Information Commissioner of Canada

Commissaire à l'information du Canada

Annual Report Information Commissioner

2004-2005

Annual Report
Information Commissioner
2004-2005

"The struggle for information is, first and last,
a struggle for accountability"

Jeremy Pope, "Access to Information:
Whose Right and Whose Information"
In **Global Corruption Report 2003** at
p. 8

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

(613) 995-2410
1-800-267-0441 (toll-free)
Fax (613) 947-7294
(613) 992-9190 (telecommunications device for the deaf)
general@infocom.gc.ca
www.infocom.gc.ca

Cat. No. IP1/2005
ISBN 0-662-69017-6

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

Subsection 2(1)
Access to Information Act

June 2005

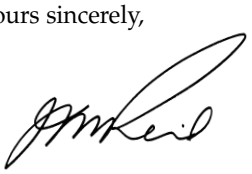
The Honourable Daniel Hays
The Speaker
Senate
Ottawa ON K1A 0A4

Dear Mr. Hays:

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

This report covers the period from April 1, 2004, to March 31, 2005.

Yours sincerely,



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

June 2005

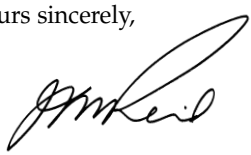
The Honourable Peter Milliken
The Speaker
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Milliken:

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

This report covers the period from April 1, 2004, to March 31, 2005.

Yours sincerely,



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

2004-2005 ANNUAL REPORT

Table of Contents

MANDATE 1

Chapter I: **LOOKING BACK ON A TERM OF SERVICE** 3

Chapter II: **DELAYS IN THE SYSTEM – REPORT CARDS AND TIME EXTENSION STUDY** 15

Chapter III: **INVESTIGATIONS AND REVIEWS** 25

A. Workload Statistics 25

B. Investigative Process - Update 27

Chapter IV: **CASE SUMMARIES** 35

Chapter V: **THE *ACCESS TO INFORMATION ACT* IN THE COURTS** 51

A. The Role of the Judiciary 51

B. The Commissioner in the Courts 52

I) cases completed 52

II) cases in progress – Commissioner as applicant/appellant 57

III) cases in progress – Commissioner as respondent 60

IV) cases in progress – Commissioner as intervener 64

C. Legislative Changes 65

Chapter VI: **CORPORATE SERVICES** 75

MANDATE

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

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

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

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

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

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

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

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

CHAPTER I
LOOKING BACK ON A TERM OF SERVICE

By law, information commissioners give an annual accounting to Parliament of their activities and concerns. Once every seven years, however, they traditionally look back, not just over the past year, but over their entire term of office. July 1, 2005, will mark the end of this commissioner's seven-year term and this year's annual report is his occasion to offer Parliament more than just a one-year snapshot.

At the beginning of his term, in 1998, the commissioner's first impressions included these:

- that parliamentarians are determined to have a fiercely independent information commissioner. (In 1998, members of both houses of Parliament insisted on the opportunity to put questions to the nominee *before* voting on the appointment – a first for any officer of Parliament);
- that Parliamentarians were deeply troubled by resistance to, and non-compliance with, the *Access to Information Act*. The most tangible illustration of this concern came in the form of passage into law of a private member's bill (put forward by Ms. Colleen Beaumier) making it an offence to destroy, alter or conceal records (or to counsel or direct anyone else to do so) with the intent to deny access rights set out in the Act;
- that it is something of a conflict of interest to have (as we do) the Minister of Justice responsible in cabinet, and in Parliament, for the *Access to Information Act*. After all, the Minister of Justice is the commissioner's adversary in all litigation initiated by the commissioner, and it is the minister's role to advocate on behalf of secrecy;
- that, despite a sea of change in the information technology and government organization environments in which the law operates, the *Access to Information Act* had not been modernized and strengthened to keep pace. A unanimous report by an all-party committee of MPs in 1986 had recommended wholesale changes; no government (Liberal or Conservative) paid any heed;

- that the strategy of delay was in widespread use by the bureaucracy to deny and control access to government-held information. In 1998, 55 percent of complaints to the commissioner concerned failure to meet statutory response deadlines;

- that the government's records management infrastructure was inadequate to support information rights (access and privacy), good decision-making, thorough audit and preservation of the history of Canadian governance;

- that the workload of the commissioner's office exceeded its resources to give timely, thorough and fair investigations. The backlog of incomplete investigations in 1998 was equivalent to six months of work (some 742 cases), a doubling from the previous year. The government's control over the purse strings posed the greatest threat to the effectiveness and independence of the commissioner; and

- that the stubborn persistence of a culture of secrecy in the Government of Canada owed much to weak leadership, not just on the part of leaders of government and the public service, but also on the part of Parliament. In 1998 – 15 years after the coming into force of the *Access to Information Act* – the Parliamentary committee designated to keep the commissioner's annual reports under review had never convened for that purpose.

Seven years of experience has reinforced those initial impressions; indeed, those concerns remain at the forefront of the challenges for the coming seven years. That is not to say that there has been no progress; there have been improvements, accomplishments and positive developments on many fronts. Yet, the clear lesson of these seven years is that governments continue to distrust and resist the *Access to Information Act* and the oversight of the Information Commissioner. Vigilance, by users, the media, academics, the judiciary, information commissioners and members of Parliament, must be maintained against the very real pressures from governments to take back from citizens, the power to control what, and when, information will be disclosed.

Positive Developments

1) Support for the Commissioner's Powers

For virtually all but one of the past seven years, the government of former Prime Minister Chrétien engaged in numerous legal challenges to the jurisdiction and powers of the Information Commissioner. Most of those attacks were resolved by the Federal Court last year and the details of the court's decision are set out in last year's annual report at pages 9 to 13. The government of Paul Martin continues the legal challenge (by pursuing an

appeal to the Federal Court of Appeal) of the Information Commissioner's right to see records which the government claims to be subject to solicitor-client privilege. Despite that remaining uncertainty, it is now settled, and accepted by the government, that the Information Commissioner has the authority to compel the production of records, for investigative purposes, which are held in the PMO and ministers' offices. It is also settled, and accepted by the government, that the commissioner has the authority to compel ministers and exempt staff members in ministers' offices and the PMO, to appear and give evidence relevant to matters under investigation by the commissioner.

The Federal Court has also decided that the government may not come to it for rulings on the substance of matters which are under investigation by the commissioner. The Federal Court has made it clear that the scheme of the *Access to Information Act* gives Canadians the right to have a full investigation of their complaints by the commissioner before the Federal Court will become involved.

2) Creation of a New Parliamentary Committee

In his first Annual Report to Parliament (1998-1999), this commissioner suggested that the responsibility for overseeing his office should be moved from the busy Standing Committee on Justice and the Solicitor General to a committee more able to concern itself with access to information matters. In 2002, the commissioner commenced reporting to a committee called the Standing Committee on Government Operations and Estimates. After the election of a minority Liberal government in 2004, a new committee was formed and named: the Standing Committee on Access to Information, Privacy and Ethics. Already, since that committee's creation, the Information Commissioner has appeared several times to give evidence with respect to his 2004-05 spending estimates, his 2003-04 annual report, and on issues of new funding mechanisms for officers of Parliament and reform of the *Access to Information Act*.

In this latter regard, the new committee has made it a priority to ensure that the *Access to Information Act* is modernized and strengthened - whether or not the Minister of Justice brings forward a reform bill, as promised. This increased level of parliamentary interest in, and scrutiny of, the operations of the *Access to Information Act* is a very positive sign of parliamentary leadership in nurturing the public's right to know.

3) Reform of the *Access to Information Act*

The *Access to Information Act* owes its existence to courageous and persistent backbenchers in the Liberal, Conservative and New Democratic parties. As mentioned previously, the amendment to add an offence of wrongful destruction of records was an initiative of a Liberal backbencher. The impetus in recent years, for a broad overhaul of the Act came, too, from backbenchers

from all parties, led by former MP John Bryden. The principle of his private members' bill received unanimous support in the House (all party leaders stood in a recorded vote) at second reading. The 2004 election put an end to that bill; however, it was revived after the election under the sponsorship of NDP member, Pat Martin. As a result of discussions between Pat Martin and the Minister of Justice, Mr. Martin agreed not to go forward with his private member's bill on the understanding that the Minister of Justice would introduce a government bill which would be true to the principles of Mr. Martin's private member's bill.

Regrettably, there has been backtracking by the Minister of Justice. While continuing to profess that the government is committed to proceeding with long-overdue reform of the *Access to Information Act*, the minister referred a framework discussion paper to the Committee on Access to Information, Privacy and Ethics, rather than a reform bill. It is also disappointing that the framework discussion paper reveals a government preference for increasing secrecy and weakening oversight. This commissioner's proposals for reform, and concerns about government proposals to weaken the Act, are set out in a special report to Parliament tabled in September 2002.

4) Fewer Delays in the System

Early in this commissioner's term, the persistent, widespread problem of delay in answering access requests became the commissioner's top priority. Through special reports (report cards) to Parliament on the performance of individual departments and the use of order powers to compel ministers and deputy ministers to explain why mandatory, statutory response deadlines were being ignored, the commissioner sought to bring the government's attention to bear on solving the delay problem.

Many departments took up the challenge, made timeliness a priority, devoted the resources necessary and instituted streamlined processes for answering access requests. In year one (1998), all six institutions reviewed received a grade of "F". In those six institutions, from 35 percent to 86 percent of answers to access requests were late. Last year, in those same institutions, the percentage of responses which were late ranged from a high of 17 percent in Foreign Affairs and International Trade to 3.8 percent in the Privy Council Office.

This dramatic improvement in the delay situation is also reflected in the profile of complaints to the Information Commissioner. In 1998-99, 49.5 percent of the 1,351 complaints which were investigated related to failure to meet response deadlines. Last year, delay complaints represented 14.5 percent of the office's workload. This year, that percentage has increased to 21 percent. This, then, is

both a positive and negative story; substantial improvements have been made, yet vigilance is essential because some backsliding is evident.

5) Improved Records Management

Over the years, since 1998, significant intellectual, policy, financial and human resources have been brought to bear on what was recognized as a crisis in the government's records management. As is often the case in large organizations, momentum for action came from scandal and public exposure of records management shortcomings, such as: inability to find important records; failure to create an accountability paper trail; failure to establish and respect retention and disposal rules appropriate to different types of records; failure to accord appropriate security to sensitive records; and failure to build and maintain centralized, indexed systems of records which capture all forms of recorded information including electronic records, such as e-mail exchanges.

In recent years, governments and public servants are coming, albeit slowly, to the realization that good record-keeping is essential to good, accountable governance. Conducting government business in an oral culture (in the belief that the rigors of accountability through openness can be avoided) is not as comfortable for officials as originally thought. It has come to be seen as fraught with danger: that capable, honest officials may be put at the mercy of the versions of events recounted by officials who are incompetent, dishonest or embarrassed by their predicaments; that the authority for action may not be provable when challenged; that government decisions will not be fully informed by past experience and that there will be no continuity of knowledge when officials resign or retire.

A very positive, tangible illustration of this changing attitude was the adoption, in 2003, by the government of a new policy on the management of government information. For the first time, officials are required (only, so far, by policy) to create records to document their decisions, actions, deliberations and transactions. While it is true that this requirement is not well known in government and not broadly respected – especially by senior officials – it marks an important development.

Indeed, throughout government, there are a myriad of initiatives underway to tackle the crisis of information management. These efforts need focus, coordination, senior level support, resources and analysis in order to be pulled together into a government-wide solution (or set of solutions). That is the next challenge for an already impressive effort.

6) Information Rights Education and Training

From the very beginning, when the *Access to Information Act* was passed, there has never been sufficient attention to the education and training of those involved in the Act's administration. There have been sporadic efforts by government to provide training to the ATIP officers and coordinators in government institutions, but there has never been mandatory training, there are no system-wide knowledge standards or codes of conduct, and no professional accreditation for information rights specialists. While training and education for access and privacy specialists has been sporadic and inadequate, training and education for senior officials, deputy ministers, ministers and ministerial exempt staff has been almost non-existent. It is often at these senior and political levels where ignorance of the law wrecks the most havoc.

Over the past several years, a ray of hope has been shining through. The University of Alberta became the first Canadian university – indeed, the first in the world – to offer a comprehensive, online, post-secondary, certificate program on the administration of information rights, including access to information and privacy laws. The program – Information Access and Protection of Privacy (IAPP) Certificate Program – is offered by the Government Studies center of the University of Alberta's faculty of extension, in collaboration with leading information rights experts. The online courses are enhanced with audio and video presentations, guest speakers, discussion groups and technical and instructional support. Successful completion of five courses is required to obtain the IAPP certificate.

The Information Commissioner became involved as a supporter and user of the IAPP's services. The commissioner's involvement was conditional, however, on the program becoming national in scope and delivered in both official languages. The University of Alberta took up that challenge and courses in French commenced this year.

[For more information, phone 1-877-686-4625 (toll free)
or e-mail at **govstudy@ualberta.ca**.
Website: **www.govsource.net/programs/iapp]**

It is to be hoped that this program will lead the way towards a full academic and professional standard for individuals who seek a career in information rights administration in government or the private sector.

Persistent Problems

1) Distrust

There continues to be a deep distrust of the *Access to Information Act* at all levels in government and, most regrettably, in Parliament. In particular, the vigor of the Act's exemptions, to protect information which should be kept secret, is doubted. As a result, whenever governments propose laws which involve sensitive information, there is often a knee-jerk decision to add new exemptions to the Act, remove records from the coverage of the Act or weaken the commissioner's (and court's) oversight of decisions to keep such information secret.

Regrettably, parliamentarians rarely question government's distrust of the access law when it manifests itself. Recent examples include: the provision in the *Anti-Terrorism Act* allowing the Attorney General to stop an investigation by the Information Commissioner into denials of access to information which the Attorney General considers sensitive to national security; the decision to exclude the Ethics Commissioner's Office from the coverage of the Access Act, even though its predecessor – the Office of the Ethics Counsellor – was covered; the decision to include in the proposed whistleblowing legislation (Bill C-11) an amendment to the *Access to Information Act* allowing government to refuse access, for 20 years, to information collected or compiled as a result of a whistleblower's report.

Indeed, since the Act came into force in 1983, governments and parliaments have agreed that secrecy provisions in 50 statutes will be mandatory, even if the information doesn't qualify for any of the substantive exemptions set out in the *Access to Information Act*. So much for the articulated purpose of the Act which is 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"! (section 2)

Bill C-11

Nothing demonstrates the distrust of the access law, and the ignorance of its effect, more than the amendments to it proposed in the so-called "whistleblowing" bill.

