-96 Décary, Sexton and Evans JJ.A. This was an appeal from an opinion of the Trial Division reported at [1999] 2 F.C. 543 (T.D.). At issue in the Court below was an application by way of a special case stated for opinion of the Court pursuant to paragraph 17(3)(b) of the **Federal Court Act**. The question put to the Court was the following one: Is the disclosure of "personal information" by the Department of National Revenue to the Canada Employment Insurance Commission pursuant to the Ancillary Memorandum of Understanding for data capture and release of customs information on travellers authorized by section 8 of the **Privacy Act** and section 108 of the **Customs Act.**

The Court answered the question in the affirmative. Noting that subsection 108(1) of the **Customs Act** refers to "information obtained under this Act" , he noted that there is simply no reason why the word "information" should not be interpreted in its plain, general, encompassing meaning rather than being restricted, as suggested by counsel, to the limited meaning of "commercial information". An Act of Parliament authorizing the disclosure of information may come within paragraph 8(2)(b) of the **Privacy Act** even though it does not expressly designate the information in question as "personal information".

A more serious argument was raised by the Privacy Commissioner. It revolves around the purposes for which a federal institution may disclose personal information under its control. According to the Commissioner, paragraph 8(2)(b) of the **Privacy Act**, when read in the context of the entire Act and particularly of section 7, requires that personal information be disclosed only for the purpose for which it was collected or for a use consistent with that purpose. The Court noted that section 4 provides that "[n]o personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution". That obligation clearly relates to the collection of information, not to its disclosure. It went on to note that subsection 5(1) requires a government institution such as the Commission to "collect personal information that is intended to be used for an administrative purpose directly from the individual to whom it relates". The requirement, however, is not absolute. First, it is qualified by the words "wherever possible". Surely, in a self reporting scheme such as the employment insurance scheme, the Commission must be able to collect information from an outside source when a claimant fails to voluntarily report it. Second, the requirement is expressly made subject to the provisions of subsection 8(2), which itself is "subject to any other Act of Parliament" and which

enables the Commission to access personal information collected by another government institution, in this case, Customs, in a large number of circumstances. The wide range of the exceptions permitted under subsection 8(2) unquestionably attests to the intention of Parliament to allow disclosure of personal information to persons who have no connection whatsoever with the disclosing institution and for purposes other than those for which the information was collected.

Section 7 prescribes two possible uses of personal information collected by a government institution. The first use, (a), is for the purpose for which the information was obtained or a use consistent with that purpose. The second use, (b), is for a purpose for which the information may be disclosed to the institution under subsection 8(2). The first use is related to the purpose of the collection; the second use, clearly, is not.

Subsection 8(2) contemplates three types of disclosure: that, allowed under paragraph (a), for the very purpose of the collection or a use consistent with that purpose; that, expressly allowed under paragraphs (b) and (m), for "any purpose", and that, expressly allowed under paragraphs (c), (d), (e), (f), (g), (h), (i), (j), (k) and (l), for specific purposes therein described, some of which are totally unrelated to the purpose for which the information was collected.

The **Privacy Act** therefore clearly contemplates, and distinguishes between, the collection of information, which can only be for purposes related to the activity of the institution in this case, direct collection by Customs of the information found in Form E-311 and indirect collection by the Commission, through Customs, of that part of the information found in Form E-311 which is relevant to the activity of the Commission and the disclosure of information, which, in most cases, is for purposes other than those for which it was collected and for purposes related to the activity of the requesting institution.

In this context, paragraph 8(2)(b) cannot but be interpreted as being a provision that enables Parliament to confer on any Minister (for example) through a given statute a wide discretion, both as to form and substance, with respect to the disclosure of information his department has collected, such discretion, of course, to be exercised in conformity with the purpose of the **Privacy Act**. Paragraph 8(2)(b) could obviously have been phrased differently and its interpretation might have been made easier had it expressly stated, as did paragraph (f) with respect to agreements or arrangements between a federal government institution on the one hand and a provincial government, a foreign government or an international organization on the other hand, that agreements or arrangements could be made between two federal government institutions for the purpose of administering or enforcing any law of Canada. But one can simply not conclude from Parliament's alleged failure, in paragraph 8(2)(b), to be specific when it clearly intended to be general, that federal government institutions cannot be authorized under that paragraph to disclose to other federal institutions personal information that, without any express restriction, they can disclose to foreign institutions. In using words of wide import in paragraph 8(2)(b)

of the **Privacy Act** and eventually in paragraph 108(1)(b) of the **Customs Act**, Parliament clearly left itself a considerable margin of manoeuvre with respect to its own legislation and took advantage of it. In the end, therefore, the Court was of the view that paragraph 8(2)(b) of the **Privacy Act** has a much wider meaning than that suggested by the Commissioner and that paragraph 108(1)(b) of the **Customs Act** gives the Minister of National Revenue the discretionary power to authorize the arrangement at issue with the Canadian Employment Insurance Commission.

(12) Notification of collection purpose not required prior to disclosure - Paragraph 8(2)(b)

Smith v. Canada (Attorney General), CUB 44824, decision dated May 27, 1999; aff'd [2000] F.C.J. No. 174, (Fed. C.A.); aff'd 2001 SCC 88, at para. 65 Rothstein J. (Umpire). The appellant argued that paragraph 8(2)(b) of the **Privacy Act** does not envisage disclosure of information under paragraph 108(1)(b) of the **Customs Act** because paragraph 108(1)(b) merely delegates the authorizing power of disclosure to the Minister and does not itself expressly authorize disclosure. In dismissing the argument, Rothstein J. noted that paragraph 8(2)(b) does not spell out the mechanism by which another Act of Parliament may authorize disclosure. The mechanism provided in paragraph 108(1)(b) of the **Customs Act** is needed to delegate to the Minister the decision as to the persons to whom and the conditions under which disclosure may be made. In delegating the disclosure decision-making power to the Minister, paragraph 108(1)(b) provides a mechanism which, when properly carried out, authorizes disclosure. Therefore, paragraph 8(2)(b) of the **Privacy Act** provides for the disclosure of E-311 information from Customs to the Commission as long as the disclosure is made in accordance with paragraph 108(1)(b) of the **Customs Act**. Paragraph 8(2)(b) imposes no additional obligations or restrictions on Customs over those in paragraph 108(1)(b) of the **Customs Act**.

(13) Definition of "aboriginal people" - Paragraph 8(2)(k)

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3. F.C. 527 (Fed. T.D.) Rothstein J. The phrase "researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada" appears to contemplate formal claims or disputes brought by aboriginal peoples in their capacity as aboriginal peoples. The Court did not read these words to apply to any or all disputes between individuals of aboriginal descent. If that were the case, paragraph 8(2)(k) of the **Privacy Act** would allow for disclosure of "personal information" in disputes involving individuals of aboriginal descent but not in disputes involving individuals from other ethnic communities or disputes where the issue of race is irrelevant. Such distinction clearly was never intended by the **Privacy Act**.

(14) Census records may be disclose to a Indian Band for the purpose of researching or validating a land claim – paragraph 8(2)k)

Canada (Information Commissioner) v. Canada (Minister of Industry), 2006 FC 132:

The Information Commissioner sought review under section 42 of the *Access to Information Act* of the refusal of the Chief Statistician of Canada to disclose certain census records for the years 1911, 1921, 1931 and 1941. The Minister of Industry argued that section 24 of the *Access Act* is a mandatory prohibition since the disclosure of the census records are "restricted by or pursuant to any provision set out in Schedule II", which includes section 17 of the *Statistics Act*. Section 17(2) contains an exception to the prohibition to disclosure found in subsection 17(1):

> *«Exception to prohibition*
>
> *(2) The Chief Statistician may, by order, authorize the following information to be disclosed:*
>
> *(d) information available to the public under any statutory or other law»*[2]*.*

According to the Court, the intent of Parliament in enacting this law is obvious, namely personal information under the control of a government institution may be disclosed to an Indian Band for the purpose of researching or validating a land claim. Accordingly, paragraph 8(2)(k) of the *Privacy Act* is "statutory law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*.

(15) Public interest. No obligation to consider grounds contained in paragraph 8(2)(m)

Cemerlic v. Canada (General Solicitor), [2003] F.C.J. No. 191, Kelen J. : In this case, the Court found that it is not enough for the Department to simply state that personal information is exempted because it concerns identifiable individuals. The Department must also conduct the discretionary balancing as required by paragraph (8)(2)(m) of the Privacy interest of the third parties involved.

Ruby v. Canada (Solicitor General), [2000] 3 F.C. 589 (Fed. C.A.) at 642 Létourneau, Robertson and Sexton JJ.A. Létourneau and Robertson JJ.A., for the Court, agreed with the reviewing Judge that the balancing in subparagraph 8(2)(m)(i) does not have to be done in reference to every piece of information concerning every party to whom the information relates. Some kind of weighing of public interest must take place, but the manner in which to conduct the weighing of interests is within the discretion of the head

> of the government institution. Section 26 clearly was meant to protect third parties from having confidential information revealed about them. In that provision, discretion is conferred upon the head of a government institution in order that he or she use judgement in balancing third party privacy interests with the

[2] Paragraph 35

requesting party's access rights. Subparagraph 8(2)(m)(i) was enacted in order that a similar discretionary balance be maintained between the public interest in disclosure and the right to privacy.

The purpose for which discretion was granted under subparagraph 8(2)(m)(i) illuminates how that discretion may be sensibly and responsibly exercised. The purpose of the grant of the discretion involves protection of the interest of the citizens of Canada in privacy. It should be noted, however, that the right to privacy may be understood in a specific or general way. If understood very specifically, it is the privacy of the individuals named in the requested records that the institution head would be required to consider in each and every case involving sections 26 and 8. A broader understanding of privacy, drawing inspiration from the very general wording of subparagraph 8(2)(m)(i) ("any invasion of privacy" / "une éventuelle violation de la vie privée") would suggest that the institution head may on some occasions understand protection of privacy as a broadly conceived policy goal, without reference to particular individuals.

See also *Gardiner v. Canada (Attorney General)*, [2004] F.C. 483 (T.D.), Campbell J.: In this case, the Court held that when applying the exemption under s. 26 of the Privacy Act (Section 19 of the Access to Information Act), it is not necessary for every piece of information concerning another individual to be considered in relation to s. 8(2)(m) before the head of the institution refuses to disclose it.

Ruby v. Royal Canadian Mounted Police, [1998] 2 F.C. 351 (Fed. T.D.) aff'd [2000] 3 F.C. 589 (Fed. C.A.) MacKay J. The Court agreed with counsel for the respondents that section 26 sets a mandatory exemption, unless the information concerning another individual may be released in the circumstances provided by subsection 8(2) of the **Privacy Act**. For the applicant, it was submitted that a proper exercise of discretion to release information about another individual requires the head of the institution concerned to consider paragraph (m) of subsection 8(2) and to form an opinion whether the public interest in disclosure clearly outweighs any invasion of privacy that could result from disclosure. In the Court's opinion, that submission ignored the emphasis of section 8 as a whole, that is, not to disclose information about other persons to one who makes a request under the Act, unless there be an exceptional ground as set out by subsection 8(2). The Court was not persuaded that every reference to another individual must be considered in relation to paragraph (m) of that provision before the head of the institution refuses to disclose it.

Ruby v. Royal Canadian Mounted Police, [2004] F.C. 594 (F.C.T.D.), von Finckenstein J.: In this case, the Applicant, in separate requests under the *Privacy Act,* asked that CSIS and Department of Foreign Affairs provide him with information allegedly being held in information banks. Department and CSIS both refused to disclose the information partly undergrounds of section 26 of the *Privacy Act* (the equivalent of section 19 of the *Access to an information Act*). In reviewing the department's decision, the Court found that section 26 and subclause 8(2)(m)(i) require the head of a government institution to engage in a

discretionary balancing of the public interest and privacy. The term "privacy" as set out in subclause 8(2)(m)(i) may be understood in a specific, individualized manner or as a general broadly conceived policy goal. In this regard, the Court of Appeal found at paragraph 123 that:

"The two ways of conceiving of privacy create some flexibility in the manner of exercising discretion under subparagraph 8(2)(m)(i). Generally, the most obvious way for the institutions head to exercise his or her discretion will be by inquiring into the impact of disclosure upon the privacy of those individual third parties specifically named in the requested information. At other times, it might be appropriate to deal with the privacy interest at a more abstract level so as to weigh it against the public's interest in disclosure. The latter approach may at times be an equally valid exercise of the broad discretion conferred upon the head of a government institution. The extent to which the privacy interest ought to be considered in a more or less specific form will depend largely on the facts surrounding each request."

(16) Public interest in disclosure of personal information - Names of retired MPs receiving pension allowances - Paragraph 8(2)(m)

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), [1997] 1 F.C. 164 (Fed. T.D.) Richard J. The Minister refused to disclose the names of pension recipients pursuant to section 19 of the **Access to Information Act**. The amounts of pensions received were also withheld by the Information Commissioner who agreed that they had to be withheld. Recognizing that the names would be exempt from disclosure pursuant to 19(1) of the Access Act, the Court ordered the names released because (1) much of the information was publicly available or its release had been consented to, pursuant to 19(2)(a) and (b) and therefore the Minister had no discretion to refuse to release it; (2) the information which was not publicly available or which had not been the subject of a consent to release ought also to be disclosed since the public interest outweighed the unsupported claim to a private interest, pursuant to paragraph 19(2)(c) of the Access Act and subparagraph 8(2)(m)(i) of the **Privacy Act**.

(17) Public interest v. invasion of privacy - Subparagraph 8(2)(m)(i)

Mackenzie v. Canada (Department of National Health and Welfare), [1994] F.C.J. No. 1746 (Fed. T.D.) Wetston J. The Department of National Health and Welfare refused to disclose records containing the names of those medical practitioners who have their prescribing privileges restricted or revoked. The Court concluded that the names were "personal information" as provided for in paragraph 3(i) of the Act. In its analysis, the Court noted that whether the public interest "clearly outweighs" an invasion of privacy is a discretionary matter conferred on the head of the responsible government institution. In exercising said discretion, regard must be had to the purpose of the **Access to Information Act** and its exercise "within proper limits and on proper principles". The Court found that neither the

refusal letter from the respondent, nor the letter from the Information Commissioner of Canada, contained any indication that any particular public interest was weighed against a private interest, both letters merely indicated that "serious consideration was given". In the Court's opinion, in keeping with the purpose of the Access Act, subparagraph 8(2)(m)(i) of the **Privacy Act** mandates more than a blanket statement from the respondent that private interests override the public's right to disclosure.

(18) Historical list of postings occupied by RCMP officers

Canada (Information Commissioner) v. Canada (Royal Canadian Mounted Police), [2001] 3 F.C. 70 (Fed. C.A.) At 78-81 Décary, Létourneau and Noël JJ.A. On the issue of whether the Motions Judge should have himself proceeded to exercise the discretionary power found in subsection 19(2) of the **Access to Information Act**, Mr. Justice Létourneau, for the Court, found that a careful reading of section 19 of the **Access to Information Act** clearly indicates that it is the head of a government institution who must, pursuant to subsection 19(1), refuse the disclosure of a record which contains personal information, and that it is also the head of a government institution who, pursuant to subsection 19(2), may disclose that record if, in his opinion, the conditions of subparagraph 8(2)(m)(i) are met.

(19) What if bad faith is involved in refusing to disclose a record under subsection 19(2)

Canada (Information Commissioner) v. Canada (Royal Canadian Mounted Police), [2001] 3 F.C. 70 (Fed. C.A.) At 78-81 Décary, Létourneau and Noël JJ.A. Noting that it is the head of a government institution who, pursuant to subsection 19(2), may disclose that record if, in his opinion, the conditions of subparagraph 8(2)(m)(i) are met, the Court could conceive of instances where evidence of bad faith or oblique or improper motives could be adduced which could satisfy a motions judge that guarantees and safeguards are required to ensure that both the purposes of the **Access to Information Act** and subparagraph 8(2)(m)(i) of the **Privacy Act** are not defeated by an obstructive and uncooperative government institution. The Motions Judge reviewing a refusal to disclose possesses the power, pursuant to section 49 of the **Access to Information Act**, to make such order as he deems appropriate to ensure what is in fact due respect for and proper implementation of that Act. He also has inherent jurisdiction when issuing an order to impose conditions or take measures likely to ensure its implementation. The Court was not willing at this stage to rule out the possibility that, in an appropriate case, a judge could retain jurisdiction over the case to ensure proper compliance in a timely and satisfactory fashion with his order referring a matter back to a government institution for an assessment under subparagraph 8(2)(m)(i) of the **Privacy Act**.

In the same vein, Justice Létourneau could conceive of a rare instance where the behaviour and attitude of the institution would have been such throughout as to indicate a foregone conclusion if the matter were referred back and where it would be a sheer waste of time and money to issue an order to that effect. Nothing would prevent a motions judge in such an instance from inferring that the discretion has been exercised and disclosure denied, and from proceeding to review the exercise of that discretion. But this is not our case.

(20) Views and opinions expressed by a union official - Subparagraph 8(2)(m)(i)

Robertson v. Canada (Minister of Employment and Immigration), [1987] F.C.J. No. 713 (Fed. T.D.) Jerome A.C.J. The applicant argued that in order to properly prepare counter-submissions for its grant application, it needed to know not only the Union's position and the identity of the author who filed it on behalf of the Union, but the contents of the excised paragraphs as well. The Court disagreed. If there was a public interest there it was fully served by disclosure of the text of that portion of the letter which was written on behalf of the Union. This also included the author's signature which could be important in case a question should arise as to whether the Union submissions were properly authorized. Having determined that the rest of the letter was personal information, the Court did not see that the public interest required its disclosure simply for the purpose of assisting the applicant to prepare further submissions.

(21) Remuneration of chairs, heads, and presiding officials - Subparagraph 8(2)(m)(i)

Rubin v. (Clerk of the Privy Council), [1993] F.C.J. No. 287(Fed. T.D.) Muldoon J. The applicant was seeking disclosure of specific remuneration of Governor in Council appointees. The Court held that personal information shall not be disclosed except what is specified in subparagraph (j)(iii). The Court noted that there is a statutory exception to the foregoing statutory imperative. The exception to the disclosure of personal information (apart from the individual's consenting to disclosure) is elaborately set out in subsection 8(2) of the **Privacy Act**. The only exception following items (a) through (l) is the double discretion (m)(i) "for any purpose where, in the opinion of the head of the institution, the public interest in disclosure clearly outweighs any invasion of privacy which could result from the disclosure". Parliament had declared specific salary sums and daily remuneration rates to be personal information which shall not be disclosed, unless the public interest in disclosure clearly [not "barely" nor yet "presumably"] outweighs any invasion of privacy which could result from the disclosure. The Court found that to disclose the information requested would destroy the privacy of specific remuneration which Parliament has prescribed by limiting disclosure to salary range. Parliament's view of public interest is most persuasive. The greater the government's embarrassment over its own folly with the taxpayers' money, the greater the public interest in disclosure of the information, for this

legislation must never operate to cover up folly and bad government. Such was not the case.

(22) Exercising discretion – Non-interference by the Court. Subparagraph 8(2)(m)(i)

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3. F.C. 527 (Fed. T.D.) Rothstein J. With respect to paragraph 8(2)(m), applicant's counsel submitted that the Court should substitute its opinion for that of the head of the government institution by determining that public interest in disclosure of the "personal information" in question clearly outweighs the invasion of privacy. The Court stated that when the head of a government institution, in the exercise of a discretion conferred upon him or her by Parliament, decides that the public interest in disclosure of "personal information" does not clearly outweigh the invasion of privacy, the head of the institution acts within jurisdiction. For a Court to interfere with such a decision, it must conclude that the head of the government institution was not authorized to exercise his or her discretion in the manner in which it was exercised. Justice Rothstein had no basis for coming to such a conclusion on the evidence before him in that case.

(23) Names, addresses and rental charges of tenants - Section 8

Bland v. Canada (National Capital Commission), [1991] 3 F.C. 325 (Fed. T.D.) Muldoon J. The applicant was seeking disclosure of the names of NCC tenants, their addresses and the rents paid. The Court stated that the "public interest in disclosure" is a statutory right, and it is not to be cursorily denigrated by the simple assertions that it is "less than apparent in this situation" and that "there would be no general benefit for or advantage to the public to be provided with that information". Such assertions do not constitute any weighing of one statutory factor against the other. The Court held that the public interest in disclosure which had been extensively described and reviewed in the decision, in terms of non-disclosure generating the corrosion of public trust, and generating suspicion and public cynicism in a free and democratic society which is gravely, if not mortally, wounded by public cynicism. It was abundantly clear in such circumstances, noted the Court, that the public interest in disclosure clearly, vastly outweighs any invasion of privacy which could result from such disclosure.

(24) Offence committed by a Canadian Forces member

Terry v. Canada (Minister of National Defence), [1994] F.C.J. No. 1679 (Fed. T.D.) Rouleau J. The Minister of National Defence withheld certain information in the personal file of a member of the Canadian Armed Forces which he determined to be "personal" information and exempt from disclosure. The Court did not see how the requested information could be of any public interest and should be released pursuant to section 8 of the **Privacy Act**.

Canada (Information Commissioner) v. Canada (Royal Canadian Mounted Police), [2001] 3 F.C. 70 (Fed. C.A.) At 78-81 Décary, Létourneau and Noël JJ.A. Mr. Justice Létourneau, for the Court, found that a careful reading of section 19 of the **Access to Information Act** clearly indicates that it is the head of a government institution who must, pursuant to subsection 19(1), refuse the disclosure of a record which contains personal information, and that it is also the head of a government institution who, pursuant to subsection 19(2), may disclose that record if, in his opinion, the conditions of subparagraph 8(2)(m)(i) of the **Privacy Act** are met.

2. ACCESS TO INFORMATION ACT - SUBSECTION 19(2)

a. General

(1) Government institution must make the initial determination - Subsection 19(2)

Canada (Information Commissioner) v. Canada (Royal Canadian Mounted Police), 2001 FCA 56, Décary, Létourneau and Noël JJ.A. The RCMP released the current positions of four members of the police force but refused to disclose information concerning their previous postings. The ground of refusal was that such information related to the employment history of the officers and thus was exempt from disclosure under paragraph 3(b) of the Act. The Trial Judge dismissed the Information Commissioner's claim that the requested information fell within the exception to the definition of personal information in paragraph 3(j) of the **Privacy Act**. However, the Trial Judge was satisfied that the RCMP Commissioner had failed to determine, pursuant to subsection 19(2) of the Act and subparagraph 8(2)(m)(i) of the **Privacy Act**, if the requested information, although personal information, should not be released in the public interest. He sent the matter back to the RCMP Commissioner ordering him to exercise the discretionary power conferred upon him by subsection 19(2). The Court of Appeal agreed, noting that the government institution, being in possession of the records, dealing regularly with numerous access to information requests and possessing some expertise in the handling of these matters as well as in the implementation of the Act, is in a better position than the Court to make the initial determination as to privacy as well as the initial balancing of the privacy interest against the public interest which includes the needs of the institution.

(2) Adverse in interest to the requester does not divest institution of discretionary power - Subsection 19(2)

Canada (Information Commissioner) v. Canada (Royal Canadian Mounted Police), 2001 FCA 56, Décary, Létourneau and Noël JJ.A. The Trial Judge was satisfied that the RCMP Commissioner had failed to determine, pursuant to subsection 19(2) of the Act and subparagraph 8(2)(m)(i) of the **Privacy Act**, if the requested information, although personal information, should not be released in

the public interest. He sent the matter back to the RCMP Commissioner ordering him to exercise the discretionary power conferred upon him by subsection 19(2) of the Act. The Court of Appeal agreed, noting that the government institution, being in possession of the records, dealing regularly with numerous access to information requests and possessing some expertise in the handling of these matters as well as in the implementation of the Act, is in a better position than the Court to make the initial determination as to privacy as well as the initial balancing of the privacy interest against the public interest which includes the needs of the institution. The Court of Appeal added that the mere fact that the government institution may be adverse in interest to the requesting party, and therefore, adverse to disclosure is not sufficient to divest it of the exercise of the discretionary power contained in subsection 19(2) unless evidence of bad faith or oblique or improper motives can be adduced which could satisfy a motions judge that guarantees and safeguards are required to ensure that both the purposes of the Act and subparagraph 8(2)(m)(i) of the **Privacy Act** are not defeated by an obstructive and uncooperative government institution. The motions judge reviewing a refusal to disclose possesses the power, pursuant to section 49 of the Act, to make such an order as he deems appropriate to ensure what is in fact due respect for and proper implementation of that Act. He also has inherent jurisdiction when issuing an order to impose conditions or take measures likely to ensure its implementation. In an appropriate case, a judge could retain jurisdiction over the case to ensure proper compliance in a timely and satisfactory fashion with his order referring a matter back to a government institution for an assessment under subparagraph 8(2)(m)(i) of the **Privacy Act**. Alternatively, where the behaviour and attitude of a government institution is such throughout so as to indicate a foregone conclusion if the matter were referred back and where it would be a sheer waste of time and money to issue an order to that effect, nothing would prevent a motions judge from inferring that the discretion has been exercised and disclosure denied, and from proceeding to review the exercise of that discretion.

(3) Information already in the public domain – Paragraph 19(2)(b)

Canada (Information Commissioner) v. Canada (Canadian Cultural Property Export Review Board), 2002 FCA 150 (Fed. C.A.) Strayer, Décary, Rothstein JJ.A. Speaking for the Court, Strayer J.A., noted that the appeal should be dismissed for mootness since it was clear that the 13 documents at issue were now in the public domain. The rights of the parties as far as these documents were concerned cannot be affected by any decision on the appeal. While the application judge may have cited some other possible reasons for denying protection from disclosure the central ground was that the information was already publicly available.

Canada (Information Commissioner) v. Canada (Canadian Cultural Property Export Review Board), [2002] F.C.J. No. 124, 2002 FCA 37 (Fed. C.A.) Rothstein J.A. The former mayor of North York, Ontario donated a series of documents. The amount of the tax credit received for the donation was subsequently made

public at a press conference held by Mr. Lastman. In the motion for stay, pending appeal of the Trial Division Order requiring disclosure of the information, the Appeal Court held that whatever may be the merits of the appellant's irreparable harm arguments in the case of confidential information, they do not apply to the unusual facts here. Mr. Lastman made the information public, the Appeal Court noted. The appellant's arguments do not establish irreparable harm when the information is already public.

Canada (Information Commissioner) v. Canada (Canadian Cultural Property Export Review Board), [2001] F.C.J. No. 1469, 2001 FCT 1054 (Fed. T.D.) Rouleau J. Conf'd in appeal. [2002] FCA 150. The former mayor of North York, Ontario donated a series of documents. The amount of the tax credit received for the donation was subsequently made public at a press conference held by Mr. Lastman. Arguing that the records at issue constitute personal information, as defined in the **Privacy Act**, the CCPERB, relying on sections 19 and 24 of the Act, refused disclosure. The Court was satisfied, however, that the information in question was available in the public domain and that the respondent CCPERB had failed to properly apply subsection 19(2) of the **Access to Information Act** failing therefore to discharge its burden under section 48 to establish that it was authorized to refuse to disclose the requested records or portions thereof pursuant to subsection 19(1). The Court went on to note that section 48 of the **Access to Information Act** provides that the respondent government institution bears the burden of establishing, on a balance of probabilities, that the disputed information falls within the exemption it is relying upon to refuse disclosure. The Court emphasized also that the party seeking to withhold the requested information has a heavy onus to bear in that it must place "specific and detailed evidence" before the Trial Judge to demonstrate that the requested information comes within the terms of the exemption. Court was not persuaded that onus had been met in the present case.

Canadian National Railway Company v. Canada (Attorney general), [2002] FCJ 974, Pelletier J.: In this case, the Court noted that subsection 19(2) authorizes the disclosure of personal information when the public has access to the information in question. The Court ordered disclosure of the information in issue as it was listed in public registry offices.

Public

Canada (Information Commissioner) v. Canada (Minister of Industry), 2006 FC 132: In it's interpretation of paragraph 17(2)d) of the *Statistic Act,* the Court also dealt with the interpretation of the term «public». The Court stated that the words «available to the public», the word «public» is a noun, not an adjective by interpreting with the aid of dictionary, the Court found that the information in the census records requested by the Algonquin Bands is exactly the type of information which Parliament intended under the *Privacy Act* may be disclosed to an Aboriginal people or Indian band. Similarly, it is exactly the type of information which the Crown is obliged to provide an Aboriginal people or Indian band under section 35 of the *Constitution Act, 1982.* Applying the modern approach to statutory interpretation, the words "available to the public" should be liberally

construed and interpreted to mean a member of the public, and not only the public as a whole.

2) <u>Ontario</u>:

Paragraph 3(j):

(Orders #M-30, M-210)

- The Commission ruled that this provision applied to information about an identifiable individual and includes and applies to the names of individuals who are or were employed by the institution.

(Order #P-273)

- Access to an individual's application for employment and resume cannot be achieved through this provision.

(Order #M-18, M-102)

- Since exact salaries have the benefit of a presumed unjustified invasion of personal privacy, it is unlikely, in most circumstances, that any salary-related information would be available to the public. Where salary ranges do not exist, the head may be ordered to establish a salary range which is narrow enough to provide a member of the public with reasonable information.

(Order #M-378)

- The Commission held that an account entry reflecting contributions to a particular pension fund by an identifiable employee was benefit information and hence accessible under this provision. The fact that exact salary information may be derived from the pension contributions did not result in the information not being disclosed.

Paragraph 8(2)(m):

(Reconsideration Order R-980036 (upholding Order P-1561), May 11, 1998)

- A request for police records requested in connection with insurance litigation relating to the circumstances of an individual's death was denied on grounds that the records disclosed personal information. The Ontario Commissioner held that the involvement of an individual in a criminal prosecution does not violate the individual's privacy rights under the Ontario Act and that disclosure of the records was not necessary to advise the public interest in the administration of justice. The Commissioner held that the [requester's] interest in the records, which was "essentially a private interest related to private litigation", did not outweigh the purpose of the Ontario Act's exemption from disclosure for personal information.

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(1) Disclosure of inmates' photographs must be in accordance with access and privacy statutes

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(3) Information on security classifications of positions

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(4) Information relating to performance evaluations

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(5) Individual's name – Subsection 19(1)

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(6) Personal views and opinions expressed in an official capacity

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(7) Opinions and complimentary closing on letters by third parties

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(8) Information on the remuneration of government officials

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(9) Names of medical practitioners whose prescribing privileges have been restricted

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(11) Name of individual may not be "personal information"

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(12) "Discretionary benefit" does not extend to the granting of all licences or permits

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(13) Financial information concerning Indian Bands

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(14) Annuities of Members of Parliament

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Mackenzie v. Canada (Department of National Health and Welfare), [1994] F.C.J. No. 1746 (F.C.T.D.)

Rubin v. (Clerk of the Privy Council), [1993] F.C.J. No. 287(F.C.T.D.)

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3 F.C. 527at 541-543(F.C T.D.)

c. Paragraphs 3(j) – individual who is officer/employee of a government

(1) Interpretation of paragraph 3(j)

Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), [2003] SCC 8, [2003] S.C.J. No. 7.

X v. Canada (Minister of National Defence), [1992] 2 F.C. 77, 46 F.T.R. 206

(2) Performance evaluations

Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C. 551(F.C.T.D.)

(3) Renumeration

Rubin v. (Clerk of the Privy Council), [1993] F.C.J. No. 287(F.C.T.D.)

(4) Discipline

Terry v. Canada (Minister of National Defence), [1994] F.C.J. No. 1679 (F.C.T.D.)

(5) Views

Mislan v. Canada (Minister of Revenue), [1998] F.C.J. No. 704 (F.C.T.D.)

d. Paragraph 3(l) – Discretionary benefit

Bland v. Canada (National Capital Commission), [1991] 3 F.C. 325, [1991] F.C.J. No. 435, 41 F.T.R. 202, 4 Admin L.R. (2d) 171, 36 C.P.R. (3d) 289, [F.C.T.D.) reversed (1992), [1993] 1 F.C. 541, [1992] F.C.J. No. 1225, 151 N.R. 10, 46 C.P.R. (3d), 59 F.T.R. 319 (note), 1992 (F.C.T.D)

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), (1996) [1997] 1 F.C. 164 at 180 and 188, [1996] F.C.J. No. 1318, 121 F.T.R. 1, 70 C.P.R. (3d), 37 (F.C T.D.)

Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs), [1990] 1 F.C. 395 at 400 (F.C.T.D.)

Rubin v. Canada (Clerk of the Privy Council) (1993), 62 F.T.R. 287 at 291-292 (F.C.T.D.)

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3 F.C. 527at 541-543(F.C T.D.)

Van Den Bergh v. Canada, [2003] F.C. 1116, 2003 F.T.R. No. 1407 (F.C.T.D.), O'Reilly J.

e. Paragraph 3(m) – Individual dead for 20 years

Canada (Information Commissioner) v. Canada (Minister of Employment and Immigration), [1986] 3 F.C. 63 at 66-67 (F.C T.D.)

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), (1996) [1997] 1 F.C. 164 at 180 and 188, [1996] F.C.J. No. 1318, 121 F.T.R. 1, 70 C.P.R. (3d), 37 (F.C T.D.)

X v. Canada (Minister of National Defence), [1992] 1 F.C. 77 at 95 (F.C T.D.)

f. Disclosure of personal information - Subsection 8(1)

(1) Generally

Mackenzie v. Canada (Department of National Health and Welfare), [1994] F.C.J. No. 1746 (F.C.T.D.)

(2) *T*he right to fairness

Lee v. Canada (Armed Forces, Chief of Defence Staff), [1992] F.C.J. No. 145 (F.C.T.D.)

(3) Information relating to others

Ternette v. Canada (Solicitor General), [1992] 2 F.C. 75 (F.C.T.D.)

g. Subsection 8(2)

(1) Consistent use

AB v. Canada (Minister of Citizenship and Immigration), [2002] F.C.J. No. 610 (F.C.T.D.)
Parnian v. Canada (Minister of Citizenship and Immigration), [1995] F.C.J. No. 777 (F.C.T.D.) Wetston J
Rahman v. Canada (Minister of Employment and Immigration), [1994] F.C.J. No. 2041 (F.C. T.D.)
Igbinosun v. Canada (Minister of Citizenship and Immigration), [1994] F.C.J. No. 1705 (F.C.T.D

(2) Disclosure of personal information to another section within the department

Gauthier v. Canada (Minister of Consumer and Corporate Affairs), [1992] F.C.J. No. 1040 (F.C.T.D.)

(3) No remedy if disclosure - Subsection 8(2)

Chandran v. Canada (Minister of Employment and Immigration), [1995] F.C.J. No. 165 (F.C.T.D.)

(4) Notification of collection purpose not required prior to disclosure of information

Smith v. Canada (Attorney General), CUB 44824, decision dated May 27, 1999; aff'd [2000] F.C.J. No. 174, (Fed. C.A.); aff'd 2001 SCC 88, at para. 110 Rothstein J. (Umpire)

(5) Fairness - Process - Paragraph 8(2)(a)

Puccini v. Canada (Director General, Corporate Administrative Services, Agriculture Canada), [1993] 3 F.C. 557 (Fed. T.D.) at 561, 573-574 (F.C.T.D.)

(6) Disclosure of employee information to bargaining agent

Public Service Alliance of Canada v. Canada (Treasury Board), 161-2-791 and 169-2-584, decision rendered April 26, 1996, PSSRB (before I. Deans, M. Korngold Wexler and Y. Tarte)

(7) Financial information of Indian Band

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3. F.C. 527 (F.C.T.D.)

(8) Datamatch - section 108 of the *Custom Act* - Paragraph 8(2)(b)

Privacy Act *(Can.) (Re)*, [2000] 3 F.C. 82 (Fed. C.A.) affirmed 2001 SCC 89, at pp. 86, 90, 91-96 (F.C.A.)

(9) Notification of collection purpose not required prior to disclosure of information -Paragraph 8(2)(b)

Smith v. Canada (Attorney General), CUB 44824, decision dated May 27, 1999; aff'd [2000] F.C.J. No. 174, (Fed. C.A.); aff'd 2001 SCC 88, at para. 65 Rothstein J. (Umpire)

(10) Definition of "aboriginal people" - Paragraph 8(2)(k)

Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3. F.C. 527 (F.C.T.D.)

(11) No obligation to consider grounds contained in paragraph 8(2)(m)

Ruby v. Canada (Solicitor General), [2000] 3 F.C. 589 (Fed. C.A.) at 642 (F.C.A.)

(12) Public interest in disclosure of personal information - Names of retired MPs receiving pension allowances - Paragraph 8(2)(m)

Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services), [1997] 1 F.C. 164 (F.C.T.D.)

(13) Public interest v. invasion of privacy - Subparagraph 8(2)(m)(i)

Mackenzie v. Canada (Department of National Health and Welfare), [1994] F.C.J. No. 1746 (F.C.T.D.)

(14) Historical list of postings occupied by RCMP officers

Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), [2003] SCC 8, [2003] S.C.J. No. 7

(15) Views and opinions expressed by a union official - Subparagraph 8(2)(m)(i)

Robertson v. Canada (Minister of Employment and Immigration), [1987] F.C.J. No. 713 (F.C.T.D.)

(16) Specific remuneration of chairs, heads, and presiding officials - Subparagraph 8(2)(m)(i)

Rubin v. (Clerk of the Privy Council), [1993] F.C.J. No. 287(F.C.T.D.)

(17) Exercising discretion - Subparagraph 8(2)(m)(i)

Cemerlic v. Canada (General Solicitor), [2003] F.C.J. No. 191, Kelen J.
Gardiner v. Canada (Attorney General), [2004] F.C. 483 (T.D.)
Sutherland v. Canada (Minister of Indian and Northern Affairs), [1994] 3. F.C. 527 (F.C.A.)
Ruby v. Royal Canadian Mounted Police, [2004] F.C. 594 (F.C.T.D.), von Finckenstein J.

(18) Names, addresses and rental charges of tenants - Subsection 3(l) and section

Bland v. Canada (National Capital Commission), [1991] 3 F.C. 325 (F.C.T.D.)

(19) Information concerning an offence committed by a Canadian Forces member while on active service

Terry v. Canada (Minister of National Defence), [1994] F.C.J. No. 1679 (Fed. T.D.)

(20) Burden of Proof - Section 8

Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403

Ontario

P-273, M-18, M-102, M-30, M-210, M-378

The Questions

Subsection -- 19(1) & (2)

Exemption: PERSONAL INFORMATION

19(1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act.

19(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

(a) the individual to whom it relates consents to the disclosure;
(b) the information is publicly available; or
(c) the disclosure is in accordance with section 8 of the Privacy Act.

Statement of Test to be Met

Inquiry Path

Relevant Questions	Departmental Response	Assessment
Is the information 'personal information' under paragraphs 3(a) to (i) of the Privacy Act? - Is it information about an identifiable individual?		
If so, is the information also described in paragraphs 3(j) - (m) of the Privacy Act? - If so, information is not personal information. - If not, investigate applicability of section 19(2) of Access to Information Act.		
Does section 19(2) apply?		
Is the information publicly available (paragraph 19(2)(b)); or		
does the individual consent to disclosure (paragraph 19(2)(a)); or		

does section 8 of the Privacy Act apply?
- do paragraphs 8(2)(a) - (l) apply; or
- does paragraph 8(2)(m) apply
  - clear benefit to individual (sub-paragraph 8(2)(m)(ii)); or
  - public interest in disclosure (sub-paragraph 8(2)(m)(i)).		

Subsection -- 19(1)

Exemption: PERSONAL INFORMATION

19(1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act.

Section 3 - Privacy Act

3. In this Act, 'personal information' means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

Statement of Test to be Met

Information about an identifiable individual

Relevant Questions	Departmental Response	Assessment
Does the information relate to a person other than the requester?		

Statement of Test to be Met

Must be able to identify the individuals

Relevant Questions	Departmental Response	Assessment
To whom does the information relate?		
Does the access request describe this person?		

Statement of Test to be Met
Linkage of information to identifiable individuals must be clear and direct

Relevant Questions	Departmental Response	Assessment
If the information does not relate to a named individual, is it possible to identify the individual from the information in the record? - How?		
Does the information describe or relate to inclusion of individuals in a group? - Describe the group - How large is the group? - How unique is the group? - What characteristics does the group have?		

Statement of Test to be Met
- Look for specific characteristics of members of group. - Must be small and specific enough to identify individuals in the group.

Relevant Questions	Departmental Response	Assessment
Are members of the group identified by personal characteristics?		
- Race, religion, age, gender - Professional, educational or other qualifications - Medical status - Citizenship status - By employment status, i.e. classification, trade - By participation in financial transactions - By ownership of property, assets, shares In a company - By personal interests - By participation in an event - By membership in groups or associations - By a specific appointment - By work location		

Relevant Questions	Departmental Response	Assessment
Is it possible to identify individuals as members of this group? - How big is the group? - Over what geographic area are its members? - What organization do they belong to?		
Is there other information in the record that links an identifiable individual with the group - How?		

Statement of Test to be Met

Information must be 'about' the identifiable individual

Relevant Questions	Departmental Response	Assessment
Is the individual described in a way that is personal?		

Statement of Test to be Met

Information must be specific to the individual

Relevant Questions	Departmental Response	Assessment
Does the information relate directly to the individual? - How?		
If not, does the information relate indirectly to the individual?		

Statement of Test to be Met

Must be personal in nature

Relevant Questions	Departmental Response	Assessment
Is there a meaningful connection between the information and the individual?		

Statement of Test to be Met
Cannot be so general as to not relate in a meaningful way to the individual

Relevant Questions	Departmental Response	Assessment
Would another person reasonably ascribe to the individual the qualities, personal, professional or employment characteristics or financial information described in the record?		
[questions above about inclusion of individuals in a group are also relevant here]		

Section – 19	
(a)	Information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual.
(b)	Information relating to the education or the medical, psychological, criminal or employment history or characteristics of the individual or information relating to financial transactions in which the individual has been involved.
(c)	Any identifying number, symbol or other particular assigned to the individual.
(d)	The address, telephone number if unlisted, DNA, fingerprints or blood type of the individual.
(e)	The personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations.
(f)	Correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence.
(g)	The views or opinions of another individual about the individual.
(h)	The views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual.
(i)	The name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual.

Statement of Test to be Met
Paragraphs 3(a), (b) and (d) Information must identify an individual - physical characteristics - personal activities - personal status

Relevant Questions	Departmental Response	Assessment
Does the information ascribe personal characteristics to an individual? - race - gender - national or ethnic origin - colour - religion - age - infirmity		
Does the information record the voice of an identifiable individual?		
Does the information attribute physical characteristics to an individual? - disability - illness - past illness - sexual orientation - medical history - blood type		
Does the information describe activities that are personal to an individual? - schooling, education, courses - personal financial situation - personal financial management - membership in groups - current employment or employment history		
Does the information describe the status of the individual? - marital status - family status - citizenship status - immigration status - financial status - criminal history or status - address, living arrangements		

Relevant Questions	Departmental Response	Assessment
Does the request identify such personal characteristics or circumstances?		

Statement of Test to be Met

- Must be specific in relation to the individual

Relevant Questions	Departmental Response	Assessment
Does the information describe general characteristics of a group?		
If so, how is the information related to the individual?		

Is the individual connected to the information?
- Elsewhere in the record?
- By deduction through other sources?
  - telephone books
  - other publications		

Are the sources publicly available?		
Is it easy to connect the individual with the information using these sources, financial transactions or financial position?		

Statement of Test to be Met

- Contractual relationships.
- Watch for connections with 3(j), (k) and (l).

Relevant Questions	Departmental Response	Assessment
Does the information describe average income, expenditure, net worth of members of a group?		
Are these average amounts meaningful indicators of the financial status of the individual?		
Does the information confirm the participation of a specific individual in a commercial or financial transaction?		

Relevant Questions	Departmental Response	Assessment
If not, does the information provide a meaningful indication of the participation of the individual in a commercial or financial transaction? - How?		
Is the commercial or financial transaction personal in nature?		
Does the transaction relate to the job of the individual?		
Did the individual have responsibility for the transaction or activity at issue as a function of his or her position or job?		
Is this a government job or position?		
Does the information describe a contract in which the individual is involved as a party? As a sub-contractor or agent?		
Is this a contract for personal services? - By the individual - By the individual's employer		
If so, is the contract with the government? - Does section 3(k) or (l) apply?		
Is it a contract by the individual for services from someone else? - Are the services personal to the individual - accounting - legal - other services		
Is the contract for services related to the job or position of the individual? - If so, did the individual sign the contract in their capacity as an officer or employee? - For the benefit of an organization, as opposed to the individual?		

Statement of Test to be Met

Paragraph 3(b) -- Employment history
- watch for section 3(j), (k) and (l)

Relevant Questions	Departmental Response	Assessment
Does the record reveal an individual's postings and positions held within each posting, employment or employment history?		
- If so, is this in a context where it is personal to the individual or the information requested sufficiently related to the general characteristics associated with the position or functions held by an officer or employee of a federal institution?		
- Or is the individual acting in an official capacity or by virtue of his job or position?		
- Or was/is the employment with the government? - Does section 3(j) apply?		
- Is the employment in connection with a government contract? - Does section 3(k) apply?		
- Did the employment result from a government (GIC) appointment? - Does section 3(j) or (l) apply?		

Statement of Test to be Met

Paragraph 3(c) -- Personal Identification

Identifying number, symbol or other particular assigned by the individual

Must relate to the individual in their personal capacity

Other particulars assigned to the individual
- Must identify the individual

Relevant Questions	Departmental Response	Assessment
Does the information assign a number, title, symbol or other		

Relevant Questions	Departmental Response	Assessment
identifier to an individual?		
Does this identifier relate to the individual alone or does it identify a group of individuals?		
- If it identifies a group of individuals, is there a meaningful connection with an identifiable individual?		

- Does the group designation identify personal characteristics or other personal information about the individual?
  - i.e., membership in a club, religious organization
  - Membership in another group
  - Level of education
  - Professional designation		

Is the identifier connected with other personal information identifying the individual? - i.e., name, address, unlisted phone number		
- If not, can the identity of the individual be determined from the identifier? - How?		
- Through publicly available sources?		

- Through other information in the record?
  - Specify other information.
  - How does this information identify the individual?		

Does the identifier relate to the individual in their personal capacity?
- Is the identifier assigned to the individual or does it relate to a position or job filled by the individual?
  - i.e., security clearances
  - Does the information requested relate to a security clearance assigned to a job?
  - Does the information requested relate to the level of security clearance of an individual?		

Statement of Test to be Met

Paragraph 3(d)
- Address, fingerprints, blood type.

Relevant Questions	Departmental Response	Assessment
If the information reveals an address, is it the address of an identifiable individual or immediate family member?		
Is it a home or other residential address?		
- If not, how is the address connected to the individual?		
Is it a business address or address of a group?		
- If so, does the record identify the individual in a personal capacity or in an official capacity?		
- If the person is identified in an official capacity, is the business address connected with the group or organization or does it relate to the individual?		

Statement of Test to be Met

Paragraphs 3(e), (g) and (h)

Views and Opinions.

Watch for section 3(j)(v), 3(k).

- Must be view/opinion of an individual.
- Were they about another individual?
- Can only be disclosed to the other individual.

Proposals for grants award and prizes by a government institution.
- Can disclose views to the person about whom the views or opinions are expressed, without the name.

Relevant Questions	Departmental Response	Assessment
Does the information set out the views and opinions of an		

Relevant Questions	Departmental Response	Assessment
identifiable individual?		
Does paragraph 3(j)(v) apply?		
- Is it the view or opinion expressed by an officer, employee or agent of a government institution? - If so, was it given in the course of employment?		
- Is it the view or opinion of someone on contract to provide services to the government?		
- Is it expressed in the course of performance of contract or of providing services?		
- Is it the opinion or view of the individual or of the organization or firm that the individual is representing?		
If it is the opinion or view of the individual, is it a personal opinion or conveyed in an official capacity?		
Does the opinion or view represent the opinion or views of a group?		
Does the information convey an opinion or view? - Is the information a recommendation as opposed to an opinion or view?		
Does the information recite, synthesize or analyze facts as opposed to expressing an opinion or view?		
What does the opinion or view consist of?		
Is the opinion or view about another individual? - If so, is the requester the individual about whom the opinion or view was expressed? - If so, it can be disclosed under the Privacy Act. - If not, it cannot be disclosed unless paragraph 3(h) applies.		
Is the opinion or view about a proposal for a grant, award or prize to be given to someone else?		
- If so, is the requester the person to whom the grant, award or prize would be given? - If so, opinion may be disclosed to that requester. - If requester is someone else, opinion or view cannot be disclosed without effective severance. - Would severance of the name of the individual giving		

Relevant Questions	Departmental Response	Assessment
the opinion or view, and severance of the name of the individual about whom the opinion was expressed still identify the individuals concerned? - If so, how would the individuals be identified?		
Is there other information in the record which would identify the individuals?		
Is the nature of the grant, award or prize such that potential recipients can be easily identified? - Through publicly available sources?		
Is the information about the grant, award or prize such that individuals judging or awarding grants can be easily identified? - From publicly available sources?		
Is the grant, award or prize being awarded by a government institution specified in the regulations to the Privacy Act - If not, information is personal information and cannot be disclosed.		

Statement of Test to be Met

Paragraph 3(f) Privacy Act

Private and confidential correspondence
- content must be personal and private in nature
- does not apply to official correspondence

Watch for section 3(j)
- does not apply to correspondence on a public issue
- can be implicit
- based on content of information
- reply must reveal content of information

Watch for section 3(l)

Severance is important

Relevant Questions	Departmental Response	Assessment
Does the record consist of correspondence by an individual with a government institution or government official?		

Relevant Questions	Departmental Response	Assessment
Is the correspondence private or confidential in nature?		
What does the correspondence relate to?		
Is the correspondence sent by the individual in their personal capacity?		
Is the information sent by an individual representing a group or organization? - If so, is the correspondence being sent from the group?		

- Is it being sent by the individual as a member of the group, but in their individual capacity?
  - i.e., whistle blowing letters.
  - Letters making personal suggestions about improvements to an organization?
  - Letters taking issue with position(s) taken by their parent organization?
  - Why is this content private and confidential in nature?		

Does the correspondence relate to the position or duties, tasks, functions of a government employee? - If so, is the correspondence sent by that government employee?		
Is the correspondence sent by another government employee?		
Is the correspondence sent by the government employee in their capacity as a government employee, or in their capacity as an individual or both?		
Is the content of the correspondence routine?		
Is the content of the correspondence administrative (procedural) in nature?		
Does the correspondence relate to a public issue or to public policy? - If so, is a view or opinion personal to the author being expressed?		
Does this correspondence provide recommendations or analysis of a public issue by the author?		
Was the correspondence explicitly sent on a private or confidential basis?		

Relevant Questions	Departmental Response	Assessment
Does the person sending the correspondence request confidentiality? Is it implied?		
Is the correspondence implicitly confidential or private? - Does it relate to the personal affairs or situation of the individual, his immediate family? - Does it relate to subject matter described in paragraphs 3(a), (b), (c) or (d)?		
Does the reply reveal the content of the original correspondence?		
Is the reply confined to matters dealing with public policy?		
Does the reply apply government criteria for assistance or such matter to the individual?		
Does the correspondence deal with the conferring of a benefit? - Is the benefit financial in nature? - Is the benefit an entitlement or discretionary?		
Would severance of the name of the individual sending the correspondence eliminate the likelihood of the correspondence being seen as relating to an identifiable individual? - If not, why not?		
Could the individual be identified from the correspondence through public, accessible sources?		

Statement of Test to be Met
Paragraph 3(i) --Names names of individuals - must appear with other personal information; or - where name itself reveals information about the individual Watch for sections 3(j), (k) Severance must be considered

Relevant Questions	Departmental Response	Assessment
Does the information include names, aliases, nicknames of individuals?		
What other personal information appears with the name?		
Is the information that appears with the name personal in nature? - Does the information relate to a job responsibility or function? - Does it relate to the position of the individual? - Is the individual employed by the government? - Does section 3(j) apply?		
Does the name appear in the context of an individual dealing with the government as a representative of an organization or for a business purpose? - If so, name does not appear with other personal information?		
Would the name itself reveal information about an identifiable individual? - Does the request relate to the personal characteristics or personal information about an individual?		
Is there other information in the record which connects the name with personal information?		
Does the person involved have a high public profile? Significant notoriety? - Does the name itself reveal information about an individual? - If so, does inclusion of that person's name in this document reveal information about the individual which is not already publicly known?		

Relevant Questions	Departmental Response	Assessment
Does the title or heading in the document create personal information about the individuals named in the document? - How?		
Would severance of the name leave information in the record which still identifies the individual? - If so, how? - From publicly available sources? - How accessible are these sources?		

Subsection – 19(2)

3. In this Act, 'personal information' means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing… but, for the purposes of sections 7, 8 and 26 and section 19 of the Access to Information Act, does not include

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

Statement of Test to be Met

Officers and employees of government institutions
- must relate to position or function of individual
  - performance in the function is not included
  - personnel evaluations not included

Includes:
- Employment history with the government
- When employment with government ceased
- Period of time employed by government
- Position(s), title(s), location(s)
- General information about the duties and functions performed by the individual
- Classification and salary range of position(s)
- Per diems, specific salaries not included

Statement of Test to be Met

Identification of individual in course of employment
- Documents by individual
- Views and opinions of individual

Watch for paragraph 3(l)

Relevant Questions	Departmental Response	Assessment
Does the information relate to an individual who is an officer or employee of a government institution?		
Is the government institution listed in the Schedule of the Access to Information Act/Privacy Act?		
Is the employee currently employed by a government institution?		
If not, was the person ever employed by a government institution? - Over what period of time?		
Is the information described in subparagraphs (l)-(v)? - If not, does the information relate to the position or functions of the individual while an employee is in a government institution?		
Generally, does the information relate to the general duties or activities connected with or required by the position, i.e., - attendance logs - workplace phone logs (?) - e-mails		
Information not covered by 3(j)		
Is the information related to the individual's performance? - Is the information in the nature of a performance or personnel evaluation or assessment? (remains exempt)		
Does the information describe the effectiveness of the individual in performing the function?		
Does the information describe the effectiveness of the individual in dealing with an issue for which the individual has responsibility?		

Relevant Questions	Departmental Response	Assessment
Does the information relate to the employment history of the individual with the government? - If so, is this information restricted to information relating to positions or functions or responsibilities held by the individual? - If about past positions, is it limited in time, scope and place?		
Is it related to information contained in subparagraphs (I) through (v)?		
Does the information describe personal accomplishments or failures of the individual?		
Does the information relate to how an individual is affected by government reorganization?		
Does the information relate to changes in the responsibilities assigned to an individual?		
- Does this arise as a result of performance by the individual in their current position? - Does the change in responsibilities relate to the individual or to the reorganization affecting the position?		
With respect to documents prepared by the individual: - does the information relate to grievance or discipline meetings or investigation of harassment complaints?		
- If so, was the individual the griever or an employee being disciplined? - Was the individual present as a function of their government position or responsibilities?		
Does the information relate to compensation given to a government employee? - If so, does the information disclose the salary or a per diem rate paid to an employee or officer?		

Relevant Questions	Departmental Response	Assessment

- Does the information describe an employment benefit received by an individual?
  - If so, is the benefit received as part of the salary of the individual?
  - Is the benefit attached to or come with the position held by the individual?
  - Does the benefit given to employees on a case by case basis?
  - Is the benefit given on a first come first served basis?
  - Is the benefit discretionary in nature?		

Does the information describe a settlement of employment conditions between the individual and the government institution?		
Does the information describe a severance package or retirement benefit(s) or relocation benefit(s)?		
- If so, is the severance package negotiated to avoid litigation? - Was the severance package determined by the application to the individual of government policy?		

Section – 19

'Personal information' means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services

Statement of Test to be Met

- Must be a contract for services
- Relates to paragraph 21(2)(b)
- Does not include evaluation of performance under the contract

Relevant Questions	Departmental Response	Assessment
Does the information relate to a contract for services between an individual and the government?		
Is the individual employed pursuant to such a contract?		
Does the individual perform services under the contract for the government institution?		
Does the information relate to the terms of the contract?		
Does the information relate to conclusions or views of the individual given in the course of the contract?		
Does the information relate to an evaluation of the individual's performance under the contract?		

Section – 19

'Personal information' means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

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

Statement of Test to be Met

Discretionary benefit of a financial nature

- benefit must be discretionary
- must confer a measurable financial benefit
  - licence or permit must confer a financial benefit
  - discounts, lower than market rates, subsidies are included
  - does not apply to salarial compensation
  - extra leave

Relevant Questions	Departmental Response	Assessment
Is the benefit conferred by a government institution?		
Is the benefit established on the government institution's own initiative?		
Is the benefit discretionary?		
- Does the benefit result from the application of known criteria to a specific individual?		
- Are the eligibility criteria themselves discretionary in nature?		
- Does the benefit result from decisions on a case by case basis?		
- Does the benefit result from a lottery?		
- Is the benefit allocated on a first come first served basis?		
- Is the benefit allocated on the basis of individual decisions or individual consideration of applications by individual? - i.e., application for lease.		
Is a financial benefit conferred - If a licence or permit is involved, what financial benefit is derived from it?		
- Are discounts, lower than market rate amounts or subsidies included? - What do these consist of?		
Does the benefit relate to salarial compensation? - If so, see above under paragraph 3(j).		

Section – 19

'Personal information' means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(m) information about an individual who has been dead for more than twenty years;

Statement of Test to be Met

Individual has been dead for more than twenty years
- government institution must have reasonable basis for concluding section 3(m) does

not apply
- government institution must undertake some examination
- assess against the period of time described in the information

Relevant Questions	Departmental Response	Assessment
Does the information relate to an individual who could be dead for more than twenty years?		
Has the government institution investigated this possibility? - If not, why not?		
What period of time does the information relate to?		
Is there a possibility the individual could have been dead?		
Would this fact be known using available public sources? - examination in the public archives - examination in public libraries - on databases available to the government		

Subsection – 19(2)

The head of a government institution may disclose any record requested under this Act that contains personal information if

(a) the individual to whom it relates consents to the disclosure;
(b) the information is publicly available; or
(c) the disclosure is in accordance with section 8 of the Privacy Act.

Statement of Test to be Met

Consent of individual to whom information relates
- implicit or explicit
- look at consent provided under the Privacy Act

Relevant Questions	Departmental Response	Assessment
Has the individual consented to disclosure of the information?		
Has the government institution sought consent of the individual?		
- If so, was consent refused? Is there a confidentiality clause preventing the individual and/or		

Relevant Questions	Departmental Response	Assessment
the institution from disclosing the information? - Why was consent refused?		
- If not, why was consent not sought?		
Has the individual provided an explicit direction to the government not to disclose the information?		
Has the individual provided consent to disclosure under the provisions of the Privacy Act?		
Has the individual implicitly consented to disclosure of the information?		
Has the individual himself made the information public?		
See questions on whether information is publicly available.		
Has the individual consented in the past to disclosure of the record?		
Has the individual consented to disclose parts of the information?		
Has the individual consented to disclose a version of the information which eliminates highly sensitive matters? - i.e. where monetary compensation is involved, disclosure of a range or other description (six months' salary) as opposed to specific amounts.		

Subsection – 19(2)
Statement of Test to be Met
Information is publicly available - publicly available sources - disclosure within government - disclosure in Parliament, in Court - disclosure under other FOI statutes

Relevant Questions	Departmental Response	Assessment
Has the information been circulated publicly? - by the government? - by the press? - was the information circulated as part of a press release		

Relevant Questions	Departmental Response	Assessment
announcing an appointment to a government position relevant to a request for a curriculum vitae, educational history of individuals appointed to a government positions, etc.?		
Can the information be obtained from an examination of publicly available sources? - at the Public Archives? - at public libraries? - in publications on the subject matter? - in newspaper articles? - in data bases accessible to the public - in public registry offices		
Has the information been circulated within the government? - how much circulation has the information received? - was it circulated on a need to know basis? - was it circulated generally?		
If circulated on a need to know basis, what criteria were applied? - did this result in a wide circulation?		
Has the information been released under other freedom of information statutes?		
Would the information be protected from disclosure under other freedom of information statutes?		
Was the information disclosed to the media inadvertently? - Was this the result of an unauthorized leak?		
Has there been disclosure subsequent to the inadvertent leak?		
Has the government publicly confirmed the leaked information or the information inadvertently disclosed?		
Has the matter been discussed in the House of Commons or by a parliamentary committee? - If discussed by a parliamentary committee, were the proceedings in camera or public?		
Does the personal information relate to disciplinary or other proceedings? - If so, are the proceedings ongoing? - Are the proceedings conducted in public? - Have the proceedings concluded? - if so, has a decision been issued with respect to the proceedings?		

Relevant Questions	Departmental Response	Assessment
- is this decision publicly available? - does this decision reveal the personal information contained in the record?		
Would the information be available under another freedom of information statute? - if so, has the information been disclosed? - if it has been disclosed, has it been circulated or is it accessible to the public?		

Exemption: Personal Information
Section 8 -- Privacy Act

8(1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

(a) for the purpose for which the information was obtained or compiled by the institution for a use consistent with that purpose;

(b) for any purpose in accordance with any Act of Parliament or any regulation made thereunder that authorizes its disclosure;

(c) for the purpose of complying with a subpoena or warrant issued or order made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with rules of court relating to the production of information;

(d) to the Attorney General of Canada for use in legal proceedings involving the Crown in right of Canada or the Government of Canada;

(e) to an investigative body specified in the regulations, on the written request of the body, for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, if the request specifies the purpose and describes the information to be disclosed;

(f) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, 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;

(g) to a member of Parliament for the purpose of assisting the individual to whom the information relates in resolving a problem;

Exemption: Personal Information
Section 8 -- Privacy Act

(h) to officers or employees of the institution for internal audit purposes, or to the office of the Comptroller General or any other person or body specified in the regulations for audit purposes;

(i) to the National Archives of Canada for archival purposes;

(j) to any person or body for research or statistical purposes if the head of the government institution
  (i). is satisfied that the purpose for which the information is disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and
  (ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates;

(k) to any association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such association, band, institution or part thereof, for the purpose of researching or validating the claims, disputes or grievances of any of the aboriginal peoples of Canada;

(l) to any government institution for the purpose of locating an individual in order to collect a debt owing to Her Majesty in right of Canada by that individual or make a payment owing to that individual by Her Majesty in right of Canada; and

(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, or
  (ii) disclosure would clearly benefit the individual to whom the information relates.

Statement of Test to be Met

Provisions requiring an Access to Information Request
- Paragraph 8(2)(a)
- Disclosure authorized for a use consistent with the purpose for collecting the information

Determine why information was collected
Determine the likely use of information if disclosed
- Are these consistent with one another?

Relevant Questions	Departmental Response	Assessment
Would disclosure of the information be for a use consistent with the original purpose behind collecting the information?		

Relevant Questions	Departmental Response	Assessment
To determine if this is the case:		
Why and how was the information originally collected?		
How is the information likely to be used if it is disclosed?		
What is the reason that the information has been requested?		
Is there a meaningful connection between the requester and the information requested? - If so, what is the purpose for which this requester has requested the information?		
Is the likely use of the information consistent with the original purpose for collecting it?		
Does the personal information concern individuals who are parties to a proceeding? - investigation of harassment complaints - disciplinary matters - staffing matters - dismissal/termination		
Was the information collected in connection with this proceeding?		
Is a party to the proceeding requesting the information?		
Would disclosure of the information otherwise be given to the party in the course of the proceedings?		
Would disclosure of the information to the requester ordinarily take place?		
Does the requester want the information for a government purpose? - if this is the case, ask why the requester had to use the Access to Information Act to get the information?		
Does the requester want the information for personal use? - if so, is this use connected with a government activity? - would use of the information outside of the government ordinarily take place?		
Is use of the information outside of the government consistent with the reason the government obtained or generated the information?		

Statement of Test to be Met

Paragraph 8(2)(b)
- For any purpose where a statute or regulation authorizes disclosure

Relevant Questions	Departmental Response	Assessment
Was the information generated pursuant to a statutory provision or regulation? - specify the provision		
Does the statute or regulation require individuals outside the government to provide the information?		
Does the statute or regulation allow disclosure of the information? - under what circumstances?		
Is disclosure controlled?		
How is disclosure controlled?		
In what circumstances does the statute or regulation authorize disclosure? - to specified individuals		
Is the requester a person to whom disclosure would be authorized?		

Statement of Test to be Met

Paragraph 8(2)(j)
Research or statistical purposes
- Determine if it is possible to disclose without identifying the individual
- Ensure undertaking is provided not to identify individual in subsequent disclosure

Relevant Questions	Departmental Response	Assessment
Is the information requested for researchers' statistical purposes?		
Are there measures that can be taken to disclose the information without identifying the individual?		

Relevant Questions	Departmental Response	Assessment
- Would these measures compromise the research or statistical validity of the information? - if so, how?		
Would the government institution be able to create a record which would avoid disclosing the identity of the individual?		
Has the requester provided an undertaking not to identify any individuals in subsequent disclosure?		
What does this undertaking consist of?		
Is the undertaking enforceable?		
Has the requester established that the information is required for a research or a statistical purpose?		
What is being researched?		
Why are the statistics being generated? What will the statistics show?		
How will the research or statistics be used? Will they be published? Where? When?		

Statement of Test to be Met

Public Interest Override

Paragraph 8(2)(m)

For any purpose where, in the opinion of the head of the government institution
- the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure

Opinion of the head of institution
- discretionary power
- assess on basis of relevant considerations

Standard of proof is high
- clearly outweighs any invasion of privacy

Standard of proof quantifying privacy interest is low
- any invasion of privacy that could occur

Public interest in disclosure

- characterize the public interest in disclosure
- quantify its importance

Relevant Questions	Departmental Response	Assessment
What are the reasons favouring disclosure of this information?		
Does the information relate to a private interest only, or does it relate to a matter of public concern?		
Do these reasons relate to a public concern for a particular matter?		
Is there general public interest in knowing the information? Is it urgent? Compelling?		
Is the information of use to the requester only, or to a broader public group?		
Would disclosure of the information subject the activities of the government to public scrutiny, accountability?		
Would disclosure of the information reassure the public about government activity?		
Would disclosure of the information promote public health and safety, public security?		
Would disclosure of the information assist the requester in obtaining a fair determination of his or her rights?		
Would disclosure of the information inform the public about the consumer issues?		
Does the information concern an investigation into activity which is likely to generate significant public interest?		
Why are the reasons in favour of disclosure compelling?		

Statement of Test to be Met

Any invasion of privacy?

- characterize/quantify the invasion of privacy
- assess the likelihood of an invasion of privacy
- identify any mitigating measures that would reduce the invasion of privacy

Relevant Questions	Departmental Response	Assessment
What is the invasion of privacy that will result if the information is disclosed?		
How serious is the invasion of privacy?		
Is the personal information involved of a highly sensitive nature?		
Would the individual to whom the personal information relates be unfairly exposed to financial harm? - to loss of reputation - to questioning about personal characteristics - to questions about the individual's personal integrity - to threats to the individual's safety		
Is the personal information involved accurate or reliable? - if not, question what the public interest in disclosure would be.		
Was the personal information supplied in confidence to the government institution? - was it supplied in the course of a confidential relationship? - doctor/patient - religious counselling - psychological or other counselling		
What is the likelihood of harm from disclosure? Reduced credibility, reduced standing, reduced reputation.		
What is the likelihood of the above invasions of privacy?		
Can the government institution sever the information in order to reduce the invasion of privacy?		
Can the government institution provide an explanatory note or take other measures to reduce the invasion of privacy?		

Statement of Test to be Met
Balance the interests - weigh the likelihood and degree of invasion of privacy against reasons in favour of disclosure - assess which are more important - note that courts have stated disclosure in and of itself is an important public interest Standard of Proof - do the reasons favouring disclosure to the public clearly outweigh the invasion of privacy

Relevant Questions	Departmental Response	Assessment
Do the reasons in favour of disclosure outweigh the likelihood and degree of the invasion of privacy? How so?		
Is the public interest compelling?		
Is the invasion of privacy minimal or serious in nature?		
What factors were taken into account by the head of the government institution?		
Are these consistent with the purpose of the Access to Information Act? - disclosure is the general rule and exceptions to disclosure are limited and specific		
Are the factors consistent with the purpose of the Privacy Act? - to protect the privacy of individuals with respect to personal information about themselves		
Are the reasons for not disclosing the information proper? - is the information not being disclosed in order to avoid embarrassment to public officials, parliamentarians, other staff or the institution per se? - is the information not being disclosed in order to avoid a scrutiny of government operations? - is the information not being disclosed in order to avoid public misunderstanding or debate?		
Are the reasons for not disclosing relevant to the purpose of avoiding invasion of privacy of the individuals concerned?		

Statement of Test to be Met

Sub-paragraph 8(2)(m)(ii)

Clear benefit to the individual
- look at likely use of the information
- would the individual otherwise know or be able to obtain information about the benefit
- is the benefit significant, symbolic
- mitigating measures to minimize invasion of privacy
  - undertakings

Relevant Questions	Departmental Response	Assessment
Would disclosure clearly benefit the individual about whom the information relates?		
What is the likely use of the personal information?		
Would the individual otherwise know about the benefit? - is the individual aware of the benefit? Generally, or in specifics?		
What kind of benefit is involved? - Is it a financial benefit?		
How large is the benefit?		
Would disclosure of the information apprise the individual of a medical risk? - Would this information benefit the individual?		
Has the individual about whom the information relates sought this information in the past?		
Are there mitigating measures the institution can take to minimize the invasion of privacy?		
Can the institution obtain an undertaking from the requester not to use the information for purposes other than benefiting the individual?		
Is this undertaking enforceable?		

Endnotes

1. Note that this criteria is significantly different from other exemptions such as subparagraph 16 (1)*(c)*(ii) [Information the disclosure of which could reasonably be expected to reveal the identity of a confidential source of information] or section 17 [information the disclosure of which could reasonably be expected to threaten the safety of individuals]. In these two exemptions, the particular knowledge of the requester can be important since it could have a direct bearing on the reasonable expectation of harm.

2. *X v. Canada (Minister of National Defence),* [1992] 1 F.C. 77; 46 F.T.R. 206 (T.D.).

3. *Sutherland v. Canada (Minister of Indian & Northern Affairs et al.),* (6 May 1994) T-2573-93, (F.C.T.D.).

4. *X. v. Canada (Minister of National Defence),* [1992] 1 F.C. 77; 46 F.T.R. 206 (T.D.).

5. *Canada (Information Commissioner) v. Canada (Minister of Employment & Immigration),* [1986] 3 F.C. 63 (T.D.); *Canada (Information Commissioner)* v. *Canada (Public Works and Government Services)* (1996) 70 C.P.R. (3d) 37

6 *Ruby v. Canada (Solicitor General, R.C.M.P.*), [2000] F.C.J. No. 779, June 8, 2000, (F.C.A.).

Paragraph 20(1)*(a)*

The Provision:

20(1) *Subject to this section, the head of a government institution* ***shall refuse*** *to disclose any record requested under this Act that contains*

(a) ***Trade secrets*** *of a third party*

NOTE: As noted in *St Joseph Corporation v. Canada (Public Works and Government Services)*, [2002] F.C.J. No. 361, 2002 FCT 274 (F.C.T.D.) Heneghan J., the use of the word "shall" in section 20 suggests that no deference will be accorded by the Court to decisions of the heads of government institutions who decide to disclose records.

Preliminary matters:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizen or permanent resident within the meaning of the *Immigration Act* and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, the Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under section 68 or 69.

Paragraph 20(1)*(a)* is a mandatory class exemption. The consequence is that once the head determines that a record or part thereof contains certain information which falls within the class enunciated in the exemption, he/she must then refuse to grant access to the requested information unless either of the exceptions in 20(2) or (5) applies. The exemption process under 20(1)*(a)* is not completed until this determination is made.

NOTE: Subsection 20(6) (disclosure in the public interest) does not apply to information which constitutes a '*trade secret*'.

The "Test":

1) Preamble:

The test is very simple to state (i.e. does the information contain or constitute a trade secret of a third party) but is often difficult to apply.

'*Trade secrets*' consists of commercial, scientific and/or technical information, which is treated consistently in a confidential manner by a third party. Thus it is safe to assume that all information which falls within the scope of 20(1)*(a)* will also fall within the scope of 20(1)*(b)*. Accordingly, where a claim is made for the exemption of the same information under both 20(1)*(a)* and *(b)*, investigators should first determine whether 20(1)*(b)* applies before considering the trade secret exemption. If you are satisfied that 20(1)*(b)* applies and that none of 20(2), (5) or (6) apply, there is no need to consider the trade secret exemption and arrive at a preliminary decision whether the information constitutes a trade secret. It is only when the trade secret exemption is claimed alone, or there is a concern that the public interest override exemption applies that the trade secret exemption should be considered. Each case will be determined on a case-by-case basis. The following pages will help you to determine what type of information you must obtain during the course of your investigation to determine whether you are dealing with a trade secret.

2) Criteria for application:

In the case of paragraph 20(1)*(a)* only one test must be met in order for the information to qualify for exemption - i.e. the information must contain a '*trade secret*'. But what is a '*trade secret*'?

'*Trade secret*' is not a term of art in Canadian law nor is it defined in the ***Access to Information Act***.[1] As noted above, anything that would fall within the ambit of 20(1)*(a)* would also be covered by 20(1)*(b)*. However the opposite isn't necessarily true. Some confidential, commercial, scientific or technical information could meet the requirements of 20(1)*(b)* but not constitute a trade secret.

What attributes distinguish trade secrets from other confidential commercial, scientific or technical information?

The claim for exemption under 20(1)*(a)* has been made on three occasions and it has been rejected in a fairly summary manner. In *Intercontinental Packers Limited v. Minister of Agriculture* (1987), 14 F.T.R. 142 the Federal Court briefly rejected the claim for exemption by stating that a general allegation that such secrets existed were not enough to establish the exemption. Similarly, the decision in *Merck Frosst Canada Inc v. Minister of Health & Welfare*, (1988), 22 C.P.R. (3d) 177; 20 F.T.R. 73; 20 C.I.P.R. 302 (T.D.), provides the guidance that when the alleged trade secret has already been disclosed, the exemption is not applicable.

A review of the applicable jurisprudence from the Federal Court of Canada indicates that 'trade secret' has been defined as a term by the Federal Court of Canada in *Société Gamma Inc. v. Canada (Secretary of State)* (1994), 79 F.T.R. 42 at 45 (F.C.T.D.) Strayer J. in the following terms:

> "One can, I think, conclude that in the context of subsection 20(1) trade secrets must have a reasonably narrow interpretation since one would assume that they do not overlap the other categories: in particular, they can be contrasted to 'commercial ... confidential information supplied to a government institution ... treated consistently in a confidential manner ..." which is protected under paragraph (b). In respect of neither (a) nor (b) is there a need for any harm to be demonstrated from disclosure for it to be protected. There must be some difference between a trade secret and something which is merely 'confidential' and supplied to a government institution. I am of the view that a trade secret must be something, probably of a technical nature, which is guarded very closely and is of such peculiar value to the owner of the trade secret that the harm to him would be presumed by its mere disclosure.

