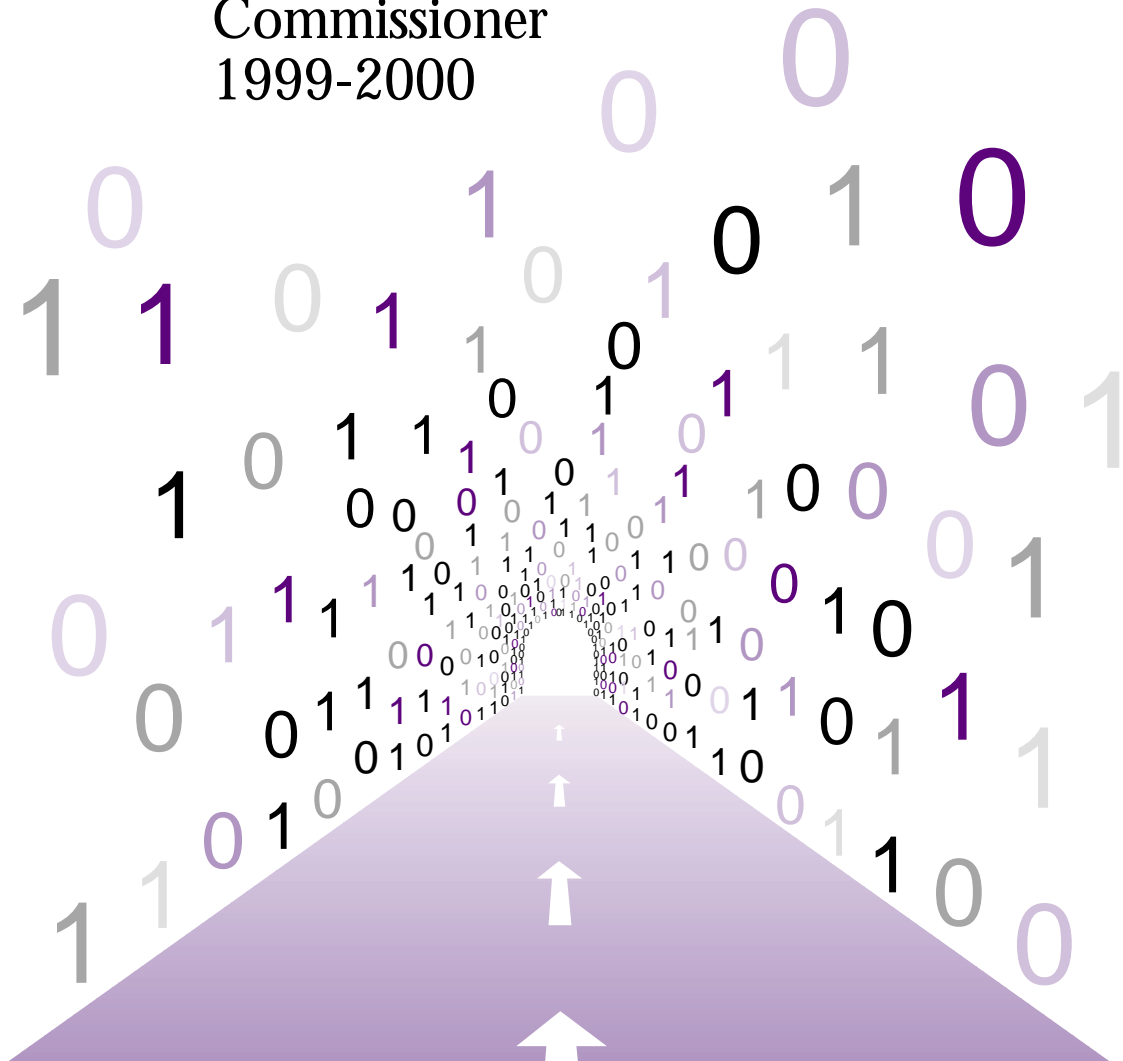




Information
Commissioner
of Canada

Commissaire
à l'information
du Canada

Annual Report Information Commissioner 1999-2000





Annual Report
Information Commissioner
1999-2000

“The overarching purpose of access to information legislation ... is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.”

Former Supreme Court of Canada Justice
Gerard LaForest in *Dagg v. Canada*
(*Minister of Finance*), [1997] 2 S.C.R. 403 at 432.

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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

October 2000

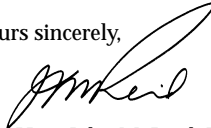
The Honourable Gildas Molgat
The Speaker
Senate
Ottawa ON K1A 0A4

Dear Mr. Molgat:

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

This report covers the period from April 1, 1999 to March 31, 2000.