In what the government insists was a well-intentioned effort to give assurances of confidentiality to potential whistleblowers, it decided that all information collected or compiled as a result of a whistleblower's report should be kept secret for up to 20 years. To accomplish this, it proposes to amend the *Access to Information Act* to include the following provision:

"**55. Section 16 of the *Access to Information Act* is amended by adding the following after subsection (1):**

(1.1) The head of a government institution may refuse to disclose any record requested under this Act that contains information obtained or prepared by the President of the Public Service Commission under the *Public Servants Disclosure Protection Act*, by a senior officer designated under subsection 10(2) of that Act or by a supervisor to whom a public servant has disclosed a wrongdoing under section 12 of that Act and that is in relation to a disclosure made or an investigation carried out under that Act if the record came into existence less than 20 years prior to the request."

The effect of this provision is to enable government to cloak in secrecy for 20 years a great deal of information including:

- identities of whistleblowers;
- identities of accused persons;
- details of the allegations of wrongdoing;
- details of actions taken to investigate the allegations
- details of remedial actions taken to prevent future wrongdoings;
- details of disciplinary action taken against wrongdoers;
- details of disciplinary action taken against whistleblowers;
- details of retaliation actions or retribution against whistleblowers.

The government has given no explanation as to why it needs to keep the details of alleged wrongdoing secret for 20 years. Intended or not, the only purpose of a new exemption of this breadth is to offer the government legal means to engage in cover-up and damage control. Public Service unions, and those whistleblowers who have come forward, do not want a secret system for investigating disclosures of wrongdoing – they want protection from retaliation. They see a strong right of access to be one such protection.

To compound the insult to accountability, the government also proposes in Bill C-11 to amend the *Privacy Act* to put an end (in whistleblowing situations) to the long-standing, quasi-constitutional right of an individual to have access to his or her own personal information (subject to limited, specific exemptions) to request correction, if necessary, and to know what opinions or views others expressed about him or her. That provision in Bill C-11 is as follows:

"**58. Section 22 of the *Privacy Act* is amended by adding the following after subsection (1):**

(1.1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) that was obtained or prepared by the President of the Public Service Commission under the *Public Servants Disclosure Protection Act*, by a senior officer designated under subsection 10(2) of that Act or by a supervisor to whom a public servant has disclosed a wrongdoing under section 12 of that Act and that is in relation to a disclosure made or an investigation carried out under that Act if the information came into existence less than 20 years prior to the request."

The effect of this provision is that both whistleblowers and accused persons will lose, for 20 years, their rights of access and correction with respect to their own personal information collected or compiled pursuant to Bill C-11.

Again, the government states that its only reason for introducing this amendment to the *Privacy Act* is to protect the identities of whistleblowers. Of course, this explanation begs the questions: Why take away the privacy rights (of access and correction) from the whistleblower? How does this serve to encourage whistleblowers to come forward? How do whistleblowers go about getting the evidence that their complaints have been taken seriously or that they have been the victims of retaliation?

Finally, the most astounding feature of this proposed amendment to the *Privacy Act* is that it removes, in the whistleblowing context, the fundamental right we all have to know who is making allegations against us and the nature of those allegations. Heretofore, this principle has only been abrogated for confidential police informants and in national security cases. Indeed, the government patterned sections 55, 57 & 58 of Bill C-11 on the 20-year secrecy authority given by the Access and Privacy Acts to law enforcement agencies.

This long-standing rule against anonymous accusations has been a hallmark of our civilized society built on respect for the integrity of the person. Former Privacy Commissioner, John Grace, appeared before the Public Accounts Committee to object to the then Auditor General's proposal to set up a fraud and waste hotline where anonymity would be guaranteed. He insisted that making the Public Service of Canada into an informer society, where faceless accusers would be encouraged, would undermine a key privacy right and be inconsistent with Canadian values. The Public Accounts Committee agreed, and the anonymous fraud and waste hotline did not go ahead.

Dr. Grace's successor, Bruce Phillips, too, went to battle in defence of the privacy right of an individual to have access to opinions and views others express about him or her. His battle was against the government's proposal to allow employees to provide anonymous performance appraisals of their supervisors. This "reverse appraisal" proposal was seen by government as necessary to ensure that employees had a voice in evaluating their managers. Commissioner Phillips strongly insisted that a "flavour-of-the-month" initiative of this sort should not take precedence over the quasi-constitutional right each of us has to know what others are saying about us (when recorded in government records) and who expressed those views.

It must be emphasized that preservation of the right of individuals to know what others say about them does not mean (under either the Access or Privacy Acts) that there are no circumstances in which the identity of a whistleblower can be kept from the accused wrongdoer. For example, both the *Privacy Act* and the *Access to Information Act* would allow identities of accusers and whistleblowers to be kept secret during investigations and, otherwise, if disclosure could reasonably be expected to be injurious to investigations or law enforcement. Moreover, both Acts would protect the identities of both whistleblowers and accused persons from being disclosed to anyone else. In other words, the media or the public at large cannot now obtain access to the personal information of individuals (including their identities as whistleblowers or accused persons). No amendment of either Act is necessary to accomplish this result.

Bill C-11 is a classic case study of the depth of misinformed distrust of the ability of the *Access to Information Act* to protect sensitive information and to draw an appropriate balance among justifiable secrecy, the public interest in accountability and the individual's privacy right of access and correction with respect to his or her own personal information.

2) Inadequate Resources

Year after year, information commissioners have asked Treasury Board ministers to provide adequate (not extravagant) funds to enable commissioners to effectively discharge the duties Parliament gave them. The requests are routinely denied or pared down to bare bones.

Year after year, the Information Commissioner's workload of complaints increases and, without adequate resources, the backlog of incomplete investigations also increases. Now, it ranks at an all-time high; it represents more than a full year of work for every one of the commissioner's 23 investigators. In 1986, parliamentarians reviewed the operations of the *Access to Information Act* and asked the Information Commissioner to aim to complete

investigations in 90 days. That target has never been met due to lack of resources. This year, the median time to completion of an investigation is some six months.

Again, this year, the commissioner put forward a request for seven additional investigators for three years to clear the backlog, and eight additional investigators for the long-term to ensure that the backlog did not redevelop. Treasury Board ministers agreed to give the commissioner five additional investigators for fifteen months and none for the long-term. Resources for such a short-term would, for all practical purposes, be wasted. In one year, the commissioner could not recruit for only one year, train, security clear and deploy five new investigators to accomplish any appreciable reduction of the backlog. Moreover, with no permanent increase to the number of investigators, the incoming workload will still outstrip the resources available, contributing to more backlogged investigations. The commissioner told the President of Treasury Board that the Board's response to the commissioner's request was a recipe for failure and a waste of taxpayer funds. The minister's response: Try again next year.

And that, of course, is the deep flaw in the manner in which the commissioner's office is funded – due to its control of the purse strings, the government has control over the effectiveness of Parliament's officer. So much for independence!

It is vital that Parliament take over the role of ensuring the commissioner get adequate resources to do the job and, of course, holding him or her accountable for how resources are utilized. Parliament took such a step with one of its officers, the Ethics Commissioner. It is equally important that it do so for the Information Commissioner and the other officers of Parliament who are mandated to investigate government actions and decisions.

In February 2005, the Standing Committee on Access to Information, Privacy and Ethics launched a study into this issue. The government, too, is considering proposals for a funding mechanism for officers of Parliament which is not controlled by the government of the day. In the meantime, this funding gap cries out for immediate redress.

CHAPTER II
DELAYS IN THE SYSTEM – REPORT CARDS AND TIME EXTENSION STUDY

A: Report Cards: Part I

For several years, a number of institutions were subject to review because of evidence of chronic difficulty in meeting response deadlines. In his 1996-97 annual report to Parliament, the former information commissioner reported that delays in responding to access requests had reached crisis proportions.

In 1998, at the beginning of this Information Commissioner's term, the "report card" system was commenced. Selected departments were graded on the basis of the percentage of the access requests received that were not answered within the statutory deadlines of the *Access to Information Act*. Under the Act, late answers are deemed to be refusals. Initially, the report cards were tabled in Parliament as specials reports; since the fiscal year 2000-01, they have been included within the commissioner's annual report.

Since the introduction of the report cards, the Information Commissioner has observed a dramatic reduction in the number of delay complaints: from a high of 49.5 percent in 1998-99 to a low of 14.5 percent of complaints in 2003-04. This year, the delay complaints account for 21.1 percent of our workload. The Office of the Information Commissioner will continue to focus its attention on the delay problem in order to remind government institutions of their responsibilities to provide timely responses to requests.

The Information Commissioner has adopted the following standard as being the best measure of a department's compliance with response deadlines – percentage of requests received which end as deemed refusals:

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

In previous years, the deemed-refusal ratio to requests received did not take into consideration those requests carried over from the previous year, nor the number of requests already in a deemed-refusal status on April 1. **These figures are taken into consideration in this year's report**.

This year, the Office of the Information Commissioner reviewed the status of requests in a deemed-refusal situation for the following twelve departments: Canada Revenue Agency (CRA); Citizenship and Immigration Canada (CIC); Correctional Service Canada (CSC); Fisheries and Oceans Canada (F&O); Department of Foreign Affairs and International Trade (DFAIT); Health Canada (HCan); Human Resources and Skills Development Canada (HRSDC); Industry Canada (IC); National Defence (ND); Privy Council Office (PCO); Public Works and Government Services Canada (PWGSC); Transport Canada (TC).

Using the grading scale, the results attained by the twelve government institutions reviewed this year, during the period April 1 to November 30, 2004, are set out in Table 1.

Table 1: New Request to Deemed-Refusal Ratio - April 1 to November 30, 2004

Department	% of Deemed Refusals (Previous Formula)	Grade Grade	% of Deemed Refusals (Current Formula)	Grade
CRA	5.9%	B	4.7%	A
CIC	12.1%	C	13.8%	C
CSC	4.0%	A	3.6%	A
F&O	4.9%	A	5.2%	B
DFAIT	20.8%	F	28.8%	F
HCan	11.5%	C	17.2%	D
HR(S)DC	3.2%	A	3.0%	A
IC	10.0%	C	16.2%	D
ND	6.0%	B	9.5%	B
PCO	26.4%	F	26.5%	F
PWGSC	15.7%	D	17.7%	D
TC	6.3%	B	7.2%	B

Table 2: New Requests to Deemed-Refusal Ratio – April 1 to November 30, 2003

Department	% of Deemed Refusals (Previous Formula)	Grade	% of Deemed Refusals (Current Formula)	Grade
CRA	6.5%	B	6.5%	B
CIC	15.4%	D	14.1%	C
CSC	3.2%	A	8.8%	B
F&O	1.9%	A	3.9%	A
DFAIT	17.0%	D	15.0%	D
HCan	5.4%	B	5.6%	B
HRDC	39.3%	F	40.2%	F
IC	25.0%	F	40.2%	F
ND	6.2%	B	9.1%	B
PCO	3.8%	A	12.8%	C
PWGSC	14.5%	C	17.0%	D
TC	17.2%	D	24.4%	F

From observing Table 2, five institutions improved their performance over last year, two showed no change and five received lower grades than last year. Congratulations to Human Resources and Skills Development Canada (formerly part of Human Resources Development Canada) for achieving an "A" compared with the "F" received by HRDC last year. A positive effort was noted by Industry Canada, in its second year in the reporting system, going from an "F" to a "D". Of particular concern is the Privy Council Office, which went from an "A" last year to an "F" in this year's report. National Defence has levelled off at a grade of "B" over the last two years, which is a good report, but the department needs to press ahead to achieve ideal compliance. Correctional Service Canada deserves credit for its ability to maintain a grade "A" in the last two years. Although Fisheries and Oceans Canada narrowly missed getting an "A" this year by 0.2%, it had maintained a grade of "A" for the two previous years.

Table 3: Grading from 1998 to 2004 (April 1 to November 30)

Dept	1998	1999	2000	2001	2002	2003		2004	
						Previous Formula	Current Formula	Previous Formula	Current Formula
CRA	F	F	C	B	A	B	B	B	A
CIC	F	F	D	C	A	D	C	C	C
CSC	-	-	-	-	F	A	B	A	A
F&O	-	-	F	F	A	A	A	A	B
DFAIT	F	F	F	D	B	D	D	F	F
HCan	F	A	-	-	A	B	B	C	D
HR(S)DC	-	A	-	-	D	F	F	A	A
IC	-	-	-	-	-	F	F	C	D
ND	F	F	D	C	B	B	B	B	B
PCO	F	A	-	-	D	A	C	F	F
PWGSC	-	-	-	-	F	C	D	D	D
TC	-	F	F	C	D	D	F	B	B

Table 3 shows how difficult it is to maintain a high performance in meeting legislated timeframes under the *Access to Information Act*. For example, PCO and DFAIT show a large degree of performance fluctuation over the years. Industry Canada's progress in the past year is actually more positive than the figures would indicate. A lot of work was done by the department in addressing the many recommendations that were made last year by the Office of the Information Commissioner. Industry Canada is encouraged to continue pressing forward to attain a better performance next year. DFAIT and PWGSC constitute chronic problem cases which are at the top of the commissioner's list of priorities for attention.

There appear to be five main causes of delay in processing access requests:

- Inadequate resources in ATIP offices;
- Chronic tardiness in the retrieval of records due to poor records management and staff shortages in offices of primary interest (OPIs);
- Difficulties encountered during the consultation process with third parties and other government institutions;
- Top-heavy approval processes, including too much "hand-wringing" over politically sensitive requests and too frequent holdups in ministers' offices; and
- Poor communications with requesters to clarify access requests.

The complete text of the twelve reviews conducted this year is available on our website at www.infocom.gc.ca.

B: Report Cards: Part II

As indicated earlier, as part of the proactive mandate of the commissioner's office, each year a department (or departments) is selected for review and a report card is completed. The review is conducted to determine the extent to which the department is meeting its responsibilities under the *Access to Information* (ATI) *Act*. The responsibilities and requirements can be set out in the Act or its Regulations, such as the timelines required to respond to an access request. Or, the responsibilities may emanate from Treasury Board Secretariat or departmental policies, procedures or other documentation in place to support the access to information process.

Fundamental to the access to information regime are the principles set out in the "Purposes" section of the *Access to Information Act*. These principles are:

- Government information should be available to the public;
- Necessary exemptions to the right of access should be limited and specific;
- Decisions on the disclosure of government information should be reviewed independently of government.