The validity and authority of this definition was affirmed in the following recent judgements:

> *Merck Frosst Canada Inc. v. Canada (Minister of National Health),* [2002], F.C.J. 128 (F.C.T.D.)
>
> *PricewaterhouseCoopers, LLP v. Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No. 1439, 2001 FCT 1040 (Fed. T.D.) Campbell J. In appeal (A-611-01). This section 44 application was concerned with a decision to disclose two reports. The Court opened by noting the definition of a "trade secret" which had been determined by Strayer J. in *Société Gamma Inc. v. Canada (Department of Secretary of State)*, [1994] F.C.J. No. 589 at paragraph 7 to the effect that "a trade secret must be something, probably of a technical nature, which is guarded very closely and is of such particular value to the owner of the trade secret that harm to him would be presumed by its mere disclosure." A strong argument was made by the Respondent that the results of the assignment did not constitute "technical" information, which has a bearing both on s. 20(1)(a) and s. 20(1)(b). The Respondent argued that the results of the assignment constituted "a work product" which was something different than the "methodology" used to produce it. The Respondent further argued that on the facts of the present case, "technical information" meant the methodology, not the work product resulting from its application. The Court dismissed the Respondent's argument that there is a distinction to be made between the methodology and the work product. The Court found that the work product was capable of proving the methodology, and, therefore, they were one and the same. Thus, the Court found that the work done was "something of a technical nature" within Strayer J.'s definition of a trade secret in Société Gamma. Therefore, the Court concluded that the Reports under review contained trade secrets. Based on well substantiated affidavits, therefore, the Court found that the Reports meet the requirement of subsections 21(b) and 21(c) and, pursuant to section 51, ordered the head of Canadian Heritage not to disclose the Reports.
>
> *i) The Treasury Board Guidelines[2] defines the term '<u>trade secret</u>' as follows:*

"*For a record to qualify under this paragraph as a trade secret, it must satisfy all of the criteria contained in the following list:*

- *it must consist of information;*
- *the information must be secret in an absolute or a relative sense (i.e. known only by one or a relatively small number of persons);*
- *the possessor of the information must demonstrate that he has acted with the intention of treating the information as secret;*
- *the information must be capable of industrial or commercial application; and*
- *the possessor must have an interest (e.g. an economic interest) worthy of legal protection*."

The Treasury Board's interpretation is consistent with the one formulated in 1986 by the Alberta Institute of Law Research Reform. (see definition below)[3] However, the one formulated by Mr. Justice Strayer is much closer, if not indistinguishable[4]. It is also authoritative. At that time, the Institute of Law Research Reform made public a new proposal for the protection of trade secrets. It recommended new legislation be enacted to give better defined legal protection to trade secrets. The Institute's proposed definition for trade secrets is often described as a comprehensive summary of the elements necessary for a finding of a trade secret in Canada.

ii) The Institute defined the term 'trade secret' as follows:

"Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique or process, or information contained or embodied in a product, device or mechanism which:

(i) is or may be used in trade or business;
(ii) is not generally known in that trade or business;
(iii) has economic value from not being generally known; and
(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

According to the Institute, there are four elements of trade secret protection:

- **Specificity:** The information must be specific and ascertainable. For instance, general information on an area of technology does not constitute a trade secret.

- **Secrecy:** To protect secrecy any disclosure made of the trade secret must be restricted and contained. The owner must treat the information as confidential and it must always be clear that the owner regards the information as a secret. If the owner discloses the information under contract, it must be on appropriate terms and conditions as to secrecy protection and confidentiality. Consequently, the ease with which discovery is possible by those not in a contractual, confidential or fiduciary relation with the owner bears on the question of secrecy.

The extent of employee knowledge also bears heavily on this question of secrecy. If there is unrestricted access to secret information by employees, the owner has probably failed to maintain the necessary element of control. If the access to the information is restricted to designated employees and there are appropriate safeguards in place, there is a greater chance of achieving trade secret status.

- **Commercial value:** The trade secret must have a certain value which, in the hands of a competitor, would remove a competitive advantage enjoyed by the owner.

- **Not generally known to the public:** This does not mean that the information be novel or that it be suitable subject matter for patent or copyright protection. It can be information that could be acquired from materials available to the public with the expenditure of time and effort.

The institute also described four categories of trade secrets:

- **Secret formulae and processes:** For example, the recipe formulae for Coke or Pepsi. In such cases the formula/recipe is secret. Only a small number of persons know the formula.

- **Technological Secrets:** Every business uses a combination of labour, energy and raw materials to produce some product or service. Faced with soaring costs for all three items, contemporary businesses rely on technology to reduce costs and increase productivity. The ability of an enterprise to do well or even survive in today's highly competitive climate is directly related to its success in acquiring, protecting and using modern technology. Knowledge of these processes is usually referred to as technological '*know-how*'. If this know-how becomes available to other industry members, the enterprise is not necessarily lost, but its market competitiveness will be reduced. For example, some factories do not permit visitors to view assembly lines for fear of technological espionage.

- **Strategic business information:** Business spends a good deal of time and money preparing internal marketing studies, industry forecasts, etc. This inside information forms the raw data on which other decisions, such as financing or marketing may be based. Disclosure of such information might alert competitors to a particular business strategy, or save them valuable start-up time or costs in assembling the information.

- **Compilations and Collations:** This category relates to information as a product in and of itself. The value of the information lies in the collation, not the individual items, which can be publicly available. Secrecy in such cases is something of a misnomer. It applies because no one else has the equipment or know-how to collate the relevant information or has invested the time and resources required to do so.

The following constitutes an illustration of how trade secrets are interpreted in other jurisdictions:

a) Ontario:

(Orders #M-29, M-37, M-65, P-418, P-420, M-94, P-500, P-561).

- Subsection 17(1) of the *Ontario Freedom of Information Act,* R.S.O. 1990, ch. F.31 is the equivalent to our paragraph 20(1)*(a)*. In interpreting this provision, the Ontario Commissioner adopted the definition of '*trade secret*' from the Institute of Law Research and reform.

The following constitutes some illustrations in application of this definition:

(Order 222)

- The request involved information on bids of all contracts awarded by the Ministry. The Ministry of Culture and Communications exempted work plans, costing and overall proposal structures on the grounds that they constituted trade secrets. In his decision, Assistant Commissioner Tom Wright stated that while he agreed that the requested information constituted technical and commercial information, he could not agree that the information could constitute '*trade secrets*'.

(Order M-29)

- The requester requested from the Etobicoke Board of Education any "*information purchased by the institution from a research company*". In his decision, Commissioner Wright stated that the research company did not provide sufficient information to support the position that the information was the subject of efforts which were reasonable to maintain its secrecy - which is a necessary element of the definition of '*trade secret*'.

(Order M-65)

- The Hamilton Board of Education received an access request to a proposal that was developed in conjunction with Apple Canada for an advanced technology secondary school. The records identified were a four-page document which outlined the conceptual framework for the development of a possible project and a one page '*Letter of Intent*'. The inquiry officer refused to qualify the information as a trade secret since the connection between the information contained in the records and the commercial activities of Apple Canada was too remote.

(Order P-561)

- The Commission found that information concerning the construction of the retractable roof of the SkyDome was '*trade secret*' information. The records showed unique construction processes and techniques together with testing procedures for the roof seals. The information represented an acquired body of knowledge, experience and skill relating to the development of certain techniques, methods and processes unique to the construction of the SkyDome

structure. The Commission found that the knowledge base or learning curve, conferred proprietary rights on its owners. The information had economic value and was subject to efforts to keep it confidential. While the information was circulated to a construction management group, it was done so on express terms that it be kept confidential.

b) Quebec

No major differences exist in the basic legal principles applied in the Province of Quebec as compared to other Canadian provinces. However, in view of the differences in the legal system, the basis upon which these legal principles are founded are different.

Since no statute exists to define what a trade secret is, the courts have attempted to delimit the scope of the notion. Two important cases decided in Quebec, proposed a definition. In *RI Crain Limited v. Ashton Press Manufacturing Co. Limited* [1949] C.P.R. 143, at 149, Mr. Justice Chevrier, relying on definitions offered in American cases, generally defined trade secret as follows:

> "What are trade secrets? (...)
>
> 1st: A trade secret… is a property right, and differs from a patent in that as soon as the secret is discovered, either by an examination of the product or any other honest way, the discoverer has the full right to use it (...)
>
> 2nd: A trade secret is a plan or process, tool, mechanism or compound known only to its owner and those of his employees to whom it is necessary to confide it (...)
>
> 3rd: The term trade secrets, as usually understood, means a secret formula or process not patented, but known only to certain individuals using it into compounding certain articles of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on (...)
>
> 4th: A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. A trade secret is a process or device for continuous use in the option of the business. The subject matter of a trade secret must be secret (...)"

In the second case, *Positron Inc. v. Desroches et al.* [1988] R.J.Q. 1636, at 1653, Mr. Justice Biron proposed the following definition:

> "Trade secrets are usually formulas, manufacturing processes unique to its owner and which have been revealed confidentially to an employee. This is not experience acquired by an employee on his own but, more à propos, knowledge or "savoir-faire" belonging to the employer and revealed by him to the employee for the sole purpose of permitting the latter to produce what the trade secret enables

him to do. Included in this category are chemical formulas, recipes, manufacturing technologies (...)". [translation]

One of the most important Common Law cases on the subject of trade secrets is *Faccenda Chicken Ltd. v. Fowler* (1986) 1 All E.R. 617, at 623, a British case and the reasoning therein was adopted and followed by Mr. Justice Biron in *Positron* where he described the three categories of information that an employee can acquire during the course of his employment and the protection to which each category is entitled:

"First there is information which, because of its trivial character or its easy accessibility from public sources of information, cannot be regarded by reasonable persons or by law as confidential at all. The servant is at liberty to import it during his service or afterwards to anyone he pleases, even his master's competitor. An example might be a published patent specification well known to people in the industry concerned [...] Second, there is information which the servant must treat as confidential, either because he is expressly told it is confidential, or because from its character it obviously is so, but which once learned necessarily remains in the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master; and [...] there seems to be no established distinction between the use of such information where its possessor trades as a principal, and where he enters the employment of a new master, even though the latter case involves disclosure and not mere personal use of the information. If an employer wants to protect information of this kind, he can do so by an express stipulation restraining the servant from competing with him (within reasonable limits of time and space) after the termination of his employment [...] Third, however, there are, to my mind, *specific trade secrets so confidential* that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but their master's. An example is the secret process which was the subject matter of *Amber Size ad Chemical Co. Ltd. v. Menzel* [1913] 2 Ch 239 ([23])."

On September 7, 1999, the Court of Appeal of Quebec rendered a decision, which constitutes a considerable analysis regarding the legal protection offered to trade secrets in Canada and more particularly under Quebec's civil law system. In *Ghaly Elia Gideon and Gideochem Inc. v. Tri-Tex Co. Inc*. [1999] R.J.Q. 2324 (C.A.) Mr. Justice Joseph R. Nuss, was specifically asked to issue on whether or not secret formulae are to be protected by the **Copyright Act** and on the possibility for a person to seize confidential information before judgement alleging ownership of same.

When the Court of appeal was asked to issue a ruling on whether or not Tri-Tex's chemical formulae were subject to the **Copyright Act**, Justice Nuss confirmed the decision rendered by Superior Court Judge Dalphond and restated a fundamental rule of Copyright Law saying that there can be no copyright in ideas or in information but only in

the expression of them and that ideas are public property. The Court decided that the chemical formulae were ideas and as such are not subject to copyright. Justice Nuss specified that even if the formulae were written or printed on paper or otherwise recorded on computer software, it does not mean that they are “literary works” within the meaning of the **Copyright Act**. The Court mentioned that the Tri-Tex formulae might constitute a trade secret and referred to the definition of trade secrets proposed by Mr. Justice Biron in the case *Positron Inc. v. Desroches et al*. [1988] R.J.Q. 1636.

The Quebec courts have offered a wide and open definition which indicates a tendency to include in the notion of trade secrets a variety of information. However, it is clear that only information which cannot be obtained in any other way than from the business source using this information, as opposed to the product put on the market by that source, will be considered a trade secret. For example, in today's technical fields such as electronic or computer engineering, competitors often analyze marketed products to understand their functioning and ultimately, duplicate them. In accordance with the definitions adopted by Quebec courts, no violation of trade secrets is involved in this procedure. As specifically emphasized in *Positron*, matters relating to trade secrets are decided in the Province of Quebec in accordance with civil law. In the absence of a written contractual disposition forbidding the disclosure and use of Trade Secrets or confidential information, sections 1310, 1434, 1457 and 1590 of the Civil Code will be applied. They read as follows:

> **1310.** No administrator may, in the course of his administration, become a party to a contract affecting the administered property or acquire otherwise than by succession any right in the property or against the beneficiary.
>
> [. . .]
>
> **1434.** A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law.
>
> **1457.** Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> [. . .]
>
> He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.
>
> **1590.** An obligation confers on the creditor the right to demand that the obligation be performed in full, properly and without delay.
>
> Where the debtor fails to perform his obligation without justification on his part and he is in default, the creditor may, without prejudice to his right to the performance of the obligation in whole or in part by equivalence,
>
> (1) force specific performance of the obligation;

(2) obtain, in the case of a contractual obligation, the resolution or resiliation of the contract or the reduction of his own correlative obligation;

(3) take any other measure provided by law to enforce his right to the performance of the obligation.

c) United States:

In the United States, exemption 4, 5 U.S.C. @ 552*(b)*(4), justifies withholding of trade secrets. 4. This exemption applies to "*trade secrets and commercial or financial information obtained from a person and privileged or confidential*".[5] Here again, there is not very much guidance as to the meaning of the term '*trade secret*'.

In *Public Citizen Health Research Group v. FDA*, 704 F. 2d 1280, 1288 (D.C. Cir. 1983), the Court of Appeal for the District of Columbia Circuit has adopted a narrow '*Common Law*' definition of the term '*trade secret*' that differs from the broad definition used in the restatement of Torts (i.e. that trade secret is a broad term extending to virtually any information that provides a competitive advantage). The D.C. Circuit's decision in that case represented a distinct departure from what until then had been almost universally accepted by the courts. The narrow definition provided described '*trade secrets*' as "*a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort*". This definition requires that there be a '*direct relationship*' between the trade secret and the productive process.

The Court of Appeal for the tenth Circuit has expressly adopted the D.C. Circuit's narrow definition, finding it "*more consistent with the policies behind the FOI than the broad Restatement definition.*[6] In so doing, the Court of Appeal noted that the adoption of the broader Restatement definition "*would render superfluous*" the remaining category of exemption 4 information because there would be no information falling within the latter category that would be outside the reach of the trade secret category.

North American Free Trade Agreement.

Chapter 17 – Intellectual Property, Part Vl of the NAFTA defines trade secrets as follows:

Article 1711: Trade Secrets

1. Each Party shall provide the legal means for any person to prevent trade secrets from being disclosed to, acquired by, or used by others without the consent of the person lawfully in control of the information in a manner contrary to honest commercial practices, in so far as:

(a) the information is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons that normally deal with the kind of information in question;

(b) the information has actual or potential commercial value because it is secret; and

(c) the person lawfully in control of the information has taken reasonable steps under the circumstances to keep it secret.

2. A Party may require that to qualify for protection a trade secret must be evidenced in documents, electronic or magnetic means, optical discs, microfilms, films or other similar instruments.

3. No Party may limit the duration of protection for trade secrets, so long as the conditions in paragraph 1 exist.

CASE LAW

Société Gamma Inc. v. Canada (Secretary of State) (1994), 79 F.T.R. 42 at 45 (F.C.T.D.) Strayer J. defined the terms «trade» secrets» in the following terms:

> "One can, I think, conclude that in the context of subsection 20(1) trade secrets must have a reasonably narrow interpretation since one would assume that they do not overlap the other categories: in particular, they can be contrasted to 'commercial ... confidential information supplied to a government institution ... treated consistently in a confidential manner ..." which is protected under paragraph (b). In respect of neither (a) nor (b) is there a need for any harm to be demonstrated from disclosure for it to be protected. There must be some difference between a trade secret and something which is merely 'confidential' and supplied to a government institution. I am of the view that a trade secret must be something, probably of a technical nature, which is guarded very closely and is of such peculiar value to the owner of the trade secret that the harm to him would be presumed by its mere disclosure.

AstraZeneca Canada inc. c. Health Canada, 2005 FC 1451; The type of information which could potentially fall into this class includes the chemical composition of a product and the manufacturing processes used. However, it is not every process or test which would fall into this class particularly where such process or test is common in a particular industry.

PricewaterhouseCoopers, LLP v. Canada (Minister of Canadian Heritage), [2001] F.C.J. No. 1439, 2001 FCT 1040 (Fed. T.D.) Campbell J. In appeal (A-611-01). This section 44 application was concerned with a decision to disclose two reports. The Court opened by noting the definition of a "trade secret" which had been determined by Strayer J. in *Société Gamma Inc. v. Canada (Department of Secretary of State)*, [1994] F.C.J. No. 589 at paragraph 7 to the effect that "a trade secret must be something, probably of a technical nature, which is guarded very closely and is of such particular value to the owner of the trade secret that harm to him would be presumed by its mere disclosure." A strong argument was made by the Respondent that the results of the assignment did not constitute "technical" information, which has a bearing both on s. 20(1)(a) and s. 20(1)(b). The Respondent argued that the results of the assignment constituted "a work product" which was something different than the "methodology" used to produce it. The Respondent further argued that on the facts of the present case, "technical

information" meant the methodology, not the work product resulting from its application. The Court dismissed the Respondent's argument that there is a distinction to be made between the methodology and the work product. The Court found that the work product was capable of proving the methodology, and, therefore, they were one and the same. Thus, the Court found that the work done was "something of a technical nature" within Strayer J.'s definition of a trade secret in Société Gamma. Therefore, the Court concluded that the Reports under review contained trade secrets. Based on well substantiated affidavits, therefore, the Court found that the Reports meet the requirement of subsections 21(b) and 21(c) and, pursuant to section 51, ordered the head of Canadian Heritage not to disclose the Reports.

St Joseph Corp. v. Canada (Public Works and Government Services), [2002] F.C.J. No. 361, 2002 FCT 274 (Fed. T.D.) Henegan J. [In appeal. Doc. A-202-02). The Court noted that the affidavit evidence filed by the Applicant did not meet this onus. The affidavit speaks only in general terms and is more in the nature of speculation than a statement of facts. The lack of cross examination on the affidavit does not enhance its reliability and the affidavit stands to be assessed on its face value. Therefore, the Court noted, the affidavit did not establish how the requested records meet the legal test of a "trade secret" so as to be exempted under subsection 20(1)(a).

Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services Canada), [2003] F.C.J. 254 (F.C.T.C.), Layden-Stevenson J.: In this application for Review brought pursuant to s.44 of the Act the third party objected to disclosure of bid documents. The third party claimed that its unique formula (i.e. non-confidential art, craft, rhetorical design and flavour, giving rise to a unique presentation) used by it when responding to requests for bids is a "trade secret". The Court rejected the argument and held that the third party "technique" was nothing more than the age-old skill of putting the punch in the first paragraph and creating a positive first (and hopefully lasting) impression. This was not, by any definition, a trade secret.

TABLE OF AUTHORITIES

Trade Secrets

Canada

AstraZeneca Canada inc. c. Health Canada, 2005 FC 1451;
Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services Canada), [2003] F.C.J. 254 (F.C.T.C.), Layden-Stevenson J.

Intercontinental Packers Ltd. V. Canada (Minister of Agriculture), (1987), 14 F.T.R. 142

Merk Frosst Canada Inc. v. Canada (Minister of Health and Welfare), (1988), 22 C.P.R. (3d) 177; 20 F.T.R. 73; 20 C.I.P.R. 302 (T.D.)

Merck Frosst Canada Inc. v. Canada (Minister of Health), [2000] F.C.J. No. 1281 (F.C.T.D.)

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Ontario

Orders: M-29, M-37, M-65, M-94, P-22, P-418, P-420, P-500, P-561

Québec

Ghaly Elia Gideon and Gideochem Inc. v. Tri-Tex Co. Inc. [1999] R.J.Q. 2324 (C.A.) Nuss J.

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R.I. Crain *Limited v. Ashton Press Manufacturing Co. Limited* [1949] C.P.R. 143, at 149, Chevrier J

United Kingdom

Faccenda Chicken Ltd. v. Fowler (1986) 1 All E.R. 617, at 623

United States

Anderson v. HHS, 907 F. 2d 936 (10th Cir. 1990)

Public Citizen Health Research Group v. *FDA*, 704 F. 2d 1280, 1288 (D.C. Cir. 1983)

The Questions

Paragraph -- 20(1)(a)
Statement of Test to be Met
Information must describe something of a technical nature, plan, formula, process, device, pattern, compilation, programme, method, technique - must be the product of innovation or effort by a third party

Relevant Questions	Departmental Response	Assessment
What does the record describe?		
Does the information in the record represent a [method, formula, technique or process]?		
If the information represents a compilation of information, ask - What are the sources of the information? - How did the third party generate the information?		
Did the third party need permission, a licence or other agreement to use the information? - details of agreement		
How did the third party generate the information [method, formula, technique or process]?		
Did they originate the idea?		
Is the [method, formula] the product of work, research and effort undertaken by the third party?		
Is the [method, etc.] unique or new?		
Has the third party applied in Canada for patent, trademark, industrial design or copyright protection with respect to the [method, process, formula, etc.]?		

Statement of Test to be Met
- must have commercial or industrial application - relationship between the [method, process, etc.] and the business of the third party must be direct

Relevant Questions	Departmental Response	Assessment
Is the [method, etc.] used or sold commercially?		
Is the [method, etc.] used in the production of an end product or service? - how?		
How does the [method, etc.] contribute or add value to the business of the third party?		
How are the [method, process, formula, etc.] used or applied?		
What is the market for the method, process, etc. or the end product?		

Statement of Test to be Met
- [method, process, etc.] must be secret - reasonable efforts must be made to maintain its confidentiality - assess degree of circulation - is it limited?

Relevant Questions	Departmental Response	Assessment
Has the information been disclosed to others? - who? - what were the circumstances? - for what purpose?		
Is use of the information licensed?		
Are there terms in the license preserving the confidentiality of the information, non-disclosure clauses, etc.?		
Is there an agreement or contract by those to whom the information is disclosed prohibiting further disclosure?		

Relevant Questions	Departmental Response	Assessment
Where are the records stored?		
Are they stored separately from other files?		
What restrictions are there on its circulation within the third party?		
Which employees have access to the records?		
Which employees know the information contained in the records?		
Has the [method, process, formula, etc.] described in the records been the subject matter of scientific or technical papers or discussed at conferences? - has it been published? - where?		
Is the [method, process, formula, etc.] demonstrated to customers or suppliers? - when?		
What precautions are taken to prevent further disclosure?		
Is the [method, process, formula, etc.] described in a product monograph (i.e. approved medical devices, drugs, pharmacology manuals, etc.)?		

Statement of Test to be Met

- must be value in the fact that the information is not known (harm presumed to occur from mere disclosure)

Relevant Questions	Departmental Response	Assessment
See questions above concerning relationship between [method, formula, process, etc.] and the business of the third party.		
Are there others who make similar products or generate similar information in competition with the third party?		
What competitive or other advantage does the [method, formula, process, etc.] provide to the third party?		

Relevant Questions	Departmental Response	Assessment
Can this advantage be quantified?		
How would disclosure benefit a competitor?		

Endnotes

1. *C. H. McNairn & C.D. Woodbury, Government Information: Access and Privacy*, Carswell, 1991.

2. *Treasury Board Manual: Access to Information Volume, Treasury Board of Canada,* December 1, 1993, Chap 2-8 at 26.

3. *The Institute of Law Research and Reform, Alberta and a Federal-Provincial Working party, Trade Secrets*, (Report No. 46, July 1986).

4. The interpretations of the Institute (and of Mr. Justice Strayer) is much narrower than the Treasury Board's interpretation and is preferred by this office. In particular, the interpretation given by Mr. Justice Strayer is authoritative and binding. For example, the T.B. interpretation does not require the trade secret to have obtained its economic value from not being generally known, nor does it require that the efforts taken to protect the information be reasonable under the circumstances.

5. 5 U.S.C. § 552.

6. *Anderson v. HHS,* 907 F. 2d 936, 944 (10th Cir. 1990).

Paragraph 20(1)*(b)*

The Provision:

20(1) *Subject to this section, the head of a government institution **shall refuse** to disclose any record requested under this Act that contains*

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

Preliminary matters:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act), as extended by the **Access to Information Act** extension order no. 1 of April 13, 1989, gives any Canadian citizen or permanent resident within the meaning of the **Immigration Act** and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, the Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under section 68 or 69.

Paragraph 20(1)*(b)* is a mandatory class exemption. The consequence is that once the head determines that a record or part thereof contains certain information which falls within the class enunciated in the exemption, he/she must then refuse to grant access to the requested information unless either of the exceptions in 20(2), (5) or (6) applies. The exemption process under 20(1)*(b)* is not completed until this determination is made.

This test applies to commercially sensitive information regardless of whether it was filed voluntarily or was legally required to be filed.

The "Test":

In *Air Atonabee Ltd. v. Minister of Transport*, (1989), 27 F.T.R. (3d) 180 at 197 (F.C.T.D.), the Federal Court applied the four criteria that were laid down by Jerome A.C.J. on April 15, 1988, in *Montana Band of Indians v. Minister of Indian and Northern Affairs et al*., [1989] 1 F.C. 143. To fall within 20(1)*(b)*, it must be established that the information meets all of the following criteria - i.e., it must (be):

- *financial, commercial, scientific or technical information,*
- *confidential information,*
- *supplied to a government institution by a third party, and*

- *treated consistently in a confidential manner by a third party.*

Case Law:

1) <u>Financial, commercial, scientific or technical information</u>:

According to the *Federal Court of Canada* in the following decisions:

a) *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 C.P.R. (3d) 180 at 197 (F.C.T.D.), for the purpose of this section it is sufficient that the information "relate or pertain" to matters of finance, commerce, science or technical matters, as those terms are "commonly understood".

b) *Canada Post Corp. v. Canada (Minister of Public Works),* [1993] 3 F.C. 320 (T.D.) Rothstein J. , dictionary definitions can be considered in determining the meaning of a provision when the suggested meaning in the dictionary is consistent with the purpose of the Act.

c) *Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs)* (1996), 116 F.T.R. 37 at 48 (F.C.T.D.), information will be deemed to be financial, commercial, scientific or technical when it relates to material that is commonly referred to as such, in keeping with the ordinary dictionary definition of those terms.

The terms "financial", "commercial", "scientific" and "technical" are defined as follows in the Concise Oxford Dictionary , 8th ed. (Oxford University Press 1991):

- **Finance**: " 1. the management of (esp. public) money. 2. monetary support for an enterprise 3. (in pl.) the money resources of a State, company or person . . ."
- **Financial**: "1. of finance . . ."
- **Commerce**: "1. financial transactions, esp. the buying and selling of merchandise, on a large scale. . . ."
- **Commercial:** "1. of, engaged in, or concerned with, commerce. 2. Having profit as primary aim rather than artistic etc. value: philistine. . ."
- **Science:** " 1. A branch of knowledge conducted on objective principles involving the systematized observation of and experiment with phenomena , esp. concerned with the material and functions of the physical universe . . ."

"2.a. systematic and formulated knowledge, esp. of a specified type or on a specified subject . . ."
"2.b. the pursuit or principles of this."
"3. an organized body of knowledge on a subject."
"4.d. skillful technique rather than strength or natural ability."
"5. archaic knowledge of any kind."

- **Scientific**. "1.a. according to rules laid down in an exact science for performing observations and testing the soundness of conclusions."
"1.b. systematic, accurate."
"2. used in, engaged in, or relating to science."
"3. assisted by expert knowledge."

- **Technic:** "1a. Technology."
"1b. technical terms, details, methods, etc."
"2. technique."

- **Technical**: "1. of or involving or concerned with the mechanical arts and applied sciences."
"2. of or relating to a particular subject or craft etc. or its techniques . . ."
"3. using technical language; requiring special knowledge to be understood. . . ."

Keddy v. Canada Atlantic Opportunities Agency, (1993), 66 F.T.R. 227 at 231-233 (F.C.T.D.) MacKay J. The information sought was financial or commercial as it related to planned and projected commercial operations of third parties. A reasonable expectation of confidence arose in light of the agency's undertaking not to release the information without permission and as the information was consistently treated by the third parties as confidential. Thus the criteria under paragraph 20(1)(b) of the Act had been met. It was in the public interest to uphold the undertaking to act in confidence. The Court also concluded that any portions that might be considered severable, as not containing in themselves confidential commercial or financial information, are such a minimal portion of the entire report as filed with ACOA that their release would not be reasonable. Nor would their release be reasonably related to the purposes for which the information was requested. Thus the Court did not order severance of any portion of the documents in question, which were found to be confidential commercial and financial information within paragraph 20(1)(b) of the Act.

Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs) (1999), 251 N.R. 220 at 222 (F.C.A.) Stone, Isaac and Rothstein JJ.A. The only basis for the appellants' argument is that some of the documents refer to land and since land is an asset, there is a financial connotation to it. Without defining what financial information consists of, the Court was satisfied that merely because documents contain references to land, they do not constitute financial information.

Canada Post Corporation v. Canada (National Capital Commission), 2002 FCT 700 Kelen J. In this section 44 application, the Court was satisfied that the amounts of financial assistance for sponsorship is "financial and commercial information". The Court was also satisfied that it was confidential in nature. However, the Court noted that the evidence on the record was conspicuously lacking in that Canada Post did not produce a confidentiality agreement with NCC in this regard. If Canada Post wished to prevent the NCC from disclosing the amounts paid for sponsorship, Canada Post logically would have entered into a confidentiality agreement at the outset, and filed it as evidence. In its concluding statement, the Court added that it would have expected Canada Post to have entered into a confidentiality agreement to protect disclosure of financial information which could reasonably be expected to result in financial loss or prejudice to its competitive position. This lack of evidence, together with the respondent's success on two of the three grounds for exemption, will be reflected in an order that both parties bear their own costs.

Keddy v. Canada Atlantic Opportunities Agency, (1993), 66 F.T.R. 227 at 231-233 (F.C.T.D.) MacKay J. The information sought was financial or commercial as it related to planned and projected commercial operations of third parties. A reasonable expectation of confidence arose in light of the agency's undertaking not to release the information without permission and as the information was consistently treated by the third parties as confidential. Thus the criteria under paragraph 20(1)(b) of the Act had been met. It was in the public interest to uphold the undertaking to act in confidence. The Court also concluded that any portions that might be considered severable, as not containing in themselves confidential commercial or financial information, are such a minimal portion of the entire report as filed with ACOA that their release would not be reasonable. Nor would their release be reasonably related to the purposes for which the information was requested. Thus the Court did not order severance of any portion of the documents in question, which were found to be confidential commercial and financial information within paragraph 20(1)(b) of the Act.

Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency (1996), 109 F.T.R. 110 at 123 and 126 (F.C.T.D.) McGillis J. The Commission applied to review the decision of the Agency not to disclose information pertaining to the actual number of jobs created in each company surveyed for the Agency by Public Works on the ground that the information was confidential and commercial in nature and had been treated consistently in a confidential manner. The Agency wrote to the companies, 60 per cent of which responded indicating that the information was commercially confidential in nature and refused to consent to the disclosure. The Court concluded that the Agency had discharged its burden of establishing that the information fell within the exemption in paragraph 20(1)(b) of the Act. In the present case, the evidence in the record establishes overwhelmingly that the companies in question are

commercial entities and are considered to be “commercial clients” of the Agency. Given that the companies are commercial entities, information pertaining to their operations, including internal employment data, constitutes commercial information within the meaning of paragraph 20(1)(b) of the Act. Accordingly, the information concerning the actual number of jobs created in each company by virtue of its participation in the Program is commercial information.

Canada Post Corporation v. Canada (National Capital Commission), 2002 FCT 700 Kelen J. In this section 44 application, the Court was satisfied that the amounts of financial assistance for sponsorship is “financial and commercial information”. The Court was also satisfied that it was confidential in nature. However, the Court noted that the evidence on the record was conspicuously lacking in that Canada Post did not produce a confidentiality agreement with NCC in this regard. If Canada Post wished to prevent the NCC from disclosing the amounts paid for sponsorship, Canada Post logically would have entered into a confidentiality agreement at the outset, and filed it as evidence. In its concluding statement, the Court added that it would have expected Canada Post to have entered into a confidentiality agreement to protect disclosure of financial information which could reasonably be expected to result in financial loss or prejudice to its competitive position. This lack of evidence, together with the respondent’s success on two of the three grounds for exemption, will be reflected in an order that both parties bear their own costs.

Bitove Corp. v. Canada (Minister of Transport) (1996), 119 F.T.R. 278 at 281 (F.C.T.D.) Pinard J. A competitor of Bitove sought the release of records relating predominantly to the negotiation of an amendment to a lease between the respondent and the applicant with respect to goods and services provided at Terminals 1 and 2 at the Lester B. Pearson International Airport. Noting that the information consists of records of meetings, including minutes of negotiating meetings, as well as detailed financial reports, including sales information and projections, the Court was satisfied that all of the information relating to Terminals 1 and 2 has been provided to the respondent in confidence and only as a result of the contractual relations between the applicant and the respondent. This information would not be and is not available to anyone other than the respondent and the applicant. The information relating to Terminal 3 is also confidential to the applicant. All of the information sought to be disclosed by a competitor of the applicant is otherwise maintained within the strictest confidence by the applicant. It is all information the nature of which would be of great assistance to the applicant's competitors to determine precisely how and where the applicant negotiated its contractual arrangements with the respondent, how it conducts its affairs at Lester B. Pearson International Airport and how it directs its sales efforts at that airport. To provide a competitor of the applicant with that information would allow a competitor a direct insight into its plans and strategies, something that has taken years of work for the applicant to

determine. The Court held that in the circumstances, the applicant has successfully discharged the burden of establishing that the records requested under the Act contain the kind of information described in paragraphs 20(1)(b) and (c) of the Act.

H. J. Heinz, Company of Canada Ltd. c. Canada (Attorney General), 2005 CF 1314
In August 2004, a request under the Act was made to CFIA for all submissions made by any party regarding the adequacy, inadequacy, advisability or legality of any restrictions on the format of containers, in terms of volume, weight or otherwise, for any food or drink, classified as infant or junior food under the Processed Products Regulations. Heinz filed an application under section 44 of the act to prohibit disclosure of certain documents while claiming paragraphs 20(1)b and 20(1)c) of the act. As to the claim of paragraph 20(1)b), Heinz argued that the public is not aware as to whether Heinz did, or did not make, submissions to CFIA. Even if the Heinz Documents contain public information, having that public information disclosed would reveal its confidential regulatory strategy to competitors. The Court rejected this argument by stating that this strategy had nothing to do with its operations. Even giving the most generous interpretations to the words "financial, commercial, scientific or technical information.

Canada (Information Commissioner) v. Executive director of the Canadian Transportation Accident Investigation and Safety Board 2006 FCA 157: The requesters sought access to recordings and/or transcripts of air traffic control communications recorded by NAV CANADA and now under the control of the Safety Board. As to the claim of Paragraph 20(1)(b) of the Act, the Court found that the word “commercial” connotes information which in itself pertains to trade (or commerce). It does not follow that merely because NAV CANADA is in the business of providing air navigation services for a fee, the data or information collected during an air flight may be characterized as “commercial”. The Court also found that it is incorrect to characterize the entire record collected during an air navigation flight as being “technical” information when only a specific part might be, for instance when precise flight instructions are given.

2) <u>Confidential information</u>:

Under the Act, the Federal Court in *Maislin Industries Ltd. v. Canada (Minister for Industry, Trade and Commerce)*, [1984] 1 F.C. 939 has declared that in determining whether third party information is confidential or not, an objective standard must be applied. In order to prove that the information is confidential in nature, in *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 C.P.R. (3d) 180 (F.C.T.D.) the Federal Court has also set four essential conditions:

1. The communications must originate in confidence that the information revealed will not be disclosed to fourth parties.
2. This element of confidentiality must be essential and intrinsic to the full and satisfactory maintenance of the relation between parties.
3. The relation must be one that in the opinion of the community it ought to be sedulously fostered.

4. The injury that would result to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Confidentiality Agreement. In *St Joseph v. Canada (Public Works and Government Services)* [2002] F.C.J. No. 361, 2002 FCT 274 (F.C.T.D.) Henegan J. the Court considered the question of a Confidentiality Agreement between parties. In that instance, the Confidentiality Agreement provided that neither party could disclose any information acquired in the course of an investigation into the transactions contemplated by the sale and purchase of the assets of Canada Communications Group and would keep such information, including but not limited to analyses, compilations, forecasts, studies or other documents prepared in respect to this investigation 'confidential" in perpetuity. As indicated immediately below, the Court recognized that there was conflicting authority as to the effect to be given to a Confidentiality Agreement. It ruled, however, that the Court MAY take a Confidentiality Agreement into account in assessing the objective confidentiality of the information in issue; however, a Confidentiality Agreement remains subordinate to the Act.

PRO

Keddy v. Canada (Atlantic Canada Opportunities Agency), (1993) 50 C.P.R. 484 (F.C.T.D.) at 490-491 it was held that where the government gives an undertaking of confidentiality, that undertaking constitutes evidence that the information in question is CONFIDENTIAL and is a factor in requiring the government to refuse to disclose a record under paragraph 20(1)(b) of the Act.

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 665 (F.C.T.D.) at 675 Denault J. wrote: "I am satisfied that paragraph 20(1)(b) does require that the Government consider itself bound by its undertakings to act confidentially, in respect of financial, commercial, scientific or technical information, whenever the third party to whom the undertaking was given has consistently treated the information as confidential . . . To hold otherwise, and conclude that undertakings of confidentiality are strictly meaningless in light of the Act is to give the Act a dogmatic interpretation rather than the rational one, and thus an interpretation which the law resists.

CON

Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sport), [1989] 2 F.C. 480 (F.C.T.D.) at 487 (F.C.T.D.) Strayer J. held that voluntarily submitted material marked 'confidential' remained subject to the right of access in the Act. ". . . it is not enough to state that their submission is confidential in order to make it so in an objective sense. Such a principle would surely undermine much of the purpose of this Act which in part is to make available to the public the information upon which government action is taken or refused. Nor would it be consistent with that purpose if a Minister or his officials were able to exempt information from disclosure simply by agreeing when it is submitted that it would be treated as confidential."

Canadian Broadcasting Corporation v. National Capital Commission, (1998), 147 F.T.R. 264 (F.C.T.D.) Teitelbaum J. concluded that a confidential agreement may be imposed in relation to the parties to that agreement but it cannot affect the access rights of a third party making a request under the Act.

Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency, (1999) 250 N.R. 314 (F.C.A.), Strayer J.A. writing for the Federal Court of Appeal held that an undertaking to keep the information gathered by a government agency cannot be determinative of disclosure obligations under the Act.

Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services Canada), [2003] F.C.J. 254 (F.C.T.D.), Layden-Stevenson J.: In this application for Review brought pursuant to s.44 of the Act the third party objected disclosure of bid documents. On each page of the third party's bids it was stated that the information "is proprietary" to BLJC and that the use or disclosure of the information contained in the documents, without written permission, "is prohibited". The Applicant relied heavily on the fact that the information was communicated in response to an undertaking of confidentiality. The Federal Court held that while an understanding that information was submitted in confidence could be taken into account, it could not override the express statutory provisions of the Act. Brookfield's attempt to characterize every element of its bids diluted the substance of its position and militated against an objective finding of confidentiality. The records in dispute consisted of generic and general information that could not be objectively regarded as confidential. The fact that the information has, to date, been kept confidential, is merely one aspect of the test. In the final analysis, while confidentiality agreements may be taken into account, they cannot override or trump the express statutory provisions of the Act.

Coradix Technology Consulting Ltd v. Canada (Minister of Public Works and Government services Canada, 2006 FC 1030: In this case, the application sought review of the decision to release certain information contained in the Applicant's winning proposal in a government procurement pursuant to an access to information request. While claiming paragraph 20(1)b) of the Act, the Applicant contended that various protective measures were taken to maintain the confidentiality of the Information. For example, the Applicant attached a confidentiality statement to its bid, included confidentiality clauses in its employment contracts with full-time employees and independent contractors, and engaged in specific business practices such as storing and maintaining business records in a manner that can only be accessed by authorized individuals. The Court rejected the Applicant's claim for exemption by stating that part of the information was accessible by the public on the Internet and although the Applicant may have wished the Information to be kept confidential by inserting a confidentiality statement, there is no indication that the Respondent agreed to exempt the Information from disclosure.

Canada (Information Commissioner) v. Executive director of the Canadian

Transportation Accident Investigation and Safety Board 2006 FCA 157: The requesters sought access to recordings and/or transcripts of air traffic control communications recorded by NAV CANADA and now under the control of the Safety Board. According to the Court, NAV CANADA suggested that there is a reasonable expectation of privacy in the ATC communications on the part of the pilots and controllers whose voices and utterances are recorded. NAV CANADA pointed in this regard to the confidentiality provisions of the collective agreements with its unions. This consideration cannot, however, be determinative of the status of this information under the *Access Act*: private parties cannot through such agreements alone contract out of the express statutory provisions of the *Access to Information Act.* On this argument, the Court found that at most, such agreements may be taken into account in the final analysis, to support other objective evidence of confidentiality.

a) Confidentiality must be tested on objective grounds

Maislin Industries Ltd. v. Canada (Minister for Industry, Trade and Commerce), [1984] 1 F.C. 939 at 947 Jerome A.C.J. Paragraph 20(1)(b) establishes a twofold test: (1) the information contained in the record must be confidential in its nature and (2) this information must be consistently treated in a confidential manner by the third party.

Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports), [1989] 2 F.C. 480 at 487 (T.D.) Strayer J. When individuals, associations, or corporations approach the government for special action in their favour, it is not enough to state that their submission is confidential in order to make it so in an objective sense. Such a principle would undermine the purpose of the Act which is, in part, to make available to the public the information upon which government action is taken or refused.

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 665 at 671-676 (T.D.) Denault J. Whether information is confidential depends upon its contents, purposes and the circumstances in which it is communicated i.e. the information is not otherwise accessible by the public, it was communicated in a reasonable expectation that it would not be disclosed and in a relationship that is either fiduciary or not contrary to the public interest. There is a public interest in ensuring that government act in good faith regarding confidential information that is received by it. The government may not always be bound by its undertaking to act in confidence, but paragraph 20(1)(b) requires it to consider itself bound by its undertakings to act confidentially in respect of financial, commercial, scientific or technical information, whenever the party to whom the undertaking was given has consistently treated the information as confidential.

Société Gamma Inc. v. Canada (Department of Secretary of State) (1994), 79 F.T.R. 42 at 45-46 (F.C.T.D.) Strayer J. After a careful review of the expurgated versions of the Proposals which the Respondent is prepared to disclose, I am

unable to conclude that what remains is confidential. As has been well established, whether information is confidential must be decided objectively. I do not believe that the material from the applicant's Proposals with the Respondent intends to disclose can be regarded as confidential by its intrinsic nature. [. . .] The onus is well established and is always on the person claiming an exemption from disclosure to show that the material in question comes within one of the criteria of subsection 20(1) and I do not think that the claimant here has adequately demonstrated that, tested objectively, this material is of a confidential nature. I accept that the applicant and, up to now, the respondent, have treated this material as confidential but that is only one part of the test prescribed in paragraph 20(1)(b) for confidentiality.

Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs) (1997), 132 F.T.R. 106 at 114-115 (F.C.T.D.) Cullen J. Because the object of the Act is disclosure, it follows that the standard for non-disclosure must be a high one. There is solid case law from this Court that elaborates on the content of confidentiality. First, the information should not have been obtained from sources to which the public has other access. Further, it must have been communicated in confidence with the reasonable assurance that it would not be disclosed. Moreover, it must have been provided as part of a relationship of trust between the government and the person providing it and this relationship must not be contrary to the public interest. In this context, confidentiality must be essential to the complete and satisfactory maintenance of the relationship between the parties. Finally, the relationship must be such that society feels that it should be assiduously upheld. Regarding information that must be reported to the Department, such as information regarding land transfers, there is no presumption of confidentiality. The applicant's mere expectation that the communications would remain confidential when submitted to the Department is not enough. The case law on the issue of confidentiality is clear that the test to be met is an objective, and not purely subjective one. The Department did not treat the information as confidential, and provided no assurances that it would not be disclosed.

Canada Post Corporation v. Canada (Minister of Public Works & Government Services), [2004] F.C. 270 (F.C.T.D.), Henegan J.: In this section 44 application, the Applicant argued that the records in issue were "confidential in nature" because there was no evidence before the Court that the records were in the public domain. While the Court agreed that the information contained in the disputed records was not in the public domain this is not the end of the matter. While the manner in which that information was compiled was apparently done on a confidential basis, the manner in which the information was communicated to Public Works did not show that the Applicant held a reasonable expectation that the information would not be disclosed at some future time. Indeed, the disputed letter indicated that Public Works had said that it could provide no guarantee of non-disclosure of the records. Accordingly, the Court rejected the claim for protection under subsection 20(1)(b).

Canada Post Corporation v. Canada (Minister of Public Works & Government

Services), [2004] F.C. 270 (F.C.T.D.), Henegan J.: In that case, the Court was not satisfied that the third criterion identified in *Air Atonabee Ltd*., that is, whether the relationship between the government institution and the third party would be fostered for the public benefit in keeping the information confidential, was applicable. In fact some of the information related to the Applicant's bid for a government contract and, therefore the Court could see no benefit to the public that would be lost in not disclosing the information at issue.

Canada (Information Commissioner) v. Executive director of the Canadian Transportation Accident Investigation and Safety Board 2006 FCA 157: The requesters sought access to recordings and/or transcripts of air traffic control communications recorded by NAV CANADA and now under the control of the Safety Board. According to the Court also found that it is incorrect to characterize the entire record collected during an air navigation flight as being "technical" information when only a specific part might be, for instance when precise flight instructions are given. NAV CANADA relied upon its own policies and consistent past practice to establish the confidentiality of the records at issue. According to the Court, such evidence – which essentially only substantiates a heretofore unchallenged subjective belief that the records are confidential – is insufficient to satisfy the objective test as the evidence does not elaborate, by reference to the information actually contained within the records at issue, as to how or why the information is *objectively* confidential.

b) Criteria to meet "confidential test"

Maislin Industries Ltd. v. Canada (Minister for Industry, Trade and Commerce), [1984] 1 F.C. 939 at 942 Jerome A.C.J. Given that some of the historical financial information requested by the applicant had at one time or another been published in Maislin financial statements, thus available to the public, the trial judge was not persuaded that such information was indeed confidential in its nature.

Intercontinental Parkers Ltd. v. Canada (Minister of Agriculture) (1987), 14 F.T.R. 142 at 146 (F.C.T.D.) Jerome A.C.J. The applicant sought the disclosure of meat inspection audit team reports prepared by the Department of Agriculture. The information in the audit reports has been available since 1972 in the companion American reports which can be obtained on request from the Department of Agriculture in Washington. In addition, the Canadian reports were released between 1981 and 1983. I do not find, therefore, that these reports contain information which is, by objective standards, confidential. An exemption under S. 20(1)(b) has not been established.

Air Atonabee Ltd. v. Canada (Minister of Transport) (1989), 27 C.P.R. (3d) 180 at 197 (F.C.T.D.) MacKay J. Exemption from disclosure under paragraph 20(1)(b) requires that the information in question meet the following criteria: (1) The information must not be available from other sources otherwise accessible by the

public or attainable by observation or independent study by a member of the public acting on its own financial, commercial, scientific or technical information. (2) The information must originate and be communicated in circumstances giving rise to a reasonable expectation of confidence that it will not be disclosed. (3) The information, whether required by law or supplied gratuitously, must be communicated in the context of a relationship which is either fiduciary or not contrary to the public interest and which will be fostered "for public benefit by confidential communication."

Société Gamma Inc. v. Canada (Department of Secretary of State) (1994), 79 F.T.R. 42 at 45-46 (F.C.T.D.) Strayer J. After a careful review of the expurgated versions of the Proposals which the Respondent is prepared to disclose, I am unable to conclude that what remains is confidential. As has been well established, whether information is confidential must be decided objectively. I do not believe that the material from the applicant's Proposals, which the Respondent intends to disclose, can be regarded as confidential by its intrinsic nature. [. . .] The onus has been well established is always on the person claiming an exemption from disclosure to show that the material in question comes within one of the criteria of subsection 20(1) and I do not think that the claimant here has adequately demonstrated that, tested objectively, this material is of a confidential nature. I accept that the applicant and, up to now, the respondent, have treated this material as confidential but that is only one part of the test prescribed in paragraph 20(1)(b) for confidentiality.

Jacques Whitford Environment Ltd. v. Canada (Minister of National Defence), [2001] F.C.J. No. 828 (Q.L.) 2001 FCT 556 (F.C.T.D.) O'Keefe J. I am satisfied that the applicant meets all the criteria for confidential information, as outlined by MacKay J. in *Air Atonabee*, subject to the exceptions listed in my discussion of severance. The confidential information in the document is not available from sources otherwise accessible by the public, nor could it be obtained by observation or independent study by a member of the public acting on his or her own. The confidential portion of the information in the document originated and was communicated in a reasonable expectation of confidence that it would not be disclosed. This information was developed by the applicant and submitted in response to a need that the applicant perceived the respondent might have. In my view, the information was communicated in a relationship that is not contrary to the public interest, and a relationship that is fostered for public benefit by confidential communication. I therefore find that the information contained in the unsolicited proposal with the exceptions of the severed portions of the document, meets the requirements of paragraph 20(1)(b) of the Act and thus, shall not be disclosed.

St Joseph Corp. v. Canada (Public Works and Government Services), [2002] F.C.J. No. 361, 2002 FCT 274 (Fed. T.D.) Henegan J. [In appeal. Doc. A-202-02). The Court concluded it may take confidentiality agreements into account in assessing the objective confidentiality of the information in issue. However, confidentiality agreements remain subordinate to the Act. However, the Court noted that while the confidentiality agreement and clause in the present case

may be binding as between the parties, public policy did not permit such a clause to allow parties to contract out of the Act. Given the paucity of evidence as to how the requested records were objectively confidential and how they were maintained in a confidential manner, the Court concluded that the Applicant had not met the evidentiary burden to exempt all the requested records under paragraph 20(1)(b).

AstraZeneca Canada inc. c. Health Canada, 2005 FC 1451; The fact that government and third parties have kept the information confidential to date is one aspect of the test, it is not determinative, nor is the fact that the records have a notation related to them that they are not to be released without the third party's permission.

AstraZeneca Canada inc. c. Health Canada, 2005 FC 1451; Health Canada has Operational Guidelines which assist third parties in understanding how the department deals with information supplied to it. Those Guidelines do not have the force of law and cannot be the basis for refusing disclosure which otherwise ought to occur. At best, the Guidelines indicate the extent of any expectation of confidentiality.

Coradix Technology Consulting Ltd v. Canada (Minister of Public Works and Government services Canada, 2006 FC 1030: In this case, the application sought review of the decision to release certain information contained in the Applicant's winning proposal in a government procurement pursuant to an access to information request. While claiming paragraph 20(1)b) of the Act, the Applicant contended that various protective measures were taken to maintain the confidentiality of the Information. For example, the Applicant attached a confidentiality statement to its bid, included confidentiality clauses in its employment contracts with full-time employees and independent contractors, and engaged in specific business practices such as storing and maintaining business records in a manner that can only be accessed by authorized individuals. The Court rejected the Applicant's claim for exemption by stating that part of the information was accessible by the public on the Internet and although the Applicant may have wished the Information to be kept confidential by inserting a confidentiality statement, there is no indication that the Respondent agreed to exempt the Information from disclosure.

c) Interpretation of the word "Confidential"

Noël v. Great Lakes Pilotage Authority Ltd., [1988] 2 F.C. 77 at 84-86 (T.D.) Dubé J. The applicant requested the names of masters and deck officers who are not subject to compulsory pilotage on the Great Lakes. The Court held that it was not sufficient for the shipowners to allege that confidentiality existed and was maintained for the names of the individuals. It must also be proven. The Court concluded that the list of names of individuals was not confidential under paragraph 20(1)(b) because: 1. There is no evidence that the names originated in a confidence that they would not be disclosed; 2. Confidentiality is not

essential to maintaining the relationship between parties, since communication of the names is required by law; 3. In the case at bar, there is no obligation on the parties to sedulously foster relations; 4. It was not established that disclosure of the communications would cause any permanent injury; whatever injury might be supposed to occur would certainly not be greater than the benefit of correct disposal of the litigation, which in the case at bar must reflect the purpose of the Act, namely extending the laws of Canada to provide a right of access to government records.

Montana Band of Indians v. Canada (Minister of Indian Affairs and Northern Development), [1989] 1 F.C. 143 at 158 (T.D.) Jerome A.C.J. The Act's definition of "confidential" does not include an injury test, and actual competitive harm need not be shown under paragraph 20(1)(b).

Montana Band of Indians v. Canada (Minister of Indian & Northern Affairs), [1989] 1 F.C. 143 at 158 (T.D.) Jerome A.C.J. Whether information is confidential depends upon its content, its purposes and the circumstances in which it is compiled and communicated namely: (a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on its own; (b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed; and (c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the third party supplying it that it is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for the public benefit by confidential communication.

Société Gamma Inc. v. Canada (Secretary of State) (1994), 79 F.T.R. (3d) 42 at 58 (F.C.T.D.) Strayer J. The Court held that there must be some difference between a trade secret and something which is merely "confidential" and supplied to a government institution. A trade secret must be something, probably of a technical nature, which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure. Noting that the proposals were put together for the purpose of obtaining a government contract, with payment to come from public funds, it held that when a would-be contractor sets out to win a government contract he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability.

The Court also observed that while there may be much to be said for proposals or tenders being treated as confidential until a contract is granted, once the contract is either granted or withheld there would not, except in special cases, appear to be a need for keeping tenders secret. The onus is always on the person claiming an exemption from disclosure to show that the material in question comes within one of the criteria of subsection 20(1) and, in this case,

the claimant has not adequately demonstrated that, tested objectively, this material was of a confidential nature.

Société Gamma Inc. v. Canada (Department of Secretary of State) (1994), 79 F.T.R. 42 at 46 (F.C.T.D.) Strayer J. After a careful review of the expurgated versions of the Proposals which the respondent is prepared to disclose, I am unable to conclude that what remains is confidential. As has been well established, whether information is confidential must be decided objectively. I do not believe that the material from the applicant's Proposals which the respondent intends to disclose can be regarded as confidential by its intrinsic nature. [. . .] The onus has been well established and it is always on the person claiming an exemption from disclosure to show that the material in question comes within one of the criteria of subsection 20(1) and I do not think that the claimant here has adequately demonstrated that, tested objectively, this material is of a confidential nature. I accept that the applicant and, up to now, the respondent, have treated this material as confidential but that is only one part of the test prescribed in paragraph 20(1)(b) for confidentiality.

Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency (1996), 109 F.T.R. 110 at 123 and 126 (F.C.T.D.) McGillis J. The Commissioner applied to review the decision of the Agency not to disclose information pertaining to the actual number of jobs created in each company surveyed for the Agency by Public Works on the grounds that the information was confidential and commercial in nature and had been treated consistently in a confidential manner. In considering whether the information is confidential in nature, as required by the second branch of the test concerning the applicability of paragraph 20(1)(b) of the Act, the evidence indicates objectively that the information was strictly internal to the companies and, as such, was neither available from any other source nor ascertainable in any other manner by a member of the public. Conversely, all of these companies had expressly agreed with the Agency to make publicly available a broad range of other internal information in recognition of the fact that they were receiving public assistance to fund specific projects undertaken by their enterprises. The one item of information which all of these companies had not agreed to make public concerned the actual number of jobs created. The evidence further indicates that companies carefully guarded the confidentiality of actual employment figures for various reasons, including their desire to maintain a competitive advantage. Accordingly, a review of the evidence in the record, in its totality and from a purely objective perspective, establishes that the information concerning the actual number of jobs created in each of the companies that participated in the survey is private or confidential in nature. The Court noted that if it were to make a finding to the contrary, this would lead to the undesirable result that the internal employment figures of the 607 companies which participated voluntarily in the survey would become public, while the identical information for the approximately 4,500 remaining companies would continue to be private, commercial information. That would not only be unfair, but it would also discourage the companies from voluntarily providing information of this nature to the Agency in the future.

Merck Frosst Canada Inc. v. Canada (Minister of National Health), [2000] F.C.J. No. 1281 (F.C.T.D.) (QL), Pinard J. These findings indicate that most of the disputed information is available from sources otherwise accessible to the public. It is true that in some limited instances the respondent's evidence is that part of the disputed information is "likely" available from sources otherwise accessible to the public. This inference is not unreasonable, considering the extensive and detailed evidence of Ms. Freeman, which clearly demonstrates that the material to be released is already largely in the public domain, and considering that the applicant's evidence in that regard is contained in a document entitled "Merck's Response to HPB's objections", a document which merely contains a cryptic response by the applicant affirming that the material is confidential but providing no factual basis for this statement. Therefore, it seems to me that the criteria in *Air Atonabee* are not met and that the applicant has failed to demonstrate that the disputed information is objectively confidential.

Merck Frosst Canada & Co. v. Canada (Minister of Health), [2004] F.C. 959 (F.C.T.D.), Harrington J. : In this application pursuant to section 44 of the Act, the Court found that while some of the information contained in the requested records appears to be currently in the public domain; if that information in the form presented "comme telle" (as such) is not in the public domain, confidentiality has not been lost.

> *"Consider the exemption of solicitor-client privilege. … Nothing is more public than the decisions of our courts. Imagine if the head of a government institution deleted everything in the brief except the references to the court cases cited therein. The mere fact that certain cases were cited would give another party great insight."*

*AstraZeneca Canada inc. c. Health Canada, 2005 FC 1451;*The expectation of confidentiality must be less where a third party is attempting to persuade government to grant it some concession or licence, then where the third party is assisting government in carrying out its mandate. Parties seeking government approvals, just as parties seeking government funds or contracts, cannot expect the same degree of confidentiality as a party who is assisting government.

d) **Burden of proof.** In *Noël v. Great Lakes Pilotage Authority Ltd.*, [1988] 2 F.C. 77 at 84 (T.D.), the Federal Court noted that it is not sufficient for a third party to allege that confidentiality exists it still has to be proven. The burden of doing so is on those refusing to disclose the information.

Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency (1996), 109 F.T.R. 110 at 123 and 126 (F.C.T.D.) McGillis J. The Commissioner applied to review the decision of the Agency not to disclose information pertaining to the actual number of jobs created in each company surveyed for the Agency by Public Works on the ground that the information was confidential and commercial in nature and had been treated consistently in a confidential manner. The Agency wrote to the companies, 60 percent of which responded indicating

that the information was commercially confidential in nature and refused to consent to the disclosure. The Court concluded that the Agency had discharged its burden of establishing that the information fell within the exemption in paragraph 20(1)(b) of the Act.

Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency (1999), 250 N.R. 314 at 315 (F.C.A.) Strayer, Linden and McDonald JJ.A. The matter in issue was whether the information provided by the companies surveyed, in particular the statistics as to actual jobs created or maintained as a result of the respondent Agency's program, was confidential when provided and whether it has been consistently treated as confidential. If so it would be exempt from disclosure under paragraph 20(1)(b) of the Act. It is clear from section 48 of the **Access to Information Act**, noted the Court, that the Agency had the burden of proof to satisfy the Court that it was authorized to refuse to disclose the record in question. This requires the production of factual direct evidence, which in this case was needed to prove original and continuing confidentiality of the information. In our view there was no such evidence as would support a finding of confidentiality in respect of each of the companies concerned. The material chiefly relied on by the learned Trial Judge consisted of “representations” made to the Information Commissioner by 24 companies under subparagraph 35(2)(c)(iii) of the Act during the course of his investigation. These unsworn statements could not be treated as evidence even as to the confidentiality of the information of the companies making the representations, let alone as to the confidentiality of information of all the other companies. The only evidence supporting the claim to confidentiality is that Price Waterhouse, in seeking the information for the Agency from the companies, stated that the information gathered would be kept confidential. This was an undertaking not authorized by the Agency and, according to well established jurisprudence, cannot be determinative of disclosure obligations under the **Access to Information Act**. It is regrettable if those surveyed were misled by this undertaking, but they were aware that the information was being gathered for a government agency. By law such information became part of a government record subject to the Act.

StenoTran Services v. Canada (Minister of Public Works and Government Services), [2000] F.C.J. No. 747 (F.C.T.D.) (QL) Heneghan J. :

What is important to consider is whether any objective fact could prove that the information is confidential. For example:

1. That the information is marked confidential, it is kept locked and that only a few people have access to it, etc. However, since some information is normally considered to be confidential in nature it does not need to meet a very high burden of proof.

2. It would not need very much evidence to consider a company’s overhead, profit margins, operations cost, labour costs, administrative fees, etc. as being confidential. The test of the ‘reasonable man’ is to be applied when determining whether information is confidential or not. See *Ottawa*

Football Club v. Canada (Minister of Fitness and Amateur Sport), [1989] 2 F.C. 480, (F.C.T.D.)

e) Government documents are presumed to be in the public domain

Perez Bramalea Ltd. v. Canada (National Capital Commission), [1995] F.C.J. No. 63 (QL) (F.C.T.D.) Simpson J. In the Act, Parliament has given the citizens of Canada a right of access to government documents and records. The Act creates a presumption that government documents are in the public domain. That presumption is only defeated if it is shown by an applicant that a particular document or record or part thereof is covered by a specific exemption under the Act. The onus is on an applicant to satisfy the court that an exemption is justified and any doubt will be resolved in favour of disclosure. One ground for exempting material from disclosure is confidentiality. This exemption is described in Section 21(b) of the Act. In general terms, that section requires an applicant to show that financial or commercial information was supplied to the Government, that it was always treated as confidential information by the parties and that, given its content and purpose, outsiders looking at it objectively would also consider it to be confidential. It goes without saying that information which is publicly available or which can be obtained by observation, will not be considered confidential. An applicant need not show commercial harm to be entitled to an exemption for confidentiality.

f) Undertakings of confidentiality given before coming into force of the Act

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 665 at 666 (T.D.) Muldoon J. The department refused to disclose the specific amount in kilograms of the largest single annual import quota of foreign cheese allocated to a firm or individual in 1985 on the basis that the information was confidential financial or commercial information between the department and the third party exempted from disclosure under paragraph 20(1)(b) or information the disclosure of which could prejudice the third party under paragraph 20(1)(c). The import quotas on foreign cheeses given to Canadian firms are determined on the basis of an importer's percentage of the cheese import business in 1973 and 1974. An undertaking had been given at that time that the information would be kept confidential. The Court held that there is a public interest in ensuring government act in good faith regarding confidential information that is received by it. The Court also held that this rule holds true whether the undertaking was given before or after the coming into force of the Act. To hold that undertakings of confidentiality are nullified by the Act would be to give it a dogmatic interpretation rather than a rational one - an interpretation which the law resists.

g) Consultation

Occam Marine Technologies Ltd. v. Canada (National Research Council) (1998), 55 F.T.R. 117 at 128 (F.C.T.D.) MacKay J. A government institution need not

consult third parties before deciding to apply the provisions of paragraph 20(1)(b) to records in a situation where the third party could reasonably rely on the confidentiality regime applicable in the institution's policy concerning disclosure of the records which indicated the information was exempt from disclosure.

h) What is not necessarily considered as 'confidential'

Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare) (1992), 45 C.P.R. (3d) 390 at 403 (F.C.A.) Mahoney, Stone and Robertson JJ.A. The only information in controversy is that which is contained in the product monograph. The appellant itself made that information publicly available by releasing that document. Rights of secrecy and confidentiality fell away with the release of the product monograph; any injury, prejudice or advantage must surely flow from that release itself.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 45 C.P.R.(3d) 390 at 403-404 (F.C.A.) Mahoney, Stone and Robertson JJ.A. Requested information that is also included in the product monograph need not be severed because, by the appellant's own action in releasing that document, it has become part of the public domain. Rights of secrecy and confidentiality fell away with the release of the product monograph; any injury, prejudice or advantage surely must flow from that release itself. I cannot see that the appellant has established any basis under paragraphs 20(1)(a), (b) or (c) for interfering with the order of the Trial Division. The appellant itself made this information publicly available by releasing that document. In my opinion, it has simply not been shown that additional harm would flow to the appellant from release of the same information under the provisions of the Act.

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 52 F.T.R. 22 at 36 (F.C.T.D.) Jerome A.C.J. Information contained in the product monograph of a drug is not confidential. The evidence is that the product monograph is required to be widely distributed to health professionals and there are no measures taken to prevent the dissemination of this information to others or to the public generally. It is also substantially available in other sources.

Sutherland v.Canada (Minister of Indian and Northern Affairs), [1994] 3 F.C. 527 at 547 (T.D.) Rothstein J. The applicant requested disclosure of financial information including expenditure plans and cash flows. Noting that some of the information had previously been made public, the Court observed that the information that is already public is similar to the information in the balance of these pages. The Band and the Minister having not satisfied the onus on them of proving that the information qualified under paragraph 20(1)(b), the Judge ordered its disclosure.

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 at 128 (F.C.T.D.) The Court held that some information in the proposal was clearly not exempt from disclosure because on its face it was not confidential information

within paragraph 20(1)(b). i.e. printed material from other sources, the published financial statements of partners in the venture which were both publicly owned corporations, summary reviews of other projects in which the applicant was previously involved, summaries of experience and curriculum vitae of those who would provide leadership if the project were to proceed. However, aside from that kind of information, other portions, especially of the financial aspects of the proposal, appeared clearly to be confidential within paragraph 20(1)(b) and s. 20, imposing a responsibility on the respondent to refuse to disclose that. That responsibility, the Court held, is not discharged by saying to the third party who may be affected by disclosure "Here is information that relates to you. It may contain information that should not be disclosed but I will release it as requested unless you prove by evidence satisfactory to me (or to a court on an application to review) that the information ought not to be disclosed under the Act". While it is true that on review under ss. 44(1) the burden is on the applicant seeking to restrain disclosure, the actual responsibility to refuse to disclose the information under s. 20 is that of the head of the institution, in this case the respondent. The Court held that in the instant case that responsibility had been taken too lightly.

Halifax Development Ltd. v. Canada (Minister of Public Works and Government Services), [1994] F.C.J. No. 2035 (QL) (F.C.T.D.) McGillis J. The rental rates were not exempt from disclosure under section 20(1) of the **Access to Information Act**. The evidence established that the rates were negotiated between the applicant and the Minister as a term of the lease and a negotiated term of a lease could not properly be characterized as information which was supplied to the government. Subsection 20(1)(b) was inapplicable. Moreover, the evidence tendered by the applicant was couched in generalities and fell significantly short of establishing a reasonable expectation of probable harm.

Canada Post Corporation v. Canada (Minister of Public Works & Government Services), [2004] F.C. 270 (F.C.T.D.), Henegan J.: In this section 44 application, the Applicant argued that the records in issue were "confidential in nature" because there was no evidence before the Court that the records were in the public domain. While the Court agreed that the information contained in the disputed records was not in the public domain this is not the end of the matter. While the manner in which that information was compiled was apparently done on a confidential basis, the manner in which the information was communicated to Public Works did not show that the Applicant held a reasonable expectation of confidence that the information would not be disclosed at some future time. Indeed, the disputed letter indicated that Public Works had said that it could provide no guarantee of non-disclosure of the records. Accordingly, the Court rejected the claim for protection under subsection 20(1)(b).

Canadian Broadcasting Corp. v. Canada (National Capital Commission) (1998), 147 F.T.R. 264 at 270-271 (F.C.T.D.) Teitelbaum J. Article 7.14 states that the terms of the Agreement are confidential and that they shall not be released without written consent by the party affected. This article in the Agreement cannot prevent a Court from granting access to the terms of an Agreement if the granting of the access does not contravene paragraphs 20(1)(c) and (d) of the

Act. It may affect the relationship of the contracting parties but not any third party making an access request pursuant to the law.

Air Transat A.T. Inc. v. Canada (Transport)[2001] F.C.J. No. 108 (Fed.T.D.) Rouleau J. In a section 44 Application for Review, the Court noted that the fact that a document is considered as a federal government document covered by the Act is not sufficient to support a conclusion that the content of the document cannot fall within the exception set out in ss. 20(1)(b). A distinction should be made between the analysis done by the government organization from information obtained during the inspection and the information supplied directly to the inspectors by the third party. Where there is an inspection report, which additionally is a federal government document covered by the Act, anyone seeking an exception to the Act must prove the confidentiality of the information initially supplied as well as showing the ongoing confidentiality of the information. In other words, in my opinion, it is necessary to establish that the information was confidential when it was given to the inspectors and had to remain confidential throughout the inspection report, which includes the information contained in the final report. This must be shown by the submission of real direct evidence. The defendant's argument being insufficient, the Court then analyzed the claims of the defendant in accordance with the exception contained in ss. 20(1)(b) and the four conditions for it to apply. The Court did not order disclosure of internal documents of the plaintiff and of answers to questions submitted by the defendant.

Wyeth-Ayerst Canada Inc. v. Canada (Attorney General), [2002] F.C.J. No. 173, 2002 FCT 133 (Fed. T.D.) Henegan J. [In appeal. A-130-02] Much of the information sought to be withheld by the applicant was already in the public domain, either as the result of prior disclosures made by the office or pursuant to disclosures made in relation to the pharmaceutical industry, both in Canada and the United States. Referring to the public affidavit of M.J. Bujaki which demonstrated that there were many documents on the public record concerning conjugated estrogens, including publications issued by Health Canada and the U.S.F.D.A, the Court concluded that the public availability of these materials undercut the Applicant's broadly based claim for confidentiality.

Canadian National Railway Company v. Canada (Attorney general), [2002] FCT 974, Pelletier J.: In this case, the Court noted that subsection 19(2) authorizes the disclosure of personal information in certain cases, including when the public has access to the information in question. Paragraph 20(1)(*b*) exempts from disclosure documents containing financial information that is confidential. However, the courts have held that information is not confidential if it can be obtained from sources to which the public otherwise has access. In the case of subsection 19(2), as in that of paragraph 20(1)(*b*), the fact that certain information is listed in registry offices is relevant to deciding whether there is a duty to disclose the documents. The recording of the names of purchasers, the description of the property, the date of sale and the selling price found in registry offices means that the information that appears in the documents in question is

publicly available, and that consequently the information in question is not confidential.

Hi-Rise Group v. Canada (Minister of Public Works and Government Services), [2004] F.C.A. 99, 248 F.T.R. 160 : In this section 44 application, the Applicant argued that documents, the release of which would reveal the annual rents being paid by PWGS with respect to an office building located in Hamilton, Ontario, and the option prices at which this building can be acquired by PWGS, are exempt from disclosure under paragraph 20(1)(b) of the Act. The question to be answered by the Court was therefore whether the respondent, assuming that its proposal was successful, could reasonably expect that amounts paid or payable to it out of public funds pursuant to the ensuing contract would remain confidential by reason of the fact that the process which led to the grant of the contract was confidential. The Court rejected the claim for 20(1)(b) exemption for the following reasons:

> - When a would-be contractor sets out to win a government contract through a confidential bidding process, he or she cannot expect that the monetary terms, in the event that the bid succeeds, will remain confidential.
>
> - As was pointed out in *Société Gamma*, there are good reasons for maintaining confidentiality during the bidding process but different considerations arise once the contract is awarded and public funds are committed to it. Absent special circumstances (national security comes to mind), I fail to see how public benefit could be fostered by maintaining the confidentiality of amounts paid or payable by government pursuant to contractual obligations with third parties.

3) Information supplied to a government institution by a third party.

Under the Act, the Federal Court in *Maislin Industries Ltd. v. Canada (Minister for Industry, Trade and Commerce)*, [1984] 1 F.C. 939 has declared that in determining whether third party information is confidential or not, an objective standard must be applied. In order to prove that the information is confidential in nature, in *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 C.P.R. (3d) 180 (F.C.T.D.) the Federal Court has also set four essential conditions:

1. The communications must originate in confidence that the information revealed will not be disclosed to fourth parties.
2. This element of confidentiality must be essential and intrinsic to the full and satisfactory maintenance of the relation between parties.
3. The relation must be one that in the opinion of the community it ought to be sedulously fostered.
4. The injury that would result to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

One of the requirements of this section is that the information be supplied to the government by the third party. Therefore, where the records consists of comments and observations made by public (government) inspectors based on their review of the records maintained by the third party, such information is not to be considered as provided by the third party.

> **NOTE**: See: *Intercontinental Packers Ltd v. Canada (Minister of Agriculture),* (1987), 14 F.T.R. 142 (F.C.T.D.) and *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), [1989] 1 F.C. 47 (F.C.A.) in which the same reports were held not to be 'confidential' on the basis that they did not contain information which 'was supplied to a government institution by a third party' but rather judgements based on observations made by government inspectors.

Of course such reports may be based both on an examination of particular operations or the physical condition of premises and on a written or oral record made available by the third party. If any information from the latter source is incorporated into the report, that part of the text may qualify for protection under the commercial information exemption (e.g. plant production statistics which were not readily observable and which were given by the company to the inspector.)

It should be noted that information supplied by the third party would also include any information that, if disclosed, would permit an accurate inference to be drawn as to the actual information that was supplied by the third party. Thus, information generated by an institution could qualify for protection from disclosure if it summarizes what must logically have come from the third party.

> *In Tridel Corp. v. Canada (Canada Mortgage and Housing Corp*.), (1996) 115 F.T.R. 185, the Court found that since Tridel Corp. had not supplied the information, there was no factual basis for it raising an objection under subparagraph 20(1)(b).

Similarly, as indicated by the following case law, information MUST have been supplied to a government institution by a third party:

> *Canada Packers v. Canada (Minister of Agriculture),* [1989] 1 F.C. 47 at 54 (F.C.A.) Heald, Urie and MacGuigan JJ.A.. Paragraph 20(1)(b) related not to all confidential information but only to that which has been supplied to a government institution by a third party.
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> *Bacon International inc. v. Canada (Department of Agriculture and Agri-Food)*, [2002] F.C.T. 587 (T.D.), Beaudry J. : In the course of its function of protecting the public in matters involving food the defendant carries out inspections and gives businesses ratings. The Department received a request under the *Access to Information Act* for these business ratings. The Department decided to release the information. The plaintiffs argued that the information was confidential and protected under s. 20(1)(b). The Court rejected the Applicant's claim for 20(1)(b) as the document was not supplied by the third party but originated with the defendant. Paragraph 20(1)(b) relates not to all confidential information but only to that which has been "supplied to a government institution by a third party". Apart from the employee and volume information which the

respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed. According to the court no other reasonable interpretation is possible, either of this paragraph or of the facts, and therefore paragraph 20(1)(b) is irrelevant in the cases at bar.

H.J. Heinz Company of Canada Ltd. v. Canada (Attorney General), [2003] F.C.J. 344 (T.D.), Layden-Stevenson J. : In this application of the section 44 of the Act, the third party objected to disclosure of information pertaining to the operations of a commercial enterprise or information that relates or pertains to matters of finance or commerce. Third party claimed exemption under 20(1)(b). The Court found that although the records were created by the Canadian Food Inspection Agency, they contained information supplied by Heinz. Such information supplied can be subject to a paragraph 20(1)(b) exemption.

Hi-Rise Group inc. v. Canada (Minister of Public Works and Government Services), [2003] F.C.T. 430 (T.D.), Campbell J. : In this case, Justice Campbell held that records produced by Public Works based on raw proposal data supplied by a third party constituted records submitted by a third party within the meaning of section 20(1)(b) of the Act. (Appeal granted on other grounds).

AstraZeneca Canada inc. c. Health Canada, 2005 FC 1451; Information which reflects government officials' viewpoints, opinions or comments is not information supplied by third parties. Only to the extent that those opinions or comments disclose the actual information supplied by the third party, the information must then be assessed against the other criterion in the Act.

Canada (Minister of Health) v. Merck Frosst Canada & Co., 2005 FCA 215

In this case, a drug company created asthma drug and obtained regulatory approval from Health Canada for marketing and distribution. The company fully disclosed to Health Canada for regulatory approval all information it had about the drug. The Court found that the trial judge erred in law in ruling that the documents in issue met the criteria for the exemption under paragraph 20(1)(*b*) of the *Act* because the information they contain was not *as such* in the public domain. According to the Court, once the information is within the public domain, it is no longer confidential, even if it differs in form.

