Information Commissioner of Canada

Commissaire à l'information du Canada

Annual Report Information Commissioner

2005-2006

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Information Commissioner
2005-2006

"Countless individuals reported that senior officials, both political and administrative, find various ways to deny providing information to the public."

Justice John H. Gomery, *Restoring Accountability*
2nd Report of the Commission of Inquiry in the
Sponsorship Program and Advertising Activities, 2006
Cf. pp. 43-44

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

Subsection 2(1)
Access to Information Act

June 2006

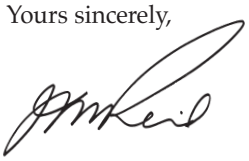
The Honourable Noël A. Kinsella
The Speaker
Senate
Ottawa ON K1A 0A4

Dear Mr. Kinsella:

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

This report covers the period from April 1, 2005 to March 31, 2006.

Yours sincerely,



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

June 2006

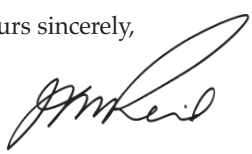
The Honourable Peter Milliken
The Speaker
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Milliken:

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

This report covers the period from April 1, 2005 to March 31, 2006.

Yours sincerely,



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

2005-2006 ANNUAL REPORT

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MANDATE

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

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

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

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

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

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

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

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

CHAPTER I

A Political Roller Coaster Ride

A Liberal minority government, a winter general election, a Conservative minority government, the interim and final reports of the Gomery Commission – for the country, the past year in politics was a thrilling ride! So, too, was it for the *Access to Information Act*. Every politician in search of high ground or a defensive position on matters of scandal or accountability had something to say about our right to know.

Yet, a front seat on a political roller coaster ride can be as dangerous as it is thrilling. This report recounts how the *Access to Information Act* and its Information Commissioner were affected by the past year's political events.

Low Points

A particularly troubling low point was the former Liberal government's refusal to accept the expressed will of Parliament (and its own promise) to introduce a bill to amend and strengthen the *Access to Information Act*. Instead, the former government pushed legislative proposals (such as the so-called whistleblower protection law) that derogated from the right to know, and took specific decisions to deprive the Information Commissioner of sufficient funds to perform his watchdog function.

Equally concerning were the actions taken by the former Liberal administration at the end of the Information Commissioner's seven-year term (the term expired on June 30, 2005). Prior to the end of the Information Commissioner's term, Parliament voted by overwhelming majority – including the Liberal government's front benches – to extend the Information Commissioner's term by one year. Subsection 54(3) of the *Access to Information Act* permits such a course of action. It provides:

> "The Information Commissioner, on the expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term not exceeding seven years."

The former Liberal government rejected the expressed will of the House of Commons in two disturbing ways. First, the former government announced that the commissioner's term would be extended for only three months; second, it effected the extension of term pursuant to subsection 54(4) of the *Access to Information Act*, rather than pursuant to subsection 54(3), quoted above.

Subsection 54(4) of the Act states:

> "In the event of the absence or incapacity of the Information Commissioner, or if the office of Information Commissioner is vacant, the Governor in Council may appoint another qualified person to hold office instead of the Commissioner for a term not exceeding six months, and that person shall, while holding that office, have all of the powers, duties and functions of the Information Commissioner under this or any other Act of Parliament and be paid such salary or other remuneration and expenses as may be fixed by the Governor in Council."

The clear words of subsection 54(4) indicate that this provision is not intended for dealing with the renewal, extension, or re-appointment of a sitting information commissioner. The section specifically refers to "absence or incapacity of the Information Commissioner or if the office of the Information Commissioner is vacant". None of these conditions existed when the former Liberal administration invoked subsection 54(4) to extend the Information Commissioner's term by three months. The section also uses the phrase: "… may appoint another qualified person to hold office instead of the commissioner… ." The former Liberal government used this provision to extend the sitting commissioner's term; it did not appoint another person in the commissioner's stead.

Why would a government take this course? What is the practical distinction between extending the term of a sitting information commissioner pursuant to subsection 54(3) and doing so pursuant to subsection 54(4)?

The distinction is significant, and it is this: a re-appointment pursuant to subsection 54(3) preserves the independence of the commissioner. It preserves his or her protection against dismissal by the government (the Act requires approval of the House and Senate for dismissal) and it preserves the salary protection which the Act gives to commissioners (commissioners must be paid a salary equal to the salary of a judge of the Federal Court). On the other hand, a person appointed pursuant to subsection 54(4) has no statutory protection against summary dismissal by the government and the government retains sole discretion to set the appointee's level of remuneration.

In other words, a person re-appointed pursuant to subsection 54(3) is the Information Commissioner of Canada and a true Officer of Parliament, whereas a person appointed pursuant to subsection 54(4) is an "at pleasure" appointee of the government-of-the-day charged with carrying out the commissioner's functions.

The former Liberal administration adopted the same troubling approach a second time when it extended the commissioner's term for a further six months to March 31, 2006. For nine months, thus, Canadians have not had the benefit of an information commissioner who is, in law, independent of government.

Effective April 1, 2006, the Conservative government also invoked subsection 54(4) of the Act to extend the commissioner's term by six months. Given the flawed approach taken by the previous Liberal administration, the Conservative government had little choice but to repeat the error until Parliament returns and an information commissioner can be appointed with full independence of government and genuine Officer of Parliament status.

In the process of reforming the *Access to Information Act*, care must be taken by Parliament to remove from future governments the opportunity to interfere with the Information Commissioner's independence in end-of-term situations.

High Points

The positive highlight of the year was the election promise by now Prime Minister Harper to make it one of his very first orders of business to introduce the "*Open Government Act*". This Act – a package of comprehensive amendments to strengthen the *Access to Information Act* – was drafted by the Office of the Information Commissioner at the request of the pre-election Standing Committee on Access to Information, Privacy and Ethics. It received the approbation of the Standing Committee in one of its final acts before the election. Many of the proposals contained in the proposed *Open Government Act* were also endorsed by Justice Gomery in his second report.

At the end of this reporting year, Parliament had not resumed and so, at this writing, there are many unknowns, including whether or not the new government will get "cold feet", and how the other parties will react to the proposed *Open Government Act* in a minority government situation. Information commissioners, through bitter experience, have a profound appreciation for the ability of governments to disappoint when it comes to making good on promises to beef-up access rights. Even new governments, history has shown, quickly lose the courage and determination to give Canadians stronger access to information rights. Nevertheless, in the 23 years since the *Access to Information Act* came into force, this is the closest we have ever come to comprehensive reform and strengthening of this law.

Reform Required

The need for reform is pressing. Year after year, by commissioner after commissioner, Parliament is told that many public officials – both elected and non-elected – just don't get it! They don't get the basic notion that, in passing the *Access to Information Act* in 1983, Parliament wanted a shift of power away from ministers and bureaucrats to citizens. Parliament wanted members of the public to have the positive legal right to get the facts, not the "spin"; to get the source records, not the managed message; to get whatever records they wanted, not just what public officials felt they should know.

Ministers and bureaucrats, regrettably, didn't get the memo on this one! Still, after almost 23 years of living with the *Access to Information Act*, the name of the game, all too often, is how to resist transparency and engage in damage control by ignoring response deadlines, blacking-out the embarrassing bits, conducting business orally, excluding records and institutions from the coverage of the *Access to Information Act*, and keeping the system's watchdog overworked and under-funded.

No; of course not – it is not all bad news. There has been progress. But the clear lesson of these past years is that governments continue to distrust and resist the *Access to Information Act* and the oversight of the Information Commissioner. Even in its very early days, the new government has already launched a court action against the Information Commissioner, challenging powers that the Information Commissioner has exercised for many years, and which even the litigious Chrétien administration did not challenge.

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.

Each and every one of the fine initiatives to improve government accountability that were put forward by Justice Gomery, by the parties during the election, and by the Liberal government in response to the sponsorship scandal, require the nourishment of unfiltered knowledge about what goes on in government, if they are to be truly effective. There can be no true accountability, or true disincentive for corruption and maladministration, without the bright light of transparency. That was the motivation for the changes the Information Commissioner published this year in the form of the *Open Government Act*.

At the heart of the suggested changes is a mandatory requirement to create records, backed up by penalties for non-compliance. Once adopted, one of the top priorities of the public service – if not the government – will be to establish

record-creation and record-retention protocols for every business line and activity of government – from staffing and classification, to pay and benefits, to contracting, to grants and contributions, to investigations and audits, to policy development and advice-giving, and to managerial activities. Why will all this be a priority? Because accepted record-creation and record-retention standards for all business lines will be a prudent defence against accusations of failure to comply with this new duty to create records.

Justice Gomery also saw this critical link between records management and good accountable governance. This is what Justice Gomery had to say:

> "The Commission concurs with the Information Commissioner that there should be mandatory record-keeping in government, and that the obligation to create a "paper trail" should be something more than a matter of policy. It should be an explicit part of the law of Canada."
>
> "Accordingly, the Commission agrees that the *Access to Information Act* should be amended to include an obligation on the part of every officer and employee of a government institution to create records that document decisions and recommendations, and that it should be an offence to fail to create those records. Going further, the Commission believes that there should also be free-standing record-keeping legislation which would require public servants and persons acting on behalf of the Government to collect, create, receive and capture information in a way that documents decisions and decision-making processes leading to the disbursement of public funds. This would make it possible to reconstruct the evolution of spending policies and programs, support the continuity of government and its decision-making, and allow for independent audit and review. Such record-keeping legislation should state clearly that deliberate destruction of documentation and failure to comply with record-keeping obligations are grounds for dismissal."
>
> "The reason for the creation of legal obligations to maintain and not to destroy government records, in addition to similar rules in the access to information regime, is that the rationale for mandatory record-keeping does more than facilitate public access to information: it ensures good government and accountability, a requirement consistent with the theme of the Commission's overall recommendations."
>
> [Gomery Report #2 at pp. 180-181]

Indeed, the legal requirement to create records is a vitally important first step – but only a first step. The entire life cycle of recorded information held by government requires regulation. The good guidance given in the government's policy on management of government information (MGI Policy) has not been

implemented in practice to an acceptable extent. Now is the time for a comprehensive information management act that will enshrine accountabilities for monitoring and enforcement – accountabilities which are, at present, highly confusing.

At present, the only statute that specifically mandates a minister to pay attention to how the government's information is managed is the *Access to Information Act*. Section 70 of the Act contains this provision:

Section 70(1) "… the designated Minister (President of the Treasury Board) shall

> (a) 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."

This is the statutory basis for the MGI policy, yet no President of the Treasury Board, in the 23 years since the Act's passage, has ever caused a single study to be made into the effect on access rights of information management practices. Yes, there have been efficiency studies, and e-government studies, and procurement initiatives and standards, and all the other good and important initiatives undertaken over the years by the Chief Information Officer Branch of the Treasury Board Secretariat – but virtually no attention paid to the statutory mandate.

The Office of the Information Commissioner intends to devote some considerable attention to monitoring how the Treasury Board Secretariat (TBS) is fulfilling its statutory obligations under the *Access to Information Act*, and this is, perhaps, the most important of those obligations. The other obligation placed on TBS by law is to ensure that all government institutions capture and report annually statistics on how the *Access to Information Act* is being administered. For almost 23 years, TBS has been content to capture only basic descriptive information, such as numbers of requests, categories of requesters, exemptions invoked, and so forth. Statistics that reveal performance deficits or successes are not captured. For example, government institutions are not required to publish the percentage of requests received that are answered late – a highly reliable predictor of the state of health of access administration in any institution. If the proposed *Open Government Act* is adopted, some gathering of basic performance data would be mandatory.

The proposed new *Open Government Act*, which the Information Commissioner presented to the Standing Committee on Access to Information, Privacy and Ethics in October of 2005, contains the following features:

1. All exemptions should contain an injury test and be discretionary. As well, all exemptions should be subject to a public interest override. In this way, Parliament would send the clear message that this is an openness law not a secrecy code, and that the default position is disclosure.

2. Public officials should be required to document their decisions, actions, considerations, and deliberations. This law, this right of access, means nothing if public officials don't keep appropriate records and conduct governance in an oral culture.

3. The last vestiges of unreviewable government secrecy – i.e. cabinet confidences – should be brought within the coverage of the law and the review jurisdiction of the commissioner. Cabinet confidentiality risks being broadly, and too self-servingly, applied by governments when it is free from independent oversight.

4. The coverage of the access law must be made comprehensive to all the mechanisms of government through which public funds are spent or public functions discharged. Of course, this would include all Crown Corporations, Foundations, and Agents of Parliament, as well as ministers' offices and the Prime Minister's Office. The right to know is at profound risk when governments have the discretion to decide which entities, and hence which records, will be subject to the right of access and which will not. The very purpose of the *Access to Information Act* was to remove the caprice from decisions about disclosure of government records; now is the time to remove the caprice from decisions about which entities will be subject to the Act.

5. Connected with this notion, that the coverage of the Act should be comprehensive, is the notion that the Act should be a complete code setting out the openness/secrecy balance. No longer should secrecy provisions in other statutes be permitted to be mandatory, in perpetuity, without meeting any of the tests of secrecy in the Act's substantive exemptions. Section 24 of the *Access to Information Act*, which sets out this open-ended, mandatory, class exemption, should be abolished.

Recurring Themes: Delays

As mentioned earlier, a good indicator of the overall effectiveness of the access to information process in government is the percentage of access requests made to government that are answered within the statutory deadlines. Regrettably, the government does not gather and report this key statistic. Consequently, it is only possible to offer here an impression based on the number of delay

complaints received as compared with previous years, and on the results of the commissioner's report card reviews of selected government institutions.

On that basis, it appears that the problem of delay remains a significant concern. This year, a higher percentage of complaints were delay complaints than was the case last year. Three of the institutions newly reviewed this year (Immigration and Refugee Board, Public Safety and Emergency Preparedness Canada, Royal Canadian Mounted Police) received failing grades, indicating an unacceptably high percentage of late responses to access requests. Five institutions that received a failing grade last year again received "Fs" this year. More will be said about delays in the "Report Card" section. Suffice to say that the Information Commissioner will require the assistance of the Standing Committee on Access to Information, Privacy and Ethics, as well as the assistance of the President of the Treasury Board, if the persistent problem of delay is to be solved once and for all.

The Standing Committee made an important contribution last year to solving the problem of delay, when it called officials from the departments that had received failing grades on their report cards to explain themselves. This determination by the committee to publicly expose the problem served to focus the minds of senior officials on taking response times seriously.