Previous report cards issued since 1999, and those in Part I of this chapter, focused on the deemed refusal of access requests, the situations that may have led to the deemed refusals and recommendations for eventually eliminating the problem. In 2004-05, the scope of the report cards was broadened. The scope now seeks to capture an extensive array of data and statistical information to determine how an ATI office and a department are supporting their responsibilities under the Act. The new report card is divided into chapters on the:

- Access process and how it is managed
- Deemed-refusal situation
- Resources devoted to ATI and their adequacy
- Leadership framework to create a culture of access to information in the institution
- Information management framework as an underpinning of ATI
- Complaint profile for ATI from the perspective of the Office of the Information Commissioner.

In 2004-05, three institutions were selected for review using the new report card format – Justice Canada, Agriculture and Agri-Food Canada, and Library and Archives Canada. Each department completed an extensive Report Card Questionnaire. The completed questionnaire was used as the starting point for an interview with the ATI coordinator of each institution. In addition, a random sample of approximately 15 completed access request files were reviewed to determine how decisions about access requests were made, approved and documented.

The grading scale used in the new report cards is described in the following table.

Overall Grade	Overall ATI Operations
A = Ideal	• All policies, procedures, operational plan, training plan, staffing in place • Evidence of senior management support, including an ATI Vision • Streamlined approval process with authority delegated to ATIP coordinator • 5% or less deemed refusals
B = Substantial	• Minor deficiencies to the ideal that can easily be rectified • 10% or less deemed refusals
C = Borderline	• Deficiencies to be dealt with
D = Below Standard	• Major deficiencies to be dealt with
F = Red Alert	• So many major deficiencies that a significant departmental effort is required to deal with their resolution or many major persistent deficiencies that have not been dealt with over the years

On the above grading scale, Justice Canada, Agriculture and Agri-food Canada, and Library and Archives Canada each rated an "F". Their performance was Red Alert.

JUSTICE CANADA

The report card on Justice Canada made a number of recommendations for ATI operations. Of particular note, it recommended, as an essential component in the administrative framework to support the operation of the *Access to Information Act*, the development of an ATI operational plan for the ATIP office. The ATI operational plan would establish priorities, tasks and resources,

deliverables, milestones, timeframes and responsibilities to implement the business plan developed for the ATIP office. The business plan is essentially a business case on the need for additional resources for the ATIP office. Other recommendations in the report card focused on the need to have up-to-date comprehensive documentation in place to promote consistent decision-making by individuals with responsibilities in the operations supporting the *Access to Information Act*. These individuals require ATI training to support the fulfillment of their responsibilities.

AGRICULTURE AND AGRI-FOOD CANADA

This report card identified the need for an administrative framework to support the operation of the *Access to Information Act* through the development of an ATI improvement and operational plan for the ATIP office. The plan would establish priorities, tasks and resources, deliverables, milestones, timeframes and responsibilities. The plan could be used as an operational framework to manage improvements, guide day-to-day activities and manage the implementation of recommendations in their report card. The plan is also a method of engaging and obtaining senior management support for departmental improvements in ATI activities. Other recommendations in the report card focused on the need to have up-to-date comprehensive documentation in place to promote consistent decision-making by individuals with responsibilities in the operations supporting the *Access to Information Act*. These individuals require ATI training to support the fulfillment of their responsibilities.

LIBRARY AND ARCHIVES CANADA

The report card recommended the development of an ATI operational plan for the ATIP division. The plan would establish priorities, tasks and resources, deliverables, milestones, timeframes and responsibilities to ensure compliance with response deadlines and appropriate application of exemptions. An internal task force has already examined the 18 to 20-month backlog of access and privacy requests and proposed systemic, innovative and durable solutions to the situation.

As in the report cards for the other two institutions, other recommendations in the Library and Archives Canada report card focused on the need to have up-to-date comprehensive documentation in place to promote consistent decision-making by individuals with responsibilities in the operations supporting the *Access to Information Act*. These individuals require ATI training to support the fulfillment of their responsibilities.

CONCLUSION

All three institutions have recognized that there are serious and persistent problems in the processes that support the administration of the *Access to Information Act* in their institution. Each institution in 2004-05 took some positive initial remedial actions. But there was no commitment at the time of the report cards on precisely how and when the serious deficiencies described in the report cards will be addressed and how improvements will be sustained.

A critical component of the administration of the *Access to Information Act* is the leadership role of the ATI coordinator and senior management in a department. Senior management exercises leadership by identifying access to information as a departmental priority and then acting upon this by providing the appropriate resources, technology, training and policies. Together with the ATI coordinator, it is important for senior management to foster a culture of openness and access to departmental information, by adopting and staying engaged in a remedial plan with clearly defined deliverables and critical dates.

The full text of the report cards is available on our website at **www.infocom.gc.ca.**

C: Time Extension Study

In previous reports, concern was expressed that a system-wide improvement in meeting response deadlines might be the result of abuse of the Act's extension of response-time provisions. Indeed, since the 2000-01 fiscal year, the number of complaints concerning time extensions has more than doubled. To assess the veracity of these impressions, the commissioner initiated a study in the fall of 2004.

Forty-two government institutions were canvassed by a written questionnaire concerning their general approach to applying time extensions. Based on an analysis of the responses, the commissioner chose a representative sample of eight institutions in which to conduct a more in-depth study. The methodology included in-person interviews with ATIP coordinators and a review of selected processing files for access requests in respect of which the response times were extended beyond 30 days. The main elements of the review included:

1) Were reasons for extension documented on the files?

2) Was there evidence supporting the need for an extension and the duration of the extension?

3) Were answers given within the extended period and, if not, what was the duration of delay beyond the extended period?

4) Does the institution have a tracking and BF system to monitor compliance with extended response times?

5) Does the institution follow a practice of partial disclosure prior to the end of the extended period?

6) When extensions are taken for the purpose of consultations with other government institutions, are there appropriate prior consultations and follow-up with the institution being consulted?

7) When extensions are for the purpose of consultations with non-governmental third parties, are the time delays specified in sections 27 and 28 of the Act respected?

8) When extensions are longer than 30 days, does the institution fulfill its obligation to notify the Information Commissioner?

9) Of all access requests received by an institution, in what percentage was the 30-day response time extended? What was the average length of the extension?

In half of the 42 institutions surveyed, 40 percent or more (up to a high of 80 percent) of all access requests received had an extension of time applied. The study also determined that the overall management of extensions demonstrates serious shortcomings.

First, there is a lack of comprehensive and consistently applied criteria for determining whether or not paragraph 9(1)(a) extensions are needed and, if so, the appropriate duration of the extension.

Second, there is no consistent practice in government institutions of documenting processing files with the justification for claiming extensions.

Third, there is widespread failure to meet the extended response times. This is particularly true in the case of extensions for consultations with third parties and despite the fact that the timelines for such consultations are set by the statute.

Fourth, consultations with PCO require twice as much time to complete than do consultations with other government institutions.

Finally, the study determined that institutions are not consistently notifying the Information Commissioner of extensions of more than 30 days. The study also showed discrepancies between the response-time statistics which institutions report to Parliament and Treasury Board, on the one hand, and those reported

during this study. Treasury Board conducts no verifications of the statistics provided to it by government institutions.

These results support the need for more careful management of extensions by government institutions, better guidance and verification from Treasury Board, allocation of sufficient resources to ensure that extensions are the exception not the rule, improved turnaround time on consultations by PCO and continued monitoring by the Information Commissioner.

CHAPTER III
INVESTIGATIONS AND REVIEWS

A. Workload Statistics

This reporting year, 1,506 complaints were lodged with the Information Commissioner against government institutions and 1,140 investigations were completed (see Table 1). Table 1B shows that 21.1 percent of all complaints received concerned delays. As can be seen from that table, this is up from last year's 14.4 percent of complaints, which sounds an alarm that the incidence of delays is once again on the rise. In addition to the complaints received this year, the office responded to 1,387 inquiries.

Table 2 shows the results of the 1,140 completed investigations. Of the cases that were not discontinued (withdrawn by the complainant) or cancelled, 99 percent were resolved without the commissioner having to go to the Federal Court. (Since 96 of the 104 unresolved complaints were interconnected in that they were all requesting the same census information, they are being treated as one file for litigation purposes.)

Table 3 shows the median overall turnaround time for complaint investigations. The median time to complete a file increased to 7.45 months from 5.57 months last year. This increase was due to the negative effects of inadequate resources to meet the burden of work and the effect of two significant investigations, which took a long time to complete. These are the census cases mentioned above and another major investigation consisting of over fifty complaints. Table 3A shows the effect on completion time of the workload in the difficult complaint categories. It also illustrates the deterioration of turnaround times for both standard and difficult cases.

Table 1 shows a disturbing increase in incomplete investigations. Last year, it was 1,019; this year, it is 1,385. It has been impossible to sustain the modest improvements in turnaround times and the reduction of the backlog due to the continuing and severe lack of resources. As noted last year, the mandate of the Information Commissioner to complete timely and thorough investigations cannot be met with the current resources. Neither can the Information Commissioner act as an effective watchdog with these resources.

Table 4 shows the distribution of completed complaints against 60 government institutions. Of these complaints, 64 percent were made against only ten government institutions. Once again, only a few institutions account for the bulk of all complaints.

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

1.	National Defence	132
2.	Royal Canadian Mounted Police	96
3.	Statistics Canada	96
4.	Public Works and Government Services Canada	84
5.	Privy Council Office	63
6.	Transport Canada	61
7.	Citizenship and Immigration Canada	57
8.	Canada Revenue Agency	50
9.	Fisheries and Oceans Canada	47
10.	Justice Canada	46

Being on this top ten list does not necessarily mean that these institutions performed badly. A more accurate way to assess "performance" is to look at the number of complaints against each institution which were found to have merit versus the number which were found not to be substantiated. This year's top ten institutions against which complaints made were found to have merit were:

1.	Statistics Canada	96
2.	National Defence	73
3.	Royal Canadian Mounted Police	67
4.	Public Works and Government Services Canada	57
5.	Transport Canada	55
6.	Privy Council Office	41
7.	Citizenship and Immigration Canada	40

8. Fisheries and Oceans Canada	36
9. Canada Revenue Agency	34
10. Justice Canada	34

B. Investigative Process – Update

In our 2002–03 annual report, we reported on our efforts to demystify the investigative process by the judicious use of the Information Commissioner's discretion to select the procedures by which investigations are conducted. This discretion gives the Information Commissioner flexibility in the choice of investigative methods, styles and approaches. Despite the need for this flexibility, the Information Commissioner also recognizes the importance of assisting all parties involved in investigations to understand what procedural options are open to the Information Commissioner and the circumstances in which they are likely to be used.

To that end, the 2002–03 annual report set out the two types of processes used – informal and formal – and when each is likely to be used. Additionally, the role of counsel at formal proceedings, the usage of confidentiality orders and the potential for adverse comments were discussed. Tied closely to this procedural flexibility was the institution of the quality of service standards discussed on pages 54 through 58 of that annual report.

After one-and-a-half year's experience with the timeframes set out in the service standards, it would appear that the major stumbling block to them being fully met is the fact that most institutional processing files do not document or substantiate the reasons for the decision made with regard to exemptions or the exercise of discretion. This shortcoming is of serious concern since it means that, whenever there is a complaint, the processing must be recreated and repeated for the investigator – a needlessly time-consuming activity.

Failure to address this problem across the system is particularly surprising given the recommendation of the Report of the Access to Information Review Task Force, "Access to Information: Making It Work for Canadians", issued in June 2002. In chapter 6 of that report, "Ensuring Compliance: The Redress Process", the Task Force made the following recommendation: "The Task Force recommends that the Treasury Board Secretariat, with the advice of the Office of the Information Commissioner, work with institutions to develop realistic standards for the documentation of processing files." That work must be completed.

In the meantime, in order to make the investigative process faster, the commissioner intends to amend the service standards by including a new approach when there is no documented rationale on file for the exemptions claimed. In such cases, the delegated authority will be expected to provide representations, in the form of a detailed rationale, regarding all exemptions claimed and discretionary decisions made. Depending on the circumstances, such representations may be in writing or by way of oral evidence and will be expected within a matter of days, not weeks. A decision whether or not to require formal representations will be taken at the end of the first meeting between the investigator and the coordinator of the institution, if it is apparent that no documented rationale exists.

The Information Commissioner hopes to improve cooperation with his investigations by following-up on a suggestion made by the Access to Information Review Task Force. In chapter six, the Task Force recommended that "training and information sessions on the investigative process be offered to access officials by the Office of the Information Commissioner" and the "investigators of the Office of the Information Commissioner meet from time to time with access officials to clarify and resolve general issues related to the investigation process in order to make investigations more efficient and effective."

The Office of the Information Commissioner has been working with the University of Alberta to produce information and training materials to be used online, in the office or in sessions with the staff of the commissioner. As well, in the new fiscal year, workshops will be offered to ministerial and senior political staff on their role in the process. The compact disc version of this training will be available for self-study and covers the Act and Regulations and the obligations of government institutions under that legislation. In addition, senior staff of the Office of the Information Commissioner are prepared to meet with senior staff of ministers to educate them on their roles and obligations.