Canada (Minister of Health) v. Merck Frosst Canada & Co., 2005 FCA 215: In this case, the Federal Court of Appeal reversed the trial's judge finding that the reviewer's notes

and the correspondence between the parties should not be communicated under paragraph 20(1)(b) of the Act solely because they were written in response to the respondent's request. According to the Court, the information in the reviewer's notes contains certain information that does not emanate from the respondent, and the fact that these notes were written pursuant to the respondent's request does not affect this situation in any way.

Hutton v. Canada (Minister of Natural Resources) (1997) 137 F.T.R. 110 at 118 (F.C.T.D.) Gibson J.

> My review of the requested record indicates that the record was, in fact, generated or produced by the Canadian Explosive Research Branch. A careful review of the requested record does not enable me to identify any information given to C.E.R.L. by a third party or one or more of its associates. Thus, on the basis of the evidence before me, I cannot conclude that the requested record contains financial, commercial, scientific or technical information supplied to C.E.R.L. by Terra or one or more of its associates that has been treated consistently in a confidential manner by the supplier.
>
> In this section 44 application there was a contradictory aspect to the dealings between the parties. On one, a sponsor had the right to know, in advance, that the amount of its sponsorship may be disclosed by the recipient. On the other hand, a recipient who has been informed by the sponsor that the amounts shall be kept private has no reason to act as though they should. The Court was of the opinion that paragraph 20(1)(b) of the Act did not apply to the case for the reason that the negotiated amounts of the financial assistance cannot be characterized as information “supplied to a government institution” as required in paragraph 20(1)(b). The intention of Parliament in exempting financial and commercial information from disclosure applied to confidential information supplied to the government, not negotiated amounts for goods or services. Otherwise, every contract amount with the government would be exempt from disclosure, and the public would have no access to this important information. Moreover, there would be no need for Parliament to have enacted 20(1)(c) and 20(1)(d). Accordingly, the Court concluded that paragraph 20(1)(b) was not grounds for an order that the information not be disclosed.

Canada Post Corporation v. National Capital Commission, 2002 FCT 700 (Fed. T.D.) Kelen J. This was an application for review pursuant to section 44 of the **Access to Information Act** of the respondent’s decision to disclose certain information concerning financial sponsorship assistance received by the National Capital Commission from Canada Post Corporation with respect to three events. The issue was whether the amount paid by Canada Post for sponsoring the events were exempt from disclosure pursuant to either paragraph 20(1)(b), or (c) or (d) of the Act. The Court was of the opinion that paragraph 20(1)(b) of the Act does not apply to the case for the reason that the negotiated amounts of the financial assistance cannot be characterized as information “supplied to a government institution by a third party” as required in

paragraph 20(1)(b). The intention of Parliament in exempting financial and commercial information from disclosure applies to confidential information submitted to the government, not negotiated amounts for goods or services. Otherwise, every contract amount with the government would be exempt from disclosure, and the public would have no access to this important information. Moreover, there would be no need for Parliament to have enacted paragraphs 20(1)(c) and 20(1)(d). Accordingly, paragraph 20(1)(b) is not a ground for an order that the information not be disclosed in this case.

4) Treated consistently in a confidential manner by the third party:

To meet the test of being treated consistently, it must be shown that when the information was being supplied to the government, the third party took sufficient steps to ensure the government would treat it confidentially.

While the exemption reads "*treated consistently in a confidential manner by the third party*", the Federal Court in *Cynamid Canada v. Minister of National Health and Welfare* (February 21, 1992) No.T-1970-89, T-2235-89, T-868-90 (F.C.T.D.) confirmed by F.C.A. (October 23, 1992), A-456-91, A-457-91, A-458-91, A-296-92, A-297-92 held that it is not sufficient that the applicant consider the information to be confidential, it must also be kept confidential by both parties and must not have been otherwise disclosed or available from sources to which the public has access[1]. In other words, the parties must be able to say that, the information was confidential when it was supplied to the institution and has remained confidential from the date of supply to the government up to the time of the decision not to disclose. This may seem to be more than what the words of the Act require but this is how the Court has interpreted the test.

While the Court's decision seems to go farther than the actual terminology of the exemption, we seem to be bound by it since the Federal Court of Appeal in *Cynamid Canada v. Minister of National Health and Welfare* (October 23, 1992) No.A-456-91, A-457-91, A-458-91, A-294-92, A-296-92, A-297-92 made no comments on the matter.

Another example of this principle is found in *Canada Post Corporation v. Canada (Minister of Public Works & Government Services*), [2004] F.C. 270 (F.C.T.D.), Henegan J.: In refusing to grant protection under subsection 20(1)(b), the Court found that the Applicant failed to "consistently" treat the information as confidential when it provided the records at issue to Public Works, knowing that the information was not subject to a confidentiality agreement or any undertaking from the Respondent that the information would be maintained and treated on a confidential basis.

Case law

a) Information must remain confidential

Canada Post Corporation v. Canada (National Capital Commission), 2002 FCT 700 Kelen J. In a section 44 application, the Court observed that while the applicant's affidavit did state the importance of the information remaining confidential, at no point did the applicant make it clear that such information had been "treated consistently in a confidential manner". Indeed, the affidavit pointed out past instances where such information was not treated confidentially. Those instances may occur through no fault of the applicant, but regardless, are not indicative of careful, consistent measures to restrict access to the information, noted the Court.

b) Cogent evidence is required

Cistel Technology Inc. Canada (Correctional Service), [2002] F.C.J. No. 328, 2002 FCT 253 (Fed. T.D.) McKeown J. The applicant did not satisfy the Court that the information was treated consistently in a confidential manner despite the fact that there was an affidavit in which the Chief Executive Officer of the applicant stated that it was treated in a confidential manner, but there was no indication of how this was done. Lastly, noted the Court, there was no reference to "confidential" on any of the invoices and no facts set out in the affidavit to indicate how the applicant was consistently treating the information as confidential. The mere assertion in the affidavit, without direct cogent evidence on how the applicant treated the information in a confidential manner, is insufficient to establish that the exemption ought to apply, concluded the applications judge.

c) Number of people to whom information is available is not determinative of its confidentiality

Montana Band of Indians v. Canada (Minister of Indian & Northern Affairs), [1989] 1 F.C. 143 at 144 (T.D.) Jerome A.C.J. The Indian Bands were seeking to prevent disclosure under the Act of audited financial statements provided to government under the **Indian Act**. The Court held that the information should be protected, however, under paragraph 20(1)(b), as it is confidential information supplied to a government institution by a third party who treated it consistently in a confidential manner. The only people likely to have access to the information are the members of the Bands, to whom it belongs. The number of people to whom the information is available is not determinative of its confidentiality, if only those who have a beneficial interest in the information have access to it. Posting on the Bands' reserves does not affect the confidential nature of the information, as the reserves are the private property of the Band members. The information was treated consistently in a confidential manner by the Band. Members could review the financial statements in the Band's office, but could not take them away. There was no evidence that the information was available to anyone beyond the Band and its professional advisers. Consequently, the capital and

revenue accounts dealing with Band funds are exempt from disclosure under paragraph 20(1)(b).

d) Miscellaneous

Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency (1996), 109 F.T.R. 110 at 123 and 126 (F.C.T.D.) McGillis J. The Commissioner applied to review the decision of the Agency not to disclose information pertaining to the actual number of jobs created in each company surveyed for the Agency by Public Works on the grounds that the information was confidential and commercial in nature and had been treated consistently in a confidential manner. The Agency wrote to the companies, 60 percent of which responded indicating that the information was commercially confidential in nature and refused to consent to the disclosure. The Court concluded that the Agency had discharged its burden of establishing that the information fell within the exemption in paragraph 20(1)(b) of the Act. The final element of the test to invoke the exemption in paragraph 20(1)(b) of the Act requires the information to be "...treated consistently in a confidential manner by the third party." The application of this element of the test in the circumstances of the present case raises some of the same considerations that were pertinent in the assessment of the confidential nature of the information under the second branch of the test. With respect to the final requirement, the evidence indicates that, at least in relation to the ordinary course of business between the Agency and the companies, the information concerning the actual number of jobs created under the Program was treated consistently in a confidential manner. In particular, the information was neither disclosed publicly, as was most of the other pertinent information, nor was it even collected by the Agency, except on the one occasion by Price Waterhouse from a random sampling of companies for the limited purpose of collecting statistical data in the survey. In the circumstances, the Court was satisfied that the information was consistently treated as confidential by the third parties concluding that the Agency had discharged its burden of establishing that the information fell within the exemption in paragraph 20(1)(b) of the Act.

Canada (Information Commissioner) v. Atlantic Canada Opportunities Agency (1999), 250 N.R. 314 at 315 (F.C.A.) Strayer, Linden and McDonald JJ.A. The matter in issue was whether the information provided by the companies surveyed, in particular the statistics as to actual jobs created or maintained as a result of the respondent Agency's program, was confidential when provided and whether it had been consistently treated as confidential. If so it would be exempt from disclosure under paragraph 20(1)(b) of the Act. It is clear from section 48 of the **Access to Information Act**, noted the Court, that the Agency had the burden of proof to satisfy the Court that it was authorized to refuse to disclose the record in question. This requires the production of factual direct evidence, which in this case was needed to prove original and continuing confidentiality of the information. In our view there was no such evidence as would support a finding of confidentiality in respect of each of the companies concerned. The material

chiefly relied on by the learned Trial Judge consisted of “representations” made to the Information Commissioner by 24 companies under subparagraph 35(2)(c)(iii) of the Act during the course of his investigation. These unsworn statements could not be treated as evidence even as to the confidentiality of the information of the companies making the representations, let alone as to the confidentiality of information of all the other companies. The only evidence supporting the claim to confidentiality is that Price Waterhouse, in seeking the information for the Agency from the companies, stated that the information gathered would be kept confidential. This was an undertaking not authorized by the Agency and, according to well established jurisprudence, cannot be determinative of disclosure obligations under the **Access to Information Act**. It is regrettable if those surveyed were misled by this undertaking, but they were aware that the information was being gathered for a government agency. By law such information became part of a government record subject to the Act.

Coopérative fédérée du Québec (c.o.b. Aliments Flamingo) v. Canada (Agriculture and Agri-Food) (2000), 5 C.P.R. (4th) 344 at 351 (F.C.T.D.) Pinard J. Informed that the respondent intended to disclose records in accordance with subsection 27(1) of the Act in response to a request for access to information sent to the Canadian Food Inspection Agency concerning some facilities inspection reports, the applicants objected to their disclosure. Citing the complexity and vagueness of the information, and its confidential and prejudicial nature, the applicants requested the benefit of the exemptions prescribed in paragraphs 20(1)(c) and (d) of the Act. Noting that the applicants did not specifically rely on the exemption contained in paragraph 20(1)(b) of the Act, the Court observed that they did treat the inspection reports as confidential. Suffice to recall, the Court noted, that these records are collected by a government agency and in legal terms constitute records of the Government of Canada subject to the Act.

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Canada Packers Inc. v. Canada (Minister of Agriculture), [1989] 1 F.C. 47 at 54 (C.A.) Heald, Urie and MacGuigan JJ.A.

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Occam Marine Technologies Ltd. v. Canada (National Research Council) (1998), 55 F.T.R. 117 at 128 (F.C.T.D.) MacKay J.

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Société Gamma Inc. v. Canada (Secretary of State) (1994), 79 F.T.R. (3d) 42 (F.C.T.D.) Strayer J.

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The Questions

Paragraph -- 20(1)(b)

Statement of Test to be Met

Financial, commercial, scientific or technical information

Relevant Questions	Departmental Response	Assessment
Financial/Commercial		
What does the record describe?		
What activity of the third party does this relate to?		
Is the activity commercial in nature?		
Does the information relate to sales, services or marketing thereof?		
Does it contain proposals to provide services to government?		
Does the record contain - pricing information - proprietary information (technical) - work plans - costing - budgets - financial proposals - financial analysis - financial statements - loans, other security - business plans or strategy - assessment of market potential - market research - equity, public, private offerings - asset valuation - leasing costs, etc.		
Scientific/Technical		
What does the record describe?		
What activity or procedure of the third party does it describe?		

Relevant Questions	Departmental Response	Assessment
Does the record describe: - product standards - product specifications - production process - work methodology - production capacity or other production details - descriptions of equipment, software or other assets used in production - auditing, accounting, cost-accounting study procedures and methodology		

Statement of Test to be Met

- Assess degree of specialization, must not be generally available public know-how

Relevant Questions	Departmental Response	Assessment
How complicated or unique is the process, methodology or work plan? - is it specialized? - is it unique to the third party?		
Does the information convey something beyond what a member of the general public would know or be able to accomplish on their own, without the information?		

Statement of Test to be Met

- Confidential information treated consistently in a confidential manner by a third party

Relevant Questions	Departmental Response	Assessment
Can the information be objectively regarded as confidential?		
How is the information stored? - is it locked? Is its disclosure tightly controlled?		
Is it protected from general access on a computer system, file room or other open location?		
To whom is the information in the record made available? - within the third party and its agents		

Relevant Questions	Departmental Response	Assessment
- outside of the third party		
What restrictions are imposed on use or copying of the information when it is circulated? - within the third party - outside the third party		
Is the information contained in a government tender document? - if so, on what basis is it confidential?		
Is the record a response to a call for tenders? - if so, has the contract been granted - if yes, was the third party awarded the contract? - have the terms of the contract been publicly disclosed?		
Was the information generated solely by the third party? - if not, by whom? - did this other person circulate the information or make it available to others?		
Why is there a need to keep the information confidential?		
Is the information publicly known? - disclosure in public government documents - estimates, annual reports, to Parliamentary Committees, contracting disclosure, etc.? - disclosure in the press - general public knowledge - how was this knowledge obtained - published elsewhere - contained in speeches, used in seminars		
Can the information be obtained from sources to which the public otherwise has access?		
If so, is that information available in the form presented as such in the public domain?		
Is use of the information licensed? - how		
Are there terms in the licence which prohibit disclosure by the licensee?		
Has the government institution maintained the information in a confidential manner?		
Where in the government has the information been		

Relevant Questions	Departmental Response	Assessment
disclosed? - to House of Commons Committee - to MPs - to a government institution - under what conditions was it provided?		
How is the information stored by the government?		
Is the third party obligated to provide to government the information under regulations, statutes or during government inspections, investigations?		
Would the third party stop providing the information if it was disclosed?		
Was there a direction by the third party to the government institution that the information was being supplied on a confidential basis and was to be maintained on a confidential basis?		
Is there a history of supplying this information on a confidential basis? - how has it been treated in the past		
Is there anything about the circumstances or the information which requires that the information be supplied or maintained on a confidential basis? - what - why		

Statement of Test to be Met
Supplied to a government institution by a third party

Relevant Questions	Departmental Response	Assessment
Is the record authorized by the third party or given to the government by the third party?		
- If not, does the record contain information supplied by the third party?		
Is this information available by observation without the third party providing it?		
Is the information generated by the government itself		

Relevant Questions	Departmental Response	Assessment
from the information received from the third party?		
If yes, does it contain information supplied by the third party?		
Was the information obtained during a government official's visit, inspection, or investigation?		
Check if subsection 20(2), (5) or (6) applies - See grids on these subsections		

Endnotes

1. For example see *Robert Sutherland v. Canada (Minister of Indian and Northern Affairs et al.*, (May 6, 1994), T-2573-93) (F.C.T.D.) where the Court found that some of the requested records had previously been made public or were similar to the information that was made public: "*Once the information is public, ordering that it remains confidential serves no useful purpose*".

Paragraphs 20(1)*(c)* & *(d)*

The Provision:

20(1) Subject to this section, the head of a government institution **shall refuse** to disclose any record requested under this Act that contains . . .

(c) information the disclosure of which **could reasonably be expected** to result in **material financial loss or gain to**, or could reasonably be expected **to prejudice the competitive position of**, a third party; or

Canada Packers Inc. v. Canada (Minister of Agriculture), [1989] 1 F.C. 47 at 59-60 (C.A.) Heald, Urie and MacGuigan JJ.A. In light of the purpose of the Act as set out in section 2, the exception to access in paragraph 20(1)(c) must be interpreted as requiring a reasonable expectation of probable harm.

(d) information the disclosure of which could reasonably be expected to **interfere with contractual or other negotiations** or a third party.

Canada Packers Inc. v. Canada (Minister of Agriculture), [1989] 1 F.C. 47 at 55 (C.A.) Heald, Urie and MacGuigan JJ.A. This paragraph is intended to catch contractual situations not covered by paragraph 20(1)(c) and hence can have no application to day-to-day sales such as are principally in question in the domestic meat industry. It may, however, have some relevance with respect to international sales. Also, in light of the purpose of the Act as set out in section 2, the exception to access in paragraph 20(1)(d) must be interpreted as requiring a reasonable expectation of probable harm.

The emphasis is added but it is to be noted that these tests apply to any third party whereas in 20(1)(b), it applies only to the third party who actually supplied the information.

Air Atonabee Ltd. v. Canada (Minister of Transport) (1989), 27 C.P.R. (3d) 180 at 199-206 and 207 (F.C.T.D.) MacKay J. Some of the records in issue originated with other third parties and it was suggested that in some cases the interests of other third parties might be adversely affected by disclosure of the records. The Court addressed these confidentiality issues and interests relating to other third parties by noting that, so far as it knew, other third parties associated with the record had not been involved in this process of determining access to these records. It held that the interests of other third parties are matters to be of concern to the head of the ministry. However, it concluded that even if other third party interests may be involved that did not provide a basis for classifying information here in issue as confidential in the relationship between the department and the air carrier.

*Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services) (*1990), 67 D.L.R. (4th) 315 at 316 (F.C.A.) Pratte, Urie, Hugessen JJ.A. To justify an application by a third party under section 44 there must necessarily be an interference whose consequences will likely be damaging to that party. "Interference" is used here in the sense of "obstruct" ("entraver", in French), much as it is in sport parlance, when the player is penalized for interference. The threshold must be that of probability and not mere possibility or speculation.

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 665 at 682-683 (T.D.) Denault J. Paragraph 20(1)(d) requires proof of a reasonable expectation that actual contractual negotiations other than the daily business operations of the third party will be obstructed by disclosure. Evidence of the possible effect of disclosure on international contracts generally and hypothetical problems concerning foreign suppliers and local customers is insufficient to establish a reasonable expectation that any particular contract or negotiations would be obstructed by disclosure.

Canada Post Corporation v. Canada (National Capital Commission), 2002 FCT 700 Kelen J. In this section 44 application, the Court held that the possibility of pressure from third parties for matching sponsorship funds and pressure from competitors cannot be considered interference or obstruction with future contractual negotiations. Canada Post argued that it was under certain pressures as a public body to match sponsorship funds. This submission was pertinent to the exemption in paragraph 20(1)(c), not 20(1)(d). The Court was not persuaded that disclosure could reasonably be expected to interfere with future contractual or other negotiations by Canada Post. Accordingly, the Court concluded that paragraph 20(1)(d) was not applicable.

Preliminary matters:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizens or permanent residents within the meaning of the Immigration Act and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, the Act provides for access to all the information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under sections 68 or 69.

Paragraphs 20(1)(c) and (d) are mandatory injury exemptions.

Hutton v. Canada (Minister of Natural Resources) (1997), 137 F.T.R. 110 at 115 (F.C.T.D.) Gibson J. A refusal to disclose any record by virtue of any of paragraphs 20(1)(b),(c) or (d) is mandatory. Where the Minister concludes that the requested record falls within any of those paragraphs, he or she shall refuse to disclose the record.

The consequence of a mandatory exemption is that once the head determines that disclosure of a record or part thereof would give rise to the prejudice enunciated in one of the exemptions, he/she must then refuse to grant access to the requested information unless either of the exceptions in 20(2), (5) or (6) applies. The exemption process under paragraphs 20(1)(c) and (d) is not completed until this determination is made.

The "Test":

Criteria for application

1) Subsection 20(1)(c). In the case of paragraph 20(1)(c) there are two alternative tests.

AB Hassle v. Canada (Minister of National Health and Welfare) (1998), 161 F.T.R. 15 at 19 and 21(F.C.T.D.) Tremblay-Lamer J. In its analysis, the Court noted that the proper test to be used was whether, on a balance of probabilities, the proprietary, commercial and scientific interests of the asserting party could reasonably be harmed by the disclosure of the confidential information.

If either of the two tests apply, the relevant information must be exempted from disclosure, that is:

- Where the disclosure of the information could reasonably be expected to result in material financial loss or gain to a third party; or

- Where the disclosure of the information could reasonably be expected to prejudice the competitive position of a third party.

a) <u>Material financial loss or gain to</u>:

The terms '*material*' is not defined in the *Access to Information Act.* However, it is to be narrowly constructed as the exceptions to the right of access must be limited and specific. The word '*material*' has the meaning of '*substantial*' or '*important*'. Therefore, in order to be exempted under paragraph 20(1)(c*)*, disclosure of the information must produce a substantial prejudice or gain to a third party (i.e., this is any third party and not only the third party to whom the information refers) that can be translated into monetary value. The substantial prejudice must be assessed in relation to the specific third party to which it refers - i.e., what is material to one third party might not be material to another third party and vice versa.

In *Bitove Corp. v. Canada (Minister of Transport)* (1996), 119 F.T.R. 278, Bitove Corp. asked for a review of a decision of the department of Transport to release certain records which had been requested by a competitor of Bitove Corp. The question was whether the information could not be disclosed pursuant to paragraphs 20(1)(b) and (c) of the Act. The Court was satisfied that all the information had been provided to the department in confidence and as a result of the contractual relations between Bitove Corp. and the department. The Court was further of the opinion that it was all information the nature of which would be of great assistance to Bitove

Corp.'s competitors to determine precisely how and where the applicant negotiated its contractual arrangements with the respondent, how it conducts its affairs and how it directs its sales efforts. In these circumstances, the Court was of the view that the applicant had successfully discharged the burden of establishing that the records contained the kind of information described in paragraphs 20(1)(b) and (c) of the Act.

b) <u>Prejudice to the competitive position of a third party</u>:

The Federal Court of Canada interpreted this part of the test in such a way that in order to be covered by this exemption the third party must have a defined market or business which would be adversely affected by the disclosure[1]. However, this injury does not have to be translatable into monetary value. Unlike the other test under this exemption, the prejudice is not qualified -i.e., the Act does not say materially prejudice. Therefore, the only requirement is that the disclosure of the requested information would likely cause harm to the competitive position of a third party.

There could be some situations where, for example, it is possible to perceive a prejudice but it is not possible to translate it into monetary value. (E.g. the expertise of the employees of a third party, the quality of products/services used, etc.). Such information is also covered by 20(1)(c).

The prejudice under this exemption could apply to any third party, not just the third party that supplied the information.

2) Subsection 20(1)(d). In the case of paragraph 20(1)(d) there is only one test. The information must be such that its disclosure could reasonably be expected to interfere with contractual or other negotiations of a third party.

a) Generally

Canada Packers Inc. v. Canada (Minister of Agriculture), [1989] 1 F.C. 47 at 64 (C.A.). Heald, Urie and MacGuigan JJ.A. With respect to paragraph 20(1)(d), I accept the submission of the Information Commissioner that this paragraph is intended to catch contractual situations not covered by paragraph 20(1)(c).

b) Test

Société Gamma Inc. v. Canada (Secretary of State) (1994), 79 F.T.R. 42 at 47 (F.C.T.D.) Strayer J. The Court noted that when paragraph 20(1)(d) refers to disclosure which could “interfere” with contractual negotiations it must refer to an obstruction to those negotiations and not merely the heightening of competition for the third party which might flow from disclosure.

Canadian Broadcasting Corp. v. Canada (National Capital Commission) (1998), 147 F.T.R. 265 at 271(F.C.T.D.) Teitelbaum J. Paragraph 20(1)(d) of the Act requires proof of a reasonable expectation that actual contractual

negotiations other than the daily business operations of the applicant will be obstructed by disclosure. Evidence of the possible effect of disclosure on other contracts generally and hypothetical problems are insufficient to qualify under the exemption. It is also not enough to merely speculate that the applicant may suffer some probable harm if the requested information is made public. Paragraph 20(1)(d) must refer to an obstruction to negotiations rather than merely the heightening of competition which might flow from disclosure*.*

c) Interference with contractual or other obligations:

Paragraph 20(1)(d) also applies when any third party could reasonably be expected to be prejudiced by the disclosure. This exemption must be distinguished from the prejudice to the competitive position dealt with in paragraph 20(1)(c). As such, the Federal Court in *Société Gamma Inc. v. Canada (Department of the Secretary of State)*, (April 27, 1994), T-1587-93 T-1588-93 (F.C.T.D.) interpreted this provision as requiring that "it must refer to an obstruction to those negotiations and not merely the heightening of competition for the third party which might flow from disclosure".

Case Law:

1) Burden of proof

Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services), (1990), 107 N.R. 89 at 91 (F.C.A.), the Federal Court of Appeal considered paragraphs (c) and (d) of section 20(1) and concluded that a party seeking to prevent disclosure pursuant to these provisions must establish the probability of harmful consequences. In the present case, noted the Court, the affidavits filed by the Applicant provided no more than speculation as to probable harm. The affidavits provided only general statements which, in the opinion of the Court, amounted merely to bald assertions unsupported by any evidence as to the likelihood of "material financial loss". Noting that in order for the Applicant to succeed pursuant to section 20(1)(d) it must show an obstruction in the actual contractual negotiations, as discussed in *Société Gamma*, the Court concluded that the evidence presented by the Applicant was lacking in this regard and was insufficient to support a finding under this section.

Air Transat A.T. Inc. v. Canada (Transport)[2001] F.C.J. No. 108 (Fed.T.D.) Rouleau J. In a section 44 Application for review, the Court noted that the affidavits filed in support of the application do not discuss the question of the anticipated harm at any length. The affidavit of Denis Pétrin, the plaintiff's vice president, finance and administration, indicated that "the disclosure of the information ... without being previously placed in context and without further explanation would give the public a false image of the safety level of the company". Further, "In a highly competitive market, such disclosure would by its negative impact on the public be very likely to give our competitors an advantage". Finally, he added "In such a situation, financial loss could

reasonably be expected to result". The other affidavits filed in support of the application are more or less to the same effect. In the Court's view, showing that a reasonable expectation of probable harm exists requires more than mere general allegations of the type contained in the affidavits filed by the plaintiff.

Wyeth-Ayerst Canada Inc. v. Canada (Attorney General), [2002] F.C.J. No. 173, 2002 FCT 133 (Fed. T.D.) Henegan J. [In appeal. A-130-02] The Court was of the opinion that the affidavit evidence which had been filed did not meet the test. The affidavits being framed in very general language and furthermore, were said to be based on belief. Since the present proceeding was an application for judicial review, not a motion, an affidavit based on belief is not proper evidence. (See: Federal Court Rules, 1998, rules 81(1) and (2).) The affidavit based on personal belief of a representative of the Applicant who could reasonably be expected to have personal knowledge about the matters in issue, is insufficient and does not meet the test. The Court went on to note that when an applicant seeks to invoke the section 20(1) exemption, it must provide clear evidence that the facts of its case fall within one or more of the exemptions named in that provision.

Bacon International Inc. v. Canada (Agriculture and Agri-Food), 2002 CFPI 587, [2002] A.C.F. no. 776*,* Beaudry J. The Court emphasizes that general assertions of prejudice are not sufficient for the Court to conclude to the necessity of withholding the information. It is necessary that the plaintiffs demonstrate to the Court how and why disclosure would likely cause the alleged harm. The Court concludes that the plaintiffs' assertion concerning the prejudices they could suffer are too vague and brief for the Court to conclude that it is better not to disclose the document in question. It is rather a possibility of harm not a probability as must be demonstrated by the plaintiffs. The plaintiffs cannot meet the burden of proof simply by stating that disclosure of a record would cause financial loss, affect their competitive position and interfere with negotiations with the access to information applicant.

SNC-Lavalin Inc. v. Canada (Minister of Public Works) (1994), 79 F.T.R. 113 at 127 (F.C.T.D.) MacKay J. The department received a request for records relating to the Northumberland Strait Crossing Project consisting of "a fixed link" between New Brunswick and Prince Edward Island. The applicant argued that the detailed information in the Proposal, regarding finances, construction techniques, and logistics proposed for the project if it were successful in its bid, would, if disclosed, result in material financial loss or prejudice to the applicant, and in interference with its contractual negotiations in the future. Disclosure of the record, the evaluation report, would also harm the applicant's reputation and compromise its chances of obtaining future contracts for similar work. After having examined the Record and the Proposal, the Court noted that it was not self-evident from the documents themselves that the applicant, whatever may be its concerns, had demonstrated a basis for "a reasonable expectation of probable harm". The Court also noted that the applicant could not demonstrate probable harm as a reasonable expectation from disclosure of the Record and the Proposal simply by affirming by affidavit that disclosure

"would undoubtedly result in material financial loss and prejudice" to the applicant or would "undoubtedly interfere with contractual and other negotiations of SNC-Lavalin in future business dealings". These affirmations are the very findings the Court must make if paragraphs 20(1)(c) and (d) are to apply. Without further explanation based on evidence that establishes those outcomes are reasonably probable, the Court is left to speculate and has no basis to find the harm necessary to support application of these provisions. The Court concluded that the Record and the Proposal were not exempt from disclosure pursuant to either paragraph 20(1)(c) or paragraph 20(1)(d) of the Act.

Matol Botanique International Ltée v. Canada (Minister of Health and Welfare) (1994), 84 F.T.R. 168 at 178 (F.C.T.D.) Noël J. The applicant established the possibility that the release of negative information could have a negative impact on its firm, but the evidence was far from establishing a reasonable expectation of significant financial loss or prejudice to its competitive position. Accordingly, the Court held that the applicant had not discharged the burden of proving that the disclosure of the documents at issue would probably cause it material financial loss or affect its competitive position within the meaning of paragraph 20(1)(c) of the Act.

Canada (Information Commissioner) v. Canada (Prime Minister), (1992) 1 F.C. 427 (F.C.T.D.) Rothstein. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how and why harm would result from disclosure, little explanation needs to be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between the disclosure of particular documents and the harm alleged. In addition, allegations of harm from disclosure must be considered in light of the relevant circumstances. In particular, this includes the extent to which the same or similar information that is sought to be kept confidential is already in the public domain. While the fact that the same or similar information is public is not necessarily conclusive of the question of whether or not there is a reasonable expectation of harm from disclosure of the information sought to be kept confidential, the burden of justifying confidentiality would, in such circumstances, be more difficult to satisfy.

Viandes du Breton Inc. v. Canada (Department of Agriculture and Agri-Food) . [2000] F.C.J. No. 2088, 2000 CarswellNat 3169, 2000 CarswellNat 3526 (Fed. T.D.), Nadon J. The Court noted, that as confirmed by MacKay J. in *SNC-Lavalin Inc. v. Canada (Minister of Public Works)* (1994), 79 F.T.R. 113 (T.D.) at 127, a plaintiff should not only state in an affidavit that disclosure of the documents would probably cause it harm, it should also submit evidence of the likelihood of such harm. Consequently, it is not sufficient for the plaintiff to

show a possibility of harm or to speculate as to the probability of harm which the disclosure would cause it in negotiations. As laid down by the courts, the plaintiff must clearly show that the disclosure will probably cause it harm. The Court also noted that the consequences discussed by the plaintiff appear to have been the result of speculation rather than of thorough analysis or study. The lack of discussion of the calculation method used in arriving at these figures or the source of the figures raising questions about the accuracy of these analyses, these figures, as submitted by the plaintiff, did not suffice to show that there was a probability of harm. The Court went on to note that the plaintiff had also argued that the likelihood of harm from disclosure was linked to the possibility of unjust or incorrect coverage of the content of the reports by the media. The Court opined that this fear appeared to be the real reason the plaintiff was objecting to disclosure of the inspection reports on its hog kill cut plant. In support of this argument, the plaintiff alluded to unjust press coverage which occurred in April 1998 following the disclosure of the inspection reports at another business, Aliments Flamingo. Relying on *Coopérative fédérée du Québec v. Canada (Agriculture and Agri-food)*, [2000] F.C.J. No. 26 (Fed. T.D.) Pinard, J the Court held that media coverage cannot be presumed to be unfair or negative noting that the plaintiff has other legal remedies if it is the victim of unfair or unfounded coverage. The fact that the plaintiff fears bad publicity after the inspection reports are disclosed does not mean that the Court should prevent their disclosure. For all the aforementioned reasons, in the opinion of the Court, the exemptions allowed by paragraphs 20(1)(c) and (d) of the Act cannot be applied in the case at bar, as the Department's decision indicated. The plaintiff was unable to discharge its burden of establishing that the disclosure of inspection reports on its plant would create a reasonable expectation of probable harm and that the documents in question are covered by the exemptions allowed by paragraphs 20(1)(c) and (d) of the Act.

St Joseph Corp. v. Canada (Public Works and Government Services), [2002] F.C.J. No. 361, 2002 FCT 274 (Fed. T.D.) Henegan J**.** [In appeal. Doc. A-202-02]. The Court noted that it had to rely primarily on the affidavit. Yet, the Court observed, the affidavit only speculates as to probable harm. The statements are very general and do not support the contention that disclosure of the requested records would result in a reasonable expectation of probable harm. Furthermore, the Court noted, paragraph 20(1)(d) requires that the applicant show an obstruction in the actual contractual negotiations, as discussed in *Société Gamma*, but the evidence presented by the applicant was lacking in this regard and did not support granting the exemption which was sought.

Bacon International inc. v. Canada (Department of Agriculture and Agri-Food), [2002] F.C.T. 587 (T.D.), Beaudry J. : In the course of its function of protecting the public in matters involving food the defendant carries out inspections and gives businesses ratings. The Department obtained a request under the *Access to Information Act* for these business ratings. The Department decided to release the information. The plaintiffs applied under section 44 of the Act and argued that the information was confidential and that its disclosure could result in financial loss or prejudice their competitive positions.

The Court rejected the Applicant’s claim for 20(1)(d) on the following grounds:

"The documents, which in the case at bar are several years old (1998), are not risks of probable harm as the ratings are actually favourable. Even if the ratings were unfavourable, MacGuigan J.A. noted in Canada Packers, at page 64:

"In the cases at bar, I have carefully scrutinized each report and have also considered them in relation to the others requested. (I refrain from explicit comment on their contents to preserve their confidentiality through the time for appeal). I would say in summary form that, although all are negative to some degree, I am satisfied in each case that, particularly now, years after they were made, they are not so negative as to give rise to a reasonable probability of material financial loss to the appellant, or of prejudice to its competitive position or of interference with its contractual or other negotiations."

Canadian Pacific Hotels Corp. v. Canada (Attorney General), [2004] F.C. 444 (F.C.T.D.), Russell J.: In this case, the Court found that the applicant met his legal burden of establishing real interference with contractual negotiations. The harm to the applicant was, however, temporary. As a result, the Court ordered that the records be disclosed, in a redacted form, to ensure that the harm envisaged did not materialize. Once the dangers of the immediate situation passed, the Court required that the leases be disclosed in their entirely.

2) Paragraph 20(1)c)

a) The Test

Piller Sausages & Delicatessens Ltd. v. Canada (Minister of Agriculture), [1988] 1 F.C. 446 at 468 (T.D.), Jerome A.C.J. When considering subsection 20(1)(c) of the statute, the test is one of reasonable expected financial or competitive harm, regardless of whether the information disclosed is confidential per se. The evidence must not require pure speculation, but must at least establish a likelihood of substantial injury. The expectation must be reasonable, but it need not be a certainty.

b) Exemptible

Canada Post Corporation v. Canada (National Capital Commission), 2002 FCT 700 Kelen J. In this section 44 application, the Court, considering the confidential evidence, was persuaded that the disclosure of the amounts paid for the sponsorship of three public events can reasonably be expected to prejudice the competitive position of Canada Post. Canada Post's private sector competitors, eg. Federal Express and United Parcel Service, will probably use the information to the competitive disadvantage of Canada Post by trying to outbid Canada Post. In addition, other groups will use the information to seek increased sponsorship funding from Canada Post. Disclosure of the amounts paid by Canada Post for sponsorship will probably

undermine Canada Post's negotiating position. The Court noted that this conclusion was analogous to the conclusion of Simpson J. in *Perez Bramalea Ltd.*

Prud'homme v. Canadian International Development Agency, [1994] 85 F.T.R. 302 at 305-306 (F.C.T.D.) Pinard J. A business specializing in aerial spraying and consultation in this field, entered into an agreement with CIDA regarding a permanent offer of consultant and professional services on aerial spraying in connection with a locust control program in Western Africa. The applicant, one of the main competitors, asked CIDA to disclose the text of the agreement. The Court held that the evidence in the record was sufficiently persuasive to conclude that the rates contained in the financial clauses and a listing of the business staff contained in the agreement were information which represents the specific expertise acquired by the business as the result of significant investments of time and money in a very specialized field. Similarly, the Court held that since the business had been able to obtain its certification as a consultant and supplier of services to CIDA on account of its special expertise and its specialized staff, a certification now being sought by the applicant, but not yet obtained for the very reason that it lacks expertise and specialized staff in this field, disclosure of all this information to the applicant in the circumstances would amount to giving the business' main competitor the results of the exceptional know-how possessed by the latter business in the field of aerial spraying and the related consultation. The Court concluded that in the circumstances disclosure to the applicant would involve a "reasonable expectation of probable harm" for the business under paragraph 20(1)(c).

Bitove Corp. v. Canada (Minister of Transport) (1996), 119 F.T.R. 278 at 281 (F.C.T.D.) Pinard J. A competitor of Bitove sought the release of records relating predominantly to the negotiation of an amendment to a lease between the respondent and the applicant with respect to goods and services provided at Terminals 1 and 2 at the Lester B. Pearson International Airport. Noting that the information consists of records of meetings, including minutes of negotiating meetings, as well as detailed financial reports, including sales information and projections, the Court was satisfied that all of the information relating to Terminals 1 and 2 had been provided to the respondent in confidence and only as a result of the contractual relations between the applicant and the respondent. This information would not be and is not available to anyone other than the respondent and the applicant. The information relating to Terminal 3 is also confidential to the applicant. All of the information sought to be disclosed by a competitor of the applicant is otherwise maintained within the strictest confidence within the applicant. It is all information the nature of which would be of great assistance to the applicant's competitors to determine precisely how and where the applicant negotiated its contractual arrangements with the respondent, how it conducts its affairs at Lester B. Pearson International Airport and how it directs its sales efforts at that airport. To provide a competitor of the applicant with that information would allow a competitor a direct insight into its plans and

strategies, something that has taken years of work for the applicant to determine. The Court held that in the circumstances, the applicant had successfully discharged the burden of establishing that the records requested under the Act contain the kind of information described in paragraphs 20(1)(b) and (c) of the Act.

Coradix Technology Consulting Ltd v. Canada (Minister of Public Works and Government services Canada, 2006 FC 1030

In this case, the application sought review of the decision to release certain information contained in the Applicant's winning proposal in a government procurement pursuant to an access to information request.

The Applicant was successful in claiming paragraph 20(1)c) of the Act. The Court found that there were a number of instances where when read in isolation it was not readily apparent how the disclosure of a specific item could compromise the Applicant's competitive position. However, when read in its entirety, it became apparent that it is the composite of these various business and management strategies that constitute the Applicant's methodology and approach to its core business, successful human resource management and quality control. Viewed in this light, it became evident that should the Information be disclosed, a competitor could implement or replicate the Applicant's methodology in subsequent bids to its competitive advantage and to the detriment of the Applicant's competitive position:

> *«Having regard to the uncontradicted evidence relied upon by the Applicant consisting of the "commoditized" nature of the industry, the government's past requests for proposals, the government's methodology used to evaluate the proposals, the importance of differentiation on the basis of corporate qualifications, the criteria the government will likely use in future solicitations and the fact that the Applicant's core business is in its unique approach to quality assurance and human resource management, I am satisfied on a balance of probabilities that the Applicant has a reasonable expectation of probable harm if the Information is disclosed».*

Wells v. Canada (Minister of Transport) (1995), 103 F.T.R. 17 at 20 (F.C.T.D.) Jerome A.C.J. The applicant requested a technical document held by the department on an aircraft owned by a third party, a company carrying on business as an air carrier. The information in question was developed by the third party with a good deal of expertise and expense. Also, the information was such as could be advantageously pirated if not held in the strictest confidence by the Minister. The document contained information used by the department to assess and audit an air carrier's operation. The department denied the request on the basis of paragraphs 20(1)(b) and 20(1)(c) of the Act. In view of my conclusions on the validity of the refusal under paragraph 20(1)(b), it seems a contradiction for me to attempt an analysis on the concessions in 20(1)(c). First, there is an obvious financial advantage

that would follow from publication which would permit a competitor to gain all of the advantages without any of the effort or expense. As I have already indicated, there is a financial consequence. More importantly, I have also concluded that if the Minister divulges this information, the third party in this case, Time Air Inc., suffers the financial set-back and has lost the right of confidentiality in the information which it provided in good faith to the Minister. There certainly, therefore, is no justification to set aside the refusal on the grounds under paragraph 20(1)(c) alone.

Wells v. Canada (Minister of Transport), [1996] F.C.J. No. 598 (F.C.T.D.) (QL), Jerome A.C.J. I am equally satisfied that those records not (be) disclosed on the grounds of paragraph 20(1)(b) were properly dealt with. The information in question is confidential and was provided to Transport Canada with the understanding that it would be treated as such and not be communicated to the public. It is confidential for the same reasons outlined above with respect to paragraph 20(1)(c); its disclosure would be injurious to the company's financial position and this economic harm would outweigh any benefit to the public. I must agree with the Information Commissioner who wrote the following to the applicant: "I cannot conclude that the public interest in disclosure clearly outweighs the potential injury to the third party".

Occam Marine Technologies Lt. V. Canada (National Research Council) (1998), 155 F.T.R. 117 at 128-129 (F.C.T.D.) MacKay, J. The general financial success or lack thereof, of any third party has no significance in relation to the decision to refuse to disclose requested information. Whether third parties would have agreed to release the information requested if they had been asked at an earlier time is a matter of sheer speculation, and so is a forecast by failing to agree third parties risked disclosure of the information through this review process. In order to withhold information there must be reasonable expectation of probable harm to a third party. The information sought relates to those parties' past business strategies, their financial circumstances and it may reveal future tactics for funding applications. A competitor of the third parties could rely on the information to enhance its own funding proposals, thus adversely affecting the third parties in the marketplace. Ultimately, this is a decision, based upon judgement, here on behalf of the Head of the NRC. Unless that decision can be said to be unreasonable in the circumstances, the Court should not intervene in the exercise of discretion.

Merck Frosst Canada Ltée c. Canada (Ministre de la Santé), 2006 CF 1200 : The Federal Court of Appeal referred back the matter to the Federal Court for redetermination. The Federal Court held that the pages for which the third party claimed that communication should be refused because they contained information which was not available «as such» in the public domain are not excluded pursuant to paragraph 20(1)c). However, communication should be refused pursuant to paragraph 20(1)c) where documents contain more precise of detailed information that what is found in the public domain and whose disclosure would reasonably be expected to result in material financial loss or gain to a third party.

c) Not exemptible

Saint Burns Meats Ltd. v. Canada (Minister of Agriculture) (1987), 14 F.T.R. 137 at 141 (F.C.T.D.) Jerome A.C.J. The requester asked for copies of the meat inspection audit reports on Canadian slaughter/meat packing plants for 1982, 1983 and 1984. Burns produced evidence of harm resulting from newspaper coverage of reports which were similar in content to the ones in issue here. The evidence is that, as a result of misleading publicity based on inspection reports, the applicant suffered a loss of a fraction of 1% of its annual sales over a period of about three months in a limited area. The cost to Burns was between $200,000 and $300,000 dollars. Noting that these companies are justly proud of the generally high standards they maintain in their plants and clearly wish to prevent negative information about them becoming available to the media, the Court held that this desire in itself will not establish an exemption under the Act. The Court held that Burns had not established a case for an exemption under ss. 20(1)(c) of the Act showing that disclosure of these reports can be reasonably expected to result in material financial loss or competitive harm.

Air Atonabee Ltd. v. Canada (Minister of Transport) (1989), 27 F.T.R. 194 at 216 (F.C.T.D.) MacKay J. After considering the remaining concerns, the Court concluded that apprehensions about general misunderstandings that might arise from disclosure, either concerning safety in its operations or about use by persons adverse in interest do not raise more than speculation about probable harm. The Court was not persuaded that disclosure raised a reasonable expectation of probable harm in the context of possible general misunderstandings within paragraph 20(1)(c).

Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 45 C.P.R. (3d) 390 at 403-404 Jerome A.C.J. The applicant argued that the product monographs for its prescription drugs Methotrexate and Minocin and severed documents relating to its New Drug Submission for Minocin were exempt from disclosure, as a trade secret, as scientific and technical information of a confidential nature, as information the disclosure of which would be prejudicial, as information. Although the applicant was able to provide dollar and percentage estimations reflecting the possible reduction in sales if brand drugs become genericized, the Court had difficulty accepting the link between the disclosure of the requested information and the copying of the drugs by generic manufacturers. Accepting that a direct causality is not required, the Court noted that there is nevertheless no “reasonable expectation of harm” since this information is already publicly available and while this information may assist a competitor, it is by no means certain that it will produce the result contemplated by the applicant. The Court held that the estimates of injury provided in this instance were simply not sufficient to establish a reasonable expectation of harm within the meaning of paragraph 20(1)(c).

Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare) (1992), 41 C.P.R. (3d) 176 at 186 (F.C.T.D.) Jerome A.C.J. The applicant objected to the disclosure of certain departmental records concerning a drug

known as Zantac which is used in the prevention, treatment and healing of ulcers because they contain information, the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of Glaxo. The Court was not persuaded by the applicant's suggestion that disclosure of such information would undercut the mandatory reporting process and adversely affect a full and frank disclosure on the part of drug companies. It held that this kind of full and frank disclosure is essential in the respondent's role as guardian of public health standards and it is appropriately set out by Parliament in clear language. The product monograph and the CPS contain information concerning adverse drug reactions and drug manufacturers are required to provide information concerning any adverse reactions to HPB. The fact that the same type of inherently prejudicial information is compiled and provided by a competitor does not make the information more harmful to the applicant within the meaning of para. 20(1)(c). The Court held that the fact that such records contain “negative information” with respect to the applicant's drug is also not sufficient to exempt the records from disclosure under paragraph 20(1)(c) of the Act.

Northern Cruiser Co. v. Canada (Minister of Transport) (1991), 47 F.T.R. 192 at 194-195 (F.C.T.D.) Strayer J. The requester sought a copy of the most recent agreement whose purpose is essentially for the payment of a subsidy by the government of Canada to Northern Cruiser as operator of a ferry, the “Northern Princess”, which carries passengers and vehicles between St. Barbe, Newfoundland and Blanc Sablon, Quebec across the Strait of Belle Isle. The department proposed to release the contract with only a few deletions pertaining to financial matters but first sought the views of the applicant herein as it was required to do by law. The applicant objected to the release of clauses 25, 26 and 27 which set out the circumstances in which, and the terms on which, the contract can be terminated by the Minister of Transport. Noting that what was in issue was a contract made for expenditure of public funds in connection with the provision of a service to the members of the public, the Court observed that this was not a case where trade secrets or confidential information of a private individual or company have come into the hands of the government, or where such information would affect negotiations between private third parties, a situation clearly requiring due care that mere contact with the government should not render the information public. It is clear that the disclosure of clauses 25, 26 and 27 will in no way affect the legal relations between the parties to the contract, namely the applicant and Her Majesty: the Minister's rights to terminate the contract, and the applicant's rights to resist such termination, exist now and they will not be any different after disclosure. Noting that pursuant to paragraph 20(1)(c) an applicant must show a “reasonable expectation of probable harm” in the release of the documents the Court was not satisfied that the applicant had met this burden of proof.

Wyeth-Ayerst Canada Inc. v. Canada (Attorney General), [2002] F.C.J. No. 173, 2002 FCT 133 (Fed. T.D.) Henegan J. [In appeal A-130-02] Noting that

the general thrust of the Applicant's argument was that the documents in question, for which it sought to prevent disclosure, were released by the Applicant in error to the Minister and that the documents were intrinsically confidential, commercial information amounting to trade secrets, the disclosure of which would cause harm to the Applicant and interfere with future contractual and other negotiations, the Court was of the opinion that the affidavit evidence which had been filed did not meet the test, the affidavits being framed in very general language and furthermore, were said to be based on belief. Since the present proceeding was an application for judicial review, not a motion, an affidavit based on belief is not proper evidence. (See: Federal Court Rules, 1998, rules 81(1) and (2)). The affidavit based on personal belief of a representative of the Applicant who could reasonably be expected to have personal knowledge about the matters in issue, is insufficient and does not meet the test. The Court went on to note that when an applicant seeks to invoke the subsection 20(1) exemption, it must provide clear evidence that the facts of its case fall within one or more of the exemptions named in that provision. When an applicant relies on confidentiality as the basis for exemption for disclosure, that confidential basis must be objectively shown. (See: Maislin).

Merck Frosst Canada Ltée c. Canada (Ministre de la Santé), 2006 CF 1200 : The Federal Court of Appeal referred back the matter to the Federal Court for redetermination. The Federal Court held that the pages for which the third party claimed that communication should be refused because they contained information which was not available «as such» in the public domain are not excluded pursuant to paragraph 20(1)c). However, communication should be refused pursuant to paragraph 20(1)c) where documents contain more precise of detailed information that what is found in the public domain and whose disclosure would reasonably be expected to result in material financial loss or gain to a third party.

AstraZeneca Canada Inc. v. Canada (Minister of Health), *2005 FC 189, [2005] A.C.F. n^{o} 859 (F.C) (QL),* confirmed by *AstraZeneca Canada Inc. v. Health Canada, 2006 FCA 241, [2006] A.C.F. n. 1076 (C.A.F.) (QL):* The Court rejected the third party claimed to the effect that although information may be publicly available, it is not available from a single source and, if access were granted under the Act it would confer an advantage upon the requester by saving him time and expense of collecting that information from several other public sources and enable him to construct the "larger picture" to the detriment of the third party.

*AstraZeneca Canada inc. c. Health Canada, 2005 FC 1451;*As a general proposition disclosure of information which would give insight into how government carries out its approval process is not the type of information which Parliament wished to exempt from disclosure. It is the very information about which the Act was established. Section 20 in the sole section under the heading "Third Party Information". The information which is within this general category is information supplied by a third party or about a third party; not

information about the operation of government.

H. J. Heinz, Company of Canada Ltd. c. Canada (Attorney General), 2005 CF 1314
In August 2004, a request under the Act was made to CFIA for all submissions made by any party regarding the adequacy, inadequacy, advisability or legality of any restrictions on the format of containers, in terms of volume, weight or otherwise, for any food or drink, classified as infant or junior food under the Processed Products Regulations. Heinz stated that the release of the documents would show a competitor that Heinz made submissions on the proposed changed to the Processed Products Regulations. Heinz submits that:

> *«This knowledge would allow such competitors to attempt to undermine both Heinz Canada's submissions on the regulations and its infant and junior food business»*[1].

Heinz also submitted that a competitor could then submit a narrow response to Heinz's submissions. Heinz submits that the competitor would not have to put in as much time, effort and resources into this submission, as they would only be responding to Heinz's submission. According to the Court, there is no merit in this position. It cannot be a surprise to members of the food industry that Heinz is making submissions regarding the proposed amendments to the Processed Products Regulations. In a democratic process, for this process to be effective, it has to be open and transparent.

3) Paragraph 20(1)d)

a) The Test

Société Gamma Inc. v. Canada (Secretary of State) (1994), 79 F.T.R. 42 at 47 (F.C.T.D.) Strayer J. The Court noted that when paragraph 20(1)(d) refers to disclosure which could "interfere" with contractual negotiations it must refer to an obstruction to those negotiations and not merely the heightening of competition for the third party which might flow from disclosure.

Canadian Broadcasting Corp. v. Canada (National Capital Commission) (1998), 147 F.T.R. 265 at 271(F.C.T.D.) Teitelbaum J. Paragraph 20(1)(d) of the Act requires proof of a reasonable expectation that actual contractual negotiations other than the daily business operations of the applicant will be obstructed by disclosure. Evidence of the possible effect of disclosure on other contracts generally and hypothetical problems are insufficient to qualify under the exemption. It is also not enough to merely speculate that the applicant may suffer some probable harm if the requested information is made public. Paragraph 20(1)(d) must refer to an obstruction to negotiations rather than merely the heightening of competition which might flow from disclosure.

[1] Paragraph 16

Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services) (1989), 24 F.T.R. 32 at 37 (F.C.T.D.) Martin J. The setting of the threshold at the point of probable harm flows necessarily from the context, not only of the section but of the whole statute. As to the notion of interference, in order to justify an application by a third party under section 44 there must necessarily be an interference whose consequences will likely be damaging to that party. "Interference" is used here in its sense of "obstruct" ("entraver", in French), much as it is in sports parlance, when the player is penalized for "interference". Here again, the threshold must be that of probability and not the mere possibility of speculation.

Canada Packers Inc. v. Canada (Minister of Agriculture), [1989] 1 F.C. 47 at 55 (C.A.) Heald, Urie and MacGuigan JJ.A. This paragraph is intended to catch contractual situations not covered by paragraph 20(1)(c) and hence can have no application to day-to-day sales such as are principally in question in the domestic meat industry. It may, however, have some relevance with respect to international sales. Also, in light of the purpose of the Act as set out in section 2, the exception to access in paragraph 20(1)(d) must be interpreted as requiring a reasonable expectation of <u>probable</u> harm.

Saint John Shipbuilding Ltd. v. Canada (Minister of Supply and Services) (1990), 67 D.L.R. (4th) 315 at 316 (F.C.A.) Pratte, Urie, Hugessen JJ.A. To justify an application by a third party under section 44 there must necessarily be an interference whose consequences will likely be damaging to that party. "Interference" is used here in the sense of "obstruct" ("entraver", in French), much as it is in sport parlance, when the player is penalized for interference. The threshold must be that of probability and not mere possibility or speculation. An examination of the other documents the applicant seeks to have exempted pursuant to paragraphs 20(1)(c) or (d) brings me to the same conclusion as above. It is not the place of this Court, on a motion for judicial review, to examine such documents in minute detail and substitute its opinion about them over that of the respondent. Instead, if the applicant can show that the respondent came to a decision in a reviewable way concerning these documents, this Court will intervene. However, counsel for the applicant has not gone through the non-exempt portions of the documents and shown, to this Court, how they satisfy the various provisions for exemption in the Act. Counsel has shown no evidence of probable harm. Again, counsel has merely provided speculation of possible harm. That is not enough.

b) Exemptible

Bitove Corp. v. Canada (Minister of Transport) (1996), 119 F.T.R. 278 at 281 (F.C.T.D.) Pinard J. A competitor of Bitove sought the release of records relating predominantly to the negotiation of an amendment to a lease between the respondent and the applicant with respect to goods and services provided at Terminals 1 and 2 at the Lester B. Pearson International Airport. Noting that the

information consists of records of meetings, including minutes of negotiating meetings, as well as detailed financial reports, including sales information and projections, the Court was satisfied that all of the information relating to Terminals 1 and 2 had been provided to the respondent in confidence and only as a result of the contractual relations between the applicant and the respondent. This information would not be and is not available to anyone other than the respondent and the applicant. The information relating to Terminal 3 is also confidential to the applicant. All of the information sought to be disclosed by a competitor of the applicant is otherwise maintained within the strictest confidence within the applicant. It is all information the nature of which would be of great assistance to the applicant's competitors to determine precisely how and where the applicant negotiated its contractual arrangements with the respondent, how it conducts its affairs at Lester B. Pearson International Airport and how it directs its sales efforts at that airport. To provide a competitor of the applicant with that information would allow a competitor a direct insight into its plans and strategies, something that has taken years of work for the applicant to determine. The Court held that in the circumstances, the applicant had successfully discharged the burden of establishing that the records requested under the Act contain the kind of information described in paragraphs 20(1)(b) and (c) of the Act.

c) Not exemptible

Canada Post Corporation v. National Capital Commission, 2002 FCT 700 (Fed. T.D.) Kelen J. This was an application for review pursuant to section 44 of the *Access to Information Act* of the respondent's decision to disclose certain information concerning financial sponsorship assistance received by the National Capital Commission from Canada Post Corporation with respect to three events. The issue was whether the amount paid by Canada Post for sponsoring the events were exempt from disclosure pursuant to paragraphs 20(1)(b), (c) or (d) of the Act. The Court was unable to conclude from the evidence and submissions how disclosure could obstruct future negotiations. The possibility of pressure from third parties for matching sponsorship funds and pressure from competitors cannot be considered interference or obstruction with future contractual negotiations. Canada Post argued that it is under certain pressures as a public body to match sponsorship funds. The Court observed that this submission was pertinent to the exemption in paragraph 20(1)(c), not 20(1)(d). The Court was not persuaded that disclosure could reasonably be expected to interfere with future contractual or other negotiations by Canada Post. Accordingly, the Court concluded that paragraph 20(1)(d) was not applicable but 20(1)(c) was applicable.

Canada (Information Commissioner) v. Canada (Minister of External Affairs), [1990] 3 F.C. 665 at 682-683 (T.D.) Denault J. Paragraph 20(1)(d) requires proof of a reasonable expectation that actual contractual negotiations other than the daily business operations of the third party will be obstructed by disclosure. Evidence of the possible effect of disclosure on international contracts generally and hypothetical problems concerning foreign suppliers and local customers is insufficient to establish

a reasonable expectation that any particular contract or negotiations would be obstructed by disclosure.

Blood Band v. Canada (Minister of Indian Affairs and Northern Development), [2003] F.C.J. No. 1794, (F.C.T.D.), Lemieux J. : In this section 44 application, the Court held that while settlement privilege attaches to documents created or exchanged during negotiations carried on for the purpose of settling an action or avoiding litigation, it is insufficient simply to assert the privilege of settlement negotiations to fit within subsection 20(1)(d) of the Act. An applicant must bring evidence that the requested records could reasonably be expected to interfere with settlement negotiations.

Canadian National Railway Company v. Canada (Attorney general), [2002] FCT 974, Pelletier J.: In this case, the plaintiff argued that its negotiations for the sale of other properties would be impeded by comparisons available to potential purchasers if prices paid in other transactions were disclosed. The Court rejected this argument and determined that selling prices will vary depending on the circumstances, so that a purchaser would have to know much more than the gross prices paid in other transactions to have any significant advantage in negotiations with the plaintiff.

AstraZeneca Canada Inc. v. Canada (Minister of Health), 2005 FC 189, [2005] A.C.F. n^{o} 859 (F.C) (QL), confirmed by AstraZeneca Canada Inc. v. Health Canada, 2006 FCA 241, [2006] A.C.F. n. 1076 (C.A.F.) (QL): In this case, the third party claimed paragraph 20(1)d) asserting that competitors may be able to use information disclosed in "negative" marketing, particularly to influence provincial governments who must approve the listing of drugs under provincial health and pharmaceutical programs. The Court rejected this exemption by stating that the process of obtaining government approval is not the type of negotiations to which this section refers. The term "other negotiations" following "contractual" indicates that those parties must be in a commercial or business context. Obtaining approval for provincial formularies is more in the nature of a regulatory context.

4) Press coverage

Viandes du Breton Inc. v. Canada (Department of Agriculture and Agri-Food) . [2000] F.C.J. No. 2088, 2000 CarswellNat 3169, 2000 CarswellNat 3526 (Fed. T.D.), Nadon J. The Court noted, that as confirmed by MacKay J. in *SNC-Lavalin Inc. v. Canada (Minister of Public Works)* (1994), 79 F.T.R. 113 (T.D.) at 127, The Court noted that the plaintiff had also argued that the likelihood of harm from disclosure was linked to the possibility of unjust or incorrect coverage of the content of the reports by the media. The Court opined that this fear appeared to be the real reason the plaintiff was objecting to disclosure of the inspection reports on its hog kill cut plant. In support of this argument, the plaintiff alluded to unjust press coverage which occurred in April 1998 following the disclosure of the inspection reports at another business, Aliments Flamingo. Relying on *Coopérative fédérée du Québec v. Canada (Agriculture and Agri-food),* [2000] F.C.J. No. 26 (Fed. T.D.) Pinard, J. the Court held that media coverage cannot be presumed to be unfair or negative noting that the plaintiff has other legal remedies if it is the victim of unfair or unfounded coverage. The fact that the plaintiff fears bad publicity after the inspection reports are disclosed

does not mean that the Court should prevent their disclosure. For all the aforementioned reasons, in the opinion of the Court, the exemptions allowed by ss. 20(1)(c) and (d) of the Act cannot be applied in the case at bar, as the department's decision indicated. The plaintiff was unable to discharge its burden of establishing that the disclosure of inspection reports on its plant would create a reasonable expectation of probable harm and that the documents in question are covered by the exemptions allowed by ss. 20(1)(c) and (d) of the Act.

Coopérative fédérée du Québec (c.o.b. Aliments Flamingo) v. Canada (Agriculture and Agri-Food) (2000), 5 C.P.R. (4th) 344 at 349-351(F.C.T.D.) In regard to the apprehended harm, the applicants referred to media coverage. The Court held that access to information should not be prohibited solely because it might be unfavourable to the persons it concerns. This is especially true when, as it happens, the information has to do with the state of facilities as a result of things done by the applicants, who operate them. What they had to establish, in order to prevent the public disclosure of this information under paragraphs 20(1)(c) and (d) of the Act, was that the information is so unfavourable that its disclosure could give rise to a reasonable probability of material financial losses to them, or to prejudice their competitive position or interfere with contractual or other negotiations. In the circumstances, the Court cannot, of course, presume unfair treatment by the media of the particular information that Agriculture says it is prepared to disclose in this case. Whatever the case, the applicants are certainly not unaware of the right to damages that might accrue to them for any bad faith in the dissemination of the information, given the liability that such fault would entail. In the circumstances, therefore, the merit in avoiding the risk of suppression of legitimate comment outweighs the risk of wrongful comment. In this context, the Court no real basis in the evidence for the applicants' straightforward statements as to the financial consequences of disclosure of information and its impact on their competitive position, or the consequences of such disclosure on future contracts. These are mere conjectures that fail to meet the test of “reasonable expectation of probable harm.”

5) <u>Where disclosure could reasonably be expected t</u>o:

For an exhaustive definition of these terms, please refer to the lexical.

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The Questions

Paragraph -- 20(1)(c)
Statement of Test to be Met Material financial loss or gain or prejudice to the competitive position of the third party must be likely. - must be specific type of harm

Relevant Questions	Departmental Response	Assessment
What kind of harm is expected from disclosure?		
What use could the requester make of the information?		
Does the harm from disclosure involve a financial loss or gain?		
How, when will the loss or gain specifically occur? Over what period? Is it of a permanent nature i.e. loss of market share?		
How much money is involved?		
Will the loss or gain affect the financial performance of the third party or of another person? - how - to what degree		
Does the third party perceive that disclosure would likely prejudice its competitive position?		
How would disclosure impact on the competitive position of the third party?		
Would it have an adverse effect on sales or marketing? - how		
Would disclosure reveal plans or strategy?		
What kind of plans or strategy? - product launch - product approvals - marketing plans - business acquisitions - asset acquisitions - disposal of assets - mergers		

Relevant Questions	Departmental Response	Assessment
How would knowledge of these plans specifically prejudice the third party's competitive position?		
Is there an indication of how a competitor could use the information to its own advantage, i.e., by developing competing pricing strategies?		
Does disclosure allow a competitor to confirm or acquire other sensitive information about the third party? Ask how it does so.		

Statement of Test to be Met

- There must be reasonable expectation that such prejudice will occur.
- Investigator must assess reasonableness of the assertion of prejudice caused by disclosure.

Relevant Questions	Departmental Response	Assessment
How could a competitor use the information?		
How would a member of the public react to the information?		
Has the information or the same subject matter been disclosed elsewhere? - publications - in applications to government that are public - in the press - in annual reports, government filings - in public registries		
Has it been disclosed pursuant to financial reporting obligations?		
Could a member of the public assemble the information independently and how easily?		
Is the subject matter generally well known?		
Has the information been publicly confirmed to be true or publicly acknowledged?		
Is existing public knowledge based on rumours or speculation?		

Relevant Questions	Departmental Response	Assessment
What additional competitive harm, if any, would arise from government disclosure?		
How old is the information? - if the information is not current, why would disclosure still adversely affect the third party		

Has similar information about the third party been made public in the past
- what was the impact
- was the impact quantifiable
  - lost sales
  - revenues
  - goodwill		

Is information of this nature available about competitors of the third party?		
Are there examples in other businesses where disclosure of similar information led to competitive prejudice or material financial loss or gain? - describe - quantify prejudice, loss or gain temporary or permanent - why is the situation parallel to that of this third party		
Does the third party have plans in place to deal with adverse public relations issues?		
What actions could the third party take to minimize adverse public reaction?		
What actions could the third party take to counteract potential financial loss/gain or competitive prejudice knowing the information would be disclosed?		

Paragraph -- 20(1)(d)
Statement of Test to be Met
- Interfere with contractual or other negotiations of a third party

Relevant Questions	Departmental Response	Assessment
What negotiations would be affected by disclosure?		

Relevant Questions	Departmental Response	Assessment
Are these negotiations ongoing? Have they broken up?		
Have the negotiations been concluded?		
What stage are the negotiations at?		
How long have they been going on?		
What is the subject matter of the negotiations?		
How would disclosure specifically interfere with the negotiations?		
Does the information relate to an outstanding issue in the negotiations? - if so, how would disclosure interfere with negotiations on this issue?		
Does the information relate to issues already resolved in the negotiations?		
Would disclosure cause the issue to be reopened? - why?		
Would it otherwise interfere with negotiations? - how?		

Statement of Test to be Met

Reasonable expectation such interference will occur.
- Investigator must assess "reasonableness" of claim

Relevant Questions	Departmental Response	Assessment
Is the information current?		
Does the information relate to events prior to the negotiations?		
How old is the information?		
Ask how it could affect current negotiations.		
Is the information commonly known in the industry?		

Relevant Questions	Departmental Response	Assessment
Is the information reasonably available elsewhere? - if so, how would disclosure by government interfere with negotiations?		
Does the information specifically relate to the third party or the persons with whom they are negotiating? - if not, how will it affect third party negotiations?		
Does the other side of the negotiations already have this information?		
Have they asked for it?		

Endnotes

[1.] See *Société Gamma Inc. v.Canada (Department of the Secretary of State),*(April 27, 1994), T-1587-93, T-1588-93 (F.C.T.D.): "*The applicant has not demonstrated to me that its success is so precariously dependent on the form of its proposals [i.e., the records at issue in this case] instead of on its competitive advantage based on its past record and future capacity*".

Subsections 20(2), (5) & (6)

The Provision:

20(2) *The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.*

20(5) *The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.*

20(6) *The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraphs (1)(b), (c) or (d) if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.*

Preliminary matters:

1) <u>General Right of Access</u>:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizen or permanent resident within the meaning of the **Immigration Act** and any individual or any corporation present in Canada a right (of access) to most records under the control of the federal government. More specifically, the Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under sections 68 or 69.

2) <u>Definitions - Subsection 20(2)</u>

The expression "for a fee" in subsection 20(2) has recently been defined by the Federal Court of Canada in the following terms:

> *St Joseph Corp. v. Canada (Public Works and Government Services),* [2002] F.C.J. No. 361, 2002 FCT 274 (Fed. T.D.) Henegan J**.** [In appeal. Doc. A-202-02). The Court noted that the phrase "for a fee" in this section is a qualifying phrase. None of the details of the fee arrangement have been disclosed by the Applicant. In the absence of evidence that a fee was paid, the Court was unable to find that a subsection 20(2) exemption was established.

- it consists of information;
- the information must be secret in an absolute or relative sense (i.e. known only by one of a relatively small number of persons);
- the possessor of the information must demonstrate that he has acted with the intention to treat the information as secret;
- the information must be capable of industrial or commercial application; and
- the possessor must have an interest (e.g. an economic interest) worthy of legal protection.

3) Exemption Mandatory Subjected to Exceptions:

Subsection 20(1) is a mandatory exemption which prohibits disclosure of certain third party information but it is not absolute. It is subject to the exceptions in subsections 20(2), (5) and (6). If one of these apply, the duty to exempt in section 20(1) is nullified and the institution must disclose the information unless other exemptions apply. There is always a duty to consider whether one of these exceptions might apply. The scope of the duty and the factors that govern whether the exception applies are described below.

4) Consequence of the override:

Our office agrees that the effect on a mandatory exemption is to create a duty to disclose. Our position relies on the following decision in which the Court addressed a similar override of the mandatory exemption in subsection 19(1) with respect to personal information. Pursuant to subsection 19(2), the head "may" disclose personal information in several situations, one being when the individual to whom the information relates has consented. The individual had, in the instant case, approved disclosure but the head of the institution nonetheless, purported to exercise its discretion and decided not to release the information. The Court rejected the argument that subsection 19(1) conferred a discretionary power to the head of the institution. According to the Court, to do so would be contrary to the purpose of the Act. The Court concluded that in such instances there is a virtual obligation to disclose. It held that, in such context, the word 'may" must be interpreted to mean "must" since only that interpretation gives effect to the requester's right to access to information conferred by the **Access to Information Act**.

> *Canada (Information Commissioner) v. Canada (Minister of Employment and Immigration),* [1986] 3 F.C. 63 66 (T.D.) Jerome A.C.J. Counsel for the Minister of Employment and Immigration contended that since subsection 19(2) provides that the head of a government institution may disclose personal information, it establishes with equal force a discretion not to disclose even though the conditions of subsection 19(2) have been met. The Court rejected the argument for two reasons: first, as a question of law, it is contrary to principles of statutory interpretation; second, it represents an approach that runs directly against the very purpose for which this legislation was enacted, as stated in the express provisions of the statute and confirmed in jurisprudence. In terms of statutory interpretation, the Court noted, when legislators intend to create an obligation to do something, they use the word "shall". When they

intend instead to establish a discretion or a right to do it, they use the word "may". Had the legislators intended here to repose residual discretion in the head of the government institution not to disclose information, even though the conditions of subsection 19(2) had been met, that appropriate and precise language would have been used. Of course, the Court pointed out, the Act does not establish the discretion not to disclose in such circumstances (in which case the respondent's argument might have had merit). The language chosen expresses the intent to establish a discretion to release personal information under certain circumstances. Those conditions having been fulfilled, it becomes tantamount to an obligation upon the head of the government institution to do so, especially where the purpose for which the statute was enacted is, as here, to create a right of access to the public. Emphasizing that the purpose of the **Access to Information Act** is to codify the right of access to information held by the government, the Court observed that it is not to codify the government's right of refusal and therefore access should be the normal course. Exemptions should be exceptional and must be confined to those specifically set out in the statute. In the present case, the applicant was quite properly informed that the information sought could not be obtained except by a Canadian citizen or a resident and could not involve disclosure of personal information about another person without their consent. Once those conditions were met, and they were here, the Court concluded, the information should have been disclosed.

The institution was, therefore, ordered to satisfy the personal information request. However, it should be noted that the duty to disclose is not 100% mandatory. The words shall disclose would mean mandatory. Since it is '*may*' disclose, it is discretionary. In other words, where one of the exceptions in 19(2) applies, the head is directed to disclose unless some other exemption applies. And also, if the information falls within the scope of any other exemption, the head may invoke that provision to withhold the record even though one of these exceptions may apply.

While the government does not always agree with us, it is our position that the effect of the decision in the *Information Commissioner v. Minister of Employment and Immigration* case applies equally to the exceptions in 20(2), (5) and (6) and must be followed by government institutions. The consequence of that decision is to create a duty to disclose, subject only to any other exemptions that may apply.

5) When is there a duty to consider the override:

There has been little case law on the overrides in subsection 20(2), (5) and (6). In a **Privacy Act** case involving the consent override in subsection 19(2) **Privacy Act** [subsection 13(2) ***Access to Information Act***], the Federal Court of Appeal stated that a request for personal information under the **Privacy Act** that a request by an applicant for information subject to section 19 of the **Privacy Act** (the parallel to section 13 of the ***Access to Information Act***) "*includes* a request to the head of a government institution to make reasonable efforts to seek the consent of the third party [other government or international organization of states] which provided the information" (Emphasis added). The Court noted that the evidentiary burden lies on the government institution to show that the exception in subsection 19(2) [subsection 13(2)] for consent does not apply given the inability of the

requester to know who to ask for consent or what the withheld information consists of. The test enunciated by the Court with respect to the application of the consent override in paragraph 19(2)(a) [paragraph 13(2)(a) of the ***Access to Information Act***] was whether the government institution has made reasonable efforts to seek the consent of the other government or institution. See *Ruby v. Canada (Solicitor General, R.C.M.P.)*, [2000] F.C.J. N^{o} 779, June 8, 2000, (F.C.A.).

In the *Ruby* case, the Federal Court of Appeal also considered the duty of the institution head to decide whether the public interest override in subparagraph 8(2)(m)(i) of the **Privacy Act** applied. The Federal Court of Appeal held that the institution head must undertake a weighing of the competing interests behind the public interest override, but that the manner in which the weighing of interests is conducted is within the discretion of the head of the institution. In the *Ruby* case, the Federal Court of Appeal concluded that it was unclear whether the government institution (CSIS) had conducted any kind of discretionary balancing of public interest and privacy under subparagraph 8(2)(m)(i), and remitted the matter back to the Trial Judge to determine whether the exemption from disclosure that was subject to the override had been properly applied:

> Having said all this, however, we confess that we are unable to ascertain from the decision of the reviewing judge whether in fact CSIS conducted any kind of discretionary balancing of public interest and privacy. In other words, it is unclear whether CSIS took any consideration of sub-paragraph 8(2)(m)(i) when it refused to disclose information relating to third parties and whether, therefore, it properly applied the exemption it claimed pursuant to section 26 of the [Privacy] Act. Nor are we able to determine whether the reviewing judge was satisfied that the exemption had been considered by CSIS, or that he considered it himself.
>
> In the circumstances, there should be a new review of the personal information requested in banks 010 and 015 for the purpose of determining whether the exemption in section 26 has been properly applied by CSIS. (at paragraphs 124-125).

Based on the above, the institution has a duty to consider the override in the following circumstances:

- **20(2):** The institution must examine the records requested to determine whether they contain any information relating to the results of product or environmental testing. If the record contains any such information, subsection 20(2) applies; the product and environment testing override clearly means that the institution must disclose the subject information unless another exemption applies to such information. See *Dekalb Canada Inc. v. Agriculture and Agri-food Canada* (F.C.T.D. 7 September 1999, unreported).

- **20(5):** As it applies to the third party with whom the information relates and consents to disclosure. This provision logically requires that there be some possibility for such consent. It is our position that unless the third party has made it clear in the past or on the record that it will not/never consent, the

possibility that it will consent is there. Departments should consult to see if consent would be given. They may obtain consent from the third parties at the time of the submission of documents, during informal or formal consultations (i.e., 9(1)*(b)* situations) or in response to the notification of the intent to disclose by the government institution (section 27). It is not sufficient for the head of the institution to state that they don't know if the third party would consent. In such a case, they must take positive action to determine if the third party would consent (see also *X v. Minister of National Defence*[1]).

- **20(6**): This provision permits disclosure in the public interest "*where such public interest clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of, or interference with contractual or other negotiations of a third party*". It must be considered when it is evident from the request or the requested records, the representations under section 27 or the complaint that a public disclosure under subsection 20(6) could exist. The Federal Court of Appeal has held that the institution head must undertake the balancing of interests mandated by the public interest override, but that the manner of doing so is within the discretion of the institution head. The Information Commissioner, however, can and does make findings and recommendations on the application of the subsection 20(6) override[2].