Yours sincerely,

A handwritten signature in black ink, appearing to read "J. Reid", written in a cursive style.

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

October 2000

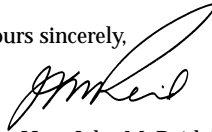
The Honourable Gilbert Parent, MP
The Speaker
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Parent:

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

This report covers the period from April 1, 1999 to March 31, 2000.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J. Reid', written in a cursive style.

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

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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.

Passage of the Act in 1983 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 time frame.

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 copied 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.

Mayday – Mayday

Last year, in this Commissioner's first Annual Report to Parliament, the government was put on notice: There would be a "zero-tolerance" policy for late responses to access requests; a new, pro-openness approach to the administration of the Access Law would be expected and, most important, the full weight of the Commissioner's investigative powers would be brought to bear to achieve these goals.

Many government insiders considered this plan of action to be threatening, ill-considered, perhaps even arrogant for a newcomer to the Commissioner's job. There has been a worrisome hardening of attitudes and increased resistance to the Commissioner's investigations as a result. When the Commissioner's subpoenas, searches, and questions come too insistently or too close to the top, the mandarins circle the wagons.

Two years into this Commissioner's term and the backlash has become tangible. The Treasury Board's attack involved starving the Commissioner of vital resources to do the job. As well, Treasury Board officially discouraged public servants from bringing concerns about wrongdoing under the *Access Act*, to the attention of the Information Commissioner.

For its part, the Privy Council Office (PCO) decided to resist and challenge almost all of the Commissioner's investigative powers. To this end, officials of PCO have ignored orders for the production of records; failed to fully comply with such orders (in one case

non-compliance persisted until after two Federal Court judges had ordered PCO to comply); withheld records claimed to be privileged (with the full knowledge that privileges do not apply during the Commissioner's investigations) and refused to answer questions under oath. Most astoundingly, PCO developed the theory that the provision in the Access Act which gives the Commissioner the power to enforce his investigatory orders, is unconstitutional.

In this latter regard, PCO lawyers advised a senior PCO official of Deputy Minister rank, to refuse to answer questions under oath put to him by the Commissioner, because there could be no punitive consequences. When the Information Commissioner cited the official for contempt and began the enforcement process, PCO also agreed to pay the legal costs associated with the constitutional challenge, which the official then launched in Federal Court. This senior PCO official argued in court that Parliament had no authority to give the Information Commissioner the power to enforce the investigative powers set out in subsection 36(1) of the *Access to Information Act*. This attack upon the very foundation of the Commissioner's role was unsuccessful—but, more of that later.

Another troubling sign of the senior level's striking back at the Commissioner is that PCO decided, with no prior notice or consultation, to rescind a protocol with the Commissioner's office which was adopted and followed since 1984. The protocol governed the process by which the Information Commissioner could obtain a certificate from the Clerk of the

Privy Council officially attesting that records claimed to be Cabinet confidences are, indeed, confidences. PCO claims now that it may exclude confidences from access without any obligation to certify to the Commissioner (as it must for a court) that such records are, indeed, confidences. In this regard, too, PCO refuses to accept the clear words of Parliament giving the Commissioner the powers of a Superior Court of Record in the conduct of his investigations.

As for Justice Canada, the "home" department for the access law, it decided not to defend the *Access to Information Act* against the above-mentioned constitutional challenge brought against it by the senior official of PCO and funded by the Crown. Indeed, in proceedings before the Information Commissioner, an agent for the Attorney General took the unprecedented position of impugning the constitutionality of the very legislation which the Attorney General has the duty to defend. The Information Commissioner's office conducted and financed the defense of the access law out of its own, limited budget. In the end, that was, perhaps, the better approach. No defence of the Act by the Attorney General was better than would have been a sham or half-hearted one! As it turned out, the Commissioner was successful; the court rejected the constitutional challenge. Since the decision was issued after the end of this reporting year, a full account of it must await next year's report.

The Prime Minister's office (PMO), too, sent its signal of displeasure to the

Information Commissioner by denying the Commissioner's request to review records held in PMO during an investigation. No other minister, in almost 17 years, has refused to co-operate with the Information Commissioner's investigations. True, some ministers take the view that their offices are not covered by the access law. Nevertheless, all ministers have, in the past, accepted inspection of their records by the Commissioner on a "without prejudice" basis to their legal position. PMO is bucking the trend (the matter is still unresolved); worse, it may be sending a message to other Ministers to cease co-operating with the Commissioner's investigations. Again, recourse to the courts, with all the attendant expense to the taxpayer, is likely to be required before the government accepts its responsibility to minimize secrecy and to respect the Commissioner's obligation to fully, fairly and independently investigate complaints which are made against government institutions.