Table 1 STATUS OF COMPLAINTS

	April 1, 2003 to Mar. 31, 2004	April 1, 2004 to Mar. 31, 2005
Pending from previous year	658	1019
Opened during the year	1331	1506
Completed during the year	970	1140
Pending at year-end	1019	1385

Table 1B COMPLAINTS RECEIVED BY TYPE

Category	April 1, 2003 to Mar. 31, 2004		April 1, 2004 to Mar. 31, 2005	
Refusal to disclose	720	54.1%	494	32.8%
S. 69 Exclusion	127	9.5%	59	3.9%
Delay (deemed refusal)	191	14.4%	318	21.1%
Time extension	186	14.0%	181	12.0%
Fees	48	3.6%	39	2.6%
Miscellaneous	59	4.4%	415	27.6%
Total	1331	100%	1506	100%

Table 2 COMPLAINT FINDINGS
April 1, 2004 to March 31, 2005

Category	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL	%
Refusal to disclose	294	100	144	71	609	53.4%
S.69 Exclusion	27	1	28	2	58	5.1%
Delay (deemed refusal)	199	-	8	11	218	19.1%
Time extension	118	-	37	2	157	13.8%
Fees	16	-	11	5	32	2.8%
Miscellaneous	42	3	16	5	66	5.8%
TOTAL	696	104	244	96	1140	100%
100%	61.1%	9.1%	21.4%	8.4%		

Table 3 TURNAROUND TIME (MONTHS)

Category	2002.04.01 – 2003.03.31		2003.04.01 – 2004.03.31		2004.04.01 - 2005.03.31	
	Months	Cases	Months	Cases	Months	Cases
Refusal to disclose	7.17	590	7.36	447	12.79	609
S.69 Exclusion	-	-	8.02	41	14.48	58
Delay (deemed refusal)	3.44	164	4.06	228	4.22	218
Time extension	4.77	125	3.45	153	4.83	157
Fees	4.22	48	5.15	48	5.29	32
Miscellaneous	4.37	79	5.10	53	5.36	66
Overall	5.42	1006	5.57	970	7.45	1140

Table 3A TURNAROUND TIME (MONTHS)

Category	2002.04.01 – 2003.03.31				2003.04.01 – 2004.03.31				2004.04.01 - 2005.03.31			
	Standard		Difficult		Standard		Difficult		Standard		Difficult	
	Months	%	Months	%	Months	%	Months	%	Months	%	Months	%
Delay (deemed refusal)	2.99	10	4.73	6	3.60	17	9.48	6	3.73	16	5.59	4
Time extension	2.96	5	8.61	7	2.47	10	6.18	6	4.37	9	5.85	4
Fees	2.61	2	5.42	3	4.64	3	6.67	2	4.96	2	5.72	1
Miscellaneous	2.40	5	8.68	3	3.55	4	12.67	2	5.10	3	5.36	2
Subtotal - Admin Cases	2.86	22	6.31	19	3.24	34	7.30	15	4.14	30	5.52	11
Refusal to Disclose	5.46	45	16.57	13	5.59	34	16.96	13	12.21	44	17.62	9
S. 69 Exclusion	-	-	-	-	8.04	4	7.07	0	13.32	5	23.01	1
Subtotal – Refusal Cases	5.46	45	16.57	13	6.12	38	16.93	13	12.33	49	18.41	10
Overall	4.34	67	8.93	33	4.67	72	10.36	28	7.00	79	10.75	21

Notes: 1. Difficult Cases - Cases that take over two times the average amount of investigator time to resolve.

2. Refusal cases take on average four times as much investigator time to resolve than administrative cases.

Table 4 COMPLAINT FINDINGS (by government institution)
April 1, 2004 to March 31, 2005

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Agriculture and Agri-Food Canada	-	-	2	-	2
Atlantic Canada Opportunities Agency	5	-	1	1	7
Business Development Bank of Canada	1	-	-	-	1
Canada Border Services Agency	9	-	1	-	10
Canada Firearms Centre	8	-	6	1	15
Canada Mortgage and Housing Corporation	3	-	-	-	3
Canada-Nova Scotia Offshore Petroleum Board	-	-	1	-	1
Canada Revenue Agency	34	-	13	3	50
Canadian Air Transport Security Authority	-	-	-	2	2
Canadian Commercial Corporation	2	-	-	-	2
Canadian Food Inspection Agency	3	-	3	2	8
Canadian Heritage	3	-	4	1	8
Canadian International Development Agency	1	-	2	-	3
Canadian Nuclear Safety Commission	2	-	-	-	2
Canadian Radio-Television & Telecommunications Commission	1	-	-	-	1
Canadian Security Intelligence Service	2	-	3	-	5
Canadian Space Agency	3	-	-	-	3
Canadian Tourism Commission	5	-	2	4	11
Citizenship and Immigration Canada	40	-	15	2	57
Correctional Service Canada	12	-	21	1	34
Department of Foreign Affairs	27	-	3	6	36
Department of International Trade	6	-	-	-	6
Environment Canada	17	2	3	1	23
Finance Canada	13	-	5	1	19
Fisheries and Oceans Canada	36	-	9	2	47
Health Canada	16	-	6	2	24
Human Resources and Skills Development Canada	5	-	5	-	10
Immigration and Refugee Board	4	-	-	-	4
Indian and Northern Affairs Canada	12	-	5	1	18
Indian Residential Schools Resolution Canada	1	-	-	-	1
Industry Canada	19	-	8	3	30
Infrastructure Canada	-	-	1	-	1

Table 4 COMPLAINT FINDINGS (by government institution)
April 1, 2004 to March 31, 2005 (continued)

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Justice Canada	33	1	12	-	46
Library and Archives Canada	19	-	12	2	33
National Capital Commission	4	-	1	-	5
National Defence	71	2	17	42	132
National Gallery of Canada	5	-	-	-	5
National Parole Board	-	-	1	-	1
Natural Resources Canada	-	-	1	-	1
Natural Sciences and Engineering Research Council of Canada	-	-	1	-	1
Office of the Correctional Investigator Canada	4	-	-	-	4
Office of the Superintendent of Financial Institutions	3	-	1	-	4
Ombudsman National Defence & Canadian Forces	1	-	-	-	1
Privy Council Office	41	-	20	2	63
Public Safety and Emergency Preparedness Canada	4	-	3	-	7
Public Service Commission of Canada	1	-	-	-	1
Public Service Staff Relations Board	1	-	-	-	1
Public Works and Government Services Canada	56	1	19	8	84
Royal Canadian Mint	1	-	-	-	1
RCMP Public Complaints Commission	1	-	-	-	1
Royal Canadian Mounted Police	67	-	21	8	96
Security Intelligence Review Committee	5	-	-	-	5
Social Development Canada	17	-	2	-	19
Standards Council of Canada	1	-	-	-	1
Statistics Canada	-	96	-	-	96
Toronto Port Authority	-	-	2	-	2
Transport Canada	54	1	6	-	61
Treasury Board Secretariat	14	1	6	-	21
Veterans Affairs Canada	1	-	-	1	2
Western Economic Diversification Canada	2	-	-	-	2
TOTAL	696	104	244	96	1140

Table 5 GEOGRAPHIC DISTRIBUTION OF COMPLAINTS (by location of complainant) April 1, 2004 to March 31, 2005

	Received	Closed
Outside Canada	11	11
Newfoundland	11	17
Prince Edward Island	6	5
Nova Scotia	29	39
New Brunswick	7	8
Quebec	156	122
National Capital Region	557	468
Ontario	153	222
Manitoba	31	49
Saskatchewan	40	26
Alberta	36	39
British Columbia	464	128
Yukon	0	0
Northwest Territories	5	4
Nunavut	0	2
TOTAL	**1506**	**1140**

CHAPTER IV
CASE SUMMARIES

In this reporting year, four investigations were completed which had received more public notoriety than usual. These four cases involved records held in the offices of ministers and the Prime Minister and prompted the government, over four years, to launch some 29 applications before the Federal and Supreme Courts seeking to stop or restrict the commissioner's investigations. Those legal challenges were unsuccessful, and their outcome is described in last year's annual report (2003-04) at pages 9 to 13.

This year, the investigations were completed and their results reported to the government and complainants. All complaints were held to be well-founded by the commissioner and recommendations for further disclosure, better records management and better education of officials were made. The government rejected the recommendations in all cases, and the Information Commissioner will be asking the Federal Court to order these four government institutions to disclose the withheld records at issue.

The commissioner's report of his findings, in each of these four cases, is extensive – too long to be reproduced here. What follows, then, are brief summaries only. However, the full text of each report forms part, by reference, of this annual report to Parliament.

Case 1: The Agendas of the Minister of Transport Held in the Minister's Office and the Deputy Minister's Office

Background

The complaint arose from Transport Canada's (TC) denial of an access request for a copy of former Minister Collenette's agenda for the period June 1, 1999, to November 5, 1999. TC's denial was expressed as follows:

> "Please be advised that no records exist in Transport Canada's files which respond to your request. It should be noted, however, that the Minister's itinerary/meeting schedules are prepared and maintained by his political staff, and are not considered departmental records."

It was the practice of the former minister to routinely provide copies of his agendas to the deputy minister (with some personal items removed) to assist the deputy minister in properly serving the minister. It was the practice of the deputy minister to routinely destroy the agenda copies she received as soon as they went out of date. Thus, at the time of the access request, all records covered by the request were held in the minister's office since the deputy minister's copies had been destroyed.

Legal Issues

The department argued that the right of access only extends to records under the control of the Department of Transport. It further argued that the office of the Minister of Transport, which held the agendas, is not a component part of the Department of Transport.

The requester, on the other hand, argued that the agendas were created, in part, to assist departmental officials in carrying out their duties and that where they were archived was immaterial. As well, the requester argued that a minister is a component part of the institution over which he or she presides and, hence, records held by a minister, which relate to the minister's departmental duties, are under the control of the minister's department.

The legal issues in this case, thus, were as follows:

1. Were the requested agendas (which were archived in the office of the Minister of Transport) under the control of the Department of Transport for the purposes of section 4 (the right to request access) of the *Access to Information Act?*

2. As a general principal, is the office of a minister a component part of the department over which the minister presides?

In coming to conclusions on these issues, the Information Commissioner also dealt with the subsidiary issue of whether or not the Minister of Transport is an officer of the Department of Transport.

Findings and Recommendations

The commissioner accepted the governing jurisprudence to the effect that the term "control" is to be given a broad meaning so as to confer a meaningful right of access, and that the physical location of requested records is not, in and of itself, determinative of the issue of control. Among the factors the commissioner took into account, to determine whether or not the requested agendas were under the control of the Department of Transport, were the following:

1. whether the individuals in possession of the relevant documents were employees or officers of an entity to which the *Access to Information Act* applies (i.e. a government institution);

2. whether there is evidence that the documents are, in fact, controlled by a government institution;

3. whether the content of the record relates to a government institution's mandate and functions;

4. whether the record is closely integrated with other records held by a government institution;

5. whether the document was created during the course of duties remunerated from parliamentary appropriations of a government institution;

6. whether any officer or employee of a government institution has the right to use, preserve or dispose of the document;

7. whether, with respect to the document, an order for production could be enforced upon an officer or employee of a government institution;

8. whether communication of the content of the document requires the authorization of an officer or employee of a government institution;

9. whether there is a right of partial, transient, or *de jure* access to the document by an officer or employee of a government institution;

10. whether the document was created as part of the day-to-day administration of a government institution or to assist an officer or employee of a government institution to carry out his or her duties; and

11. whether there is a compelling reason of public policy militating for or against control.

After considering the legal and factual elements with respect to these factors, the commissioner concluded that the requested ministerial agendas were under the control of the Department of Transport for the purposes of section 4 of the *Access to Information Act*. In coming to that conclusion, the commissioner took into account the content of the records (significant portions of which relate to the minister's duties as head of Transport Canada); the fact that the agendas were used, in part, to assist departmental officials in performing their duties; and the fact that departmental officials had authority to keep or destroy their copies of agenda records.

As well, the commissioner concluded that the Minister of Transport is an officer, and essential component, of the Department of Transport. The factors leading to this conclusion were:

1. The *Department of Transport Act* specifies that the Minister of Transport will preside over the department;

2. Constitutional experts agree that the Department of Transport, as all other portfolio departments, must have a minister because departments are extensions of the authority of their ministers;

3. The *Access to Information Act* provides that the Minister of Transport is head of his or her department for the purposes of the Act;

4. The *Financial Administration Act* (to which ministers' offices and departments are subject) defines "public officer" to include minister;

5. The definition of "public officer" in the *Interpretation Act* includes the Minister of Transport;

6. In its ordinary meaning, "officer" of a government department includes the presiding minister; and

7. To conclude otherwise would lead to absurd results such as: allowing ministers to shield departmental records from the right of access by holding them in the minister's office; allowing ministers to assert privacy rights with respect to information relating to their position and functions; and allowing ministers to escape accountability through transparency – a purpose ascribed to the *Access to Information Act* by the Supreme Court of Canada.

Consequently, the commissioner recommended that the requested agendas be disclosed, subject to justifiable exemptions to protect certain personal information contained in the agendas. The Minister of Transport disagreed with the commissioner's findings and declined to follow his recommendations. As a result, the commissioner, with the consent of the requester, will apply to the Federal Court for a review of the continuing refusal to disclose the requested records.

Case 2: The Agendas of the Prime Minister Held by the RCMP

Background

The complaint arose from the RCMP's response to an access request for copies of the agendas of former Prime Minister Chrétien covering the period January 1, 1997, to November 4, 2000. The RCMP's response to the access request was as follows:

> "Based on the information provided in your request, we have conducted a search of our records in Ottawa, Ontario, and regret to inform you that we do not receive copies of the Prime Minister's daily schedule. Such information is held by the Prime Minister's Office."

During the investigation, some 386 pages of prime ministerial agendas, relevant to the access request, were found in the RCMP's files. It was also determined that copies of the Prime Minister's agendas were sent, every day, to the offices of the Prime Minister's Protective Detail at RCMP headquarters. In other words, the RCMP's response was entirely inaccurate.

The commissioner concluded that the RCMP's failure to locate and process the agendas, and its positive assertion that the RCMP did not receive copies of the former Prime Minister's agendas, was not the result of an intention to mislead the requester. Rather, he attributed the false response to carelessness on the part of the officer who undertook the search and failure by the RCMP's access to information professionals to play a challenge and follow-up role with the Prime Minister's Protective Services.

Once the records were located, the RCMP sent a second response to the requester, refusing to disclose the agendas, in whole or in part, for the following reasons:

> "A review of the said records reveals that all of the information you have requested qualifies for exemption under section 19(1) and 17 of the *Access to Information Act*. Additionally, some information was excluded from access by virtue of section 69(1) of the Act."

Legal Issues

Unlike the preceding and succeeding cases, involving agendas which were held in the offices of a minister and the Prime Minister, there was no dispute in this case as to whether the agendas were subject to the right of access – they clearly

were. The RCMP is a government institution to which the *Access to Information Act* applies and the records were held on the premises of the RCMP headquarters under the daily control of RCMP officers.

The issues in this case were:

1. whether or not every entry on every page of these agendas constitutes "personal information" of the former Prime Minister or others which qualifies for exemption from the right of access under subsection 19(1) of the Act;

2. whether or not the entire contents of these agendas qualify for exemption under section 17 of the Act because, if disclosed, they could reasonably be expected to threaten the safety of the former Prime Minister, the present Prime Minister or their protective details;

3. whether or not certain entries constitute cabinet confidences; and

4. whether or not the RCMP discharged its obligation under section 25 of the Act, to sever and disclose any portion of the agendas which does not qualify for exemption or exclusion under sections 17, 19 and 69.