Once it is established through the request, complaint, section 27 representations or the investigator's inquiries of the institution that there is a *prima facie* case of public interest, a department arguing that the public interest does not clearly outweigh in importance any financial loss or gain to, prejudice to the competitive position of, or interference with contractual or other negotiations of a third party has the burden of demonstrating this. Since the third party is the one most directly concerned for the purposes of section 35 representations, it is essential that the third party be given an opportunity to make representations on this issue. It is the investigator's responsibility to obtain all the relevant information from the department involved, the third party and the requester in order for the Commissioner to make an appropriate finding on the application of the override.

The "Test":

1) <u>Preliminary Comments</u>:

You will have to be on the lookout to ensure that institutions have not inadvertently failed to recognize that the records deal with testing and/or testing results. If you feel that any of the information in the records might fall within the scope of 20(2), raise this with the ATIP officer. If they claim it was not testing, not a product or an environmental testing; then ensure that they are required to answer the questions designed to provide answers. These answers will then enable you to determine what testing was done, why [purpose], what was being tested and what (it) the thing being tested will do. Do not hesitate to ask to see the background files leading up to the testing if that will better enable you to get all of the material facts.

2) Subsection 20(2):

a) What is a '*product*'?:

One way to determine the meaning of this word is to use the contextual method of interpretation. According to the presumption of coherence between statutes, the legislature is deemed to enact statutes on a given subject that are coherent in their formulation. When a statute is drafted, its author supposedly takes into account legislation already in force. A statute will be drafted so as to integrate it into existing legislation, from the point of view of both form and content. This explains why related prior legislation, as part of the legal environment of the new law, can help to clarify its meaning. In other words, the same word is deemed to have the same meaning in related legislation unless there is a definition in the statute to the contrary.

b) The term '*product*' is used in no less than 99 separate statutes of Canada and is defined as follows in two of the statutes indicated below:

- "*Product includes an article and a service*."[3]

- "*Product means any article that is or may be the subject of trade or commerce but does not include land or any interest therein*".[4]

Such an interpretation would seem to be consistent with the purpose for which subsection 20(2) was incorporated into section 20. It would be reasonable to disclose information containing the results of testing done by the government on an article or a service that is, or may be the subject of trade or commerce.

c) The testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee:

We agree with the approach in the Treasury Board Guidelines, which is:

- "*Under subsection 20(2) a government institution shall not, pursuant to subsection 20(1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution. So even if a record would be exempt from disclosure under subsection (1), a government institution is not permitted to claim exemption under subsection (1) for any part of the record which contains the results of product environmental testing carried out by or on behalf of a government institution.*

- *However, if the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee, subsection 20(2) does not apply.... The provision also does not apply to testing done by a third party and submitted to a government institution, either on a voluntary or mandatory basis". (An example of this would be where the third party voluntarily*

files a study/test that contains the results of product testing and the government institution uses the record to enable it to do an assessment and to approve the product. This is a 'voluntary' situation since the institution does not have a requirement that the tests be filed and a licence issued as a condition precedent to the marketing of the product.)"

It is possible to support this interpretation of 20(2) because:

- it seems to be the most obvious interpretation;
- there does not seem to be any ambiguity in the provision - i.e. there is no other obvious interpretation;
- it does not seem to be inconsistent with the basic purposes of the Act; and
- it seems to make sense that the public should have access to what the government does or pays for itself.

d) <u>The criteria to be met for the non-application of subsection 20(2) are:</u>

- whether the testing was done as a service to a person, a group of persons or an organization other than a government institution; and
- whether the testing was done for a fee.

Example: Canadair (an organization other than a government institution) pays a fee to the National Research Council to conduct wind tunnel tests on a model of its new Challenger.

In such a case, even if all the criteria of subsection 20(2) were met, the override would not apply since the testing was done as a service to a person, a group of persons or an organization other than a government institution and the testing was done for a fee. However, if one of these two elements were missing (i.e. if Canadair didn't pay for the testing, or if Canadair made the testing and provided it to the institution, either on a voluntary or mandatory basis), 20(2) would still apply.

It may be that the department and the third party have each paid a portion of the fee and each may equally be entitled to the results. If the third party pays the government but the amount is less than the cost of the testing, it may well be that this is an attempt to get around this provision in the Act.

e) <u>What are the '*Results*'</u>?

Since there is no definition of the term in the Act or in any other Canadian Statute, the law is deemed to have been drafted in accordance with the rules of language of common use. One way to determine the meaning is to use a dictionary. The Federal Court uses dictionary meanings as a guide to interpretation but only where the meaning is consistent with the purpose of the Act.[5]

***Concise Oxford Dictionary*:**

> **Result:** 1. arise as actual or follow as logical consequence (from conditions, causes, premises etc.); have outcome or end in specified manner esp. in failure, success etc. (resulted badly, in a large profit). 2. consequence, issue, or outcome of something; satisfactory outcome (knows how to get result).

***Petit Robert, 1987*:**

- **Résultat:** "1. *tout ce qui arrive, commence à exister à la suite et comme effet de qqch., avec un caractère durable. 2....Phase ultime d'un calcul...3. L'admission ou la non-admission à un examen, un concours; la liste de ceux qui ont réussi.*" [emphasis added]

The French definition seems wider than the English. It includes "*anything that arises following and as a result of something*". If we take that interpretation, 20(2) includes the "result" portion of the testing, and also any comments, conclusions, recommendations, etc.

On the other hand, 20(4) makes it clear that the records which contain the results of the preliminary tests which were conducted to determine if the test itself was a valid test, is not part of the exception. If appropriate, such information may be exempted under subsection 20(1) or any other exemption that may apply.

Since the purpose of the Act is to "*give the public greater access to government records*", any restriction to this right of access should be interpreted narrowly.[6] Between two possible interpretations, one that restricts the right of access and another that provides greater access, the second should be adopted.

The wording of subsection 20(3) confirms that the wider interpretation is more appropriate. According to that provision, where information is disclosed pursuant to subsection 20(2), the head must at the same time provide the requester with a written explanation about the methods used in conducting the test. This caveat was designed to alleviate the potential harm to third parties due to misinterpretation of the reports upon their release. Subsection 20(3) is designed to avoid the possible misinterpretation of information contained in subsection 20(2). In that context, it would be illogical to conclude that the legislator intended that only the results of the test be disclosed and not the conclusions resulting from the test.

But subsection 20(3) is an important provision. It expressly requires the institution to disclose records that will enable the requester to understand the methodology used in the testing and then better enable the requester to assess the validity of the test results.

3) Subsection 20(5):

According to this subsection, the head of a government institution '*may*' disclose any record that contains information described in subsection (1) with the consent of the third party

to whom the information relates. In a case involving another consent override, the Federal Court of Appeal has stated that the request for information itself "*includes* a request to the head of a government institution to make reasonable efforts to seek the consent of the third party which provided the information." (Emphasis added)[7] However, as discussed above (see section 3.3), when the third party consents the head must disclose the information unless some other exemption applies.

If the requester has consented to his/her identity being given to the third party and the consent is restricted to disclosure to that particular requester, the consent ceases to be valid for the purpose of subsection 20(5) in the event of any further requests. However, if it is a general consent, it remains in force until it is withdrawn. Thus, investigators should determine whether the third party has ever consented to the disclosure of the requested information. The fact that it has been disclosed could have a great bearing on whether an exemption could be substantiated under paragraph 20(1)*(c)* or *(d)*. It couldn't under 20(1)*(a)* or *(b)* because the information is no longer secret/confidential.

4) Subsection 20(6):

a) Public interest:

This override applies to information that otherwise must be exempted under subparagraphs 20(1)*(b)*, *(c)* or *(d)*. In order to qualify for the override, the public interest in disclosing this information must be such to clearly override any prejudice contemplated by subsection 20(1) that the third party could reasonably be expected to sustain from the disclosure.

To this date, very little has been said as to what constitutes 'public interest', the *Treasury Board Guidelines* do not address this issue.

In *Nakita (Township) v. Canadian National Railway Co.*, (June 11, 1986), No. A-80-86, (F.C.J.), the Federal Court of Appeal had to determine whether the CN's intention of closing a railway station was in accordance with the public interest. The Railway Transport Committee, when assessing the public interest, considered only those aspects of the public interest that impacted directly or indirectly on the railway operations. Mr. Justice Hugessen in reversing the Committee's decision laid down the following principles:

- By definition, the term '*public interest*' includes the interests of all the affected members of the public. The determination of what is in the public interest involves the weighing and balancing of competing considerations. To exclude from consideration any class or category of interests which form part of the totality of the general public interest is an error of law justifying the intervention of the Court.

- The error of law lies simply in the failure to consider. The weight to be given to the competing considerations is a matter for the discretion of the Commission.

In *Ruby v. Canada (Solicitor General, R.C.M.P.)*, [2000] R.C.J. No. 779, June 8, 2000 (F.C.A.), the Federal Court of Appeal considered the process to be undertaken by an institution head in applying the public interest override in subparagraph 8(2)(m)(i) of the **Privacy Act**. The Court stated that an institution head must undertake a balancing of the competing public interests in disclosure of the information and in protecting the privacy of individuals, and that such balancing could take into consideration concerns specific to the request or general policy concerns as deemed appropriate by the institution head.[8]

In relation to subsection 20(6) the institution head must consider the public interest in disclosure of the information as it relates to health, safety or protection of the environment and the harm such disclosure would occasion to the third party, as further described in (b) below. The manner of weighing these interests is within the discretion of the institution head as long as full consideration of relevant factors is given by the head.[9]

As is the case in relation to the discretionary exemptions, however, it is part of the Commissioner's role to 1) ensure that consideration of the public interest override is made by the government institution, and 2) to review the decision on public interest to ensure it accords with the spirit and intent of the Act and the section 20 exemption as a whole and to ensure the head has taken all relevant factors into account.

b) <u>Clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of, or interference with contractual or other negotiations of a third party</u>:

In order for the subsection 20(6) override to apply, the public interest must clearly override the prejudice contemplated in this subsection. A department arguing that the public interest does not clearly outweigh in importance any financial loss or gain to, prejudice to the competitive position of, or interference with contractual or other negotiations of a third party has the burden of demonstrating this by showing/describing to the investigator all the factors taken into consideration.

The expression '*clearly outweigh*' is novel and has not been judicially interpreted. The normal burden under section 48 is to establish the right to exempt on a mere balance of probabilities. To show that it clearly outweighs is a higher burden - e.g. you must be more certain that you could convince a court that the override applies. In percentage terms, a balance of probabilities is 51%. Clearly it is more like 60-40%.

While the Commissioner cannot substitute his own judgement for that of the head of the institution, he is nevertheless entitled to consider the factors taken into consideration by the department in making its assessment. For example, while the Commissioner cannot require a department to give more weight to a particular factor, he can determine that some factors were missing when the head of the government institution made his/her judgement.

Case Law:

1) <u>Subsection 20(2)</u>:

The following decision by the Federal Court of Appeal considered this provision outlining its purpose:

> *Canada Post Corp. v. Canada (Minister of Public Works),* [1995] 2 F.C. 110 at 130-131 (C.A.) Pratte, Marceau and Létourneau JJ.A By enacting the **Public Works Act**, Parliament obviously had in mind that the Department of Public Works could sell its services to third parties not subject to the Act. Parliament's awareness of the possibility that the Government could provide services to such third parties and yet remain itself governed by the Act can be found in subsection 20(2) which, broadly stated, gives the public a right of access to the results of environmental testing carried out by Government on behalf of a third party, unless the testing was done for a fee.

The remaining Federal Court decisions touching on this provision confirmed that when a document is created by the public authorities by spending funds in order to protect the public, public interest considerations are paramount when considering its disclosure.

> *Dekalb Canada Inc. v. Canada (Agriculture and Agri-Food)* (1999), 175 F.T.R. 294 at 297-298 (F.C.T.D.) Dubé J. The requested information is a document containing the test results for Dekalb corn samples taken in 1995 and tested in the field plots in the summer of 1996. The requester is a party to one of the seven law suits instituted against Dekalb by farmers alleging to have used the seed variety DK 220 and claiming damages against Dekalb. Claiming that the information requested relates to testing of seed varieties which have been developed as a result of its own continuing research and development efforts, Dekalb claims the exception contained in paragraph 20(1)(c) submitting that its disclosure would reveal to knowledgeable third parties trade secret information, information which is also scientific or technical, confidential in nature and not shared with third parties. Agriculture invokes the exception to the exception at subsection 20(2). Noting that the purpose of subsection 20(2) is to require the disclosure of information relating to public health and safety, the Court held that the paramount consideration has to be public interest in disclosure. In the instant case, monitoring of the varietal purity of the seeds by Agriculture Canada was done as part of an inspection program whose purpose is to monitor the health, safety and quality of Canada's agricultural and food products and to promote consumer protection of quality seeds in accordance with national standards. The document in question contains the result of such an inspection. It does not divulgate "trade secrets"; it does not reveal information emanating from Dekalb's research and development efforts. It merely provides the end results of a government inspection. The fact that the party who makes the request in this instance happens to be the plaintiff in an action against Dekalb, and may use that information at trial, does not vest that document with the characteristics of confidentiality. The document was created by the public authorities spending funds in order to protect the public. It was not supplied by Dekalb in confidence and with the expectation that it would never be revealed to the public.

In this decision, it was held that meat audit inspection reports, which are the product of an on-site inspection process by government inspectors do not constitute environmental or product testing.

> *Gainers Inc. v. Canada (Minister of Agriculture)* (1987), 14 F.T.R. 133 at 136 (F.C.T.D.) Jerome A.C.J. The information requested was: access to meat inspection audit reports on Canadian slaughter/meat packing plants. The reports must be disclosed regardless of their potential to inflict harm on third parties. The intervenor went on at some length to discuss why he feels the material at issue here comes within subsection 20(2). I find I cannot accept his position. The meat inspection audit reports are the product of an inspection process, not either environmental or product testing. The audit which produces them is a regularly conducted overview of plant conditions and inspection systems, not a test of product quality. This is not, therefore, the kind of information which must automatically be disclosed under s. 20(2). I have concluded that the meat inspection audit reports may be disclosed.

2) <u>Subsection 20(5)</u>:

As noted above, when there is a possibility that the third party would consent to disclosure, it is not sufficient for the head of the institution to merely state that they just don't know if the third party would consent. In such a case, he must take positive actions to determine whether the third party would consent: see also *X v. Minister of National Defence* and *Ruby v. Canada (Solicitor General, R.C.M.P.)*.[10]

3) <u>Subsection 20(6):</u>

In *Canada Packers Inc. v. Minister of Agriculture et al.*, [1989] 1 F.C. 47 (C.A.) (appl'd *Hunter v. Minister of Consumer and Corporate Affairs* (1990), 35 F.T.R. 75 (F.C.T.D.)) during a review under s. 44 of a decision to disclose meat audit inspection reports, the trial judge found that even if the records were subject to exemption under subsection 20(1), their disclosure would be justified under subsection 20(6). The Federal Court of Appeal however held that the trial judge had erred in so concluding, noting that since there was nothing in the record to indicate that the head of the government institution had exercised his discretion under subsection 20(6), it would be improper for the Court to exercise this discretion in his stead.

> *Canada Packers Inc. v. Canada (Minister of Agriculture),* [1989] 1 F.C. 47 at 64 (C.A.). Heald, Urie and MacGuigan JJ.A. It is one thing for a Court to review a discretion which a Minister of the Crown has exercised. It would be quite another thing, and in my view would be entirely improper, for the Court in the first instance to exercise the Minister's discretion in his/her stead. Even on an application for mandamus, a Court can only order a Minister to act, not act for him/her. Apart from the inherent impropriety, it does not take much imagination to conjure up the perils to a fair hearing which such an after-the-fact judicial decision could lead to in the absence of evidence adduced to that issue.

Bland v. Canada (National Capital Commission), [1991] 3 F.C. 325 at 333 (T.D.) Muldoon J. History, as the Court is entitled to note, notoriously demonstrates that destroyed public confidence is soon replaced by that most accursed, corrosive, dangerous and pernicious of all public attitudes, cynicism. So, what in this situation is in the public interest? That is abundantly clear. It is that, whatever and whenever rumours fly, the conduct of the NCC should be an open book, with all the explanations it cares or needs to make about rental levels, the process of establishing them, or whatever. It is always in the public interest to dispel rumours of corruption or just plain mismanagement of the taxpayers' money and property. Naturally, if there has been negligence, somnolence or wrongdoing in the conduct of a government institution's operations it is, by virtual definition, in the public interest to disclose it, and not to cover it up in wraps of secrecy. In that case government officials arrogate to themselves, by their refusal to give requested information, the role of judges in their own cause. In this free and democratic society nothing, apart from a direction from the responsible Minister, prevents the government institution from giving whatever explanations it judges appropriate, along with the requested information lawfully disclosed. The Court is not here adjudicating on the validity of the NCC's explanations about its rental levels. The true explanations themselves might in many situations amply dispel the rumours, as it appears from the confidential record placed before this Court.

Bland v. Canada (National Capital Commission), [1991] 3 F.C. 325 at 342 (T.D.) Muldoon J. In performing a review "independently of government", that is, independently of the head of the government institution involved here, the Court concludes, upon consideration of the evidence and reflection on the arguments of counsel including their references to matters already in the public domain, that the tenants' privacy interest in the non-disclosure of their rental payment obligations is negligible. It is so negligible that any invasion of it, resulting from disclosure, is clearly outweighed by the public interest.

Hutton v. Canada (Minister of Natural Resources) (1997), 137 F.T.R. 110 at 120 (F.C.T.D.) Gibson J. The letter addressed to the applicant advising her of the Minister's decision not to disclose by reason of the exemptions under paragraphs 18(1)(b) and 20(1)(b), (c) and (d) makes no mention of subsection 20(6) or section 25. However, based on uncontradicted evidence of the Minister's delegate presented in Court accepted as reasonable his decision not to rely on both the discretionary "public interest" authority for disclosure contained in subsection 20(6) and the mandatory requirement of section 25 of the Act. The Court distinguished the situation on its facts with that in *Rubin v. Canada (Canada Mortgage and Housing Corp.),* [1989] 1 F.C. 265 (C.A.) where a request for access to a broad range of records was received by the government institution in question and rejected outright the next day. In such circumstances, it was reasonable to conclude that the government institution in question had simply failed "... to enter into the severance exercise required pursuant to the provisions of section 25 of the Act." Here, the requested record is quite slim. A review under subsection 20(6), the public interest disclosure provision, and the severability examination could quite reasonably have been carried out in the time between receipt of the request for access and its rejection of the request 30 days later.

Ontario:

(Order # 12)

- The section cannot be used by people trying to assert only private interests.

(Orders # 47, 55, 68, 123, 196)

- The party asserting the compelling public interest override bears the burden of proof

(Orders # 24, 61, 68, 72, 123, 124, 149, 159, 164, 180, 183, 196)

- To invoke the override, there must be a compelling public interest that clearly outweighs the purposes of the exemption, as distinct from the value of disclosure to the requester of the particular record in question. The burden regarding applicability of this section falls on the individual seeking the application

(Orders #123, 124)

- Where extensive public hearings are held as a result of a Royal Commission of Inquiry, the public's interest in the subject matter of the Commission's review has been adequately served such that s. 23 would not apply.

(Order # 128)

- The need for public debate in and of itself is not sufficient to outweigh the purpose of the exemption

(Order # P-241)

- While the burden of establishing the applicability of s. 23 to particular records is on the applicant, this burden is not absolute. Where the applicant is not familiar with the contents of the records, the Commissioner will review them with a view to deciding whether s. 23 applies.

TABLE OF AUTHORITIES

Overrides in general

Canada Packers Inc. v. Minister of Agriculture, [1989] 1 F.C. 47, 53 D.L.R. (4th) 246 (C.A.).
Goguen v. Gibson, [1984] 2 F.C. 463, (January 10, 1984) A-616-83 (F.C.A.).
Information Commissioner v. Minister of Employment and Immigration, [1986] 3 F.C. 63 (T.D.).
Sutherland v. Canada (Minister of Indian and Northern Affairs et al., (May 6, 1994), (T-2573-93) (F.C.T.D.).
X v. Minister of National Defence, [1992] 1 F.C. 77, 46 F.T.R. 206 (T.D.).
Ruby v. Canada (Solicitor General, R.C.M.P.), [2000] F.C.J. No. 779, June 8, 2000, (F.C.A.)

20(2)

Canada (Information Commissioner) v. Canada (Minister of Employment and Immigration), [1986] 3 F.C. 63 66 (T.D.) Jerome A.C.J
Delkalb Canada Inc. c. Canada (Agriculture and Agri-Food), [2001] F.C.J. No. 32) (F.C.A.) Desjardings, Décary and Noël JJ.A.
St Joseph Corp. v. Canada (Public Works and Government Services), [2002] F.C.J. No. 361, 2002 FCT 274 (Fed. T.D.) Henegan J. [In appeal. Doc. A-202-02).

20(5)

X v. Minister of National Defence, [1992] 1 F.C. 77, 46 F.T.R. 206 (T.D.)

20(6)

Canada

Canada Post Corp. v. Canada (Minister of Public Works), [1995] 2 F.C. 110 at 130-131 (C.A.) Pratte, Marceau and Létourneau JJ.
Dekalb Canada Inc. v. Canada (Agriculture and Agri-Food) (1999), 175 F.T.R. 294 at 297-298 (F.C.T.D.) Dubé J.
Gainers Inc. v. Canada (Minister of Agriculture) (1987), 14 F.T.R. 133 at 136 (F.C.T.D.) Jerome A.C.J.
Hunter v. Canada (Minister of Consumer and Corporate Affairs), (1990), 35 F.T.R. 75 (F.C.T.D.)

Ontario

Orders #12, 24, 47, 55, 61, 68, 72, 123, 124, 149, 159, 164, 180, 183, 196, 241.

The Questions

Sections -- 20(2), (3), (4)
Statement of Test to be Met
Mandatory disclosure Results of product or environmental testing - must be product testing - must be environmental testing Must have an environmental purpose [see S. 2 Canadian Environmental Assessment Act definition of 'environment' preamble* * This could be added to preamble section

Relevant Questions	Departmental Response	Assessment
Does any part of the record contain results of product or environmental testing?		
What was tested?		
If a product was tested, how is the product (article or service) used/consumed by industry or the public?		
If a service was tested, what does the service provide? - to whom?		
If land, water, air, animals, fish, plants, trees or other matter was tested, or if an activity (as opposed to an article or service) was tested?		
- What was the purpose of the testing?		
Was the purpose related to assessing the environmental effects of an activity?		

Statement of Test to be Met
- must include the results of the testing - includes consequences, qualifications and explanations making results understandable

Relevant Questions	Departmental Response	Assessment
What portion of the record is being disclosed?		
Do portions not being disclosed contain results of the testing?		
Do they describe the testing?		
Do they explain the results?		
Do they qualify the results?		
Do they discuss the consequences of the results obtained?		
Do they assess the results against regulatory, industry, product and contractual or other standards?		
Do they elaborate on the results?		

Statement of Test to be Met
Carried out or on behalf of a government institution

Relevant Questions	Departmental Response	Assessment
Who carried out the testing?		
Was it a government institution?		
- If not, was the testing done at the request of a government institution?		
Why did the government institution request the testing?		
As a supplement to its own testing? - To carry out statutory, regulatory functions of the institution? - To develop product or environmental standards?		

Relevant Questions	Departmental Response	Assessment
Was the arrangement to have the testing done recorded anywhere?		
Ask to see it (request for testing and response).		
Was a fee (payment, cost, compensation) paid by the institution?		

Statement of Test to be Met

- Does not include testing done by third parties and provided to government.
- Unless testing done as a service for a body other than a government institution for a fee.

Relevant Questions	Departmental Response	Assessment
Were the results given to the government by a third party? - for what purpose? - to meet a statutory or regulatory requirement?		
Did the government request that the testing be done? - why?		
Was it to enable or direct the third party to comply with a regulation or other government requirement?		
Did the government institution ask the third party to do the testing to assist the government? - if yes, in what way [relate to points above]		
Did the government institution do the testing for another body - who?		
Is this body a government institution?		
Why was the testing done?		
What were the arrangements for doing the testing?		
Did the institution receive a fee?		

Statement of Test to be Met
- Methodology used must be explained - Not preliminary tests to develop methods of testing

Relevant Questions	Departmental Response	Assessment
Has a written explanation of the methods used in conducting the tests been provided? - ask to see it		
If more than one method was used, have all methods been disclosed?		
Were preliminary tests conducted to develop methods of testing?		
What part of the records relates to these preliminary tests?		
Ask to see description of various methods tested in preliminary tests.		
Were additional methods for testing the product used along with the method being disclosed?		
Were the results of these tests disclosed?		
Were the results of these tests compared in any way to those obtained from the tests that are being disclosed? - if so, they qualify as results and should be disclosed.		

Section -- 20(5)
Statement of Test to be Met
Consent of third party to disclosure of section 20(1) information - Government institution has duty to inquire

Relevant Questions	Departmental Response	Assessment
Does the third party to whom the section 20(1) information relates consent to its disclosure?		
What portions of the record does the third party consent to release?		

Relevant Questions	Departmental Response	Assessment
Has the third party intentionally put into the public domain any information in the record to which paragraph 20(1)(a) might otherwise apply? - is there a qualification to this effect in the document?		
Did the third party otherwise waive property rights to use of the information when they provided it, i.e., specify the information is for public use or disclosure?		
Did the third party provide to the government institution a previous consent to disclosure? - was this ever withdrawn?		
Did the government institution ask the third party if it consents to disclosure? - in its notice under section 27 - in other communications		

Section -- 20(6)
Statement of Test to be Met
Record must contain information relating to public health, public safety or protection of the environment.

Relevant Questions	Departmental Response	Assessment
Does the record contain 20(1)(a) information? - if yes, 20(6) is inapplicable to that information?		
Does the record contain information in paragraphs 20(1)(b), (c) or (d)? - if yes, do subsections 20(2), (3) (4) or 20(5) apply to allow disclosure - if yes, 20(6) investigation unnecessary - if no, 20(6) investigation may be necessary		
What does the 20(1)(b), (c) or (d) information relate to?		
Is it information which concerns - public health? - public safety and security? - protection of the environment?		

Relevant Questions	Departmental Response	Assessment
For what purpose did the government institution obtain the information?		
Is this purpose related to public health, public safety or protection of the environment?		
Was there a specific incident, event or activity which gave rise to the collection of the information from the third party? - what was it?		
Did this event have any impact or potential impact on public health, public safety or protection of the environment?		

Statement of Test to be Met

- There must be a public interest in disclosure of the information for these purposes
- Must be a public, not private interest

Relevant Questions	Departmental Response	Assessment
Whose interests would be affected by disclosure other than the third party? - individual - general - describe affected group		
Does the information concern an event/proposal/incident/condition involving health, safety or protection of the environment?		
- If so, what group in the public is affected by the event/proposal/incident/condition?		
Is the event/proposal/incident/condition one which requires government approval?		
Did it result in government enforcement activity or investigation?		
Did it involve contravention of standards in health, safety and environmental protection?		

Relevant Questions	Departmental Response	Assessment
Does the information describe a danger or risk in the areas of health, safety or protection of the environment? - describe the extent of the danger or risk - who is affected by the danger or risk		
Has the danger or risk been alleviated? - to what extent? - when? - what was the degree of exposure to the danger or risk before it was alleviated? - for how long?		
What was the impact of any past event, incident described in the record? - describe degree or extent		
What are the remaining effects or impact?		
Are people, animals, plants (trees) or other material things such as structure, roads, monuments, or environment in general currently exposed to the dangers or risks arising from the event described in the information? - to what degree?		
Have the issues described in the information sought been publicly examined elsewhere? - in an ongoing process		
Will that process likely result in disclosure of the information to the public or in public discussion of the information?		
What are the dangers, if any, that would be caused by disclosure (aside from 20(1)(b), (c) and (d) harm? - what are they? - why would they arise?		

Statement of Test to be Met
- Public interest in disclosure must clearly outweigh in importance the financial loss or gain, competitive prejudice, interference in negotiations of third party - Assess degree of s. 20(1)(b), (c) and (d) events on third party - Interest in public health, safety, protection of the environment must clearly outweigh importance of s. 20(1)(b), (c) and (d) event

Relevant Questions	Departmental Response	Assessment
Quantify the financial loss or gain, goodwill and reputation, prejudice to the competitive position or degree of interference in negotiations of third party.		
In the case information described in s. 20(1)(b), what degree of importance attaches to keeping the information confidential or out of the public domain?		
What is the nature of the relationship between the government institution and the third party, i.e., why did the third party supply the information to the government? - voluntary? - If so, what were the circumstances ? - mandatory?		
Describe chilling effect of disclosure, if any. Is impact ephemeral or long term?		
Describe any impact on government relationship or duty to third party to maintain information in a confidential fashion.		
What factors did the government institution consider in assessing whether s. 20(6) applies?		
Ask for an explanation of the relevance of any non-obvious factors to s. 20(6).		

Statement of Test to be Met
- Weigh the competing third party interest against the public interest - Ensure that the factors taken into account are relevant to s. 20(6) - Assess whether any relevant considerations were omitted

Relevant Questions	Departmental Response	Assessment
Why did the institution decide not to disclose under s. 20(6)?		
Did the institution consider the purpose of the Access to Information Act in its decision? - extend the laws of Canada to provide a right of access to information - government information should be available to the public - necessary exceptions should be limited and specific		
Did the government institution consider: - the value of public education with respect to the subject matter of the information - public confidence in regulatory, enforcement or investigatory systems - need for public awareness of successes or failures of regulatory enforcement or investigatory systems - need for public awareness of legislative or regulatory gaps or inadequacies in the areas of public health, safety, environmental protection?		
Were the interests of all groups interested in disclosure of the information taken into account?		

Statement of Test to be Met
Ensure no irrelevant considerations taken into account

Relevant Questions	Departmental Response	Assessment
Was the government's own performance an issue in the consideration leading to a decision not to apply s. 20(6)?		
Have there been any allegations of impropriety, negligence, cover-up, inefficiency or inadequacy about the government institution arising from the matters described in the records?		

Relevant Questions	Departmental Response	Assessment
Has the institution responded to these allegations? - how?		
Does this information differ in any way from this response?		
Does the information confirm the allegations?		
What is the danger of further disclosure?		
Was the decision not to apply s. 20(6) based in part on a fear of public confusion?		
What would give rise to the confusion?		
Would the institution be able to take measures to avoid confusion? - other disclosure - other explanations - why could no measures be taken		
Could the government institution take measures to reduce or eliminate the dangers? - public relations measures - explanations		
Why could no other measures be taken?		
Could the third party take measures (with respect to s. 20(1)(b) and (d) information that would reduce the impact on them of disclosure? - what measures? - why could no measures be taken?		

Endnotes

1. [1992] 1 F.C. 77; 46 F.T.R. 206 (T.D.). In this case, Mr. Justice Denault stated:

"*With the above in mind, information must clearly fit within and not be exempted by the relevant paragraphs of section 3 of the* ***Privacy Act*** *or subsection 19(2) of the Act before it can be withheld. In fact, subsection 19(1) provides that in such circumstances, it 'shall' be withheld. The Act does not provide for a discretion to release information on the basis of how long ago it was obtained. It does not say that a document ought to be revealed after 30 years or if the applicant has a good reason for requesting the information. The fact that Yardley has been dead now for 35 years and the circumstances of his dismissal almost 50 years ago are simply not relevant to the question of whether personal information concerning individuals other than Yardley should be disclosed unless that individual has been dead for more than twenty years or has consented to the release of the information. I recognize the difficulty that may be presented in attempting to ascertain whether these exceptions apply. However, in my opinion, it would not be sufficient for the head of a government institution to simply state that they are unaware or that they do not know if the exceptions apply. Rather, they should be in a position to state what activities and initiatives were undertaken in this regard*." [Emphasis added].

2 *Ibid*

3. ***Competition Act***, R.S.C. 1985, c. C-34, s. 2(1).

4. *Consumer Packaging and Labelling Act* R.S.C. 1985, c. C-38, s.2.

5. See for example *Air Atonabee v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (F.C.T.D.). See also *Canada Post Corporation v. Minister of Public Works et al.*, (June 3, 1993), no. T-2059-91; confirmed by F.C.A. February 10, 1995), A-372-93.

6. *Société de transport de la Communauté urbaine de Montréal v. Minister of Environment,* [1987] 1 F.C. 610 (T.D.).

7. *Ruby v. Canada (Solicitor General R.C.M.P.)*, [2000] F.C.J. No. 779, June 8, 2000 (F.C.A.).

8. Ibid.

9. *Ibid*

10. [1992] 1 F.C. 77, 46 F.T.R. 206 (T.D.).

Section 21

The Provision:

21(1) *The head of a government institution may refuse to disclose any record requested under this Act that contains*

(a) ***advice or recommendations*** ***developed by or for*** ***a government institution*** *or a minister of the Crown,*

(b) *an* ***account*** *of* ***consultations*** *or* ***deliberations*** *involving* ***officers or employees*** *of a* ***government institution****, a* ***minister*** *of the Crown or the* ***staff of a minister*** *of the Crown,*

(c) ***positions*** *or* ***plans developed for the purpose*** *of* ***negotiations*** ***carried on or to be carried on*** *by or on behalf of the* ***Government of Canada*** *and* ***considerations relating*** *thereto, or*

(d) ***plans*** *relating to the* ***management of personnel*** *or the* ***administration*** *of a government institution that have not yet been put into operation,*

if the record came into existence ***less than twenty years*** *prior to the request.*

21(2) *Subsection (1) does not apply in respect of a record that contains*

(a) *an* ***account of****, or a* ***statement of reasons*** *for, a* ***decision*** *that is made in the* ***exercise of a discretionary power*** *or an* ***adjudicative function*** *and that* ***affects the rights of a person****; or*

(b) *a* ***report*** *prepared by a* ***consultant*** *or an* ***adviser*** *who was not, at the* ***time the report was prepared****, an* ***officer*** *or* ***employee*** *of a* ***government institution*** *or a* ***member*** *of the* ***staff of a*** *minister of the Crown.*

The "Test":

1) **Preliminary matters:**

The **Access to Information Act**, R.S.C. 1985, c.A-1 (the Act) gives any Canadian citizens or permanent resident within the meaning of the **Immigration Act** and any individual or any corporation present in Canada a right of access to most records under the control of the Federal government. More specifically, the Act provides for access to all information in records controlled by government institutions listed in Schedule 1 of the Act unless there is specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the record (or part thereof) are excluded under sections 68 or 69.

Section 21 is a discretionary class exemption. This is a two-step process requiring two distinct determinations by the head of the institution. First, the head of the institution must determine whether the records fall within the class enunciated in the exemption. Second, the head of the institution must also exercise his or her discretion whether to disclose information by determining the consequences or effects to be expected from the disclosure of the requested information considering whether these consequences outweight the public interest in the disclosure of this information.

Burden of proof. When reviewing the application of a discretionary exemption like section 21, it is important to remember that, normally, the government institution has the evidentiary burden of showing not only that the information falls within the scope of the exemption, but that the head properly exercised their discretion in deciding not to disclose the information.

Acknowledging that the head of a government institution has a discretion to disclose records exempted from the right of access by paragraph 21(1)(*a*), in *Canada (Information Commissioner) v. Canada (Minister of Industry)* [2001] F.C.J. 1327, 2001 FCA 254 [F.C.A.] the Court T agreed that section 48 places on the head of the government institution the burden of proving that a record is within an exemption, because, say, it contains advice or recommendations for the purpose of paragraph 21(1)(*a*). On the issue of whether the head of the government institution also has the burden of proving that the decision not to disclose the exempted documents was made lawfully, in the exercise of the statutory discretion, the Court then went on to note that in determining whether a document had properly been withheld pursuant to a permissive exemption, two distinct questions must be answered:

a. did the record fall within the exemption and,

b. if it did, was the discretion to disclose it lawfully exercised?

In that decision, the Court was clear as to the burden of proof. In matters of access to confidential information such as that covered by section 21, the Act puts on the head of a government institution the burden of proving an exemption. This encompasses both

the burden of proving that the conditions of the exemptions were met and that the discretion conferred on the head of a government institution was properly exercised. On the other hand, the Court held, the burden of proof is on an appellant to establish that a Minister failed to exercise his discretion according to law the statutory discretion to disclose the documents containing advice and recommendations within the meaning of paragraph 21(1)(*a*). In other words, once a Minister has discharged the burden of establishing that a document falls within an exemption, the proceeding will be dismissed unless the appellant satisfies the Court that the Minister failed lawfully to exercise the discretion to refuse to disclose an exempted document.

On this latter issue, in the same decision, the Court noted, however, that it could not effectively exercise its statutory function of reviewing refusals to disclose information without some knowledge of the discretionary decision-making process. According to the Court, this concern can be met by imposing on the head of the government institution concerned a legal obligation, as part of the 'duty of fairness', to give reasons for the discretionary refusal to disclose, when reasons are requested and fairness requires that they be given. Without such reasons, the Court added, it would be impossible for a tribunal to effectively discharge its statutory duty to review the legality of the refusal.

Absent such evidence establishing that the institution head considered whether or not to disclose information subject to the discretionary exemption, or if the evidence about why they decided to refuse disclosure indicates that the head relied on irrelevant or unreasonable factors or improper considerations or that the decision is not consistent with the objects of the Act (i.e. that of extending disclosure of government information subject to limited and specific exemptions), then it is open to our office, in the first instance, and then incumbent upon the Federal Court on a subsequent review to question or reject the decision to refuse disclosure.

Competing interests. The investigation of why the institution head exercised his or her discretion to refuse disclosure of information described in section 21 will be, therefore, an important component of any investigation involving section 21. This is because section 21 describes a very broad class of records, limited only by one's imagination, dealing with many aspects of governance as well as the conduct of day-to-day operations by government institutions. In the following decisions, the Federal Court of Canada addressed some of the competing interests behind the section 21 exemption as well as the principles of 'openness and transparency' which is at the very hearth of the **Access to Information Act***:*

- *Cie de Construction Gaston Picard c. Canada*, [1991] F.C.J. No. 20 (F.C.T.D.) Objecting to the filing and inspection of documents, the defendant alleged that the head of a government institution may refuse to disclose certain documents less than twenty years old. However his arguments did not persuade the Court which noted that the purpose of the Act is to extend the laws of Canada to provide a right of access to documents of the federal government in accordance with the principle that government information should be available, within certain

specific and limited exceptions, including those mentioned in subsection 21(1). The purpose of the Act, the Court noted, is not to reduce access to documents requested by one of the parties appearing in this Court solely on the ground that the other party is the federal government. Moreover, subsection 21(1) clearly indicates that refusal to disclose is connected with an application made under this Act.

- *Rubin v. Canada (Canada Mortgage and Housing Corp.)* [1989], 1 F.C. 265 at 274 (F.C.A.) It is incumbent upon the institutional head (or his delegate) to have regard to the policy and object of the **Access to Information Act** when exercising the discretion conferred by Parliament pursuant to the provisions of subsection 21(1). When it is remembered that subsection 4(1) of the Act confers upon every Canadian citizen and permanent resident of Canada a general right to access and that the exemptions to that general rule must be limited and specific, I think it's clear that Parliament intended the exemptions to be interpreted strictly.

- *Canadian Council of Christian Charities v. Canada (Minister of Finance),* [1999] 4 F.C. 245at 260-262 (T.D.) Despite the importance of governmental openness as a safeguard against the abuse of power, and as a necessary condition for democratic accountability, it is equally clear that governments must be allowed a measure of confidentiality in the policy-making process. To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies. It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness. On the other hand, of course, democratic principles require that the public, and this often means the representatives of sectional interests, are enabled to participate as widely as possible in influencing policy development. Without a degree of openness on the part of government about its thinking on public policy issues, and without access to relevant information in the possession of government, the effectiveness of public participation will inevitably be curbed. Since citizen participation is more likely to be effective if it comes early in the policy-making process, subsection 21(1) should not be given a broader interpretation than its wording clearly requires. A central purpose of the **Access to Information Act** is, after all, to enhance the democratic foundations of government, and accountability. It is difficult to avoid the conclusion that the combined effect of paragraphs 21(1)(a) and (b) is to exempt from disclosure under the Act a very wide range of documents generated in the internal policy processes of a government institution. Documents containing information of a

factual or statistical nature, or providing an explanation of the background to a current policy or legislative provision, may not fall within these broad terms. However, most internal documents that analyze a problem, starting with an initial identification of a problem, then canvassing a range of solutions, and ending with specific recommendations for change, are likely to be caught within paragraphs (a) or (b) of subsection 21(1).

A balancing act is required between "the effectiveness of government" and the statutory imperatives of disclosure. Noting that section 21 covers a broad range of documents, the Court indicated also that the head of the institution has the required discretion to decide on the disclosure of documents falling within the description provided in this legislative provision without putting into peril the 'effectiveness of government'.

- *Canadian Council of Christian Charities v. Canada (Minister of Finance),* [1999] 4 F.C. 245 at 257 (T.D.) The Act thus leaves to the heads of government institutions, subject to review and recommendations by the Information Commissioner, the discretion to decide which of the broad range of documents that fall within these paragraphs can be disclosed without damage to the effectiveness of government. There is very little role for the Court in overseeing the exercise of this discretion.

Given the fact that the Court, by its own admission has but a limited role in overseeing the exercise of this discretion, it behoo ves us to investigate comprehensively the manner in which an institution head may have exercised his or her discretion under section 21.

- *Canadian Council of Christian Charities v. Canada (Minister of Finance),* [1999] 4 F.C. 245 at 257 (T.D.) Permissive exemptions such as those contained in paragraphs 18(d), subsection 21(1) and section 23 provide that the head of a government institution may refuse to disclose information of a given description. When reviewing decisions made under permissive provisions, the Court must decide not only whether the information falls within that described in the relevant provision, but also, if it does, whether the head of the government institution lawfully exercised the discretion not to disclose it. When reviewing the exercise of discretion under a permissive exemption the Court is not to decide how it would have exercised the discretion, but merely to review on administrative law grounds the legality of the exercise of that discretion by the Minister, in light of the overall purpose of the statute and of the particular exemption. Accordingly, if the Court concludes that the discretion was exercised unlawfully, the normal remedy will be to remit the matter to the head of the government institution for a re-determination in accordance with the Court's reasons, not an order by the Court that the document be disclosed.

Another line of inquiry in reviewing the exercise of discretion is to determine and assess whether and how damage to the decision-making or government negotiations would result from any disclosure. The Grids section identifies specific lines of inquiry so as to permit such a critical review of discretion. However, the scope of a review of a

discretionary refusal to disclose information could also be obtained by relying on the Court's own guidance as reflected in the following decision:

- *330901 Canada Inc. and Telezone Inc. v. Canada (Minister of Industry)*, [1999] F.C.J. No. 1859 (Q.L.) (F.C.T.D.). The review should consist of looking at the document in question and the surrounding circumstances and to simply consider whether the discretion appears to have been exercised in good faith and for some reason which is rationally connected to the purpose for which the discretion was granted. As such, in the first instance, ask whether it was reasonably open to the head of the institution to exercise his or her discretion to exempt the document from disclosure.

The notes which follow are based to a great extent on the Treasury Board Guidelines but while there are similarities, we differ in substantive respects on the exercise of discretion and on consultations.

2) Paragraph 21(1)(a).

Criteria for application: This exemption is a discretionary class exemption which applies to advice or recommendations in respect of government operations and policy that occur at the ministerial or other sub-Cabinet level. In order to qualify for this exemption, the document, or at least part thereof, must comply with the following criteria:

- Noting that most documents containing information of a factual or statistical nature or providing an explanation on the background to a current policy or legislative provision would NOT fall within the purview of paragraphs 21(1)(a) and (b), the Court in *Canadian Council of Christian Charities v. Canada (Minister of Finance),* [1999] 4 F.C. 245 at 257 (T.D*.)* noted that most internal documents that analyze a problem, starting with an initial identification of a problem, then canvassing a range of solutions, and ending with specific recommendations for change, are likely to be caught within paragraphs 21(1)(a) or (b).

a) <u>The purpose of the communication must be to 'give advice" or 'make a recommendation" to a government institution or a Minister.</u> Subsection 21(1) was not intended to exempt all communications between public servants despite the fact that many of the communications generated by these persons can and often is characterized as advice or recommendations developed by a government institution for a Minister of the Crown. What must be kept in mind is that the purpose of this legislative provision is to protect and shield the "free flow of advice" and "recommendations" within the deliberate process of government decision-making and policy-making, as opposed to the delivery of programs or the conduct of government operations. Of course, the meaning of the words "advice and recommendations" is a question of statutory interpretation that turns on an understanding of the fundamental principles underlying the statutory scheme. The following recent decision by the Federal Court of Appeal provides some guidance:

- **Advice.** On the issue of advice, the Court in *Canada (Information Commissioner) v. Canada (Minister of Industry)* [2001] F.C.J. 1327, 2001 FCA 254 [F.C.A.] noted that by exempting "advice and recommendations" from disclosure, Parliament must have intended the former to have a broader meaning than the latter, otherwise it would be redundant. In addition, the exemption must be interpreted in light of its purpose, namely removing impediments to the free and frank flow of communications within government departments, and ensuring that the decision-making process is not subject to the kind of outside scrutiny that would undermine the ability of government to discharge its essential functions. On the basis of these considerations, the benefit of paragraph 21(1)(*a*) should be reserved for the opinion, policy or normative elements of advice and **should not** be extended to the facts on which it is based. Whenever reasonably practicable, the factual component of advice must be severed under section 25 and disclosed, although advice and facts may be so intertwined as to preclude this.

  a. *Uncommunicated advice.* Paragraph 21(1)(*a*) speaks of advice "developed by or for a government institution or a minister of the Crown" [underlining added]. It follows that a record otherwise falling within the category of "advice", still contains advice even if it was only intended to assist participants in the decision-making process to formulate the advice or recommendations that they would ultimately give to the final decision-maker. These documents form an integral part of the process by which policy advice is developed within an institution. For example, personal notes made by a member in preparation, say, of a meeting and working papers prepared to a meeting which were communicated only to other members of the group for the purpose of providing an update on the progress of the given matter are also within paragraph 21(1)(*a*), which speaks of advice "developed by or for a government institution or a minister of the Crown". According to the court, it follows that a record otherwise falling within the category of "advice" still contains advice even if it was only intended to assist participants in the decision-making process to formulate the advice or recommendations that they would ultimately give to the final decision-maker. Such documents form an integral part of the process by which policy advice is developed.

  b. *Inconclusive advice.* Records identifying for a Minister the most important aspects of a given issue, informing a Minister of issues that require a decision and setting out the options available in making the decision, together with the arguments for and against adopting them are also within paragraph 21(1)(*a*). Similarly, a memorandum to the Minister stating that something needs to be decided, identifying the most salient aspects of an application, or presenting a range of policy options on an issue, implicitly contains the writer's view of what the Minister should do, how the Minister should view the matter, or what are the parameters within which a decision should be made. All are normative in nature and are an integral part of an institutional decision-making process. They do not merely inform the Minister of matters that are largely factual but are an expression of opinion on policy-related matters.

- **Recommendations.** Noting that by exempting "advice and recommendations" from disclosure, Parliament must be taken to have intended the former to have a broader meaning than the latter, otherwise it would be redundant, the Court held that a record providing advice need not urge a specific course of action as this would equate "advice" with "recommendations". By using both words in paragraph 21(1)(*a*), the Court held, that clearly Parliament indicated that records that do not contain "recommendations" may still fall within the exemption. In other words, records which fall within the mischief's at which paragraph 21(1)(*a*) are aimed, namely the danger that disclosure would endanger the unimpeded flow of discussion within government that is essential to effective decision-making, and would erode the ability of government to govern are also covered by subsection 21(1).

Therefore, where information is claimed to be advice and/or recommendations – i.e. words are used in such a way so as to indicate to the reader that the author intended to provide advice or recommendations, you may presume the intention but you still must ask would a '*reasonable person'* i.e. who, in law, connotes a person whose notions and standards of behaviour and responsibility corresponds with those generally obtained among ordinary people in society at the present time and who seldom allows his emotions to overbear his reason and whose habits are moderate and whose disposition is equable. He is NOT the same as the average man, a term which implies an amalgamation of counter-balancing extremes – would reach the conclusion, on a balance of probabilities that the requirements of 21(1)(a) have been met. The bottom line: does the record contain or not contain advice or recommendations or both.

c) The government sometimes suggests that there could be 'implicit' advice contained in records or part thereof:

There is no such notion of 'implicit' advice contained in the Act. So where the department claims it is implicit advice the test is still whether a reasonable person would conclude it is advice! In such circumstances, you should apply a two-fold test, both of which must be met, namely:

i) What was the intention of the author/sender of the information? Is it clear on a balance of probabilities that a reasonable person would conclude:

- that the sender was (in fact) giving advice/making a recommendation; and
- that what (information) constitutes the advice/recommendation is clear:

ii) The recipient would conclude that he/she was being given advice and/or receiving a recommendation

- that the sender was (in fact) giving advice/making a recommendation; and
- that what information constitutes the advice would be clear.

If both parts of this test can't be met, it is not advice etc. within 21(1)*(a)*. We are not saying that only one interpretation of the advice or recommendation must be possible. We recognize that even where it is patently clear/evident that someone is trying to give advice/recommendation we may fail and the advice - because of its wording may be ambiguous/unclear BUT there should be no doubt in your mind that it is advice/recommendation before you support its exemption under 21(1)*(a)*. If it is equally possible that the person may or may not be giving advice then the burden in section 48 has not been met.

It must be established that the disclosure of the information would result in injury to the deliberative process of the government.[1] While we may not agree with the decision of the head of the government institution, if we are satisfied with the factors which the head took into consideration - i.e., the basis upon which the discretion was taken by the head of the institution, it must be accepted as valid. However, in the absence of any prejudice whatsoever to the deliberative process of the government, the information should be disclosed.

iii) The exemption provided by this paragraph applies to advice and recommendations developed:

- by a government institution - i.e., by officials of a Schedule I institution;
- by a Minister of the Crown or by his staff;
- for a government institution (in Schedule I);
- for a Minister - i.e., by his staff or officials.

Note, it is our policy that the advice/recommendation must come from within and that it cannot be formulated from outside the government. In that regard, see para 21(2)*(b)* below.

iv) Examples of documents that constitutes advice or a recommendation:

- If the content of a document is exclusively objective and factual, it is not an advice or a recommendation. However, any <u>subjective</u> notes <u>can</u> be considered as advice if they constitute the opinion of the author and constitute a submission as to a future course of action.[2]

- A letter of reference is an advice or recommendation because it is essentially subjective[3] because it is expressing an opinion about an individual and recommending that person for a position.

- The circumstances might indicate whether a document constitutes advice: *in Couto et al. c. Ville de Longueuil*[4], the issue was whether a police report which indicated the probable cause of an incident constituted advice or a recommendation. In that case, the Quebec Commission decided that such a report was in fact covered by the exception since it was made in order to influence the Head of Operations - i.e., in making a decision whether to lay a charge.

v) Examples of documents that do not constitute advice or a recommendation:

- The report of an investigator setting out the causes of a blaze which contains only factual and technical conclusions and which cannot be separated from the investigator's personal observations do not constitute advice or recommendation.[5]

- The criteria used by the inspector to arrive at an opinion as to the nature of the blaze doesn't qualify either as advice or recommendation. They are facts more than opinions.[6]

- Similarly, a mere subjective conclusion does not constitute advice or a recommendation because it does not constitute a submission as to a future course of action.[7]

- The observations of a member of a selection committee which pertain to a person who filed a job application do not constitute advice or recommendation since they are merely factual conclusions. However, the judgement made about the value of the candidate (and whether he/she should be hired) constitutes advice.[8]

- The decision based on the advice or recommendation is not exemptible under this provision[9]. The decisions taken at a meeting are neither advice nor a recommendation. Moreover if the advice is incorporated into the decision, it is not exemptible under 21(1)*(a)*.

- Input to the government by members of the public on issues canvassed by the focus group session, although arguably helpful in the formulation of government policy, does not constitute advice or recommendations for the purpose of section 13(1).[10] In addition, the work of a polling firm in summarizing, analyzing and interpreting the results of these focus group sessions did not constitute advice or recommendations. In order to come within the scope of section 13, the consultant would have to take the extra step of applying that analysis in the form of actual advice, recommendations or suggested courses of action to be taken by the client Ministry.

- A medical diagnosis is not advice or a recommendation because the information which constitutes the diagnosis is not distinguishable from the medical observation itself.[11] However, the medico-administrative recommendation (recommended treatment) that the physician makes following the diagnosis and which invites the government institution to make decisions regarding the patient is advice or a recommendation[12].

- In fields other than medicine the same can be said about comments made by experts. Therefore, a report which determines whether financial statements of an institution are accurate is not advice or a recommendation since its aim is not to

help a person to take a decision.[13] However, solutions suggested in the report are considered as advice or recommendations.[14]

- Finally, the Commission d'accès in *Deslauriers c. Sous-ministre de la Santé et des Services sociaux du Québec*,[15] gave further indication as to what doesn't constitute an advice or a recommendation:

  — a classification of the information;
  — a conclusion subsequent to a simple analysis of factual background information;
  — an observation or remark that does not contain enough substance or precise indication to have any influence
  — factual statements
  — observations
  — personal observations
  — a hypothesis or a question.

3) Paragraph 21(1)*(b)*

- **Criteria for application:** This exemption is a discretionary class test which applies to accounts of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown, or the staff of a Minister of the Crown. In order to qualify for exemption, the record must comply with the following criteria:

a) A government institution must be involved: To that effect, section 3 of the Act defines '*government institution*' as:

- "*Any department or ministry of state of the Government of Canada listed in Schedule I or any body or office listed in Schedule I*".

In order that this criteria be complied with, it is sufficient that one government institution be involved. It does not require that the department/ institution claiming the exemption be involved.

b) Government people must be involved:

Minister of the Crown or members of the minister's staff or officers or employees of a government institution must be actively involved in the actual consultations or deliberations in order to trigger paragraph 21(1)*(b)*. They must participate in the consultations or deliberations, not simply report or observe the consultations or deliberations between two or more persons who are not officers or employees, Ministers of the Crown or Minister's staff members of a government institution as defined in the Act.

c) There must be an account of consultations or deliberations:[16]

The minutes of a meeting which record only the decisions taken at the meeting are not exemptible under 21(1)*(b)* because they are the result of deliberation.

In *Rubin v. Canada Mortgage and Housing Corporation*, [1989] 1 F.C. 265 (C.A.), the Federal Court of Appeal did not accept that the minutes of meetings of the board of directors and executive committee of CMHC were necessarily exempted in their totality under the 21(1)*(b)* exemption. Consequently, it referred the request for such minutes back to the agency with the message that the minutes be reviewed in detail and suggested that some parts could have been properly treated as subject to disclosure.

This exemption in paragraph 21(1)*(b)* does not apply to pure facts, the questions/topics under which the consultations/deliberations arose, or to decisions taken from such consultations/deliberations. In summary, this exemption would not include any material not entailing an exchange of views.[17]

d) The consultations or deliberations must involve at least two or more of the following persons:

- officials or employees of a government institution;
- a Minister; or
- the staff of a Minister.

It would not be logical if an advice/recommendation formulated by a person from outside the government cannot be exempted pursuant to paragraph 21(1)*(a)*, but could be exempted under paragraph 21(1)*(b)* if it was formulated during the course of consultations/deliberations in which government officials were present.[18] The purpose of *(b)* is to permit accounts of consultations between government people to be exempted where to do otherwise would impair the ability of the government to operate.

e) The disclosure of the information must result in injury to the deliberative process of the government.

4) Paragraph 21(1)*(c)*:

- **Criteria for application:** This exemption is a discretionary class exemption which applies to positions or plans developed for the purpose of negotiations carried on by or on behalf of the Government of Canada and considerations relating thereto.

The purpose of this provision is to protect strategies and tactics prepared by or for government institutions for the purpose of negotiations. Given this purpose, the meaning of the terms '*positions*' and '*plans*' should not present any difficulty.

One should note that the positions or plans developed for the purpose of negotiations will be protected only where the negotiations have been carried on or will be carried on. Positions and plans developed for negotiations which are not scheduled but only remotely possible or which have been abandoned in their entirety could not be protected (although they might qualify for exemption pursuant to sections 14 or 15).

It should also be noted that paragraph 21(1)*(c)* extends its protection beyond positions and plans to "*considerations relating thereto*". The term '*considerations*' could be best defined in accordance with the *Webster New Collegiate Dictionary*, ninth edition, to mean: "*a matter weighed or taken into account when formulating an opinion or plan*". Thus, a record identifying the facts and circumstances or the factors taken into account when formulating plans and positions would also fall within the scope of this provision. The considerations must relate directly to the positions or plans.

5) Paragraph 21(1)*(d)*:

- **Criteria for application:** This exemption is a discretionary class exemption which applies to plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation. It's purpose is to protect plans relating to the internal management of any government institution listed in Schedule I. For example, it would protect plans to abolish positions, to do away with a program or to implement new programs. Other examples: plans for the full-scale re-organization of a government department or part thereof or the reclassification of several public service positions; plans to relocate a given federal institution into a new geographical locale; plans for the restructuration of a given government program (Civilian Reduction Programme); the amalgamation of two sister organizations into a whole; or, the transfer of a given established and funded programme from one department to another.

It should be noted, however, that the protection afforded such plans extends only to the point where they have been started to be implemented. Generally speaking implementation has started once formal approval has been given by the final authority and any notice has been given about the contents of the plan or their implementation.

6) Subsection 21(2):

Subsection 21(2) identifies two situations where the exemptions provided by subsection 21(1) cannot be claimed.

a) The first is set out in paragraph 21(2)*(a)* which prevents the application of subsection 21(1) to:

- "*an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person*".

The business of government is very broad and affects many people in many ways. While the amount government regulates is on the decline, there are still thousands of decisions made every year that affect the rights of everyone.

The purpose of this provision is to ensure that the text of certain decisions and reasons are available to the public. However, it is clear from the Federal Court decision *Information Commissioner of Canada v. Chairman of the C.R.T.C.* [1986] 3 F.C. 413 (T.D.) that preparatory notes and other internal communications leading to a final decision are unaffected by paragraph 21(2)*(a)* where the actual decision and the reasons for that decision have already been made public.

Paragraph 21(2)*(a)* does not apply to all types of decisions. It is clear from the wording of this provision that only two types of decisions are affected - those made in the exercise of either a discretionary power or an adjudicative power and then only where the decision affects the rights of a person (this includes partnerships and corporations).

A '*person*' includes a limited corporation, a partnership or an association. It is not restricted to individuals.

The following summarizes the application of the override:

- The exception applies only to "*an account of, or statement of reasons for a decision...*". Therefore, the background documents or advice/recommendations leading to the decision may normally be exempted under subsection 21(1). An exception to this would be where the decision-maker incorporates the advice into the decision. For example, where the decision-maker writes '*I concur*' or '*I approve*', on the page containing the advice, the advice becomes the decision and must be disclosed.

- For the exemption to apply, the discretionary power/adjudicative function must affect the rights of a person. The decision must therefore be binding in the sense of having some legal effect - i.e., a decision refusing to issue a permit - to that person. This point was emphasized by the Federal Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of Industry)* [2001] F.C.J. 1327, 2001 FCA [F.C.A.], paragraph 21(2)(a) excludes from the exemptions in subsection (1) "an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power . . . and that affects the rights of a person." The word "rights" in paragraph 21(2)(a) means "legal rights." Further, the Black's Law Dictionary defines 'legal right' as 1. a right created or recognized by law 2. A right historically recognized by common-law courts.

- As a general rule, if a decision affects the rights of an individual, the rule *audi alteram partem* applies. According to this rule, the person making the decision must '*hear the other side*'. Nevertheless, this presumption should not be taken too rigorously; very often decisions are made by infringing upon the rules of natural justice. However, you should look to see if the affected person was given

an opportunity to be heard. If the answer is yes, the rights of the person were probably affected by the decision.

- The exemption covers judicial (adjudicative power + affects the rights of an individual) or quasi-judicial (i.e., recommendation that is not made based upon the law or regulations but affects the rights of a person).

- One simplistic way to describe the exception would be: an account or statements of a judicial or quasi-judicial decision. Did someone have the authority to make a decision about someone, or to permit/ refuse someone permission to do something?

b) The second situation in which the exemption provided by subsection 21(1) cannot be claimed is set out in paragraph 21(2)(b) which prevents the application of subsection 21(1) to:

- "*A report prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a Minister of the Crown.*"

The following summarizes the application of the override:

i) The information must be a report:

While the term '*report*' is not defined in the Act and there is no jurisprudence on the issue, as Mr. Justice Rothstein explained in *Canada Post Corporation v. Minister of Public Works* et al., [1993] 3 F.C. 320 (T.D.); confirmed F.C.A. (February 10, 1995), A-372-93, dictionary definitions can be considered in determining the meaning of a provision when the suggested meaning in the dictionary is consistent with the purpose of the Act.

This term is defined as follows in the *Concise Oxford Dictionary*, 8th ed. (Oxford University Press, 1991):

- **Report:** "*2 an account given or opinion formally expressed after investigation or consideration*"

The term '*report*' should be given a wide interpretation to be consistent with the purpose of the Act. It could include almost any advice, recommendation or deliberation (i.e., oral or written) made by a consultant or adviser.

ii) The report must have been prepared by a consultant or an adviser:

These terms are defined as follows in the *Concise Oxford Dictionary*:

- **Consultant:** "*A person providing professional advice etc., esp. for a fee.*"
- **Adviser:** "*A person who advises, esp. one appointed to do so and regularly consulted.*"

In trying to determine whether we have an adviser or a consultant, we must look as to whether the person had a mandate to formulate his/her opinion (i.e., was solicited by the department), whether the person had the ability/experience to formulate an opinion; and whether there was some consideration (compensation paid) for the opinion provided.

There is significant commonality between a lobbyist and a consultant. The same individual can be both a lobbyist and a consultant at the same time. For example, Mr. X is hired as a consultant by a pharmaceutical firm to lobby a government institution. From the perspective of the commercial firm, Mr. X is a consultant proffering advice as to how best to meet a given objective and is, in turn, hired to bring about the desired results by communicating with the appropriate government officials. In accordance with section 5 of the **Lobbyist Registration Act**, Mr. X would qualify as a lobbyist.

Lobbyist Registration Act, R.S., 1985, c. 44 (4th Supp.)

5. Consultant-Lobbyist - Every individual who, for payment, on behalf of any person or organization (in this section referred to as the "client"), undertakes to

(*a*) communicate with a public office holder in an attempt to influence

(i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,

(ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,

(iii) the making or amendment of any regulation as defined in subsection 2(1) of the **Statutory Instruments Act**,

(iv) the development or amendment of any policy or program of the Government of Canada,

(v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or

(vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada, or

(*b*) arrange a meeting between a public office holder and any other person

iii) The adviser was not at the time an officer or employee of a government institution:

When assessing this question, you can ask yourself questions such as: How was the consultant nominated to make the report? How was he paid?, etc.

In order to find the right interpretation of section 21, we must bear in mind the overall scheme of the Act. That scheme creates a specific right of access to records subject to exemptions which protect three specific outside interests. Information the government receives from other governments is protected under section 13. Information the government gets from individuals is protected under section 19. Similarly, information the government gets from all other third parties is protected if it fits within the provisions of section 20. These then are the only sources of information that are truly outside the government.

When the government obtains advice from another government, it is either protectable under section 13, or if it isn't, the government will not obtain that type of advice any more, at least not in the unprotectable mode or format. Similarly, outside advice received from individuals is clearly a matter of personal opinion and protectable under section 19. The same applies to third parties if the information falls under section 20. The advice and recommendations received from anywhere within the government comes from section 21 -- which is the section that deals with government operations.

CASE LAW

Subsection 21(1) generally

Information Commissioner of Canada v. Canada (Minister of Environment), 2006 FC 1235: In accordance with the Court of Appeal's judgment dated February 7, 2003, the Clerk reassessed four documents originally identified as responsive to Ethyl's request and severed the portions falling within the scope of the exception defined in paragraph 69(3)(b). The Clerk concluded that the Analysis Section constituted a "discussion paper" within the meaning of paragraph 39(4)(b) of the *Canada Evidence Act* and therefore did not warrant protection as a Cabinet Confidence. Paragraph 39(4)(b), which is set out in Appendix "C" to these Reasons, is identical to paragraph 69(3)(b) of the *Access Act*. Further to the Court of Appeal's judgment, the Minister was given an opportunity to claim exemptions applicable to the Analysis Section. The department claimed exemption under paragraphs 21(1) a) and b). The Commissioner disagreed with this interpretation and asked the Court to interpret the *Access Act* in such a way as to prevent the exemption under subsection 21(1) of any records within the scope of subsection 69(3).

The Court disagreed with this interpretation. According to the Court, the specific exemption under subsection 21(1) of "advice and recommendations" and "accounts of consultations or deliberations" is distinct from the terminology found in paragraph 69(3)(b): "discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions". It follows that, whatever

Parliament's intention was in respect of discussion papers, the intention as expressed in subsection 21(1) is that the Minister has discretion to refuse to disclose records containing information described in that subsection. Parliament did not intend these provisions to be applied such that records within the scope of the latter are necessarily excluded from the former. While the possibility for overlap exists, nothing inherent in these provisions requires it.

Subsection 21(1)a)

Information Commissioner of Canada v. Canada (Minister of Environment), 2006 FC 1235: As to the claim of exemption under paragraph 21(1) a), the Court found that some sentences exempted under 21(1) a) contained purely factual information and, therefore, were not subject to paragraph 21(1)(a). Accordingly, the Court found that paragraph 21(1)(a) applies in respect of the opinion expressed in the first 15 words in the second sentence but not in respect of the factual information provided in the remaining 18 words.

Subsection 21(1)b)

Information Commissioner of Canada v. Canada (Minister of Environment), 2006 FC 1235: As to the claim for exemption under paragraph 21(1) b), the Court found that the terms "account", "consultation" and "deliberations" should be given their ordinary and usual meaning as reflected in the Treasury Board Manual. Accordingly, portions of the Disputed Passages contains largely factual information are not exempt under paragraph 21(1)b).

Newfoundland Power Inc. v. Canada (Minister of National Revenue), 2002 FCT 692: In this case, the Court held:

> «I consider that the analysis of various strategic or legal alternatives, and any recommendation made by managers or employees of the defendant regarding the position the latter should take on a taxpayer's notice of objection, are clearly covered by paragraph 21(1)(b) of the Act.»

Subsection 21(2)

Canada (Information Commissioner) v. Ponts Jacques Cartier et Champlain Inc. (2000), 8 C.P.R. (4th) 536 (F.C.T.D.) In this instance, the outside firm had completed its work and had presented its recommendations in the form of a report. The Court was not convinced that the internal audit report in question was a plan nor was it an initial draft of work. Even if the corporation plans to put it into operation at some later stage, the Court was of the opinion that this did not alter the fact that it was a report, as its name clearly indicated. Subsection 21(2) is clear, the Court emphasized. It indicates that only reports prepared by an adviser or consultant who is an officer or employee of a government institution or a member of the minister's staff is excluded. In the case at bar, the Report was prepared by a private firm and thus it escapes the application of subsection 21(1).

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The Questions

Section -- 21(1)&(2)
Statement of Test to be Met
Exemption: 21(1) The head of a government institution may refuse to disclose any record requested under this Act that contains: (a) advice or recommendations developed by or for a government institution or a minister of the Crown, (b) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown, (c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or (d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation, if the record came into existence less than twenty years prior to the request. 21(2) Subsection (1) does not apply in respect of a record that contains (a) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or (b) a report prepared by a consultant or an adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a minister of the Crown.

Relevant Questions	Departmental Response	Assessment
Inquiry Path		
1. Check age of record against 20 year time limit in section 21(1).		
2. Determine first whether section 21(2)(a) or (b) applies - If so, section 21(1) exemption does not apply.		
3. If not, determine whether record is described by section 21(1)(a)-(d).		

Relevant Questions	Departmental Response	Assessment
4. If so, using the "reasonable person" standard, then determine whether the exercise of discretion by the government institution refusing disclosure is justified.		

Section -- 21(1)

21(1) The head of a government institution may refuse to disclose any record requested under this Act that contains: […]

- If the record came into existence less than twenty years prior to the request.

Statement of Test to be Met

Record must have been created less than 20 years prior to the request

Relevant Questions	Departmental Response	Assessment
When was the record first created (there might be an earlier version of the record in the form of a first or subsequent edition) - assess this against date of request.		
If 20-year date is close, ask what the continuing need is for protection of the information from disclosure. - see exercise of discretion sections below.		
If 20 year mark has passed since the date of the request, ask why department could not exercise its discretion in favour of disclosure in such circumstances.		

Section -- 21(1)

21(1) The head of a government institution may refuse to disclose any record requested under the Act that contains

(a) advice or recommendations developed by or for a government institution or a minister of the Crown,

Statement of Test to be Met

Advice or recommendations

- the advice requires a suggested course of action or decision to be taken.
- implicit advice recommendations would qualify accepted if they suggest a discernible course of action.
- record contains a suggested course of action which will ultimately be accepted or rejected by the government institution/minister.

Relevant Questions	Departmental Response	Assessment
What does the record describe?		
Does it consist of a briefing note or other document destined for senior officials (senior management level) or the Minister?		
If not, did the author intend to be conveying advice or recommendations through the recipients of the memo?		
Look at paragraph 21(1)(b).		
Was the briefing or memorandum requested by the Minister or a senior official?		
If it was not requested, are such briefings or memoranda initiated in the normal course of departmental operations?		
What is the purpose of the memorandum or briefing note, aide-mémoire, analysis, briefing deck or book?		
Is the purpose to provide advice or recommendations to senior officials or Ministers?		
Does the record contain a suggested course of action and/or alternatives for the senior official or Minister to follow?		
Does the record contain a suggested decision which the		

Relevant Questions	Departmental Response	Assessment
senior official or Minister should make? - what does this consist of?		
Does the record make suggestions about policy initiatives? - what do these consist of?		
Does the record make suggestions or provide options about responses the officials or a Minister could give with respect to a particular issue or matter of concern?		
What response or steps are suggested?		
Was the record first generated outside of the department or government institution? - if so, does subsection 21(2) apply?		
Was the outside author providing the memo or report pursuant to a statutory provision?		
Look for statutory provisions requiring supervision of departmental operations by outside bodies and recommendations by outside bodies concerning departmental operations.		
Is the government institution or Minister free to accept or reject the suggested course of action or suggested change or decision or is it a “fait accompli” and pre-ordained or pre-determined? - if so, what has the Minister or senior official done in response? - has a decision been taken or implemented? - was this decision similar to the advice given or recommendation made? - if so, has the head of the institution considered disclosing the advice (see section on discretion below)? - if not, would any harm result if the advice was disclosed (see section on discretion below)?		

Statement of Test to be Met
Does not include...

Relevant Questions	Departmental Response	Assessment
Does the record consist of <u>factual</u> observations, analysis or conclusions? - if so, does the record go on to make recommendations or give advice based on the factual observations, analysis or conclusions? - have the factual observations, analysis or conclusions been severed and disclosed?		
Is the advice or recommendation intertwined with the factual observations or analysis? - can they be separated?		
Does the record consist of procedures, guidelines, criteria, or manuals interpreting or applying ules/regulations/policies, i.e., Treasury Board Guidelines, Justice manuals, other manuals on regulatory activity (health protection, food and drug, transport, agriculture, pesticides, environment)?		
If so, does the record go on to deal with any specific issues or give advice on particular matters? - if not, paragraph 21(1)(a) likely does not apply		
Have the subject headings been severed?		
Does the record contain statements of issues which present controversy or require decision/action by the Minister/senior officials? - if so, have descriptions of the issues requiring decisions been severed and disclosed? - if not, does the description of the issue contain advice or recommendations on how to handle the issue? - indicate where this is.		
Does the record contain observations about departmental operations or issues relevant to the government institution?		
If so, does this observation also contain advice or recommendations?		
Is the purpose of providing the observation to inform the Minister rather than to provide advice or recommendations about follow-up action by the Minister? - if so, paragraph 21(1)(a) likely does not apply		

Statement of Test to be Met

Developed by or for a government institution
- advocacy or lobbying by outside groups is not included
- does not include representations or submissions as to a course of action

NOTE: Lobbying is defined in Lobbyist Registration Act

Does not include requests for a particular course of action
- oral advice by outside groups included only if solicited by institution
- advice must be directed to the Minister/ official's interests and not political inclinations

Relevant Questions	Departmental Response	Assessment
Who prepared the record?		
Did a member of the government institution prepare the record?		
If not, did another government institution prepare the record? - if so, what was the mandate of that government institution to provide advice or recommendations to the Minister or officials of the recipient government institution?		
Was the record prepared by an individual or group outside of the government? - Does paragraph 21(2)(b) apply?		
If a group outside the government prepared the document, for what purpose was it given or provided to the government institution?		
Did the group who prepared the document have a particular position which they advocated or advanced to the government institution?		
Does the record reflect a lobbying effort by an outside group? By a registered lobbyist?		
Does the record reflect requests for action on a particular matter by an outside group?		
Has the government institution requested the outside group to provide advice?		

Relevant Questions	Departmental Response	Assessment
Has the government institution requested representations, as opposed to advice, from outside groups?		
Does paragraph 21(1)(b) apply in this situation?		
Does the record reflect representations or submissions to the government institution as to a particular course of action as opposed to advice or recommendations?		
Did the group who prepared the record prepare it for purposes of the group or for the government institution?		
If it is claimed that the outside group was providing advice to the Minister, did the Minister request this advice?		
For what reason(s) would advice not requested by the Minister be expected or accepted by the Minister in the ordinary course of policy or legislative development?		
Is there an established relationship between the Minister and the group that would mandate such advice being given? - i.e., Minister of Justice and CBA committee on judicial appointments - i.e., Minister of Transport and physicians advisory groups on medical fitness of pilots - Bureau of Biologics at Health Canada and outside experts on immunization - Prime Minister and Round Table on the Economy - Advisory Group on Gender Integration - Conference of Defence Associations		
Can the purpose of the document be described more as giving advice than as presenting the position of an interested person's stakeholder?		
See discussion on relevant factors for the exercise of discretion below.		

Paragraph -- 21(1)(b)

The head of a government institution may refuse to disclose any record requested under this Act that contains:

(b) an account of consultations or deliberations involving officers or employees of a government institution, a minister of the Crown or the staff of a minister of the Crown.

Statement of Test to be Met

'Consultations' (see endnote 19) involves seeking advice, instruction or opinion for guidance in decision-making principally
- internal

Relevant Questions	Departmental Response	Assessment
Does the record describe consultations?		
Does it reflect advice or opinions given to a Minister/ government institution for guidance in decision making?		
Did the government institution/Minister seek such advice, instruction or opinion?		
Was the institution/Minister seeking consultations for assistance in its own decision-making?		
What was the government deciding the issue upon?		
Why were consultations undertaken?		
Was the purpose of the consultations more to seek the representations/positions of outside groups as opposed to their advice, instruction or opinion or guidance?		
See above at paragraph 21(1)(a) for questions relating to advice and recommendations.		
If consultations were with groups internal to the government, was a joint decision or joint jurisdiction between the institutions involved?		
If not, why was the other government institution being consulted?		
Would the decision under consideration have a direct impact on the other government institution?		

Relevant Questions	Departmental Response	Assessment
Was the decision-maker seeking opinion or guidance from the other government institution?		
Was the decision-maker simply receiving factual input, without advice, instruction or opinion/guidance from the other institution?		
What course of action is identified as being given through the consultations with the other institution?		