The President of Treasury Board, too, has an important role to play in (1) ensuring that ATI functions in departments are properly resourced; (2) issuing best practices and offering consulting services to problem institutions; (3) maintaining and managing a "flying squad" of ATI professionals to respond to request surges in the system; (4) professionalizing ATI workers and ending expensive and inappropriate reliance upon contract workers; (5) collecting the statistics necessary to allow TBS (and the public) to identify problem areas as soon as possible; (6) enforcing good records management throughout government; (7) increasing pro-active disclosures of government information; and (8) educating managers and exempt staffers as to their ATI obligations.

Under the Liberal administration, the Presidents of the Treasury Board gave no meaningful priority to their obligations as designated minister responsible for the administration, across government, of the *Access to Information Act*. This statutory function of the President of Treasury Board must be given a greater priority and importance within TBS. The TBS' ATI responsibility centre has an obligation to become a conscience for openness within government as a whole. It has, all too often, been in the service of the governments' communications effort to explain away, and minimize, failures of compliance with the *Access to Information Act* throughout the system.

Technology, too, continues to offer promise to help solve the problem of delay.

In the late 1990s, the Information Commissioner's "Report Cards on Compliance with Response Deadlines under the *Access to Information Act*" recommended that institutions make use of the latest technologies to assist them in meeting their response time obligations under the Act.

One product in particular, **ATIP*image***, which was originally part of a package entitled **ATIP*suite***, was recommended for its potential in easing the work associated with processing records. At that time, the company which offered this product was known as MPR & Associates, and its pamphlet had the following to say about it:

> "**ATIP*image*** uses document imaging technology to achieve a paperless ATIP case review process that lets you and your staff focus on actual case management rather than clerical tasks. Electronically sever text, attach notes, apply and track sections of the Act, disclose documents and more with a click of the mouse. You can paginate and print out consultation and release packages automatically. Search and retrieve one specific document within thousands of pages instantly. A duplicity-checking feature ensures duplicate or similar documents are processed exactly the same way."

The vast majority of institutions now use technology – inclusive of imaging technologies – to assist them with the administrative work associated with the *Access to Information Act*. **ATIP*image*** has undergone various upgrades, and is now known as **AccessPro Redaction Imaging**, which forms part of PrivaSoft's **Access Pro Suite**. The software now has one additional timesaving feature: it allows electronic documents to be saved directly into the system.

Have imaging technologies helped to alleviate response times? The short answer is "no." Although these imaging technologies offer processing advantages, the clerical work associated with getting the information into the system can be extremely time-consuming. Of course, the length of time that it consumes is dependent on the volume of records involved, the volume of requests being processed within the institution, the number of scanners available, and the number of support staff available to assist with the work.

The preliminary clerical work includes preparation, scanning, and indexing. Preparation involves the removal of staples, clips, and/or pegs. If records are in rough condition, or of unusual size, they may need to be photocopied. Scanning can be a long process, particularly if the records sit in long queues waiting to be scanned. Indexing includes the manual data entry of myriad identifying information, such as the identification of document type (memo, letter…), date,

"to" and "from", et cetera. Finally, either before or after the records are in electronic form, the records are triaged, meaning the records are reviewed for relevancy and duplicates are removed. If the preliminary processes add more than one week to the processing timelines, they effectively diminish or cancel out the benefits of electronic review processes.

Manual indexing is a major stumbling block in fully exploiting technology to reduce response times. Unfortunately, the problems associated with manual indexing are not easily resolved by institutions. Few institutions are in a position to hire a large contingent of clerical staff to do this tedious work. Yet, too often, this work is being performed by ATIP analysts or contractors, on a time-permitting basis. It takes away valuable time from their most significant work: reviewing and preparing records for release.

Imaging technologies can yet be improved to solve some of these remaining problems. We urge more work on developing improved text recognition capabilities. Indexing should become a seamless process, performed by the software, whereby key elements of records are recognized and captured as the records are scanned into the system.

Recurring Themes: Merger of the Offices of the Information and Privacy Commissioners

From time to time, since the early 1990s when the Mulroney government announced its intention to merge the offices of the Information and Privacy Commissioners under a single commissioner (an initiative which was not abandoned), the pros and cons of such an initiative have been debated. The debate commenced anew in this reporting year when the former Liberal government announced, in June of 2005, that it would appoint an eminent person to inquire into, and make recommendations concerning, the merits of merging the Information and Privacy Commissioners' offices.

The person so appointed, former Supreme Court Justice the Honourable Gérard La Forest, conducted his review between July 22, 2005 (the date of his appointment) and November 15, 2005 (the date of his report to the Minister of Justice). Dr. La Forest was assisted by Professor Steven Penny of the Faculty of Law, University of New Brunswick. While the short term given Dr. La Forest did not permit him to hold public hearings, he consulted broadly with relevant stakeholders and experts. All of those who dealt with him, including this commissioner, were impressed by his thoughtfulness, convinced of his

independence of mind, struck by his intellectual honesty, and inspired by his personal integrity.

Dr. La Forest made the following recommendations:

- "There should not be either a full merger of the offices of the Information Commissioner and the Privacy Commissioner or an appointment of one commissioner to both offices. These changes would likely have a detrimental impact on the policy aims of the *Access to Information Act*, the *Privacy Act*, and PIPEDA.
- If the Government and Parliament decide to proceed with a merger or cross-appointment, implementation should be delayed for a considerable period of time. The transition should take place gradually, and only after the challenges facing the current access and privacy regimes have been thoroughly studied and addressed.
- Caution should be exercised in proceeding with any attempt to share the corporate services personnel of the offices of the Information and Privacy Commissioners. Care must be taken to establish mechanisms ensuring adequate accountability and control.
- Government must do much more to foster a "culture of compliance" with access and privacy obligations. With respect to access, it should:
  - make it clear to officials that access should be provided unless there is a clear and compelling reason not to do so;
  - develop better information management systems;
  - ensure adequate training for access officials;
  - create proactive dissemination policies; and
  - provide adequate incentives for compliance.

  With respect to privacy, it should:
  - pay greater attention to the implications of programs involving the sharing, matching, and outsourcing of personal information;
  - ensure adequate training for privacy officials; and
  - develop comprehensive privacy management frameworks.
- The *Access to Information Act* and the *Privacy Act* should be amended to specifically empower the commissioners to comment on government programs affecting their spheres of jurisdiction. Ideally, there should be a corresponding duty imposed on government to solicit the views of the commissioners on such programs at the earliest possible stage.

- The *Access to Information Act* and the *Privacy Act* should be amended to recognize the role of the commissioners in educating the public and conducting research relevant to their mandates.

- The option of granting order making powers to the Information and Privacy Commissioners should be studied in further depth.

- The *Access to Information Act* and the *Privacy Act* should be amended to specifically empower the commissioners to engage in mediation and conciliation."

[La Forest Report, pp. 55-56]

It is a tribute to Dr. La Forest's courage that more than fifty percent of his recommendations are reminders to the government that appointed him that there are a number of access to information and privacy issues having more importance for Canadians than the pros and cons of the merger of the commissioners' offices. The following extract from the report identifies the central challenge for the *Access to Information Act*:

> "There is undoubtedly a need for certain kinds of government information to remain confidential. This need is reflected in the many exemptions to access set out in the *Access to Information Act*. The Act itself proclaims, however, that as a general rule 'government information should be available to the public', and the 'necessary exceptions to the right of access should be limited and specific'. If this legal principle is to have its full effect, however, the bureaucracy must experience a profound cultural shift."

[La Forest Report, p. 46]

There is a welcome consensus as to how to encourage this "cultural shift", among the La Forest recommendations, the Gomery recommendations, the Information Commissioner's recommendations, and the promises for access to information reform contained in the Conservative Party election platform.

Following publication of Dr. La Forest's endorsement of two separate offices, the Privacy Commissioner and the Information Commissioner made a joint request to the Clerk of the Privy Council that their two offices be separately listed in Schedule 1.1 of the *Financial Administration Act*. This separate listing would give legal recognition to the separate status of the two offices – a result which has also been recommended by the Auditor General in order to ensure that the two offices could have separate general ledgers. According to the Auditor General, separate general ledgers would improve the accountability of the two offices. As of this writing, there has been no response from the Privy Council Office.

Recurring Issues: Funding the Commissioner's Office

During this reporting year, two committees of the House (Standing Committee on Public Accounts and Standing Committee on Access to Information, Privacy and Ethics) and one Senate Committee (Standing Committee on National Finance) recommended that a new system for funding Officers of Parliament be adopted. In particular, they recommended that Parliament play a greater role in assessing the resource needs of its five independent officers (Information Commissioner, Privacy Commissioner, Auditor General, Commissioner of Official Languages, and Chief Electoral Officer). These three committees concluded that the then existing system, under which government ministers (Treasury Board) decide on the level of resources that will be given to Officers of Parliament, constituted a threat to the independence and effectiveness of Officers who have oversight functions vis-à-vis government ministers and institutions.

The former Liberal government agreed to participate in a pilot project for two fiscal years (2006-07 and 2007-08). The pilot involved the creation of an ad hoc committee of representatives from all parties represented in the House of Commons. The committee – called the House of Commons Panel on the Funding of Officers of Parliament – is chaired by the Speaker of the House.

The "mandate" of the House of Commons Panel is to consider resource requests from Officers of Parliament, taking into account the views of Treasury Board Secretariat officials and experts, if necessary, and to make recommendations as to the level and mix of resources which Treasury Board ministers should provide. The former government agreed that, for the period of the pilot project, it would – barring financial crisis – follow the panel's recommendations.

The panel met in November of 2005 to consider requests for additional resources submitted, separately, by the Information Commissioner and the Privacy Commissioner. In the case of the Information Commissioner, the panel recommended increases of $2,814,006 for FY 2006-07, $2,262,028 for FY 2007-08, $2,262,028 for FY 2008-09, and $1,505,286 for 2009-10 and future years. The full text of the panel's recommendations is available on our website at **www.infocom.gc.ca**.

On January 19, 2006, Treasury Board ministers accepted the panel's recommendation. Regrettably, Treasury Board ministers at that January 19th meeting, just prior to the election, reneged on an understanding between the OIC and TBS that there would be some additional funding for 2005-06 (by way of supplementary estimates or Vote 5 transfers). The expected additional funding would be consistent with the terms recommended for funding by the panel, and would allow the Information Commissioner to jumpstart the initiatives approved by the panel. To learn, just two months before the end of

the fiscal year, that some $450,000 of expected funding would not be forthcoming, imposed an enormous challenge for the Information Commissioner's office. Many ongoing activities, such as the completion of report card reviews, proceeding with systemic investigations, staffing vacant positions, purchasing basic supplies, investigator training, servicing information technology and working tools, translating reports and speeches, investigation-related travel, had to be terminated. The office's ability to meet backlog reduction and turnaround time targets was significantly compromised.

On the bright side, the former government's punitive decision with respect to the 2005-06 budget – a period not covered by the House of Commons Panel pilot project – shows how vitally important the panel's role will be in future.

In the longer term, it is to be hoped that the informal ad hoc House of Commons Panel will become a formalized joint committee of the House and Senate. That would be more appropriate for Officers who report to both Houses of Parliament. As well, it is to be hoped that the panel will reconsider its decision to conduct its budget reviews behind closed doors. All Officers of Parliament agree that, except in exceptional circumstances, their independence and accountability is best served by having the Parliamentary review process conducted in public.

It is especially important to note that the funding panel recognized, from the outset, that the government has a vital role to play in helping to reduce the Information Commissioner's workload. The panel recognized that the number of complaints to the Information Commissioner can best be reduced at the front end by better service to access requesters.

To that end, the panel made special note of a commitment by Treasury Board Secretariat officials to submit a report to the panel in the Fall of 2007 on the measures it has taken with government institutions and the Information Commissioner's office to ensure compliance across government with the *Access to Information Act*. This reporting commitment by the Treasury Board Secretariat may be a long-overdue signal that the Secretariat intends to give greater priority to its leadership role in making the *Access to Information Act* work at the front lines.

Recurring Themes: Professionalizing Access to Information Officers

For many years, there has been a recognition that those who administer access to information and privacy rights constitute a new profession – a profession having specialized knowledge, specific ethical obligations, and direct impact on the rights of Canadians.

In recognition of this reality, this year, the Canadian Access and Privacy Association (CAPA), primarily composed of federal government access to information and privacy employees, and the Canadian Association of Professional Access and Privacy Administrators (CAPAPA), primarily composed of provincial and municipal access to information and privacy employees, announced the establishment of a joint committee to develop canadian professional standards – and associated training, education, ethical requirements, and certification – for "information rights" professionals. Both the federal Privacy Commissioner and the Information Commissioner have endorsed this initiative and have agreed to be represented on the committee.

Professionalizing the administrators of information rights, whether those rights are administered in government institutions or in private sector firms, will yield better informed, more consistent, and more principled implementation and delivery of information rights programs.

The government of Canada is urged to support the professionalizing of its ATIP administrators and to reflect such support in ATIP officer job descriptions, hiring practices, and training plans.

CHAPTER II

Delays in the System – Report Cards

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 2000-01, they have been included within the commissioner's annual report.

With the introduction of the report cards, the Information Commissioner initially 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. However, in recent years, the number has begun to rise again. This year, they account for 24.1 percent of the complaints from the public, up from 21.1 percent last year. 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 %	Ideal compliance	A
5-10 %	Substantial compliance	B
10-15 %	Borderline compliance	C
15-20 %	Below standard compliance	D
More than 20 %	Red alert	F

Like last year, the deemed-refusal ratio to requests received takes into consideration those requests carried over from the previous year, including the number of requests already in a deemed-refusal status on April 1, 2005.

This year, the Office of the Information Commissioner reviewed the status of requests in a deemed-refusal situation for the following twelve departments: Agriculture and Agri-Food Canada (AAFC); Citizenship and Immigration Canada (CIC); Fisheries and Oceans Canada (F&O); Department of Foreign Affairs and International Trade (DFAIT); Health Canada (HCan); Industry Canada (IC); Justice Canada (Jus); Library and Archives Canada (LAC); 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 are set out in Table 1.

Table 1: New Request to Deemed-Refusal Ratio - April 1 to November 30, 2005

Department	April 1 to November 30,2004 % of Deemed Refusals	Grade	April 1 to November 30, 2005 % of Deemed Refusals	Grade
AAFC	21.9	F	38.7	F
CIC	13.8	C	15.3	D
DFAIT	28.8	F	60.1	F
F&O	5.2	B	12.7	C
HCan	17.2	D	18.9	D
IC	16.1	D	5.9	B
Jus	43.0	F	38.8	F
LAC	70.0	F	55.5	F
ND	9.5	B	14.8	C
PCO	26.5	F	31.9	F
PWGSC	17.7	D	7.3	B
TC	7.2	B	9.2	B

Two institutions improved their performance over last year, six showed no change, and three received lower grades than last year. A positive effort was noted by Public Works and Government Services Canada, and again by Industry Canada in its third year in the reporting system, as both institutions' grades went from a "D" to a "B". Transport Canada has levelled off at a grade of "B" over the last two years; it is to be hoped that the department will press ahead to achieve ideal compliance in 2006-07. Although Library and Archives Canada again received an "F", much progress has been made, and LAC has virtually eliminated its backlog (by March 31, 2006). LAC has devoted some $850,000 in new resources to the task of coming into compliance with the law's response deadlines.