Section 19 – Personal Information

The RCMP admitted that, if the request had been for the agendas of the RCMP Commissioner, it would have severed and released the work-related portions of the agendas and withheld the portions relating to purely personal affairs.

The reason it would have taken such an approach is because paragraph 8(2)(j) of the *Privacy Act* restricts the zone of privacy for "officers and employees of a government institution". The RCMP Commissioner is an officer of the RCMP and, hence, may not assert privacy rights to refuse to disclose information relating to his position and functions.

The reason the RCMP did not take the same approach with the Prime Minister's agendas is because, in the RCMP's view, the Prime Minister is not an officer or an employee of any government institution and, hence, the Prime Minister's zone of privacy is not restricted by paragraph 8(2)(j) of the *Privacy Act*.

The Information Commissioner rejected this argument, finding that the Prime Minister is an officer of the Privy Council Office (a government institution subject to the Act). The reasons in this regard are set out in the succeeding case summary.

Consequently, the Information Commissioner concluded that the portions of the Prime Minister's agendas which relate to his position and functions as head of PCO, and/or which relate to public activities or events attended by the former Prime Minister, should be disclosed.

Section 17 – Threat to the Safety of the Prime Minister

The RCMP argued that disclosure of any portion of the agendas – even public events or blank pages – could threaten the safety of both the former Prime Minister and the current Prime Minister. The RCMP argued that patterns of behaviour could be drawn from the agendas and used to plan attacks on the Prime Ministers. The RCMP also argued that it did not have to show that disclosure would pose a "probable" threat. Rather, it argued that it need only show that its concern in this regard is not frivolous or exaggerated – that it is reasonable.

The Information Commissioner found that the proper test is that of reasonable expectation at the level of a probability. However, he concluded that the RCMP had not discharged its burden to demonstrate that the likelihood of threat from disclosure is either probable or the lesser test of being non-frivolous or non-exaggerated. He concluded that the only patterns of behaviour, not already publicly known, which could be learned from the agendas, relate to routine and widely known meetings held by the former Prime Minister. No evidence was presented to show how knowledge of these patterns – which don't involve moving or exposing the Prime Minister – would pose a risk to the former Prime Minister's safety or the safety of his security detail. As well, no witness was able to demonstrate how disclosure of the agendas for days containing no scheduled events would meet the section 17 test.

The RCMP admitted that it has not assessed the security implications of disclosure in today's context when Mr. Chrétien has left public life. The RCMP presented no evidence to support the contention that disclosure of the agendas of the former Prime Minister could pose a threat to the safety of Prime Minister Martin.

Section 69 – Cabinet Confidence Exclusion

Portions of the requested agendas were withheld as constituting cabinet confidences. Since no subject-matter details were included in the agendas, the commissioner concluded that section 69 had been improperly applied. The mere fact that members of cabinet met at a certain date and time does not, in the commissioner's view, constitute a cabinet confidence.

Recommendations

For the foregoing reasons, the Information Commissioner concluded that the RCMP's decision to withhold the requested records in their entirety was unjustified. He recommended that the agendas be disclosed with the exception of information of a private character, such as medical appointments, family events and private receptions.

The RCMP Commissioner refused to accept the Information Commissioner's recommendations. With the consent of the requester, the Information Commissioner will apply to the Federal Court of Canada for a review of the RCMP's refusal to disclose the requested records.

Case 3: The Agendas of the Prime Minister Held in the PMO and PCO

Background

The complaint arose from the Privy Council Office's (PCO) responses to six access requests for former Prime Minister Chrétien's agendas. Each request covered a different period of time; collectively, they covered the period from January 1994, to June 25, 1999. With respect to five of the requests, PCO informed the requester that it held no agendas. PCO did not inform the requester that the requested agendas were held by the Prime Minister's Office (PMO) – but that is where they were held.

With respect to one request, most of the relevant records were held in the PMO, but some were also held in the office of the then Clerk of the Privy Council, Mel Cappe. In its response to this request, PCO refused to confirm or deny whether it held any agendas saying only that if it did, they would qualify for exemption as the Prime Minister's personal information.

After the complaint was made to the Information Commissioner, and the investigation began, PCO clarified its reasons for refusal to disclose the requested agendas. With respect to the agendas held in the PMO, the PCO position was that they were not subject to the right of access because only the PCO, not the PMO, is subject to the *Access to Information Act*.

With respect to the agendas found in the PCO (which were clearly subject to the right of access), the refusal to disclose was based on subsection 19(1) of the Act, in order to protect the privacy of the Prime Minister.

It was not until much later in the investigation that PCO invoked section 17 of the Act, arguing that disclosure of the agendas, in whole or in part, could

reasonably be expected to threaten the safety of the former Prime Minister and his protective detail. PCO also took the position that disclosure of any part of former Prime Minister Chrétien's agendas would pose a threat to the safety of Prime Minister Martin.

Some portions of the agendas were also claimed to constitute cabinet confidences which would be excluded from the right of access under section 69 of the Act.

During the investigation, PCO ceased reliance on the provision in the Act pursuant to which it had refused to confirm or deny that PCO held some copies of the Prime Minister's agendas.

Legal Issues

1. Are the agendas of the Prime Minister, which are held on the premises of the PMO, under the control of the PCO for the purposes of the right of access set out in section 4 of the *Access to Information Act*?

2. If so, may the agendas, in whole or in part, be exempted or excluded from the right of access under sections 19 (privacy), 17 (safety of individuals) or 69 (cabinet confidences) of the Act?

3. Are the agendas of the Prime Minister, which were held in the PCO at the time of the request, exempt from the right of access, in whole or in part, under sections 19, 17 or 69 of the Act?

Findings and Recommendations

With respect to the first issue, the Information Commissioner concluded that the agendas held in the PMO were under the control of the PCO for the purposes of section 4 of the Act. He also concluded that the Prime Minister is an officer of the PCO. In coming to those conclusions, the commissioner assessed the same factors described previously in case summary #1.

With respect to the second and third issues, the commissioner concluded that section 17, 19 and 69 had been improperly invoked. In this regard, he relied on the same analysis as described in case summary #2.

Records Management and Process Concerns

The investigation determined that the agendas of the former Prime Minister were not maintained in a manner which reflected their status and importance as records of archival importance to Canada.

The commissioner found that there were no procedures in place or followed to ensure that accurate and complete agendas for each day were created, and archived for eventual, mandatory transfer to the National Archives. Thus, he concluded the existing version of the agendas of the former Prime Minister is inaccurate and incomplete. Since prime ministerial agendas are historically significant, created and maintained at taxpayer expense and concern official functions, the commissioner found these shortcomings in records management practices to be profoundly troubling.

Recommendations

For all these reasons, the Information Commissioner recommended to Prime Minister Martin that the requested agendas be disclosed, subject only to exemptions to protect entries unrelated to the prime ministerial functions of the former Prime Minister. The commissioner also recommended that a plan for the proper management of prime ministerial agendas be developed with the National Archivist of Canada and the Information Commissioner.

Prime Minister Martin refused to accept the commissioner's recommendations. Thus, with the consent of the requester, the commissioner will ask the Federal Court of Canada to review the refusal by PCO to disclose the requested records.

Case 4: Records Held in the Office of the Minister of National Defence Concerning Senior Level Committee Meetings

Background

The complaint arose from the responses by the Department of National Defence (ND) to requests from two individuals for access to records prepared for, or emanating from, so-called "M5" meetings. "M5" was a recurring meeting involving the then Minister of Defence Art Eggleton and five other officials (Chief of Defence Staff, Deputy Minister, Executive Assistant, Director of Operations and Director of Communications).

In response to both requests, ND denied having any records relevant to the requests. One requester complained to the Information Commissioner, the other did not. However, once the Information Commissioner learned that the same response had been given to two requesters, the commissioner investigated both responses.

During the investigation, many hundreds of records relevant to the access requests were uncovered. Some 650 records were found in the minister's office. These included: notes taken at M5 meetings by the minister's exempt staffers; agendas; and scheduling records. Some 750 records were found elsewhere in ND including: briefing documents, charts, maps, satellite images and reports.

During the investigation, ND processed and released (subject to exemptions) all M5 records which were located, except for the records which were located in the former minister's office. The commissioner found that all the exemptions applied to the released records were justified. With respect to the M5 records found in the minister's office, ND took the position that they were not subject to the right of access.

In ND's view, although the Department of National Defence is subject to the Act, the office of the Minister of National Defence is not a component part of ND and, hence, is not subject to the Act.

Issues

1. Were the false answers intentional?
2. Were the M5 records which were held in the minister's office under the control of ND for the purposes of the right of access set out in section 4 of the *Access to Information Act*?
3. If so, do any exemptions or exclusions apply to justify a refusal to disclose the requested records?
4. Was the management of M5 records appropriate?

Findings

Issue #1

The false answers to the access requests resulted, in the commissioner's view, from inaccurate and misleading information about the M5 process being given to the department's access to information professionals by the offices of the Minister, Deputy Minister and Chief of Defence Staff. As well, the commissioner attributed the false answers to the failure by the department's access to information professionals to play an appropriate challenge function. Given the role, composition and frequency of M5 meetings, the commissioner found that there should have been a very high degree of skepticism in the access to information unit concerning the "no records" responses it received from the senior officials.

Issue #2

The commissioner concluded that the M5 records held in the minister's office were under the control of ND for the purposes of the right of access. In coming to that conclusion, he took into account the factors discussed in case summary #1.

Issue #3

The commissioner agreed that all exemptions and exclusions put forward by ND, in respect of the records held in the minister's office, were justifiable. For example, the commissioner agreed that the notes taken at the meeting by exempt staff members qualified for exemption under section 21, as 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."

Issue #4

During this investigation, it became clear that there were serious shortcomings in the state of knowledge of M5 members about records retention and disposition rules and about the basics of good records management practices. First, information was destroyed in contravention of the *National Archives Act*. In particular, some agendas of M5 meetings were disposed of by M5 members immediately after the meetings on the mistaken assumption that the records were transitory and, hence, covered by the National Archivist's blanket authorization for destruction of transitory records. In fact, agendas would only qualify as transitory if they were permanently recorded and preserved in another record such as M5 meeting minutes. Since no minutes were kept, the agendas were not "transitory" and at least one copy should have been preserved.

Second, notes taken at M5 meetings were wrongly considered "personal" and some were destroyed without authorization of the minister or the National Archivist. None of the notes were included in properly indexed and accessible records systems. This shortcoming in knowledge and practice is surprising in light of the fact that Treasury Board has issued government-wide guidance on the proper treatment of notes taken at work. The guidance is contained TBS Implementation Report No.67, September 17, 1999. In fact, Appendix B to the IR is devoted to explaining the meaning of "transitory records" and a number of examples or scenarios are included. Scenario E reads as follows:

"You keep a notebook as an ongoing record and reminder of your daily activities. The notebook contains information related to meetings and presentations you have attended as well as information; your lunch dates and dentist appointments. Any information in the notebook that contributes to the

documentation of a program or activity should be copied to the departmental record in a timely manner. Once that has been done, you may dispose of the notebook at your discretion. If the notebook contains information relevant to an Access to Information request received prior to its disposal, it must be included in the records reviewed for responding to the request."

Third, records associated with M5 should have been tracked to show their connection with M5. For archival and accountability purposes, good records management practices require not only that records be kept (we know these records exist in indexed files), but that the use of the records (i.e. for discussion at M5) be tracked and recorded.

Fourth, inadequate records were kept to document the decisions, considerations and activities of M5. Government information management policy, and the very traditions of public service, require that adequate records be kept to document government decisions, considerations and actions. For example, the most recent version of the government's *Policy on the Management of Government Information (May 1, 2003)* is not restricted to government institutions as described in the *Access to Information Act*. Rather, the policy applies to the Government of Canada as a whole as is clear from its "Policy Objective" and definition of "government information". The policy makes it clear that there is an obligation, inter alia, to create the records necessary to:

> "document decisions and decision making processes to account for government operations, reconstruct the evolution of policies and programs, support the continuity of government and its decision-making, and allow for independent audit and review." (paragraph 2.2(d))

The policy also makes clear that there is an obligation on government to:

> "manage information regardless of its medium or format, to ensure its authenticity, accuracy, integrity, and completeness for as long as it is required by the *National Archives Act, National Library of Canada Act, Privacy Act, Access to Information Act*, specific departmental statutes, and other laws and policies." (paragraph (e), p. 3)

The commissioner expressed the view that the very notions of good, accountable governance presuppose the creation and maintenance of adequate, accurate records. Certainly, the whole scheme of the *Access to Information Act* depends on records being created, properly indexed and filed, readily retrievable, appropriately archived and carefully assessed before destruction to ensure that valuable information is not lost. So, too, is our ability as a nation to preserve, celebrate and learn from our history. And, of course, good decision-making by government presupposes the existence of a well-documented body of precedent and expertise.

The commissioner concluded that, at a minimum, the following records should have been generated and maintained as part of the support for M5 meetings:

1) Agendas

2) Minutes

3) Records of decision

4) Records of documents used and tabled

5) Records of attendees

The evidence of General Baril, then Chief of the Defence Staff, supports the view that such record-keeping would not have interfered with the informal, ad hoc nature of M5. In this regard, General Baril testified:

Q.: "There are two things, General, I would like to ask you as we finish. The practice that seems to have developed around M5 of keeping it very informal and not having a written agenda, not having any notation of subject matters at all, what is your personal feeling about the prudence of that approach?

A.: That's a bit of a loaded – no, interesting question. On one side, politicians are politicians. And I think if I want to keep this very open-minded exchange between me, and the Minister and the DM, I think we've got to be…Now, I personally understand.

On the other hand — and I think you suggested the last time that we met here for record purposes — it would be quite easy to have a system in place to make it easier to track for the population of Canada, for the history of our nation, where are we going in the decision-making process, because there are some pretty difficult decisions that will start, originate or finish in those meetings. And it would be much easier to track in five years, or two years, or 20 years from now how it happened. A fairly easy system could be put in place without creating any document, or not very many.

But I personally feel that the Minister's office should be the lead and should tell us to do that. He runs the department. He is accountable to the Government of Canada. And if it would be his choice to have an easier access to what is going up there, according to the law of the land — I'm not a specialist in the law of the land — probably an easy system could be put in place."

Recommendations

In light of the foregoing, the Information Commissioner made recommendations to the Minister of National Defence, including:

1. the M5 records held in the minister's office be disclosed, subject to applicable exemptions and exclusions;

2. ND's access to information professionals be given direction concerning their challenge and follow-up role to ensure proper searches; and

3. ND follow the government's information management policy for all its senior level meetings and committees, including the preparation of agendas, minutes and ensuring paper flow tracking.