Statement of Test to be Met

Deliberations involve an exchange of views with a goal of reaching a decision or agreed position, course of action

Relevant Questions	Departmental Response	Assessment
Does the record describe deliberations with another body or persons?		
Was the government institution seeking to exchange views or test options on a particular matter with the other participants?		
Was the government institution planning to jointly reach a decision or agreed position/course of action with the other participants?		
What prior status did the other participants have to be engaging in joint discussions/decision making with the government institution? - See above for questions about consultations with other government institutions. - See above at section 21(1)(a) for questions with respect to positions of outside bodies with whom the government may be consulting.		
Was the government institution soliciting guidance or joint decision-making?		
Would the views being conveyed to the government institution be provided in the normal course of the operations of another department or of officials within the government institution?		

Relevant Questions	Departmental Response	Assessment
If the input from outside the government institution was not directly solicited, is there a past relationship giving rise to an understanding that the views would be taken into account?		
How often has the other institution provided input on these matters before?		
What decision or potential course of action can be identified from the record?		

Statement of Test to be Met

- Must involve officers/employees of a government institution/Minister

Relevant Questions	Departmental Response	Assessment
Were officers or employees of the government institution involved in the consultations/deliberations? - in what way?		
Did their involvement include participation and contribution to the discussions?		
If not, was the purpose of the attending officials merely to facilitate, exchange, observe or to note the views of those expressing them? - if so, what is the basis for the institution's claim that consultations or deliberations were taking place?		
In what way did the government employees contribute to the consultations or deliberations?		
At whose instance were the consultations or deliberations initiated?		
If they were initiated by the government institution, was it for the purpose of seeking guidance, assistance or consensus in decision making (see above for questions on this topic)?		
Does the record simply report on consultations undertaken by others?		
What role did the government have in those consultations and deliberations, if any?		

Relevant Questions	Departmental Response	Assessment
If government had no role, paragraph 21(1)(b) likely does not apply.		

Statement of Test to be Met

- Decisions recorded as part of the deliberations is not exempt.

Relevant Questions	Departmental Response	Assessment
Was a decision taken in the course of the consultations or deliberations?		
Does the record record such a decision?		
Has the decision been severed and disclosed?		
Are there relevant parts of the record describing deliberations or consultations which are necessary in order to describe the decision taken? - if so, have these been severed and disclosed?		
If a decision has been taken, what harm would be created by disclosing the account of consultations or deliberations now (see discussion on discretionary exemption below)?		

Statement of Test to be Met

Discretionary Exemption institution must consider disclosing
- assess public interest in subject matter against any harm of disclosure

Relevant Questions	Departmental Response	Assessment
Has the head of the government institution considered disclosing the document? Has the head considered both the pros and cons?		
If so, what was the basis for refusing to disclose the document?		
What interference in the decision making process would be created if the information was disclosed?		

Relevant Questions	Departmental Response	Assessment
Has a decision been taken with respect to the subject matter of the record?		
If so, why would disclosure of the advice, recommendations, consultations or deliberations behind it create harm?		
Would there be on going interference in the decision making process?		
What does this interference consist of?		
Is there an on-going review or appeal from the decision taken?		
What status does this appeal or review have?		
Would disclosure impair the government's ability to maintain the course of action decided upon?		
Has the course of action been implemented through regulations or legislation?		
At what stage are the regulations or legislation?		
Would disclosure compromise enacting the proposed regulations or legislation?		
If the decision is still under consideration, what harm would result from disclosing the advice, recommendations, consultations or deliberations received? Would disclosure enlighten or value-add to the quality of the public debate?		
Is there significant public discussion about the issues under consideration?		
Are there competing interests in favour of or opposing a course of action? - assist in providing balance to the public debate? - would disclosure accentuate this situation? - are the positions of the players well-known or public?		
How would disclosure impair the government's decision making ability?		
Is a decision by the government imminent - if so, when is it expected?		
Will disclosure be made after the decision is taken?		

Relevant Questions	Departmental Response	Assessment
If a decision is not imminent, what harm would disclosure of current advice or recommendations create?		
Would disclosure interfere with consideration of the issue by other decision making bodies? - i.e., the cabinet, parliamentary committees, independent tribunals, courts.		
Would disclosure make future advice less candid? - why?		
Is the person or organization providing the advice/ deliberations independent of the recipient?		
- if so, how would disclosure impair or prevent future advice from this source?		
Is the person providing the advice/recommendations required to do so by statute? - if so, how would disclosure impair or prevent future advice from being given?		
Are the consultations undertaken mandatory? - i.e., Citizen's Code for proposed regulations - Statutory Instruments Act - statute requiring consultation and receipt of representations from interested persons		
If so, why would disclosure prevent or impair future consultations?		
How old is the record?		
Does the 20-year limitation apply?		
If the record does not involve a current issue, why would disclosure impair future decision-making in this area?		
If the record reflects a matter upon which a decision has already been made, is the decision itself public?		
Why would disclosure impair the ability of the government to maintain the decision?		
What is the subject matter of the decision?		
Does it involve a routine, procedural, administrative or technical matter?		
If so, why is protection of the record required?		

Relevant Questions	Departmental Response	Assessment
Has the head of the institution considered whether there is value in exposing the decision-making process through scrutiny through disclosure of the advice/deliberations?		
Has the head of the institution considered the benefits of informing the public on considerations behind major or new policy initiatives?		
How much of the information described in the record has been publicly discussed?		
Would disclosure promote more public debate or analysis on an unresolved issue?		
Is the subject matter of the deliberations or advice of public importance?		
Are there compelling reasons (i.e., public safety, rehabilitation of individuals, compassion, prevention of future harm, public awareness of health, environmental, safety, security, fiscal matters adding to the sophistication of the electorate) that would be served by its disclosure?		
Would disclosure increase public confidence in the substantive decision or process behind the decision?		
Would disclosure present an unfair picture of the decision making process? - if so, can this be ameliorated with an explanatory note?		
Would disclosure unfairly expose individuals to public scrutiny? - i.e., individuals who are now potentially subject to criminal charges - identify individuals pending disposition of criminal charges against them		
Disclosure of highly sensitive personal issues (see section 19)		

Paragraph -- 21(1)(c)

The head of a government institution may refuse to disclose any record requested under this Act that contains

(c) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or

Statement of Test to be Met

- Related to sections 14 and 15
- Protects positions, plans, considerations relating thereto

Relevant Questions	Departmental Response	Assessment
Have sections 14 or 15 been claimed to exempt the records from disclosure? - if so, why is paragraph 21(1)(c) needed? - is it because the injury test in sections 14 and 15 could not been met? - if so, what harm would result from disclosure under section 21? (See exercise of discretion discussion below)		
Does the record consist of information used during the course of negotiations?		
Does it outline positions or plans for the use of negotiators?		
Were the positions or plans implemented during the negotiations?		
Could these positions or plans still be implemented in the future?		
Does the information outline factors taken into account in developing positions and plans for the negotiations?		
What are these factors?		
How do they relate to the positions or plans?		
Do they indicate when the position or plans would be used?		
Do they outline the strategic reasons for developing certain plans or positions?		
Does the record consist of factual analysis about issues relating to the negotiations?		

Relevant Questions	Departmental Response	Assessment
Is this factual analysis known publicly?		
How would disclosure of the factual analysis reveal what a position or plan with respect to the negotiations is?		
How would revealing that the government has considered the factual analysis impact on the government's position in the negotiations?		
Is the analysis or information directly relevant to on-going negotiations? - if not, how does the information relate to the negotiations? - if of little relevance or importance, see section on exercise of discretion below.		

Statement of Test to be Met

Negotiations must involve the government and an outside party

Relevant Questions	Departmental Response	Assessment
Who is involved in the negotiations?		
Is the Government of Canada a party to the negotiations?		
Are the negotiations being conducted within the government? - if so, paragraph 21(1)(c) does not apply		
What is the government's role in the negotiations?		
Is the government negotiating with the other parties, or is it an observer to do the negotiations?		
If the government has only a tangential role in the negotiations, what is the need for protection of the information? - does some other exemption more properly apply (sections 18 or 20)?		
Negotiations in which the government is not a party are not exempt under paragraph 21(1)(c).		

Relevant Questions	Departmental Response	Assessment
See below for section on exercise of discretion under paragraphs 21(1)(c) and (d).		

Section -- 21(1)(d)

The head of a government institution may refuse to disclose any record requested under this Act that contains

(d) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation

Statement of Test to be Met

Must involve a government institution - Schedule I, Access to Information Act

Relevant Questions	Departmental Response	Assessment
Does the record reveal plans regarding a government institution?		
Is the institution listed in Schedule I to the Access to Information Act? - if not, paragraph 21(1)(d) does not apply		
Does the record relate to plans regarding personnel or the administration of a government institution? - could include plans regarding down-sizing, program elimination, privatization of existing functions, creation of new programs, re-organizations, funding, relocations, technological substitution, etc.		
Does the record involve departmental operations, as opposed to their management or administration?		
<u>Operations do not qualify under paragraph 21(1)(d).</u>		
Does the record relate to deployment or reclassification of staff or programs within the department?		
Does the record consist of budgetary plans for personnel or areas within the department?		
What is the status of the plans? - when is it expected the plans will be implemented?		

Relevant Questions	Departmental Response	Assessment
Has any portion of the plan been implemented? - to what extent has the entire plan been implemented?		
Have the portions which have not been implemented been made public internally? To PSAC or PIPS or to the National Council?		
Have the plans received approval of the government institution or the Treasury Board Secretariat? - when is such approval being sought or expected? - has any notice been given to employees? - has notice of future phases been given to employees? - if the plans have not been implemented, how long ago were they developed?		
Is there an intention to implement them at any point in time?		
If the plans have been discarded or not implemented, why is it necessary to protect them from disclosure? - note Treasury Board Guidelines suggest discretion should be exercised in favour of disclosure - see factors relevant to exercise of discretion in paragraphs 21(1)(c) and (d) below		

Paragraph -- 21(c) & (d)

Statement of Test to be Met

Discretionary Exemption

Relevant Questions	Departmental Response	Assessment
Has the head of the government institution considered disclosing the records?		
What was the basis for deciding not to disclose the records?		
Relevant factors include: - age of the record - status of the negotiations or plans - has the item been negotiated or agreed upon? - if so, what is the continuing need for protection of the information?		

Relevant Questions	Departmental Response	Assessment
If plans are about to be implemented, how would disclosure prejudice implementation?		
If not, would disclosure be consistent with providing notice to people affected of changes in personnel or management?		
Public knowledge of the negotiations or plans: - have the negotiations or plans been discussed publicly? - would public disclosure confirm negotiating position to the government's detriment? - have the negotiations been conducted in public? - have the plans been revealed in budgetary documents or other legislative instruments, in Speeches to the Throne, in parliamentary committees, in Estimates, statements by Ministers in the House of Commons?		
If the personnel or administration plans have not yet been implemented, have there been negotiations concluded with unions under which the reorganizations will take place?		
- if so, how would implementation of the plans be impaired by disclosure		
- if the negotiations referred to in the record are dormant, what is the possibility of their revival on short to medium notice?		
- how would revival impact on the issue described in the record?		
If a revival is unlikely, what is the continuing need to protect the information from disclosure?		
Does the negotiation involve a sensitive issue?		
Describe the issue.		
Why is it sensitive?		
Are the negotiations at a sensitive juncture? - describe why negotiations would be impaired by disclosure.		
Could disclosure compromise the results achieved in the negotiations?		

Section -- 21(2)

Subsection (1) does not apply in respect of a record that contains

a) An account of, or statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person

Statement of Test to be Met

- There must be a decision
- Draft, preparatory notes not included in paragraph 21(2)(a)
- Briefing notes, advice may become incorporated in the decision

Relevant Questions	Departmental Response	Assessment
Does the record set out a decision that has been made concerning the person affected?		
Does the record consist of a draft or preparatory notes for the decision?		
Does the record set out advice to the decision maker prior to the decision being taken?		
If so, has the decision maker expressed an agreement with the advice or other disposition of the matter on the record? - in another record		

Section -- 21(2)(a)

(a) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or

Relevant Questions	Departmental Response	Assessment
Are there other memoranda or records which track the decision made by the government institution? - if so, ask to see them.		
Has the official responsible for making the decision incorporated his decision in any of these memos or records? - if so, the memos or records become an account of the decision or reasons and should be disclosed.		

Relevant Questions	Departmental Response	Assessment
Do the remarks or comments made by the official on the memoranda or records consist of further instructions or comments requiring further information or analysis? - if so, ask to see these - if so, assess whether the notes and response are preparatory to a decision.		

Statement of Test to be Met

Is the decision made in the exercise of a discretionary power of adjudicative function?

Relevant Questions	Departmental Response	Assessment
What was the subject matter or nature of the decision?		
Was the decision made pursuant to a statutory authorization or regulation? - ask to see the provision or regulation		
Does the statutory provision create a mandatory entitlement or obligation concerning the person about whom the decision was made?		
Was the decision made through calculation of a mandatory formula or by application of mandatory, factual criteria?		
- If so, section 21 (2)(a) may not apply.		
Did the criteria contain any discretion or decision-making power on the part of the government official who made the decision?		
Did the decision involve an application by a person for relief or exemption from statutory obligations?		
Did the decision involve a request by a person for special consideration in any way?		
Did the decision involve an internal appeal process or a reconsideration of prior decision? - if so, it is likely a discretionary power		

Relevant Questions	Departmental Response	Assessment

Did the decision involve an assessment or choice between competing interests by the decision maker?
- i.e., tax appeals
- human rights investigation decisions
- airline/pilot licensing decisions
- permit, licenses or applications that were contested
  - if so, these are likely adjudicated decisions
  - does the decision involve an administrative function?
  - grievance adjudication?		

What is this function?		
Does the function involve the conferral of a benefit? - confirmation of an entitlement, award - confirmation of an obligation - granting of permission - granting of licenses, permits - granting of an exemption or relief from an obligation		
If so, decision likely involves the exercise of a discretionary power.		

Statement of Test to be Met

Does the decision affect the rights of a person? [A person can be either an individual or an organization such as a corporation]

Relevant Questions	Departmental Response	Assessment
Does the decision concern an individual, corporation, or other entity?		
Does the decision require the person to do anything or refrain from doing anything?		
Does the decision confer a benefit on the person?		
Does the decision confirm the entitlement of the person to a benefit or to certain status under the legislation?		
Does the decision confirm the obligation of a person to do something under a statute or regulation?		

Relevant Questions	Departmental Response	Assessment
If so, decision likely affects the "rights" or entitlement of a person.		
If the decision does not directly concern a person, does it have a direct impact or economic effect on the person?		
Is the person one of a group of individuals or entities that is affected by the decision? - if so, decision likely affects the rights of the person		
Was the decision made after a hearing or inquiry? - if so, did the person participate at the hearing or inquiry?		
Was the person given an opportunity to make representations or submissions at the hearing or inquiry? - if so, decision likely affects the rights of the person		
Is the decision legally binding on the person?		
Is the decision subject to appeal or review by a tribunal or court?		
Is the decision determinative of an entitlement, obligation, request for relief?		
Does the decision permit or prohibit an activity in a regulated setting?		
If so, decision likely affects the rights of a person.		

Statement of Test to be Met

Examples of decisions under paragraph 21(2)(a) would include:

Relevant Questions	Departmental Response	Assessment
Decision by independent tribunals, commissions and courts.		
Disciplinary decisions, grievance decisions, arbitration and review from those decisions.		
Decisions awarding or refusing funding, grants, loans or subsidies.		
Decisions conferring or refusing, permits, licenses,		

Relevant Questions	Departmental Response	Assessment
exemptions from regulatory requirements including extensions thereof.		
Decisions determining obligations or entitlements, under tax, pension, unemployment insurance, work permits, pension or superannuation laws.		
Decisions determining obligations or entitlement under labour laws - vacation pay, termination surplus and severance pay, sick leave, unjust dismissals, re-classification.		
Decisions involving human rights complaints.		
Decisions involving tax appeals. Decisions involving harassment complaints. Decisions involving appeal from refugees and immigration.		
Internal review and appeals from these decisions. Decisions involving annuities and pensions.		
Decisions determining qualifications or competence of employees or participants in regulated industries (i.e., airline pilots, government conducted ship master examinations, etc.) - appeals from these decisions		

Statement of Test to be Met

Recommendations will fall under section 21(2)(a)
- if they follow a hearing or inquiry
- if they could require reconsideration by the decision maker

Relevant Questions	Departmental Response	Assessment
Did the decision involve a recommendation?		
Does the recommendation involve changing or confirming a prior decision?		
What was the nature of the prior decision?		
Did the prior decision affect the rights of persons?		

Relevant Questions	Departmental Response	Assessment
Did the recommendation follow a hearing or inquiry?		
Was the person given an opportunity to make submissions or representations in the course of the hearing or inquiry?		
Was there an obligation on the body making the recommendation to consider these submissions and representations?		
Were other submissions and representations received / considered - from the government institutions - from other interested parties		
Is the process leading to the recommendation required by statute or regulation?		
If so, recommendation is likely a decision within paragraph 21(2)(a).		

Section -- 21(2)

Subsection (1) does not apply in respect of a record that contains:

(b) a report prepared by a consultant or advisor who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff or a minister of the Crown.

Statement of Test to be Met

Consultant or advisor not employed by the government or a Minister

Relevant Questions	Departmental Response	Assessment
When was the record prepared?		
Who prepared it?		
Was this person employed by the government or on a Minister's staff at the time?		
Are they on the government payroll?		
Does the government make source deductions for income		

Relevant Questions	Departmental Response	Assessment
tax, unemployment insurance and CPP for this individual?		
Is the individual paid by salary?		
Does the individual submit invoices for services connected with preparing the report?		
Ask to see the invoices.		
Does the individual get compensated on a per service or per contract basis?		
Is the individual retained under a contract from the government? - ask to see the contract. - does the contract involve preparation of this report?		
What is the purpose of the report?		
Is the purpose of the report to inform the government institution about the subject matter? - to analyze it - to assess it		
Is the purpose of the report to advise the government on the subject matter of a report?		

Statement of Test to be Met

includes unpaid advisors or consultants

Relevant Questions	Departmental Response	Assessment
Was the author of the report paid or otherwise compensated?		
If not, was the author of the report acting in the capacity of an advisor to the government institution or Minister?		
Was there explicit or implicit acceptance of this relationship by the government institution or the Minister concerned? - if not, paragraph 21(2)(b) likely does not apply		

Relevant Questions	Departmental Response	Assessment
Did the Minister or government institution take the report into consideration after it was submitted?		
Did the government institution act on any of the matters set out in the report?		
If so, author of the report likely had the status of an advisor to the institution or Minister.		

Endnotes

1. **Order 118** (Appeal Number 890172) dated November 15, 1989 at 4 (Per Linden).

2. While this term is not defined in the Act nor in the Federal Court jurisprudence, the Québec case law can be useful in determining the meaning of this term. In Québec, the Commission d'accès relied on the dictionary meaning and defined the term as "l'action de conseiller avec insistance". S… c. Ministère du Revenue de Québec, (1984-86) 1 C.A.I. 35; La Voix de l'Est (1982) Inc. v. Ville de Granby, (1984-86) 1 C.A.I. 54; Talbot c. Office du crédit agricole du Québec, (1984-86) 1 C.A.I. 104. It can be said therefore that an advice can be distinguished from a recommendation from its firmness.

3. **Ontario Order 172** (Appeal Number 890059) dated June 4, 1990 (Per McCamus)

4. *Dufour c. Commission scolaire Nouvelle Beauce,* (1984-86) 1 C.A.I. 25; *Morel c. Office du crédit agricole du Québec*, (1984-86) 1 C.A.I. 67; *Cie d'assurances du Québec c. Ville de Chicoutimi*, [1987] C.A.I. 84.

5. *Ouellet c. Fonds pour la formation des chercheurs et l'aide à la recherche,* [1986] C.A.I. 38.

6. [1987] C.A.I. 24, 31.

7. *Boudrias, Fréchette, Gélinas et associés c. Régie de l'électricité et du gaz*, (1984-86) 1 C.A.I. 331.

8. *Cie d'assurances du Québec c. Ville de Chicoutimi,* [1987] C.A.I. 84.

9. *Huard c. Régie de l'assurance automobile du Québec*, [1989] CAI 43, 47. See also *Lebel c. Commission scolaire de Manicouagan*, [1989] CAI 358, 361.

10. *Wilson c. Commission scolaire régionale protestante South Shore,* (1984-86) 1 C.A.I. 594. See also *Morel c. Office du crédit agricole du Québec,* (1984-86) 1 C.A.I. 67.

11. *Cooperative de commerce des Milles-îles c. Société des alcools du Québec,* [1987] C.A.I. 454; *Giroux c. Commission des écoles catholiques de Verdun,* [1987] C.A.I. 394.

12. Order PO-1726 by Tom Mitchinson (5 November 1999) at page 3).

13. *S... c. Ministère du Revenu du Québec* (1984-86) 1 C.A.I. 35. See also *Rainville c. Commission administrative des régimes de retraite et d'assurances (C.A.R.R.A.).* (1984-86) 1 C.A.I. 437.; *Rousseau-Martin c. Régie des rentes du Québec* [1987] C.A.I. 331; *Cinq-Mars c. Commission administrative des régimes de retraite et d'assurances,* [1986] C.A.I. 187.

14. *S... c. Ministère du Revenu du Québec*, (1984-86) 1 C.A.I. 35; *Pépin c. Commission administrative des régimes de retraite et d'assurances (C.A.R.R.A.),* (1984-86) 1 C.A.I. 43; *Rousseau-Martin c. Régie des rentes du Québec, [1987] C.A.I. 331; Dufour c. Centre hospitalier Robert-Giffard, [1987] C.A.I. 574.*

15. *Robitaille c. Foyer Notre-Dame-de Lourdes,* [1986] C.A.I. 152. See also *Dancause*

c. Ministère des transports du Québec, [1986] C.A.I. 85

16. *Houde c. Corp. mun. de la paroisse de Ste-Anne de la Pointe-aux-Pères,* [1987] C.A.I. 214.

17. [1991] CAI 311, 321-22.

18. These terms are defined in the Shorter Oxford English Dictionary as follows:

Consultation:"*1. The action of consulting or taking counsel together; deliberation, conference. 2. A conference in which the parties, e.g. lawyers, medical practitioners consult and deliberate. 3. The action of consulting (a book).*"

Deliberation:"*1. The action of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision. 2. The consideration and discussion of the reasons for and against a measure by a number of councillors. 3. A resolution or determination*."

The Shorter Oxford English Dictionary also defined '*consult*' to include:

"*1. To take counsel together, to deliberate, confer. 2. To confer about, deliberate upon, consider... 5. To ask advice of, seek counsel from; to have recourse to for instruction or professional advice.*"

19. *Leblanc c. Centre hospitalier de Chandler,* [1987] C.A.I. 181.

20. But see para 21(2)*(b)*.

Section 22

The Provision:

22 *The head of a government institution **may refuse** to disclose any record requested under this Act that contains information relating to **testing** or **auditing procedures or techniques** or **details** of **specific tests** to be given or **audits** to be conducted if the disclosure **would prejudice** the **use** or **results** of **particular tests** or **audits**. R.S. 1985, c. A-1, s. 22.*

Preliminary matters:

The **Access to Information Act,** R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizens or permanent resident within the meaning of **the Immigration Act** and any individual or any corporation present in Canada a right (of access) to most records under the control of the federal government. More specifically, the Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under sections 68 or 69.

Section 22 is a discretionary exemption which is based on an injury test to a particular class of records.

The "Test":

1) Preamble

It is a discretionary exemption based on an injury test but it is an injury test with a difference. This exemption allows a government institution to refuse to disclose information about testing and auditing procedures or specific tests and audits that are to be carried out if it can be established that the consequence of disclosure will be to prejudice the use of or results from/of particular tests or audits. It is important to note that it is a higher or more demanding injury test than in the other exemptions within the Act.

This exemption does not require a reasonable expectation of harm to occur but rather it requires the department to prove that the harm will in fact occur as a result from the disclosure. This determination by the institution (of the harm that would result from disclosure) does not have to be absolute but almost!

The head does have to establish - on a balance of probabilities - that disclosure would cause the harm. What does it mean? "Balance of probability" means that the weight of the evidence, though not sufficient to free the mind wholly from all reasonable doubt, is still

sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in a civil trial, in which a jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. To put it in colloquially, on a scale of 1 to 100, you must not be able to reach more than 50 on the 'doubt' scale. One who scores 51 on the 'doubt' scale about the validity or veracity his or her position or stand loses on a 'balance of probabilities".

The test is not whether the disclosure might cause the injury, could cause the injury or probably would cause the injury — you have to be satisfied it would cause it.

- **Step One:** The first step is to review the records to determine if there are any parts which contain information, the disclosure of which would prejudice the use of results of particular tests.

- **Step Two:** Even though the department may be able to establish that the injury test has been met, this does not mean that exemption is automatic or even that it is justified. Discretion must be exercised following the proper principles. The prejudice to the particular test or audit must be weighed against the public interest. Thus the second step is to weigh the public interest in the disclosure of the particular information against the injury that has been identified and determine whether discretion should be exercised to exempt that information.

These two steps are different and both require documentation, by the department, as part of the proof of its decision making process. In each case, to justify the withholding of particular information, the department must be able to demonstrate the injury that would occur from disclosure and why that injury is greater than the benefit that would occur from disclosure.

The department must, at the same time, show the factors that were taken into consideration by the head of the institution by deciding whether to exempt that information.

2) <u>The Criteria</u>

Section 22 may be used to exempt records which contain information relating to:

- test or auditing procedures;

- techniques or details of specific tests to be given; or

- techniques or details of specific audits to be conducted.

As noted above, they must be able to produce facts which will satisfy you that the consequence of disclosure will almost certainly be:

- the inability to use the test or auditing procedure again.

- the inability to use or rely upon the tests or to use the techniques etc.

It is not possible to predict all the harm that could happen hence the use of the all-purpose term '*prejudice*'. It should be noted that this provision cannot be used to exempt an audit report.

The exemption is not limited to tests or audits that are conducted by a government institution. Therefore, the procedures for private testing - for example, a test on how to evaluate the performance of public servants - would meet the criteria of this exemption, if disclosure would impair the reliability of the test results. According to the Honourable Francis Fox (Minister responsible for the introduction of the **Access to Information Act**), the exemption would probably not cover the tests conducted by the Department of Consumer and Corporate Affairs on safety of products since it would be unlikely that disclosing the procedures that were used in product testing would prejudice the use or results of these particular tests.[1]

Case Law:

Federal:

Section 22 of the **Access to Information Act** permits withholding of Public Service Commission tests used in assessing candidates in various competitions. In *Bombardier v. Canada (Public Service Commission)*, (1990) 41 F.T.R. 39 (F.C.T.D.) the requester made an application under the **Privacy Act** to obtain originals of Public Service Commission testing taken by him. The evidence demonstrated that these tests were used in assessing candidates in various competitions, and had always been kept confidential by the Commission. The Court found that based on the above evidence, disclosure of the requested information would prejudice the use or results of the test and therefore confirmed the department's exemption of the records.

There is, however, a case of a more recent vintage involving this office. In *Canada (Information Commissioner) v. Ponts Jacques Cartier et Champlain Inc.* (2000) 8 C.P.R. (4th) 536 at 543-545 (F.C.T.D.) the president of the union requested a copy of the internal audit report prepared by a civilian firm. Relying on paragraphs 21(1)(a),(b) and (d) and section 22 of the Act, the institution refused to disclose the report. After an investigation, the Information Commissioner concluded that the complaint was justified and recommended that the report be disclosed. The respondent did not implement this recommendation. At trial, the Court was not convinced that the report in question was a plan or an initial draft of a work. The firm had completed its work and presented its recommendation in the form of a report which contained the results of the internal audit. Since the report in question contained only the results of an internal audit rather than testing or auditing procedures, techniques or details of specific tests to be given or audits to be conducted, the Court ruled that it was excluded from the scope of section 22.

TABLE OF AUTHORITIES

Federal

Bombardier v. Canada (Public Service Commission), (1990) 41 F.T.R. 39 (F.C.T.D.)
Canada (Information Commissioner) v. Ponts Jacques Cartier et Champlain Inc. (2000), 8 C.P.R. (4th) 536 at 543-545 (F.C.T.D.) (Q.L.).

The Questions

Section -- 22

The head of a government institution may refuse to disclose any record requested under this Act that contains information relating to testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted if the disclosure would prejudice the use or results of particular tests or audits.

Statement of Test to be Met

Testing or auditing procedures
- techniques or details of specific tests
- must be audits or tests to be conducted in the future

Relevant Questions	Departmental Response	Assessment
Does the record describe a testing or auditing procedure?		
What kind of test or audit is involved?		
What is the purpose of the test or the audit?		
Do the procedures relate to a specific test or audit?		
Does the information describe techniques or details of specific test or audit?		
Does the information relate to audits or tests to be conducted in the future? - when - in what circumstances		
Does the information relate to tests used in assessing candidates for positions in the public service?		
Does the information relate to tests used or audits performed of performance by public servants?		
Does the information relate to audits of the effectiveness of government programs?		

Statement of Test to be Met
Disclosure would prejudice the results of particular tests or audits - must prejudice particular tests or audits - assess whether information otherwise available

Relevant Questions	Departmental Response	Assessment
Will similar techniques or procedures be used in future audits?		
Will they be used in particular audits? - if so, please specify		
How will disclosure of the tests or audits prejudice future tests or audits?		
Is the information kept confidential by the government institution?		
To whom is the information disclosed?		
If the information relates to public service staffing process of PSC competitions or performance evaluations: - will the information be disclosed in the course of any appeals or grievances? - is the information detailing testing techniques contained in any personnel manuals? - is the information detailed in any Treasury Board or other personnel management guidelines?		
Does the information relate to audits or tests used in the course of investigations? - for what purpose is the investigation conducted? - does the investigation relate to enforcement of a regulatory provision? - What is the purpose of the regulatory provision? - are the results of the test or audit disclosed to these persons or organization who was the subject of the audit? - for what purpose? - is testing methodology disclosed when this occurs?		
Would disclosure of the same information be required under section 20(4)?		

Statement of Test to be Met
- Prejudice must be directly related to disclosure.

Relevant Questions	Departmental Response	Assessment
How would disclosure cause prejudice to the use of results of particular tests or audits?		
How could advance information of these tests or audits be used to advantage by those subject to tests or audits?		
Is the procedure or methodology described in a report to government by the Auditor General, the consulting arm of the government or outside organizations? - If so, what circulation has the report received?		

Statement of Test to be Met
- Discretionary Exemption

Relevant Questions	Departmental Response	Assessment
Is disclosure of procedures or techniques necessary to understand the results of audits or particular tests?		
Is disclosure likely in the context of appeals, investigative reports or government investigative guidelines?		
Was the test or audit conducted for investigative purposes?		
Is the investigation complete?		
Is the appeal or audit conducted for education purposes of the group being audited or tested? - if so, does the disclosure of the methodology contribute to such education?		
Is disclosure necessary to assess the validity or efficacy of the test or audit?		
Would disclosure prejudice future audits (as opposed to particular audits) in the same area?		

Endnotes

1. *Minutes of Proceeding and evidence of the Standing Committee on Justice and Legal Affairs*, Tuesday, October 27, 1981, Issue No. 51, pages 38-40.

Section 23

The Provision:

23(1) *The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to* ***solicitor-client privilege****. R.S. 1985, c. A-1, s. 23.*

Preliminary matters:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizen or permanent resident within the meaning of the **Immigration Act** and any individual or any corporation present in Canada a right (of access) to most records under the control of the federal government. More specifically, the Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under sections 68 or 69.

Section 23 is a discretionary class exemption. This is a two step process requiring two distinct determinations by the head of the institution. First the head must determine whether the records fall within the class enunciated in the exemption. Secondly, he/she must also exercise his/her discretion whether to disclose the information by determining the consequences/effect to be expected from the disclosure of the requested information and considering whether those consequences outweigh the public interest in the disclosure of this information.

When reviewing the application of a discretionary exemption like section 23, it is important to remember that the government institution has the evidentiary burden of showing not only that the information falls within the scope of the exemption, but that the head of the institution or his/her delegate properly exercised their discretion in deciding not to disclose the information[1]. If there is no evidence establishing that the institution head considered whether or not to disclose information subject to a discretionary exemption, or if the evidence about why they decided to refuse disclosure indicates the head relied on irrelevant or unreasonable factors or on improper considerations or that the head relied on irrelevant or unreasonable factors or on improper considerations or that the decision is not consistent with the objects of the Act (that of extending disclosure of government information subject to limited and specific exemptions), then it is open to our office, and to the Federal Court on a review, to question or reject the decision to refuse disclosure.

The "Test":

1) Preamble

There are two distinct branches of solicitor/client privilege, the legal advice privilege and the litigation privilege (which is sometimes called the lawyers' brief privilege). The legal advice privilege extends to all communications written or oral, passing between solicitor and client for the purpose of obtaining legal advice. It is not necessary for the purpose of the legal advice privilege that the solicitor have actually been asked to give the advice: preliminary communications made by the client to a solicitor for the purpose of asking the solicitor to give advice are also privileged. As for the litigation privilege, it protects from disclosure communications between a solicitor and a client or with third parties which are made in the course of preparation for litigation, whether existing or contemplated, such as an expert's report where the dominant purpose of obtaining the report was for the purpose of litigation.

The reason for the legal advice privilege is that if the privilege did not exist at all, everyone would be thrown upon his own legal resources. Deprived of all professional assistance, a man will not venture to consult any skilful person or would only dare to tell his counsellor half his case.[2]

The reason for the lawyer's brief privilege is that, under our adversary system of litigation a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the court other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.[3]

2) Definition

As noted in *Weiler v. Canada (Department of Justice),* [1991] 3 F.C. 617 at 621-624 (F.C.T.D.) and *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration),* [1996] 1 F.C. 268 at 291-292 (F.C.T.D.), the Act does not define "solicitor-client privilege". [1] Thus it is important to refer to the 'common law' doctrine. According to the Court, in Canada, solicitor-client privilege is one of the fundamental tenets of our system of justice and the privilege has been elevated beyond a rule of evidence, and accorded the status of a substantive rule of law. The legal effect of the privilege has been expanded beyond protection of solicitor-client communications from disclosure in legal proceedings involving the parties to any circumstances where such communications may be disclosed without the client's consent.

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[1] The Black's Law Directory defines the lawyer-client privilege as: "The client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney."

Before one can apply the substantive rule of law, it is first necessary to define what is included under the umbrella of "solicitor-client privilege".

The Exchequer Court of Canada, predecessor to the Federal Court of Canada, in the decision of *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex.C.R. 27 Jackett P. has enunciated the following two principles which have since been followed in several decisions.

(a) all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged; and

(b) all papers and materials created or obtained specially for the lawyer's "brief" for litigation, whether existing or contemplated, are privileged.

In *Blank v. Canada (Minister of Justice), 2006 SCC 39*, the Court ruled that it was not uncommon at the time the *Act* was adopted to treat "solicitor-client privilege" as a compendious phrase that included both the legal advice privilege and litigation privilege. This best explains why the litigation privilege is not separately mentioned anywhere in the *Act*. The *Access to information Act* has not deprived the government of the protection previously afforded to it by the legal advice privilege *and* the litigation privilege: In interpreting and applying the *Act*, the phrase "solicitor-client privilege" in s. 23 should be taken as a reference to both privileges.

In *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 560, the Supreme Court has formulated the four-part substantive rule with respect to solicitor privilege. 1. All information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. 2. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, to the lawyer as well as to his employees. 3. It arises even before the retainer is established, as soon as the client takes the first steps in approaching a law firm. It may be invoked in any circumstances where such communications are likely to be disclosed without the client's consent. 4. However, communications which are criminal in themselves or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged.

3) Criteria

In order to be exempted from disclosure under this section, the information in issue must fall in either of the two branches of the privilege. Not only does it need to fall under a branch but also it needs to meet all the requirements within that branch.

a) Legal Advice Privilege:

All communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto).

Not all communications can be exempted under this part of the privilege. In order to be exempted the information must meet the three following criteria:

- all the information must be of a confidential nature;
- the information must be between a client and a legal adviser; and
- the communication must have been made for the purpose of requesting, formulating or giving legal advice or assistance.

Since the purpose of the Act is to provide a right of access in accordance with the principle that the exemptions must be narrowly interpreted, you must take a restrictive view in determining whether this exemption applies. For example, the common-law privilege only attaches to the lawyer's advice and not to the subsequent annotations by a non-lawyer as to what he or she thinks that advice was.[4] The privilege does not apply when, while the advice was given by a lawyer, he was not exercising at the time the role of a legal adviser - i.e., the person must be in an LA position. Similarly the privilege does not apply when the advice is policy advice.

b) Litigation Privilege:

All papers and materials created or obtained specially for lawyers brief for litigation, whether existing or contemplated:[5] sometimes the question will be what was the purpose for which the record was created. Solicitor/client privilege only applies where the principal purpose for which the record was obtained or created is the litigation. It does not require to be created for the sole purpose of litigation[6].

The definition of “litigation” includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or “juridical source”). Proceedings that raise issues common to the initial action and share its essential purpose would qualify as well[7].

Here again a restrictive approach must be adopted. Records prepared in contemplation of litigation must meet a two-fold test:

- the dominant purpose for which the record is produced or copied is for litigation; and
- if the litigation had not actually started there must have been a reasonable prospect of litigation at the time of preparation.[8]

A difficult task for any investigator when investigating such an exemption is to determine whether the dominant purpose for which a record was produced was for litigation when the purpose is not clear. In many instances, a record could serve for many purposes, one of which could be to assist in litigation. However, in order to be exempted under this provision, the dominant purpose must be litigation. In order to determine the answer to that question, obtain from the department the records they rely on and ask yourself questions such as:

- Who requested the records to be produced?
- When did he ask the records to be produced?
- Why was the record produced?
- If there was more than one reason why the record was created what was the reason stipulated in any related records; and
- Was litigation reasonably contemplated at the time?

In order to determine whether the litigation was reasonably contemplated at the time the record was received or produced, a reasonable prospect of litigation is required - i.e., litigation must be more than just a vague or theoretical possibility. In order to determine this, you must ask yourself questions, such as:

- What would be the purpose of the litigation or statute;
- Was litigation possible or was it barred because of time limitations?
- Who does it involve - the parties?
- When were the causes of litigation identified?
- Had legal advice been sought/a legal opinion been obtained on the possibility of a claim being made by the Crown or on the feasibility or the viability of a claim made against the Crown.

The fact that the records were prepared prior to the comments made or litigation, or that litigation for which they were prepared did not materialize or has since discontinued does not mean that the privilege does not apply.[9] However, the litigation privilege may be lost once litigation is terminated.[10]

The common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege. Unlike the solicitor-client privilege, it is neither absolute in scope nor permanent in duration. The privilege may retain its purpose and its effect where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. This enlarged definition of litigation includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action or juridical source. Proceedings

that raise issues common to the initial action and share its essential purpose would qualify as well.[11]

c) Exceptions to the Privilege:

There are three exceptions to the privilege namely:

- First is the informed waiver of the privilege by the client or implied waiver of a privileged document by its use in court;
- Communications between a lawyer and a client are not privileged when the client attempts to obtain legal advice that would facilitate a crime or fraud; this would (hopefully) never occur in a government context.
- the privilege extends only to communications and does not protect from disclosure certain facts discovered in the course of a solicitor/client relationship by either solicitor or client.[12]

One of the frequent exceptions to a privilege is when the client waives the privilege. It is important to note that only the client can waive the privilege except in rare circumstances where the client endorsed all actions taken by solicitor.[13] When determining whether a privilege has been waived, all the circumstances regarding the disclosure of the information must be considered. For example, disclosure of a summary of a legal opinion may not necessarily constitute a waiver of the opinion itself.[14] Similarly, disclosure of a '*final*' legal opinion does not necessarily constitute a waiver in respect to an earlier '*draft*' legal opinion. What you must determine is whether the two legal opinions are very similar in their nature.[15]

4) Distinctions differences between the litigation privilege and the solicitor-client privilege

There are at least three important differences between the litigation privilege and the solicitor-client privilege. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Litigation

privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client)

The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed.[16]

Case Law:

1) <u>Federal:</u>

a) Definition of the solicitor-client privilege

Blank v. Canada (Minister of Justice), 2006 S.C.C. 39: It was not uncommon at the time the *Act* was adopted to treat "solicitor-client privilege" as a compendious phrase that included both the legal advice privilege and litigation privilege. This best explains why the litigation privilege is not separately mentioned anywhere in the *Act*. The *Access to information Act* has not deprived the government of the protection previously afforded to it by the legal advice privilege *and* the litigation privilege: In interpreting and applying the *Act*, the phrase "solicitor-client privilege" in s. 23 should be taken as a reference to both privileges.

b) Legal Advice Privilege:

In *Blank v. Canada (Minister of Justice), 2006 S.C.C. 39,* the Court laid down the following important principles:

1. The litigation privilege attaches to documents created for the dominant purpose of litigation. It does not require to be created for the sole purpose of litigation.

2. The litigation also privilege attaches to documents gathered or copied – but not necessarily created – for the purpose of litigation.

3. The definition of "litigation" includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action (or "juridical source"). Proceedings that raise issues common to the initial action and share its essential purpose would qualify as well.

The Exchequer Court of Canada in the decision of *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex.C.R. 27 at 33: The *Legal Advice privilege* contains all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged.

The proper method to substantiate a claim of privilege was explained by the Supreme Court of Canada in *Solosky v. The Queen* [1980], 1 S.C.R. 821 at 837: privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege -(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. As it is unlikely that all records or transactions between a solicitor and client fall within this privilege, the burden falls on the moving party to demonstrate that each and every document in question fits

squarely within the scope of the rule. *Wells v. Canada (Minister of Transport)* (1995), 63 C.P.R. (3d) 201at 204-205 (F.C.T.D.)

The privilege protects not only the communications between a solicitor and his client in a particular case, but also any future communications between clients and their lawyers in general. *Stevens v. Canada (Prime Minister),* [1998] 4 F.C. 89 at 105 (F.C.A.)

The privilege protects the integrity of the solicitor-client relationship. A solicitor's bills of accounts are at the heart of that relationship. The terms and amount of the retainer; the arrangements with respect to payment; the type of services rendered and their cost - all these matters are central to the relationship. If the relationship is indeed worth protecting, these matters must be immune to any intrusion. Therefore, bills of account are privileged, but lawyers' trust accounts and other accounting records are not so privileged because they related to acts done by counsel. *Stevens v. Canada (Prime Minister),* [1998] 4 F.C. 89 at 109-110 and 117 (F.C.A.)

The itemized disbursements and general statements of account detailing the amount of time spent by the Commission counsel and the amounts charged for that time are all privileged. *Stevens v. Canada (Prime Minister),* [1998] 4 F.C. 89 at 105 (F.C.A)

Legal opinions were created and exchanged in the course of a commercial transaction but not in the face of pending or actual litigation, the parties having a joint interest in ensuring completion of the transaction. There was no evidence that either party intended or anticipated their respective legal opinion would be disclosed to strangers to the transaction. The Court concluded that there was a legitimate interest in protecting legal advice provided to parties to a commercial transaction such as the one involved here. From the Court`s perspective, there was no apparent impediment to extending the benefit of the common interest privilege to the legal opinions exchanged in this case, particularly in light of the joint submissions from counsel for the parties. *St Joseph Corp. v. Canada (Public Works and Government Services)*, [2002] F.C.J. No. 361, 2002 FCT 274 (F.C.T.D.) (In appeal.
Doc. A-202-02).

The documents in issue also included communications that were not between solicitor and client, but between officials of the client department. In each case, the document or portion of the document that had not been ordered disclosed contained a description or discussion of legal advice sought or to be sought, or legal advice obtained. The Court held that those undisclosed portions were privileged. *Blank v. Canada (The Minister of the Environment*), F.C.J. No. 1844, 2001 FCA 374 (F.C.A.)

One of the grounds of appeal was that counsel for the appellants should be permitted to examine the material for which solicitor-client privilege had been claimed in order to determine for himself whether any argument can be made that the solicitor-client privilege did not apply. Counsel for the appellants acknowledged that he would be obliged to give appropriate undertakings to keep confidential what he may learn from examining the documents. However, the Court noted, the party claiming the privilege cannot be sure that counsel for the opposing party, however willing and conscientious,

will be able to erase knowledge gained from the documents. As a practical matter, it observed, to permit opposing counsel to view the documents would risk destroying the privilege. The Court noted that those communications either seek or give legal advice, or represent an integral part of the ongoing dialogue relating generally to the matter of the criminal charges, in which the legal advice is expressly or implicitly referred to. Retorting, counsel for the appellant pointed out that not all communications between solicitor and client are privileged and that, especially in the case of lawyers employed by government, advice sought or given may sometimes relate to matters of policy rather than law. While that is true in theory, in this case Sharlow J.A., ruled that she was unable to identify any advice sought or given that could not properly be characterized as legal advice. *Blank v. Canada (The Minister of the Environment)*, F.C.J. No. 1844, 2001 FCA 374 (F.C.A.)

c) Litigation Privilege:

The Exchequer Court of Canada in the decision of *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex.C.R. 27 at 33: *Litigation privilege* includes all papers and materials created or obtained specially for the lawyer's "brief" for litigation, whether existing or contemplated, are privileged.

For litigation privilege to work, the dominant purpose of a document must be assessed as the time that the document was brought into existence. *Professional Institute of the Public Service of Canada v. Canada (Director of the Canadian Museum of Nature)*, [1995] 3 F.C. 643 at 652 (F.C.T.D)

Blank v. Canada (Minister of Justice), 2006 S.C.C. 39: The litigation privilege may be lost once litigation is terminated. The common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege. Unlike the solicitor-client privilege, it is neither absolute in scope nor permanent in duration. The privilege may retain its purpose and its effect where the litigation that gave rise to the privilege has ended, but related litigation remains pending or may reasonably be apprehended. This enlarged definition of litigation includes separate proceedings that involve the same or related parties and arise from the same or a related cause of action or juridical source. Proceedings that raise issues common to the initial action and share its essential purpose would qualify as well.

d) Difference between the Litigation privilege and solicitor-client privilege

Blank v. Canada (Minister of Justice), 2006 S.C.C. 39: There are at least three important differences between the litigation privilege and the solicitor-client privilege. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, the rationale for solicitor-client privilege is very

different from that which underlies litigation privilege. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice. Litigation privilege, on the other hand, is geared directly to the process of litigation. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client)

e) Burden of proof

A party must produce for the Court all material for which it is seeking to assert privilege, to enable the judge to make an informed evaluation of the contents: *Nabisco Brands Ltd.* v. *Procter & Gamble Co. et al.* (1989), 24 C.P.R. (3d) 570 (F.C.A.).

The onus is on the government department in question to establish that the information was communicated to or by a government lawyer in order to provide senior departmental officials with advice on the legal ramifications of proposed departmental actions. In addition, it must be demonstrated that the information given was and is confidential; there must have been confidentiality at the time it was communicated and since that time: *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)* (1995), 93 F.T.R. 172 (F.C.T.D.)

f) Rationale of solicitor-client privilege

Blank v. Canada (Minister of Justice), 2006 S.C.C. 39: the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice. Litigation privilege, on the other hand, is geared directly to the process of litigation. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client)

The rationale of this privilege is to ensure that a client is free to tell his or her lawyer anything and everything that is pertinent to the case, without any fear that this information may subsequently be divulged and used against them. Without this freedom, there is the possibility that the lawyer may not have the benefit of all the relevant information, and may not be able to do his or her job effectively. And that possibility must be avoided as contrary to the interests of justice. *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 at 100 (F.C.A.)

The privilege is of such importance to the administration of justice and held in such high regard by the courts that it is not necessary that the client personally object to the disclosure of material. A court, on its own motion, may raise the matter of privilege in order to protect the sanctity of the solicitor-client relationship. This underscores the idea that the protection of the privilege is not merely in the interests of the individual client in the particular circumstances, but it is also important to all present and future clients. The public should have the security of knowing that all communications with lawyers will be regarded as inviolate. Therefore, it is not only in the individual client's interest to assert the privilege, it is also in the court's interest, as long as no waiver has been given. Only in this way will the privilege facilitate the giving of advice generally. *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 at 108-109 (F. C.A.)

> The basic rule as it applies in Canadian law today is where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protected be waived. *Stevens v. Canada (Prime Minister),* [1998] 4 F.C. 89 at 100, 106 (F.C.A.)

> *Gauthier v. Canada (Minister of Justice)*, [2004] F.C. 655, 14 Admin. L.R. (4th) 106, (F.C.T.D.), Mosley J. : In the course of an application under the *Privacy Act*, the Department denied disclosure of certain documents, primarily on the ground that documents were exempt from disclosure pursuant to section 27 (solicitor-client privilege). In reviewing the exemptions, the Court stated that the "overarching purpose" of access to information legislation is to ensure a citizen's meaningful participation in the democratic process and privacy legislation is to be viewed as necessary in order to preserve the autonomy of the individual in a free and democratic society. The Court also found that the purpose of section 23 must also be regarded as fundamental to our society. Shielding information developed in the solicitor-client relationship from disclosure is a central underpinning within the administration of justice and the functioning of the rule of law. The balancing of these interests points to a less deferential standard of review, in that an independent review by the court will be required when such important interests are at stake.

g) Nature of solicitor-client privilege

All information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, to the lawyer as well as to his employees. It arises even before the retainer is established, as soon as the client takes the first steps in approaching a law firm. It may be invoked in any circumstances where such communications are likely to be disclosed without the client's consent. However, communications which are criminal in themselves or that are made with a view to obtaining legal advice to facilitate the commission of a crime will not be privileged. The fundamental right to communicate with one's legal adviser in confidence has given rise

to a rule of evidence and a substantive rule. *Descôtaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at 861.

The history of solicitor-client privilege is one of a tension between the public interest in maintaining free communication between lawyers and clients and the public interest in the disclosure of relevant evidence before the court. The underlying justification in either case is the fair and proper administration of justice. This doctrine, which dates back to the 16th century, has evolved over the years. Nowadays any communication between a lawyer and a client in the course of obtaining, formulating or giving legal advice is privileged and may not be disclosed without the client's consent. *Stevens v. Canada (Prime Minister),* [1998] 4 F.C. 89 at 105 (F.C.A.)

In Canada, the solicitor-client privilege has been elevated beyond a rule of evidence, and accorded the status of a substantive rule of law. *Weiler v. Canada (Department of Justice),* [1991] 3 F.C. 617 at 621-624 (F.C.T.D.)

The solicitor-client privilege is different from a guarantee of confidentiality: it has been primarily a rule of evidence, while the rule that a client's confidence must not be betrayed is an ethical or equitable doctrine. The law may, in certain circumstances, compel someone to betray a mere confidence, but may not compel someone to reveal something which is the subject of solicitor-client privilege. The duty of confidentiality is much broader than the protection provided by the solicitor-client privilege. The privilege is of such importance to the administration of justice that a court, on its own motion, may raise it in order to protect the sanctity of the solicitor-client relationship. *Stevens v. Canada (Prime Minister),* [1998] 4 F.C. 89 at 105 (F. C.A.)

h) What is not included under the umbrella of solicitor – client privilege?

In *Blood Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2003] F.C.J. No. 1794, (F.C.T.D.), Lemieux J., the Federal Court of Canada found that settlement negotiations are not covered by the solicitor-client exemption. According to the Court, the settlement negotiation privilege is not a true solicitor-client privilege, in that it does not relate to communications between a solicitor and client, but rather to communications with the other side or adverse party to a dispute.

Foster Wheeler Power Co. v. Société intermunicipale de gestion & d'élimination des déchets inc., [2004] S.C.C. 18, 318 N.R. 111, 237 D.L.R. (4th) 417, 48 C.P.C. (4th) 1, Lebel J. : In this case, the Superior Court and court of Appeal authorized certain number of questions, despite objections, based on professional secrecy, to questions asked by plaintiff during discovery regarding information the defendant received from lawyers. The Appeal to Supreme Court of Canada was dismissed. While rendering its decision, the Supreme Court of Canada held that :

> *"1. Professional secrecy is fundamentally important to the protection of the essential interest of clients, to the operation of Canada's legal system and to preserving the rule of law in Canada. Professional secrecy is limited because not*

everything in the relationship between a lawyer and a client is confidential.

"2. The intensity and scope of the protection recognized by professional secrecy vary according to the nature of the duties carried out and services rendered. When the professional relationship arises out of a complex and prolonged mandate the limits of the scope of application of the obligation of confidentiality require from the court a closer analysis of the relationship between the parties, such as the nature and context of the professional services rendered.

"3. In case of an individual professional act, simple or summary evidence would no doubt be sufficient to establish the confidential nature of the information wanted and the right to immunity from disclosure. As for complex and prolonged cases, it would be sufficient to require the party claiming professional secrecy to establish that a general mandate be given to a lawyer in order to obtain a range of professional services. A rebuttable presumption of fact would then be imposed, according to which the whole of the communications between the client and the lawyer, as well as the information shared, would be prima facie confidential. The opposing party would then need to specify the nature of the information sought and explain why it is not subject to professional secrecy or that their disclosure is authorized by law."

In this case, the questions sought to obtain information only about two specific facts: the identity of the project subjected to the regulatory approval process and the status of that process. According to the Court that kind of information did not engage the lawyers' obligation of confidentiality and the disclosure of this information was not prohibited. Within the limits of their new wording, the questions could be asked in the context of discovery.

i) Exceptions

Blank v. Canada (Minister of Justice), 2006 S.C.C. 39: The privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed.

Canadian law has sought to strike an appropriate balance between openness and secrecy by creating two exceptions to the privilege. The first exception is for communications which are themselves criminal or which counsel a criminal act. The second exception relates to information which is not a communication but is rather evidence of an act done by counsel or is a mere statement of fact. The solicitor-client privilege is different from a guarantee of confidentiality: it has been primarily a rule of evidence, while the rule that a client's confidence must not be betrayed is an ethical or equitable doctrine. The law may in certain circumstances compel someone to betray a mere confidence, but may not compel someone to reveal something which is the

subject of solicitor-client privilege. *Stevens v. Canada (Prime Minister),* [1998] 4 F.C. 89 at 105 (F.C.A.)

Acts of counsel or mere statements of fact are not protected. The general rationale for not protecting matters of fact or acts done is the detrimental effect it would have on litigation. For example, a person cannot avail himself or herself of the privilege by simply communicating a fact to a lawyer or allowing the lawyer to perform an act in his or her place. Although a great deal of importance is placed on protecting the relationship between a solicitor and his or her client, the paramount task is the administration of justice. To that end the privilege will be interpreted so that it protects only what it is intended to protect and nothing more. Thus statements of fact are not themselves privileged. It is the communication of those facts between a client and a lawyer that is privileged. *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 at 108-109 (F.C.A.)

Where the communication itself between a client and his solicitor constitutes a criminal act, or counsels someone to commit a crime, a client or a solicitor cannot hide behind the privilege. *Stevens v. Canada (Prime Minister),* [1998] 4 F.C. 89 at 105 (F.C.A.)

The relationship between *amicus curiae* and the Court is not a solicitor-client relationship. Only the particulars of *amicus curiae's* professional services are considered to be subject to privilege. *Desjardins, Ducharme, Stein, Monast v. Canada (Department of Finance)*, [1999] 2 F.C. 381 at 386 (F.C.T.D.) Nadon J.

j) Client may choose to waive privilege

With respect to the release of portions of records protected under the solicitor-client privilege, it is the government *qua* client which enjoys the privilege; the government may choose to waive it, if it wishes, or it may refuse to do so. By disclosing portions of the accounts the government was merely exercising its discretion in that regard. A government body may have more reason to waive its privilege than private parties, for it may wish to follow a policy of transparency with respect to its activity. This is highly commendable; but the adoption of such a policy or such a decision in no way detracts from the protection afforded by the privilege to all clients. *Stevens v. Canada (Prime Minister),* [1998] 4 F.C. 89 at 121 (F.C.A.)

Where a client authorizes the solicitor to reveal solicitor-client communication, either the communication was never made with the intention of confidentiality or the client has waived the right to confidentiality. In either case, no privilege attaches. The principle is that disclosure to a third-party constitutes a waiver of the solicitor-client privilege. *Stevens v. Canada (Prime Minister)*, [1997] 2 F.C. 759 at 779 (F.C.T.D.)

The question of whether or not people have waived their right to privilege, absent explicit waiver, is one which must be judged according to all the circumstances. *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 at 120 (F.C.A.)

The inadvertent release does not necessarily constitute waiver. *Stevens v. Canada (Prime Minister)*, [1997] 2 F.C. 759 at 779 (T.D.) Rothstein J.

By inadvertence the applicant received disclosure of one account of legal services. The Court held that since the partial disclosure was obviously by inadvertence, it does not constitute waiver. *Stevens v. Canada (Prime Minister)*, [1997] 2 F.C. 759 at 779 (F.C.T.D.)

In general, with respect to solicitor-client privilege between government institutions, the release of privileged information by one institution to another would not normally constitute a waiver as this action is internal to the government, the ultimate beneficiary of the privilege. *Stevens v. Canada (Prime Minister)*, [1997] 2 F.C. 759 at 776 (F.C.T.D.)

With respect to the release of portions of the records, a similar view has been adopted emphasizing that all the circumstances must be taken into consideration and that the conduct of the party and the presence of an intent to mislead the court or another litigant are of primary importance. This approach is appropriate particularly in light of section 25 of the Act, which allows the disclosure of portions of privileged information. This is an attempt to balance the rights of individuals to access to information, on the one hand, while maintaining confidentiality on the other hand. It would be a perverse result if the operation of section 25 of the Act were thereby to abrogate the discretionary power given to the government head under section 23 of the Act. *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 at 121 (F.C.A.)

The Auditor General was allowed access to the forensic report for which the Museum later invoked the exemption at section 23. The Court held that the Auditor General must be regarded as a third party vis-à-vis the government entities that he is called upon to audit. The Court observed that it is not clear that the Auditor General had the power to compel the production of the forensic report, and if he had, it was not clear that the Museum could not have invoked privilege. In turning the report over to the Auditor General voluntarily and with the full knowledge that it would be reviewed and used in conformity with the Auditor General's statutory mandate, the Museum waived the privilege. That the Auditor General cannot be confined by a privilege belonging to the entity which he is called upon to audit and that he must make use of relevant and material information that comes to his attention in the fulfilment of his statutory mandate establishes that the voluntary release of information to the Auditor General is a waiver of privilege. P*rofessional Institute of the Public Service of Canada v. Canada (Director of the Canadian Museum of Nature)*, [1995] 3 F.C. 643 at 652 (F.C.T.D.)

Foster Wheeler Power Co. v. Société intermunicipale de gestion & d'élimination des déchets inc., [2004] S.C.C. 18, 318 N.R. 111, 237 D.L.R. (4th) 417, 48 C.P.C. (4th) 1, Lebel J. : In this decision, the Supreme Court of Canada held that the Court of Appeal erred in concluding that the presence of a professional facilitator hired to chair a meeting of the organization constituted a waiver of professional secrecy with respect to what was said at that meeting. The meeting was held with a view to maintain confidentiality. The facilitator was a temporary participant in the organization and its

deliberations in order to contribute to its effective operation. The meeting was held in camera and its nature never changed. The facilitator was an independent person hired to moderate the proceedings and her presence was useful as well as necessary. One could not infer from her presence a waiver of secrecy with respect to the communications made by the lawyers during that meeting.

Gauthier v. Canada (Minister of Justice), [2004] F.C. 655, 14 Admin. L.R. (4th) 106, (F.C.T.D.), Mosley J. : In the course of an application under the *Privacy Act*, the Department denied disclosure of certain documents, primarily on ground that documents were exempt from disclosure pursuant to section 27 (solicitor-client privilege). In reviewing the exemptions, the Court stated that it is trite law that the privilege belongs to the client and can only be waived by the client and not the solicitor:

Gauthier v. Canada (Minister of Justice), [2004] F.C. 655, 14 Admin. L.R. (4th) 106, (F.C.T.D.), Mosley J. : In the course of an application under the *Privacy Act*, the Department denied disclosure of certain documents, primarily on ground that documents were exempt from disclosure pursuant to section 27 (solicitor-client privilege). In reviewing the exemptions, the Court stated that it is clear that solicitor-client privilege exists whether or not the client is aware of the exact parameters of such obligation of confidentiality, and until instructions to waive the privilege have been received from the client, a lawyer must maintain the privilege.

Gauthier v. Canada (Minister of Justice), [2004] F.C. 655, 14 Admin. L.R. (4th) 106, (F.C.T.D.), Mosley J. : In the course of an application under the *Privacy Act*, the Department denied disclosure of certain documents, primarily on ground that documents were exempt from disclosure pursuant to section 27 (solicitor-client privilege). In reviewing the exemptions, the Court stated that if the client had desired to waive its privilege, then the solicitors at the DOJ would be obliged to carry out their client's wishes.

k) Solicitor-client privilege extends to Justice Canada lawyers

There is clearly a solicitor-client privilege between the lawyers from the Department of Justice and the Government of Canada. *Weiler v. Canada (Department of Justice),* [1991] 3 F.C. 617 at 621-624 (F.C.T.D.)

From time immemorial it has been a fundamental principle of our system of justice that information or advice given in confidence between lawyer and client is privileged from disclosure to the public. The onus is on the government department in question to establish that the information was communicated to or by a government lawyer in order to provide senior departmental officials with advice on the legal ramifications of proposed departmental actions. In addition, it must be demonstrated that the information given was and is confidential; there must have been confidentiality at the time it was communicated and since that time. *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)* (1995), 93 F.T.R. 172 (F.C.T.D.)

The identity of the client is irrelevant to the scope or content of the privilege. A government is not granted less protection than any other client by the law of solicitor-

client privilege. More importantly, the privilege protects communications only, not acts of counsel or mere statements of fact, the protection of which would have a detrimental effect on litigation. The privilege is of such importance to the administration of justice that a court, on its own motion, may raise it in order to protect the sanctity of the solicitor-client relationship. *Stevens v. Canada (Prime Minister),* [1998] 4 F.C. 89 at 105 (F.C.A.)

Gauthier v. Canada (Minister of Justice), [2004] F.C. 655, 14 Admin. L.R. (4th) 106, (F.C.T.D.), Mosley J. : In the course of an application under the *Privacy Act*, the Department denied disclosure of certain documents, primarily on ground that documents were exempt from disclosure pursuant to section 27 (solicitor-client privilege). In reviewing the exemptions, the Court stated that as held in Campbell, supra, Stevens, and Weiler, solicitor-client privilege attaches to legal advice provided by "in-house" lawyers to their client(s) in various departments of the government, as well as to documents prepared in anticipation of litigation.

l) Duty of the Court in reviewing client-solicitor privilege

Where a lawyer is required by law to disclose information, and that information is protected by solicitor-client privilege, then a lawyer must be careful to disclose only as much information as is required and no more. *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 at 103 (F.C.A.)

The reviewing Court must examine the material in which solicitor-client privilege is claimed to see if the privilege was properly invoked. Section 46 clearly gives the Court authority to interfere with solicitor-client confidentiality. This is consistent with one of the purposes of the Act stated in subsection 2(1), namely “that decisions on the disclosure of government information should be reviewed independently of government”. Solicitor-client information is admissible as evidence for the reviewing judge to consider confidentially for the purposes of deciding whether the section 23 exemption has been properly invoked. The power granted by section 46 of the Act to Courts to “examine” privileged records goes beyond a mere inspecting power: it includes the ability for the Courts to use privileged communications as evidence to decide the merits of the exemption claimed and the legality of the refusal to disclose. *Canada (Information Commissioner) v. Canada (Minister of the Environment)* (2000), 187 D.L.R. (4th) 127 at 128, 132-133 (F.C.A.)

Permissive exemptions such as those contained in paragraph 18(d), subsection 21(1) and section 23 provide that the head of a government institution may refuse to disclose information of a given description. When reviewing decisions made under permissive provisions, the Court must decide not only whether the information falls within that described in the relevant provision, but also, if it does, whether the head of the government institution lawfully exercised the discretion not to disclose it. When reviewing the exercise of discretion under a permissive exemption the Court is not to decide how it would have exercised the discretion, but merely to review on administrative law grounds the legality of the exercise of that discretion by the Minister, in light of the overall purpose of the statute and of the particular exemption. Accordingly,

if the Court concludes that the discretion was exercised unlawfully, the normal remedy would be to remit the matter to the head of the government institution for a re-determination in accordance with the Court's reasons, not an order by the Court that the document be disclosed. *Canadian Council of Christian Charities v. Canada (Minister of Finance),* [1999] 4 F.C. 245 at 256-257 (F.C.T.D.)

The burden falls on the moving party to demonstrate that each and every document in question fits squarely within the scope of the rule. A party must produce for the Court all material for which it is seeking to assert privilege, to enable the judge to make an informed evaluation of the contents. *Wells v. Canada (Minister of Transport)* (1995), 63 C.P.R. (3d) 201at 204-205 (F.C.T.D.)

Section 23 says the head of a government institution may refuse to disclose the information, and thus this section provides a discretionary exemption. Accordingly, there are two types of decisions to be made in relation to section 23: firstly, a factual decision as to whether or not the requested information is subject to solicitor-client privilege, and secondly, a discretionary decision as to whether or not it ought to be nevertheless disclosed. *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration),* [1996] 1 F.C. 268 at 291 (F.C.T.D.)

2) <u>Ontario:</u>

a) <u>General</u>:

This exemption covers records subject to the common-law solicitor/client privilege (Branch 1) or those records prepared by or for Crown counsel or counsel employed or retained by an institution, for use in giving legal advice or in contemplation of or for use in litigation (Branch 2). The common-law privilege applies to:

- all communications, verbal or written, of a confidential character, between a client, or his or her agent, and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers directly related thereto); and

- papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated.

(Order #49)

- It is possible for letters or communications passing between opposing counsel to obtain the status of a privileged communication if they are made '*without prejudice*' and in pursuance of settlement.

(Order #135)

- A briefing note that summarizes the substance of an opinion given by an institution's legal counsel to an institution employee is privileged.

(Orders #52, 123, 170, P-218, P-538, P-660)

- Crown counsel includes any acting in the capacity of legal adviser to an institution covered by the Act. This includes outside counsel retained by the Crown.

(Order #136)

- Despite the fact that persons other than the solicitor and the client have access to the record, the privilege is not waived unless there is evidence to indicate that the client has waived the privilege available at common-law. In this case, the record was written to and for persons outside the institution, and was given to an institution official by someone other than the addressee. Only the client can waive solicitor/client privilege and although it is clear that persons other than the solicitor and the client had access to the letter, the Commission ruled that the privilege had not been waived.

(Order #M-19)

- While only the client may waive the privilege, all the circumstances regarding the disclosure of a legal opinion must be considered to determine whether there has been a waiver. Where the legal opinion was provided by the Reeve of the Township to the affected party intentionally and without any restrictions on its use, the disclosure constituted a waiver of the solicitor/client privilege.

(Order #P-579)

- In this case, the Commission ruled that fairness did not require the disclosure of a legal opinion when an institution had disclosed a summary of a legal opinion and not the opinion itself. The Commission stated that the purpose of requiring disclosure of the entire opinion on the basis of implied waiver, would be to prevent any unfairness to the requester, so that the requester would not be misled as to the institution's position or so that the institution could effectively rely on only those elements of the opinion which are advantageous to its position. In a postscript, the Commission noted that the disclosure by the institution of a statement of its legal position represented a useful way of providing some information to the public in circumstances in which it was not required to do so.

(Order #M-260)

- In this case, the Commission found that an implicit waiver of the privilege had occurred in respect of a letter from a lawyer which was kept in the requester's personnel file. The requester was authorized to view the record at any time when she was acting as the executive secretary to the institution. The institution

indicated that it was reviewing its practices with a view towards creating a separate filing system for solicitors' letters and removing them from employees' personnel files.

(Order #M-291)

- Where a solicitor for an institution sent a summary of an opinion to another private sector solicitor, he or she waived the privilege. The institution, a Town, had passed a by-law which endorsed all actions taken by the solicitor in the proceedings in question. As a result, the Commission found that the solicitor had acted on behalf of the Town when the summary of the opinion was disclosed and the privilege waived.

(Order #P-780)

- Where Crown counsel sends letters to the appellant's solicitor, who was a third party with an adverse interest in litigation, the privilege is waived.

(Order #M-2, M-11, M-19, M-59, M-61, M-69, and see also Orders #163, 170 and P-227 where draft records were held to be covered by the solicitor/client privilege.)

- The disclosure of a 'final' legal opinion that is subject to solicitor/client privilege does not constitute a waiver in respect of the earlier 'draft' legal opinion. The two opinions are separate responses, produced at different times. The second opinion was provided by the solicitor after consultation with his client in respect of the '*draft*'. The earlier '*draft*' legal opinion is still subject to this exemption. The solicitor/client privilege applies even though the legal opinion was obtained in response to concerns raised by members of the public.

b) 1st Branch:

(Order #P-281)

- A Crown counsel's memorandum is prepared for use in giving legal advice where it provides an interpretation of an agreement and legal options to consider in attempting to resolve a matter under dispute.

(Order #P-417)

- Where a non-lawyer employee of an institution creates a record that quotes from a legal opinion provided by a lawyer to the institution, the quotes are exempt under this section.

(Order #126 and see contra below, Order #M-213).

- A legal account from a lawyer to his or her client reflects a confidential communication related to legal advice and is therefore exempt under the first

branch of the common-law solicitor/client privilege. The account reflects communications of a confidential nature directly related to the seeking, formulating or giving of legal advice between a client and its legal adviser. The Commission, in coming to this decision, considered the case of *The Mutual Life Assurance Company of Canada v. The Deputy General of Canada* [1984] C.T.C. 155, Supreme Court of Ontario (Toronto Motions Court).

(Orders #M-213, M-258, P-624, M-274, P-667, P-676 (see contra above, Order #126))

- Invoices and accounts from a lawyer to his or her client are not automatically covered by the common-law solicitor/client privilege. The institution must determine whether the contents of the legal account relate in a tangible and direct way to the seeking, formulating or provision of legal advice. The Commission ruled that, in this case, the legal account which set out in summary fashion the steps that the law firm took to complete its work assignment, did not contain legal advice and did not reveal any such advice indirectly. The account did not reveal the subjects which the law firm was asked to investigate, the strategy used to address these issues or the result of the advice. The Commission noted that the intent of the legislation would be ill-served by allowing this exemption to be used to shield a non-substantive record of this nature from public scrutiny, particularly in times when public bodies have to ensure that tax dollars are spent wisely.

(Orders #P-624, M-274)

- Although a legal account arises out of a solicitor/client relationship, this record category differs qualitatively from legal opinions or other communications which purport to provide legal advice from a lawyer to his or her client. The Commission referred to *Re Ontario Securities Commission and Greymac Credit Corp.; Re Ontario Securities Commission and Prousky* (1983) 41 O.R. (2d) 328 at 337 (Ont. Div. Ct.) where Southey J. stated that legal accounts are evidence of transactions and not subject to the privilege where the advice and communications are severed from them. The Commission noted that the purpose of the Act was to provide a right of access in accordance with the principle that the exemptions are to be narrowly interpreted. As a result, the test was held to apply to legal accounts which would reveal the subjects for which legal advice was sought, the strategy used to address the issues raised, the particulars of any legal advice provided or the outcome of these investigations. This allows for legal accounts to be severed or information relating in a direct, tangible way to the seeking, formulating or provision of legal advice. In this case, legal accounts that disclosed a tally of the hours spent and disbursements made by the law as well as brief narratives of the steps taken to complete the assignments were disclosed.

(Order #M-173)

- The retirement agreement between an institution and a former employee was not exempt under this provision. Contracts are not '*communications*'. In addition, the institution's lawyer is not the lawyer for the former employee, and the contract cannot be said to be directly related to seeking, formulating or giving legal advice for existing or contemplated litigation. Even though a wrongful dismissal suit was a possibility, the dominant purpose of the preparation of the agreement was not litigation. The agreement is also not prepared by counsel for the purpose of giving legal advice.

(Order #P-586)

- Records that seek or provide information on a privacy compliance review conducted by the Office of the Information and Privacy Commissioner of Ontario but which do not recommend a course of action based on legal considerations and in which no legal opinion is expressed are not exempt.

(Order #M-237)

- In these instances, the Commission ruled that the exemption did not apply to a record that stated that a response from the legal department was required and to a record that noted the status of a matter involving the City and the appellant. The Commission stated that none of this information was directly related to seeking, formulating or giving legal advice for the purpose of this exemption.

(Order #M-233)

- Views of a City solicitor, contained in a letter sent to the mayor, regarding the job performance of an individual who had made allegations of wrongdoing were not governed by the privilege in this case. While the City argued that the letter was inherently advisory, the Commissioner found that the comments were more administrative than legal in nature.

(Order #P-604)

- A letter written by a solicitor employed by an institution was not exempt where the letter recommends a policy which may be put in place to deal with ministry staff responses to a corporation's proposal. The solicitor had conducted an inquiry on behalf of the ministry's Director of Human Resources. The Commission noted that the letter makes no reference to legal issues and presented no review of the present state of the law. The letter outlined the chronology of events, set out factual findings and presented a proposal. The Commission characterized the letter as an internal investigation report and not a legal opinion.

(Order #P-710)

- In this case, the Commission found that correspondence from the accounting firm to the Board's Director of Legal Services related to the conduct of the forensic audit investigation and was not prepared either for use in giving legal advice or contemplation of or for use in litigation. All reports for information, reports and accounts from the accounting firm were forwarded to the legal branch.

(Order #P-236)

- Where Crown counsel's letter states that the litigation is without merit and that the institution will not be involved, the record is not prepared in contemplation of litigation and this exemption does not apply.

(Order #141)

- Where the information sought can be obtained from publicly available court records, it is not reflective of a confidential communication between a client and a solicitor.

(Order #163)

- Where the institution had sent the appellant the records to which this exemption is claimed, the exemption does not apply and the records cannot be considered confidential.

(Order #M-258)

- The privilege did not apply to an invoice submitted to the institution's solicitor who, in turn, forwarded it to the institution for approval and payment. The Commission ruled that the institution's solicitor was merely a conduit for the passing of the documents to the client. The communication originated with the third party and not a legal adviser of the institution.

(Order #M-394)

- Notes prepared for City Staff meetings attended by certain members of City staff, their counsel, and staff of a local hospital and their counsel and consultants were not confidential communications between a solicitor and his or her client.

(Order #P-365)

- The common-law privilege does not apply to a record created by a non-lawyer employee of an institution that contains a review of legal advice the employee previously obtained from her own lawyer, who was not an employee of the institution. In this context, the common-law privilege only attaches to the lawyer's advice, not to subsequent notations by a non-lawyer as to what that advice was. As well, the client may waive the privilege where legal advice is sent to a third party.

(Order #150)

- Communications between solicitor and client include those between a solicitor and an Appeal Assistant of the Rent Review Board, who acts as agent of the Board member in the review and analysis of a Rent Review Hearings Board file. When the draft decision of the board was submitted to the board's legal advisor for advice, it is exempt.

(Order #170)

- Where a third party reports that certain legal advice was given by a solicitor to a particular client, the privilege would not attach. However where the record is the device used to communicate the solicitor's advice to the client, it is covered by the exemption.

(Orders P#-402, P-424, M-158)

- Memoranda prepared by one employee for review by another, where neither is a lawyer, is exempt if it summarizes the advice given by legal counsel for the institution. Here, the employee who obtained the advice from the lawyer is acting as an agent of the person seeking the advice so that the solicitor/client relationship existed.

(Orders #170, 150, P-381, P-403)

- Where records are marked up or annotated by Crown counsel for the purpose of giving advice, the exemption applies.

(Order #200)

- A note saying that a legal memo is attached or a title page to a legal opinion, which contains a distribution list, is not subject to this exemption.

(Order #170)

- Where an investigation into wrongdoing is conducted by Crown counsel, the fact-finding exercise need not be divorced from the advice given concerning the legal implications of those facts. All of the records are exempt.

(Order #P-227)

- The fact that a lawyer reviewed a record that he or she did not create and that is, in itself, unrelated to the provision of legal advice does not bring that record within this exemption.