In sum, then, there is a full counter-attack in progress against the office of the Information Commissioner. This counter-attack is imposing an onerous, unexpected burden on the office's legal and investigative resources. At the same time, Treasury Board has refused to give the Commissioner the resources which, even the Board's officials agree, he needs. The result is no less vigour on the part of the Commissioner, but service to Canadians is becoming slower and the right to "timely" access is further eroded.

Finally, there is a troubling "personal" aspect to the government's counter-

attack. The future careers in the public service of the Commissioner's staff have, in not so subtle terms, been threatened. The Commissioner has a fixed, seven-year term with the same insulation from retribution or influence as does a superior court judge. But the Commissioner's staff does not have those protections.

This development is inexcusably unprofessional and profoundly troubling. If members of the public service come to believe that it is career suicide to work, and do a good job, for the Information Commissioner, the future viability and effectiveness of the Commissioner's office is in grave jeopardy. Having said that, it is also apparent that the difficult circumstances in which the staff of the Commissioner's office work, forges a special breed of public servant. Walk in their shoes and understand why it has been said that courage is the foundation of integrity.

There is no retreat from the game plan of "zero tolerance" for delays or for the general culture of excessive secrecy. For one thing, despite the resistance, there is some heartening evidence that the game plan is working. Moreover, recent decisions of the Federal Court have foiled the government's efforts to circumscribe the jurisdiction and powers of the Commissioner. With or without the financial aid of Treasury Board or the Minister of Justice's willingness to defend the integrity of the Act for which she is responsible, or the PCO's positive leadership example to other institutions, these legal battles will be aggressively and professionally fought by the Commissioner. The people of Canada are legally entitled to nothing less.

All talk, no action

The government's palpable animosity towards the "right" of access (it would prefer to dole out information by grace and favour in well-digested mouthfuls) is no more apparent than in the disconnect between talk and action in the matter of reform of the *Access to Information Act*. Every study of the Act (from Parliament's own review in 1986, to the Justice department's internal reviews, to the Information Commissioner's reviews, to independent, academic reviews and careful reviews conducted by private members) has concluded that the law needs to be modernized, strengthened and expanded. Modernized to meet the fast-paced information revolution; strengthened to meet the more-deeply-entrenched-than-anticipated bureaucratic resistance to openness and broadened to cover a myriad of public interest activities now being conducted through entities which are not covered by the access law.

More than one government and more than one Minister of Justice, including the present Minister, have promised to move ahead with reform. Nothing has happened. Worse, the government moved to crush Parliamentary consideration of a sweeping series of thoughtful reforms put forward (with broad support) by John Bryden in a private members bill. True, the bill was flawed in some respects, as are most legislative proposals at the introductory stages, but consideration of it by Committee would have been the much-needed means for a full, public discussion of the matter. The bill would have been amended and strengthened and so, too, would the public's right of

access. This is the normal legislative process.

As part of the government's successful effort to kill Mr. Bryden's bill, the Deputy Prime Minister informed Liberal members of the concerns held by Ministers about the Bill. It is instructive to take note of the substance of the government's objections.

First, not one single objection was made to the provisions in the Bill which would expand secrecy—such as the introduction of a new, class exemption (i.e., no injury from disclosure need be shown) for records relating to national unity matters. The government embraced those derogations from the very purpose of the Act without a moment's hesitation.

Rather, the government expressed concern about provisions which would expand openness, for example the proposal to abolish section 24 of the Access Law. Section 24 allows the government to throw blankets of secrecy over an unlimited range of government information merely by referencing such information in Schedule II of the Access to Information Act. When this provision was reviewed by the Justice Committee in 1986, there was a unanimous conclusion and recommendation that section 24 was unnecessary and posed a real threat to the accomplishment of the purpose of the Access Law—being, more open government.

Not surprisingly, perhaps, while the Deputy Prime Minister sought to kill the Bryden Bill in order to preserve section 24, the government was driving forward its money laundering legislation which included a provision placing a blanket of

secrecy over a whole range of information—a blanket which depends on the exemption contained in section 24 of the *Access to Information Act*.

The government chose to wage war under the banner of concern for privacy against Mr. Bryden's effort to reform the *Access to Information Act*. It alleged that the bill might be read as requiring the disclosure of personal information after the passage of 30 years rather than, as the *Privacy Act* requires, until 20 years after death of the individual to whom the information relates. That flaw if it existed, could have been easily remedied in Committee—as suggested by the Privacy Commissioner.