Moreover, it has entirely re-engineered its access to information request processes to ensure sustainability in the long term. LAC is making itself a model in government of how to make the access law work efficiently and effectively. DFAIT, too, received an "F", but it has devoted some $500,000 in new resources, and developed a good business plan to bring it into ideal compliance with response deadlines before the end of 2007-08. Kudos to DFAIT for its serious commitment to coming into compliance with response deadlines. Of concern is the number of institutions whose performance has slipped in the past year, particularly the Privy Council Office and Agriculture and Agri-Food Canada who have both slipped deeper into "Red Alert".

Table 2: Grading from 1998 to 2005 (April 1 to November 30)

Dept	1998	1999	2000	2001	2002	2003	2004	2005
AAFC	-	-	-	-	-	-	F	F
CIC	F	F	D	C	A	C	C	D
DFAIT	F	F	F	D	B	F	F	F
F&O	-	-	F	F	A	A	B	C
HCan	F	A	-	-	A	C	D	D
IC	-	-	-	-	-	F	D	B
Jus	-	-	-	-	-	-	F	F
LAC	-	-	-	-	-	-	F	F
ND	F	F	D	C	B	B	B	C
PCO	F	A	-	-	D	F	F	F
PWGSC	-	-	-	-	F	D	D	B
TC	-	F	F	C	D	B	B	B

Note: Only grades from 2003 and onwards were calculated with the new formula that takes into consideration those requests carried over from the previous year.

Table 2 illustrates that government institutions have not taken the steps necessary to ensure that timeframes under the *Access to Information Act* are respected on a consistent basis. It is particularly discouraging that two important "example setters" – PCO and Jus – have had failing grades again this year, despite past assurances to the Information Commissioner and Parliament that they would respect their lawful obligations.

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 part of the proactive mandate of the commissioner's office, each year a department (or departments) is selected to be the subject of a broad review to determine the extent to which the department is meeting its responsibilities under the *Access to Information 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 régime are the principles set out in the "Purpose" 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.

Unlike the report cards described in Part I of this chapter, which focused on delays, the scope of these reviews seeks to capture an extensive array of data and statistical information to determine how a government institution and its Access to Information (ATI) office are supporting their responsibilities under the Act. The new report card is divided into chapters, as follows:

- 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 2005-06, four institutions were selected for review – Finance Canada (Fin), the Immigration and Refugee Board (IRB), Public Safety and Emergency Preparedness Canada (PSEPC), and the Royal Canadian Mounted Police (RCMP). 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, the Immigration and Refugee Board, Public Safety and Emergency Preparedness Canada, and the Royal Canadian Mounted Police each rated an "F". Their performance was Red Alert. However, Finance Canada rated a "C", Substantial Compliance. Finance Canada is to be congratulated, as, of the 19 institutions reviewed over the years, only one other received a grade other than "F" on its first report.

FINANCE CANADA

Finance Canada has made progress in reducing the deemed-refusal situation. The department is encouraged to continue its efforts to make further progress to achieve a higher grade.

This report card makes a number of recommendations for ATI operations in Finance Canada. Of particular note, an essential component in the administrative framework to support the operation of the *Access to Information Act* is the development of an ATI Operational Plan for the ATIP Directorate. The plan would establish priorities, tasks and resources, deliverables, milestones, timeframes, and responsibilities to implement the business plan and those recommendations in this Report Card that are accepted by the department. Other recommendations focus 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.

IMMIGRATION AND REFUGEE BOARD

The report card identified a serious deemed-refusal situation and lack of an up-to-date ATI support structure in the IRB's current policies, procedures, and technology. Although the ATIP Director (who was appointed to the position in December 2005) has recognized the need to have the support structure updated and started on some projects, there is no comprehensive plan that covers all aspects of what must be accomplished.

Of particular note among the recommendations for ATI operations in the IRB is the development of an ATI Operational and Improvement Plan for the ATIP Directorate, an essential component in the administrative framework to support the operation of the *Access to Information Act*. The plan would establish priorities, tasks and resources, deliverables, milestones, timeframes, and responsibilities to guide improvements to the administration of the *Access to Information Act* in the ATIP Directorate and the IRB. Senior management of the IRB should monitor the plan. Other recommendations focus on the need to review the access request

approval process to reduce reviews. The ATIP Director has fully delegated authority to make decisions under the *Access to Information Act*, and that delegation should be exercised without senior level approvals. Senior staff should be informed, as required, in a parallel process.

PUBLIC SAFETY AND EMERGENCY PREPAREDNESS CANADA

There exists a serious and persistent deemed-refusal situation in the department. The internal departmental process for finalizing the access request release package is subject to numerous reviews and approvals. The effect of this is to delay the processing of an access request to the point that it is almost impossible to meet the statutory requirements of the Act. Numerous reviews and approvals prior to the release of records also foster an institutional culture of "play it safe".

The report card recommended the development of an ATI Operational and Improvement Plan for the ATIP Office. The plan would establish priorities, tasks and resources, deliverables, milestones, timeframes, and responsibilities to implement the business plan and those recommendations in this Report Card that are accepted by the department. Other recommendations focus 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*.

ROYAL CANADIAN MOUNTED POLICE

As in the report card for two other institutions, the review identified a serious and persistent deemed-refusal situation that the RCMP is just starting to address. The situation appears to be the result of staffing reductions that left the ATIP Office over a number of years with significantly fewer staff positions than required to process access requests. The condition has deteriorated to the point where three out of every four access requests have been answered beyond the statutory time requirements of the Act. Senior management of the RCMP is now engaged in solving the problem. For example, it recently allocated an additional 20 positions to the ATIP Office.

In this case too, the report card recommends that the RCMP develop an ATI Operational Plan for the ATIP Office. In addition, an ATI Improvement Plan is urgently needed to guide a dramatic improvement in the deemed-refusal situation. Both plans would establish priorities, tasks and resources, deliverables, milestones, timeframes, and responsibilities to implement the operational plan and the improvement plan, and those recommendations in this report card that

are accepted by the RCMP. Other recommendations focus 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 regular ATI training to support the fulfillment of their responsibilities.

CONCLUSION

All four institutions have recognized that they have serious problems in the processes that support the administration of the *Access to Information Act*. Each institution in 2005-06 took some positive initial remedial actions. But there was no commitment, at the time of the report cards, as to precisely how and when all of 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**.

CHAPTER III

Investigations and Reviews

Commissioner-Initiated Complaints

As indicated earlier in this report, the Information Commissioner initiated 760 complaints this year against government institutions. What is to be made of this high number? Does it indicate a shift in the commissioner's approach to oversight?

Here is the explanation. The 760 complaints were made against three government institutions: Royal Canadian Mounted Police (481), Privy Council Office (126), and the Department of Foreign Affairs and International Trade (153). All the complaints were of delay. Indeed, in each case, the initiated complaints covered all access requests to these three institutions that had not been answered, despite the lapse of statutory deadlines (i.e. all requests in "deemed-refusal" status). The first reason for the Information Commissioner's decision to initiate these complaints was a long-term inability by these institutions to respect statutory response deadlines. The second reason was the apparent failure of these institutions to act on recommendations for improvement that the commissioner had made to these institutions in previous report cards. The third reason, perhaps the most important, was concern that a "squeeky-wheel-gets-the-grease" approach (i.e. awaiting the receipt of individual complaints of delay against these institutions) was unfair to the many requesters whose answers were late but who did not choose to make complaints to the Information Commissioner.

This systemic approach to the problem of delay in answering access requests will be used with greater frequency, given a recent trend upward in the number of delay complaints.

Systemic Complaint Received by the Commissioner

A second systemic approach to investigating an alleged problem of delay commenced in this reporting year when the Canadian Newspaper Association (CNA) made a complaint against all government institutions (later reduced to 21 institutions). The complaint alleged that there is a secret system in government for the handling of access requests from members of the media. Moreover, the CNA alleged that this secret system has the effect of delaying media requests. The CNA based its complaint on previously published research which showed that, in some federal government institutions, it takes longer to respond to requests from members of the media than to requests from others.

This latter type of systemic complaint is being investigated through a combination of standardized data collection through questionnaire responses, and on-site verification and interviews. The investigation will assess whether or not media requests appear to be receiving discriminatory treatment; if so, in what departments and to what extent.

As well, the investigation will inquire into whether responsible central agencies (Treasury Board Secretariat, Privy Council Office, and Justice Canada) were aware of concerns about discriminatory treatment of media requests and, if so, what action was taken in response. The results of this systemic investigation of the CNA complaint will be reported in next year's report.

Report Card Investigations

The third type of systemic investigation that is undertaken by the Information Commissioner is the expanded report card process that collects and assesses data from selected government institutions on a host of performance-related variables. These expanded report card investigations allow the commissioner to obtain early identification of problem areas such as: abuse of time extensions, inflation of fees, failure to document reasons for exemptions, overuse of exemptions, poor records management, failure to exploit opportunities for pro-active and informal disclosure, political interference, and insufficient resources and/or training.

In this reporting year, the Information Commissioner undertook follow-up investigations of government institutions who did not achieve ideal compliance last year, and a number of expanded report card reviews. The results of this year's report card reviews are provided in Chapter II of this report.

Non-Systemic Complaints from the Public

In addition to the three types of systemic complaints described above, in this reporting year the office had a workload of 2,773 complaints (1,365 carried over from last year and 1,408 received this year - see Table 1). The complaints received this year covered a variety of matters, categorized in Table 2. Of special concern is the increasing percentage of complaints relating to delays and time extensions.

Disposition of Workload

- With respect to commissioner-initiated complaints, this year 329 such complaints were closed (62-RCMP, 119-PCO, 148-DFAIT).

- With respect to systemic complaints received from the public (i.e. complaints against more than one institution about the same matter from the same

complainant), significant work has been undertaken this year in investigating the CNA complaint. The full investigation will be completed this year and reported in next year's annual report.

- With respect to report card reviews, the office completed 12 follow-up reviews and 4 expanded reviews this year.
- With respect to individual complaints from members of the public, 1,319 were completed, and the outcomes are summarized in Table 3.
- The "top 10" list of institutions against which well-founded complaints were made are:

1. Canada Revenue Agency . . . . . 369 of 379
2. Royal Canadian Mounted Police . . . . . 102 of 118
3. Privy Council Office . . . . . 68 of 98
4. Public Works and Government Services Canada . . . . . 57 of 76
5. Department of Foreign Affairs and International Trade . . . . . 43 of 48
6. National Defence . . . . . 38 of 69
7. Fisheries and Oceans . . . . . 30 of 46
8. Health Canada . . . . . 30 of 45
9. Canada Border Services Agency . . . . . 21 of 24
10. Justice Canada . . . . . 20 of 26
10. Transport Canada . . . . . 20 of 22

Complaints in Backlog

This year, the office gave additional attention, and devoted new resources, to completing investigations that had fallen into backlog. The office considers any investigation of a refusal to disclose complaint should be completed within four months; complaints of administrative problems, such as delay, should be completed within one month. 850 backlogged files were completed, and the average time to completion of this group of files was 15 months. Of course, until the office's backlog reduction plan is fulfilled (2008-09 at the earliest), overall completion times will remain high as such files are closed and reflected in the completion statistics.

Completion Times

Table 4 confirms the expected effect on completion times due to the pursuit of the backlog reduction plan. Of the 1,319 cases which were closed this reporting year, 65% were backlog cases. Of the 1,454 cases pending at year end, 1,323 were in backlog status. Table 5 illustrates the significantly shorter completion times for complaints not in backlog.

The Information Commissioner's pleas for resource relief have, as discussed in Chapter I, born fruit. Starting in 2006-07, some additional resources (though less than the Information Commissioner requested) have been approved until the end of 2007-08. Although it will take some time of training, finding accommodation, and experience to maximize the effectiveness of the new investigative staff, the Information Commissioner expects that the backlog reduction program will be in full swing in 2006. Based on the Information Commissioner's projections of workload in the coming year, and given the level of resources provided, it will take until the end of 2008-09 to substantially complete the backlog reduction project.

Miscellaneous

Table 6 shows the distribution of complaint outcomes by government institution. Table 7 shows the distribution of complaints received/closed by province/territory.

Table 1 SUMMARY OF WORKLOAD

	April 1, 2004 to Mar. 31, 2005	April 1, 2005 to Mar. 31, 2006
Complaints from the Public		
Pending from previous year	1019	1365
Opened during the year	1486	1408
Completed during the year	1140	1319
Pending at year-end	1365	1454
Commissioner-Initiated Systemic Complaints		
Pending from previous year	0	0
Opened during the year	0	760
Completed during the year	0	329
Pending at year-end	0	431
Report Cards		
Full Review	3	4
Follow-up Review	12	12

Table 2 COMPLAINTS RECEIVED BY TYPE

Category	April 1, 2004 to Mar. 31, 2005		April 1, 2005 to Mar. 31, 2006	
Refusal to disclose	492	33.1%	430	30.5%
S.69 Exclusion	59	4.0%	52	3.7%
Delay (deemed refusal)	308	20.7%	339	24.1%
Time extension	178	12.0%	438	31.1%
Fees	35	2.3%	43	3.1%
Miscellaneous	414	27.9%	106	7.5%
Total	**1486**	**100%**	**1408**	**100%**

Table 3 COMPLAINT FINDINGS
April 1, 2005 to March 31, 2006

Category	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL	%
Refusal to disclose	171	14	116	43	344	26.1%
S.69 Exclusion	58	-	15	12	85	6.4%
Delay (deemed refusal)	276	-	8	26	310	23.5%
Time extension	447	-	32	2	481	36.5%
Fees	18	-	15	13	46	3.5%
Miscellaneous	19	-	8	26	53	4.0%
TOTAL	**989**	**14**	**194**	**122**	**1319**	**100%**
100%	**75.0%**	**1.1%**	**14.7%**	**9.2%**		

Table 4 TURNAROUND TIME (MONTHS)

Category	2003.04.01 – 2004.03.31				2004.04.01 – 2005.03.31				2005.04.01 - 2006.03.31			
	Standard		Difficult		Standard		Difficult		Standard		Difficult	
	Months	%	Months	%	Months	%	Months	%	Months	%	Months	%
Delay (deemed refusal)	3.60	17	9.48	6	3.73	16	5.59	4	4.54	14	6.77	9
Time extension	2.47	10	6.18	6	4.37	9	5.85	4	4.42	5	15.02	32
Fees	4.64	3	6.67	2	4.96	2	5.72	1	5.46	3	11.51	1
Miscellaneous	3.55	4	12.67	2	5.10	3	5.36	2	9.67	3	18.81	1
Subtotal - Admin Cases	3.24	34	7.30	15	4.14	30	5.52	11	4.57	25	15.02	23
Refusal to disclose	5.59	34	16.96	13	12.21	44	17.62	9	9.30	19	19.82	7
S. 69 Exclusion	8.04	4	7.07	0	13.32	5	23.01	1	19.69	5	28.42	1
Subtotal – Refusal Cases	6.12	38	16.93	13	12.33	49	18.41	10	11.18	24	24.84	8
Overall	4.67	72	10.36	28	7.00	79	10.75	21	6.58	49	15.02	51

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 admin. cases.