(Order #P-398)

- Where a letter from one legal counsel to another outlines administrative arrangements, put in place by the lawyer to deal with the transfer of responsibility of a file to a different lawyer, it is not related to the seeking, formulating or giving of legal advice. It is therefore not exempt.

(Order #P-477)

- Records that incorporate legal advice given by an institution's counsel are exempt. In this case, the records contain written notations of the verbal legal advice that had been provided to institution employees from their counsel following a series of meetings.

(Order #M-157)

- This exemption does not apply to a confidential written communication between a solicitor and client that contains a factual response regarding the status of a pending court application.

(Order #M-162)

- While portions of a record prepared by counsel and retained by an institution were factual in nature, these were intermingled with material prepared for use either in giving legal advice or for use in litigation. As a result, the exemption applied.

(Orders #P-550, P-551)

- Parts of records prepared as a result of an internal workplace allegation of sexual harassment were exempt under this provision. The legal branch of the institution provided advice regarding a memo sent by the investigator to the harassment coordinator and, as a result, the memo was not disclosed. In addition, written legal advice from the institution's legal counsel regarding this matter was exempt. In order to be exempt under this exemption, the communication between solicitor and client must be directly related to seeking, or giving legal advice.

(Order #258)

- The privilege did not apply to an invoice submitted to the institution's solicitor who, in turn, forwarded it to the institution for approval and payment. The Commission ruled that the institution's solicitor was merely a conduit for the passing of the documents to the client. The communication originated with the third party and not a legal adviser of the institution. As well, the communication was not '*legal advice*' in that it was prepared by forensic and investigative accountants and no recommended course of action based on legal considerations or legal opinion was expressed.

c) 2nd Branch:

(Order #P-381)

- Letters from the prosecuting Crown attorney to the investigating officer or to the Sheriff's officer regarding a particular prosecution are exempt under this provision.

(Order #P-676)

- Two disbursements listed in the legal account and a portion of a narrative description of services provided by a law firm was held to reveal the strategy used to address the issues raised by the lawsuit and the results obtained and therefore were covered by the privilege. In addition, severances were made of privileged information that disclosed the type of legal advice sought and the legal advice provided.

(Order #P-583)

- Ontario Securities Commission documents consisting of lists of questions to be posed to individuals during an enforcement investigation, a memo updating action to be taken in future, a *'to do*' list or chronology made by senior enforcement counsel, and background notes setting out facts as understood from interviews with individuals and from reviews of documents do not come within the exemption. The Commission noted that there was no evidence that the records were created for use by anyone other than the author or that the records were used for ongoing or anticipated litigation. As well, the records did not contain legal advice.

(Orders #136, 137, P-236)

- Records prepared in contemplation of litigation must meet a two-fold test: 1. the dominant purpose that the record is produced is for litigation; and 2. there must have been a reasonable prospect of litigation at the time of preparation.

(Orders #49, 52, 56, 68, 123, M-2, M-19, M-86, M-120, M-121, P-585, M-257, M-280, M-281, P-667, P-677, P-710)

- Papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated, are privileged. The dominant purpose for the preparation of the document must be the contemplation of litigation and the potential for litigation must be more than a mere possibility. The privilege also includes material of a non-communicative nature such as notes made in preparation for the litigation to assist the lawyer.

(Order #M-86, M-173)

- The dominant purpose for the preparation of the document must be in contemplation of litigation; and there must be a reasonable prospect of such litigation at the time of the preparation of the record--litigation must be more than just a vague or theoretical possibility. Where an institution's solicitor requested that staff prepare notes in respect to a matter that the solicitor expected, would result in a grievance arbitration, the notes were exempt under the '*litigation privilege*'. The solicitor swore, in an affidavit, that the dominant purpose for the preparation of the records was contemplation of probable litigation. The fact that the records were prepared prior to the commencement of the litigation, or that the litigation for which they were prepared did not materialize or has since been discontinued, does not mean that the privilege does not apply.

(Order #M-280)

- This exemption did not apply to records prepared as a result of a complaint made to the Equity Advisor regarding alleged unfairness in a job competition. The Commission ruled that the dominant purpose for preparing the report was to respond to a complaint filed by the appellant concerning a job competition, not in contemplation of litigation. The Commission found that the fact that a subsequent Human Rights Commission complaint was filed and that this '*prospect of litigation*' was contemplated did not mean that the dominant purpose of creating the records was in contemplation of litigation.

(Orders #P-368, P-467, #M-52, P-613)

- A criminal prosecution file consisting of legal research, correspondence to and from Crown counsel relating to the prosecution, lists of witnesses that may be called and letters regarding matters to be done in preparation for the trial are exempt under the second branch of the exemption. Each of these records was prepared by or for Crown counsel in contemplation of litigation.

(Order #126)

- Private investigators' reports, intended for use in litigation, are exempt under the litigation privilege branch of the common-law solicitor/client privilege. The invoices from, and payments to, the private investigators are closely related to their reports and as such are also exempt under this exemption.

(Order #P-546)

- Legal advice from the Director of the Crown Law Office, Criminal, to Crown attorneys regarding legal issues arising from the prosecution of drinking and driving offenses is exempt under this provision. The memorandum provides an interpretation and analysis of various cases and offers suggestions on how to address them in the context of litigation. As a result, the Commission ruled that the record was prepared for use in litigation.

(Order #M-285)

- The privilege applies to papers and materials created or obtained especially for the lawyers' brief for litigation whether existing or contemplated. The adjuster's reports in this case were created as a result of the claims filed with the institution.

(Order P-667)

- Records copied for the lawyer's brief for litigation are privileged as long as there was an intention to keep them confidential. In this instance, the common-law privilege remains until the litigation is contemplated.

(Orders P-660, M-86, M-162, M-315, P-701)

- There is no distinction between matters in dispute before a court or a tribunal. Re-employment hearings considered by an administrative tribunal of the Workers' Compensation Board are properly classified as litigation matters. Therefore, counsel's advice to the board is privileged.

(Order #165)

- The exemption does not apply to records created during an investigation for sexual harassment where they are not prepared by or for Crown counsel. As well, where the records are prepared to fulfil the institution's obligation to investigate in these circumstances, they are not prepared primarily for use in litigation.

(Order #P-403)

- A hand-written complaint and investigator's notes compiled during an investigation by the Ontario Human Rights Commission are used primarily for determining whether a public inquiry is warranted and not for a lawyer's use in contemplation of litigation. The privilege does not apply.

(Order #P-428)

- A police officer's notes that were compiled in the course of an investigation into allegations that the requester was wrongfully convicted of murder are not exempt

under this section. The notes were not compiled for use in existing or contemplated litigation.

(Order P-441)

- Stage II grievance reports may not be exempt under this provision where they were not prepared by or for Crown counsel. In this particular case, the record was prepared by an employee who was not a lawyer. It was prepared in order to brief senior management. Since neither the author nor the recipient of the record was a lawyer, it is not exempt regardless of whether it was prepared in contemplation of litigation.

(Orders #P-454, P-463)

- In this case, an institution retained a researcher to provide advice regarding aboriginal land claims. The dominant purpose of the preparation of the records was for the researcher to comment on work undertaken by another researcher in the land claims field and to indicate further areas for study. The fact that the material provided by the researcher may have subsequently been used in helping to structure legal advice or in litigation does not alter the fact that the records were not prepared for such purposes originally. As a result, the records are not exempt under this section.

(Order #P-585)

- Information related to the handling of a criminal prosecution gathered and transmitted in the form of a letter from the Ontario Provincial Police (OPP) to a Regional Director of Crown Attorneys for the purpose of drafting a response to a letter of complaint addressed to the Attorney General, was not exempt. The information did not constitute a legal opinion, nor did it provide legal advice on a recommended course of action having legal implications. Similarly, the letter prepared after completion of the trial was not prepared in contemplation of litigation. The dominant purpose of the letter from the OPP was to provide information for the drafting of a response by the Attorney General -- not litigation.

(Order #M-237)

- A letter from a City solicitor to another solicitor regarding negotiations in respect of the City's eventual purchase of a property was not subject to the litigation privilege. The Commission noted that the record was not obtained or created especially for the lawyer's brief for litigation, existing or contemplated, nor was there any evidence as to what the litigation was.

(Orders #M-257, M-296)

- In this case, the Commission ruled that the litigation privilege did not apply. The records concerned an internal workplace matter in which the records were

created, according to the Commission, to provide documentary support for contemplated disciplinary action against the requester, rather than in contemplation of litigation.

(Order #P-776)

- Policies and procedures on prosecutions under the **Occupational Health and Safety Act** was held not to be privileged. The Commission found that while Crown counsel prepared the record, it did not satisfy the second part of the test in that it did not contain a legal opinion. The Commission held that it dealt with policies and administrative procedures, was not based on legal considerations and did not provide a legal opinion based on the state of the law.

(Order #667)

- At common law, the solicitor/client privilege may be lost once litigation is terminated. While direct communications between solicitor and client continues to be privileged, derivative communications made in contemplation of litigation cease to be privileged when litigation is completed. This would include reports collected for the litigation and records copied for inclusion in the lawyer's brief for litigation.

TABLE OF AUTHORITIES

Canada

Blank v. Canada (Minister of justice), 2006 SCC 39
Blank v. Canada (The Minister of the Environment), F.C.J. No. 1844, 2001 FCA 374 (F.C.A.)
Blood Band v. Canada (Minister of Indian Affairs and Northern Development), [2003] F.C.J. No. 1794, (F.C.T.D.), Lemieux J.
Brands Ltd. v. *Procter & Gamble Co. et al.* (1989), 24 C.P.R. (3d) 570 (F.C.A.).
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Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] 4 F.C. 245 at 267-268 (C.F.T.D.)
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Foster Wheeler Power Co. v. Société intermunicipale de gestion & d'élimination des déchets inc., [2004] S.C.C. 18, 318 N.R. 111, 237 D.L.R. (4th) 417, 48 C.P.C. (4th) 1, Lebel J.;
Gauthier v. Canada (Minister of Justice), [2004] F.C. 655, 14 Admin. L.R. (4th) 106, (F.C.T.D.), Mosley J.
Professional Institute of the Public Service of Canada v. Canada (Director of the Canadian Museum of Nature), [1995] 3 F.C. 643 at 652 (F.C.T.D).
Stevens v. Canada (Prime Minister), [1997] 2 F.C. 759 at 779 (F.C.T.D.)
Stevens v. Canada (Prime Minister), [1998] 4 F.C. 89 at 100 (F.C.A.)
Solosky v. The Queen [1980], 1 S.C.R. 821 at 837
Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex.C.R. 27 at 33 Jackett
Wells v. Canada (Minister of Transport) (1995), 63 C.P.R. (3d) 201 at 204-205 (F.C.T.D.)
Weiler v. Canada (Department of Justice), [1991] 3 F.C. 617 at 621-624 (F.C.T.D.)

Ontario

Order #49, 52, 56, 68, 123, 126, 135, 136, 137, 141, 150, 163, 165, 170, 200, 258, P-218, P-227, P-236, P-277, P-281, P-365, P-368, P-381, P-398, P-402, P-403, P-417, P-403, P-424, P-428, P-441, P-454, P-463, P-467, P-477, P-538, P-546, P-550, P-551, P-579, P-583, P-585, P-586, P-604, P-613, P-624, P-660, P-667, P-676, P-677, P-701, P-710, P-776, P-780, M-2, M-11, M-19, M-52, M-59, M-61, M-69, M-86, M-120, M-121, M-157, M-158, M-162, M-173, M-213, M-233, M-237, M-257, M-258, M-260, M-274, M-280, M-281, M-285, M-291, M-296, M-315 and M-394.

The Questions

Section -- 23
Exemption: The head of a government institution may refuse to disclose any record requested under this Act that contains information that is subject to solicitor/client privilege.

Statement of Test to be Met
Solicitor/client privilege preserves the confidentiality of communications between a client and a lawyer - in the course of providing legal advice - during or in contemplation of litigation

Relevant Questions	Departmental Response	Assessment
Does the record consist of a communication or record between a lawyer and his client?		
Is the purpose of the communication to provide the client with legal advice?		
What is the subject matter of the legal advice?		
Does the record consist of a communication between a lawyer and a third party?		
What is the purpose of this communication?		
Is the purpose of the communication to prepare for existing or contemplated litigation?		

Statement of Test to be Met
- Communication must be to and from a lawyer

Relevant Questions	Departmental Response	Assessment
Who is the author of the record?		
If the record provides legal advice, was the author a lawyer? - at the employ of the Department of Justice		

Relevant Questions	Departmental Response	Assessment
- employed elsewhere - if employed elsewhere was this lawyer retained to provide legal advice to the government? (see below)		
Is this lawyer called to the Bar of a province of Canada or a member of the Chambre des Notaires in Quebec?		
- If not, has the communication been provided to a lawyer?		
- for purposes of pending or contemplated litigation		
If these conditions are not met, section 23 exemption does not apply.		

Statement of Test to be Met

Communication must be for the purpose of obtaining or giving legal advice

Does NOT include:
- policy advice
- factual analysis
- historical or other research
- status reports on existing litigation
- legal bills

Relevant Questions	Departmental Response	Assessment
If the communication is to a lawyer, is it for the purpose of obtaining legal advice? - What legal advice is sought?		
If the communication is from a lawyer, is it to a client for purposes of giving legal advice? - What legal advice is given?		
Does the advice given consist of a legal opinion?		
Does it consist of advice about the application of legislative provisions or regulations or common law in a particular situation?		
Does it advise the government institution how to resolve a		

Relevant Questions	Departmental Response	Assessment
conflict arising pursuant to a statutory or regulatory provision?		
Does it describe the legal obligations of a government institution?		
Does it describe or define legal obligations or entitlements of third party to deal with the government institution?		
What is the legal issue raised by the communication?		
Is there a letter of retainer or request for advice which sets out the legal advice sought? - ask to review the retainer letter or request for advice		
Is the lawyer providing the advice employed in a legal advisory position? - in legal services - by the Department of Justice		
Is the lawyer providing the advice employed or practising law from outside of the government? - ask to see the retainer letter to assess whether the advice sought is legal in nature		
Is the lawyer providing the advice employed in a general staff or policy assessment job?		
Has the lawyer been asked for advice on policy and operational as opposed to legal issues?		
Does the communication contain legal analysis ? - where?		
Does the communication consist of a factual, as opposed to legal, analysis?		
Does the record apply any legal standards to the factual analysis?		
Are legal issues intertwined with the factual analysis?		
Does the record consist of a factual analysis with a factual conclusion? - if so, section 23 will likely not apply		
Does the record consist of historical or policy research?		
What is the purpose of this research?		

Relevant Questions	Departmental Response	Assessment
Was this research conducted in preparation for existing or contemplated litigation? - ask to see any memoranda requesting that the research be done to assess whether it was performed for purposes of litigation		
If the purpose of the historical research was not to support litigation, how has the report been used by the government institutions?		
If the report has been used to set factual criteria for entitlements under a statute, was any legal analysis applied to determine whether the entitlement exists? - if not, section 23 likely does not apply		
Does the record compile or report on the status of existing litigation? - if so, does the record contain any legal analysis about the outcome or status of the litigation?		
Is the information reported available on court files? - unless under seal, section 23 likely does not apply		
Does the record consist of an account for legal services? - if so, is the content of any legal strategy or advice contained in the account?		
Have the financial aspects of the account been severed and disclosed?		

Statement of Test to be Met

Communication must be for purpose of advising a client about a particular matter
- newsletters, articles or bulletins for general circulation not included

Relevant Questions	Departmental Response	Assessment
What government institution requested the legal advice contained in the record?		
Does the record consist of legal advice about a particular matter?		
Does the record consist of legal interpretation of a general		

Relevant Questions	Departmental Response	Assessment
nature?		
Was the record circulated on a generally broad basis throughout the government?		
What was the purpose of this general circulation?		
Was the purpose of the general circulation to provide broad legal advice about a particular matter to the government as a whole? - what is the particular matter about which the advice was provided?		
Was the record designed to explain, on a general basis, for the collectivity, how a statutory provision works?		
Is the record a manual or guideline? - i.e., Treasury Board Guidelines - i.e., Department of Justice Manuals on the Charter These should be disclosed because they are not legal advice about a particular matter		
See above for questions/reports on the status of pending litigation.		
If the client department did not specifically request the advice, would the advice from the lawyer be expected in the ordinary course of operations?		
Is the lawyer employed in legal services at the government institution or retained on a general basis by the government institution? - if retained from outside the government, ask to see the retainer letter to assess the nature of advice being provided		
Does the record consist of a legal article or paper?		
Was the paper presented within the government?		
What degree of circulation did the paper get?		
Has the paper or article been published? Has it been submitted for publication? - if so, section 23 likely does not apply		

Statement of Test to be Met
Litigation Privilege: - communication must be for purposes of conducting litigation - must be a reasonable prospect of litigation

Relevant Questions	Departmental Response	Assessment
Is a litigation privilege claimed with respect to the record?		
Was the communication for purposes of conducting litigation?		
What is the status of the litigation? - has it been commenced? Has a demand letter been issued?		
Has the litigation terminated? - if so, when did it terminate?		
If the litigation has not been commenced, is litigation contemplated? By whom?		
On what basis has the government institution concluded that litigation will take place?		
What kind of litigation is contemplated? - in Court - challenges to administrative tribunals - proceedings before tribunals		
If internal proceedings or reviews are being conducted, does the record contain legal advice sought in connection with those proceedings? - if so, privilege will apply to the legal advice sought		
Was the document prepared in contemplation of the internal proceedings? - if so, was the document prepared in order to assist the solicitor to provide advice in connection with the proceedings?		
If it was prepared for the assistance of the decision-maker, as opposed to the lawyer, what is the basis for the claim of solicitor/client privilege? - section 23 likely does not apply in these circumstances		

Relevant Questions	Departmental Response	Assessment
If litigation has not been commenced, has the government institution received or sent demand letters? - ask to see these		
Have any responses been sent or received? - ask to see these to assess whether litigation is a reasonable prospect		
If the communication is with a third party, was it for the purpose of preparing for litigation?		
Does it consist of an opinion by an expert?		
Was this opinion sought in the context of current or contemplated litigation? - check the applicable date - ask to see the request for the opinion - has the opinion been filed or entered in evidence in the litigation? - if so, it has become evidence and is no longer privileged		
Does the record consist of - draft pleadings - memoranda on strategy for the litigation - preparatory notes for court proceedings or discoveries - witness interviews - investigations by lawyers into the facts in preparation for the case - opinions given by the lawyer to the client with respect to the litigation - settlement offers made between lawyers on a without prejudice basis - Have these settlement offers concluded in an agreement - The agreement may not be privileged		
Does the report consist of internal investigations? - harassment complaints - human rights complaints - formal grievances		

Relevant Questions	Departmental Response	Assessment
Was the purpose of preparing these reports in order to defend the government in contemplated litigation? - ask to see evidence of a reasonable prospect of litigation - demand letters - human rights complaints		
Was the investigation report prepared in order to enable the government institution to deal with allegations or complaints of harassment, discrimination or other internal matters? - if so, was any legal advice provided in the report?		
Did the report investigate and make factual conclusions as to the allegations? - if so, will the factual conclusions be incorporated in or intertwined with any legal advice? - if not, was the report prepared in order to respond to current or pending litigation? - this will often not be the case and the report will often not be privileged		
Do the records relay facts of evidence that may be used in a court case? - if so, they likely are not privileged unless incorporated with legal advice or opinion evidence.		
Do the records consist of copies of documents provided to a lawyer for preparation? - if so, the copies may be privileged, but the originals will not be privileged		

Statement of Test to be Met

- legal advice retains its privilege if quoted by the client internally
- interpretations of legal advice are not privileged

Relevant Questions	Departmental Response	Assessment
Has the requester requested originals from the client department?		

Relevant Questions	Departmental Response	Assessment
If the communication is by the client to other recipients in the government, does it quote legal advice or opinions obtained from the Department of Justice? - if so, the quotations or repetition of legal advice provided retains solicitor/client privilege.		
Does the record discuss or interpret the advice provided by the lawyer? - if so, the discussion/interpretation is not privileged. - have these portions been severed and disclosed?		
Watch for double banking with section 21 in these circumstances.		

Statement of Test to be Met

SOLICITOR/CLIENT PRIVILEGE DOES NOT APPLY IF:
- the client has waived the privilege
- common interest privilege may apply
- partial waiver may waive other parts of document containing advice or same matter

Relevant Questions	Departmental Response	Assessment
Has the client circulated the legal advice or privileged document?		
What degree of circulation has the document received?		
Has the document been circulated within the government? - have the names of the recipients been circulated with the document? - have the recipients been told about the advice received?		
Did the recipients need to know about the advice received? - why? - if the recipients did not need to know about the advice received, the privilege may have been waived.		

Relevant Questions	Departmental Response	Assessment
Did the client disclose the document or substance of the advice publicly? Publicly here has a very restrictive meaning and includes disclosure to personnel within and outside a given institution who are not party to the litigation or matter involved. - how? - what degree of public exposure has the advice received? - to whom was it disclosed? - why was it disclosed?		
Did the client institution disclose the document to provincial counterparts or other governments?		
Does the government institution claim a common interest privilege in this respect?		
On what basis is the common interest privilege claimed?		
Did the parties to whom the advice or record was disclosed have a similar position in litigation? - describe this.		
Are the parties jointly liable with the Government of Canada as defendants in a proceeding?		
Are the parties co-plaintiffs with the Government of Canada in a proceeding?		
Is there any difference in the positions of the parties?		
Note that in most constitutional and public law issues the interest of the Federal Government and provinces will not be identical.		
Did the client waive all or part of the privilege in the record? - if a partial waiver was given, to what part did the waiver apply? - why was the privilege in the rest of the document not waived? - does the rest of the document deal with the same subject matter as the part for which privilege was waived? - if so, what reason is given by the client to distinguish between these parts?		
Note that a client cannot waive privilege with respect to		

Relevant Questions	Departmental Response	Assessment
helpful issues only.		

Statement of Test to be Met

- Illegal use is made of the advice.

Relevant Questions	Departmental Response	Assessment
Has the advice been used in order to facilitate the commission of an offence or an attempted commission of an offence?		
Has the client, in the action or attempt of committing a fraud, used the advice?		
Has the advice been used by the client in the course of a breach of trust by a public official misuse of funds or abuse of public office amounting to a criminal act (kickbacks, brides, etc.)? - if so, section 23 will not apply		

Statement of Test to be Met

- Legal advice to trustees cannot be withheld from beneficiaries.

Relevant Questions	Departmental Response	Assessment
Was the legal advice for the Department of Indian and Northern Affairs?		
Was the legal advice for government officials making decisions with respect to the administration of Indian reserves or treaties?		
Are members of those Indian Bands or treaties requesting the information? - if so, is there a trust relationship established between the recipient of the advice and the requester. - if so, legal advice may not be privileged as against the member of the Indian Band or treaty as a		

Relevant Questions	Departmental Response	Assessment
beneficiary of the trust.		

Statement of Test to be Met

- Severance must take place for information not subject to solicitor/client privilege.

Relevant Questions	Departmental Response	Assessment
Has the information not subject to solicitor/client privilege been severed and disclosed ? - factual analysis - policy analysis - interpretations and discussion of legal advice by non-lawyers - information of a legal nature provided by non-lawyers - business advice - commercial matters involving lawyers - privilege which has been waived		

Statement of Test to be Met

- Discretionary Exemption

Relevant Questions	Departmental Response	Assessment
Has the client institution considered disclosing the record? - by waiving the privilege - by exercising the discretion to disclose notwithstanding the privilege		
Relevant factors in the exercise of discretion or decision to waive the privilege include the following:		
Crown has historically relevant legal opinions: - Native treaties and administration - Constitutional amendments - Criminal Code amendments - terms of union with provinces - war-time/emergency measures		

Relevant Questions	Departmental Response	Assessment
Crown may be the only party in possession of documents outlining its relations with Indian or other groups.		
These documents may now be relevant to Indians in the context of self-government or entitlements under the Charter.		
Passage of time reduces the need for protection of information subject to solicitor/client privilege. However, passage of time alone does not render void the privilege.		
The harm to the client institution's position in respect of the litigation or the substantive issue on which advice was provided should be assessed. - similar considerations to those set out in section 21 may apply - see section 21 grid - Legal advice may have been provided on routine or innocuous matters		
Government position is often available in public documents - Factums - memoranda of argument - motion material - affidavit		
Purpose of request may be relevant - what use will be made of the records? A public purpose serves the purposes of the Act more than a private purpose. - Note that government is in a position to waive the privilege by consenting to its disclosure, where there is a valid purpose which does not damage the solicitor/client relationship.		

Endnotes

1. *Ruby v. Canada (Solicitor General, R.C.M.P.)*, [2000] F.C.J. No. 779 (June 8, 2000) (F.C.A.)

2. *Weiler v. Canada (Department of Justice),* [1991], 3 F.C. 617 (T.D.)

3. *Ibid.*

4. Ontario Order P-365.

5. *Ibid.*

6. *Blank v. Canada (Minister of justice), 2006 SCC 39.*

7. *Blank v. Canada (Minister of justice), 2006 SCC 39.*

8. See Ontario Orders No. 136, 137 and P-236.

9. Ontario Order M-86 and 173.

10. *Blank v. Canada (Minister of justice), 2006 SCC 39.*

11. *Blank v. Canada (Minister of justice), 2006 SCC 39.*

12. Ontario Order P-667.

13. Ontario Order M-291.

14. Ontario Order P-579.

15. Ontario Orders M-2, M-11, M-19, M-59, M-61, M-69 and see also Orders 163, 170, and P-227 where draft records were held to be covered by the solicitor/client privilege.

16. *Blank v. Canada (Minister of justice), 2006 SCC 39.*

Section 24

The Provision:

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

(2) Such committee as may be designated or established under section 75 shall review every provision set out in Schedule II and shall, not later than July 1, 1986 or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting, cause a report to be laid before Parliament on whether and to what extent the provisions are necessary.

Provisions set out in Schedule II

Act	Provision
Aeronautics Act	subsections 4.79 (1) and 6.5 (5)
Anti-Inflation Act	section 14
Assisted Human Reproduction Act	subsection 18 (2)
Business Development Bank of Canada Act	section 37
CanadaNewfoundland Atlantic Accord Implementation Act	section 119
CanadaNova Scotia Offshore Petroleum Resources Accord Implementation Act	sections 19 and 122
CanadaNova Scotia Oil and Gas Agreement Act	section 53
Canada Pension Plan	subsection 104.01 (1)
Canada Petroleum Resources Act	section 101
Canada Transportation Act *Loi sur les transports au Canada*	subsection 51 (1) and section 167
Canadian Environmental Assessment Act *Loi canadienne sur l'évaluation environnementale*	subsection 35 (4)
Canadian International Trade Tribunal Act	sections 45 and 49
Canadian Ownership and Control Determination Act	section 17

Act	Provision
Canadian Security Intelligence Service Act	section 18
Canadian Transportation Accident Investigation and Safety Board Act	subsections 28 (2) and 31 (4)
Competition Act	subsections 29 (1) , 29.1 (5) and 29.2 (5)
Corporations and Labour Unions Returns Act	section 18
Criminal Code	sections 187, 193 and 487.3
Criminal Records Act	subsection 6 (2) and section 9
Customs Act	sections 107 and 107.1
Defence Production Act	section 30
Department of Industry Act	subsection 16 (2)
DNA Identification Act	subsection 6 (7)
Energy Administration Act	section 98
Energy Efficiency Act	section 23
Energy Monitoring Act	section 33
Energy Supplies Emergency Act	section 40.1
Excise Tax Act	section 295
Family Allowances Act	section 18
First Nations Fiscal and Statistical Management Act	section 108
Hazardous Products Act	section 12
Canadian Human Rights Act	subsection 47 (3)
Income Tax Act	section 241
Industrial Research and Development Incentives Act	section 13
Investment Canada Act	section 36
Canada Labour Code	subsection 144 (3)
Mackenzie Valley Resource Management Act	paragraph 30 (1) (b)
Marine Transportation Security Act	subsection 13 (1)

Act	Provision
Motor Vehicle Fuel Consumption Standards Act	subsection 27 (1)
Nuclear Safety and Control Act	paragraphs 44 (1) (*d*) and 48 (*b*)
Old Age Security Act	subsection 33.01 (1)
Patent Act	section 10, subsection 20 (7) , and sections 87 and 88
Petroleum Incentives Program Act	section 17
Proceeds of Crime (Money Laundering) and Terrorist Financing Act	paragraphs 55 (1) (*a*) , (*d*) and (*e*)
Railway Safety Act	subsection 39.2 (1)
Sex Offender Information Registration Act	subsections 9 (3) and 16 (4)
Shipping Conferences Exemption Act, 1987	section 11
Softwood Lumber Products Export Charge Act	section 20
Special Import Measures Act	section 84
Statistics Act	section 17
Telecommunications Act	subsections 39 (2) and 70 (4)
Trademarks Act	subsection 50 (6)
Transportation of Dangerous Goods Act, 1992	subsection 24 (4)
Yukon Environmental and Socioeconomic Assessment Act	paragraph 121 (*a*)
Yukon Quartz Mining Act	subsection 100 (16)

Aeronautics Act, subsections 4.79(1) and 6.5(5)

4.79 (1) Unless the Minister states under subsection 4.72(3) that this subsection does not apply in respect of a security measure, no person other than the person who made the security measure shall disclose its substance to any other person unless the disclosure is required by law or is necessary to give effect to the security measure.

6.5 (5) Notwithstanding subsection (3), information provided pursuant to subsection (1) is privileged and no person shall be required to disclose it or give evidence relating to it in any legal, disciplinary or other proceedings and the information so provided shall not be used in any such proceedings.

Anti-Inflation Act, section 14 (Repealed)

14. (1) Except as provided in this section, all information with respect to a person, business or employee organization that is, in its nature, confidential and that is obtained by a member of the Anti-Inflation Board or by any person engaged in carrying out duties of that Board under this Act, in the course of carrying out those duties, is privileged and no person shall knowingly, except as expressly provided in this or any other Act, communicate or allow to be communicated to any person any such information except for the purposes of the administration or enforcement of this Act or allow any person to inspect or have access to any such information except for the purposes of the administration or enforcement of this Act.

(2) Any information with respect to a person, business or employee organization obtained by a member of the Anti-Inflation Board or any person engaged in carrying out the duties of the Board, in the course of carrying out those duties, may, on request in writing to the Chairman of the Anti-Inflation Board by or on behalf of the person or employee organization to which the information relates or the person carrying on the business to which the information relates, be communicated to any person or authority named in the request on such terms and conditions and under such circumstances as are approved by the Chairman of the Anti-Inflation Board.

(3) Notwithstanding any other Act or law, no Minister of the Crown and no person employed in the administration or enforcement of this Act shall be required, in connection with any legal proceedings, to give evidence relating to any information that is privileged under subsection (1) or to produce any statement or other writing containing such information.

(4) Subsections (1) and (3) do not apply in respect of proceedings before the Appeal Tribunal or any court of law relating to the administration or enforcement of this Act.

Assisted Human Reproduction, subsection 18(2)

18(2) Notwithstanding section 8 of the *Privacy Act* but subject to subsections (3) to (8), health reporting information under the control of the Agency relating to a donor of human reproductive material or an *in vitro* embryo, a person who has undergone an assisted reproduction procedure or a person who was conceived by means of such a procedure is confidential and shall be disclosed only with the written consent of the donor or that person, as the case may be.

See also ss. 18(3) to 18(8)

18 (3) The Agency shall, on request, disclose health reporting information relating to a donor of human reproductive material or of an *in vitro* embryo to a person undergoing an assisted reproduction procedure using that human reproductive material or embryo, to a person conceived by means of such a procedure and to descendants of a person so conceived, but the identity of the donor — or information that can reasonably be expected to

be used in the identification of the donor — shall not be disclosed without the donor's written consent.

(4) On application in writing by any two individuals who have reason to believe that one or both were conceived by means of an assisted reproduction procedure using human reproductive material or an *in vitro* embryo from a donor, the Agency shall disclose to both of them whether it has information that they are genetically related and, if so, the nature of the relationship.

(5) The Agency shall disclose health reporting information

(*a*) for the purpose of complying with a subpoena or warrant issued or order made by a court, body or person with jurisdiction to compel the production of information, or for the purpose of complying with rules of court relating to the production of information; and

(*b*) to the extent required by provisions of any federal or provincial law respecting health and safety that are specified in the regulations.

(6) The Agency may disclose health reporting information

(*a*) for the purposes of the enforcement of this Act;

(*b*) to the extent required for the administration of a health care insurance plan within the meaning of the *Canada Health Act*; and

(*c*) for the purposes of disciplinary proceedings undertaken by any professional licensing or disciplinary body established under the laws of Canada or a province and specified in the regulations.

(7) The Agency may disclose the identity of a donor to a physician if, in the Agency's opinion, the disclosure is necessary to address a risk to the health or safety of a person who has undergone an assisted reproduction procedure, was conceived by means of such a procedure or is a descendant of a person so conceived. The physician may not disclose that identity.

(8) The Agency may disclose health reporting information to an individual or organization for scientific research or statistical purposes, other than the identity of any person — or information that can reasonably be expected to be used in the identification of any person.

Business Development Bank of Canada Act, section 37

37. (1) Subject to subsection (2), all information obtained by the Bank in relation to its customers is privileged and a director, officer, employee or agent of, or adviser or consultant to, the Bank must not knowingly communicate, disclose or make available the information, or

permit it to be communicated, disclosed or made available.

(2) Privileged information may be communicated, disclosed or made available

(*a*) for the purpose of the administration or enforcement of this Act and legal proceedings related to it;

(*b*) for the purpose of prosecuting an offence under this Act or any other Act of Parliament;

(*c*) to the Minister of National Revenue solely for the purpose of administering or enforcing the *Income Tax Act* or the *Excise Tax Act*; or

(*d*) with the written consent of the person to whom the information relates.

Canada Newfoundland Atlantic Accord Implementation Act, section 119

119. (1) In this section,

"delineation well" means a well that is so located in relation to another well penetrating an accumulation of petroleum that there is a reasonable expectation that another portion of that accumulation will be penetrated by the first-mentioned well and that the drilling is necessary in order to determine the commercial value of the accumulation;

"development well" means a well that is so located in relation to another well penetrating an accumulation of petroleum that it is considered to be a well or part of a well drilled for the purpose of production or observation or for the injection or disposal of fluid into or from the accumulation:

"engineering research or feasibility study" includes work undertaken to facilitate the design or to analyse the viability of engineering technology, systems or schemes to be used in the exploration for or the development, production or transportation of petroleum in the offshore area;

"environmental study" means work pertaining to the measurement or statistical evaluation of the physical, chemical and biological elements of the lands, oceans or coastal zones, including winds, waves, tides, currents, precipitation, ice cover and movement, icebergs, pollution effects, flora and fauna both onshore and offshore, human activity and habitation and any related matters;

"experimental project" means work or activity involving the utilization of methods or equipment that are untried or unproven;

"exploratory well" means a well drilled on a geological feature on which a significant discovery has not been made;

"geological work" means work, in the field or laboratory, involving the collection, examination,

processing or other analysis of lithological, paleontological or geochemical materials recovered from the seabed or subsoil of any portion of the offshore area and includes the analysis and interpretation of mechanical well logs;

“geophysical work” means work involving the indirect measurement of the physical properties of rocks in order to determine the depth, thickness, structural configuration or history of deposition thereof and includes the processing, analysis and interpretation of material or data obtained from such work;

“geotechnical work” means work, in the field or laboratory, undertaken to determine the physical properties of materials recovered from the seabed or subsoil of any portion of the offshore area;

“well site seabed survey” means a survey pertaining to the nature of the seabed or subsoil of any portion of the offshore area in the area of the proposed drilling site in respect of a well and to the conditions of those portions of the offshore area that may affect the safety or efficiency of drilling operations;

“well termination date” means the date on which a well or test hole has been abandoned, completed or suspended in accordance with any applicable regulations respecting the drilling for petroleum made under Part III.

(2) Subject to section 18 and this section, information or documentation provided for the purposes of this Part or Part III or any regulation made under either Part, whether or not such information or documentation is required to be provided under either Part or any regulation made thereunder, is privileged and shall not knowingly be disclosed without the consent in writing of the person who provided it except for the purposes of the administration or enforcement of either Part or for the purposes of legal proceedings relating to such administration or enforcement.

(3) No person shall be required to produce or give evidence relating to any information or documentation that is privileged under subsection (2) in connection with any legal proceedings, other than proceedings relating to the administration or enforcement of this Part or Part III.

(4) For greater certainty, this section does not apply to a document that has been registered under Division VIII.

(5) Subsection (2) does not apply to the following classes of information or documentation obtained as a result of carrying on a work or activity that is authorized under Part III, namely, information or documentation in respect of

(*a*) an exploratory well, where the information or documentation is obtained as a direct result of drilling the well and if two years have passed since the well termination date of that well;

(*b*) a delineation well, where the information or documentation is obtained as a direct result of drilling the well and if the later of

(i) two years since the well termination date of the relevant exploratory well, and

(ii) ninety days since the well termination date of the delineation well,

have passed;

(*c*) a development well, where the information or documentation is obtained as a direct result of drilling the well and if the later of

(i) two years since the well termination date of the relevant exploratory well, and

(ii) sixty days since the well termination date of the development well,

have passed;

(*d*) geological work or geophysical work performed on or in relation to any portion of the offshore area,

(i) in the case of a well site seabed survey where the well has been drilled, after the expiration of the period referred to in paragraph (*a*) or the later period referred to in subparagraph (*b*)(i) or (ii) or (*c*)(i) or (ii), according to whether paragraph (*a*), (*b*) or (*c*) is applicable in respect of that well, or

(ii) in any other case, after the expiration of five years following the date of completion of the work;

(*e*) any engineering research or feasibility study or experimental project, including geotechnical work, carried out on or in relation to any portion of the offshore area,

(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (*a*) or the later period referred to in subparagraph (*b*)(i) or (ii) or (*c*)(i) or (ii), according to whether paragraph (*a*), (*b*) or (*c*) is applicable in respect of that well, or

(ii) in any other case, after the expiration of five years following the date of completion of the research, study or project or after the reversion of that portion of the offshore area to Crown reserve areas, whichever occurs first;

(*f*) any contingency plan formulated in respect of emergencies arising as a result of any work or activity authorized under Part III;

(*g*) diving work, weather observation or the status of operational activities or of the development of or production from a pool or field;

(*g*.1) accidents, incidents or petroleum spills, to the extent necessary to permit a person or body to produce and to distribute or publish a report for the administration of this Act in respect of the accident, incident or spill;

(*h*) any study funded from an account established under subsection 76(1) of the *Canada Petroleum Resources Act*, if the study has been completed; and

(*i*) an environmental study, other than a study referred to in paragraph (*h*),

(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (*a*) or the later period referred to in subparagraph (*b*)(i) or (ii) or (*c*)(i) or (ii), according to whether paragraph (*a*), (*b*) or (*c*) is applicable in respect of that well, or

(ii) in any other case, if five years have passed since the completion of the study.

(6) [Repealed, 1988, c. 28, s. 260]

See also s. 18

18. (1) The Federal Minister and the Provincial Minister are entitled to access to any information or documentation relating to petroleum resource activities in the offshore area that is provided for the purposes of this Act or any regulation made thereunder and such information or documentation shall, on the request of either Minister, be disclosed to that Minister without requiring the consent of the party who provided the information or documentation.

18. (2) Section 119 applies, with such modifications as the circumstances require, in respect of any disclosure of information or documentation or the production or giving of evidence relating thereto by a Minister as if the references in that section to the administration or enforcement of a Part of this Act included references to the administration or enforcement of the Provincial Act or any Part thereof.

Canada Nova Scotia Offshore Petroleum Resources Accord Implementation Act, sections 19 and 122

19. (1) The Federal Minister and the Provincial Minister are entitled to access to any information or documentation relating to petroleum resource activities in the offshore area that is provided for the purposes of this Act or any regulation made thereunder and such information or documentation shall, on the request of either Minister, be disclosed to that Minister without requiring the consent of the party who provided the information or documentation.

(2) Section 122 applies, with such modifications as the circumstances require, in respect of any disclosure of information or documentation or the production or giving of evidence relating thereto by a Minister as if the references in that section to the administration or enforcement of a Part of this Act included references to the administration or enforcement of the Provincial Act or any Part thereof.

(3) The Board shall require every person who makes an application in respect of which a fundamental decision is to be made by the Board to give, forthwith after making the application, a written summary of the application to both Ministers.

122. (1) In this section,

“delineation well” means a well that is so located in relation to another well penetrating an accumulation of petroleum that there is a reasonable expectation that another portion of that accumulation will be penetrated by the first-mentioned well and that the drilling is necessary in order to determine the commercial value of the accumulation;

“development well” means a well that is so located in relation to another well penetrating an accumulation of petroleum that it is considered to be a well or part of a well drilled for the purpose of production or observation or for the injection or disposal of fluid into or from the accumulation;

“engineering research or feasibility study” includes work undertaken to facilitate the design or to analyse the viability of engineering technology, systems or schemes to be used in the exploration for or the development, production or transportation of petroleum in the offshore area;

“environmental study” means work pertaining to the measurement or statistical evaluation of the physical, chemical and biological elements of the lands, oceans or coastal zones, including winds, waves, tides, currents, precipitation, ice cover and movement, icebergs, pollution effects, flora and fauna both onshore and offshore, human activity and habitation and any related matters;

“experimental project” means work or activity involving the utilization of methods or equipment that are untried or unproven;

“exploratory well” means a well drilled on a geological feature on which a significant discovery has not been made;

“geological work” means work, in the field or laboratory, involving the collection, examination, processing or other analysis of lithological, paleontological or geochemical materials recovered from the surface or subsurface or the seabed or its subsoil of any portion of the offshore area and includes the analysis and interpretation of mechanical well logs;

“geophysical work” means work involving the indirect measurement of the physical properties of rocks in order to determine the depth, thickness, structural configuration or history of deposition thereof and includes the processing, analysis and interpretation of material or data obtained from such work;

“geotechnical work” means work, in the field or laboratory, undertaken to determine the physical properties of materials recovered from the surface or subsurface or the seabed or its

subsoil of any portion of the offshore area;

“well site seabed survey” means a survey pertaining to the nature of the surface or subsurface or the seabed or its subsoil of any portion of the offshore area in the area of the proposed drilling site in respect of a well and to the conditions of those portions of the offshore area that may affect the safety or efficiency of drilling operations;

“well termination date” means the date on which a well or test hole has been abandoned, completed or suspended in accordance with any applicable regulations respecting the drilling for petroleum made under Part III.

(2) Subject to section 19 and this section, information or documentation provided for the purposes of this Part or Part III or any regulation made under either Part, whether or not such information or documentation is required to be provided under either Part or any regulation made thereunder, is privileged and shall not knowingly be disclosed without the consent in writing of the person who provided it except for the purposes of the administration or enforcement of either Part or for the purposes of legal proceedings relating to such administration or enforcement.

(3) No person shall be required to produce or give evidence relating to any information or documentation that is privileged under subsection (2) in connection with any legal proceedings, other than proceedings relating to the administration or enforcement of this Part or Part III.

(4) For greater certainty, this section does not apply to a document that has been registered under Division VIII.

(5) Subsection (2) does not apply to the following classes of information or documentation obtained as a result of carrying on a work or activity that is authorized under Part III, namely, information or documentation in respect of

(*a*) an exploratory well, where the information or documentation is obtained as a direct result of drilling the well and if two years have passed since the well termination date of that well;

(*b*) a delineation well, where the information or documentation is obtained as a direct result of drilling the well and if the later of

(i) two years since the well termination date of the relevant exploratory well, and

(ii) ninety days since the well termination date of the delineation well,

have passed;

(*c*) a development well, where the information or documentation is obtained as a direct result of drilling the well and if the later of

(i) two years since the well termination date of the relevant exploratory well, and

(ii) sixty days since the well termination date of the development well,

have passed;

(*d*) geological work or geophysical work performed on or in relation to any portion of the offshore area,

(i) in the case of a well site seabed survey where the well has been drilled, after the expiration of the period referred to in paragraph (*a*) or the later period referred to in subparagraph (*b*)(i) or (ii) or (*c*)(i) or (ii), according to whether paragraph (*a*), (*b*) or (*c*) is applicable in respect of that well, or

(ii) in any other case, after the expiration of five years following the date of completion of the work;

(*e*) any engineering research or feasibility study or experimental project, including geotechnical work, carried out on or in relation to any portion of the offshore area,

(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (*a*) or the later period referred to in subparagraph (*b*)(i) or (ii) or (*c*)(i) or (ii), according to whether paragraph (*a*), (*b*) or (*c*) is applicable in respect of that well, or

(ii) in any other case, after the expiration of five years following the date of completion of the research, study or project or after the reversion of that portion of the offshore area to Crown reserve areas, whichever occurs first;

(*f*) any contingency plan formulated in respect of emergencies arising as a result of any work or activity authorized under Part III;

(*g*) diving work, weather observation or the status of operational activities or of the development of or production from a pool or field;

(*g*.1) accidents, incidents or petroleum spills, to the extent necessary to permit a person or body to produce and to distribute or publish a report for the administration of this Act in respect of the accident, incident or spill;

(*h*) any study funded from an account established under subsection 76(1) of the *Canada Petroleum Resources Act*, if the study has been completed; and

(*i*) an environmental study, other than a study referred to in paragraph (*h*),

(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (*a*) or the later period referred to in subparagraph (*b*)(i) or (ii) or (*c*)(i) or (ii), according to whether paragraph (*a*), (*b*) or (*c*) is applicable in respect of that well, or

(ii) in any other case, if five years have passed since the completion of the study.

Canada NovaScotia Oil and Gas Agreement Act, section 53 (Repealed)

53 (2) Except as authorized by this section, no official shall

a) knowingly communicate or knowingly allow to be communicated to any person any tax information ; or

b) knowingly allow any person to inspect or to have access to any tax document.

(3)Notwithstanding any other Act or law, no official shall be required, in connection with any legal proceedings,

a) to give evidence relating to any tax information; or

b) to produce any tax document.

(4) Subsections (2) and (3) do not apply in respect of criminal proceedings, either by indictment or on summary conviction, under an Act of Parliament or in respect of proceedings relating to the administration or enforcement of this Part.

(5) An official may communicate or allow to be communicated any tax information to, or allow inspection of or access to any tax document by,

a) any person employed, or occupying a position of responsibility, in the service of Her Majesty in right of Canada or in right of Nova Scotia, for any purpose relating to the administration or enforcement of this Part, including legal proceedings relating thereto;

b) any person employed, or occupying a position of responsibility, in the service of Her Majesty in right of Nova Scotia, for any purpose relating to the administration or enforcement of the Nova Scotia Sales Tax Act, if information obtained by the Government of Nova Scotia for that purpose is made available to the Minister on a reciprocal basis;

c) any person employed, or occupying a position of responsibility, in the Department of Finance for any purpose relating to the evaluation and formulation of tax policy;

d) any person employed, or occupying a position of responsibility, in the Department of National Revenue, for any purpose relating to the administration and enforcement of the *Customs Act,* the *Customs Tariff,* the *Excise Act,* the *Excise Tax Act,* or the *Income Tax Act;*

e) the Minister of Energy, Mines and Resources solely for the purpose of evaluating and formulating policy in relation to energy matters;

f) the Chief Statistician of Canada for the purposes of the *Statistics Act;*

g) the Nova Scotia Minister or Provincial Tax Commissioner or their authorized delegates for the purpose of carrying out any of their powers, duties or functions under this Part; or

h) any person otherwise legally entitled thereto.

Canada Pension Plan, subsection 104.01(1)

104.01 (1) Information with respect to an individual is privileged and shall not be made available except as authorized by this Act.

Canada Petroleum Resources Act, section 101

101. (1) In this section,

"delineation well" means a well that is so located in relation to another well penetrating an accumulation of petroleum that there is a reasonable expectation that another portion of that accumulation will be penetrated by the first-mentioned well and that the drilling is necessary in order to determine the commercial value of the accumulation;

"development well" means a well that is so located in relation to another well penetrating an accumulation of petroleum that it is considered to be a well or part of a well drilled for the purpose of production or observation or for the injection or disposal of fluid into or from the accumulation;

"engineering research or feasibility study" includes work undertaken to facilitate the design or to analyse the viability of engineering technology, systems or schemes to be used in the exploration for or the development, production or transportation of petroleum on frontier lands;

"environmental study" means work pertaining to the measurement or statistical evaluation of the physical, chemical and biological elements of the lands, oceans or coastal zones, including winds, waves, tides, currents, precipitation, ice cover and movement, icebergs, pollution effects, flora and fauna both onshore and offshore, human activity and habitation and any related matters;

"experimental project" means work or activity involving the utilization of methods or equipment that are untried or unproven;

"exploratory well" means a well drilled on a geological feature on which a significant discovery has not been made;

"geological work" means work, in the field or laboratory, involving the collection, examination, processing or other analysis of lithological, paleontological or geochemical materials recovered from the surface or subsurface or the seabed or its subsoil of any frontier lands and includes the analysis and interpretation of mechanical well logs;

"geophysical work" means work involving the indirect measurement of the physical properties

of rocks in order to determine the depth, thickness, structural configuration or history of deposition thereof and includes the processing, analysis and interpretation of material or data obtained from such work;

“geotechnical work” means work, in the field or laboratory, undertaken to determine the physical properties of materials recovered from the surface or subsurface or the seabed or its subsoil of any frontier lands;

“well site seabed survey” means a survey pertaining to the nature of the surface or subsurface or the seabed or its subsoil of any frontier lands in the area of the proposed drilling site in respect of a well and to the conditions of those lands that may affect the safety or efficiency of drilling operations;

“well termination date” means the date on which a well or test hole has been abandoned, completed or suspended in accordance with any applicable regulations respecting the drilling for petroleum made under the *Canada Oil and Gas Operations Act*.

(2) Subject to this section, information or documentation is privileged if it is provided for the purposes of this Act or the *Canada Oil and Gas Operations Act* or any regulation made under either Act, or for the purposes of Part II.1 of the *National Energy Board Act*, whether or not the information or documentation is required to be provided.

(2.1) Subject to this section, information or documentation that is privileged under subsection (2) shall not knowingly be disclosed without the consent in writing of the person who provided it, except for the purposes of the administration or enforcement of this Act, the *Canada Oil and Gas Operations Act* or Part II.1 of the *National Energy Board Act* or for the purposes of legal proceedings relating to its administration or enforcement.

(3) No person shall be required to produce or give evidence relating to any information or documentation that is privileged under subsection (2) in connection with any legal proceedings, other than proceedings relating to the administration or enforcement of this Act, the *Oil and Gas Production and Conservation Act* or Part II.1 of the *National Energy Board Act*.

(4) For greater certainty, this section does not apply to a document that has been registered under Part VIII.

(5) Information or documentation that is privileged under subsection (2) may be disclosed to any government of a province or to any organization representing any aboriginal people of Canada, where such disclosure is made pursuant to an agreement between the Government of Canada and the government of that province or that organization respecting resource management and revenue sharing in relation to activities respecting the exploration for or the production of petroleum carried out on any frontier lands.

(6) The recipient of information or documentation disclosed pursuant to an agreement referred to in subsection (5) shall not disclose that information or documentation except as otherwise provided in this section.

(7) Subsection (2) does not apply in respect of the following classes of information or documentation obtained as a result of carrying on a work or activity that is authorized under the *Canada Oil and Gas Operations Act*, namely, information or documentation in respect of

(*a*) an exploratory well, where the information or documentation is obtained as a direct result of drilling the well and if two years have passed since the well termination date of that well;

(*b*) a delineation well, where the information or documentation is obtained as a direct result of drilling the well and if the later of

(i) two years since the well termination date of the relevant exploratory well, and

(ii) ninety days since the well termination date of the delineation well,

have passed;

(*c*) a development well, where the information or documentation is obtained as a direct result of drilling the well and if the later of

(i) two years since the well termination date of the relevant exploratory well, and

(ii) sixty days since the well termination date of the development well,

have passed;

(*d*) geological work or geophysical work performed on or in relation to any frontier lands,

(i) in the case of a well site seabed survey where the well has been drilled, after the expiration of the period referred to in paragraph (*a*) or the later period referred to in subparagraph (*b*)(i) or (ii) or (*c*)(i) or (ii), according to whether paragraph (*a*), (*b*) or (*c*) is applicable in respect of that well, or

(ii) in any other case, after the expiration of five years following the date of completion of the work;

(*e*) any engineering research or feasibility study or experimental project, including geotechnical work, carried out on or in relation to any frontier lands,

(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (*a*) or the later period referred to in subparagraph (*b*)(i) or (ii) or (*c*)(i) or (ii), according to whether paragraph (*a*), (*b*) or (*c*) is applicable in respect of that well, or

(ii) in any other case, after the expiration of five years following the date of completion of the research, study or project or after the reversion of the lands to Crown reserve lands, whichever occurs first;

(*f*) any contingency plan formulated in respect of emergencies arising as a result of any work

or activity authorized under the *Canada Oil and Gas Operations Act*;

(*g*) diving work, weather observations or the status of operational activities or of the development of or production from a pool or field;

(*g*.1) accidents, incidents or petroleum spills, to the extent necessary to permit a person or body to produce and to distribute or publish a report for the administration of this Act, or of the *Canada Oil and Gas Operations Act*, in respect of the accident, incident or spill;

(*h*) any study funded from an account established under subsection 76(1), if the study has been completed; and

(*i*) an environmental study, other than a study referred to in paragraph (*h*),

(i) where it relates to a well and the well has been drilled, after the expiration of the period referred to in paragraph (*a*) or the later period referred to in subparagraph (*b*)(i) or (ii) or (*c*)(i) or (ii), according to whether paragraph (*a*), (*b*) or (*c*) is applicable in respect of that well, or

(ii) in any other case, if five years have passed since the completion of the study.

(8) [Repealed, R.S., 1985, c. 21 (4th Supp.), s. 4]

Canada Transportation Act, subsection 51(1) and section 167

51. (1) Except as otherwise specifically provided in this Act or any other Act of Parliament, information required to be provided to the Minister pursuant to this Act is, when it is received by the Minister, confidential and must not knowingly be disclosed or made available by any person without the authorization of the person who provided the information or documentation, except for the purposes of a prosecution of a contravention of section 173.

167. Where the Agency is advised that a party to a final offer arbitration wishes to keep matters relating to the arbitration confidential,

(*a*) the Agency and the arbitrator shall take all reasonably necessary measures to ensure that the matters are not disclosed by the Agency or the arbitrator or during the arbitration proceedings to any person other than the parties; and

(*b*) no reasons for the decision given pursuant to subsection 165(5) shall contain those matters or any information included in a contract that the parties agreed to keep confidential.

Canadian Environmental Assessment Act, subsection 35(4)

35 (4) Where a review panel is satisfied that the disclosure of evidence, documents or other things would cause specific, direct and substantial harm to a witness, the evidence, documents or things are privileged and shall not, without the authorization of the witness,

knowingly be or be permitted to be communicated, disclosed or made available by any person who has obtained the evidence, documents or other things pursuant to this Act.

Canadian International Trade Tribunal Act, sections 45 and 49

45. (1) Where a person designates information as confidential pursuant to paragraph 46(1)(*a*) and that designation is not withdrawn by that person, no member and no person employed in the federal public administration who comes into possession of that information while holding that office or being so employed shall, either before or after ceasing to hold that office or being so employed, knowingly disclose that information, or knowingly allow it to be disclosed, to any other person in any manner that is calculated or likely to make it available for the use of any business competitor or rival of any person to whose business or affairs the information relates.

(2) Subsection (1) does not apply in respect of any non-confidential edited version or non-confidential summary of information or statement referred to in paragraph 46(1)(*b*).

(3) Notwithstanding subsection (1), information to which that subsection applies that has been provided to the Tribunal in any proceedings before the Tribunal may be disclosed by the Tribunal to counsel for any party to those proceedings or to other proceedings arising out of those proceedings or to an expert, acting under the control or direction of that counsel, for use, notwithstanding any other Act or law, by that counsel or expert only in those proceedings, subject to any conditions that the Tribunal considers reasonably necessary or desirable to ensure that the information will not, without the written consent of the person who provided the information to the Tribunal, be disclosed by counsel or the expert to any person in any manner that is calculated or likely to make it available to

(*a*) any party to the proceedings or other proceedings, including a party who is represented by that counsel or on whose behalf the expert is acting; or

(*b*) any business competitor or rival of any person to whose business or affairs the information relates.

(3.1) Notwithstanding subsection (1), the Tribunal may disclose information to which that subsection applies to an expert retained by the Tribunal for use, notwithstanding any other Act or law, by the expert only in proceedings before the Tribunal under the *Special Import Measures Act* or this Act, subject to any conditions that the Tribunal considers reasonably necessary or desirable to ensure that the information will not, without the written consent of the person who provided the information to the Tribunal, be disclosed by the expert to any person in any manner that is calculated or likely to make it available to

(*a*) any party to the proceedings; or

(*b*) any business competitor or rival of any person to whose business or affairs the information relates.

(3.2) For greater certainty, disclosure of information under subsection (3) or (3.1) to a person

described in subsection (5) who is an employee of an institution of the Government of Canada that is a party to the proceedings or, in the case of subsection (3), other proceedings is not disclosure to a party to those proceedings for the purposes of subsection (3) or (3.1).

(4) In subsection (3), “counsel”, in relation to a party to proceedings, includes any person, other than a director, servant or employee of the party, who acts in the proceedings on behalf of the party.

(5) In subsections (3) and (3.1), “expert” includes any of the following persons whom the Tribunal recognizes as an expert:

(*a*) persons whose duties involve the carrying out of the *Competition Act* and who are referred to in section 25 of that Act, other than persons authorized by the Governor in Council to exercise the powers and perform the duties of the Director of Investigation and Research;

(*b*) in respect of the determination of damages and costs in procurement review proceedings, persons employed in the government institution involved in the procurement under review; and

(*c*) any prescribed person.

(6) Every person commits an offence who

(*a*) uses information disclosed to the person by the Tribunal under subsection (3) or (3.1) for any purpose other than the purpose for which the information was disclosed under that subsection; or

(*b*) contravenes any condition imposed by the Tribunal under subsection (3) or (3.1).

(7) Every person who commits an offence under subsection (6) is guilty of

(*a*) an indictable offence and liable to a fine of not more than $1,000,000; or

(*b*) an offence punishable on summary conviction and liable to a fine of not more than $100,000.

(8) No proceedings for an offence under subsection (6) shall be instituted without the consent in writing of the Attorney General of Canada.

(9) In addition to any punishment imposed under subsection (7), counsel or an expert who commits an offence under subsection (6) may be barred by the Tribunal from any further appearance before it in respect of any proceedings before the Tribunal for the period that the Tribunal considers appropriate.

49. If

(*a*) information or material given or elicited in the course of any proceedings before the Tribunal is, in the opinion of the Tribunal, in its nature confidential, or

(*b*) the President indicates to the Tribunal in writing that subsection 84(1) of the *Special Import Measures Act* applies to information or material filed with the Secretary under paragraph 37(*a*) or 38(3)(*b*) or subsection 76.03(9) of that Act,

the information or material shall not knowingly be disclosed by any member or person employed in the federal public administration who comes into possession of the information in any manner that is calculated or likely to make it available for the use of any business competitor or rival of any person to whose business or affairs the information relates.

Canadian Ownership and Control Determination Act, section 17

17. Information or documentation obtained by the Minister under this Act or by a person or agency referred to in paragraphs 18(1)(*a*) to (*e*) is privileged and shall not knowingly be or be permitted to be communicated, disclosed or made available without the written consent of the person from whom it was obtained

Canadian Security Intelligence Service Act, section 18

18. (1) No civil proceedings may be brought against any member or other person or authority acting on behalf or under the direction of the Commission for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commission under this Act or for any alleged neglect or default in the execution in good faith of any such power, duty or function.

(2) No civil proceedings may be brought against any person or authority referred to in subsection 44(8) or (9) for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commission under this Act or for any alleged neglect or default in the execution in good faith of any such power, duty or function.

(3) Nothing in this section relieves the Commission of liability in respect of a tort or extracontractual civil liability to which the Commission would otherwise be subject.

Canadian Transportation Accident Investigation and Safety Board Act, subsection 28(2) and 31(4)

28 (2) Every on-board recording is privileged and, except as provided by this section, no person, including any person to whom access is provided under this section, shall

(*a*) knowingly communicate an on-board recording or permit it to be communicated to any person; or

(*b*) be required to produce an on-board recording or give evidence relating to it in any legal, disciplinary or other proceedings.

31 (4) Where the identity of a person who has made a report to the Board pursuant to regulations made under subsection (1) is protected by rules referred to in subsection (3), information that could reasonably be expected to reveal that identity is privileged, and no person shall

(*a*) knowingly communicate it or permit it to be communicated to any person; or

(*b*) be required to produce it or give evidence relating to it in any legal, disciplinary or other proceedings

Competition Act, subsections 29(1), 29.1(5) and 29.2(5)

29. (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act

(a) the identity of any person from whom information was obtained pursuant to this Act;

(b) any information obtained pursuant to section 11, 15, 16 or 114;

(c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;

(d) any information obtained from a person requesting a certificate under section 102; or

(e) any information provided voluntarily pursuant to this Act.

29.1 (5) No person who performs or has performed duties or functions in the administration or enforcement of the *Canada Transportation Act* shall communicate or allow to be communicated to any other person any information communicated under subsection (1), except to persons who perform duties or functions under section 56.1 or 56.2 of that Act.

29.2 (5) No person who performs or has performed duties or functions, in the administration or enforcement of the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* shall communicate or allow to be communicated to any other person any information communicated under subsection (1), except to other persons who perform those duties or functions.

Corporations and Labour Unions Returns Act, section 18

18. (1) Except as provided in section 19, all information contained in a return filed by a

corporation pursuant to section 5 or 6 is privileged and no official or authorized person shall knowingly

(*a*) communicate or allow to be communicated to any person any such information (in this section and section 19 referred to as "privileged information") obtained under this Act; or

(*b*) allow any person to inspect or have access to any statement or other writing containing any privileged information obtained under this Act.

(2) Notwithstanding any other Act or law, no official or authorized person shall be required, in connection with any legal proceedings,

(*a*) to give evidence relating to any privileged information obtained under this Act; or

(*b*) to produce any statement or other writing containing any privileged information obtained under this Act.

See also s. 19

19. (1) Subsections 18(1) and (2) do not apply in respect of proceedings relating to the administration or enforcement of this Act.

(2) An official who is an officer or other person employed in the execution of any duty under the *Statistics Act* or any regulation thereunder may

(*a*) communicate or allow to be communicated to any other such official any privileged information obtained under this Act; and

(*b*) allow any other such official to inspect or have access to any statement or other writing containing any privileged information obtained under this Act.

(3) and (4) [Repealed, R.S., 1985, c. 2 (4th Supp.), s. 5]

(5) Notwithstanding anything in this section, in no case shall any privileged information obtained under this Act be communicated to any person for the purpose of facilitating the institution or furtherance of any proceedings brought or taken or that may be brought or taken under any law of Canada other than this Act.

Criminal Code, sections 187, 193 and 487.3

187. (1) All documents relating to an application made pursuant to any provision of this Part are confidential and, subject to subsection (1.1), shall be placed in a packet and sealed by the judge to whom the application is made immediately on determination of the application,

and that packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be dealt with except in accordance with subsections (1.2) to (1.5).

(1.1) An authorization given under this Part need not be placed in the packet except where, pursuant to subsection 184.3(7) or (8), the original authorization is in the hands of the judge, in which case that judge must place it in the packet and the facsimile remains with the applicant.

(1.2) The sealed packet may be opened and its contents removed for the purpose of dealing with an application for a further authorization or with an application for renewal of an authorization.

(1.3) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet.

(1.4) A judge or provincial court judge before whom a trial is to be held and who has jurisdiction in the province in which an authorization was given may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet if

(*a*) any matter relevant to the authorization or any evidence obtained pursuant to the authorization is in issue in the trial; and

(*b*) the accused applies for such an order for the purpose of consulting the documents to prepare for trial.

(1.5) Where a sealed packet is opened, its contents shall not be destroyed except pursuant to an order of a judge of the same court as the judge who gave the authorization.

(2) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made pursuant to section 185 or subsection 186(6) or 196(2) may only be made after the Attorney General or the Minister of Public Safety and Emergency Preparedness by whom or on whose authority the application for the authorization to which the order relates was made has been given an opportunity to be heard.

(3) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made pursuant to subsection 184.2(2) or section 184.3 may only be made after the Attorney General has been given an opportunity to be heard.

(4) Where a prosecution has been commenced and an accused applies for an order for the copying and examination of documents pursuant to subsection (1.3) or (1.4), the judge shall not, notwithstanding those subsections, provide any copy of any document to the accused until the prosecutor has deleted any part of the copy of the document that the prosecutor believes would be prejudicial to the public interest, including any part that the prosecutor believes could

(*a*) compromise the identity of any confidential informant;

(*b*) compromise the nature and extent of ongoing investigations;

(*c*) endanger persons engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used; or

(*d*) prejudice the interests of innocent persons.

(5) After the prosecutor has deleted the parts of the copy of the document to be given to the accused under subsection (4), the accused shall be provided with an edited copy of the document.

(6) After the accused has received an edited copy of a document, the prosecutor shall keep a copy of the original document, and an edited copy of the document and the original document shall be returned to the packet and the packet resealed.

(7) An accused to whom an edited copy of a document has been provided pursuant to subsection (5) may request that the judge before whom the trial is to be held order that any part of the document deleted by the prosecutor be made available to the accused, and the judge shall order that a copy of any part that, in the opinion of the judge, is required in order for the accused to make full answer and defence and for which the provision of a judicial summary would not be sufficient, be made available to the accused.

193. (1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

(*a*) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(*b*) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

(*a*) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;

(*b*) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;

(*c*) in giving notice under section 189 or furnishing further particulars pursuant to an order

under section 190;

(*d*) in the course of the operation of

(i) a telephone, telegraph or other communication service to the public,

(ii) a department or an agency of the Government of Canada, or

(iii) services relating to the management or protection of a computer system, as defined in subsection 342.1(2),

if the disclosure is necessarily incidental to an interception described in paragraph 184(2)(*c*), (*d*) or (*e*);

(*e*) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere; or

(*f*) where the disclosure is made to the Director of the Canadian Security Intelligence Service or to an employee of the Service for the purpose of enabling the Service to perform its duties and functions under section 12 of the *Canadian Security Intelligence Service Act*.

(3) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication where that which is disclosed by him was, prior to the disclosure, lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in paragraph (2)(*a*).

487.3 (1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament or a production order under section 487.012 or 487.013, or of granting an authorization to enter a dwelling-house under section 529 or an authorization under section 529.4 or at any time thereafter, make an order prohibiting access to and the disclosure of any information relating to the warrant, production order or authorization on the ground that

(a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and

(b) the ground referred to in paragraph (a) outweighs in importance the access to the information.

(2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(a) if disclosure of the information would

(i) compromise the identity of a confidential informant,

(ii) compromise the nature and extent of an ongoing investigation,

(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

(3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

(4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.

Criminal Records Act, subsection 6(2) and section 9

6(2) Any record of a conviction in respect of which a pardon has been granted or issued that is in the custody of the Commissioner or of any department or agency of the Government of Canada shall be kept separate and apart from other criminal records, and no such record shall be disclosed to any person, nor shall the existence of the record or the fact of the conviction be disclosed to any person, without the prior approval of the Minister.

9. Nothing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy or the provisions of the *Criminal Code* relating to pardons, except that sections 6 and 8 apply in respect of any pardon granted pursuant to the royal prerogative of mercy or those provisions.

Customs Act, sections 107 and 107.1

107. (1) The definitions in this subsection apply in this section.

“customs information” means information of any kind and in any form that

(*a*) relates to one or more persons and is obtained by or on behalf of

(i) the Minister for the purposes of this Act or the *Customs Tariff*, or

(ii) the Minister of National Revenue for the purposes of the collection of debts due to Her Majesty under Part V.1;

(*b*) is prepared from information described in paragraph (*a*).

“official” means a person who

(*a*) is or was employed in the service of Her Majesty in right of Canada or of a province;

(*b*) occupies or occupied a position of responsibility in the service of Her Majesty in right of Canada or of a province; or

(*c*) is or was engaged by or on behalf of Her Majesty in right of Canada or of a province.

“specified person” means a person who is employed in the service of, who occupies a position of responsibility in the service of, or who is engaged by or on behalf of, Her Majesty in right of Canada to carry out the provisions of this Act, the *Customs Tariff* or the *Special Import Measures Act*. It includes a person who was formerly so employed or engaged or who formerly occupied such a position.

(2) Except as authorized under this section, no person shall

(*a*) knowingly provide, or allow to be provided, to any person any customs information;

(*b*) knowingly allow any person to have access to any customs information; or

(*c*) knowingly use customs information.

(3) An official may use customs information

(*a*) for the purposes of administering or enforcing this Act, the *Customs Tariff*, the *Excise Act, 2001*, the *Special Imports Measures Act* or Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* or for any purpose set out in subsection (4), (5) or (7);

(*b*) for the purposes of exercising the powers or performing the duties and functions of the Minister of Public Safety and Emergency Preparedness under the *Immigration and Refugee Protection Act*, including establishing a person’s identity or determining their inadmissibility; or

(*c*) for the purposes of any Act or instrument made under it, or any part of such an Act or instrument, that the Governor in Council or Parliament authorizes the Minister, the Agency,

the President or an employee of the Agency to enforce, including the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, the *Canada Agricultural Products Act*, the *Feeds Act*, the *Fertilizers Act*, the *Fish Inspection Act*, the *Health of Animals Act*, the *Meat Inspection Act*, the *Plant Protection Act* and the *Seeds Act.*

(4) An official may provide, allow to be provided or provide access to customs information if the information

(*a*) will be used solely in or to prepare for criminal proceedings commenced under an Act of Parliament;

(*b*) will be used solely in or to prepare for any legal proceedings relating to the administration or enforcement of an international agreement relating to trade, this Act, the *Customs Tariff*, the *Special Import Measures Act*, any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty or Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, before

(i) a court of record, including a court of record in a jurisdiction outside Canada,

(ii) an international organization, or

(iii) a dispute settlement panel or an appellate body created under an international agreement relating to trade;

(*c*) may reasonably be regarded as necessary solely for a purpose relating to the administration or enforcement of this Act, the *Customs Tariff*, the *Excise Act*, the *Excise Act, 2001*, the *Excise Tax Act*, the *Export and Import Permits Act*, the *Immigration and Refugee Protection Act*, the *Special Import Measures Act* or Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* by an official of the Agency;

(*c.1*) may reasonably be regarded as necessary solely for a purpose relating to the enforcement of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, the *Canada Agricultural Products Act*, the *Feeds Act*, the *Fertilizers Act*, the *Fish Inspection Act*, the *Health of Animals Act*, the *Meat Inspection Act*, the *Plant Protection Act* and the *Seeds Act* by an official of the Agency;

(*c.2*) may reasonably be regarded as necessary solely for a purpose relating to the administration or enforcement of Part V.1 by an official or a class of officials of the Canada Revenue Agency designated by the Minister of National Revenue;

(*d*) may reasonably be regarded as necessary solely for a purpose relating to the administration or enforcement of this Act, the *Excise Act*, the *Excise Act, 2001* or the *Export and Import Permits Act* by a member of the Royal Canadian Mounted Police;

(*e*) may reasonably be regarded as necessary solely for a purpose relating to the life, health or safety of an individual or to the environment in Canada or any other country;

(*f*) will be used solely for a purpose relating to the supervision, evaluation or discipline of a

specified person by Her Majesty in right of Canada in respect of a period during which the person was employed or engaged by, or occupied a position of responsibility in the service of, Her Majesty in right of Canada to administer or enforce this Act, the *Customs Tariff*, the *Special Import Measures Act* or Part 2 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* to the extent that the information is relevant for that purpose;

(*g*) is reasonably regarded by the official to be information that does not directly or indirectly identify any person; or

(*h*) is reasonably regarded by the official to be information relating to the national security or defence of Canada.

(5) An official may provide, allow to be provided or provide access to customs information to the following persons:

(*a*) a peace officer having jurisdiction to investigate an alleged offence under any Act of Parliament or of the legislature of a province subject to prosecution by indictment, the Attorney General of Canada and the Attorney General of the province in which proceedings in respect of the alleged offence may be taken, if that official believes on reasonable grounds that the information relates to the alleged offence and will be used in the investigation or prosecution of the alleged offence, solely for those purposes;

(*b*) a person that is otherwise legally entitled to the information by reason of an Act of Parliament, solely for the purposes for which that person is entitled to the information;

(*c*) an official solely for the purposes of developing, administering or enforcing an Act of Parliament or developing or implementing a policy related to an Act of Parliament if the information relates to

(i) goods, the importation, exportation or in-transit movement of which is or may be prohibited, controlled or regulated under that Act,

(ii) a person who that official has reasonable grounds to believe may have committed an offence under that Act in respect of goods imported or exported by that person, or

(iii) goods that may be evidence of an offence under that Act;

(*d*) an official, solely for the purpose of administering or enforcing an Act of the legislature of a province, if the information relates to goods that are subject to import, in-transit or export controls or taxation upon importation into the province under that Act;

(*e*) an official of a participating province, as defined in subsection 123(1) of the *Excise Tax Act*, or an official of the province of Quebec, if the information relates to the administration or enforcement of Part IX of that Act in that province, solely for that purpose;

(*f*) an official solely for the purpose of the formulation or evaluation of fiscal or trade policy or the development of a remission order under an Act of Parliament;

(*g*) an official solely for the purpose of setting off, against any sum of money that may be due to or payable by Her Majesty in right of Canada, a debt due to

(i) Her Majesty in right of Canada, or

(ii) Her Majesty in right of a province on account of taxes payable to the province if an agreement exists between Canada and the province under which Canada is authorized to collect taxes on behalf of the province;

(*g.1*) an official of the Canada Revenue Agency solely for a purpose relating to the administration or enforcement of the *Canada Pension Plan*, the *Employment Insurance Act*, the *Excise Act*, the *Excise Act, 2001*, the *Excise Tax Act* or the *Income Tax Act*;

(*h*) counsel, as defined in subsection 84(4) of the *Special Import Measures Act*, in accordance with subsection 84(3) of that Act and subject to subsection 84(3.1) of that Act, except that the word "information" in those subsections is to be read as a reference to the words "customs information";

(*i*) an official of the Department of Human Resources and Skills Development solely for the purpose of administering or enforcing the *Employment Insurance Act*, if the information relates to the movement of people into and out of Canada;

(*j*) an official of the Department of Citizenship and Immigration solely for the purpose of administering or enforcing the *Immigration and Refugee Protection Act*, if the information relates to the movement of people into and out of Canada;

(*j.1*) an official of the Canadian Food Inspection Agency for the purpose of administering or enforcing any Act referred to in section 11 of the *Canadian Food Inspection Agency Act* if the information relates to the import, export or in-transit movement of goods into or out of Canada;

(*k*) an official of the Financial Transactions and Reports Analysis Centre of Canada solely for the purpose of administering or enforcing the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*;

(*l*) a person solely for the purpose of determining any entitlement, liability or obligation of the person under this Act or the *Customs Tariff* including the person's entitlement to any refund, relief, drawback or abatement under those Acts;

(*m*) any person, if the information is required to comply with a subpoena or warrant issued or an order made by a court of record in Canada;

(*n*) any person, if the information is required to comply with a subpoena or warrant issued or an order made by a court of record outside of Canada, solely for the purposes of criminal proceedings; and

(*o*) prescribed persons or classes of persons, in prescribed circumstances for prescribed purposes, solely for those purposes.