Let there be no doubt, however, that the government's motivation was not to serve the value of privacy but to resist the value of openness. It talks the openness talk, but it has not yet walked the walk. Only time will tell whether or not the present Minister of Justice will act on her stated position that the time is ripe for reform and strengthening of the *Access Act*.

On this point—the stubborn persistence of a culture of secrecy in Ottawa—it is worth opening a short parenthesis. In 1998, U.S. Senator Daniel Patrick Moynihan's book, *Secrecy: The American Experience*, was released. His conclusion: Secrecy is for losers. Why? First, because it shields internal analyses from the scrutiny of outside experts and dissenters. As a result, some very poor advice is used to inform many government decisions. Second, secrecy distorts the thinking of the citizenry, giving rise to unfounded conspiracy theories and an unnecessarily high level of mistrust of governments. In short, as

George F. Will wrote in a *Newsweek* review of Moynihan's book:

"Government secrecy breeds stupidity, in government decision making and in the thinking of some citizens." (*Newsweek*, October 12, 1998, p. 94).

Treasury Board Leadership

The President of Treasury Board is the member of Cabinet responsible for providing guidance and direction to all government institutions concerning the implementation of the *Access to Information Act*. For that reason, this Commissioner has been consistent in holding Treasury Board to account for its leadership within government with respect to the proper administration of the Act.

Last year, the Board received poor marks for having largely ignored its responsibilities under the Act. This year there were some signs of rejuvenation. A modest increase in resources was provided to establish a Training Advisory Working Group within the Treasury Board Secretariat (TBS). The purpose of this group is to serve as a consultative body for the advancement of continuous learning in the access community. TBS expects this working group to play a key role in ensuring that federal government managers and employees understand their obligations and responsibilities under the *Access to Information Act*.

During the reporting year, TBS prepared and distributed advice to public servants on the administration of time extensions

and the interpretation and application of subsection 67.1 of the Act which makes it an offence to engage in, or counsel, any records handling practice designed to thwart the right of access. TBS also conducted a training session for departmental security officers and access officers on the topic of subsection 67.1.

Throughout the year, TBS hosted bi-monthly meetings to enable departmental access coordinators to bring their concerns to the attention of TBS and Justice. As well, a conference was organized by TBS during the reporting year to consider the Commissioner's "report cards" and share strategies for addressing the problem of delay in answering access requests.

Treasury Board showed its most tangible commitment to solving the delay issue by informing all departments that it would sympathetically entertain requests for additional resources needed to respond to unexpected peaks in access workloads.

These are, indeed, positive signs of a renewed commitment on the part of Treasury Board to the discharge of its leadership role. Yet, there is more to be done.

The Board has not yet begun collecting the statistics necessary to reveal the performance of all government institutions under the Act. That initiative would be a necessary step towards enabling TBS to be proactive in solving problems in the system before they result in complaints to the Commissioner.

As well, the Board has not yet taken up the Commissioner's challenge to develop a professional code of conduct for access coordinators. It has not established itself as the champion of access coordinators—who are often caught between the demands of the law (to give access) and the demands of their superiors (to maintain secrecy).

Finally, the TBS has not tackled its primary leadership responsibility to be the champion of a culture of openness within the federal bureaucracy. In this regard, the Board has been overly preoccupied with documenting and quantifying the perceived irritants in the access system (for example: bulk users, frivolous and vexatious requests, high costs of compliance and difficult-to-meet response deadlines). The Board has spent no time educating itself and the public service about the profound and tangible benefits of the access law. Former Information Commissioner, John Grace, put it this way:

"Courtesy of the right to know, there is greater responsibility, honesty, frugality, integrity, better advice, and more selfless decision-making. Every exposure, as a result of an access request, of abuse of power, excessive perks and privilege or just plain silliness, serves the public purse and the public interest." (1996-97) Annual Report, p. 8)

For too long, the whiners and complainers inside the system have had their causes taken up by TBS; it is the turn of the citizens on the outside and the access law to have the designated minister become their champion.

Delays: Persistence Starting to Pay

The "zero tolerance" policy with respect to delays in answering access requests involved two main activities: 1) a report card to Parliament which graded the performance of selected departments in meeting response deadlines; and 2) calling Deputy Ministers to explain the reasons for delay (on the record and under oath) when the assigned investigator could not resolve the matter with his or her counterparts. The bad news of this policy, as has been described previously, was that senior officials did not enjoy being the focus of attention and they have found a multitude of ways to register their displeasure.