The minister refused to accept the recommendations and, with the consent of the requester, the commissioner has asked the Federal Court to review the minister's decision to refuse requested records.

Regrettably, there is no jurisdiction for the Federal Court to review the minister's refusal to follow the government's records management policy for the future. The refusal cries out for review by the President of Treasury Board, taking into account his obligation under paragraph 70(1)(a) of the Act to:

> "cause to be kept under review the manner in which records under the control of government institutions are maintained and managed to ensure compliance with the provisions of this Act and the regulations relating to access to records."

ND's refusal to agree to create and maintain appropriate records should also be taken up by Parliament.

Cumulative Index of Case Summaries

A cumulative index of Annual Report Case Summaries from 1993-94 is available on request or at the Commissioner's website: **www.infocom.gc.ca**.

CHAPTER V
LEGAL SERVICES

The *Access to Information Act* in the Courts

A. The Role of the Judiciary

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

Requesters dissatisfied with responses received from government to their access requests first must complain to the Information Commissioner. If they are dissatisfied with the results of his investigation, they have the right to ask the Federal Court to review the department's response. If the Information Commissioner is dissatisfied with a department's response to his recommendations, he has the right, with the requester's consent, to ask the Federal Court to review the matter. This year, the Information Commissioner filed four new applications for review (section 42).

This reporting year, the commissioner's office investigated 1,140 complaints. 104 cases could not be resolved to the commissioner's satisfaction and these resulted in four new applications for review being filed by the commissioner (101 cases concerned the same matter, i.e. disclosure of the 1911 census and were consolidated into one application for review). Eight applications for court review were filed by dissatisfied requesters (section 41). Third parties opposing disclosure filed 17 applications (section 44). Individuals or the Crown may ask the Federal Court to judicially review pursuant to the *Federal Court Act* alleged excesses of jurisdiction by the commissioner in the conduct of his investigations. In this reporting year, 22 applications were initiated against the Information Commissioner by the Crown, certain witnesses and other individuals.

Court Decisions Issued in Access Litigation

This year, with respect to access litigation, the Federal Court of Canada issued 17 decisions, the Federal Court of Appeal issued 2 decisions and the Supreme Court of Canada granted leave to appeal in one case. Summaries follow of the decisions in which the Information Commissioner is or was a party.

B. The Commissioner in the Courts

I. Cases Completed

The Information Commissioner of Canada* v. *Transportation Accident Investigation and Safety Board, Nav Canada and the Attorney General of Canada, 2005 FC 384, Court files T-465-01, T-888-02, T-889-02, T-650-02, Snider J., March 18, 2005

Nature of Proceedings

There were four (4) applications for judicial review brought pursuant to paragraph 42(1)(a) of the *Access to Information Act* (the "ATIA").

Factual Background

The Information Commissioner sought judicial review of the decisions of the Executive Director of the Canadian Transportation Accident Investigation and Safety Board (hereinafter, the "TSB") to refuse to disclose requested records. In addition, the Information Commissioner sought an order declaring that subsection 9(2) of the *Radiocommunication Act*, R.S.C. 1985, c. R-2, infringes paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*.

The records at issue consist of tapes and transcripts of communications between air traffic control and aircraft personnel ("ATC communications") with respect to the provision of aeronautical services in relation to four separate airplane collisions or crashes, namely the Clarenville Occurrence (T-465-01), the Penticton Occurrence (T-650-02), the Fredericton Occurrence (T-888-02), and the St. John's Occurrence (T-889-02). ATC communications are merely an exchange of information related to the provision of aeronautical services.

In each case, TSB maintained the position that ATC communications are personal information within the meaning of subsection 19(1) of the ATIA and that disclosure of the ATC communications is not warranted under subsection 19(2) of the ATIA. Nav Canada intervened in these applications to raise and argue third-party exemptions pursuant to paragraphs 20(1)(b) and (d) of the Act. More specifically, Nav Canada argued that the ATC communications either fit the criteria in paragraph 20(1)(b), either as commercial or technical information, or are records the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

Issues Before the Court

The issues as defined by the court are as follows:

1) Do ATC communications constitute "personal information" as defined in section 3 of the *Privacy Act*, thus preventing disclosure under subsection 19(1) of the ATIA?

2) Did the TSB err in determining that disclosure of the ATC communications was not warranted by subsection 19(2) of the ATIA?

3) Does subsection 20(1) of the ATIA prohibit the disclosure of ATC communications?

4) Can the personal information in the ATC communications reasonably be severed from the remaining information pursuant to section 25 of the ATIA?

5) Does subsection 9(2) of the *Radiocommunication Act* infringe paragraph 2(b) of the Charter and, if so, is such an infringement justified under section 1 of the Charter?

Findings

The court refused to determine the constitutional issue and did not address the section 20 exemption. The court found against the Information Commissioner on the remaining issues. A summary of the reasons is available on request or at **www.infocom.gc.ca**.

Outcome

The four (4) applications for review were dismissed.

Future Action

The Information Commissioner is appealing Madam Justice Snider's decision.

The Attorney General of Canada et al.* v. *Information Commissioner of Canada, Court files T-984-04 to T-990-04, T-992-04 to T-1002-04

Nature of Proceedings

These proceedings involved eighteen (18) applications for judicial review, brought by the Attorney General of Canada and various government officials (hereinafter, "the government"), against the Information Commissioner, under section 18.1 of the *Federal Courts Act*, for an order, *inter alia*, declaring that the Information Commissioner (and/or his delegate) lacks jurisdiction to make certain confidential orders, and quashing those confidentiality orders issued.

Factual Background

The within applications for review have their background in that portion of the proceedings adjudicated by the Federal Court in Canada (*Attorney General et al.*) v. Canada (*Information Commissioner*) 2004 FC 431, on the issue of the Information Commissioner's jurisdiction to impose confidentiality orders on witnesses appearing before the Information Commissioner's delegate during the course of investigations carried out under the ATIA (the Group B – "Confidentiality Order Applications"). As reported in the 2003-04 annual report of the Information Commissioner, at pages 9 –13, on this issue, Justice Dawson held that the imposition of confidentiality orders is a procedure which the commissioner may follow when exercising his power to compel persons to give evidence. Yet, Justice Dawson held that the particular orders issued in that case were overly broad, in that they went further than was reasonably necessary in order to achieve the commissioner's objects and therefore infringed upon the witnesses' rights to freedom of expression enshrined in paragraph 2(b) of the Canadian Charter of Rights and Freedom.

In accordance with Justice Dawson's ruling, the Information Commissioner, on April 23, 2004, issued new confidentiality orders to: Bruce Hartley, Art Eggleton, Emechete Onuoha, Merribeth Morris, Randy Mylyk, Sue Ronald, Mel Cappe, Judith Mooney and George Young. These confidentiality orders were more limited in scope.

On May 20, 2004, the Attorney General of Canada and those witnesses to whom confidentiality orders had been reissued, filed some 18 applications for judicial review against the Information Commissioner seeking to have the new confidentiality orders quashed.

By July 22, 2004, the Office of the Information Commissioner had completed the fact-gathering phase of his investigations into complaints arising from requests for the (former) Prime Minister's agendas; the (former) Minister of Transport's agendas; and records pertaining to the M5. The Information Commissioner's delegate therefore terminated the confidentiality orders issued to the above-noted witnesses.

Outcome

Thereafter, on August 19, 2004, the Attorney General of Canada and witness applicants discontinued the 18 judicial review applications against the Information Commissioner on the basis that the applications were moot.

The Attorney General of Canada et al.* v. *Information Commissioner of Canada, Court files T-589-04 and T-1076-04

Nature of Proceedings

This was an application for judicial review of the decision of the Information Commissioner's delegate to issue a confidentiality order binding on legal counsel for the National Archivist and the Chief Statistician.

Factual Background

The Information Commissioner received some 90 complaints by requesters who had sought access to the 1911 Census of Canada returns. Statistics Canada had refused to disclose the records on the ground that they were exempt pursuant to section 24 of the *Access to Information Act* and section 17 of the *Statistics Act*. In the course of carrying out his investigation, the Deputy Information Commissioner received oral testimony from both the National Archivist and the Chief Statistician. The two witnesses appeared before the Deputy Information Commissioner accompanied by counsel who also represented the Attorney General of Canada. The Deputy Information Commissioner requested that counsel sign an undertaking to keep the questions asked, answers given, and exhibits used during the interview confidential except with the client's authorization. The purpose of the undertaking was to give the witnesses the opportunity to give evidence in private and out of the presence of their superiors. Counsel signed the undertaking.

The Attorney General of Canada then brought an application for judicial review, seeking declarations that the Information Commissioner's delegate erred in the exercise of his discretion to issue the confidentiality orders, and a declaration that the Information Commissioner's delegate exceeded his jurisdiction in seeking to obtain undertakings from counsel.

Outcome

The Information Commissioner subsequently reported to the Minister of Industry (the minister responsible for Statistics Canada) the results of his investigation into the 90 complaints. Given that the report referred extensively to the testimony of the National Archivist and the Chief Statistician, the Deputy Information Commissioner was of the view that the two confidentiality orders were no longer necessary. Consequently, counsel was released from the undertakings in the confidentiality orders. As a result, the Attorney General discontinued the judicial review applications.

Sheldon Blank* v. *The Information Commissioner of Canada, T-2324-03, Federal Court, Layden-Stevenson, J., May 27, 2004 (see annual report 2003-04, p. 59 for further details)

Factual Background

The applicant, Sheldon Blank, brought an application for a mandamus order on December 9, 2003, asking that the Information Commissioner be required to issue his report to the applicant pursuant to section 37 of the *Access to Information Act*. The applicant was of the view that his complaint had not been investigated and reported on in a timely manner.

Before the matter was heard, Mr. Blank was sent a report of the results of the commissioner's investigation.

Outcome

The application was dismissed by Madam Justice Layden-Stevenson on May 27, 2004, as being moot.

Sheldon Blank* v. *The Information Commissioner of Canada, Court file T-1623-04 Federal Court, O'Reilly, J., March 1, 2005

Nature of Proceeding

This was an application by the Information Commissioner to strike the applicant's application for an order in the nature of mandamus on grounds of mootness.

Factual Background

The applicant, Sheldon Blank, brought an application for a mandamus order in an effort to require the Information Commissioner to issue his report to the applicant pursuant to section 37 of the *Access to Information Act*. The applicant submits that his complaint had not been reported on in a timely manner. The Information Commissioner supplied the applicant with that report on February 15, 2004, rendering the application for mandamus moot and brought an application to strike on grounds of mootness. The applicant urged the court to hear and decide his application nonetheless.

Issue Before the Court

Should the court exercise its discretion to hear a matter that has become moot?

Findings

The court's reasons are summarized at **www.infocom.gc.ca**.

Outcome

The Information Commissioner's motion to strike was allowed without costs.

II. Cases in progress - Commissioner as Applicant/Appellant

The Information Commissioner* v. *The Minister of Industry (Court files T-53-04, T-1996-04 and T-421-04) Federal Court (See annual report 2003-04, p. 53 for more details)

Nature of Proceedings

This was a motion by the respondent Minister of Industry to strike the Information Commissioner's applications for review of government refusals to disclose requested records.

Factual Background

At issue in the two underlying applications was the refusal of the Minister of Industry to disclose individual census returns to a large number of requesters. The census records for the years 1911, 1921, 1931, and 1941 were sought.

In the first application, a number of genealogists sought disclosure of the 1911 census records for various regions of Canada. After receiving complaints from 97 requesters, the Information Commissioner investigated the refusals and recommended that the Minister of Industry disclose the records. The minister refused disclosure on the ground that the confidentiality provisions in the *Statistics Act* precluded disclosure. The Information Commissioner brought an application for judicial review.

In the second application, the Algonquin Nation Secretariat sought the disclosure of the 1911, 1921, 1931 and 1941 census records for the purpose of preparing statements of claim for submission to the federal Comprehensive Claims Policy. The Information Commissioner investigated and recommended that the records be disclosed pursuant to paragraph 8(2)(k) of the *Privacy Act* and section 35 of the *Constitution Act, 1982*. The minister refused disclosure on the ground that the confidentiality provisions in the *Statistics Act* precluded disclosure of the records to anyone, regardless of the purpose for which the records were sought.

Issue Before the Court

The sole issue before the court was whether the applications should be struck as having no chance of success on judicial review.

Outcome

After a half-day of oral argument, counsel for the respondent conceded that the respondent could not meet the burden of showing that the applications were "bereft of any chance of success" and indicated a willingness to abandon the motion. A schedule for the remaining steps in the litigation was agreed to by the court and the applications will likely be heard in the fall of 2005.

The Information Commissioner* v. *The Minister of Transport, Court file T-55-05

Nature of Proceeding

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

Factual Background

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

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

Transport Canada has conceded that the information in and of itself does not constitute personal information, yet it maintains that the release of CADORS information would amount to disclosure contrary to subsection 19(1) of the Act because of what is referred to as the "mosaic-effect" (a concept used in relation to information pertaining to security and intelligence in the context of assessing a reasonable expectation of injury). Specifically, Transport Canada states that it

is possible that CADORS information might be linked with other information publicly available to reveal "personal information" concerning identifiable individuals.

In the Information Commissioner's view, the information contained in the database pertains to aircraft and air occurrences, not individuals, such that section 19 of the ATIA does not apply. The minister has refused to accept the Information Commissioner's recommendation that the requested records be disclosed. On January 14, 2005, the Information Commissioner of Canada filed an application for judicial review of the minister's access refusal.

Both the Information Commissioner and the respondent have filed their affidavit materials in relation to the application.

Future Steps in the Proceeding

This proceeding will continue before the Federal Court, and results will be reported in next year's annual report.

The Information Commissioner* v. *The Minister of National Defence, Court file T-210-05

Nature of Proceedings

This is an application for judicial review, commenced pursuant to paragraph 42(1)(a) of the *Access to Information Act*, for a review of the refusal by the Minister of National Defence to disclose records requested under the ATIA pertaining to "M5 meetings" for 1999.

Factual Background

See the summary at pages 44 to 49.

Future Steps in the Proceeding

Documentary evidence in support of the application for review has yet to be filed. The Information Commissioner will report the results and/or progress of these proceedings in next year's annual report.

The Information Commissioner of Canada* v. *Minister of Environment, T-555-05, Federal Court

Nature of Proceeding

The Information Commissioner brought an application for judicial review on March 24, 2005, with the consent of Ethyl Canada Inc. with respect to Environment Canada's refusal to disclose records requested under the Act.