(6) The Minister may provide, allow to be provided or provide access to customs information to any person if

(*a*) the information may not otherwise be provided, allowed to be provided or provided access to under this section and, in the Minister's opinion, the public interest in providing the information clearly outweighs any invasion of privacy, or any material financial loss or prejudice to the competitive position of the person to whom the information relates, that could result from the provision of the information; or

(*b*) in the Minister's opinion, providing the information would clearly benefit the individual to whom the information relates.

(7) If customs information provided under subsection (6) is personal information within the meaning of section 3 of the *Privacy Act*, the Minister must notify, in writing, the Privacy Commissioner appointed under section 53 of that Act of any provision of personal information under that subsection before its provision if reasonably practicable or, in any other case, without delay after the provision. The Privacy Commissioner may, if the Privacy Commissioner considers it appropriate, notify the individual to whom the information relates of the provision of the information.

(8) Customs information may be provided by any person to an official or any other person employed by or representing the government of a foreign state, an international organization established by the governments of states, a community of states, or an institution of any such government or organization, in accordance with an international convention, agreement or other written arrangement between the Government of Canada or an institution of the Government of Canada and the government of the foreign state, the organization, the community or the institution, solely for the purposes set out in that arrangement.

(9) An official may provide, allow to be provided or provide access to customs information relating to a particular person

(*a*) to that particular person;

(*b*) to a person authorized to transact business under this Act or the *Customs Tariff* as that particular person's agent, at the request of the particular person and on receipt of such fee, if any, as is prescribed; and

(*c*) with the consent of that particular person, to any other person.

(10) Despite any other Act of Parliament or other law, no official may be required, in connection with any legal proceedings, to give or produce evidence relating to any customs information.

(11) The person presiding at a legal proceeding relating to the supervision, evaluation or discipline of a specified person may order any measure that is necessary to ensure that customs information is not used or provided to any person for any purpose not relating to that proceeding, including

(*a*) holding a hearing *in camera*;

(*b*) banning the publication of the information;

(*c*) concealing the identity of the person to whom the information relates; and

(*d*) sealing the records of the proceeding.

(12) An order or direction that is made in the course of or in connection with any legal proceeding and that requires an official to give or produce evidence relating to customs information may, by notice served on all interested parties, be immediately appealed by the Minister or the Minister of National Revenue, as the case may be, or by the person against whom the order or direction is made

(*a*) to the court of appeal of the province in which the order or direction is made, in the case of an order or direction made by a court or other tribunal established under the laws of the province, whether or not that court or tribunal is exercising a jurisdiction conferred by the laws of Canada; or

(*b*) to the Federal Court of Appeal, in the case of an order or direction made by a court or other tribunal established under the laws of Canada.

(13) The court to which the appeal is taken may allow the appeal and quash the order or direction appealed from or may dismiss the appeal. The rules of practice and procedure from time to time governing appeals to the courts apply, with any modifications that the circumstances require, in respect of the appeal.

(14) An appeal stays the operation of the order or direction appealed from until judgment in the appeal is pronounced.

(15) The Governor in Council may make regulations prescribing the circumstances in which fees may be charged for providing or providing access to customs information or making or certifying copies of information and the amount of any such fees.

107.1 (1) The Minister may, under prescribed circumstances and conditions, require any prescribed person or prescribed class of persons to provide, or provide access to, prescribed information about any person on board a conveyance in advance of the arrival of the conveyance in Canada or within a reasonable time after that arrival.

(2) Any person who is required under subsection (1) to provide, or provide access to, prescribed information shall do so despite any restriction under the *Aeronautics Act* on the disclosure of such information.

Defence Production Act, section 30

30. No information with respect to an individual business that has been obtained under or by virtue of this Act shall be disclosed without the consent of the person carrying on that business, except

(*a*) to a government department, or any person authorized by a government department, requiring the information for the purpose of the discharge of the functions of that department; or

(*b*) for the purposes of any prosecution for an offence under this Act or, with the consent of the Minister, for the purposes of any civil suit or other proceeding at law.

Department of Industry Act, subsection 16(2)

16 (2) No person employed in the federal public administration who comes into possession of information made available to the Minister under this section shall disclose any such information relating to a particular person, organization or business unless the disclosure is consented to in writing by the person or organization or the owner of the business.

DNA Identification Act, subsection 6(7)

6 (7) Subject to this section, no person shall communicate any information that is contained in the DNA data bank or allow the information to be communicated.

Energy Administration Act, section 98

98. (1) Subject to this section, all information with respect to a person or business obtained by any person in the course of the administration of this Act is privileged and no person shall knowingly, except as provided in this Act, communicate or allow to be communicated to any person not legally entitled thereto any such information or allow any person not legally entitled thereto to inspect or have access to any such information.

(2) Any information with respect to a person or business obtained by any person in the course of the administration of this Act may, on request in writing to the Minister by or on behalf of the person to which it relates or by or on behalf of the person or group of persons carrying on the business to which it relates, be communicated to any person or authority named in the request on such terms and conditions and under such circumstances as are approved by the Minister.

(3) Notwithstanding any other Act or law, no person employed in the administration of this Act shall be required, in connection with any legal proceedings, to give evidence relating to any information that is privileged under subsection (1) or to produce any statement or other writing

containing that information.

(4) Subsections (1) and (3) do not apply in respect of legal proceedings relating to the administration or enforcement of this Act.

Energy Efficiency Act, section 23

23. (1) In this section and section 24,

"authorized person" means any person engaged or employed, or formerly engaged or employed, by or on behalf of Her Majesty in right of Canada for any purpose relating to the administration or enforcement of this Act;

"official" means any person employed in, or occupying a position of responsibility in, the service of Her Majesty in right of Canada, and any person formerly so employed or occupying such a position.

(2) Except as provided in section 24, the statistics and information filed with the Minister pursuant to regulations made under section 22 are privileged and no official or authorized person shall knowingly

(*a*) communicate or allow to be communicated to any person any statistics or information so filed (in this section and section 24 referred to as "privileged information"); or

(*b*) allow any person to inspect or have access to any report, statement or other document containing any privileged information.

(3) Notwithstanding any other Act or law, no official or authorized person shall be required, in connection with any legal proceedings,

(*a*) to give evidence relating to any privileged information; or

(*b*) to produce any report, statement or other document containing any privileged information.

See also s. 22

22. The Governor in Council may make regulations requiring prescribed persons to file with the Minister, in the prescribed form and manner, at the prescribed time and for each prescribed reporting period, a report setting out prescribed statistics and information respecting

(*a*) the value, quantity, type and use of energy, including alternative energy, purchased, consumed or sold by that person;

(*b*) the expenditures of that person on the research, development, acquisition and operation of energy-using equipment and related technology; and

(*c*) the sales of prescribed energy-using products or classes of energy-using products by that person, including the revenue from, and geographic distribution of, the sales.

Energy Monitoring Act, section 33

33. The statistics, information and documentation obtained by the Minister under this Act, by the Energy Supplies Allocation Board under section 15 or by the persons referred to in paragraphs 34(*a*) and (*b*) are privileged and shall not knowingly be or be permitted to be communicated, disclosed or made available without the written consent of the person from whom they were obtained.

Energy Supplies Emergency Act, section 40.1

40.1 (1) Subject to subsection (2), all information and documentation obtained by the Board under or in connection with this Act is privileged and shall not knowingly be or be permitted to be communicated, disclosed or made available without the written consent of the person from whom they were obtained.

(2) Information and documentation obtained by the Board under or in connection with this Act may be communicated, disclosed or made available for the purposes of the administration or enforcement of this Act, legal proceedings related thereto or criminal proceedings under this or any other Act of Parliament.

(3) Notwithstanding any other Act or law, no person who obtains any information or documentation under or in connection with this Act shall be required, in connection with any legal proceedings, other than proceedings referred to in subsection (2), to give evidence relating to any information or documentation that is privileged under this Act or to produce any statement, document, writing or portion thereof containing any such information or documentation.

Excise Tax Act, section 295

295. (1) In this section,

“authorized person” means a person who is engaged or employed, or who was formerly engaged or employed, by or on behalf of Her Majesty in right of Canada to assist in carrying out the provisions of this Act;

“business number” means the number (other than a Social Insurance Number) used by the

Minister to identify

(*a*) a registrant for the purposes of this Part, or

(*b*) an applicant (other than an individual) for a rebate under this Part;

"confidential information" means information of any kind and in any form that relates to one or more persons and that is

(*a*) obtained by or on behalf of the Minister for the purposes of this Part, or

(*b*) prepared from information referred to in paragraph (*a*),

but does not include information that does not directly or indirectly reveal the identity of the person to whom it relates;

"court of appeal" has the meaning assigned by the definition of that expression in section 2 of the *Criminal Code*;

"official" means a person who is employed in the service of, who occupies a position of responsibility in the service of, or who is engaged by or on behalf of, Her Majesty in right of Canada or a province, or a person who was formerly so employed, who formerly occupied such a position or who formerly was so engaged.

(2) Except as authorized under this section, no official shall knowingly

(*a*) provide, or allow to be provided, to any person any confidential information;

(*b*) allow any person to have access to any confidential information; or

(*c*) use any confidential information other than in the course of the administration or enforcement of this Part.

(3) Notwithstanding 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.

(4) Subsections (2) and (3) do not apply in respect of

(*a*) criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information or the preferring of an indictment, under an Act of Parliament; or

(*b*) any legal proceedings relating to the administration or enforcement of this Act, the *Canada Pension Plan*, the *Employment Insurance Act,* the *Unemployment Insurance Act* or any other Act of Parliament or law of a province that provides for the imposition of a tax or duty.

(4.1) The Minister may provide to appropriate persons any confidential information relating to imminent danger of death or physical injury to any individual.

(5) An official may

(*a*) provide such confidential information to any person as may reasonably be regarded as necessary for the purpose of the administration or enforcement of this Act, solely for that purpose;

(*b*) provide to a person confidential information that can reasonably be regarded as necessary for the purposes of determining any liability or obligation of the person or any refund, rebate or input tax credit to which the person is or may become entitled under this Act;

(*c*) provide, allow to be provided, or allow inspection of or access to any confidential information to or by

(i) any person, or any person within a class of persons, that the Minister may authorize, subject to such conditions as the Minister may specify, or

(ii) any person otherwise legally entitled thereto by reason of an Act of Parliament, solely for the purposes for which that person is entitled to the information;

(*d*) provide confidential information

(i) to an official of the Department of Finance solely for the purposes of the formulation or evaluation of fiscal policy or for the purposes of an administration agreement, as defined in subsection 2(1) of the *Federal-Provincial Fiscal Arrangements Act*, entered into with an aboriginal government, as defined in that subsection, or for the purposes of an administration agreement, as defined in subsection 2(1) of the *First Nations Goods and Services Tax Act*,

(ii) to an official solely for the purpose of the initial implementation of a fiscal policy or for the purposes of the administration or enforcement of the *Canada Pension Plan*, the *Employment Insurance Act*, the *Unemployment Insurance Act* or an Act of Parliament that provides for the imposition or collection of a tax or duty or that provides that displays or indications of the price or consideration for property or services include tax under this Act,

(iii) to an official solely for the purposes of the administration or enforcement of a law of a province that provides for the imposition or collection of a tax or duty, that provides that displays or indications of the price or consideration for property or services include tax under this Act or that provides for reimbursements to persons of amounts paid or payable by the persons as or on account of tax under this Act,

(iv) to an official of the government of a province solely for the purposes of the formulation or evaluation of fiscal policy,

(iv.1) to a person authorized by the council of a band listed in the schedule to the *Budget*

Implementation Act, 2000 solely for the purposes of the formulation, evaluation or initial implementation of fiscal policy relating to a tax that the council of the band may impose under a by-law made under subsection 24(1) of that Act,

(iv.2) to a person authorized by the governing body of a first nation listed in the schedule to the *First Nations Goods and Services Tax Act* solely for the purposes of the formulation, evaluation or initial implementation of fiscal policy relating to a tax referred to in that Act,

(v) to an official of a department or agency of the Government of Canada or of a province as to the name, address, occupation, size or type of business of a person, solely for the purposes of enabling that department or agency to obtain statistical data for research and analysis,

(vi) to an official solely for the purposes of setting off, against any sum of money that may be due or payable by Her Majesty in right of Canada, a debt due to

(A) Her Majesty in right of Canada, or

(B) Her Majesty in right of a province on account of taxes payable to the province where an agreement exists between Canada and the province under which Canada is authorized to collect taxes on behalf of the province, or

(vii) to an official solely for the purposes of section 7.1 of the *Federal-Provincial Fiscal Arrangements and Federal Post-secondary Education and Health Contributions Act*;

(*e*) provide confidential information solely for the purposes of sections 23 to 25 of the *Financial Administration Act*;

(*f*) use confidential information to compile information in a form that does not directly or indirectly reveal the identity of the person to whom the information relates;

(*g*) use, or provide to any person, confidential information solely for a purpose relating to the supervision, evaluation or discipline of an authorized person by Her Majesty in right of Canada in respect of a period during which the authorized person was employed by or engaged by or on behalf of Her Majesty in right of Canada to assist in the administration or enforcement of this Act, to the extent that the information is relevant for that purpose;

(*h*) provide access to records of confidential information to the Librarian and Archivist of Canada or a person acting on behalf of or under the direction of the Librarian and Archivist, solely for the purposes of section 12 of the *Library and Archives of Canada Act*, and transfer such records to the care and control of such persons solely for the purposes of section 13 of that Act;

(*i*) use confidential information relating to a person to provide information to that person;

(*j*) provide the business number, name, address, telephone number and facsimile number of a holder of a business number to an official of a department or agency of the Government of Canada or of a province solely for the purpose of the administration or enforcement of an

Act of Parliament or a law of a province, if the holder of the business number is required by that Act or that law to provide the information (other than the business number) to the department or agency;

(*k*) provide confidential information to any person, solely for the purposes of the administration or enforcement of a law of a province that provides for workers' compensation benefits; or

(*l*) provide confidential information to a police officer (within the meaning assigned by subsection 462.48(17) of the *Criminal Code*) solely for the purpose of investigating whether an offence has been committed under the *Criminal Code*, or the laying of an information or the preferring of an indictment, if

(i) such information can reasonably be regarded as being relevant for the purpose of ascertaining the circumstances in which an offence under the *Criminal Code* may have been committed, or the identity of the person or persons who may have committed an offence, with respect to an official, or with respect to any person related to that official,

(ii) the official was or is engaged in the administration or enforcement of this Part, and

(iii) the offence can reasonably be considered to be related to that administration or enforcement.

(5.1) The person presiding at a legal proceeding relating to the supervision, evaluation or discipline of an authorized person may order such measures as are necessary to ensure that confidential information is not used or provided to any person for any purpose not relating to that proceeding, including

(*a*) holding a hearing *in camera*;

(*b*) banning the publication of the information;

(*c*) concealing the identity of the person to whom the information relates; and

(*d*) sealing the records of the proceeding.

(6) An official may provide confidential information relating to a person

(*a*) to that person; and

(*b*) with the consent of that person, to any other person.

(6.1) On being provided by any person with information specified by the Minister sufficient to identify a single person and a number, an official may confirm or deny that the following statements are both true:

(*a*) the identified person is registered under Subdivision d of Division V; and

(*b*) the number is the business number of the identified person.

(7) An order or direction that is made in the course of or in connection with any legal proceedings and that requires an official to give or produce evidence relating to any confidential information may, by notice served on all interested parties, be appealed forthwith by the Minister or by the person against whom the order or direction is made to

(*a*) the court of appeal of the province in which the order or direction is made, in the case of an order or direction made by a court or other tribunal established under the laws of the province, whether that court or tribunal is exercising a jurisdiction conferred by the laws of Canada; or

(*b*) the Federal Court of Appeal, in the case of an order or direction made by a court or other tribunal established under the laws of Canada.

(8) The court to which an appeal is taken under subsection (7) may allow the appeal and quash the order or direction appealed from or may dismiss the appeal, and the rules of practice and procedure from time to time governing appeals to the courts shall apply, with such modifications as the circumstances require, in respect of an appeal instituted under subsection (7).

(9) An appeal instituted under subsection (7) shall stay the operation of the order or direction appealed from until judgment is pronounced.

Family Allowances Act, section 18 (Repealed in 1992)

18. An application for review shall be made within 90 days after the date of notice to the applicant of the decision he applies to have reviewed. The Board may, however, allow the applicant to present his application for review after such time if he shows that in fact it was impossible for him to act sooner.

First Nations Fiscal and Statistical Management Act, section 108

108. Except for the purpose of communicating information in accordance with the conditions of an agreement made under section 106, for the conduct of a prosecution under this Act or for the purposes of subsection (2);

a) no person, other than a person employed by, or under contract to, the Institute and sworn of affirmed under section 103, shall be permitted to examine any identifiable individual return made for the purposes of this Part; and

b) no person who has been sworn or affirmed under section 103 shall knowingly disclose any information obtained by the Institute that can be related to any identifiable individual, first nation, business or organization.

(2) The First Nations Chief Statistician may authorize the following information to be disclosed:

a) information collected by persons, first nations, organizations or departments for their own purposes and communicated to the Institute, subject to the same secrecy requirements applicable to it when it was collected, and in the manner and to the extent agreed on by its collector and the First Nations Chief Statistician;

b) information relating to a person, first nation, business or organization in respect of which disclosure is consented to in writing by that person, first nation, business or organization;

c) information available to the public under an Act of Parliament of the legislature of a province;

d) information relating to a hospital, institution for individuals with a mental health disability, library, educational institution or other similar non-commercial institution that cannot be related to an individual to whom services were or are provided by that institution; and

e) a list of businesses, showing

i) their names and addresses,

ii) the telephone numbers at which they may be reached in relation to statistical matters,

iii) the official language in which they prefer to be addressed in relation to statistical matters,

iv) the products they produce, transport, store, purchase or sell, or the services they provide, in the course of their business, or

v) the number of persons they employ, as a specified range.

See also ss. 103 and 106

103. The First Nations Chief Statistician, every person employed by the Institute, every person retained under contract by the Institute and every employee and agent of a person retained under contract by the Institute shall, before commencing their duties, swear or solemnly affirm that he or she will comply with section 108 and will not without authority disclose any information acquired in the course of his or her duties that can be related to any identifiable individual, first nation, business or organization.

106. (1) The Institute may enter into an agreement with a first nation or other aboriginal group, federal department or agency, provincial department or agency, municipality, corporation or other organization for the sharing of information collected by or on behalf of

either party and for its subsequent tabulation or publication.

(2) An agreement under subsection (1) shall provide that

(*a*) respondents from whom information is collected are to be informed by notice that the information is being collected on behalf of the Institute and the first nation, other aboriginal group, department, agency, municipality, corporation or organization, as the case may be; and

(*b*) if the respondents object by notice in writing to the First Nations Chief Statistician to the sharing of the information by the Institute, the information will not be shared unless the first nation, other aboriginal group, department, agency, municipality, corporation or organization is authorized by law to require respondents to provide that information.

Hazardous Products Act, section 12

12. This Part does not apply in respect of the sale or importation of any

(*a*) explosive within the meaning of the *Explosives Act*;

(*b*) cosmetic, device, drug or food within the meaning of the *Food and Drugs Act*;

(*c*) pest control product as defined in subsection 2(1) of the *Pest Control Products Act*;

(*d*) nuclear substance, within the meaning of the *Nuclear Safety and Control Act*, that is radioactive;

(*e*) hazardous waste;

(*f*) product, material or substance included in Part II of Schedule I and packaged as a consumer product;

(*g*) wood or product made of wood;

(*h*) tobacco or a tobacco product as defined in section 2 of the *Tobacco Act*; or

(*i*) manufactured article.

Canadian Human Rights Act, subsection 47(3)

47 (3) Any information received by a conciliator in the course of attempting to reach a settlement of a complaint is confidential and may not be disclosed except with the consent of the person who gave the information.

Income Tax Act, section 241

241. (1) Except as authorized by this section, no official shall

(*a*) knowingly provide, or knowingly allow to be provided, to any person any taxpayer information;

(*b*) knowingly allow any person to have access to any taxpayer information; or

(*c*) knowingly use any taxpayer information otherwise than in the course of the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act or for the purpose for which it was provided under this section.

(2) Notwithstanding 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 taxpayer information.

(3) Subsections 241(1) and 241(2) do not apply in respect of

(*a*) criminal proceedings, either by indictment or on summary conviction, that have been commenced by the laying of an information or the preferring of an indictment, under an Act of Parliament; or

(*b*) any legal proceedings relating to the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act or any other Act of Parliament or law of a province that provides for the imposition or collection of a tax or duty.

(3.1) The Minister may provide to appropriate persons any taxpayer information relating to imminent danger of death or physical injury to any individual.

(3.2) An official may provide to any person the following taxpayer information relating to another person that was at any time a registered charity (in this subsection referred to as the "charity"):

(*a*) a copy of the charity's governing documents, including its statement of purpose;

(*b*) any information provided in prescribed form to the Minister by the charity on applying for registration under this Act;

(*c*) the names of the persons who at any time were the charity's directors and the periods during which they were its directors;

(*d*) a copy of the notification of the charity's registration, including any conditions and warnings; and

(*e*) if the registration of the charity has been revoked, a copy of any letter sent by or on

behalf of the Minister to the charity relating to the grounds for the revocation.

(4) An official may

(*a*) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act, solely for that purpose;

(*b*) provide to any person taxpayer information that can reasonably be regarded as necessary for the purposes of determining any tax, interest, penalty or other amount that is or may become payable by the person, or any refund or tax credit to which the person is or may become entitled, under this Act or any other amount that is relevant for the purposes of that determination;

(*c*) provide to the person who seeks a certification referred to in paragraph 147.1(10)(a) the certification or a refusal to make the certification, solely for the purposes of administering a registered pension plan;

(*d*) provide taxpayer information

(i) to an official of the Department of Finance solely for the purposes of the formulation or evaluation of fiscal policy,

(ii) to an official solely for the purposes of the initial implementation of a fiscal policy or for the purposes of the administration or enforcement of an Act of Parliament that provides for the imposition and collection of a tax or duty,

(iii) to an official solely for the purposes of the administration or enforcement of a law of a province that provides for the imposition or collection of a tax or duty,

(iv) to an official of the government of a province solely for the purposes of the formulation or evaluation of fiscal policy,

(v) to an official of the Department of Natural Resources or of the government of a province solely for the purposes of the administration or enforcement of a program of the Government of Canada or of the province relating to the exploration for or exploitation of Canadian petroleum and gas resources,

(vi) to an official of the government of a province that has received or is entitled to receive a payment referred to in this subparagraph, or to an official of the Department of Natural Resources, solely for the purposes of the provisions relating to payments to a province in respect of the taxable income of corporations earned in the offshore area with respect to the province under the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act, chapter 28 of the Statutes of Canada, 1988, the Canada-Newfoundland Atlantic Accord Implementation Act, chapter 3 of the Statutes of Canada, 1987, or similar Acts relating to the exploration for or exploitation of offshore Canadian petroleum and gas resources,

(vi.1) to an official of the Department of Natural Resources solely for the purpose of determining whether property is prescribed energy conservation property or whether an

outlay or expense is a Canadian renewable and conservation expense,

(vii) to an official solely for the purposes of the administration or enforcement of the Pension Benefits Standards Act, 1985 or a similar law of a province,

(vii.1) to an official of the Department of Human Resources Development or to a prescribed official solely for the purpose of the administration or enforcement of Part III.1 of the Department of Human Resources Development Act,

(viii) to an official of the Department of Veterans Affairs solely for the purposes of the administration of the War Veterans Allowance Act or Part XI of the Civilian War-related Benefits Act,

(ix) to an official of a department or agency of the Government of Canada or of a province as to the name, address, occupation, size or type of business of a taxpayer, solely for the purposes of enabling that department or agency to obtain statistical data for research and analysis,

(x) to an official of the Canada Employment Insurance Commission or the Department of Employment and Immigration solely for the purpose of the administration or enforcement of, or the evaluation or formation of policy for the purposes of, the Unemployment Insurance Act, the Employment Insurance Act or an employment program of the Government of Canada,

(xi) to an official of the Department of Agriculture and Agri-Food or of the government of a province solely for the purposes of the administration or enforcement of a program of the Government of Canada or of the province established under an agreement entered into under the Farm Income Protection Act,

(xii) to an official of the Department of Canadian Heritage or a member of the Canadian Cultural Property Export Review Board solely for the purposes of administering sections 32 to 33.2 of the Cultural Property Export and Import Act.

(xiii) to an official solely for the purposes of setting off against any sum of money that may be due or payable by Her Majesty in right of Canada a debt due to

(A) Her Majesty in right of Canada, or

(B) Her Majesty in right of a province, or

(xiv) to an official solely for the purposes of section 7.1 of the Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act;

(*e*) provide taxpayer information, or allow the inspection of or access to taxpayer information, as the case may be, under, and solely for the purposes of,

(i) subsection 36(2) or section 46 of the Access to Information Act,

(ii) section 13 of the Auditor General Act,

(iii) section 92 of the Canada Pension Plan,

(iv) a warrant issued under subsection 21(3) of the Canadian Security Intelligence Service Act,

(v) an order made under subsection 462.48(3) of the Criminal Code,

(vi) section 26 of the Cultural Property Export and Import Act,

(vii) section 79 of the Family Orders and Agreements Enforcement Assistance Act,

(viii) paragraph 33.11(a) of the Old Age Security Act,

(ix) subsection 34(2) or section 45 of the Privacy Act,

(x) section 24 of the Statistics Act,

(xi) section 9 of the Tax Rebate Discounting Act, or

(xii) a provision contained in a tax convention or agreement between Canada and another country that has the force of law in Canada;

(*f*) provide taxpayer information solely for the purposes of sections 23 to 25 of the Financial Administration Act;

(*f.1*) provide taxpayer information to an official solely for the purposes of the administration and enforcement of the Charities Registration (Security Information) Act;

(*g*) use taxpayer information to compile information in a form that does not directly or indirectly reveal the identity of the taxpayer to whom the information relates;

(*h*) use, or provide to any person, taxpayer information solely for a purpose relating to the supervision, evaluation or discipline of an authorized person by Her Majesty in right of Canada in respect of a period during which the authorized person was employed by or engaged by or on behalf of Her Majesty in right of Canada to assist in the administration or enforcement of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act, to the extent that the information is relevant for the purpose;

(*i*) provide access to records of taxpayer information to the Librarian and Archivist of Canada or a person acting on behalf of or under the direction of the Librarian and Archivist, solely for the purposes of section 12 of the *Library and Archives of Canada Act*, and transfer such records to the care and control of such persons solely for the purposes of section 13 of that Act;

(*j*) use taxpayer information relating to a taxpayer to provide information to the taxpayer;

(*j.1*) provide taxpayer information to an official or a designated person solely for the purpose of permitting the making of an adjustment to

(i) a social assistance payment made on the basis of a means, needs or income test, or

(ii) a payment pursuant to a prescribed law of a province in respect of a child within the meaning of the prescribed law,

where the purpose of the adjustment is to take into account the amount determined for C in

subsection 122.61(1) in respect of a person for a taxation year;

(*k*) provide, or allow inspection of or access to, taxpayer information to or by any person otherwise legally entitled to it under an Act of Parliament solely for the purposes for which that person is entitled to the information;

(*l*) provide the business number, name, address, telephone number and facsimile number of a holder of a business number to an official of a department or agency of the Government of Canada or of a province solely for the purpose of the administration or enforcement of an Act of Parliament or a law of a province, if the holder of the business number is required by that Act or that law to provide the information (other than the business number) to the department or agency;

(*m*) provide taxpayer information to an official of the government of a province solely for use in the management or administration by that government of a program relating to payments under subsection 164(1.8);

(*n*) provide taxpayer information to any person, solely for the purposes of the administration or enforcement of a law of a province that provides for workers' compensation benefits;

(*o*) provide taxpayer information to any person solely for the purpose of enabling the Chief Statistician, within the meaning assigned by section 2 of the Statistics Act, to provide to a statistical agency of a province data concerning business activities carried on in the province, where the information is used by the agency solely for research and analysis and the agency is authorized under the law of the province to collect the same or similar information on its own behalf in respect of such activities; or

(*p*) provide taxpayer information to a police officer (within the meaning assigned by subsection 462.48(17) of the Criminal Code) solely for the purpose of investigating whether an offence has been committed under the Criminal Code, or the laying of an information or the preferring of an indictment, where

(i) such information can reasonably be regarded as being necessary for the purpose of ascertaining the circumstances in which an offence under the Criminal Code may have been committed, or the identity of the person or persons who may have committed an offence, with respect to an official, or with respect to any person related to that official,

(ii) the official was or is engaged in the administration or enforcement of this Act, and

(iii) the offence can reasonably be considered to be related to that administration or enforcement.

(4.1) The person who presides at a legal proceeding relating to the supervision, evaluation or discipline of an authorized person may order such measures as are necessary to ensure that taxpayer information is not used or provided to any person for any purpose not relating to that proceeding, including

(*a*) holding a hearing in camera;

(*b*) banning the publication of the information;

(*c*) concealing the identity of the taxpayer to whom the information relates; and

(*d*) sealing the records of the proceeding.

(5) An official may provide taxpayer information relating to a taxpayer

(*a*) to the taxpayer; and

(*b*) with the consent of the taxpayer, to any other person.

(6) An order or direction that is made in the course of or in connection with any legal proceedings and that requires an official or authorized person to give or produce evidence relating to any taxpayer information may, by notice served on all interested parties, be appealed forthwith by the Minister or by the person against whom the order or direction is made to

(*a*) the court of appeal of the province in which the order or direction is made, in the case of an order or direction made by a court or other tribunal established by or pursuant to the laws of the province, whether or not that court or tribunal is exercising a jurisdiction conferred by the laws of Canada; or

(*b*) the Federal Court of Appeal, in the case of an order or direction made by a court or other tribunal established by or pursuant to the laws of Canada.

(7) The court to which an appeal is taken pursuant to subsection 241(6) may allow the appeal and quash the order or direction appealed from or dismiss the appeal, and the rules of practice and procedure from time to time governing appeals to the courts shall apply, with such modifications as the circumstances require, to an appeal instituted pursuant to that subsection.

(8) An appeal instituted pursuant to subsection 241(6) shall stay the operation of the order or direction appealed from until judgment is pronounced.

(9) (Repealed by S.C. 1988, c. 55, s. 183(3).)

(10) In this section

"authorized person" means a person who is engaged or employed, or who was formerly engaged or employed, by or on behalf of Her Majesty in right of Canada to assist in carrying out the provisions of this Act, the Canada Pension Plan, the Unemployment Insurance Act or the Employment Insurance Act;

(Repealed by S.C. 1998, c. 19, s. 236(9).)

"court of appeal" has the meaning assigned by the definition "court of appeal" in section 2 of the Criminal Code;

"designated person" means any person who is employed in the service of, who occupies a position of responsibility in the service of, or who is engaged by or on behalf of,

(*a*) a municipality in Canada, or

(*b*) a public body performing a function of government in Canada,

or any person who was formerly so employed, who formerly occupied such a position or who was formerly so engaged;

"official" means any person who is employed in the service of, who occupies a position of responsibility in the service of, or who is engaged by or on behalf of,

(*a*) Her Majesty in right of Canada or a province, or

(*b*) an authority engaged in administering a law of a province similar to the Pension Benefits Standards Act, 1985,

or any person who was formerly so employed, who formerly occupied such a position or who was formerly so engaged and, for the purposes of subsection 239(2.21), subsections 241(1) and 241(2), the portion of subsection 241(4) before paragraph (a), and subsections 241(5) and 241(6), includes a designated person;

"taxpayer information" means information of any kind and in any form relating to one or more taxpayers that is

(*a*) obtained by or on behalf of the Minister for the purposes of this Act, or

(*b*) prepared from information referred to in paragraph 241(10) taxpayer information (a),

but does not include information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates.

(11) The references in subsections 241(1), 241(3), 241(4) and 241(10) to "this Act" shall be read as references to "this Act or the Petroleum and Gas Revenue Tax Act".

Industrial Research and Development Incentives Act, section 13 (Repealed on November 17, 1986)

13. All information with respect to a corporation obtained by an officer or employee of Her Majesty in the course of the administration of this Act is privileged, and no such officer or employee shall knowingly, except as may be necessary for the purposes of sections 11 and 12 or in respect of proceedings relating to the administration or enforcement of this Act, communicate or allow to be communicated to any person not legally entitled thereto any such information or allow any such person to inspect or have access to any application or other writing containing any such information.

Investment Canada Act, section 36

36. (1) Subject to subsections (3) and (4), all information obtained with respect to a

Canadian, a non-Canadian or a business by the Minister or an officer or employee of Her Majesty in the course of the administration or enforcement of this Act is privileged and no one shall knowingly communicate or allow to be communicated any such information or allow anyone to inspect or to have access to any such information.

(2) Notwithstanding any other Act or law but subject to subsections (3) and (4), no minister of the Crown and no officer or employee of Her Majesty in right of Canada or a province shall be required, in connection with any legal proceedings, to give evidence relating to any information that is privileged under subsection (1) or to produce any statement or other writing containing such information.

(3) Information that is privileged under subsection (1) may, on such terms and conditions and under such circumstances as the Minister deems appropriate,

(*a*) on request in writing to the Director by or on behalf of the Canadian or non-Canadian to which the information relates, be communicated or disclosed to any person or authority named in the request; or

(*b*) for any purpose relating to the administration or enforcement of this Act, be communicated or disclosed to a minister of the Crown in right of Canada or a province or to an officer or employee of Her Majesty in right of Canada or a province.

(4) Nothing in this section prohibits the communication or disclosure of

(*a*) information for the purposes of legal proceedings relating to the administration or enforcement of this Act;

(*b*) information contained in any written undertaking given to Her Majesty in right of Canada relating to an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada;

(*c*) information to which the public has access;

(*d*) information the communication or disclosure of which has been authorized in writing by the Canadian or the non-Canadian to which the information relates;

(*e*) information contained in

(i) any receipt sent pursuant to subsection 13(1) relating to an investment that is not reviewable pursuant to subsection 13(3),

(ii) any notice sent under subsection 21(1) or (2), 22(2) or (3) or 23(3), or

(iii) any demand sent by the Minister under section 39; or

(*f*) information to which a person is otherwise legally entitled.

(5) No minister of the Crown and no officer or employee of Her Majesty in right of Canada or

a province may be required, in connection with any legal proceedings or otherwise, to give evidence relating to or otherwise to communicate or disclose any information referred to in paragraph (4)(*b*) where, in the opinion of the Minister or a person designated by the Minister, the communication or disclosure of that information is not necessary for any purpose relating to the administration or enforcement of this Act and would prejudicially affect the non-Canadian that gave the written undertaking referred to in that paragraph in the conduct of the business affairs of that non-Canadian.

Canada Labour Code, subsection 144(3)

144. (3) Subject to subsection (4), no appeals officer or health and safety officer who is admitted to a work place under the powers conferred on an officer by section 141 and no person accompanying such an officer shall disclose to any person any information obtained in the work place by that officer or person with regard to any secret process or trade secret, except for the purposes of this Part or as required by law.

See also s, 144 (4)

144. (4) All information that, under the *Hazardous Materials Information Review Act*, an employer is exempt from disclosing under paragraph 125.1(*d*) or (*e*) or under paragraph 13(*a*) or (*b*) or 14(*a*) or (*b*) of the *Hazardous Products Act* and that is obtained in a work place, by an appeals officer or a health and safety officer who is admitted to the work place, under section 141, or by a person accompanying that officer, is privileged and, notwithstanding the *Access to Information Act* or any other Act or law, shall not be disclosed to any other person except for the purposes of this Part.

Mackenzie Valley Resource Management Act, paragraph 30(1)(b)

30. (1) Subject to any other provisions of this Act, a board may make rules

(*b*) for preventing trade secrets and information described in section 20 of the *Access to Information Act* from being disclosed or made public as a result of their being used as evidence before the board, including rules providing for hearings to be held in private.

Marine Transportation Security Act, subsection 13(1)

13. (1) No person shall disclose to any other person the substance of a security measure, security rule or proposed security rule unless the disclosure is

(*a*) authorized by the Minister;

(*b*) ordered by a court or other body under section 14;

(*c*) required by any law; or

(*d*) necessary to give effect to the measure or rule.

Motor Vehicle Fuel Consumption Standards Act, subsection 27(1)

27. (1) Except as provided in this section, information obtained by the Minister under this Act or by the Minister of Natural Resources under subsection (2) is privileged and shall not knowingly be or be permitted to be communicated, disclosed or made available without the written consent of the person from whom it was obtained.

Nuclear Safety and Control Act, paragraphs 44(1)(d) and 48(b)

44. (1) The Commission may, with the approval of the Governor in Council, make regulations

(*d*) respecting the production, possession, transfer, storage, import, export, use and disclosure, and restricting the disclosure, of prescribed information;

48. Every person commits an offence who

(*b*) discloses prescribed information, except pursuant to the regulations;

Old Age Security Act, subsection 33.01(1)

33.01 (1) Information with respect to an individual is privileged and shall not be made available except as authorized by this Act.

Patent Act, section 10

10. (1) Subject to subsections (2) to (6) and section 20, all patents, applications for patents and documents filed in connection with patents or applications for patents shall be open to public inspection at the Patent Office, under such conditions as may be prescribed.

(2) Except with the approval of the applicant, an application for a patent, or a document filed in connection with the application, shall not be open to public inspection before a confidentiality period of eighteen months has expired.

(3) The confidentiality period begins on the filing date of the application or, where a request for priority has been made in respect of the application, it begins on the earliest filing date of any previously regularly filed application on which the request is based.

(4) Where a request for priority is withdrawn on or before the prescribed date, it shall, for the

purposes of subsection (3) and to the extent that it is withdrawn, be considered never to have been made.

(5) An application shall not be open to public inspection if it is withdrawn in accordance with the regulations on or before the prescribed date.

(6) A prescribed date referred to in subsection (4) or (5) must be no later than the date on which the confidentiality period expires.

See also s. 20

20. (1) Any officer, servant or employee of the Crown or of a corporation that is an agent or servant of the Crown, who, acting within the scope of his duties and employment, invents any invention in instruments or munitions of war shall, if so required by the Minister of National Defence, assign to that Minister on behalf of Her Majesty all the benefits of the invention and of any patent obtained or to be obtained for the invention.

(2) Any person other than a person described in subsection (1) who invents an invention described in that subsection may assign to the Minister of National Defence on behalf of Her Majesty all the benefits of the invention and of any patent obtained or to be obtained for the invention.

(3) An inventor described in subsection (2) is entitled to compensation for an assignment to the Minister of National Defence under this Act and in the event that the consideration to be paid for the assignment is not agreed on, it is the duty of the Commissioner to determine the amount of the consideration, which decision is subject to appeal to the Federal Court.

(4) Proceedings before the Federal Court under subsection (3) shall be held in camera on request made to the court by any party to the proceedings.

(5) An assignment to the Minister of National Defence under this Act effectually vests the benefits of the invention and patent in the Minister of National Defence on behalf of Her Majesty, and all covenants and agreements therein contained for keeping the invention secret and otherwise are valid and effectual, notwithstanding any want of valuable consideration, and may be enforced accordingly by the Minister of National Defence.

(6) Any person who has made an assignment to the Minister of National Defence under this section, in respect of any covenants and agreements contained in such assignment for keeping the invention secret and otherwise in respect of all matters relating to that invention, and any other person who has knowledge of such assignment and of such covenants and agreements, shall be, for the purposes of the *Security of Information Act*, deemed to be persons having in their possession or control information respecting those matters that has been entrusted to them in confidence by any person holding office under Her Majesty, and the communication of any of that information by the first mentioned persons to any person other than one to whom they are authorized to communicate with, by or on behalf of the Minister of National Defence, is an offence under section 4 of the *Security of Information Act*.

(7) Where any agreement for an assignment to the Minister of National Defence under this Act has been made, the Minister of National Defence may submit an application for patent for the invention to the Commissioner, with the request that it be examined for patentability, and if the application is found allowable may, before the grant of any patent thereon, certify to the Commissioner that, in the public interest, the particulars of the invention and of the manner in which it is to be worked are to be kept secret.

(8) If the Minister of National Defence so certifies, the application and specification, with the drawing, if any, and any amendment of the application, and any copies of those documents and the drawing and the patent granted thereon shall be placed in a packet sealed by the Commissioner under authority of the Minister of National Defence.

(9) The packet described in subsection (8) shall, until the expiration of the term during which a patent for the invention may be in force, be kept sealed by the Commissioner, and shall not be opened except under the authority of an order of the Minister of National Defence.

(10) The packet described in subsection (8) shall be delivered at any time during the continuance of the patent to any person authorized by the Minister of National Defence to receive it, and shall, if returned to the Commissioner, be kept sealed by him.

(11) On the expiration of the term of the patent, the packet described in subsection (8) shall be delivered to the Minister of National Defence.

(12) No proceeding by petition or otherwise lies to have declared invalid or void a patent granted for an invention in relation to which a certificate has been given by the Minister of National Defence under subsection (7), except by permission of the Minister.

(13) No copy of any specification or other document or drawing in respect of an invention and patent, by this section required to be placed in a sealed packet, shall in any manner whatever be published or open to the inspection of the public, but, except as otherwise provided in this section, this Act shall apply in respect of the invention and patent.

(14) The Minister of National Defence may at any time waive the benefit of this section with respect to any particular invention, and the specification, documents and drawing relating thereto shall thereafter be kept and dealt with in the regular way.

(15) No claim shall be allowed in respect of any infringement of a patent that occurred in good faith during the time that the patent was kept secret under this section, and any person who, before the publication of the patent, had in good faith done any act that, but for this subsection would have given rise to a claim, is entitled, after the publication, to obtain a licence to manufacture, use and sell the patented invention on such terms as may, in the absence of agreement between the parties, be settled by the Commissioner or by the Federal Court on appeal from the Commissioner.

(16) The communication of any invention for any improvement in munitions of war to the Minister of National Defence, or to any person or persons authorized by the Minister of National Defence to investigate the invention or the merits thereof, shall not, nor shall anything done for the purposes of the investigation, be deemed use or publication of the invention so as to prejudice the grant or validity of any patent for the invention.

(17) The Governor in Council, if satisfied that an invention relating to any instrument or munition of war, described in any specified application for patent not assigned to the Minister of National Defence, is vital to the defence of Canada and that the publication of a patent therefor should be prevented in order to preserve the safety of the State, may order that the invention and application and all the documents relating thereto shall be treated for all purposes of this section as if the invention had been assigned or agreed to be assigned to the Minister of National Defence.

(18) The Governor in Council may make rules for the purpose of ensuring secrecy with respect to applications and patents to which this section applies and generally to give effect to the purpose and intent thereof.

Patent Act, subsection 20(7)

20 (7) Where any agreement for an assignment to the Minister of National Defence under this Act has been made, the Minister of National Defence may submit an application for patent for the invention to the Commissioner, with the request that it be examined for patentability, and if the application is found allowable may, before the grant of any patent thereon, certify to the Commissioner that, in the public interest, the particulars of the invention and of the manner in which it is to be worked are to be kept secret.

Patent Act, sections 87 and 88

87. (1) Subject to subsection (2), any information or document provided to the Board under section 80, 81 or 82 or in any proceeding under section 83 is privileged, and no person who has obtained the information or document pursuant to this Act shall, without the authorization of the person who provided the information or document, knowingly disclose the information or document or allow it to be disclosed unless it has been disclosed at a public hearing under section 83.

(2) Any information or document referred to in subsection (1)

(*a*) may be disclosed by the Board to any person engaged in the administration of this Act under the direction of the Board, to the Minister of Industry or such other Minister as may be designated by the regulations and to the provincial ministers of the Crown responsible for health and their officials for use only for the purpose of making representations referred to in subsection 86(2); and

(*b*) may be used by the Board for the purpose of the report referred to in section 100.

88. (1) A patentee of an invention pertaining to a medicine shall, as required by and in accordance with the regulations, or as the Board may, by order, require, provide the Board

with such information and documents as the regulations or the order may specify respecting

(*a*) the identity of the licensees in Canada of the patentee;

(*b*) the revenue of the patentee, and details of the source of the revenue, whether direct or indirect, from sales of medicine in Canada; and

(*c*) the expenditures made by the patentee in Canada on research and development relating to medicine.

(2) Where the Board believes on reasonable grounds that any person has information or documents pertaining to the value of sales of medicine in Canada by a patentee or the expenditures made by a patentee in Canada on research and development relating to medicine, the Board may, by order, require the person to provide the Board with any of the information or documents that are specified in the order, or with copies thereof.

(3) A person in respect of whom an order is made under subsection (1) or (2) shall comply with the order within such time as is specified in the order or as the Board may allow.

(4) Subject to section 89, any information or document provided to the Board under subsection (1) or (2) is privileged, and no person who has obtained the information or document pursuant to this Act shall, without the authorization of the person who provided the information or document, knowingly disclose the information or allow it to be disclosed, except for the purposes of the administration of this Act.

See also s. 89

89. (1) The Board shall in each year submit to the Minister a report setting out

(*a*) the Board's estimate of the proportion, as a percentage, that the expenditures of each patentee in Canada in the preceding year on research and development relating to medicine is of the revenues of those patentees from sales of medicine in Canada in that year; and

(*b*) the Board's estimate of the proportion, as a percentage, that the total of the expenditures of patentees in Canada in the preceding year on research and development relating to medicine is of the total of the revenues of those patentees from sales of medicine in Canada in that year.

(2) The report shall be based on an analysis of information and documents provided to the Board under subsections 88(1) and (2) and of such other information and documents relating to the revenues and expenditures referred to in subsection 88(1) as the Board considers relevant but, subject to subsection (3), shall not be set out in a manner that would make it possible to identify a person who provided any information or document under subsection 88(1) or (2).

(3) The Board shall, in the report, identify the patentees in respect of whom an estimate referred to in subsection (1) is given in the report, and may, in the report, identify any person who has failed to comply with subsection 88(1) or (2) at any time in the year in respect of which the report is made.

(4) The Minister shall cause a copy of the report to be laid before each House of Parliament on any of the first thirty days on which that House is sitting after the report is submitted to the Minister.

Petroleum Incentives Program Act, section 17 (Repealed in 1999)

17. Information or documentation obtained by the Minister under this Act or by a person or agency referred to in paragraphs 18(a) to (d) or paragraph 31(2)(b) is privileged and shall not knowingly be or be permitted to be communicated, disclosed or made available without the written consent of the person from whom it was obtained.

See also ss. 18 and 31(2)(b)

18. Information or documentation obtained under this Act may be communicated, disclosed or made available for the purposes of the administration or enforcement of this Act, legal proceedings related thereto or criminal proceedings under this Act or any other Act of Parliament and may be communicated, disclosed or made available

(a) to the minister of Finance solely for the purposes of evaluating and formulating tax policy in relation to energy matters;

(b) to the Minister of National Revenue solely for the purposes of administering or enforcing the *Income Tax Act* or any other prescribed taxation statute of Canada;

(c) to the Chief Statistician of Canada for the purposes of the *Statistics Act*; and

(d) to any agency established under an Act of Parliament to which the Minister is, by that Act, required to make available statistics, information and documentation obtained by the Minister under that Act that relate to energy enterprises or corporations that control energy enterprises.

31(2)(b) Where an agreement is entered into under subsection (1) and a program is established and operated by the province, subject to the agreement, information or documentation obtained under this Act may, for the purposes of the administration and enforcement of that program, be communicated, disclosed or made available to a person engaged in the administration or enforcement of that program.

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, paragraphs 55(1)(a), (d) and (e)

55. (1) Subject to subsection (3), sections 52, 55.1 and 56.1, subsection 58(1) and section 65 and to subsection 12(1) of the *Privacy Act*, the Centre shall not disclose the following:

(*a*) information set out in a report made under section 7;

(*a*.1) information set out in a report made under section 7.1;

(*d*) information voluntarily provided to the Centre about suspicions of money laundering or of the financing of terrorist activities;

(*e*) information prepared by the Centre from information referred to in paragraphs (*a*) to (*d*);

See also ss. 55(3), 52, 55.1, 56.1, 58(1) and 65

55 (3) If the Centre, on the basis of its analysis and assessment under paragraph 54(*c*), has reasonable grounds to suspect that designated information would be relevant to investigating or prosecuting a money laundering offence or a terrorist activity financing offence, the Centre shall disclose the information to

(*a*) the appropriate police force;

(*b*) the Canada Revenue Agency, if the Centre also determines that the information is relevant to an offence of evading or attempting to evade paying taxes or duties imposed under an Act of Parliament administered by the Minister of National Revenue;

(*b.1*) the Canada Border Services Agency, if the Centre also determines that the information is relevant to an offence of evading or attempting to evade paying taxes or duties imposed under an Act of Parliament administered by the Agency; and

(*c*) [Repealed, 2001, c. 41, s. 67]

(*d*) the Canada Border Services Agency, if the Centre also determines that the information would promote the objective set out in paragraph 3(1)(*i*) of the *Immigration and Refugee Protection Act* and is relevant to determining whether a person is a person described in sections 34 to 42 of that Act or to an offence under any of sections 117 to 119, 126 or 127 of that Act.

52. (1) The Director shall report to the Minister from time to time on the exercise of the Director's powers and the performance of his or her duties and functions under this Act.

(2) The Director shall keep the Minister informed of any matter that could materially affect public policy or the strategic direction of the Centre, and any other matter that the Minister considers necessary.

(3) The Director shall, at the Minister's request, disclose to the Minister any information that the Minister considers relevant for the purpose of carrying out the Minister's powers and duties under this Act.

(4) The Director shall disclose to a person engaged under subsection 42(4) any information that the person considers relevant for the purpose of advising the Minister on any matter referred to in subsection 42(2).

55.1 (1) If the Centre, on the basis of its analysis and assessment under paragraph 54(*c*), has reasonable grounds to suspect that designated information would be relevant to threats to the security of Canada, the Centre shall disclose that information to the Canadian Security Intelligence Service.

(2) The Centre shall record in writing the reasons for all decisions to disclose information made under subsection (1).

(3) For the purposes of subsection (1), "designated information" means, in respect of a financial transaction or an importation or exportation of currency or monetary instruments,

(*a*) the name of the client or of the importer or exporter, or any person or entity acting on their behalf;

(*b*) the name and address of the place of business where the transaction occurred or the address of the customs office where the importation or exportation occurred, and the date the transaction, importation or exportation occurred;

(*c*) the amount and type of currency or monetary instruments involved or, in the case of a transaction, if no currency or monetary instruments are involved, the value of the transaction or the value of the funds that are the subject of the transaction;

(*d*) in the case of a transaction, the transaction number and the account number, if any; and

(*e*) any other similar identifying information that may be prescribed for the purposes of this section.

56.1 (1) The Centre may disclose designated information to an institution or agency of a foreign state or of an international organization established by the governments of foreign states that has powers and duties similar to those of the Centre, if

(*a*) the Centre has reasonable grounds to suspect that the information would be relevant to the investigation or prosecution of a money laundering offence or a terrorist activity financing offence, or an offence that is substantially similar to either offence; and

(*b*) the Minister has, in accordance with subsection 56(1), entered into an agreement or arrangement with that foreign state or international organization regarding the exchange of such information.

(2) The Centre may disclose designated information to an institution or agency of a foreign

state that has powers and duties similar to those of the Centre, if

(*a*) the Centre has reasonable grounds to suspect that the information would be relevant to the investigation or prosecution of a money laundering offence or a terrorist activity financing offence, or an offence that is substantially similar to either offence; and

(*b*) the Centre has, in accordance with subsection 56(2), entered into an agreement or arrangement with that institution or agency regarding the exchange of such information.

(2.1) For greater certainty, designated information may be disclosed to an institution or agency under subsection (1) or (2) in response to a request made by the institution or agency.

(3) In order to perform its functions under paragraph 54(*c*), the Centre may direct queries to an institution or agency in respect of which an agreement referred to in subsection (1) or (2) has been entered into, and in doing so it may disclose designated information.

(4) The Centre shall record in writing the reasons for all decisions to disclose information made under paragraph (1)(*a*) or (2)(*a*).

(5) For the purposes of this section, “designated information” means, in respect of a financial transaction or an importation or exportation of currency or monetary instruments,

(*a*) the name of the client or of the importer or exporter, or any person or entity acting on their behalf;

(*b*) the name and address of the place of business where the transaction occurred or the address of the customs office where the importation or exportation occurred, and the date the transaction, importation or exportation occurred;

(*c*) the amount and type of currency or monetary instruments involved or, in the case of a transaction, if no currency or monetary instruments are involved, the value of the transaction or the value of the funds that are the subject of the transaction;

(*d*) in the case of a transaction, the transaction number and the account number, if any; and

(*e*) any other similar identifying information that may be prescribed for the purposes of this section.

58. (1) The Centre may

(*a*) inform persons and entities that have provided a report under section 7, 7.1 or 9, or a report referred to in section 9.1, about measures that have been taken with respect to reports under those sections;

(*b*) conduct research into trends and developments in the area of money laundering and the financing of terrorist activities and improved ways of detecting, preventing and deterring

money laundering and the financing of terrorist activities; and

(*c*) undertake measures to inform the public, persons and entities referred to in section 5, authorities engaged in the investigation and prosecution of money laundering offences and terrorist activity financing offences, and others, with respect to

(i) their obligations under this Act,

(ii) the nature and extent of money laundering in Canada,

(ii.1) the nature and extent of the financing of terrorist activities in Canada, and

(iii) measures that have been or might be taken to detect, prevent and deter money laundering and the financing of terrorist activities in Canada, and the effectiveness of those measures.

(2) The Centre may not disclose any information that would directly or indirectly identify an individual who provided a report or information to the Centre, or a person or an entity about whom a report or information was provided.

65. (1) The Centre may disclose to the appropriate law enforcement agencies any information of which it becomes aware under section 62 or 63 and that it suspects on reasonable grounds is evidence of a contravention of Part 1.

(2) For the purpose of ensuring compliance with Part 1, the Centre may disclose to or receive from any agency or body that regulates or supervises persons or entities to whom Part 1 applies information relating to the compliance of those persons or entities with that Part.

(3) Any information disclosed by the Centre under subsection (2) may be used by an agency or body referred to in that subsection only for purposes relating to compliance with Part 1.

See also s. 12 (1) of the *Privacy Act*

12. (1) Subject to this Act, every individual who is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* has a right to and shall, on request, be given access to

(*a*) any personal information about the individual contained in a personal information bank; and

(*b*) any other personal information about the individual under the control of a government institution with respect to which the individual is able to provide sufficiently specific

information on the location of the information as to render it reasonably retrievable by the government institution.

See also ss. 7 and 7.1

7. In addition to the requirements of subsection 9(1), every person or entity shall report to the Centre, in the prescribed form and manner, every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence or a terrorist activity financing offence.

7.1 (1) In addition to the requirements of section 7 and subsection 9(1), every person or entity that is required to make a disclosure under section 83.1 of the *Criminal Code* shall also make a report on it to the Centre, in the prescribed form and manner.

(2) Subsection (1) does not apply to prescribed persons or entities, or prescribed classes of persons or entities, in respect of prescribed transactions or property, or classes of transactions or property, if the prescribed conditions are met.

Railway Safety Act, subsection 39.2(1)

39.2 (1) No person shall disclose to any other person the substance of a security document that is labelled as such unless the disclosure is

(*a*) authorized by the Minister;

(*b*) ordered by a court or other body under subsection (3);

(*c*) required by law; or

(*d*) necessary to give effect to the document.

See also s. 39.2(3)

(3) If the court or other body concludes that the public interest in the proper administration of justice outweighs the interests that would be protected by non-disclosure, the court or other body

(*a*) shall order the production and discovery of the security document, subject to any restrictions or conditions that the court or other body considers appropriate; and

(*b*) may require any person to give evidence relating to the document.

Sex Offender Information Registration Act, subsections 9(3) and 16(4)

9 (3) Despite any other Act of Parliament, if the fingerprints provided under subsection (2) confirm that the person who is reporting is the sex offender, they shall not be disclosed, or used for any other purpose, and shall be destroyed without delay.

16 (4) No person shall disclose any information that is collected under this Act or registered in the database or the fact that information relating to a person is collected under this Act or registered in the database, or allow it to be disclosed,

(*a*) except to the sex offender, or the person who was served with a notice under section 490.019 of the *Criminal Code*, to whom the information relates;

(*b*) except to a person referred to in any of paragraphs (2)(*a*) to (*f*), if the disclosure to them is necessary to enable them to fulfil the purposes, perform the duties or exercise the functions referred to in that paragraph;

(*c*) except to a member or employee of, or a person retained by, a police service, if the disclosure to them is necessary to ensure compliance by a sex offender with an order or orders or with section 490.019 of the *Criminal Code*;

(*d*) except to a person or court referred to in any of paragraphs 490.03(1)(*a*) to (*c*) and (2)(*a*) to (*c*) of the *Criminal Code*, in accordance with that paragraph;

(*e*) except to a person to whom the disclosure is necessary for a prosecution for an offence under section 17 or under section 490.031 of the *Criminal Code* or an appeal from a decision made in such a proceeding, and to a court in connection with the prosecution or appeal, if the information is relevant to that proceeding;

(*f*) except to a person to whom the disclosure is necessary to assist an investigation of any act or omission referred to in subsection 7(4.1) of the *Criminal Code* by a police service in the state where the act or omission was committed; or

(*g*) unless the person is authorized under section 13 to consult information that is registered in the database, the information is disclosed for research or statistical purposes, and the disclosure is not made, or allowed to be made, in a form that could reasonably be expected to identify any individual to whom it relates.

See also s. 7(4.1) of Criminal Code

7 (4.1) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 151, 152, 153, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 173 or subsection 212(4) shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

See also ss. 16(2) a) to f)

16 (2) No person shall consult any information that is collected under this Act or registered in the database, unless they are

(*a*) a member or employee of, or a person retained by, a police service who consults the information for the purpose of investigating a specific crime that there are reasonable grounds to suspect is of a sexual nature;

(*b*) a person who collects information at the registration centre at which a sex offender last reported who consults the information in order to ensure compliance by the sex offender with an order or orders or with section 490.019 of the *Criminal Code*;

(*c*) a person who collects or registers information and who consults the information in order to exercise the functions or perform the duties assigned to them under this Act;

(*d*) a person who is authorized under section 13 to consult information that is registered in the database for research or statistical purposes and who does so for those purposes;

(*e*) the Commissioner of the Royal Canadian Mounted Police or a person authorized by the Commissioner who consults information that is collected under this Act or registered in the database in order to perform the duties of the Commissioner under this Act; or

(*f*) a member or employee of, or a person retained by, the Royal Canadian Mounted Police who is authorized to consult the information in order to maintain the database and who does so for that purpose.

See also s. 17 of Criminal Code

17. A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons).

See also ss. 490.03(1)a) and b), and 490.03 (2) of Criminal Code

490.03 (1) At the request of a prosecutor or the Attorney General, as the case may be, the Commissioner of the Royal Canadian Mounted Police shall disclose information that is registered in the database or the fact that such information is registered in the database

(*a*) to the prosecutor, if the Commissioner is satisfied that the disclosure is necessary for the purposes of a proceeding for an order under section 490.012; or

(*b*) to the Attorney General, if the Commissioner is satisfied that the disclosure is necessary for the purposes of a proceeding under section 490.015, 490.023 or 490.026, or an appeal from a decision made in a proceeding under any of those sections or in a proceeding for an order under section 490.012.

490.03 (2) At the request of the Attorney General, the Commissioner shall disclose to the Attorney General all information relating to a person that is registered in the database if the person, in connection with a proceeding, discloses any such information or the fact that any such information is registered in the database.

See also s. 490.019 of Criminal Code

490.019 A person who is served with a notice in Form 53 shall comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 490.022 unless a court makes an exemption order under subsection 490.023(2).

See also s. 490.031 of Criminal Code

490.031 Every person who, without reasonable excuse, fails to comply with an order made under section 490.012 or with an obligation under section 490.019, is guilty of an offence and liable

(*a*) in the case of a first offence, on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term of not more than six months, or to both; and

(*b*) in the case of a second or subsequent offence,

(i) on conviction on indictment, to a fine of not more than $10,000 or to imprisonment for a term of not more than two years, or to both, or

(ii) on summary conviction, to a fine of not more than $10,000 or to imprisonment for a term of not more than six months, or to both.

Shipping Conferences Exemption Act, 1987, section 11

11. Except as authorized under section 12 and subsection 14(2), no person engaged in the administration of this Act shall

(*a*) knowingly communicate or knowingly allow to be communicated to any person any information contained in any copy of a service contract that has been filed with the Agency pursuant to section 6; or

(*b*) knowingly allow any person to inspect or have access to any such copy.

See also ss. 12, 14(2) and 13(1)

12. A person engaged in the administration of this Act may communicate or allow to be communicated information contained in a copy of a service contract that has been filed with the Agency pursuant to section 6 or may allow inspection of or access to any such copy to or by

(*a*) any other person engaged in the administration of this Act; or

(*b*) any person authorized in writing by the parties to the service contract.

14 (2) Where the Commissioner intends to make representations to or call evidence before the Agency pursuant to section 125 of the *Competition Act* in respect of a complaint filed under subsection 13(1) by a person other than the Commissioner and gives notice thereof to the Agency, the Agency shall make available to the Commissioner for examination all relevant documents filed with the Agency including copies of any service contracts.

13. (1) Subject to subsection (5), where any person, including the Commissioner, has reason to believe that

(*a*) any conference agreement or interconference agreement, a copy or description of which is required to be filed with the Agency by a member of a conference pursuant to section 6, or

(*b*) any practice of a conference or of any member thereof,

has, or is likely to have, by a reduction in competition, the effect of producing an unreasonable reduction in transportation service or an unreasonable increase in transportation costs, that person may file a complaint with the Agency and the Agency may make such investigation of the complaint as in its opinion is warranted.

Softwood Lumber Products Export Charge Act, section 20

20. (1) The persons that are necessary to administer and enforce this Act are to be appointed, employed or engaged in the manner authorized by law.

(2) The Minister may authorize any person employed or engaged by the Agency or who occupies a position of responsibility in the Agency to exercise powers or perform duties of the Minister, including any judicial or quasi-judicial power or duty of the Minister, under this Act.

Special Import Measures Act, section 84

84. (1) Where a person

(*a*) designates information as confidential pursuant to paragraph 85(1)(*a*), or

(*b*) submits to the President, with respect to evidence, in this section referred to as "information", provided by him pursuant to subsection 78(3), the statement and explanation referred to in subsection 79(1),

and that designation or submission, as the case may be, is not withdrawn by the person, no person employed in the federal public administration who comes into possession of that information while he is so employed shall, either before or after he ceases to be so employed, knowingly disclose that information, or knowingly allow it to be disclosed, to any other person in any manner that is calculated or likely to make it available for the use of any business competitor or rival of any person to whose business or affairs the information relates.

(2) Subsection (1) does not apply in respect of

(*a*) any summary of information or statement referred to in paragraph 85(1)(*b*) or any summary referred to in subsection 79(2); or

(*b*) the disclosure by the President of information for the purposes of proceedings before a panel or the Appellate Body established under the Understanding on Rules and Procedures Governing the Settlement of Disputes set out in Annex 2 to the WTO Agreement.

(3) Notwithstanding subsection (1), information to which that subsection applies that has been provided to the President in any proceedings under this Act shall, on written request and on payment of the prescribed fee, be disclosed by the President, in the manner and at the time specified by the President, to counsel for any party to those proceedings or to other proceedings under this Act arising out of those proceedings for use, notwithstanding any other Act or law, by that counsel only in those proceedings, subject to any conditions that the President considers reasonably necessary or desirable to ensure that the information will not, without the written consent of the person who submitted it to the President, be disclosed to any person by counsel in any manner that is calculated or likely to make it available to

(*a*) any party to the proceedings or other proceedings, including a party who is represented by that counsel; or

(*b*) any business competitor or rival of any person to whose business or affairs the information relates.

(3.1) The President may not disclose information under subsection (3) if the President is satisfied that the disclosure might result in material harm to the business or affairs of the person who designated the information as confidential under paragraph 85(1)(*a*).

(4) In subsection (3), “counsel”, in relation to a party to proceedings under this Act, includes any person, other than a director, servant or employee of the party, who acts in the proceedings on behalf of the party.

Statistics Act, section 17

17. (1) Except for the purpose of communicating information in accordance with any conditions of an agreement made under section 11 or 12 and except for the purposes of a prosecution under this Act but subject to this section,

(*a*) no person, other than a person employed or deemed to be employed under this Act, and sworn under section 6, shall be permitted to examine any identifiable individual return made for the purposes of this Act; and

(*b*) no person who has been sworn under section 6 shall disclose or knowingly cause to be disclosed, by any means, any information obtained under this Act in such a manner that it is possible from the disclosure to relate the particulars obtained from any individual return to any identifiable individual person, business or organization.

(2) The Chief Statistician may, by order, authorize the following information to be disclosed:

(*a*) information collected by persons, organizations or departments for their own purposes and communicated to Statistics Canada before or after May 1, 1971, but that information when communicated to Statistics Canada shall be subject to the same secrecy requirements to which it was subject when collected and may only be disclosed by Statistics Canada in the manner and to the extent agreed on by the collector thereof and the Chief Statistician;

(*b*) information relating to a person or organization in respect of which disclosure is consented to in writing by the person or organization concerned;

(*c*) information relating to a business in respect of which disclosure is consented to in writing by the owner for the time being of the business;

(*d*) information available to the public under any statutory or other law;

(*e*) information relating to any hospital, mental institution, library, educational institution, welfare institution or other similar non-commercial institution except particulars arranged in such a manner that it is possible to relate the particulars to any individual patient, inmate or other person in the care of any such institution;

(*f*) information in the form of an index or list of individual establishments, firms or businesses, showing any, some or all of the following in relation to them:

(i) their names and addresses,

(ii) the telephone numbers at which they may be reached in relation to statistical matters,

(iii) the official language in which they prefer to be addressed in relation to statistical matters,

(iv) the products they produce, manufacture, process, transport, store, purchase or sell, or the services they provide, in the course of their business, or

(v) whether they are within specific ranges of numbers of employees or persons engaged by them or constituting their work force; and

(*g*) information relating to any carrier or public utility.

(3) In this section,

"carrier" means any person or association of persons that owns, operates or manages an undertaking that carries or moves persons or commodities by any form of land, sea or air transport;

"public utility" means any person or association of persons that owns, operates or manages an undertaking

(*a*) for the supply of petroleum or petroleum products by pipeline,

(*b*) for the supply, transmission or distribution of gas, electricity, steam or water,

(*c*) for the collection and disposal of garbage or sewage or for the control of pollution,

(*d*) for the transmission, emission, reception or conveyance of information by any telecommunication system, or

(*e*) for the provision of postal services.

See also ss. 11 and 12

11. (1) The Minister may, with the approval of the Governor in Council and subject to this section, enter into an agreement with the government of a province for the exchange with, or transmission to, a statistical agency of the province of

(*a*) replies to any specific statistical inquiries;

(*b*) replies to any specific classes of information collected under this Act; and

(*c*) any tabulations and analyses based on replies referred to in paragraph (*a*) or (*b*).

(2) An agreement with a province for the purposes of this section shall apply only in respect of a statistical agency of the province

(*a*) that has statutory authority to collect the information that is intended to be exchanged or transmitted pursuant to the agreement from a respondent who is subject to statutory

penalties for refusing or neglecting to furnish information to the agency or for falsifying information furnished by him to the agency;

(*b*) that is prohibited by law from disclosing any information of a kind that Statistics Canada, its officers and employees would be prohibited from disclosing under section 17, if the information were furnished to Statistics Canada; and

(*c*) whose officers and employees are subject to statutory penalties for the disclosing of any information of the kind described in paragraph (*b*), subject to exceptions authorized by law that are substantially the same as those provided under section 17.

(3) Except in respect of information described in subsection 17(2), no agreement entered into under this section applies to any reply made to or information collected by Statistics Canada or an agency of the government of a province before the date that the agreement was entered into or is to have effect, whichever is the later date.

(4) Where any information in respect of which an agreement under this section applies is collected by Statistics Canada from a respondent, Statistics Canada shall, when collecting information, advise the respondent of the names of any statistical agencies in respect of which the Minister has an agreement under this section and to which the information received from the respondent may be communicated under that agreement.

12. (1) The Minister may enter into an agreement with any department or municipal or other corporation for the sharing of information collected from a respondent by either Statistics Canada or the department or corporation on behalf of both of them and for the subsequent tabulation or publication based on that information.

(2) An agreement under subsection (1) shall provide that

(*a*) the respondent be informed by notice that the information is being collected on behalf of Statistics Canada and the department or corporation, as the case may be; and

(*b*) where the respondent gives notice in writing to the Chief Statistician that the respondent objects to the sharing of the information by Statistics Canada, the information not be shared with the department or corporation unless the department or corporation is authorized by law to require the respondent to provide that information.

(3) Information shared pursuant to this section may, subject to subsection (2), include replies to original inquiries and supplementary information provided by a respondent to Statistics Canada or the department or corporation.

Telecommunications Act, subsections 39(2) and 70(4)

39 (2) Subject to subsections (4), (5) and (6), where a person designates information as confidential and the designation is not withdrawn by that person, no person described in subsection (3) shall knowingly disclose the information, or knowingly allow it to be disclosed, to

any other person in any manner that is calculated or likely to make it available for the use of any person who may benefit from the information or use the information to the detriment of any person to whose business or affairs the information relates.

70 (4) The rules in section 39 respecting the designation and disclosure of information apply in respect of any information submitted to a person, or obtained in proceedings before a person, appointed under this section as if that person were a member of the Commission exercising the powers of the Commission.

See also subsections 39(3), (4), (5) and (6)

39 (3) Subsection (2) applies to

(*a*) any member of, or person employed by, the Commission, and

(*b*) in respect of information provided under subsection 37(3), the Minister, the Chief Statistician of Canada and any person employed in the federal public administration

who comes into possession of designated information while holding that office or being so employed, whether or not the person has ceased to hold that office or be so employed.

39 (4) Where designated information is submitted in the course of proceedings before the Commission, the Commission may disclose or require its disclosure where it determines, after considering any representations from interested persons, that the disclosure is in the public interest.

39 (5) Where designated information is submitted to the Commission otherwise than in the course of proceedings before it, the Commission may disclose or require its disclosure if, after considering any representations from interested persons, it considers the information to be relevant to the determination of a matter before it and determines that the disclosure is in the public interest.

(6) Designated information that is not disclosed or required to be disclosed under this section is not admissible in evidence in any judicial proceedings except proceedings for failure to submit information required to be submitted under this Act or any special Act or for forgery, perjury or false declaration in relation to the submission of the information.

Trademarks Act, subsection 50(6)

50(6) The Registrar shall, if so required by an applicant under subsection (5), take steps to ensure that any document, information or evidence furnished for the purpose of that application, other than matter entered in the register, is not disclosed to any other person except by order of a court.

See also subsection 50(5)

50(5) Concurrently with or at any time after the filing of an application for the registration of a trade-mark, an application for the registration of a person as a registered user of the trade-mark may be made to the Registrar in writing by that person and by the owner of the trade-mark, and the applicants shall furnish the Registrar in writing with

a) particulars of the relationship, existing or proposed, between them, including particular of the degree of control by the owner over the permitted use that their relationship will confer;

b) a statement of the wares or services for which registration is proposed;

c) particulars of any conditions or restrictions proposed with respect to the characteristics of the wares of services, to the mode or place of permitted use or to any other matter;

d) information as to the proposed duration of the permitted use; and

e) such further documents, information or evidence as may be required by the Registrar.

Transportation of Dangerous Goods Act, 1992, subsection 24(4)

24(4) No person to whom privileged information has been provided shall knowingly communicate it or allow it to be communicated to any person, or allow any other person to inspect or have access to the information, except

(*a*) with the consent in writing of the person who provided the information or from whom it was obtained; or

(*b*) for the purposes of the administration or enforcement of this Act.

Yukon Environmental and Socioeconomic Assessment Act, paragraph 121(a)

121. Notwithstanding any other provision of this Part, the executive committee, the designated offices, panels of the Board and decision bodies may not disclose

(*a*) traditional knowledge that is determined to be confidential under the applicable rules and that is provided in confidence to them for the purposes of this Act;

Yukon Quartz Mining Act, subsection 100(16) (Repealed in 2002)

16. It is at all times lawful for the Commissioner, a mining recorder or a mining recorder's agent to enter on mining property for the purpose of making an inspection and obtaining

information respecting the amount and value of the output of the mine, and for that purpose that officer.

a) May descend all pits and shafts and use all such tackle, machinery and appliances belonging to the mine as he may deem necessary or expedient,

b) shall have free ingress and egress to, from and over all buildings, erections and vessels used in connection with the mine,

c) shall be allowed to take from the mining property such samples or specimens as he may desire, for the purpose of determining by assay or otherwise the value of the ore, minerals or mineral-bearing substances being taken therefrom, or any product thereof,

d) shall have full and complete access to all books of account, correspondence and documents maintained or used for or in connection with the actual operation and business of the mine, and

e) may examine the books of account, correspondence and documents and take copies thereof or extracts therefrom,

but any information of a private or confidential nature acquired by that officer shall not be disclosed to anyone, except in so far as may be necessary for the purposes of this section.

Preliminary matters:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizens or permanent resident within the meaning of the *Immigration Act* and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, the Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under section 68 or 69.

Section 24 is a conditional mandatory class exemption. The condition is that once the Head determines that a record or part thereof contains certain information which falls within the class enunciated in the exemption, he/she must then refuse to grant access to the requested information unless one of the exceptions contained in the provision found in Schedule II applies. The exemption process under subsection 24(1) is not completed until this determination is made.

The "Test":

The determination as to whether section 24 applies to requested information is a multi-step process. Each step should be followed carefully in order to avoid undesirable mistakes. The following will summarize the steps you should follow:

1) <u>Step I</u>:

Determine whether the provision invoked by the department is one found in Schedule II.

2) <u>Step II</u>:

Determine whether the information found in the records fall within the criteria of the provision invoked.

3) <u>Step III</u>:

Determine whether the records in issue fall within an exception to the provision invoked.

Aeronautics Act, section 6.5

Canada (Procureur général) c. Gill, [1992] 3 C.F. 3

Subsection 6.5(5) precludes an order for the disclosure of subsection 6.5(1) reports. Subsection 6.5(4) deals with the liability of a physician arising out of a report and precludes any liability. Subsection 6.5(5) deals with the compellability and use of evidence and not with liability. It is not confined to "legal, disciplinary or other proceedings against a physician or optometrist" but applies to "any legal, disciplinary or other proceedings". Had Parliament intended to confine the application of subsection 6.5(5) to the proceedings in subsection 6.5(4), it could have done so. Instead, reference to "any legal, disciplinary or other proceedings" in subsection 6.5(5) indicates that a subsection 6.5(1) report cannot be "used" in any such proceeding nor can its disclosure be compelled.

Anti-Inflation Act, section 14

No relevant decision to date.

Assisted Human Reproduction, section 18

No relevant decision to date.

Business Development Bank of Canada Act, section 37

No relevant decision to date.

Canada-Newfoundland Atlantic Accord Implementation Act, Section 119

Mobil Oil Canada Ltd. v. Canada Newfoundland Offshore Petroleum Board, [1994] 1 S.C.R.. 202

It is interesting that the term "exploratory well" is defined in s. 119 as "a well drilled on a geological feature on which a significant discovery has not been made". This provision, too, demonstrates that discovery occurs only once in respect of a particular geological feature.

Geophysical Service Incorporated v. Canada Newfoundland Offshore Petroleum, 2003 CFPI 507;

The Applicant made 3 access requests for the names and addresses of all third parties who had, within the preceding one hundred and fifty-four (154) months, requested and been granted access to information concerning or provided by the applicant to the Board, together with details of the information provided.