Table 5 EFFECT OF BACKLOG ON TURNAROUND TIME

Category	Backlog Complaints				Recent Complaints				Overall			
	Standard		Difficult		Standard		Difficult		Standard		Difficult	
	Months	%	Months	%	Months	%	Months	%	Months	%	Months	%
Delay (deemed refusal)	6.16	4	7.76	6	4.27	10	4.18	3	4.54	14	6.77	9
Time extension	6.71	1	15.02	32	2.84	4	4.41	0	4.42	5	15.02	32
Fees	8.25	1	24.76	0	4.14	2	9.14	1	5.46	3	11.51	1
Miscellaneous	7.12	0	18.81	1	9.73	3	4.98	0	9.67	3	18.81	1
Subtotal - Admin Cases	6.53	6	15.02	39	4.27	19	4.18	3	4.57	25	15.02	43
Refusal to disclose	15.21	9	25.55	6	6.25	10	9.21	1	9.30	19	19.82	7
S. 69 Exclusion	21.07	4	28.42	1	6.21	1	-	0	19.69	5	28.42	1
Subtotal – Refusal Cases	18.18	13	26.73	7	6.23	11	9.21	1	11.18	24	24.84	8
Overall	13.41	19	15.02	46	4.54	30	4.83	5	6.58	49	15.02	51

Table 6 COMPLAINT FINDINGS (by government institution)
April 1, 2005 to March 31, 2006

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Agriculture and Agri-Food Canada	7	-	2	1	10
Atlantic Canada Opportunities Agency	4	-	-	-	4
Business Development Bank of Canada	-	-	2	-	2
Canada Border Services Agency	21	-	2	1	24
Canada Firearms Centre	9	-	10	-	19
Canada Lands Company Limited	-	-	-	1	1
Canada Mortgage and Housing Corporation	4	-	1	-	5
Canada Revenue Agency	368	1	7	3	379
Canadian Air Transport Security Authority	1	-	-	-	1
Canadian Commercial Corporation	2	-	2	5	9
Canadian Environmental Assessment Agency	-	-	-	1	1
Canadian Food Inspection Agency	6	1	1	1	9
Canadian Heritage	-	-	8	-	8
Canadian Human Rights Commission	3	-	-	-	3
Canadian Institutes of Health Research	-	-	1	-	1
Canadian International Development Agency	1	-	-	-	1
Canadian Nuclear Safety Commission	-	-	1	-	1
Canadian Radio-Television & Telecommunications Commission	3	-	1	-	4
Canadian Space Agency	2	-	1	-	3
Citizenship and Immigration Canada	16	1	12	3	32
Correctional Service Canada	12	-	14	14	40
Department of Foreign Affairs and International Trade	43	-	3	2	48
Environment Canada	11	-	13	-	24
Finance Canada	8	-	3	-	11
Fisheries and Oceans Canada	30	-	14	2	46
Health Canada	30	-	3	12	45
Human Resources and Skills Development Canada	4	-	1	-	5
Immigration and Refugee Board	8	-	2	1	11
Indian and Northern Affairs Canada	17	-	3	19	39
Indian Residential Schools Resolution Canada	3	-	-	-	3

Table 6 COMPLAINT FINDINGS (by government institution)
April 1, 2005 to March 31, 2006 (continued)

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Industry Canada	16	-	2	-	18
Infrastructure Canada	-	-	1	-	1
International Centre for Human Rights and Democratic Development	1	-	-	-	1
Justice Canada	18	2	5	1	26
Library and Archives Canada	8	-	1	1	10
Mackenzie Valley Land and Water Board	1	-	-	-	1
Montreal Port Authority	8	-	-	-	8
Nanaimo Port Authority	1	-	-	-	1
National Capital Commission	-	-	2	-	2
National Defence	38	-	9	22	69
National Gallery of Canada	2	-	-	-	2
National Research Council Canada	2	-	-	-	2
Natural Resources Canada	1	-	1	-	2
Office of the Superintendent of Financial Institutions	1	-	2	4	7
Parks Canada Agency	-	-	2	-	2
Privy Council Office	62	6	17	13	98
Public Safety and Emergency Preparedness Canada	10	-	2	2	14
Public Service Commission of Canada	2	-	1	-	3
Public Works and Government Services Canada	57	-	10	9	76
Royal Canadian Mint	-	-	1	1	2
Royal Canadian Mounted Police	101	1	13	3	118
RCMP Public Complaints Commission	1	-	-	-	1
Security Intelligence Review Committee	-	-	2	-	2
Social Development Canada	13	-	1	-	14
St. John's Port Authority	2	-	-	-	2
Statistics Canada	2	1	1	-	4
Status of Women Canada	-	-	1	-	1
Transport Canada	19	1	2	-	22
Transportation Safety Board of Canada	1	-	-	-	1
Treasury Board Secretariat	8	-	8	-	16
Veterans Affairs Canada	1	-	3	-	4
TOTAL	**989**	**14**	**194**	**122**	**1319**

Table 7 GEOGRAPHIC DISTRIBUTION OF COMPLAINTS (by location of complainant) April 1, 2005 to March 31, 2006

	Received	Closed
Outside Canada	9	7
Newfoundland	4	6
Prince Edward Island	0	2
Nova Scotia	21	26
New Brunswick	12	26
Quebec	81	67
National Capital Region	572	513
Ontario	137	144
Manitoba	17	27
Saskatchewan	51	40
Alberta	35	22
British Columbia	464	435
Yukon	2	1
Northwest Territories	3	3
Nunavut	0	0
TOTAL	**1408**	**1319**

CHAPTER IV

Case Summaries

Case 1 – Is a Fee Estimate of $1.6 Million Too Much?

Background

A journalist made a request to the Royal Canadian Mounted Police (RCMP) for access to some 2.8 million criminal records contained in the computer systems of the Canadian Police Information Center (CPIC). The requester specifically asked that the information be disclosed in depersonalized form (i.e. no links to specific individuals) and that it be disclosed in electronic form.

To comply with the request, the RCMP determined that it would take 15 eight-hour days of computer programming for the Criminal Records Synopsis database and 183 eight-hour days for the Criminal Records History Level Two database. The RCMP took the view that it was entitled to charge fees for this computer time at the rate of $16.50 per minute for a grand total of $1,599,840. Moreover, the RCMP demanded that the full amount of the fee estimate be deposited by the requester before any further work would be done to process the request.

The requester filed a complaint with the Information Commissioner. He pointed out that he had recently made a similar access request for six years of arrest data from the Toronto Police Service. In response, non-personal details of some 480,000 arrests and 800,000 criminal charges were released in electronic format (a single CD-Rom) at a cost of $800. Consequently, the journalist argued that the $1.6 million fee estimate made by the RCMP constituted an unreasonable and unlawful impediment to access. Moreover, he argued that it would be in the public interest to allow members of the media to analyze CPIC criminal records for trends and patterns that may shed light on police practices and outcomes in the criminal justice system.

Legal Issues

The RCMP relied upon subsection 7(3) of the *Access to Information Regulations* to justify its fee estimate. It states:

> "**7.**(1) Subject to subsection 11(6) of the Act, a person who makes a request for access to a record shall pay

(3) Where the record requested pursuant to subsection (1) is produced from a machine readable record, the head of the government institution may, in addition to any other fees, require payment for the cost of production and programming calculated in the following manner:

(a) $16.50 per minute for the cost of the central processor and all locally attached devices; and

(b) $5 per person per quarter hour for time spent on programming a computer."

The legal issue, thus, is whether or not subsection 7(3) of the *Access to Information Regulations* was properly interpreted and applied by the RCMP.

The RCMP agreed that the estimate of 1,584 hours of computer time might not be entirely accurate, yet it argued that the regulations clearly permitted a charge of $16.50 for every minute of computer time.

The complainant argued that the RCMP's strict and literal interpretation is no longer appropriate in the decentralized computing environment which prevails now, some 23 years after subsection 7(3) of the regulations was written.

In support of his position, the complainant drew the Information Commissioner's attention to the following passage from page 60 of the Information Commissioner's 2002 Special Report to Parliament (a special report containing comments on an internal government Task Force report proposing changes to the *Access to Information Act*):

"The idea that producing a report from a database is tantamount to programming a computer is outdated. Current technology, available at a modest cost, can easily produce a variety of reports from a single database. As well, charging for central processing time was reasonable when processing capacity was a scarce resource. Mainframe computers were very costly to purchase. Charging for processing time was one way to amortize their cost. The same reasoning does not apply to much less costly personal computers.

Better performance capabilities and lower costs of PC-based networked computing means that the real machine time cost is next to nothing. While a charge of $16.50 for each minute of central processor time may be appropriate for mainframe computing, it can hardly be justified for networked personal computers. **The regulations of the Act should be amended to exclude PC-based processing from the central processing fee.**

A second pricing issue involves fees to be charged for such new ways of distributing information as CD-Roms and computer printouts. These media are not covered by the current fee schedule. The fee schedule clearly intends to

limit the cost to the requester to the cost of compiling and reproducing the information. The same pricing philosophy should be maintained for new media formats."

The Information Commissioner's investigation confirmed that the deposit demanded by the RCMP was far greater than the actual costs to the RCMP of complying with the request. Despite the large amount of data to be depersonalized and prepared for release on CD-ROM, simply designed and off-the-shelf software was available to accomplish the task using very little CPU processing time. Moreover, processing the request in a modern multi-tasking computing environment, CPU systems did not need to be entirely devoted to responding to the access request. In fact, the real machine-time costs of computing in this case were so low as to be unmeasurable.

In protracted discussions during the investigation, the RCMP recognized that one entire database need not be processed as it consisted entirely of personalized information and, while maintaining its legal position, the RCMP, on December 1, 2005, disclosed the requested records to the requester in electronic format, without charging any fees.

Lessons Learned

The fee regulations for computer time do not reflect the cost realities in modern computing environments. The regulations should not be interpreted as authorizing the collection of fees which exceed the actual direct costs of the associated computing (in fact, in 2005-06, the actual direct costs of computing time are negligible).

Case 2 – Who Do the Department's Lawyers Really Work for?

Background

An individual concerned about the government's refusal to pay interest on the retroactive amounts awarded to her by way of disability pension made an access request to Human Resources Development Canada (HRDC), now known as Human Resources and Social Development (HRSD), for records about Canada Pension Plan (CPP) Disability Plan. In particular, she asked for records concerning a recently launched class action suit against the government seeking interest on retroactive disability pension payments.

In response, HRSD provided 12 pages of records as well as a few previously released records. Only one record (the statement of claim) concerned the related class action suit.

In particular, HRSD did not, in response to the request, search for relevant records which may have been held by the department's in-house lawyers. HRSD took the view that its lawyers are employees of the Department of Justice and, even though the lawyers' offices may be on HRSD premises, any records held exclusively by them and not shared with HRSD employees, are Department of Justice records, not HRSD records. Under this view, the requester would have to make an access request to the Department of Justice rather than to HRSD for any records the in-house lawyers might hold relating to the pension interest class action.

Legal Issues

Does an access request, addressed to HRSD, cover records relevant to the request which are held by the HRSD legal branch?

The investigation confirmed that two class actions had been filed seeking payment of interest on retroactive CPP disability pension payments. HRSD's in-house lawyers were seized of these actions, and HRSD was the "client" department.

The investigation confirmed that some 53 pages of records relevant to the access request were held exclusively in HRSD's legal services branch.

The Information Commissioner concluded that the lawyer in HRSD's legal branch, who had physical possession of records relevant to the access request, was an employee of the Department of Justice. He also took into account the fact that the records the lawyer possessed consisted of an exchange of communications between Department of Justice lawyers which were not shared (or intended to be shared) with HRSD employees.

In these circumstances, the commissioner concluded that the 53 records were not under the control of HRSD and, hence, a separate request would have to be made for them to the Department of Justice.

Lessons Learned

Although Department of Justice lawyers may be housed in and work for another government institution, not all records held by those lawyers will be considered to be under the control of the client department. Some record held by lawyers consist of communications between or among Department of Justice lawyers which are not shared with, or intended to be shared with, officials of the client department. Such records remain under the control of the Department of Justice and access requests for them must be addressed to the Department of Justice.

Case 3 – Keeping the Decision Record of IRB Members Secret

Background

A member of the media heard rumours that a particular member of the Immigration Refugee Board (IRB) habitually rejects the refugee claims of Muslim and Arab claimants without good reason. The journalist made access requests to the IRB for statistics about the outcomes of refugee claims cases heard by the Board member.

In response, the IRB refused to disclose the requested information, and it relied on two provisions of the *Access to Information Act* to justify its decision – paragraph 16(1)(c) and subsection 19(1). Paragraph 16(1)(c), the protection of law enforcement exemption, authorizes refusal to disclose information the disclosure of which could reasonably be expected to be injurious to law enforcement. Subsection 19(1), the protection of privacy exemption, authorizes refusal to disclose information about identifiable individuals.

Legal issues

Is it justifiable to keep secret the decision record of a quasi-judicial officer on either privacy grounds or on the grounds of protection of law enforcement efforts?

The access requester pointed out that the IRB had released such statistics in the past. She could conceive of no way in which disclosure would interfere with the IRB's work. She also argued that the decision record of a public official, especially a specialized judge, could not properly be considered the decision-maker's personal information. The requester emphasized the importance of holding the IRB accountable through transparency of its process. Here are her words:

> "As you know, failed refugee claimants in Canada are not entitled to an appeal based on the merits of their cases. Appeals to the Federal Court on the grounds that a decision contains an error of law are rarely heard, and rarely successful. It is therefore extremely important that IRB members make good decisions. The public must be able to properly scrutinize the work of those members, especially if there is a concern that a member has a pattern of making bad decisions. That requires access to the kind of information I was denied."