Disclosure of these records or portions thereof was at issue in a previous related proceeding before the Federal Court (see pages 15-16 of the 2002-03 annual report for further details).

Factual Background

On September 22, 1997, Ethyl Canada sought access to discussion papers, the purpose of which was to present background explanations, analyses of problems or policy options to the Queen's Privy Council for Canada for consideration by the Queen's Privy Council for Canada in making decisions with respect to Methylcyclopentadienyl Manganese Tricarbonyl (MMT).

Issues Before the Court

1) Did the respondent err in relying upon paragraphs 21(1)(a) and (b) of the Act to exempt from disclosure information falling within the ambit of paragraph 69(3)(b) of the Act?

2) By relying on paragraphs 21(1)(a) and (b), did the respondent re-cloak in 20 years of secrecy information covered by paragraph 69(3)(b) of the Act? However, paragraph 69(3)(b) provides that such information must be disclosed forthwith upon the making public of the decision to which it relates or, if the decision is not made public, four years after the decision is made.

This matter is ongoing.

III. Cases in Progress - The Commissioner as Respondent in Federal Court

The Attorney General of Canada and Mel Cappe* v. *Information Commissioner of Canada, Court file A-223-04

Nature of Proceedings

This is an appeal of Madam Justice Dawson's March 25, 2004, decision in *The Attorney General of Canada et al.* v. *The Information Commissioner of Canada*, 2004 FC 431 on the Group E – "Solicitor-Client Application", an application commenced under section 18.1 of the *Federal Courts Act*. In the Group E - proceeding, Justice Dawson dismissed an application by the Attorney General of Canada and Mel Cappe against the Information Commissioner for: i) a declaration that the Information Commissioner lacks jurisdiction to require the production of certain documents alleged to be the subject of solicitor-client privilege; and ii) an order of certiorari, quashing the Information Commissioner's order which compelled the production of one document asserted to be subject to solicitor-client privilege.

Note: The case, *The Attorney General of Canada et al*. v. *The Information Commissioner of Canada*, 2004 FC 43, has been reported in a number of earlier annual reports to Parliament, most recently in the Information Commissioner's 2003-04 annual report, at pages 9 –13.

Factual Background

In the course of investigating six complaints concerning the head of the Privy Council Office's responses to access requests for copies of the former Prime Minister's daily agendas for the fiscal or calendar years 1994 to June 25, 1999, the Information Commissioner served Mel Cappe, then Clerk of the Privy Council, with a subpoena *duces tecum*, which required that Mr. Cappe attend to give evidence before the commissioner's delegate and to bring with him certain records.

In response, Mr. Cappe declined to provide the Office of the Information Commissioner with eleven documents, which Mr. Cappe identified as being responsive to the subpoena *duces tecum*. Instead, the Information Commissioner was provided with a general description of the 11 documents. The basis upon which the documents were withheld from the Information Commissioner (and only a description was given) was the government's assertion that the 11 documents were protected by solicitor-client privilege and therefore not subject to the Information Commissioner's *prima facie* right of review.

Despite the claim of solicitor-client privilege, the Information Commissioner ordered the production of one of the eleven documents. According to this document's description, its purpose was to determine how to respond to one of the access requests then being investigated by the Information Commissioner's office.

In response to the order of production, Mr. Cappe produced the record to the Information Commissioner's delegate. Meanwhile, however, the government and Mr. Cappe commenced a judicial review proceeding against the Information Commissioner wherein they sought: a) a declaration from the Federal Court that all eleven documents identified as responsive to the subpoena *duces tecum* were subject to solicitor-client privilege and that the Information Commissioner, as a result, lacked the jurisdiction to compel these documents' production; and b) an order of *certiorari* which would quash, after the fact, the Information Commissioner's order to compel the one document which he had ordered to be produced.

This application *inter alia* was determined by the Federal Court on March 25, 2004. Here, Madam Justice Dawson held that subsection 36(2) of the ATIA provides the Information Commissioner with a *prima facie* right of access to documents that are protected by solicitor-client privilege. In doing so, she rejected the Crown's argument for a restrictive interpretation which would have required the Information Commissioner to establish that the production of the document was absolutely necessary for the Information Commissioner's investigations prior to his ordering that it be produced. Such a restrictive interpretation, Justice Dawson concluded, was inconsistent with Parliament's clear language, set out in the Act. In support of her ruling, Justice Dawson pointed *inter alia* to: the scheme of the Act, in general, and its overarching mandate of independent review; the clear words of Parliament as set out in subsection 36(2) of the Act. In addition, Justice Dawson noted that the production of privileged material to the Information Commissioner does not compromise privilege and that the issue had already been addressed by the Federal Court of Appeal in the *Ethyl* case, *Canada (Information Commissioner)* v. *Canada* (*Minister of Environment*) (2000), 187 D.L.R. (4th) 127 (F.C.A), (Court of Appeal file A-761-99), leave to appeal to S.C.C. dismissed, (2000) S.C.C. file 27956.

In this appeal, the Attorney General and Mel Cappe challenge Justice Dawson's decision contending *inter alia* that the Information Commissioner is required to establish absolute necessity prior to compelling the production of records during the course of his in camera investigation which are asserted to be the subject of solicitor client-privilege.

Issues Before the Court

Whether the Application Judge correctly interpreted subsection 36(2) of the Act, given:

1) the clear wording of subsection 36(2) of the Act;

2) the public policy goals sought to be achieved by Parliament in the Act and the role of the Information Commissioner; and

3) that the relevancy of the document in issue to the investigation being carried out by the Information Commissioner is a matter for determination by the Information Commissioner.

Future Steps in the Proceeding

A date for the hearing of the appeal has been set for May 4, 2005. The outcome of these judicial proceedings will be reported in next year's annual report.

Francis Mazhero* v. *The Information Commissioner of Canada, T-313-04, Federal Court

On March 12, 2004, the applicant Mazhero filed a notice of application under section 18.1 of the *Federal Courts Act* in which he sought an order in the nature of *certiorari, mandamus* and declaratory relief against the Information Commissioner of Canada. The sole relief claimed was against the Information Commissioner. The application arose from the applicant's access request under the *Privacy Act*, and his subsequent complaint to the Privacy Commissioner. Accordingly, the applicant improperly initiated this application for review against the Information Commissioner. Given, *inter alia*, that the sole relief claimed by the applicant was against the Information Commissioner and that reviews under section 18.1 are not applicable to purely administrative decisions made by the commissioner within the lawful exercise of his discretion under the *Access to Information Act*, the commissioner brought a motion to strike the application in its entirety on the basis that it was bereft of any chance of success or to remove the Information Commissioner as a party.

The Information Commissioner subsequently brought an amended motion to strike the application for judicial review in accordance with the order of Mr. Justice Rouleau, dated June 17, 2004. Prothonotary Milczynski has reserved judgment after hearing the motion on December 14, 2004.

Matthew Yeager* v. *The Information Commissioner of Canada, T-1644-04, Federal Court

On September 9, 2004, the applicant Yeager filed a notice of application under section 18.1 of the *Federal Courts Act* in which he sought relief against the Information Commissioner of Canada. The application arose from two access requests under the *Access to Information Act*, both dated November 29, 2002. One request was made to the National Parole Board ("NPB"). The second was directed to Correctional Service Canada ("CSC"). On July 22, 2004, and August 25, 2004, the Information Commissioner reported to the applicant the results of his investigations, namely, that in the commissioner's view, the applicant's complaints were not well-founded.

It was the Information Commissioner's position that the application is without merit and ought to be summarily dismissed for the following reasons: 1) a comprehensive alternative scheme has been provided for by Parliament for judicial review of the government institution's refusal to disclose records requested under the Act; 2) the commissioner's recommendation is not amenable to judicial review; and 3) the remedies sought are unavailable against the Information Commissioner. No judgment has yet been rendered by the court in this matter.

IV. The Information Commissioner as an Intervener

The Attorney General of Canada* v. *H.J. Heinz Co. of Canada Ltd. and The Information Commissioner of Canada 2004 FCA 171, T-161-03, Federal Court of Appeal, Desjardins J.A., Nadon J.A., Pelletier J.A., reasons for judgment by Nadon J.A., April 30, 2004

Nature of Proceedings

This was an appeal brought by the Attorney General of a decision of the Application Judge which allowed a third party, Heinz, to raise an exemption other than section 20 in the context of a proceeding brought pursuant to section 44 of the *Access to Information Act*. The Information Commissioner sought and obtained intervenor status for the purpose of the hearing of the appeal.

Factual Background

On June 16, 2000, a request for information was made to the Canadian Food Inspection Agency (hereinafter "CFIA"). Pursuant to section 27 of the ATIA, CFIA advised the third party, Heinz, of its intention to disclose information requested under the *Access to Information Act* and, after receiving representations from Heinz, informed Heinz of its intention to disclose requested records, subject to certain redactions.

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

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

Issues Before the Court

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

Likewise, at issue is a novel argument raised at the hearing of the appeal, namely that the Federal Court of appeal is bound by the principle of *stare decisis* to its previous ruling in *Siemens Canada Ltd.* v. *Canada (Minister of Public Works and Government Services)* (2002), 21 C.P.R. (4th) 575 (F.C.A.).

Findings

See the summary of reasons at **www.infocom.gc.ca**.

Outcome

The Court of Appeal dismissed the Attorney General's appeal with costs.

Action Taken

The Attorney General of Canada has sought and successfully obtained leave to appeal to the Supreme Court of Canada on December 17, 2004 (SCC file 30417). The Information Commissioner has been granted leave to intervene in this appeal.

C. Legislative Changes

Changes Affecting the *Access to Information Act*

The Government public Bill C-11 (37th Parliament, 3rd session), entitled *An Act to give effect to the Westbank First Nation Self-Government Agreement*, received royal assent on May 6, 2004 [Statutes of Canada, 2004, c. 17], and will come into force on April 1, 2005. This bill will replace subsection 13(3) of the *Access to Information Act* by the following:

> Definition of "aboriginal government"
> 13.(3) The expression "aboriginal government" in paragraph (1)(e) means
> a) Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the *Nisga'a Final Agreement Act*; or
> b) the council, as defined in the Westbank First Nation Self-Government Agreement given effect by the *Westbank First Nation Self-Government Act*. (section 16)

The Government public Bill C-14, entitled *An Act to give effect to a land claims self-government agreement among the Tlicho, the Government of the Northwest Territories and the Government of Canada, to make related amendments to the Mackenzie Valley Resource Management Act and to make amendments to other Acts*, received royal assent on February 15, 2004, and will come into force on proclamation, except for sections 107 to 110. This bill will replace subsection 13(3) of the *Access to Information Act* by the following:

Definition of "aboriginal government"
13.(3) The expression "aboriginal government" in paragraph (1)(e) means
a) Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the *Nisga'a Final Agreement Act*; or
b) the Tlicho Government, as defined in section 2 of the *Tlicho Land Claims and Self-Government Act*. (section 97)

Section 97 of this bill has yet to come into force. Once it does, section 107 of the bill provides that on the later of the coming into force of section 16 of the *Westbank First Nations Self-Government Act* (scheduled for April 1, 2005) and section 97 of Bill C-14, subsection 13(3) of the *Access to Information Act* will be replaced by the following:

Definition of "aboriginal government"
13.(3) The expression "aboriginal government" in paragraph (1)(e) means
a) Nisga'a Government, as defined in the Nisga'a Final Agreement given effect by the *Nisga'a Final Agreement Act*; or
b) the council, as defined in the Westbank First Nation Self-Government Agreement given effect by the *Westbank First Nation Self-Government Act*; or
c) the Tlicho Government, as defined in section 2 of the *Tlicho Land Claims and Self-Government Act*. (section 107)

The Government public Bill C-8, entitled *An Act to establish the Library and Archives of Canada, to amend the Copyright Act and to amend certain Acts in consequence*, received royal assent on April 22, 2004 [Statutes of Canada 2004, c. 11], and came into force on May 21, 2004. Section 23 of this bill replaces paragraph 68(c) of the *Access to Information Act* by the following:

a) material placed in the Library and Archives of Canada, the National Gallery of Canada, the Canadian Museum of Civilization, the Canadian Museum of Nature or the National Museum of Science and Technology by or on behalf of persons or organizations other than government institutions. (section 23)

The Government public Bill C-25 (37th Parliament, 2nd Session), entitled *An Act to Modernize Employment and Labour Relations in the Public Sector and to Amend the Financial Administration Act and the Canadian Centre for Management Development Act and to Make Consequential Amendments to Other Acts*, received royal assent on November 10, 2003, and will come into force on proclamation. This bill will amend:

- Subsection 13(3) of the Act by replacing it with the following: the expression "public service of Canada" by "federal public administration", wherever it occurs in the English version. (section 224)

- Subsection 55(3) of the Act by replacing the expression "Public Service" by the expression "public service" wherever it occurs in the English version, other than in the expressions "Public Service corporation", "*Public Service Employment Act*", "Public Service Pension Fund" and "*Public Service Superannuation Act*". (section 225)

The Government public Bill C-8, entitled *An Act to establish the Library and Archives of Canada, to amend the Copyright Act and to amend certain Acts in consequence*, received royal assent on April 22, 2004. Section 22, which came into force on May 21, 2004, replaced paragraph 68(c) of the Act with the following:

c) material placed in the Library and Archives of Canada, the National Gallery of Canada, the Canadian Museum of Civilization, the Canadian Museum of Nature or the National Museum of Science and Technology by or on behalf of persons or organizations other than government institutions.

Proposed Changes to the *Access to Information Act*

The Government public Bill C-11, *An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings*, proposes to amend section 16 of the Act by adding the following after subsection (1):

(1.1) The head of a government institution may refuse to disclose any record requested under this Act that contains information obtained or prepared by the President of the Public Service Commission under the *Public Servants Disclosure Protection Act*, by a senior officer designated under subsection 10(2) of that Act or by a supervisor to whom a public servant has disclosed a wrongdoing under section 12 of that Act and that is in relation to a disclosure made or an investigation carried out under that Act if the record came into existence less than 20 years prior to the request.