In the course of the present section 41 application, the Court stated that it is beyond doubt that the seismic data provided by the Applicant to the Canada-Newfoundland Board was information or documentation provided for the purposes of Part II or Part III and thus fell within the ambit of the privilege provided by subsection 119(2) of the *Act*. The Court also ruled that by virtue of paragraph 119(5)(d), and in particular subparagraph (ii) of paragraph (d), that privilege expired five (5) years following the date of completion of the seismic work to which the information or documentation related. Thus, on the expiration of that five (5) year period, it was entirely open to the Canada-Newfoundland Board to make such information or documentation available to a requester.

The Court stated however that the names of requesters and the link between those names and the data requested could be disclosed because it was information provided to the Canada-Newfoundland Board for the purpose of section 22 of the *Canada-Newfoundland Act* and not for the purposes of either Part II or Part III of that *Act*. Thus, it was not information subject to section 119 of the *Act*. In the result, it was not information exempt from disclosure by virtue of subsection 24(1) of, and the related item in, Schedule II to the *Access Act*.

Canada Nova Scotia Offshore Petroleum Resources Accord Implementation Act, sections 19 et 122

No relevant decision to date.

Canada Nova Scotia Oil and Gas Agreement Act, section 53

No relevant decision to date.

Canada Pension Plan, section 104.01

No relevant decision to date.

Canada Petroleum Resources Act, section 101

No relevant decision to date.

Canada Transportation Act, sections and 167

No relevant decision to date.

Canadian Environmental Assessment Act, section 35

No relevant decision to date.

Canadian International Trade Tribunal Act, sections 45 and 49

No relevant decision to date.

Canadian Ownership and Control Determination Act, section 17

No relevant decision to date.

Canadian Security Intelligence Service Act, Section 18

Atwal v. Canada, [1988] 1 F.C. 107

In 1985, a member of the Federal Court of Appeal acting as a Federal Court judge designated by the Chief Justice for the purpose of the *Canadian Security Intelligence Service Act* issued a wiretap and search warrant against the appellant, pursuant to section 21 of that Act, for the investigation of a threat to the security of Canada. The appellant was subsequently charged with criminal offences in British Columbia. Soon after the appellant moved the Judge who had issued the warrant to reseind to order granting its issuance.

This motion was dismissed. The Applicant brought this matter on appeal claiming that the Judge below erred in refusing to permit the appellant to examine the supporting affidavit, or an edited version thereof.

According to the Federal Court of Appeal, while reading sections 18 and 19 of the *CSIS Act,* nothing expressly forbid production of the affidavit. The only statutory limitation on disclosure is an absolute prohibition against disclosure by any person of information from which the identity of an informer or an employee engaged in covert operations can be inferred. That prohibition should be respected by the Court. The requirement that the application for the warrant be heard in private does not, sustain the conclusion that the supporting affidavit is not to be disclosed under any circumstances. It is standard practice that all initial applications for search warrants or wiretap authorization be made in private. It is only after execution that the right of an interested party to inspect the supporting information arises.

In the absence of an objection under section 36.1 of the Canada Evidence Act, the learned judge should have ordered disclosure of the affidavit after deleting therefrom anything from which the identity of any person described in paragraph 18(1)(a) and/or (b) of the Act can be inferred. He erred in failing to do so. The Appel is granted and the Court referred the matter back to the learned judge for a continuance of the hearing of the application in light of these principles.

R. v. Charkaoui, 2003 FC 882

In this case, the Court ruled that it is common knowledge that the names of CSIS employees may be protected by section 18 and the oath of secrecy of the *Canadian Security Intelligence Service Act* unless these names become public or other circumstances so warrant.

Canadian Transportation Accident Investigation and Safety Board Act, Section 28

Canada (Information Commissioner) v. Canadian Transportation Accident Investigation and Safety Board, 2006 FCA 157

According to the Federal Court of Appeal, subsection 28(1) of the *Safety Board Act* and section 24 of the *Access Act* protect form disclosure the on-board recordings from the flight deck of an aircraft. This is mandatory exemption with respect to such recordings and transcripts.

Competition Act, sections 29, 29.1 and 29.2

No relevant decision to date.

Corporations and Labour Unions Returns Act, section 18

No relevant decision to date.

Criminal Code, Section 187

Michaud v. Quebec (Attorney General), [1996] 3 S.C.R. 3

The appellant, a lawyer, was the target of an authorized wiretap as part of a police investigation into the leak of confidential government documents. No criminal charges were laid against the appellant. Informed of the wiretap authorization in accordance with s. 196 of the *Criminal Code*, the appellant filed a motion requesting a judicial order to open the sealed packet as well as copies of the police tapes of his private communications. In his motion, the appellant stated that he intended to file a civil action to obtain compensation for the damage he claimed to have suffered as a result of the police action against him.

The judge denied the motion, holding that where the request for access under s. 187(1)(*a*)(ii) of the *Code* originates from a non-accused target, the *Code* requires that such authorizations remain confidential. He left open the possibility that such a request might be entertained by the judge who presided over the civil suit.

The Supreme Court of Canada granted the Appeal.

Since the advent of the *Charter*, the target of a wiretap authorization who subsequently faces criminal prosecution on the basis of intercepted communications is automatically entitled to

gain access to the materials within the packet, subject only to the Crown's right to apply to have the materials edited. The discretion vested under s. 187(1)(*a*)(ii) of the *Criminal Code* must be exercised systematically in favour of access to give effect to an accused's right to full answer and defence under s. 7 of the *Charter* and an accused's right to challenge the admission of potentially unlawfully intercepted evidence under ss. 8 and 24(2) of the *Charter*. However, the pre-*Charter* interpretation of s. 187(1)(*a*)(ii) continues to operate in relation to non-accused. Where a former surveillance target applies for access in the absence of any threat of criminal prosecution, different considerations apply. Parliament clearly intended that the state's pressing interest in confidentiality of the packet should represent the dominant consideration in the exercise of this discretion. In light of the crucial fact that a competent judge will have already examined and approved a surveillance application prior to the wiretap, Canadian courts have properly concluded that the statutory discretion to open the packet should normally only be exercised upon a preliminary showing which suggests that the initial authorization was obtained in an unlawful manner. An interested non-accused party who seeks access to the packet must thus demonstrate more than a mere suspicion of police wrongdoing; he will normally be compelled to produce some evidence which suggests that the authorization was procured through fraud or wilful non-disclosure by the police.

According to the Supreme Court, the judge erred in automatically rejecting the appellant's motion to open the sealed packet. A non-accused target may apply for an order under s. 187(1)(*a*)(ii) and bring such a motion before the filing of his civil suit. The judge failed to accord the appellant an adequate opportunity to make a preliminary showing which tends to indicate that the initial authorization was obtained in an unlawful manner.

Outside a criminal proceeding, the *Criminal Code* does not provide a former surveillance target with any avenue for disclosure of the recording materials. The judicial power under s. 187(1)(*a*)(ii) to grant disclosure to the packet does not encompass disclosure of the recording materials. Notwithstanding the silence of the *Code*, however, if the non-accused target is successful in securing access to the packet under s. 187(1)(*a*)(ii), he may then seek access to the recording materials upon a new motion in a subsequent proceeding.

Criminal Code, Section 487.3

R. v. Mentuck, 2001 SCC 76

In this case, during the trial the Crown moved for a publication ban to protect the identity of the officers and the operational methods employed by those officers in the investigation. The accused and two intervening newspapers opposed the motion. According to the Court, a publication ban should only be ordered when such an order is necessary to prevent a serious risk to the proper administration of justice, because reasonable alternative measures will not prevent the risk, and when the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. The party bringing the application has the burden of displacing the presumption of openness. That party must also establish a sufficient evidentiary basis to allow the judge to make an informed application of the test, and to allow for review.

The first branch of the analysis requires consideration of the necessity of the ban in relation to its object of protecting the proper administration of justice. The concept of "necessity" has several elements: (1) the risk in question must be well-grounded in the evidence and must pose a serious threat to the proper administration of justice; (2) "the proper administration of justice" should not be interpreted so widely as to keep secret a vast amount of enforcement information the disclosure of which would be compatible with the public interest; and(3) in order to reflect the minimal impairment branch of the *Oakes* test, the judge must consider whether reasonable alternatives are available, but he must also restrict the order as far as possible without sacrificing the prevention of the risk. Under the second branch of the analysis, the effect of the ban on the efficacy of police operations, the right of the public to freedom of expression, and the right of the accused to a public trial must be weighed.

The Court ruled that a publication ban as to operational methods is unnecessary. Although police operations will be compromised if suspects learn that they are targets, media publication will not seriously increase the rate of compromise.

However, in this case, publication of the names and identities of the officers in question would create a serious risk to the efficacy of current, similar operations. The ban as to identity is necessary and there is no reasonable alternative. The Court limited however the ban to a period of one year.

Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41;

Search warrants relating to alleged violations of provincial legislation were issued. The Crown brought an *ex parte* application for an order sealing the search warrants, the informations used to obtain the warrants and related documents, claiming that public disclosure of the material could identify a confidential informant and could interfere with the ongoing criminal investigation. A court order directed that the warrants and informations be sealed. Various media outlets brought a motion for *certiorari* and *mandamus* in the Superior Court, which quashed the sealing order and ordered that the documents be made public except to the extent that the contents of the informations could disclose the identity of a confidential informant. Applying the *Dagenais/Mentuck* test, the Court of Appeal affirmed the decision to quash the sealing order but edited materials more extensively to protect informant's identity. The Supreme Court of Canada confirmed this decision.

According to the Supreme Court, once a search warrant is executed, the warrant and the information upon which it is issued must be made available to the public unless an applicant seeking a sealing order can demonstrate that public access would subvert the ends of justice: *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175. "[W]hat should be sought", it was held in *MacIntyre*, "is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime

The ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled. The governing principles were first set out in *Dagenais.*

In that case, four accused sought a ban on publication of a television mini-series, *The Boys of St. Vincent*, which was fictional in appearance — but strikingly similar in fact — to the subject matter of their trial. Writing for a majority of the Court, Lamer C.J. held that a ban should only be imposed where alternative measures cannot prevent the serious risk to the interests at stake and, even then, only to the extent found by the Court to be necessary to prevent a real and substantial risk to the fairness of the trial. In addition, a ban should only be ordered where its salutary effects outweigh its negative impact on the freedom of expression of those affected by the ban. Here, too, the presumption was said to favour openness, and the party seeking a restriction on disclosure was therefore required to justify the solicited limitation on freedom of expression.

The *Dagenais* test was reaffirmed but somewhat reformulated in *Mentuck*, where the Crown sought a ban on publication of the names and identities of undercover officers and on the investigative techniques they had used. The Court held in that case that discretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and that a publication ban should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

In the present case, the evidence brought by the Crown in support of its application to delay access amounted to a generalized assertion of possible disadvantage to an ongoing investigation. A party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. The party must, at the very least, allege a serious and specific risk to the integrity of the criminal investigation. The Crown has not discharged its burden in this case.

Criminal Records Act, sections 6 and 9

No relevant decision to date.

Customs Act, section 107

Privacy Act (an.) (Re) (T.D.) [1999] F.C.J. No. 89

Paragraph 108(1)(b) of the Customs Act allows disclosure of information to any person that the Minister may authorize, subject to conditions that the Minister may specify.

Disclosure of information by Revenue Canada (Customs) to CEIC pursuant to understanding regarding data capture and release of customs information on travellers (program aimed at catching those receiving UI benefits while out of Canada).

was established pursuant to a blanket authorization, which allows the disclosure of information obtained for the purpose of the Customs Act, when inter alia, the information is required for the administration or enforcement of a law of Canada. The test for reviewing an exercise of discretion by a Minister, as herein, was established by the Supreme Court of Canada in Maple Lodge Farms v. Government of Canada, [1982] 2 S.C.R. 2: a reviewing court is restricted to considering whether the Minister exercised his or her discretion in good faith, in accordance with the principles of natural justice and whether he or she relied on considerations which are relevant to the Act's purposes.

The authorization issued by the Minister was an invalid exercise of discretion. In exercising his discretion, the Minister is required to rely on considerations which are relevant to the purposes of the Act in question (here, the Customs Act). In *Glaxo Wellcome PLC v. M.N.R., [1998] 4 F.C. 439 (C.A.),* the Court stated that the purpose of sections 107 and 108 of the Customs Act was to preserve the confidentiality of information gathered in the administration of the Act and to disclose it only in limited circumstances. Despite this, the Minister has issued a blanket authorization purporting to authorize the communication of information for the administration or enforcement of, not simply the Customs Act, but of any Act of Canada or a province. The condition that, in the opinion of certain officials, the information is required for the administration or enforcement of a law of Canada or a province does not constitute "limited circumstances". Furthermore, it indicates a reliance upon considerations extraneous to the statutory objective of the Customs Act, as set out by the Federal Court of Appeal. Also, by issuing a blanket authorization, the Minister has fettered his discretion. There was no examination of the particular circumstances of the matter. Even if the Minister considered the present program as a whole, paragraph 108(1)(b) does not allow the Minister to authorize the investigation described in the memorandum of understanding. To authorize the program would be an exercise of discretion contrary to the purposes of the Customs Act.

Defence Production Act, section 30

Siemens Canada Ltd v. Canada (Minister of Public Works and Government Services Canada, 2001 FCT 1202
(Appeal dismissed: Canada (Attorney General) v. Siemens Canada Ltd, 2002 FCA 414)

In this application under section 44 of the *Access to Information Act,* the Applicant adopted the position that none of the documents should be disclosed pursuant to subsection 24(1) of the ATIA on the ground, among others, that such disclosure would violate section 30 of the DPA.

After the contract was awarded to Siemens, one of the unsuccessful bidders made a request under the ATIA for records held by PWGSC in relation to the applicant's participation in the solicitation process.

In it’s representation to the Court, PWGSC claimed that section 30 does not apply to the Siemens’ documents in question here, as they are part of the solicitation of the contract, and

not part of the actual contract. According to the PWGSC, it is only the contract itself that is considered to be the Defence Contract, and to which section 30 may apply.

The Court in interpreting section 30 of the DPA stated :

> *«There has been no interpretation of section 30 of the DPA. However, there is an interpretation of the predecessor section which was section 19 of the Department of Munitions and Supply Act S.C. 1940, c. 31. In R v. Northey, [1948] S.C.R. 135, the Court held:*
>
> > *It seems clear, that the prohibition contained in section 19 against disclosure of information obtained by virtue of the Act, applies to all information obtained by virtue of any section of the Act, whenever passed».*

The Court rejected PWGSC's interpretation and ruled that the information was obtained "under or by virtue of this Act," since the Minister derives his or her authority to conduct procurements, and to do all such things as appear to be incidental to such procurements, from section 16 of the Act. It is irrelevant, in my view, if the information in question constituted part of the actual contract, or was obtained as a pre-condition of the contract. It was all obtained by the Minister acting under the authority given by the Act. Once the contract comes under the DPA then section 30 does not distinguish between documents which were part of the contract and documents which were part of the solicitation. According to the Court, the documents should not be disclosed since the applicant has not provided its consent to disclosure.

Department of Industry Act, section 16

No relevant decision to date.

DNA Identification Act, section 6

No relevant decision to date.

Energy Administration Act, section 98

No relevant decision to date.

Energy Efficiency Act, section 23

No relevant decision to date.

Energy Monitoring Act, section 33

No relevant decision to date.

Energy Supplies Emergency Act, section 40.1

No relevant decision to date.

Excise Tax Act, section 295

No relevant decision to date.

Family Allowances Act, section 18

No relevant decision to date.

First Nations Fiscal and Statistical Management Act, section 108

No relevant decision to date.

Hazardous Products Act, section 12

No relevant decision to date.

Canadian Human Rights Act, section 47

No relevant decision to date.

Income Tax Act, section 241

Slattery (Trustee of) v. Slattery, [1993] 3 S.C.R. 430

Section 241 involves a balancing of competing interests: the privacy interest of the taxpayer with respect to his or her financial information, and the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the effective administration and enforcement of the *Income Tax Act* and other federal statutes referred to in s. 241(4). Only in exceptional or prescribed situations does the privacy interest give way to the interest of the state. By instilling confidence in taxpayers that the personal information they disclose will not be communicated in other contexts, Parliament encourages voluntary disclosure of this information. Parliament, however, has also recognized that the possession of personal information is useless if it cannot be used to assist in tax collection, when required, including tax collection by way of judicial enforcement.

Slattery (Trustee of) v. Slattery, [1993] 3 S.C.R. 430

Section 241(3) contemplates not only administrative and enforcement proceedings brought under the *Income Tax Act* itself but also other proceedings. Both the text and the context of s. 241 buttress this conclusion. The connecting phrases used by Parliament in s. 241(3) ("in respect of" and "relating to") are of the widest possible scope and suggest that a wide rather than narrow view should be taken when considering whether a proposed disclosure is in respect of proceedings relating to the administration or enforcement of the *Income Tax Act*. This breadth of meaning is confirmed by the French version of the section.

Section 222 clearly states that the Minister may resort generally to the courts to institute civil proceedings to collect taxes as debts in addition to the procedures specified in the *Income Tax Act*. In order to take full advantage of this power, the Minister must be able to disclose in court otherwise confidential information in order to prove the cause of action in debt.

Diversified Holdings Ltd v. Canada, [1991] 1 F.C. 595 (C.A.)

In this case, the respondent then moved under Rules 456 and 457 for an order compelling the appellant to produce a number of docket notations made by four Collection Investigation Officers of the Department of National Revenue.

According to the Federal Court of Appeal, these dockets were not, and are not "given to the Minister for the purposes of the Income Tax Act". They came into existence as a result of collection proceedings started against I.E.C. which allegedly caused the damage asserted by the plaintiff mortgagee. In that sense, there is no breach of confidentiality, or of the statute.

In order to succeed, the appellant had to demonstrate that the documents in question were of a confidential nature within the meaning of subsection 241(1), i.e. that they were: i) "obtained by or on behalf of the Minister", ii) "for the purposes of the Income Tax Act".

Section 241 cannot be interpreted in a vacuum. The legislative intent, admittedly, is the protection of the confidentiality of information given to the Minister for the purposes of the Income Tax Act. The privilege is not established in favour of Revenue Canada but in favour of those, particularly the taxpayer, who give information to the Minister on the understanding that such information will remain confidential.

The most usual and natural meaning of the word "obtained" and of its French equivalent "obtenir", whether read in the context of "any information" as in section 241(1)(a) or in the context of "other document" as in subsection 241(1)(b), is that of information or document not in the possession of the person seeking either and being "given" to that person. In order to be "obtained" within the meaning of subsection 241(1), a document must be either a document in the possession of someone else than the Minister or his officers, or a document prepared by the Minister or his officers but on the basis of information given to them that has remained confidential. For example, internal self-generated documents, as they were described by the appellant, could well be subject to the statutory prohibition against disclosure if they are based on information given to the authors of the documents under the Income Tax Act and not released to the public through court proceedings.

Gernhart v. Canada, November 1st, 1999, A-50-97

In this file, the Applicant brought an application before Dubé J. seeking a declaration that subsection 176(1) of the *Income Tax Act* was unconstitutional because it authorized an unreasonable seizure, contrary to section 8 of the *Canadian Charter of Rights and Freedoms* The Applicant argued that when the taxpayer appealed the assessment of her 1994 tax return to the Tax Court of Canada, subsection 176(1) of the *Income Tax Act* (ITA) required the Minister of National Revenue to transmit to the Tax Court copies of all returns, notices of assessment, notices of objections and notifications that were relevant to the appeal, and, by the operation of section 16 of the *Tax Court of Canada Rules,* all of those documents thereupon became available to the public at large.

The Federal Court of Appeal granted the Applicant's motion and ruled that subsection 176(1) of the ITA was unconstitutional. When a taxpayer files a tax return, the taxpayer has a reasonable expectation of privacy, by reason of section 241 of the ITA. The MNR must hold a taxpayer's confidential tax return subject to a duty to respect a taxpayer's dignity and privacy.

Sherman v. Canada (Minister of National Revenue), 2003 FCA 202

According to the Court, the legal basis for confidentiality of the Canadian information thus sent has to be found in provisions, such as section 241 of the *Income Tax Act*. As amended, this section, broadly speaking, prohibit disclosure of information relating to individual taxpayers.

Canada (Information Commissioner) v. Chairman of the Canadian Cultural property export review board, 2001 FCT 1054

In this case, the former Mayor of the City of North York, approached the municipal authorities of North York indicating that he would like to donate a series of documents. The municipal authorities then contacted the respondent Board who in turn convened a review board to determine if this collection of documents would be of archival value and meet the criteria under the *Act.*

This process was undertaken and successfully concluded and, in a letter dated April 1, 1998, the respondent Board after reviewing the opinion submitted by experts in the field, advised the former Mayor that the collection met the criteria of "outstanding significance and national importance". The Board confirmed a fair market value and forwarded a cultural property income tax certificate.

The amount of the tax credit was eventually made public by the former Mayor at a press conference held January 11, 1999 in which he revealed information regarding his donation to the former City of North York and disclosed that the Board accepted the donation which resulted in a tax credit in the amount of $55,000.00.

In September, 1998, a reporter with a national newspaper, submitted a request for the following:

«All documents pertaining to the board's review and approval of a tax credit request by or for the former City of North York (now Toronto) in regards to the donation of the archives and memorabilia of Mayor Mel Lastman, and/or members of his immediate family…».

The Secretary to the Board refused disclosure claiming impart section 24 of the Act, in particular referring to section 241 of the *Income Tax Act* insofar as subsection (10) of that provision restricts the release of taxpayer information.

The Court rejected the claim for exemption on the following manner :

«Taxpayer information refers to information about specific taxpayers obtained through tax returns or collected during tax investigations which would reveal the person's (individual or corporation) identity. Until the taxpayer submits the information to Revenue Canada or such information is obtained in the course of an investigation, the information in question cannot be said to have been "obtained" by or on behalf of Revenue Canada. The respondent has not provided any affidavit evidence by the Lastmans to demonstrate that they have submitted this information to Revenue Canada.

Furthermore, the purpose of section 241 is the protection of the confidentiality of information given to the Minister for the purposes of the Income Tax Act. Where that information has been publicly disclosed by the taxpayer himself or is generally known to be in the public domain and can be compiled with some effort, that individual's privacy interests cannot be said to have been breached».

Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] 4 F.C. 245

In this case, the Council made a request to the Minister of Finance under the *Access to Information Act*, for the disclosure of all materials in the possession of the Department relating to the interpretation of "religious order". The Department refused to grant communication and claimed section 24 with other exemptions of the Act.

In interpreting section 241 of the *Income Tax Act*, the Court ruled that subsection 241(1) forbids the knowing disclosure by officials of any "taxpayer information". This term is defined in subsection 241(10) as information relating to taxpayers that has been obtained by the Minister pursuant to the Act but, significantly for present purposes, does not include information that "does not directly or indirectly reveal the identity of the taxpayer to whom it relates". The Council's access to information request included information about the organizations, members of which had claimed the clergy residence deduction. The Minister was willing to provide information about the incidence of claims, but not the names of the organizations that employed taxpayers who had claimed the deduction or, in some cases, the position occupied by the claimants, on the ground that many of these organizations are small, or local, and that disclosure might well indirectly reveal the identity of the taxpayers who had claimed the deduction. The Court also ruled that as a matter of principle, it seems clear to me that

disclosing the name of the employer of a person who had claimed the deduction is capable of revealing the identity of the taxpayer concerned. Whether this is in fact the case must depend on the particular circumstances, including the size of the organization, the number of its employees and the extent to which it is locally based.

Wilder v. Canada, [1987] 3 F.C. 45

The plaintiffs seek an order for service of their amended statement of claim, pursuant to Rule 307, on the State of Washington or elsewhere in the United States of America.

The plaintiff's action sounds in tort founded on the defendants' alleged breach of their statutory duty, pursuant to section 241 of the Income Tax Act. The defendants Norberg and Sasnett are alleged to be agents of the Internal Revenue Service of the United States of America who, the plaintiffs allege, were not persons legally entitled to receive information obtained by or on behalf of the Minister of National Revenue.

In granting the application, the Court ruled:

> *« In the case at bar it would seem to be obvious that there is a body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction. It is a small body, being section 241 of the Act, passed for the protection of taxpayers and others from whom the Minister collects information, returns and other documents. Its basic purpose may well be to protect the Revenue, but it aims to achieve that by protecting taxpayers and others. The Minister's officials' duty not to divulge, and the plaintiffs' correlative right to have their information, books, records, returns or other documents kept from being revealed by the Minister's officals, are conceived and born and reside in section 241 which is their sine qua non».*

Industrial Research and Development Incentives Act, section 13

No relevant decision to date.

Investment Canada Act, section 36

No relevant decision to date.

Canada Labour Code, section 144

No relevant decision to date.

Mackenzie Valley Resource, paragraph 30

No relevant decision to date.

Marine Transportation Security Act, section 13

No relevant decision to date.

Motor Vehicle Fuel Consumption Standards Act, section 27

No relevant decision to date.

Nuclear Safety and Control Act, paragraphs 44 and 48

No relevant decision to date.

Old Age Security Act, section 33.01

No relevant decision to date.

Patent Act, section 10, 20, 87 and 88

No relevant decision to date.

Petroleum Incentives Program Act, section 17

No relevant decision to date.

Proceeds of Crime (Money Laundering) and Terrorist Financing Act, section 55

No relevant decision to date.

Railway Safety Act, section 39.2

No relevant decision to date.

Sex Offender Information Registration Act, sections 9 and 16

No relevant decision to date.

Shipping Conferences Exemption Act, 1987, section 11

No relevant decision to date.

Softwood Lumber Products Export Charge Act, section 20

No relevant decision to date.

Special Import Measures Act, Section 84

Canadian Steel Producers Association v. Canada (Commissioner of customs and revenue), 2003 FC 1311

The intervener, Dofasco Inc., filed a written complaint, under *Special Import Measures Act*, subsection 32(1), alleging that nine countries were guilty of dumping cold-rolled steel sheet into Canada. Canada's other three cold-rolled steel sheet producers wrote to support the Dofasco complaint. The Commissioner of the CCRA then launched a subsection 31(1) investigation. Stelco counsel took the position that, under Act, subsection 84(3), it was entitled to have access to the confidential information which the exporters provided to the Commissioner during the investigation. Access was sought on behalf of all the Canadian manufacturers. The Commissioner of the CCRA refused access decision**.** This refusal was based on administrative guidelines which identify those exporters and importers who actively participate in an investigation as being the only parties to a dumping investigation proceeding.

The Federal Court reversed this decision on the grounds that under subsection 84(3), counsel for Dofasco, as the complainant, and counsel for the Supporters are only entitled to the Confidential Information provided during the Investigation if:

(i) they are treated as a party to the Investigation, or;

(ii) they are treated as a party to subsequent proceedings arising out of the Investigation.

The Legislative history behind the recent amendments to the SIMA makes it clear (i) that disclosure is to be broader (because it became mandatory instead of discretionary), (ii) that confidentiality is to be respected (access remained limited to counsel and stiff penalties were provided), (iii) that subsection 84(3) of the SIMA is intended to align the SIMA with the practice in the United States where counsel for interested (not "directly" interested) parties who voluntarily participate in an investigation are given access to confidential information and (iv) that Parliament believed that information provided by the Domestic Producers would improve the quality of the evidence on which the Commissioner would base his calculation of the Margin.

The Court concluded that the Decision must be set aside because it is based on the Guidelines and they frustrate the intention of Parliament. Accordingly, the Complainant and its Supporters are entitled to access to the Confidential Information under subsection 84(3) of the SIMA on the basis that, in the circumstances of this case, they are parties to the Investigation which generated the Confidential Information.

Statistics Act, section 17

Canada (Information Commissioner) v. Canada (Minister of Industry), 2006 FC 132

The Information Commissioner sought review under section 42 of the *Access to Information Act* of the refusal of the Chief Statistician of Canada to disclose certain census records for the years 1911, 1921, 1931 and 1941.

The Minister of Industry argued that section 24 of the *Access Act* is a mandatory prohibition since the disclosure of the census records are "restricted by or pursuant to any provision set out in Schedule II", which includes section 17 of the *Statistics Act*. The Court does not agree. The restriction in subsection 17(1) of the *Statistics Act* must be read subject to the discretionary exceptions set out in subsection 17(2) of the *Statistics Act*.

The Commissioner, also argued that both paragraph 8(2)(k) of the *Privacy Act* and section 35 of the *Constitution Act, 1982* operate to satisfy the exemption requirement that the census records are "information available to the public under any statutory or other law".

The Court agreed with the Commissioner and stated that paragraph 17(2)(d) of the *Statistics Act* is engaged and constitutes an exception to subsection 17(1) because a member of the public, i.e. the Algonquin Bands, have a right of access to the information by statute or other law, namely section 35 of the *Constitution Act, 1982*, the common law duties referred to in paragraph 46, and subsection 8(2)(k) of the *Privacy Act*. The Court also noted that only one statute or common duty is sufficient to satisfy the requirement of paragraph 17(2)(d) of the *Statistics Act*.

To this effect, this section contains an exception to the prohibition to disclosure found in subsection 17(1):

> *«Exception to prohibition*
>
> *(2) The Chief Statistician may, by order, authorize the following information to be disclosed:*
>
> *(d) information available to the public under any statutory or other law»*[1].

In particular, as to the arguments raised by the Commissioner, the Court noted that the duty to act honourably, in good faith and as a fiduciary are common law duties that have now been constitutionalized to the extent that they relate to the Crown's legal obligations under section 35 of the *Constitution Act, 1982* with respect to Aboriginal land claims. Accordingly, section 35 and the aforementioned common law duties are "statutory or other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*

The Court also found that this informations was publicly available by virtue of paragraph 8(2)k) of the *Privacy Act*. According to the Court, the intent of Parliament in enacting this law is obvious, namely personal information under the control of a government institution may be disclosed to an Indian Band for the purpose of researching or validating a land claim. Accordingly, paragraph 8(2)(k) of the *Privacy Act* is "statutory law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*.

[1] Paragraph 35

In it's interpretation of paragraph 17(2)d) of the *Statistic Act,* the Court also dealt with the interpretation of the term «public». The Court stated that the words «available to the public», the word «public» is a noun, not an adjective by interpreting with the aid of dictionary, the Court found that the information in the census records requested by the Algonquin Bands is exactly the type of information which Parliament intended under the *Privacy Act* may be disclosed to an Aboriginal people or Indian band. Similarly, it is exactly the type of information which the Crown is obliged to provide an Aboriginal people or Indian band under section 35 of the *Constitution Act, 1982.* Applying the modern approach to statutory interpretation, the words "available to the public" should be liberally construed and interpreted to mean a member of the public, and not only the public as a whole.

Since the decision of the minister of Industry was based on errors of law, the Court ordered to set it aside and referred back to the chief statistician with directions to consider the access request under paragraph 17(2)d) of the *Statistics Act.*

Telecommunications Act, sections 39 and 70

No relevant decision to date.

Trademarks Act, section 50

No relevant decision to date.

Transportation of Dangerous Goods Act, 1992, section 24

No relevant decision to date.

Yukon Environmental and Socioeconomic Assessment Act, paragraph 121

No relevant decision to date.

Yukon Quartz Mining Act, section 100

No relevant decision to date.

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Geophysical Service Incorporated v. Canada Newfoundland Offshore Petroleum, 2003 CFPI 507;

Canadian Security Intelligence Service Act, Section 18

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R. v. Charkaoui, 2003 FC 882

Canadian Transportation Accident Investigation and Safety Board Act, Section 28

Canada (Information Commissioner) v. Canadian Transportation Accident Investigation and Safety Board, 2006 FCA 157

Criminal Code, Section 187

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Special Import Measures Act, Section 84

Canadian Steel Producers Association v. Canada (Commissioner of customs and revenue), 2003 FC 1311

Statistics Act, section 17

Canada (Information Commissioner) v. Canada (Minister of Industry), 2006 FC 132

The Questions

Section – 24
Statement of Test to be Met
(**1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.** **(2) Such committee as may be designated or established under section 75 shall review every provision set out in Schedule II and shall, not later than July 1, 1986 or, if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting, cause a report to be laid before Parliament on whether and to what extent the provisions are necessary.**

Relevant Questions	Departmental Response	Assessment
Is the provision invoked one found in Schedule II?		
Are the records in issue meeting the criteria found in the provision?		
Does the provision contain an exception permitting disclosure?		
Are the records in issue qualify under this exception?		

Section 25

The Provision:

> ***25*** *Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution* ***shall disclose*** *any* ***part of the record*** *that* ***does not contain,*** *and* ***can reasonably be severed*** *from* ***any part that contains,*** *any* ***such information*** *or* ***material.***

Preliminary matters:

The *Access to Information Act*, R.S.C. 1985, c. A-1, (the Act) gives any Canadian Citizen or permanent resident, within the meaning of the *Immigration Act* and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, our Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act, unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under section 68 or 69.

The underlying principle in applying most exemption criteria is the weighing or balancing of the right of access to government information against the injury that could ensue from disclosure of that information.

The exemptions and the categories of records excluded from the Act form the only basis for refusing access to government information requested under this legislation. Therefore, access must be given to all government information for which a person makes a request under the *Access to Information Act* except that which is either specifically exempt or excluded under a provision of the Act.

Institutions are cautioned, however, that where subsequent decisions regarding disclosure are reversed as a result of a change in circumstances, complaints may result. Institutions should therefore be completely prepared to demonstrate that the reversal was clearly warranted and supported by the change in circumstances.

Section 25 of the *Access to Information Act* provides that a government institution shall disclose any part of a record that does not contain information which may be exempt if it can be reasonably severed from any part that does contain exempt information.

This provision establishes the principle of reasonable severability. This means that a record containing information which may be exempt should not be exempted from access as a whole if exempt information can be severed from it and the rest of the record disclosed.

The "Test":

What is the test to be applied in determining whether severance should be made?

Reasonable severability should be established by the intelligibility of the document or segment of the document remaining after the information for which an exemption is to be claimed has been removed. Although the original purpose of the document may be lost when the exempt information is removed, an exemption cannot be claimed for the entire record as long as there remains some information that is itself intelligible, comprehensible and relevant to the request. For example, a document written for the purpose of providing advice, yet containing background information should, after the advice portion is removed, be disclosed as long as the factual content does not fall within one of the other exemption provisions.

Institutions should therefore be completely prepared to demonstrate that the reversal was clearly warranted and supported by the change in circumstances.

Case Law

Rubin v. Canada Mortage and Housing Corp. (F.C.A.) [1989] 1 F.C. 265

The Court found that section 25 is a paramount section since the words "Notwithstanding any other provision of this Act" are employed. This means that once the head of the government institution has determined that some of its records are exempt, the institutional head, or his delegate, is required to consider whether any part of the material requested can reasonably be severed. Section 25 uses the mandatory "shall" with respect to disclosure of such portion thereby requiring the institutional head to enter into the severance exercise therein prescribed. It is apparent from this record that no such examination was made here. C.M.H.C. received the request for information on March 6, 1985. It was refused on March 7, 1985, one day later. Given the fact that some 13 lineal feet of documents are involved, it would have been physically impossible to complete the section 25 examination in such a short period of time. Failure to perform the severance examination mandated by section 25 is an error in law which is fatal to the validity of the decision a quo**.**

Blank v. Canada (Minister of justice), 2005 FC 1551 (T.D.);

Severance of exempt and non-exempt portions must the attempted only when the result is a reasonable fulfilment of the purposes of the Access to Information Act. Severance within a document under section 25 is only to be affected where it is reasonable to do so. Reasonableness requires that the severed information be capable of standing independently and that severance must not result in the release of meaningless words and phrases out of context or provide clues to the content of the exempted portions. Severance must be done bearing in mind the importance of impairing solicitor-client privilege as little as possible.

Canada (Minister of Environment) v. Canada (Information Commissioner), 2003 FCA 68;

In this case, the Court ordered that four documents which the Department claimed exclusion under section 69 be returned for review by the Clerk of the privy council to determine whether there exists within the documents a corpus of words that can be reasonably severed from the documents pursuant to section 25 of the *Access Act*.

Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports) [1989] 2 F.C. 480

Section 25 provides that where the head of an institution is authorized to refuse to disclose a record because it contains information which the Act requires not to be disclosed, he is authorized to disclose any part of that record that does not contain such material if it "can reasonably be severed from" the protected material. If what remains is meaningful without the deleted passages and does not distort the sense of the original brief severance is permitted by section 25. This is not affected by any fear, whether reasonable or not, of speculation in the media as to what has not been disclosed.

Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs) [1989] 1 F.C. 143;

Indian bands attempted to prevent disclosure of financial statements requested under the act. The applicants have conceded that information dealing with public funds, that is, grants and contribution monies, should not be considered confidential. The respondent concluded from this that any such information in the financial statements should be severed and disclosed under S. 25 of the Act.

The Court found however that there is no reason to seek to sever the very minimal information about these monies in the confidential financial statements. The information regarding public funds could not reasonably be severed. To attempt to comply with S. 25 would result in the release of an entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such severance would require on the part of the Department is not reasonably proportionate to the quality of access it would provide.

SNC-Lavalin Inc. v. Canada (Minister of Public Works) [1994], F.C.J.. no. 1059;

In this case, the Court found two issues in relation to the application of s. 25. First, what portions of the information are exempted? Second, is the balance of the information, that is the portion not exempt, reasonably severable? In the latter regard one must bear in mind that "...Disconnected snippets of releasable information taken from otherwise exempt passages are not...reasonably severable", and severance of exempt and non-exempt portions should be attempted only when the result is a reasonable fulfilment of the purposes of the Act. Where severance would result in release of minimal portions of the information in question and would result only in release of information otherwise available from published public sources, or

where the information left to be released is not a reasonable response to the request for information in light of the portions exempt, severance has been found not to be reasonable, and thus not required within s. 25.

Canada (Information Commissioner) v. Canada (Solicitor general) [1988], 3 F.C. 551;

In this case, the Court found that disconnected snippets of releasable information taken from otherwise exempt passages are not reasonably severable. The Court also found that section 25 does not mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. The Court also found that the resulting document may be meaningless or misleading as the information it contains is taken totally out of context. The Court also found that the remaining information may provide clues to the content of the deleted portions. Also, when dealing with personal information it is preferable to delete an entire passage in order to protect the privacy of the individual rather than disclosing certain non-exempt words or phrases.

Information Commissioner of Canada v. Canada (Minister of Environment), 2006 FC 1235

In this case, as to the claim of exemption under paragraph 21(1) a), the Court found that some sentences exempted under 21(1) a) contained purely factual information and, therefore, were not subject to paragraph 21(1)(a). Accordingly, the Court found that paragraph 21(1)(a) applied in respect of the opinion expressed in the first 15 words in the second sentence but not in respect of the factual information provided in the remaining 18 words.

Noel v. Great Lakes Pilotage Authority Ltd. [1988] 2 F.C. 77

Section 25 could authorize a department to deny certain confidential information while at the same time obliging it to provide the names of individuals if it is found that the mere publication of the names, severed from other information, does not affect the confidentiality of that other information.

Blank v. Canada (Minister of justice), 2006 FC 841 (T.D.);

In this case, the Court found that certain words in the subject line of e-mails were severed from some e-mails, and not severed from other e-mails. In such cases, those subject lines should have been consistently severed. The Court ordered disclosure of such information accordingly.

Blank v. Canada (Minister of Environment) [2001] F.C.A. no 1844

The Minister argued that a record that is subject to solicitor-client privilege is not subject to the severance provision in section 25. The Court found that section 25 applies «notwithstanding any other provision of this Act». If a document contains a communication that is within the

scope of the common law solicitor-client privilege and also contain information that is not within the scope of solicitor client privilege, the Minister cannot refuse to disclose the latter.

Blank v. Canada (Minister of justice), 2005 FC 1551 (T.D.);

In this case, the applicant submitted that some of the documents for which solicitor-client privilege had been claimed contained listings of other documents which he may be entitled to access if not protected by the privilege or some other exemption recognized by the Act. The Court found that severance provision in section 25 should apply consistently to all types of information. If solicitor-client privilege is claimed for one or more of the listed documents, disclosure of the list should not compromise the privilege claimed in that document. The privilege in the document remains until such time as its content is disclosed.

Stevens v. Canada (Prime Minister) [1998] F.C.J. no. 794

Section 25 of the Act allows the disclosure of portions of privileged information. This is an attempt to balance the rights of individuals to access to information, on the one hand, while maintaining confidentiality where other persons are entitled to that confidentiality on the other hand. It would be a perverse result if the operation of section 25 of the Act were thereby to abrogate the discretionary power given to the Government head under section 23 of the Act.

Blank v. Canada (Minister of justice), 2005 FC 1551 (T.D.);

In this case, the Court found that documents determined to be subject to the exemption provided by section 23 of the Act are to be severed in the same manner as any other document subject to severance. Information which can stand alone, without compromising privilege, such as facts upon which the advice is based, must be accessible.

Blank v. Canada (Minister of justice), 2004 FCA 287;

In this case, appellant sought release of records of his prosecution for use in civil action claiming damages for abuse of prosecutorial powers. While the Department claimed section 23 as a basis of exemption, the Court ordered disclosure of general identifying information such as the description of the document, the name, title and address of the person to whom the communication was directed, the closing words of the communication and the signature block can be severed and disclosed. According to the Court, this kind of information enables the requester "to know that a communication occurred between certain persons at a certain time on a certain subject, but no more".

Vienneau v. Canada (Solicitor General) [1988] F.C. 336;

Where the head of the institution has made the initial refusal and is then required to interpret the obligation imposed by section 25 of the Act to release portions that can reasonably be severed. Any such severance, however, cannot alter the basic fact that there is only one refusal when the record is found to contain exempt material. Subsequent disclosure of any portion as contemplated by section 25 can only be interpreted as further compliance, not as further refusal. If there is only one refusal, only one notice of exempting provisions should be required.

TABLE OF AUTHORITIES

Blank v. Canada (Minister of justice), 2004 FCA 287;

Blank v. Canada (Minister of justice), 2005 FC 1551;

Blank v. Canada (Minister of Environment) [2001] F.C.A. no 1844;

Canada (Information Commissioner)vc. Canada (Solicitor general) [1988], 3 F.C. 551;

Canada (Minister of Environment) v. Canada (Information Commissioner), 2003 FCA 68;

Information Commissioner of Canada v. Canada (Minister of Environment), 2006 FC 1235

Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)) [1989] 1 F.C. 143;

Noel v. Great Lakes Pilotage Authority Ltd. [1988] 2 F.C. 77;

Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports) [1989] 2 F.C. 480;

Rubin v. Canada Mortage and Housing Corp. (F.C.A.) [1989] 1 F.C. 265;

SNC-Lavalin Inc. v. Canada (Minister of Public Works) [1994], F.C.J.. no. 1059;

Stevens v. Canada (Prime Minister) [1998] F.C.J. no. 794;

Vienneau v. Canada (Solicitor General) [1988] F.C. 336;

The Questions

Section – 25
Statement of Test to be Met
Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material

Relevant Questions	Departmental Response	Assessment
What is the volume of records involved?		
How much time did the Department require to process the records?		
What has the Department on record on the severance made ?		
Is there in the information in issue information capable of standing independently without the result of meaningless words and phrases out of context or who would provide clues to the content of the exempted portions?		
Would the remains be meaningful without the deleted passages and would not distort the sense of the original brief?		
Would the effort required on the part of the Department would be reasonably proportionate to the quality of access it would provide?		
Would the resulting document be meaningless or misleading to the requester as the information contains would be taken totally out of context?		
Have the records been consistently severed?		
Would the disclosure of the documents compromise the claim of other exemptions?		

Section 26

The Provision:

26(1) *The head of a government institution **may refuse** to disclose any record requested under this Act or any part thereof if the head of the institution **believes on reasonable grounds** that the **material in the record** or **part thereof** 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. 1980-81-82-83, c. 111, Sch. I '26'.*

Preliminary matters:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizen or permanent resident within the meaning of the **Immigration Act** and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, the Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act, unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under sections 68 or 69.

Section 26 is a discretionary class exemption. This is a two step process requiring two distinct determinations by the head of the institution. First, the head must determine whether the records fall within the class enunciated in the exemption. Secondly, he/she must also exercise his/her discretion whether to disclose the information by determining the consequences/effect to be expected from the disclosure of the requested information and considering whether those consequences outweigh the public interest in the disclosure of this information.

The "Test":

1) Preamble

This exemption recognized that it may be necessary to protect the priority of publication of the Government of Canada. It is designed to enable the head of the institution to withhold records, where the head of the institution believes, on reasonable grounds, that the material requested will be published within 90 days after the request is made, or within such further period of time as may be required for printing or translating the material.

2) Criteria

The key to this provision is to determine whether the head of the institution has reasonable grounds to believe that the material will be published within 90 days (or within such further period of time as may be necessary for printing or translating the material). At the present time, there has been no decision from the Federal Court of Canada on the criteria to be met in order for the provision to apply. However, there has been jurisprudence from other jurisdictions that could be applied by analogy to the **Federal Act** and the following will summarize the interpretation of the provision.

In order to invoke the exemption two requirements must be met:

- the material in the record will be published by a government institution, agent of the Government of Canada or Minister of the Crown; and
- the head of the government institution must believe on reasonable grounds that this publication will occur within 90 days or such further period of time as may be necessary for printing or translating the material.

a) The material in the record will be published by a government institution, agent of the Government of Canada or Minister of the Crown:

Definition

Legislative intent. In debating the creation of the **Access to Information Act**, the *Standing Committee of Justice and Legal Affairs*[1] indicated that the term "publication" does not mean making the information available (as in Section 68) but rather it means "some kind of official process where information is published by the government in finished form".

Dictionary definition. However, there is no definition within the Act of what is a 'published' document or in the French version of the Act "publication". Absent such a definition, we must rely on the ordinary meaning of the word:

[1] Wednesday, November 4, 1981, Issue #52, page 27.

ENGLISH Oxford Concise	LANGUAGE	FRENCH Le Petit Robert
Publish(ed)	WORD	Publier(é)
1. Make generally known. 2. Announce formally, promulgate 3. Issue copies for sale to the public	DEFINITION	1. Faire parole, par des écrits: annoncer publiquement. 2. Faire paraître en librairie, donner au public

Scope. In the context of the **Access to Information Act***,* the terms "published material" includes government information products in any format which are created and edited by or on behalf of a government institution and intended for distribution, dissemination or sale to the public. The format may include but is not limited to books, periodicals, brochures, microforms, audio and videotapes, machine-readable format. With the advent of multi-media electronic means of representing and transmitting information to the public, numbers, texts, sounds and images may all be represented in electronic form. Electronic publications can be stored in computers and may be displayed for viewing either on a computer screen or as a print-out. There are already many types of electronic publication. They include:

- electronic equivalents of print publications such as books, journals, pamphlets, etc.,
- interactive databases containing, for example, bibliographies, statistics, spatial data, image data or text,
- interactive multimedia such as games,
- software and expert systems,
- new publication forms such as bulletin boards, discussion lists and electronic pre-prints which are available through electronic networks.

These may be made available as individual physical items, government web-sites, on diskette, CD-ROM or other off-line media, or they may be made available through on-line host systems or directly to the user via computer networks. They may appear in electronic form only or they may be published in electronic form and as print on paper, in parallel. There is also retrospective publication which converts the record of the past to electronic form for better access, preservation of content and the production of new works. Also, the availability of computers and the growth of electronic networks makes it possible for authors to bypass conventional means of publication and to make their works available over networks.

b) <u>The head of the government institution must believe on reasonable grounds that this publication will occur within 90 days or such further period of time as may be required for printing or translating the material.</u>

The most difficult part of this exemption is to determine whether the head of that institution has reasonable grounds to believe that the information would be published within 90 days (or within such period of time as may be necessary for printing or translating the material). In order to make this determination, usually the office will require a production schedule which includes target dates.

A production schedule, which includes target dates, would provide '*reasonable grounds*' for the head to believe the information will be published within 90 days or within such further period of time as may be necessary for printing or translating the material.

Whenever this exemption is relied upon, the head has a duty to inform the requester of the specific location for obtaining the records or information in question. The exemption may be relied on even where public access to the record is not as convenient or as cost effective for the researcher as it may have been if access had been by the institution.

This exemption is discretionary. This means that where the head exercises his or her discretion to refuse access under this exemption, the head should consider the convenience of the requester compared to the convenience of the institution.

Case Law:

1) <u>Ontario</u>

(Order #P-496)

- Section 22*(a) [FIPPA]* /section 15*(a) [MFIPPA]* is unique among the exemptions contained in this part of the Act. The other exemptions permit an institution to deny access to the requested records because of content or potential harm that might reasonably be expected to result from the disclosure. No harm is listed in this exemption. As a result, the Commission ruled that the purposes of the Act are key to the interpretation of this exemption. The Commission stated that this section should not be applied to indirectly prevent or limit the public's access to information. The Commission held that the government cannot enter into a business arrangement with a private company to provide access where to do so would have the very real potential of inhibiting the public's right of access. Basing an individual's right to access on his or her ability to meet conditions for access determined by a private sector vendor may result in inequitable access to information held by government. According to this decision, where an institution has provided its information to a private sector vendor, the exemption will not apply if the vendor does not provide a "*regularized system of access*" available to members of the public generally. In a postscript, the Commission noted that the search for sources of non-tax revenue must be balanced by the rights of the public to access information for which it has already paid. This balancing will determine whether universal access to government information will be the norm or whether an information elite will be created and only those who can afford to pay will have access to government-held information. The Commission stated

that this latter situation would be "*unacceptable in an open and democratic society*".

(Orders #191, 204)

- When a head relies on this exemption, he or she has a duty to provide the requester with a description of the records or information in question.

(Order #P-463)

- Where the head relies on this provision but fails to inform the requester of sufficient information, which would enable him or her to identify the records in question, the exemption does not apply.

(Order #206)

- To rely on ss.*(b)*, the institution should have custody or control of a copy of the record, which it is prepared to publish within the requisite time period.

Disclosure could reasonably be expected

Ontario

Orders # 191, 204, 206, P-463, P-496.

The Questions

Section -- 26

The head of a government institution may refuse to disclose any record requested under this Act or any part thereof if the head of the institution believes on reasonable grounds that the material in the record or part thereof 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.

Statement of Test to be Met

Intention to publish must have been found by the time the access request is received.

Relevant Questions	Departmental Response	Assessment
Did the government institution have the intention to publish the requested records when it received the requested records? - in written form? - in electronic format? - both?		
When did it form this intention? Compare with date of request. - Ministerial statements? - Statement by an official before a Parliamentary Committee? - At a press conference by an official? - As a result of direction by management committee, executive meeting? - Announced in a Press Release? In a NewsLetter? Magazine or departmental newspaper? - Did the departmental staff submit a proposal and /or hire a consultant and/or obtain quotations to determine the feasibility and costs for publishing the pertinent records? - Have consultations taken place with departmental public affairs staff to determine the media strategy?		

Relevant Questions	Departmental Response	Assessment
Are there records (staff paper, analysis, briefing note, aide-memoire, briefings) or memoranda which outline the decision to publish or plans for this publication? - do these contain a time schedule? - ask to see these		
Has electronic publication of the record already taken place? - by posting it on bulletin boards, - by posting it on a departmental web-sites, - by printing it on diskettes, CD-ROM or other off-line media, - by providing it in the form of a power-point presentation at a gathering where members of the public were present. (This includes parliamentarians, members of professional organizations, focus groups, technical briefings to the media.)		

Statement of Test to be Met

90-day time limit runs from date of request.

Relevant Questions	Departmental Response	Assessment
Is the anticipated publication time within 90 days of the date of the access request? - if not, why will publication take longer?		
Is the longer time frame related to translating and printing the information? - if not, the extension of time is not available and information should be disclosed.		
Has the government changed its mind about publishing the information since receiving the request? - if so, information should be disclosed.		

Endnotes

1. Wednesday, November 4, 1981, Issue #52, page 27.

2. *Ibid*. at 28.

Section 69

The Provision:

69. (1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,

(*a*) **memoranda** the **purpose of which** is to present **proposals** or **recommendations** to **Council**;

(*b*) **discussion papers** the **purpose of which** is to present **background explanations, analyses of problems** or **policy options** to **Council** for **consideration by Council** in **making decisions**;

(*c*) **agenda of Council** or **records recording deliberations** or **decisions of Council**;

(*d*) **records used** for or **reflecting communications** or **discussions between ministers of the Crown** on **matters relating to the making of government decisions** or **the formulation of government policy**;

(*e*) **records** the **purpose of which** is to **brief ministers of the Crown** in **relation to matters** that **are before**, or **are proposed to be brought before**, **Council** or that are the **subject of communications** or **discussions referred to in paragraph (d)**;

(*f*) **draft legislation**; and

(*g*) **records** that **contain information about the contents** of **any record within a class** of **records referred to in paragraphs (a) to (f).**

69(2) For the purposes of subsection (1), «Council» means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Paragraph 69(3)(*b*) of the *Access Act* states:

(3) Subsection (1) does not apply to

(*a*) **confidences of the Queen's Privy Council** for Canada **that have been in existence** for **more than twenty years**; or

(*b*) **discussion papers described in paragraph 1(b)**

(i) if the **decisions to which the discussion papers relate** have **been made public**,

or

(ii) where the **decisions have not been made public**, if **four years have passed since the decisions were made**. R.S. 1985, c. A-1, s.69; 1992, c.1 s.144 (F).

Preliminary matters:

The **Access to Information Act**, R.S.C. 1985, c. A-1, (the Act) gives any Canadian citizens or permanent resident within the meaning of the *Immigration Act* and any individual or any corporation present in Canada a right (of access) to most records under the control of the Federal Government. More specifically, our Act provides for access to all information in records controlled by government institutions listed in Schedule I of the Act unless there is a specific provision in the Act that permits or requires the head of the government institution to refuse to disclose the information, or unless the records (or part thereof) are excluded under section 68 or 69.

Section 69 is an exclusion requiring a two step process. First, the Head must determine that the record or part thereof contains certain information which falls within the class enunciated in the exclusion. Then, the Head must determine whether either of the exceptions contained in subsection 69(3) apply.

The "Test":

At the present time, there have been only a few decisions from the Federal Court of Canada on the criteria to be met in order for this provision to apply.

Subsection 69(1) is an exclusion applying to confidences of the Queen's Privy Council for Canada. Consequently, once the Head determines that a record or part thereof contains certain information which falls within the class enunciated in the exclusion, he or she can then refuse to grant access to the requested information unless either of the exceptions in subsection 69(3) applies.

The history of Cabinet confidences generally begin with the House of Lords decision in *Duncan and Another* v. *Cammell, Laird & Co. Ltd.* The House of Lords held in that case that an affidavit of a Minister stating that disclosure of documents would harm the public interest was taken as absolute, without review by the courts. The *Duncan and Another* case described the common law position until 1968 when the House of Lords revised the common law with the *Conway* v. *Rimmer and Another* decision. In that case, the Court held that it could examine documents which the Minister claimed would injure the public if disclosed. The Court held that while deference should be shown to the Minister's position, the final decision should lie with the courts.

After the *Conway* v. *Rimmer* decision, Parliament enacted subsection 41(2) of the *Federal Court Act*. Subsection 41(2) followed the position of the House of Lords in *Duncan and Another*. In other words, all that was required was an affidavit that the document came within one of these categories and the Court was precluded from examination of the document.

The *Access Act* was enacted in 1982, repealing subsection 41(2) of the *Federal Court Act*. Section 69 of the *Access Act* and s. 39 of the *Canada Evidence Act* formed part of the same Bill and were enacted together. These two provisions have similar effects, s. 69 excludes from the application of the *Access Act* documents and records which are considered Cabinet confidences, and s. 39 excludes from the application of the *Canada Evidence Act* information which is considered a Cabinet confidence.

The Cabinet Paper System evoluted since the passage of the *Access Act*. When the *Access Act* was first passed in 1982, the Cabinet Paper System produced two records: the Memorandum to Cabinet and the "discussion paper" containing background explanations, analyses of problems and policy options. In 1983, an Official of the PCO, was asked to propose reforms to the Cabinet Paper System. The Official of the PCO recommended that supporting background information and analysis be put in appendices to the Memorandum to Cabinet, and that "discussion papers" be understood as papers prepared by government departments as part of a planned communications strategy. The Cabinet Paper System recommended by the Official of the PCO was adopted by the PCO in early 1984.

The format of the Memorandum to Cabinet was changed slightly in 1986 and remains in place today. The Memorandum to Cabinet is now divided into two sections: the ministerial recommendations section and the analysis section. The analysis section now contains the background information and analysis formally found in "discussion papers" as understood when the *Access Act* was first passed in 1982.

The determination as to whether section 69 applies to requested information is a multi-step process. Each step should be followed carefully in order to avoid undesirable mistakes. The following will summarize the steps you should follow:

1) <u>Step I</u>:

Determine whether the requested information constitutes confidences of the Queen's Privy Council of Canada for the purpose of the Access to Information Act. To do so, you must determine whether the requested information consist of:

> (*a*) memoranda the purpose of which is to present proposals or recommendations to Council;
>
> (*b*) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
>
> (*c*) agenda of Council or records recording deliberations or decisions of Council;
>
> (*d*) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(*e*) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);

(*f*) draft legislation; and

(*g*) records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f).

The examples of confidences of the Queen's Privy Council for Canada contained in section 3 of the *Access to Information Act* is not exhaustive. The sections includes 7 examples of what could constitute confidences of the Queen's Privy Council. These specific examples are not in any way exhaustive and only serve to illustrate the principal types of material the legislator had in mind when creating the provision. It is very important to remember that these paragraphs are examples only and do not in any way guarantee that the information is necessarily confidences of the Queen's Privy Council.

2) Step II:

Determine whether the requested information falls within subsection 69(3) of the *Access to Information Act*. This subsection excludes from the exclusion information where:

- confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or

- Discussion papers described in paragraph b) have been made public or

- The decision have not been made public, if four years have passed since the decisions were made.

Before excluding information pursuant to subsection 69(1) of the Act, the institution Head must first make the determination as to whether any of the conditions enumerated in subsection 69(3) are present. Once any of these conditions are fulfilled, the head of the government institution is required to disclose the requested information.[1]

The Head of a government institution has the duty to determine whether these conditions are present (determining whether the confidences has been in existence for more than twenty years or the decisions to which the discussion papers relate have been made public or if four years have passed since the decisions were made). In a case involving a consent override in the Privacy Act (section 19(2) Privacy Act section 13(2) Access to Information Act)), for example, the Federal Court of Appeal stated that the request for information itself "*includes* a request to the head of a government institution to make reasonable efforts to seek the consent of the third party which provided the information." The Court noted that the evidentiary burden lies on the government institution to show that the exception in subsection 19(2) of the Privacy Act (subsection 13(2) Access to Information Act) for consent does not apply given the inability of the requester to know who to ask for consent or what the withheld information consists of. The test enunciated by the Court with respect to

the application of the consent override in subsection 19(2)(a) (subsection 13(2)(a) of the Access to Information Act) was whether the government institution has made reasonable efforts to seek the consent of the other government or institution. See: *Ruby v. Canada (Solicitor General)* (2000) 3 F.C. 589, [2000] F.C.J. 779, 187 D.L.R. (4th) 675, 256 N.R. 278, 6 C.P.R. (4th) 289, leave to appeal to the Supreme Court allowed, [2000] S.C.C.A. No. 353 (S.C.C.) The same criteria applies with regard to subsection 69(3) of the Act.

Procedures for Departments:

When the relevant documents have been identified in response to a request, and departmental officials with expertise in the subject matter consider records or portions of records to contain cabinet confidences, these records will be recorded as being so on a schedule.

The ATIP Coordinator for the government institution will send the documents in question, along with a covering letter and a schedule which outlines the explanations as to why certain records or portions thereof should be excluded under Section 69 to Legislation and House Planning / Counsel to the Clerk of the Privy Council. Government policy requires that government institutions consult with LHP/Counsel in all instances where information may qualify as a Cabinet Confidence.

With respect to administering requests, which entail the processing of records of Cabinet, Departmental ATIP officials are guided by Treasury Board Implementation Reports as well as the Treasury Board Guidelines for interpreting the Access to Information Act. Appendix D of Chapter 3-4 of these Guidelines stipulates that the Schedule of Cabinet documents should contain certain elements as follows:

Document Description and Proposal

1. Letter to:
   From:
   Date:
   Proposal: Exclude 69(1)( )

2. Treasury Board Submission

   Date:
   Proposal: Exclude 69(1)(a)

3. Briefing Note to:
   From:
   Date:
   Proposal: e.g. sever
   Page & paragraph
   69(1)( )
   Exclude page() 69(1)(a)

Types of Documents:

Subsection 69 of the Act contains a list of types of documents which fall within the broad group referred to as confidences of the Queen's Privy Council for Canada. The following are some examples organized by subject. The list identified by subsection 69(1) is outlined in greater detail further below:

Subject	***Document***
Accommodation	Treasury Board Submissions including major capital construction projects
Acts and Legislation	Draft Legislation
Cabinet Documents	Cabinet Memorandum Cabinet Decisions Cabinet Agenda Cabinet Material
Committees	Agenda, notices, minutes and Reports of Cabinet Committees Briefing notes to a Minister on Cabinet Committees
Estimates and Budgets	Treasury Board Submissions
Informatics	Treasury Board Submissions
Policies, Plans and Programs	TB Submissions for Reference levels for future planning
Staffing Restraints	Resource planning information for inclusion in TB Submissions
TB Submissions and Aide-Mémoire	Drafts, précis, decision letters, briefing notes, memoranda and correspondence directly related to a TB submission and aide-mémoire.

69(1)(a) Memoranda

Paragraph 69(1)(a) refers to records the purpose of which is to present proposals or recommendations to Cabinet. Generally, a memorandum presenting proposals to Cabinet will be signed by the minister recommending the action, but it may also be signed by the secretary to the Cabinet or the Secretary to a Committee of Cabinet.

Draft memoranda are also confidences. Thus, draft memoranda that are created but never presented to Cabinet are confidences. Equally, final memoranda that are not presented to Cabinet are also confidences.

Material appended to a memorandum presented to Cabinet will not necessarily be a confidence. For example, memoranda to Council may include as appendices such items as newspaper clippings, statistical tables, and reports prepared for use within the department, etc. These records in their original state are not confidences.

Records that contain advice or recommendations developed by or for a government institution or a Minister of the Crown as outlined by paragraph 21(1)(a) of the Act must be distinguished from records described by paragraph 69(1)(a) of the Act by examining the purpose for which they were prepared. It should be noted that Memoranda to Cabinet are prepared for the purpose of presenting recommendations or proposals to Cabinet.

69(1)(b) Discussion papers

Paragraph 69(1)(b) refers to records the purpose of which is to present background explanations, analyses of problems or policy options to Cabinet for consideration by Cabinet in making decisions.

Pursuant to paragraph 69(3)(b), once a decision to which a discussion paper relates has been made public, that paper is no longer considered to be a confidence. Also if the decision to which the discussion paper relates is not made public, but four years has passed since the decision was made, then the discussion paper is no longer considered to be a confidence. Note that where no decision has been made, paragraph 69(3)(b) does not apply.

69(1)(c) Agenda and Records of Cabinet Deliberations

Paragraph 69(1)(c) refers to agenda of cabinet and records recording the deliberations and decisions of Cabinet. This type of record includes agenda of meetings of Cabinet and Cabinet committees, the minutes of any meetings of Cabinet and the records of the decisions made in such meetings. While the substance of the Cabinet decision is often made public, the formal Record of Decision remains a confidence.

69(1)(d) Records of Communications between Ministers

Paragraph 69(1)(d) refers to records used for or reflecting communications between Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy.

These records may be a letter from one minister to another setting out the minister's opinions or decisions. This category can also include notes taken during informal discussions between ministers and any record prepared for the use of a minister in discussion with a colleague or colleagues.

Records of communications between ministers that were not used to or do not reflect discussions relating to the making of government decisions or the formulation of government policy do not fall under this category.

69(1)(e) Records to Brief Ministers

Paragraph 69(1)(e) refers to records the purpose of which is to brief Ministers of the Crown in relation to matters that are before, or are proposed to be brought before Cabinet. It also refers to records the purpose of which is to brief ministers in relation to matters that are to be the subject of communications or discussions between ministers concerning the making of government decisions or the formulation of government policy.

69(1)(f) Draft Legislation

Paragraph 69(1)(f) refers to draft legislation. This provision relates to any drafts of proposed legislation and it is not relevant whether the legislation was ever introduced into the House or the Senate or seen by Cabinet.

Draft legislation includes draft Bills, draft regulations and draft Orders in Council. Draft legislation remains a confidence even after the final version is introduced in the House of Commons, subject to paragraph 69(3)(a) of the Act.

69(1)(g) Records Containing Information about Confidences

Paragraph 69(1)(g) refers to records that contain information about the contents of any record specifically listed in paragraphs 69(1)(a) through 69(1)(f). This paragraph does not cover records which simply contain information that is listed in 69(1)(a) through 69(1)(f). In order for the paragraph to apply, the record must connect the information provided to the collective decision-making and policy formulation processes of ministers.

Severability is more readily applied with this exclusion.

CASE LAW

1) 69(1) - Generally

Gogolek *v. Canada (Attorney General) [1996], 107 F.T.R. 123 (T.D.)*

- Section 69(1) states that "[t]his Act does not apply to confidences of the Queen's Privy Council for Canada", which includes the documents and material set out in ss. 69(1)(a) to (g). There is no discretionary power vested in a governmental department that would allow that department to make such confidences accessible to the public. See contra**.** *Babcock v. Canada (Attorney General), [2002] S.C.C. 57*

2) 69(1)b):

Canada (Information Commissioner) v. Canada (Minister of the Environment) [2001] F C T 277 (T.D.)

- When the *Access Act* was passed in 1982, a drafter's manual was prepared for government officials. This manual was to serve as a guideline on the preparation of Cabinet papers. The manual described "discussion papers" as follows:

  Normally a department or agency wishing to initiate a policy proposal will begin with the preparation of a Discussion Paper. That paper will describe the problem or issue and, where relevant, contain a full discussion of the alternatives for dealing with it. It will not contain recommendations or the political or other sensitive considerations and argumentation bearing on or leading to them.

  The purpose of the discussion paper is to present a thorough discussion of the issue and the alternatives for dealing with it. The originating minister's conclusion about what needs to be done, his reasons for reaching that conclusion, and any specific recommendations that might flow from it are to be presented in the separate Memorandum to Cabinet. However, it is good form to close the discussion paper with a recapitulation of the main points and, where applicable, a statement of the decision required.

Canada (Information Commissioner) v. Canada (Minister of the Environment) [2001] F C T 277 (T.D.)

- The format of the Memorandum to Cabinet was changed slightly in 1986 and remains in place today. The Memorandum to Cabinet is now divided into two sections: the ministerial recommendations section and the analysis section. The analysis section now contains the background information and analysis formally found in "discussion papers" as understood when the *Access Act* was first passed in 1982.

Canada (Information Commissioner) v. Canada (Minister of the Environment) [2001] F C T 277 (T.D.)

- The correct meaning of a "discussion paper" intended in paragraphs 69(1)(*b*) and 69(3)(*b*) of the *Access Act* is information the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions. If this information exists but is included in a Memorandum to Cabinet, the next step is to determine whether this information can be reasonably severed from the Memorandum to Cabinet pursuant to s. 25 of the *Access Act.* If the information can be reasonably severed, it must be released to the public.

Canada (Minister of the Environment) v. Canada (Information Commissioner), [2003] F C A 68

- It is not intended that the person charged with the review of the documents conduct a line by line analysis and identify, for example, information about a background explanation within part of a document which cannot stand alone as a "discussion paper". What is required is that the person determine whether there is within or appended to the documents an organized body or *corpus* of words which, looked upon on it own, comes within the definition.

3) 69(3) - Generally:

Canada (Information Commissioner) v. Canada (Minister of the Environment) [2001] F C T 277 (T.D.)

- There is a clear tension in s. 69 between the general exclusions listed in paragraphs 69(1)(*a*) to (*g*), and the exceptions to the exclusions found in paragraphs 69(3)(*a*) and (*b*).

  The purpose of the *Access Act* is to extend the right of access to government information. The exclusions listed in paragraphs 69(1)(*a*) to (*g*) of the *Access Act* should be construed in a way which infringes the stated purpose of the Act, the public's right to access, the least.

  The interpretation which infringes the public's right to access the least is one which limits the exclusions in paragraphs 69(1)(*a*) to (*g*) as much as possible, and gives full effect to the exceptions to the exclusions in paragraphs 69(3)(*a*) and (*b*).

Canada (Information Commissioner) v. Canada (Minister of the Environment) [2001] F C T 277 (T.D.)

- By creating exceptions, Parliament intended that certain types of information be released. The Honourable Francis Fox, the Minister who sponsored Bill C-43, stated the following about Parliament's intention:

> *«On the question of factual material, it seems to me most, if not all of the factual material, will be included in the discussion papers which are to be released, and I do not see why there should be a different rule for factual material that may surround draft legislation. It would come out in the discussion paper...*
>
> *And it seems to me that the general principle here of saying that the discussion papers are going to be made public after the decision is made public is a clear indication of the desirability of this coming out... Also there is the indication that we want discussion papers to come out; that we want the factual basis on which decisions are taken to be made public».*

By enacting the exceptions in paragraph 69(3)(*b*) of the *Access Act* and paragraph 39(4)(*b*) of the *Canada Evidence Act*, Parliament intended that information containing background explanations, analyses of problems or policy options be released to the public, in order to increase government accountability to the public.

Canada (Minister of the Environment) v. Canada (Information Commissioner), [2003] F C A 68

- If the override applies the Minister should be given an opportunity to claim any exemption that might apply, while the case law suggests that a government institution ought to claim the relevant exemptions at the initial stage; at least insofar as non-mandatory exemptions are concerned (see *Davidson v. Canada*, [1989] 2 F.C. 341 and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [1999] F.C.J. No. 522 (Q.L.)).

4) 69(3)b):

Canada (Information Commissioner) v. Canada (Minister of the Environment) [2001] F C T 277 (T.D.)

- When the *Access Act* was passed in 1982, a drafter's manual was prepared for government officials. This manual was to serve as a guideline on the preparation of Cabinet papers. The manual described "discussion papers" as follows:

> Normally a department or agency wishing to initiate a policy proposal will begin with the preparation of a Discussion Paper. That paper will describe the problem or issue and, where relevant, contain a full discussion of the alternatives for dealing with it. It will not contain recommendations or the political or other sensitive considerations and argumentation bearing on or leading to them.
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> The purpose of the discussion paper is to present a thorough discussion of the issue and the alternatives for dealing with it. The originating minister's conclusion about what needs to be

done, his reasons for reaching that conclusion, and any specific recommendations that might flow from it are to be presented in the separate Memorandum to Cabinet. However, it is good form to close the discussion paper with a recapitulation of the main points and, where applicable, a statement of the decision required.

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Canada (Information Commissioner) v. Canada (Minister of the Environment) [2001] F C T 277 (T.D.)

- Given that paragraph 69(3)(*b*) of the *Access Act* and paragraph 39(4)(*b*) of the *Canada Evidence Act* are almost identical, the same logic applies to both sections. The extrinsic evidence points to the existence of information the purpose of which is to provide background explanations, analyses of problems, or policy options within the documents at issue. Such information, therefore, cannot be withheld pursuant to ss. 39(1) of the *Canada Evidence Act* and should be disclosed since it is excepted pursuant to subparagraph 39(4)(*b*)(i) of the *Act*. It follows that a certificate issued under ss. 39(1) of the *Canada Evidence Act* cannot be invoked to withhold information that is excepted by virtue of subparagraph 39(4)(*b*)(i).

Canada (Minister of the Environment) v. Canada (Information Commissioner), [2003] F C A 68

- It is not intended that the person charged with the review of the documents conduct a line by line analysis and identify, for example, information about a

background explanation within part of a document which cannot stand alone as a "discussion paper". What is required is that the person determine whether there is within or appended to the documents an organized body or *corpus* of words which, looked upon on it own, comes within the definition.

5) Scope of review:

Babcock v. Canada (Attorney General), [2002] S.C.C. 57

- The judgment of the supreme court of Canada in *Babcock* makes clear that the courts can review decisions which "do not flow from statutory authority clearly granted and properly exercised" and may consider "surrounding evidence" to determine whether statutory power has been properly exercised (see *Babcock*, at paragraphs 39-41).

Babcock v. Canada (Attorney General), [2002] S.C.C. 57

- With respect to the standard of review to be applied, the standard of correctness is the appropriate standard.

Babcock v. Canada (Attorney General), [2002] S.C.C. 57

- The court, person or body reviewing the issuance of a s. 39 certificate works under the difficulty of not being able to examine the challenged information. A challenge on the basis that the information is not a Cabinet confidence within s. 39 thus will be generally confined to reviewing the sufficiency of the list and evidence of disclosure. A challenge based on wrongful exercise of power is similarly confined to information on the face of the certificate and such external evidence as the challenger may be able to provide.

Babcock v. Canada (Attorney General), [2002] S.C.C. 57

- The supreme court of Canada in this case found that information filed in a public affidavit could not described as cabinet confidence.

Babcock v. Canada (Attorney General), [2002] S.C.C. 57

- The Supreme Court of Canada has confirmed the common law principle that the public interest in disclosure must be weighed against the public interest in retaining confidentiality—even in the context of Cabinet Confidences: *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, at paragraphs 22, 28.

TABLE OF AUTHORITIES

69(1) - Generally

Gogolek v. Canada (Attorney General) [1996], 107 F.T.R. 123 (T.D.)

69(1)b):

Canada (Information Commissioner) v. Canada (Minister of the Environment) [2001] F C T 277 (T.D.)

Canada (Minister of the Environment) v. Canada (Information Commissioner), [2003] F C A 68

69(3) - Generally:

Canada (Information Commissioner) v. Canada (Minister of the Environment) [2001] F C T 277 (T.D.)

Canada (Minister of the Environment) v. Canada (Information Commissioner), [2003] F C A 68

69(3)b):

Canada (Information Commissioner) v. Canada (Minister of the Environment) [2001] F C T 277 (T.D.)

Canada (Minister of the Environment) v. Canada (Information Commissioner), [2003] F C A 68

Scope of review:

Babcock v. Canada (Attorney General), [2002] S.C.C. 57

The Questions

Section – 69 (1), (2)&(3)
Statement of Test to be Met
Exemption: **69**. (1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing, (*a*) memoranda the purpose of which is to present proposals or recommendations to Council; (*b*) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions; (*c*) agenda of Council or records recording deliberations or decisions of Council; (*d*) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; (*e*) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (*d*); (*f*) draft legislation; and (*g*) records that contain information about the contents of any record within a class of records referred to in paragraphs (*a*) to (*f*). **69.** (2) For the purposes of subsection (1), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet. **69.** (3) Subsection (1) does not apply to (*a*) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or (*b*) discussion papers described in paragraph (1)(*b*) (i) if the decisions to which the discussion papers relate have been made public, or (ii) where the decisions have not been made public, if four years have passed since the decisions were made. .

Relevant Questions	Departmental Response	Assessment
Inquiry Path		
1. Check age of record against 20 year time limit in paragraph 69 (3)(a).		
2. If the records relates to discussion papers, determine if the decisions to which the discussion papers relate have been made public. Paragraph 69(3)(a)		
3. If the records relates to discussion papers and have not been public, determine whether four years have passed since the decisions were made. Paragraph 69(3)(b)		
4. If not, determine whether record is described by paragraph 69(1)(a)-g)		
5. Does the description of the document provide sufficient information to ensure that it fits within the cabinet paper system		
6. Did PCO LHP/Counsel officials review, for context and understanding, the entire subject records for the ATI request r just the records that were proposed by the originating department as being subject to section 69		

Endnotes

1. By analogy *Canada (Information Commissioner) v. Canada (Minister of Employment & Immigration),* [1986] 3 F.C. 63 (T.D.); *Canada (Information Commissioner)* v. *Canada (Public Works and Government Services)* (1996) 70 C.P.R. (3d) 37