For its part, the IRB argued that statistics on decision outcomes could be highly misleading. If, for example, a member's caseload consisted of claims from certain regions or specific types, skewed results (either pro-acceptance of claims or vice versa) could be perfectly normal and not indicative of any bias or arbitrariness by the decision-maker.

The IRB argued that the use by the media of previous disclosures of acceptance rates proved its point; a member was named a "refusenik" by the Globe and Mail, a claim the newspaper later retracted. Here is how the IRB expressed its concern:

> "Acceptance and rejection rates appear to indicate whether decision-makers are more or less likely to accept the claims, which come before them. However, the requested statistics are highly misleading because they fail to take account of relevant factors. For example, the decision-maker named by the Globe and Mail as the member who had allegedly rejected all cases he heard in the specified time period had, in fact, heard few cases in the specified region since he works regularly in another region. Such statistics also fail to assess the types of cases assigned to decision-makers. For example, a member who works on large numbers of 'expedited claims' (claims which appear to be 'manifestly founded' from the outset) will have high positive rates while members who work on many claims from democratic nations will have high negative rates."

The Information Commissioner felt that it was entirely within the IRB's control to provide contextual information to help requesters fully understand statistical information about the acceptance rates of IRB members. He also rejected the IRB's concerns about "judge shopping", since the assignment of cases is entirely within the IRB's control. For these reasons he did not accept the IRB's contention that disclosure of acceptance rates could reasonably be expected to be injurious to the IRB enforcement of the *Immigration Act*.

With respect to the "personal information" exemption (subsection 19(1)), the Information Commissioner concluded that the requested information – the outcomes of quasi-judicial decision-making – is not information about the deciders; it is, rather, their "work product". He also concluded that Parliament's intention that the requested information not receive privacy protection is made clear by the definition of "personal information". In particular, paragraph 3(j) of the *Privacy Act* states that information relating to the position or functions of a public official does not qualify for privacy protection. As well, subparagraph 8(2)(m)(i) of the *Privacy Act* authorizes the disclosure of personal information where the public interest in disclosure clearly outweighs any invasion of privacy that could result.

With respect to the matter of the public interest in disclosure, the Information Commissioner concluded that the public interest in the accountability of the IRB through transparency clearly outweighs any possible negative effects on the reputation of the Board and its members from disclosure of statistics on decision

outcomes, especially when the IRB is fully able to disclose any needed contextual information to aid in the interpretation of such statistics.

The IRB agreed to disclose the requested information.

Lessons learned

The *Access to Information Act* does not permit government institutions to rely on secrecy as a means of winning and keeping public respect and confidence. To the contrary, the Act fosters the accountability of government institutions through transparency. The need for disclosure is especially important when a government institution exercises quasi-judicial powers – making decisions which directly affect the rights and liberties of individuals.

Case 4 – May a Government Institution Unilaterally Convert an Access to Information Act Request into a Privacy Act Request?

Background

A lawyer made requests, on behalf of two clients, to the Canada Revenue Agency (CRA) under the *Access to Information Act*. The requests were for records relating to the clients' income tax affairs. The requests were made on official Access to Information (ATI) request forms, accompanied by the required application fees. Approximately one week after receiving the requests, CRA wrote to the lawyer to say that the requests did not comply with section 6 of the Act. Section 6 requires that access requests "provide sufficient detail to enable an experienced employee of the institution with a reasonable effort to identify the record."

The lawyer did not understand how he could be more specific because he wanted all records held by CRA concerning their income tax affairs. He made a complaint to the Information Commissioner.

CRA decided to proceed to gather the responsive records, but also decided, unilaterally, to convert the ATI requests into *Privacy Act* requests.

Legal Issues

Must an access requester formulate requests with specifics as to what branches of the institution may hold the records, or what functional areas are relevant to the subject of the request? That was one issue raised by this complaint. The second was whether a government institution may, unilaterally, convert an ATI request into a *Privacy Act* request.

The Information Commissioner concluded, on the first issue, that section 6 of the Act does not require a sophisticated knowledge, on the part of the requesters,

concerning the organization, business processes, records management systems, or functional divisions of the government institution to which a request is made. Rather, it assumes that experienced officials of the government institution will do their part to comply with requests, even if the requests are for all records on a particular topic.

The Information Commissioner acknowledged that it is always good practice for government institutions to clarify requests, and for ATIP officials to keep in close communication with requesters so that access requests are well-formulated and well-understood. The Information Commissioner emphasized, however, that the Act gives no authority to government institutions to decide that access requests which are broadly worded are improper.

With respect to the second issue, the Information Commissioner concluded that requesters have the right to choose whether to make requests for information under either the *Access to Information Act* or the *Privacy Act*. Some requesters will choose to request information about themselves under the *Access to Information Act* because a greater array of records is available under that Act (whereas, under the *Privacy Act*, one may only receive access to one's own personal information). On the other hand, there are fees for making a request and obtaining copies under the *Access to Information Act*, while there are no fees under the *Privacy Act*. It is up to the requester, however, not the receiving institution, to decide which Act should govern the processing of the request.

CRA agreed to process the requests under the *Access to Information Act*, without further clarification, and responses were provided.

Lessons Learned

Government institutions walk a fine line when trying to be helpful to access requesters. For example, they may believe that fees could be eliminated if an access request is converted into a *Privacy Act* request. Even if that is the prudent course, it should not be taken without the requester's consent. And, too, institutions may feel that the time and fees associated with a broadly worded access request could be reduced if the request is more narrowly focused. Even if they are correct, it is rarely an acceptable answer to decide that the request does not comply with section 6. The prudent course is to develop a good communication with the requester to encourage a reformulation of the request; if the requester wishes to proceed with a broadly-worded request, that is his or her right.

Case 5 – Secret Expense Claims

Background

A journalist made access requests to the MacKenzie Valley Land and Water Board (MVLWB) seeking copies of the expense claims and monthly government credit card bills for a former chairperson of the MVLWB. In response, the Board refused to disclose the requested records, pursuant to subsection 19(1) of the *Access to Information Act*, to protect the privacy of the former Board chairperson. The requester complained to the Information Commissioner.

Legal Issues

Do a public official's expense claims and government credit card bills constitute the official's personal information which may be exempted from the right of access under subsection 19(1) of the Act?

The Information Commissioner noted that this issue is not new. Indeed, most government institutions now post expense and travel claims of senior public officials on their websites. The reason for this level of openness is that the definition of "personal information" (which may be kept secret) contains an explicit exception for information about present or former public officials which relates to their position or functions (see paragraph 3(j) of the *Privacy Act*).

The MVLWB accepted the commissioner's views and disclosed the requested records.

Lessons Learned

Public officials do not have as much privacy protection as do others. It is a "red flag" when a government institution justifies secrecy about the actions of its officials on the grounds of protecting their privacy. While a zone of privacy does remain for public officials, it is limited, and does not extend to records about their expense claims and use of government credit cards.

Case 6 – Gotcha!

Background

While in a Canadian jail, awaiting deportation, an individual made an access request to the RCMP for copies of agreements between U.S. agencies and the RCMP regarding the sharing of information. Some four months after receiving the request, the RCMP still had not given out the records; it had missed the response deadline by some three months. Yet, at that point, the requester had been deported. The RCMP decided that the requester had lost his right of access

because he was no longer present in Canada. The RCMP informed the requester that his "requests are no longer deemed to be valid and are considered by this office to be abandoned." The requester complained to the Information Commissioner.

Legal Issue

If an individual is entitled to make access requests by virtue of being present in Canada, is the entitlement lost if the person ceases to be present in Canada before the response is given?

In this case, the issue was made more complex by the fact that, but for the RCMP's foot-dragging, the response might have been issued before the requester's deportation.

The requester argued that, by virtue of **Extension Order No. 1**, he was properly qualified to make his access request, that his entitlement did not cease upon his deportation and that, if the RCMP had answered in a timely manner, he would have received his records while present in Canada. Section 2 of the *Access to Information Act* **Extension Order No. 1** states:

> "2. This right to be given access under subsection 4(1) of the *Access to Information Act* to records under the control of a government institution is hereby extended to include all individuals who are present in Canada but who are not Canadian citizens or permanent residents within the meaning of the *Immigration Act* and all corporations that are present in Canada."

The RCMP also invoked **Extension Order No. 1** as authority for its view. It pointed to the opening words: "This right to be given access …"; in the RCMP's view, these words make it clear that the requester must be in Canada both at the time of the request and at the time access is given. In support of its position, the RCMP pointed to the Treasury Board Guidelines, Chapter 2-2, page 1, which states that the requester (unless otherwise qualified) must be physically in Canada "both at the time that the request is filed and at the time that access is given".

The Information Commissioner concluded that the RCMP, and the Treasury Board Guidelines, had misinterpreted the intent of **Extension Order No. 1**. In particular, the Information Commissioner concluded that the RCMP's interpretation was too open to abuse to be appropriate. In the Information Commissioner's view, the critical moment is the date of the access request; if the requester is "qualified" at that date, then he or she has a continuing right to receive access even if the qualification is subsequently lost.

The RCMP, without giving up its legal position, but recognizing that its own delay was a cause of the problem, agreed to continue processing the request.

Lessons Learned

Cases such as this one will be rare. The better practice in such cases is for government institutions to respect the right of access if the process was triggered by a qualified requester, even if the requester thereafter ceases to be qualified.

Case 7 – Dead or Alive?

Background

An individual associated with the hobby of medal collecting made frequent access requests to the Library and Archives of Canada (LAC) for information about the deceased persons who had been awarded the medals. The requester was aware that, by virtue of paragraph 3(m) of the *Privacy Act*, such information is protected "personal information" unless the medal recipient has been dead for 20 years or more. In the past, the LAC had been willing to assist the requester by verifying whether or not proof of death was contained in the file and, if so, whether it showed that 20 years or more had elapsed since death. By so doing, the LAC assisted the requester in determining whether or not he was entitled to receive the medal recipient's file.

The complaint to the Information Commissioner was made after LAC changed its policy; it would no longer assist the requester in determining date of death. If the requester could not prove that he was seeking information about a person who had been dead for 20 years or more, LAC would not even begin looking through the requested file; rather, it would simply refuse access based on subsection 19(1) of the *Access to Information Act*.

Legal Issue

Who has the onus to prove that requested information is "personal" and, hence, qualifies for exemption from the right of access under subsection 19(1) of the Act? Is it the requester? Is it the government institution?

The investigation confirmed that LAC had changed its policy, now placing the onus on the requester to provide proof of death when seeking records about other persons – even if proof of death is contained on file. The LAC did not consider that it should continue to undertake confirmation of death research for access requesters, in order to verify for them whether or not requesters have a right of access to another person's information.

The Information Commissioner disagreed with the LAC view. The jurisprudence is clear that the onus of proof that secrecy is justifiable is on the party asserting it, in this case, on the LAC. Before the LAC may invoke

subsection 19(1) to refuse disclosure of requested information, it must be satisfied that the information is "personal", and information about a person who has been dead for 20 years or more is not "personal".

Consequently, if there is proof in the file that a person has been dead for 20 years or more, then the information must be disclosed to the requester.

The LAC promised to review its policy, and it disclosed the specific records requested by the complainant.

Lessons Learned

Whenever a government institution proposes to refuse disclosure on the basis of subsection 19(1) of the Act, it bears the onus of demonstrating that the information is "personal". If there is evidence in the file that the person to whom the information relates has been dead for 20 years or more, then the information is not "personal" and access may not be denied under subsection 19(1).

Case 8 – Disclosing Requester Identities

Background

An anonymous letter was received by the Information Commissioner, alleging improprieties within Citizenship and Immigration Canada in the processing of access requests. In particular, the writer alleged interference in, and delay of, the process by the Minister's Office. As well, the writer alleged widespread disclosure within the department of the identities of access requesters.

Based on these allegations, the Information Commissioner initiated a complaint on his own motion and commenced an investigation.

Legal Issues

Does the Minister's Office have an involvement in the processing of access requests in Citizenship and Immigration Canada and, if so, is such involvement proper? Are the identities of access requesters used and disclosed in accordance with the requirements of the *Privacy Act*? These were the principal issues addressed by the investigation.

With respect to the involvement of the Minister's Office, the investigation confirmed that, in the past, the Minister's Office was part of the access to information process. Without a sign-off from the Minister's Office, access requests could not be answered. However, because of the delays caused by such a process, the department had made significant changes.

At the time of the investigation (and for some 6-8 months prior to it), the Minister's Office received notice of selected impending access disclosures, but it

played no approval role or did it have any delaying effect. The investigation confirmed that the Minister's Office played no role in deciding whether or not to exempt requested information.

With respect to the issue of disclosure of requester identities, the investigation determined that care was taken by officials to disclose requester identities only to the extent necessary to process the request. For example, officials in operating areas who are tasked to find requested records are not informed of the requesters' identities; neither are identities disclosed to senior officials or the Minister's Office.

Consequently, the commissioner was satisfied that the anonymous allegations did not have merit at the time they were investigated.

Lessons Learned

Departments are becoming more sensitive to the need to separate their access to information process from their communications services to the minister. By so doing, delays and unnecessary disclosures of requester identities are likely to be avoided.

Case 9 – How Much Secrecy is Appropriate for a Draft Audit Report?

Background

A journalist made a request to the Canada Revenue Agency (CRA) for access to a copy of the report (or draft report) of an internal audit of travel and hospitality expenses. At the time of the request, the report of the audit had not been approved by the CRA's management, so it was considered to be a draft report. CRA decided to refuse access to any portion of the report relying on paragraphs 21(1)(a) and (b) of the *Access to Information Act* to justify its decision. The requester did not accept that every portion qualified for exemption, and he complained to the Information Commissioner.

Legal Issues

Paragraph 21(1)(a) authorizes refusal to disclose internal advice or recommendations; paragraph 21(1)(b) authorizes refusal to disclose accounts of internal consultations or deliberations. CRA argued that the very purpose of audit reports is to provide senior management with advice and recommendations and that such reports contain accounts of consultations and deliberations among public officials. Moreover, the CRA argued, the very process of getting approval for a draft audit report is itself a "consultation and deliberation" – a process which should be kept confidential. According to CRA, it fully intended to publicly

disclose the final report, but did not consider it appropriate to disclose a draft version which might contain misleading, incorrect or incomplete information.

The Information Commissioner reminded CRA of its obligation, set out in section 25 of the Act, to avoid blanket secrecy in favor of a page-by-page, line-by-line analysis into specific portions which may deserve secrecy. For example, the Information Commissioner reminded CRA that factual and background information would not qualify for exemption and should be disclosed.

The department agreed that it should not have decided to withhold the entire draft audit report; it agreed that portions could have been severed and disclosed without revealing advice, recommendations or accounts of consultations or deliberations.