This bill reproduces parts of the previous Government Bill C-25 on the same subject-matter, which died on the Order Paper on May 23, 2004.
(2004, Bill C-11, Section 55; read and referred to Committee October 18, 2004)

The private member's Bill C-276, *An Act to amend the Access to Information Act (Crown corporations and Canadian Wheat Board)*, proposes to make crown corporations and the Canadian Wheat Board subject to the *Access to Information Act*. This will be accomplished by replacing the definition of "government institution" in section 3 of the Act by the following:

"government institution" means any department or ministry of state of the Government of Canada listed in Schedule I, any body or office listed in Schedule I or any Crown corporation as defined in the *Financial Administration Act*, and includes the Canadian Wheat Board.
(2004, Bill C-276, Section 1; received First Reading on November 15, 2004)

Amendments to Schedules I and II

Schedule I is amended by adding, under the heading "*Other Government Institutions*", the "Public Health Agency of Canada/Agence de la santé publique du Canada". (Canada Gazette Part II, P.C. 2004-1074, in force September 24, 2004)

The Government public Bill C-6, entitled *An Act to establish the Department of Public Safety and Emergency Preparedness and to amend or repeal certain Acts*, received royal assent on March 23, 2005 [2005, c. 10], and will come in force upon proclamation. Section 9 of this bill will amend Schedule I by striking out, under the heading "*Departments and Ministries of State*" the "Department of the Solicitor General/Ministère du Solliciteur general). Section 10 will further amend Schedule I by adding, under the same heading, the "Department of Public Safety and Emergency Preparedness/Ministère de la Sécurité publique et de la Protection civile".

The Government public Bill C-5, entitled *An Act to provide financial assistance for post-secondary education savings*, received royal assent on December 15, 2004. Once proclaimed into force, section 15 of this bill will amend Schedule II to the Act by striking out the "Department of Human Resources Development Act/Loi sur le ministère du Développement des resources humaines" and the corresponding reference to section 33.5 of that Act. Section 16 will further amend the Act by adding the "Canada Education Savings Act/Loi canadienne sur l'épargne-études" and a corresponding reference to section 11 of that Act.

The Government public Bill C-20, *An Act to provide for real property taxation powers of first nations, to create a First Nations Tax Commission, First Nations Financial Management Board, First Nations Finance Authority and First Nations Statistical Institute and to make consequential amendments to other Acts*, received royal assent on March 21, 2005 [Statutes of Canada, 2005, c. 9]. Once proclaimed, sections 147 and 148 will amend Schedules I and II to the Act respectively. Schedule I will be amended by adding, under the heading "*Other Government Institutions*" the following:

- First Nations Financial Management Board/Conseil de gestion financière des premières nations

- First Nations Statistical Institute/Institut de la statistique des premières nations
- First Nations Tax Commission/Commission de la fiscalité des premières nations.

Schedule II will be amended by adding a reference to the "*First Nations Fiscal and Statistical Management Act/Loi sur la gestion financière et statistique des premières nations*" and a corresponding reference in respect of that Act to "section 108".

The Government public Bill C-6 (37th Parliament, 3rd Session), entitled *An Act respecting assisted human reproduction and related research*, received royal assent on March 29, 2004. Section 73 of this bill came into force on April 22, 2004, thereby amending Schedule II by adding "*Assisted Human Reproduction Act*" and a corresponding reference to subsection 18(2) of that Act. Section 72, which will amend Schedule I by adding in alphabetical order "*Assisted Human Reproduction Agency of Canada* " under the heading "*Other Government Institutions*", has yet to be proclaimed.

The Government public Bill C-16 (37th Parliament, 3rd Session), entitled "*An Act respecting the registration of information relating to sex offenders, to amend the Criminal Code and to make consequential amendments to other acts*, received royal assent on April 1, 2004, and came into force on December 15, 2004. Section 22 of this bill amended Schedule II to the Act by adding a reference to the *Sex Offender Information Registration Act* and a corresponding reference to subsections 9(3) and 16(4) of that Act.

The Government public Bill C-25 (37th Parliament, 2nd Session), entitled *An Act to Modernize Employment and Labour Relations in the Public Sector and to Amend the Financial Administration Act and the Canadian Centre for Management Development Act and to Make Consequential Amendments to Other Acts,* received royal assent on November 10, 2003. Section 246 came into force on November 20, 2003 (Canada Gazette, Part II, SI/2003-178). This section amends Schedule I to the Act by adding, in alphabetical order, "Public Service Staffing Tribunal" under the heading "*Other Government Institutions*". Sections 251 and 252 came into force on April 1, 2004, amending Schedule I by striking out the "Canadian Centre for Management Development" under the heading "*Other Government Institutions*" and by adding, under that same heading, the "Canada School of Public Service". Section 88 has yet to be proclaimed. Upon proclamation, it will amend Schedule I by replacing the reference to "Public Service Staff Relations Board" with a reference to "Public Service Labour Relations Board".

The Government public Bill C-4 (37th Parliament, 3rd session), entitled *An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in* consequence, received royal assent on March 31, 2004. Section 5 of this bill came into force on May 17, 2004, thus amending Schedule I to the Act by striking out "Ethics Counselor" under the heading "*Other Government Institutions*".

The Government public Bill C-7 (37th Parliament, 3rd Session), entitled *An Act to amend certain Acts of Canada, and to enact measures for implementing the Biological and Toxin Weapons Convention, in order to enhance public safety*, was assented to on May 6, 2004. Section 107 of this bill came into force on May 11, 2004, and thus amended Schedule II to the Act by replacing the reference to "subsections 4.8(1) and 6.5(5)" opposite the reference to the *Aeronautics Act* with a reference to "subsections 4.79(1) and 6.5(5)".

The Government public Bill C-8 (37th Parliament, 3rd Session), entitled *An Act to establish the Library and Archives of Canada, to amend the Copyright Act and to amend certain Acts in consequence*, received royal assent on April 22, 2004. Sections 23 and 24 came into force on May 21, 2004, and amended Schedule I to the Act by striking out the "National Archives of Canada" and the "National Library" under the heading "*Other Government Institutions*" and by adding the "Library and Archives of Canada" under that same heading.

The Government public Bill C-6 (37th Parliament, 2nd Session), *An Act to establish the Canadian Centre for the Independent Resolution of First Nations Specific Claims to provide for filing, negotiation and resolution of specific claims and to make related amendments to other Acts*, received royal assent on November 7, 2003. Sections 78 and 79, once proclaimed, will amend Schedule I by adding under the heading "*Other Government Institutions*" the "Canadian Centre for the Independent Resolution of First Nations Specific Claims/Centre canadien du règlement indépendant des revendications particulières des premières nations", and Schedule II by adding a reference to the "*Specific Claims Resolution Act/Loi sur le règlement des revendications particulières*" and a corresponding reference to section 38 and subsections 62(2) and 75(2) of that Act.

Proposed Changes to Schedules I and II

During the 2003-04 fiscal year, new government institutions became subject to the *Access to Information Act* while others, which had been abolished, were struck out. The following amendments were made to Schedules I and II of the Act.

Subsection 18(7) of the Government public Bill C-9, *An Act to establish the Economic Development Agency of Canada for the Regions of Quebec,* proposes to amend Schedule I by providing that a reference to the former agency in that schedule is deemed a reference to the new agency, that is, the Economic Development Agency of Canada for the Regions of Quebec.
(2004, Bill C-9, subsection 18(7); read and referred to Committee; reported on February 24, 2005)

The Government public Bill C-22, *An Act to establish the Department of Social Development and to amend and repeal certain related Acts*, proposes amendments to Schedules I and II to the Act.

- Section 42 would amend Schedule I by adding, under the heading "Departments and Ministries of State" the "Department of Social Development/Ministère du Développement social".
- Section 43 and 44 would respectively amend Schedule II by replacing the reference to section 104, opposite the *Canada Pension Plan*, with a reference to subsection 104.01(1), and the reference to section 33 opposite the *Old Age Security Act* with a reference to subsection 33.01(1).

(2004, Bill C-22, sections 42 to 44; read and referred to Committee; reported on February 22, 2005)

The Government public Bill C-23, *An Act to establish the Department of Human Resources and Skills Development and to amend and repeal certain related Acts*, proposes to amend Schedules I and II to the Act.

- Section 58 would amend Schedule I by striking out the following under the heading "*Departments and Ministries of State*": "Department of Human Resources Development/Ministère du Développement des resources humaines".
- Section 59 would amend Schedule I by adding the following in alphabetical order under the heading "*Departments and Ministries of State*": "Department of Human Resources and Skills Development/Ministère des Ressources humaines et du Développement des competences".
- Section 60 would amend Schedule I by striking out the following under the heading "*Other Government Institutions*": "Department of Human Resources and Skills Development/Ministère des Ressources humaines et du Développement des compétences".
- Section 61 would amend Schedule II by striking out the reference to "*Department of Human Resources Development Act/Loi sur le Ministère du Développement des resources humaines*" and the corresponding reference to section 33.5.

(2004, Bill C-23, sections 58 to 61; debated at Third Reading March 23, 2005)

The Government public Bill C-31, *An Act to establish the Department of International Trade and to make related amendments to certain Acts*, proposes to amend Schedule I to the Act:

- Section 11 would amend Schedule I by striking out, under the heading "*Departments and Ministries of State*": the "Department of Foreign Affairs and International Trade/Ministère des Affaires étrangères et du Commerce international".
- Section 12 would amend Schedule I by adding, under the heading "*Departments and Ministries of State*": the "Department of International Trade/Ministère du Commerce international".
- Section 13 would amend Schedule I by striking out, under the heading "*Other Government Institutions*": the "Department of International Trade/Ministère du Commerce international".

(2004, Bill C-31, sections 11 to 13; debated at Second Reading on February 7, 9, and 10, 2005)

The Government public Bill C-32, *An Act to amend the Department of Foreign Affairs and International Trade and to make consequential amendments to other Acts*, proposes to amend Schedule I to the Act by adding, under the heading "*Departments and Ministries of State*": the "Department of Foreign Affairs/Ministère des Affaires étrangères".
(2004, Bill C-32, section 10; debated at Second Reading on February 10, 11 and 14, 2005)

On February 17, 2005, the President of the Treasury Board tabled a report in Parliament announcing that the *Access to Information Act* ought to be amended by including by order in council ten Crown corporations currently outside the provisions of the Act: Canada Development Investment Corporation; Canadian Race Relations Foundation; Cape Breton Development Corporation; Cape Breton Growth Fund Corporation; Enterprise Cape Breton Corporation; Marine Atlantic Inc.; Old Port of Montreal; Parc Downsview Park Inc.; Queens Quay West Land Corporation; and Ridley Terminal Inc.

As of March 31, 2005, no order in council had yet been taken to this end.

Amendments to Heads of Government Institutions Designation Order

The Schedule to the *Heads of Government Institutions Designation Order* was amended by replacing the portion of item 85.1 in Column II by "President of the Treasury Board/Le président du Conseil du Trésor". (Canada Gazette Part II, SI/2004-91, in force on July 20, 2004)

Item 103 of the English version of the Schedule to the *Heads of Government Institutions Designation Order* was renumbered and reads as follows: Column I, "102.01 Trois-Rivières Port Authority/Administration portuaire de Trois-Rivières" and, Column II, "Chief Executive Officer/Premier dirigeant". (Canada Gazette Part II, SI/2004-117, in force on September 22, 2004)

The Schedule to the *Heads of Government Institutions Designation Order* was amended by adding under Column I "84.1 Public Health Agency of Canada/Agence de la santé publique du Canada and under Column II "Minister of Health/Ministre de la Santé". (Canada Gazette Part II, SI/2004-126, in force on September 24, 2004)

The Schedule to the *Heads of Government Institutions Designation Order* was amended by adding under Column I "24.01 Canadian Human Rights Tribunal/Tribunal canadien des droits de la personne" and under Column II "Chairperson/Président". (Canada Gazette Part II, SI/2004-129, registered October 20, 2004)

CHAPTER VI
CORPORATE SERVICES

Corporate Services

The Corporate Services function provides administrative services (financial, human resources, information technology, and general administration services) to the Information Commissioner's office. Its objective is to support those who administer the program.

Financial Services

As has been mentioned in several OIC publications, including the Information Commissioner's annual reports, the office has been in a resource crisis for the past several years. Consequently, financial services worked closely with the Director General, Corporate Services, as well as program managers, to ensure that the program functioned as efficiently as possible and that overhead costs were kept to a minimum – to the extent possible – consistent with good quality service.

Also, in 2004-05, the Office of the Information Commissioner underwent its second external audit, conducted by the Office of the Auditor General (OAG).

Human Resources

One of the key activities for Human Resources during 2004-05 was to work toward understanding and implementing the new requirements of the *Public Service Modernization Act*.

During the period under review, the Office of the Information Commissioner was audited by the Office of the Auditor General and the Canadian Human Rights Commission (CHRC).

The CHRC audit found the OIC to be in compliance with all twelve of the statutory requirements of the *Employment Equity Act*. Additionally, the OAG audit revealed that the OIC's Human Resources files were well maintained.

Information Technology

Efficient technology is needed to track, store and report upon the status of enquiries, complaints and their related events on a case-by-case basis. During the period covered by this annual report, the Information Technology Branch upgraded its Records Documentation Information Management System (RDIMS); its Integrated Investigations Application (IIA), which is its main case tracking system; and its Legal Tracking System (LTS).

In addition, the Information Technology Branch increased the office's internet security through the introduction of anti-span and anti-spyware.

Administrative Services

In order for the commissioner to be able to effectively and efficiently carry out his responsibilities as mandated by the *Access to Information Act*, it is important that information under the control of his institution (OIC) be properly managed.

Significant work has been undertaken to build and deploy electronic document management systems and work continues on improving practices, tools and facilities.

Figure 1: Resources by Activity (2004-2005)

	FTE's	Percent	Operating Budget*	Percent
Access to Government Information	38.2	73%	$3,542,187	74%
Corporate Services	14.4	27%	$1,213,124	26%
Total Access Vote	52.6	100%	$4,755,311	100%

* Excludes Employee Benefits

Figure 2: Details by Object of Expenditures (2004-2005)

	Corporate Services	Access to Government Information	Total
Salaries	817,670	2,893,815	3,711,485
Transportation and Communication	70,956	83,103	154,059
Information	2,900	50,617	53,517
Professional Services	165,342	410,152	575,494
Rentals	8,813	17,027	25,840
Repair & Maintenance	33,217	9,851	43,068
Materials and Supplies	34,702	22,416	57,118
Acquisition of Machinery and Equipment	74,694	45,741	120,435
Other Subsidies and Payments	4,830	9,465	14,295
Total	1,213,124	3,542,187	4,755,311

Notes:

1. Excludes Employee Benefit Plan (EBP).
2. Expenditure figures do not incorporate final year-end adjustments.