The requester suggested that, rather than asking the CRA to prepare and release a severed version of the draft report, the CRA be asked to give him an advance copy of the final version, when it was ready. CRA agreed, and, on that basis, the complaint was considered resolved.

Lessons Learned

In most institutions there is concern about disclosure, under the Act, of draft audit reports or audit reports in the approval process. Some of this concern relates to the integrity of the audit process (i.e. concerns about incomplete, inaccurate, or misleading content); some of the concern relates to a perceived need to "manage the message". Most government institutions do not wish to disclose audit reports until the institution's head, its public affairs branch, and, in some cases, central agencies have been fully informed, and until a communications "plan" or "line" has been developed. No matter what the concern, however, it is rarely justifiable to withhold a draft report in its entirety. By their nature, audit reports contain descriptive and factual information that will not qualify for section 21 exemptions.

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

CHAPTER V

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 reporting year, the commissioner's office completed 1,319 investigations. Only 14 cases could not be resolved to the commissioner's satisfaction, and these resulted in four new applications for review being filed by the commissioner. Five applications for Court review were filed by dissatisfied requesters. Third parties opposing disclosure filed twenty applications. One application was initiated against the Information Commissioner by the Crown.

This year, with respect to access litigation, the Federal Court of Canada issued 15 decisions, the Federal Court of Appeal issued 4 decisions, and the Supreme Court of Canada granted leave to the Information Commissioner to intervene in one case.

B. The Information Commissioner in the Courts

I. Cases Completed

The Information Commissioner of Canada* v. *The Attorney General of Canada and Mel Cappe, SCC 31065, Supreme Court of Canada (see Annual Report 2004-2005, pp. 60-62 for further details)

Nature of Proceedings

This was 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, and its appeal, *Canada (Attorney General)* v. *Canada (Information Commissioner)*, 2005 FCA 199, have been reported in a number of earlier annual reports to Parliament, most recently in the Information Commissioner's 2004-05 annual report at pages 60-61. However, the outcome of the appeal was not decided at that time.

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 that 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, it was a legal advice memorandum created in order to provide legal advice to the Privy Council Office in response to the access to information requests. The legal opinion pre-dated the complaint to the Information Commissioner's Office and, therefore, the commencement of the Information Commissioner's investigation.

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 Act 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, and 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 (FCA), (Court of Appeal file A-761-99) leave to appeal to SCC, dismissed, [2000] SCC file 27956.

In the appeal, the Attorney General and Mel Cappe challenged Justice Dawson's decision, contending *inter alia* that the Information Commissioner is required to

establish absolute necessity prior to compelling the production of records that are asserted to be the subject of solicitor client privilege during the course of his *in camera* investigation.

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

Outcome

The appeal was heard on May 4, 2005, and judgment was given on May 27, 2005. Justice Malone wrote the reasons for the judgement, and the panel consisted of Desjardins J., Noël J., and Malone J.

The Court interpreted subsection 36(2) of the Act restrictively. The *Ethyl* decision was distinguished. The ancillary records that the Information Commissioner was permitted to examine in *Ethyl* were created before the records were requested, and they were needed to determine the truth of a claim that the requested records did not exist. The Court in *Ethyl* found that such records were therefore relevant and necessarily must be produced to the Information Commissioner under section 46 of the Act. The Court stated that this finding was not determinative of whether a record prepared after the request was made would be producible to the Information Commissioner under subsection 36(2) of the Act.

The Court noted that solicitor-client privilege is more than a rule of evidence; it is a fundamental and substantive rule of law with a unique status. As such, it must be as close to absolute as possible and should only be set aside in unusual circumstances. Where legislation permits interference with the privilege for a particular purpose, such legislation should be interpreted as restrictively as possible. Both parties before the Court agreed that the Information Commissioner is empowered to examine information which has been withheld from an access requester pursuant to section 23 of the Act as being subject to solicitor-client privilege. However, the Attorney General argued that the Information Commissioner did not have authority to review any ancillary records.

The Court observed that there is the potential for the Information Commissioner to become adverse in interest to the government institution from which information is being requested, since the Information Commissioner has standing under subsection 42(1) of the Act to initiate a court challenge of any refusal to provide access to requested records.

In light of these two considerations, the Court found that any use of the Information Commissioner's powers under paragraph 36(1)(a) and subsection 36(2) of the Act to obtain the document requested in this case would interfere with solicitor-client privilege in a manner that is unnecessary for the achievement of the enabling legislation. Since such interference is only permitted where it is absolutely necessary, the Information Commissioner does not, the Court held, have the power to compel the production of the legal advice memorandum in this case.

The Court also made reference to the case of *Pritchard* v. *Ontario (Human Rights Commission)*, [2004] 1 SCR 809 wherein the SCC indicated that the legislature can abrogate the existence of solicitor-client privilege by eliminating the expectation of confidentiality, but that the question of whether solicitor-client privilege could be violated by the express intention of the legislature was a controversial matter.

The Court stated that the record in this case was prepared to provide legal advice on how to respond to the access to information request, and that Parliament could not have intended a government institution to be without the benefit of confidential legal advice on such a matter. Therefore an expectation of confidentiality existed that must be upheld where production of the document is not necessary in order to prevent a "chilling effect" that might discourage the government from fully confiding in its legal advisers.

The Court found that Madame Justice Dawson, therefore, erred by adopting a purposive and liberal interpretation of subsection 36(2), since the fundamental and important role of solicitor-client privilege in the legal system mandates a restrictive interpretation.

The appeal of the Attorney General was allowed.

The Information Commissioner sought leave to appeal this decision to the Supreme Court of Canada, but it was refused on November 17, 2005 (SCC File 31065).

Francis Mazhero* v. *Information Commissioner of Canada, T-313-04, Federal Court, Lafrenière, P., January 5, 2006,(see Annual Report 2004-2005, p. 63 for further details)

Nature of Proceedings

This was a motion by the Information Commissioner for an order striking out an application for judicial review against the Information Commissioner.

Factual Background

Mr. Mazhero, a self-represented litigant, brought an application for judicial review of two "decisions" of the Information Commissioner. The first was a request that Mr. Mazhero provide proof that the RCMP received his access request under the Act. The second was a suggestion that Mr. Mazhero grant the Information Commissioner permission to forward a copy of the access request to the RCMP.

Mr. Mazhero sought an order quashing these "decisions" and an order of *mandamus* directing the Information Commissioner to recommend that the RCMP disclose the records he claims to have requested. The Information Commissioner brought a motion to be removed as a respondent and to strike the application on the grounds that it was bereft of any possibility of success.

On June 17, 2004, Rouleau J. ordered the Information Commissioner removed as a Respondent and indicated the Court would hear the motion to strike.

Mr. Mazhero opposed the Information Commissioner's motion to strike on the grounds that the Information Commissioner had no standing to bring this motion because the Information Commissioner had not filed a proper Notice of Appearance.

Issues Before the Court

1) Did the Information Commissioner have standing to bring the motion?

2) Should the motion be struck?

Finding on Each Issue

Re 1), the failure to file a Notice of Appearance was not material. Mr. Mazhero knew well in advance that the Information Commissioner opposed the application, and there is no evidence that he was prejudiced by the failure to file such a Notice. In any case, any deficiency of the Information Commissioner is rectified by Rouleau J.'s order granting leave to the motion.

Re 2), the requests by the Information Commissioner that Mr. Mazhero provide certain information and grant permission for the Information Commissioner to communicate with the RCMP were administrative actions. They were not "decisions" within the meaning of subsection 18(1) of the *Federal Courts Act*. Mr. Mazhero's rights and interests were not affected by the Information Commissioner's requests. There was no indication that the Information Commissioner had refused to investigate the complaints either and, therefore, no grounds for a writ of *mandamus*.

Judicial Outcome

The application for judicial review was found to be bereft of any chance of success, and the motion to strike it was granted.

Matthew Yeager* v. *National Parole Board, Correctional Service of Canada; Information Commissioner of Canada (Commissioner); Minister of Public Safety and Emergency Preparedness; and The Attorney General, T-1644-04, Federal Court, February 3, 2006 (see Annual Report 2004-2005, p. 63 for further details)

This application for judicial review against the Information Commissioner was discontinued by the applicant on the eave of the hearing before the Federal Court.

The Information Commissioner* v. *The Minister of Industry, T-53-04, T-1996-04 Federal Court (See Annual Report 2003-2004, pp. 53-54 and Annual Report 2004-2005, pp. 57-59 for more details)

These applications for review, seeking orders requiring the Chief Statistician to disclose the 1911 nominal census returns (given the passage of more than 92 years), were discontinued after the Chief Statistician transferred the records to the National Archives which made all 1911 census records fully available to the public on its website at the end of July 2005. This action was taken by the Chief Statistician when the government introduced amendments to the *Statistics Act* which established rules for the disclosure of historic census records and rules for public disclosure of future census records.

The Information Commissioner* v. *The Minister of Industry, T-421-04 Federal Court, Kelen, J., February 13, 2006 (See Annual Report 2003-2004, pp. 54-55 and Annual Report 2004-2005, pp. 57-59 for more details)

Nature of Proceedings

This was an application for judicial review brought pursuant to paragraph 42(1)(a) of the *Access to Information Act* (the Act).

Factual Background

In this application, the Director of the Algonquin National Secretariat made a request to Statistics Canada (part of the Department of Industry) for access to the 1911, 1921, 1931, and 1941 census records in relation to certain districts in the Provinces of Ontario and Québec. The request was made on behalf of three Algonquin First Nation Bands (the "Algonquin Bands") who had received funding from the Federal Government for the purpose of researching and preparing a land claim. This land claim requires evidence of community continuity through time in terms of membership, land use, and occupancy. Without the census records, the Algonquin Bands were missing proof of continuity of occupation for the 20th century, until 1951.

The Algonquin Bands proposed that the census records be disclosed to an ethnohistorian researching the land claim on the Bands' behalf. This ethnohistorian was willing to undertake to maintain the confidentiality of the census records not related to the ancestors of the Bands in order preserve the confidentiality of personal information in the census records with respect to non-Aboriginal persons.

Notwithstanding the Bands' proposal, the Chief Statistician denied the access request based on subsection 24(1) of the Act. This provision requires the head of a government institution to refuse to disclose a requested record that contains information the disclosure of which is restricted by a provision set out in a Schedule to the Act. This Schedule, in turn, includes section 17 of the *Statistics Act*, R.S.C. 1985, c. S-19, which contains a restriction on the disclosure of individual census returns.

The Algonquin Bands complained to the Information Commissioner, who investigated the complaint 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*. Statistics Canada refused to follow the Information Commissioner's recommendation. As a result, on January 12, 2003, the Information Commissioner filed an Application for Judicial Review of the decision to refuse access to the 1911, 1921, 1931, and 1941 census records.

Thereafter, the *Statistics Act* was amended so as to require a release to the public of census records after the passage of 92 years. As a result of this amendment, Statistics Canada released the 1911 census records. The application for review was later amended to reflect the fact that access to the 1911 census records were no longer a source of contention between the parties.

Issues Before the Court

The issues defined by the Court are as follows:

1) Are the census records necessary for the land claim of the Algonquin Bands?

2) Are the census records in this case subject to production under the Act?

3) Is section 35 of the *Constitution Act, 1982* "statutory or other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*?

4) Is paragraph 8(2)(k) of the *Privacy Act* "statutory or other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*?

5) What is "information available to the public" within the meaning of paragraph 17(2)(d) of the *Statistics Act*?; and

6) In the alternative that the respondent was prohibited from disclosing census records pursuant to section 17 of the *Statistics Act*, what would be the effect of section 52 of the *Constitution Act, 1982*?

Findings

1) Are the census records necessary for the land claim of the Algonquin Bands?

The Court was satisfied that the requested census information is necessary and important for the Algonquin Bands to properly document its land claim.

2) Are the census records in this case subject to production under the Act?

The Court rejected the government's argument that section 24 of the Act prohibits the disclosure of the census records. The Court noted that, although subsection 24(1) of the Act incorporates by reference the restriction on the disclosure of census records set out in paragraph 17(1)(b) of the *Statistics Act*, subsection 17(2) grants the Chief Statistician discretion to authorize the disclosure of "information available to the public under any statutory or other law".

Thus, if the census records are "information available to the public under any statutory or other law", the Chief Statistician has the discretion to authorize their disclosure. In turn, the disclosure of the census records would not be prohibited under the Act.

3) Is section 35 of the *Constitution Act, 1982* "statutory or other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*?

Section 35 of the *Constitution Act, 1982* offers constitutional protection to Aboriginal rights and treaty rights that already exist by established land claim agreements or those rights which may be acquired. The Court noted that it would be inconsistent with section 35 of the *Constitution Act, 1982* for the Crown to have in its possession, yet suppress, evidence required by Aboriginal peoples to prove their land claim.

The Court, citing decisions by the Supreme Court of Canada, considered the Crown's obligations in its dealings with Aboriginal peoples. The Court noted that among these obligations is the duty to act honourably and enter into and conduct Aboriginal land title negotiations in good faith. Applying these principles to the case at bar, the Court held that Crown's duty to act honourably requires good faith negotiations leading to a just settlement of the Aboriginal claims. In light of the fact that Aboriginal title requires proof of continuity between present and pre-sovereignty occupation of the territory over which Aboriginal title is claimed, the Crown's honour gives rise to a fiduciary duty with respect to the census records that relate to the Aboriginal rights in the territories at stake and requires that the Crown disclose census records in its possession that may prove continuity of occupation.

The Court concluded that section 35 of the *Constitution Act, 1982* and the Crown's common law duties to act honourably, in good faith, and as a fiduciary with respect to Aboriginal land claims, are "statutory or other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*.

4) Is paragraph 8(2)(k) of the *Privacy Act* "statutory or other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*?

The Court noted that paragraph 8(2)(k) of the *Privacy Act* permits the disclosure of personal information to any Indian Band, or person acting on the Band's behalf, for the purpose of researching or validating claims, disputes, or grievances of any of the aboriginal peoples of Canada. The Court concluded that this constitutes "statutory or other law" within the meaning of paragraph 17(2)(d) of the *Statistics Act*.

5) What is "information available to the public" within the meaning of paragraph 17(2)(d) of the *Statistics Act*?

When interpreting the words "available to the public" in paragraph 17(2)(d) of the *Statistics Act*, the Court rejected the Crown's argument that this required that the information be "accessible as a matter of right or legal certainty" to "the public at

large". Instead, the Court held that the meaning of the term "available to the public" ought to be liberally construed.

The Court recognized that the information in the census records was precisely the type of information that, under the *Privacy Act*, Parliament intended could be disclosed. Meanwhile, as a result of the *Constitution Act*, the Crown is obligated to provide this type of information to Aboriginal peoples. In this context, the Court held that the term "available to the public" must be taken to mean "a member of the public", and not simply the public as a whole.

The Court went on to state that, if it were wrong in this regard, the Crown would nonetheless have failed to discharge its burden under section 48 of the Act of establishing that the access refusal was authorized, because the Court was not convinced that the Crown was correct in its interpretation of the words "available to the public".

6) In the alternative that the respondent was prohibited from disclosing census records pursuant to section 17 of the *Statistics Act*, what would be the effect of section 52 of the *Constitution Act, 1982*?

Section 52 of the *Constitution Act, 1982* states that any law that is inconsistent with the Constitution of Canada is, to the extent of the inconsistency, of no force or effect. Therefore, if section 17 of the *Statistics Act* were interpreted as prohibiting the disclosure of the census records under the Act, section 17 would be inconsistent with section 35 of the *Constitution Act* which imposes a constitutional obligation on the Crown to provide the Algonquin Bands with those parts of the census records required to prove their land title claim. Because of section 52, section 17 would be of no force or effect to the extent that it conflicts with section 35 of the *Constitution Act*, unless section 17 could be justified. The Court went on to reject the argument that section 17 could meet the test for justifying an interference with Aboriginal rights set out in section 35 of the *Constitution Act*.

Judicial Outcome

The application for review was allowed. The Court set aside the decision to refuse disclosure and referred the decision back to the Chief Statistician with a direction that he consider paragraph 17(2)(d) of the *Statistics Act* and that the census records for 1921, 1931, and 1941 could be disclosed to the ethnohistorian on behalf of the Algonquin Bands, upon his undertaking that he will keep confidential the personal information in the census records with respect to non-Aboriginal persons.

Future Steps in the Proceeding

This decision has been appealed (Court file A-107-06). The outcome of the appeal will be reported in next year's annual report.

II. Cases in progress - Information Commissioner as Applicant / Appellant

The Information Commissioner of Canada* v. *The Executive Director of the Canadian Transportation Accident Investigation and Safety Board and NAV Canada and the Attorney General of Canada, A-165-05 and A-304-05, Federal Court of Appeal, Richard, C.J., Desjardins, Evans, J.J. heard February 28 and March 1, 2006. Judgement reserved. (See Annual Report, 2004-2005, p. 52-53 for more details)

Nature of Proceedings

This is an appeal of Madam Justice Snider's decision of March 18, 2005 to dismiss the Information Commissioner's application for review of the decision of the Executive Director of the Canadian Transportation Accident Investigation and Safety Board (hereinafter the "TSB") to refuse to disclose tapes and transcripts of communication between air traffic controllers and aircraft personnel ("ATC" communications). Justice Snider further refused to determine a constitutional issue as to whether subsection 9(2) of the *Radiocommunication Act* 1985, cr. 2 infringes paragraph 2(b) of the Canadian Charter of Rights and Freedoms (the right to freedom of expression).

Issue Before the Court of Appeal

1. Whether the Application Judge erred in fact and in law in the proper interpretation of the definition of "personal information" set out in section 3 of the *Privacy Act*, R.S.C. 1985, c. P-21 and in her application of subsection 19(1) of the Act to the records at issue;

2. Whether the Application Judge erred in fact and in law by finding that all information contained in the records at issue was personal information properly exempted from disclosure under section 19 of the Act, without any severance pursuant to section 25 of the Act;

3. Whether the Application Judge erred in fact and in law with respect to the application of paragraph 19(2)(b) of the Act regarding public availability of information contained in recordings and transcripts of ATC radiocommunications on public radio frequencies reserved to the aeronautical service;

4. Whether the Application Judge erred in fact and in law with respect to the application of paragraph 19(2)(c) of the Act and paragraphs 8(2)(a), (b) and subparagraph 8(2)(m)(i) of the *Privacy Act*;

5. Whether the Application Judge erred in fact and in law by refusing to determine the constitutionality of subsection 9(2) of the *Radiocommunication Act*, relating to the public availability, the use and the dissemination of information contained in ATC radiocommunications on public radio frequencies reserved to the aeronautical service; and

6. Whether subsection 9(2) of the *Radiocommunication Act*, as it relates to ATC radiocommunications, is contrary to paragraph 2(b) of the Charter and cannot be upheld by section 1 of the Charter.

Outcome

The appeal was heard on February 28 and March 1, 2006, and judgment was reserved. The outcome of these judicial proceedings will be reported in next year's annual report.

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

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

Factual Background

On June 12, 2001, a request was made under the Act for access to "an electronic copy of the CADORS database table(s) which track(s) aviation occurrences; a paper printout of the first 50 records; a complete field list; and information on any codes needed to interpret data in the tables". The CADORS is a national database consisting in 2001 of approximately 36,000 safety reports of aviation "occurrences" 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 their entirety. Initially, this access refusal was based on the contention that the database could not be severed and reproduced. Subsequently, during the course of the Information Commissioner's investigation, Transport Canada acknowledged that the database could, in fact, be copied and, if necessary, portions could severed. Still, Transport Canada withheld 33 of the 51 fields of information based on subsection 19(1) of the Act (the "personal information" exemption).

Transport Canada 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 Act 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 filed an Application for Judicial Review of the Minister's access refusal.

Future Steps in the Proceedings

This application was heard before Mr. Justice Blais on February 9, 2006, and the hearing will continue on May 15, 2006. The outcome of these judicial proceedings will be reported in next year's annual report.

The Information Commissioner of Canada* v. *Minister of Environment, T-555-05, Federal Court, (See Annual Report 2004-2005, p. 59)

Nature of Proceedings, Background and Issues before the Court were reported in last year's annual report. In a nutshell, the issue is whether or not Cabinet confidences, which qualify for disclosure pursuant to paragraph 69(3)(b) of the Act (i.e. discussion paper material), may be withheld pursuant to section 21 of the Act.

Future Steps in the Proceedings

The matter is ongoing. Hearing of the application has not taken place yet, and the results of these judicial proceedings will be reported in next year's annual report.

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

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 Act pertaining to "M5 meetings" for 1999. The issue is whether records held in the office of the Minister of Defence, which relate to the Minister's duties as Minister of Defence, are subject to the right of access.

Factual Background

See Annual Report 2004-2005 at pages 44 to 49 for more details

Future Steps in the Proceedings

Further to a motion by the Information Commissioner, these proceedings were consolidated to some extent with related proceedings introduced this year in Federal Court files T-1209-05, T-1210-05 and T-1211-05 with respect to issues regarding disclosure of agendas of former Prime Minister Chrétien and of a former Minister of Transport Canada. However, following the federal elections of January 23, 2006, counsel for the respondents sought and obtained, with the consent of the Information Commissioner, an Order to stay the proceedings until May 5, 2006 in order to receive further instructions from the new government with respect to the conduct of these proceedings. The Information Commissioner will report the results and/or progress of these proceedings in next year's annual report.

The Information Commissioner* v. *The Prime Minister of Canada, T-1209-05, Federal Court

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 a former Prime Minister to disclose records requested under the Act pertaining to the Prime Minister's agenda books for January 1994 to June 25, 1999. The issue is whether or not the agendas, held in the Prime Minister's Office, are subject to the right of access.

Factual Background

See Annual Report 2004-2005, pages 42 to 44 for more details.

Further Steps in the Proceedings

See information *supra* in Court file T-210-05.

The Information Commissioner* v. *The Commissioner of the Royal Canadian Mounted Police, T-1210-05, Federal Court

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 Commissioner of the RCMP to disclose records requested under the Act pertaining to the agenda of the former Prime Minister Chrétien covering the period of January 1, 1997 to November 4, 2000. The issues are whether or not the

agendas qualify for exemption, in their entirety, for reasons of privacy (section 19) or for reasons of safety (section 17).

Factual Background

See Annual Report 2004-2005, pp. 39-42.

Further Steps in the Proceedings

See information supra in Court file T-210-05.

The Information Commissioner* v. *The Minister of Transport Canada, T-1211-05, Federal Court

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 Transport to disclose records requested under the Act pertaining to Minister Collenette's agenda for the period June 1, 1999 to November 5, 1999. The issue is whether these records, held in the minister's office, are subject to the right of access.

Factual Background

See Annual Report 2004-2005, pp. 35-38 for more details.

Further Steps in the Proceedings

See information *supra* in Court file T-210-05.

III. Cases in Progress - Information Commissioner as a Respondent

The Attorney General of Canada* v. *The Information Commissioner of Canada, Court file T-531-06

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

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

IV. Cases in Progress - Information Commissioner as an Intervener

The Attorney General of Canada* v. *H.J. Heinz Co. of Canada Ltd. and The Information Commissioner of Canada, SCC 30417, Supreme Court (See Annual Report 2004-2005, pp. 64-65 for more details)

The principal question is whether or not third parties are entitled to raise exemptions, other than section 20, during the course of a section 44 court review of a department's decision to disclose requested records. This appeal was heard on November 7, 2005. The outcome of this appeal will be reported in next year's annual report.

Minister of Justice* v. *Sheldon Blank, the Attorney General for Ontario, the Advocates' Society and the Information Commissioner of Canada, SCC 30553, Supreme Court

Nature of Proceedings

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

Factual Background

Sheldon Blank, the owner and operator of a pulp and paper mill, had sought the release of a large number of documents related to charges of regulatory offences laid against him by the federal government. Thirteen charges had been laid against him and his company, Gateway Industries Ltd., in 1995. Eight of these charges were quashed by the Manitoba Provincial Court in 1997, and five were quashed by the Manitoba Queen's Bench Court in April 2001. The Crown then laid new charges in July 2002 by way of indictment, but stayed them in February 2004 and declared it would not pursue the prosecution. Mr. Blank and his company sued the federal government for damages for alleged fraud, conspiracy, perjury, and abuse of prosecutorial powers. Mr. Blank's access requests related to obtaining information about how the charges against him had been handled internally.

The first of Mr. Blank's requests yielded the release of approximately 2,297 pages of material, with another 1,226 pages withheld, and 36 pages partially withheld. In May 1999, he filed a second request for all the pages that had been exempted under the first request. He did obtain release of another few hundred pages, but otherwise the exemptions were maintained. He then filed a complaint with the Information Commissioner. During the investigation, an additional few hundred pages of documents were released in whole or in part. However, some pages

remained withheld, particularly those for which solicitor-client privilege under section 23 of the Act had been claimed. Mr. Blank filed for judicial review in the Federal Court concerning the remaining pages.

Justice Campbell of the Federal Court upheld most of the claimed exemptions in the trial decision, *Blank* v. *Canada (Department of Justice)*, 2003 FC 462, but ordered the release of some additional documents, including three that were covered by litigation privilege. Justice Campbell found that litigation privilege ends when the litigation in question terminates. He ruled that, since the charges against Mr. Blank had long been stayed, there was no remaining protection for documents that were subject to litigation privilege only. Justice Campbell acknowledged that litigation privilege is considered part of solicitor-client privilege under section 23 of the Act and therefore subject to exemption where it applies. However, once litigation privilege ceases at common law, it is no longer applicable under the Act.

Mr. Blank appealed this decision to the Federal Court of Appeal, seeking the release of further documents that had continued to be exempted. The Crown cross-appealed on the issue of whether litigation privilege terminates with the litigation and is, at that point, no longer applicable under section 23 of the Act. The Federal Court of Appeal was unanimous in dismissing Mr. Blank's appeal, but split on the cross-appeal. Justices Pelletier and Décary agreed that litigation privilege, while included in section 23 of the Act, is of limited duration and ends with the litigation itself. Justice Létourneau disagreed and stated in dissent that, while litigation privilege is indeed included under section 23 of the Act, any time limit at common law would not apply in the access context.

In Justice Létourneau's dissenting view, since section 23 is discretionary, there cannot be an involuntary termination of the privilege, since that would nullify or at least restrict the government's discretion as granted to them by the Act. He concluded that, for policy reasons, access requesters should not be able to use the Act to seek documents that would not normally be available to them through regular disclosure. He noted that there were particular problems with allowing people to access litigation documents for the kind of actions that the government pursues on a regular basis, especially in cases of criminal prosecution, since the Crown might re-use the same strategy with more than one litigant, who could then gain a strategic advantage by making an access request. He recommended that the competing interests be assessed on a case-by-case basis with each claim under the Act. However, he noted that the Crown had not put forward any evidence justifying the exercise of its refusal to disclose in this particular case for the Court to weigh.

The further issue of whether those documents that were subject to solicitor-client privilege could be severed under section 25 of the Act was sent back to the Federal Court for re-determination, where it was concluded by Justice Mosley in *Blank* v. *Canada (Department of Justice)*, 2005 FC 1551, that:

- Despite the paramount nature of section 25 of the Act, it is not reasonable to expect severance of disconnected snippets of information. Where documents covered by solicitor-client privilege only contain a few words or phrases that would not be privileged, there is no need to sever them. Severance under section 25 is only required where it is reasonable.
- Substantive information contained in the privileged documents, such as, in this case, a list of other documents that may not be covered by privilege, can be severed and disclosed. However, it must be discrete and coherent data for which there is no reasonable basis to claim privilege.
- Since disclosure by the Crown is mandatory in criminal proceedings, this cannot be considered a voluntary or implied waiver of privilege.
- In the context of the Act, a partial waiver of privilege cannot be considered a full waiver for disclosure purposes.

Meanwhile, the Crown sought and received leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada. Leave was granted in April 2005, and the hearing was held in December 2005. The Information Commissioner appeared as an intervener, as did the Advocates' Society and the Attorney-General of Ontario. Mr. Blank was self-represented.

Issues Before the Court

Is litigation privilege, as encompassed in section 23 of the Act, subject to a durational limit?

Arguments

The Information Commissioner argued that, according to the federal jurisprudence, solicitor-client privilege has two branches. The first is the traditional legal advice privilege, which protects communications between counsel and client. The second is litigation privilege, which protects the counsel and client's preparation for litigation and terminates once that litigation is over. The Information Commissioner agreed with the other parties that both were covered by section 23 of Act. The Information Commissioner also agreed with the Federal Court of Appeal's position that the application of the privilege is governed by the common law and the duration limit applies.

The Information Commissioner argued that any notion that the litigation preparations of Crown counsel should be given indefinite protection would be inconsistent with the purpose of the Act and the fact that exceptions to access must be limited and specific. The Information Commissioner also argued that the discretion to disclose under section 23 must be exercised in accordance with these principles as well. The Information Commissioner noted that any client-counsel communications exchanged as part of preparation for litigation would be covered by the indefinite legal advice branch of the privilege, so there was no need to worry that they would be disclosed under the Act anyway.

The Crown argued at the hearing for a single underlying rationale for both branches of the privilege which did not justify the imposition of a durational limit on the litigation branch of the privilege. The Attorney-General of Ontario supported this position. The Advocates' Society, on the other hand, took the view that the two privileges were so different in rationale and scope as to almost constitute two separate privileges, although it acknowledged that both were covered under section 23 of the Act. The Advocates' Society also requested from the Court a set of principled guidelines for applying litigation privilege and identifying the type of documents that fall under it, in keeping with the demands of modern litigation.

Mr. Blank argued for the maximum disclosure possible under the law.

Outcome

The Supreme Court took its decision under reserve, and the outcome will be reported in next year's annual report.

C. Legislative Changes

Changes affecting the *Access to Information Act*

The definition of "aboriginal government" in subsection 13(3) of the Act has been modified to add two additional aboriginal governments. The Government public Bill C-14 (38th Parliament, 1st Session), 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 came into force on August 4, 2005 [SI/2005-0054]; and the Government public Bill C-56 (38th Parliament, 1st Session), entitled *An Act to give effect to the Labrador Inuit Land Claims Agreement and the Labrador Inuit Tax Treatment Agreement*, received royal assent on June 23, 2005, and came into force on December 1, 2005 [SI/2005-0117].

As a result subsection 13(3) of the Act reads as follows:

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*;

(b) the council, as defined in the Westbank First Nation Self-Government Agreement given effect by the *Westbank First Nation Self-Government Act*;

(c) the Tlicho Government, as defined in section 2 of the *Tlicho Land Claims and Self-Government Act* (Section 107); or

(d) the Nunatsiavut Government, as defined in section 2 of the *Labrador Inuit Land Claims Agreement Act*.

The Government public Bill C-11 (38th Parliament, 1st Session) entitled *An Act to establish a procedure for the disclosure of wrongdoings in the public sector, including the protection of persons who disclose the wrongdoings*, received royal assent on November 25, 2005 [Statutes of Canada, 2005, c. 46] and will come into force on proclamation. This Bill will amend section 16 of the Act by adding the following after subsection (1):

(1.1) If the record came into existence less than five years before the request, the head of a government institution may refuse to disclose any record requested under this Act that contains information

(a) in relation to or as a result of a disclosure or an investigation under the *Public Servants Disclosure Protection Act*; or

(b) obtained by a supervisor or a senior officer designated under subsection 10(2) of that Act, or by the Public Sector Integrity Commissioner, in relation to or as a result of a disclosure or an investigation under that Act, if the information identifies, or could reasonably be expected to lead to the identification of, a public servant who made a disclosure under that Act or who cooperated in an investigation under 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 and sections 224 and 225 came into force on April 1, 2005 [SI/2005-0024]. This Bill amends:

- Subsections 55(4) and 57(4) of the Act by replacing the expression "Public Service of Canada" by "federal public administration", wherever it occurs in the English version. (Section 224)

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

Proposed Changes to the *Access to Information Act*

The Government public Bill C-78 (38th Parliament, 1st Session) entitled *An Act respecting the establishment of the Public Health Agency of Canada and amending certain acts* proposes to amend subsection 20(1) of the Act by adding the following after paragraph (b):

> *(b.1)* information supplied to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the *Emergency Management Act* and that is about the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems".

The Bill also contemplates a change to the public interest override clause in subsection 20(6), as follows:

> 20(6) The head of a government institution may disclose all or part of any record requested under this Act that contains information described in any of paragraphs (1)*(b)* to *(d)* if
>
> > *(a)* that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment; and
> >
> > *(b)* the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party, any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations.

(2005, Bill C-78, Section 8; received First Reading on November 17, 2005)

Amendments to Schedules I and II

During the 2005-2006 fiscal year, new government institutions became subject to the *Access to Information Act* while others, which have been abolished, were struck out. More statutory prohibitions against disclosure were added to the list of provisions set out in Schedule II. The following amendments were made to Schedules I and II of the Act.

By Order in Council pursuant to subsection 77(2) of the *Access to Information Act* (Canada Gazette, Part II, SI/2005-75, in force September 21, 2005, Order 2005-1489), Schedule I was amended and the following government institutions were added in alphabetical order under the heading "Other Government Institutions":

Canada Development Investment Corporation /Corporation de développement des investissements du Canada

Canadian Race Relations Foundation / Fondation canadienne des relations raciales

Cape Breton Development Corporation /Société de développement du Cap-Breton

Cape Breton Growth Fund Corporation /Corporation Fonds d'investissement du Cap-Breton

Enterprise Cape Breton Corporation / Société d'expansion du Cap-Breton

Marine Atlantic Inc. / Marine Atlantique S.C.C.

Old Port of Montreal Corporation Inc. / Société du Vieux-Port de Montréal Inc.

Parc Downsview Park Inc. / Parc Downsview Park Inc.

Queens Quay West Land Corporation /Queens Quay West Land Corporation

Ridley Terminals Inc. / Ridley Terminals Inc.

This order was accompanied by the following Regulatory Impact Analysis Statement:

The President of the Treasury Board has requested that the following ten Crown corporations be added to Schedule I of the *Access to Information Act* and to the Schedule of the *Privacy 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 Corporation Inc., Parc Downsview Park Inc., Queens Quay West Land Corporation and Ridley Terminals Inc.

On February 17, 2005, the President of the Treasury Board, Reg Alcock, tabled in the House of Commons a report on Crown corporation governance entitled Meeting the Expectations of Canadians — Review of the Framework for Canada's Crown Corporations. The report contains 31 measures designed to significantly strengthen the governance and accountability regime for Canada's Crown corporations. One of the measures calls for the *Access to Information Act* (and by implication, the *Privacy Act*) to be extended to the ten aforementioned Crown corporations through an Order in Council.

The Government public Bill C-9 (38th Parliament, 1st Session) entitled *An Act to establish the Economic Development Agency of Canada for the Regions of Quebec*, received Royal Assent on June 23, 2005, and came in force on October 5, 2005 [SI/2005-101]. Section 18(7) is a reference to the former agency in any of the following is deemed to be a reference to the new agency: No change to Schedule I is required, as the name of the Agency is already stated under the heading "*Other Government Institutions*".

The Government public Bill C-22 (38th Parliament, 1st Session) entitled *An Act to establish the Department of Social Development and to amend and repeal certain related Acts*, received royal assent July 20, 2005, and came in force on October 5, 2005 [SI/2005-97]. Section 42 of this Bill amends Schedule I by adding, under the heading "*Departments and Ministries of State*", the "Department of Social Development / Ministère du Développement social". Sections 43 and 44 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).

The Government public Bill C-23 (38th Parliament, 1st Session) entitled *An Act to establish the Department of Human Resources and Skills Development and to amend and repeal certain related Acts*, received the royal assent on July 20, 2005, and came into force on October 5, 2005 [SI/2005-99]. Section 58 amends 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 amends 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 compétences". Section 60 amends 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". Further, section 61 amends 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.

The Government public Bill C-26 (38th Parliament, 1st Session), *An Act to establish the Canada Border Services Agency*, received royal assent on November, 2, 2005. Sections 16 and 19(1) came into force on December 12, 2005. No change is required to Schedule I as "former agency" (Canada Border Services Agency) is already stated in Schedule I. A reference to the former agency is deemed to be a reference to the new agency and any order of the Governor in Council made under paragraph (b) of the definition "head" in section 3 of the *Access to Information Act*.

The Government public Bill C-43 (38th Parliament, 1st Session) entitled *An Act to implement certain provisions of the budget tabled in Parliament* received royal assent and came into force on June 29, 2005 [Statutes of Canada, 2005, c. 30]. Section 88 amends Schedule I by adding the following under the heading "Other Government Institutions": Canada Emission Reductions Incentives Agency/Agence canadienne pour l'incitation à la réduction des émissions.

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 72 of the Bill came into force on January 12, 2006 [SI/2004-49]. Section 72 of the Bill amends Schedule I to the *Access to Information Act* by adding the following in alphabetical order under the heading "Other Government Institutions": Assisted Human Reproduction Agency of Canada/Agence canadienne de contrôle de la procréation assistée.

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 88 came into force on April 1, 2005 [SI/2005-0024].

This section amends Schedule I to the Act by replacing the reference to "Public Service Staff Relations Board" under the heading "Other Government Institutions" to the *Access to Information Act* by a reference to "Public Service Labour Relations Board".

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 (not in force as of March 31, 2006), 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.

By Order in Council, P.C. 2006-44, February 6, 2006, Schedule I of the *Access to Information Act* under the heading "Other Government Institutions" is amended by striking out the Department of International Trade.

Proposed Changes to Schedules I and II

During the 38th Parliament, a number of legislative proposals were introduced to amend Schedules I and II of the *Access to Information Act*. No progress were recorded during fiscal year 2005-2006 with respect to Government public Bill C-31 (38th Parliament, 1st Session), *An Act to establish the Department of International Trade and to make related amendments to certain Acts* and Government public Bill C-32 (38th Parliament, 1st Session), *An Act to amend the Department of Foreign Affairs and International Trade and to make consequential amendments to other Acts*. (See 2004-2005 Annual Report, p. 72 for more details.)

The Government public Bill C-62 (38th Parliament, 1st Session), *An act to amend the Aeronautics Act and to make consequential amendments to other Acts*, proposes to amend Schedule II to the *Access to Information Act* by replacing the reference to "subsections 4.79(1) and 6.5(5)" opposite the reference to the "*Aeronautics Act*" with a host of added prohibitions to disclose information and listed as follows: "subsection 4.79(1), sections 5.392 and 5.393, subsections 5.394(2), 5.397(2), 6.5(5), 22(2) and 24.1(4) and section 24.7". (Bill received First Reading on September 28, 2005.)

Amendments to Heads of Government Institutions Designation Order

The Schedule to the *Access to Information Act Heads of Government Institutions Designation Order* is amended by adding the following in numerical order (Canada Gazette Part II, SI/2005-75 in force September 21, 2005, Order 2005-1491):

Item	Column I Government Institution	Column II Position
12.1	Canada Development Investment Corporation *Corporation de développement des investissements du Canada*	Chairman *Président*
28.2	Canadian Race Relations Foundation *Fondation canadienne des relations raciales*	Executive Director *Directeur général*
32.	Cape Breton Development Corporation *Société de développement du Cap-Breton*	President and Chief Executive Officer *Président et premier dirigeant*
32.1	Cape Breton Growth Fund Corporation *Corporation Fonds d'investissement du Cap-Breton*	Chief Executive Officer *Premier dirigeant*
38.1	Enterprise Cape Breton Corporation *Société d'expansion du Cap-Breton*	Vice-President *Vice-président*
52.1	Marine Atlantic Inc. *Marine Atlantique S.C.C.*	President and Chief Executive Officer *Président et premier dirigeant*
75.4	Old Port of Montreal Corporation Inc. *Société du Vieux-Port de Montréal Inc.*	President and Chief Executive Officer *Président et premier dirigeant*
76.001	Parc Downsview Park Inc. *Parc Downsview Park Inc.*	President and Chief Executive Officer *Président et premier dirigeant*
87.2	Queens Quay West Land Corporation *Queens Quay West Land Corporation*	Senior Vice-President *Vice-président principal*
89.	Ridley Terminals Inc. *Ridley Terminals Inc.*	President *Président*

CHAPTER VI

Corporate Services

Corporate Services provides financial, human resources, information management/information technology, and general administrative services to the Office of the Information Commissioner's main activity. Such services are essential to the ability to manage the office's operations strategically, fulfill its mandate, meet the expectations of Parliamentarians and Canadians, and achieve its strategic outcomes. It also provides the important infrastructure to support the OIC's decision-making function and to implement government-wide management initiatives.

As has been mentioned previously in this report, the office has been in a resource crisis for the past several years. Corporate Services worked closely with operational managers to ensure that all possible efficiency savings were identified and implemented consistent with statutory obligations and prevailing professional service standards.

Financial Services

Additional governance and accountability structures were put into place, such as the Management Accountability Framework (MAF).

Accounting and reporting of financial activities consistent with government policies, directives, and standards was continued and, during the period under review, the Office of the Information Commissioner underwent its third annual audit, conducted by the Office of the Auditor General (OAG). A copy of the audit results are available on request, or at the commissioner's website.

Human Resources

The main activity for Human Resources during 2005-06, was the implementation of the *Public Service Modernization Act*.

During the period under review, all policies, Human Resource delegations, conflict resolution instruments, and so forth were updated to reflect changes brought about as a result of legislative amendments associated with the coming into force of the new *Public Service Modernization Act*. In addition, all OIC staff received corresponding training.

Information Technology

In managing a high volume of cases originating from across the country, the OIC relies on up-to-date, automated technological systems and tools to enable decision-makers and employees to share and exchange information, support case preparation, manage the flow of cases through various stages, and communicate and consult with stakeholders.

During the period covered by this Annual Report, the Information Technology Branch upgraded its: Records Documentation Information Management System (RDIMS); 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-spam and anti-spyware.

Administrative Services

During the period covered by this report, Administrative Services focused on ensuring its acquisitions were fair and transparent, and provided good value for money.

Funding Pilot Project

As discussed previously in this report, a House of Commons Panel on the Funding of Officers of Parliament has been created. Corporate Services plays a central role in coordinating communications with the panel and the Treasury Board Secretariat, and in preparing and presenting the OIC's resource requests and justifications.

Figure 1 summarizes the office's operating budget and FTE (full time staff equivalents) utilization for 2005-06. Figure 2 breaks down the utilization of resources by category of expenditure.

Figure 1: Resources by Activity (2005-2006)

	FTE Utilization	Percent	Operating Budget*	Percent
Access to Government Information	41.8	79%	$4,027,355	78%
Corporate Services **	11.0	21%	$1,160,987	22%
Total Access Program Vote	52.8	100%	$5,188,342	100%

* Excludes Employee Benefits

** The non-salary portion of the Corporate Services' operating budget includes approximately 90% of program-related expenditures.

Figure 2: Details by Object of Expenditures (2005-2006)

	Standard Object	Corporate Services	Access to Government Information	Total
Salaries	01	754,190	3,358,688	4,112,878
Transportation and Communication	02	71,087	66,256	137,343
Information	03	1,653	57,583	59,236
Professional Services	04	155,191	443,303	598,494
Rentals	05	9,784	19,747	29,531
Repair & Maintenance	06	54,988	24,554	79,542
Materials and Supplies	07	31,912	39,023	70,935
Acquisition of Machernery and Equipment	09	81,915	15,684	97,599
Other Subsidies and Payments	12	267	2,517	2,784
Total Access Program Vote		1,160,987	4,027,355	5,188,342

Notes:

1. Excludes Employee Benefit Plan (EBP).
2. Expenditure figures do not incorporate final year-end adjustments.
3. Corporate Services' expenditures for Standard Objects 02-12 primarily represent program related disbursements (approximately 90%).