The good news is that some marked improvement in the delay situation occurred. For example, in last year's report cards (1998/1999) six departments were reviewed and received these grades:

Department	Grade
Citizenship & Immigration (CIC)	"F"
Department of Foreign Affairs & International Trade (DFAIT)	"F"
Health Canada (HC)	"F"
National Defence (ND)	"F"
Privy Council Office (PCO)	"F"
Revenue Canada (Canada Customs and Revenue Agency CCRA)	"F"

These grades were based on the percentage of access requests received which were not answered within statutory deadlines, and the grading scale was as follows:

% 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
Over 20%	Red Alert	F

As the following chart shows, in this year's report cards, these six departments are doing better.

Health Canada and the Privy Council Office deserve a special mention and genuine praise for their accomplishments. PCO's improvement came despite a 67 percent increase in the number of requests received in 1999/2000 over the previous year. These departments devoted the energy and resources necessary to clear up a significant backlog of late cases and establish procedures and practices to prevent the delay problems of the past from returning.

In this year's report cards, two new departments were examined in addition to the follow-up on the previous six. The new departments and their grades are:

	%	Grade
Human Resources Development Canada (HRDC)	0%	"A"
Transport Canada (TC)	30.6	"F"

HRDC's performance was particularly gratifying because it was able to get a perfect score without having to invoke any of the (perfectly legitimate) extension of time provisions in the Act. All requests during the test period were answered within 30 days.

Transport Canada did not fare as well. It has work to do to streamline its procedures in order to meet, on a more consistent basis, the Act's response deadlines. In Transport Canada's case, its problem is not a large volume of requests and insufficient resources to handle them. Rather, it is a top heavy approval system wherein the Deputy Minister insists on personally reviewing and making decisions with respect to more than 40% of access requests

Department	Complaints 1998/1999		Complaints 1999/2000	
	%	Grade	%	Grade
Citizenship & Immigration (CIC)	48.9	F	23.4	F
Department of Foreign Affairs & International Trade (DFAIT)	34.9	F	27.6	F
Health Canada (HC)	57.2	F	3.1	A
National Defence (ND)	69.6	F	38.9	F
Privy Council Office (PCO)	35.9	F	3.6	A
Revenue Canada (Canada Customs and Revenue Agency – CCRC)	85.6	F	51.5	F

received. This is highly unusual in government. In this Commissioner's view, it is also entirely unnecessary. The processing of access requests should be left to properly trained professionals who have no other strategic agendas beyond obedience to the *Access Act*.

But, even for HRDC, the news is not all good. No sooner were the results in from the delay report cards—showing improvement—than the so-called "HRDC scandal" broke, triggering hundreds of access requests to HRDC and many other departments for records, such as audits, showing how grants and contributions programs were being managed. And, in the face of this development, government couldn't help but let its reflexive need to "control" the story take precedence over the legal rights of access requesters to obtain timely responses. Ministers wanted to be out front of any access request—making a clean breast of any bad news before it hit the street and, when it did, being armed with an action plan. Of course, the only way to accomplish this strategy was to buy time—to slow down or postpone the release of these requested audit reports on grants and contributions programs.

The co-ordination of the government-wide effort to do damage control fell to the communications group in PCO. It fell to Treasury Board (wearing its Comptroller General's hat) to direct all departments as to the process to be followed with respect to the disclosure of audit reports.

The process was described in memos from Treasury Board to all internal audit groups dated February 14 and 17, 2000. The positive aspect of the TB memos was their reminder that:

"All completed (audit) reports are public documents and you should make them available if requested without requiring a formal request and under such circumstances, no fee should be collected, and if any fees were collected, they should be returned. Completed reports should be made available with due diligence."

But, too, there was a negative aspect to the memos. Treasury Board, in the February 14 memo, asked departments to send it the following information:

1. A copy of the original access request for any audit report;
2. a listing of all audit reports to be released;
3. a copy of the reports to be released;
4. a copy of all audit reports even if they have not been requested; and
5. a copy of any plan of action for the release of audits, whether on grants and contributions programs or any other topic, regardless of whether release is to be formal (under the Act) or informal.

This February 14 directive brought the release of audit reports to a virtual standstill pending compliance with the Treasury Board reporting requirements. Some departments objected to this unprecedented reporting regime, especially the requirement to provide copies of the original access requests. They considered it to be an unnecessarily heavy-handed exercise of central control. There was, too, concern that compliance with this requirement would entail disclosure of requesters' identities—an action which could constitute infringement of the *Privacy Act*.

In response, on February 17, 2000, Treasury Board issued a clarification. But the clarification muddied the waters further. In the second directive, Treasury Board reminded departments of the distinction between "final" audits (which could be disclosed to the public with no access request) and "draft" audits (which should not be disclosed without a formal access request). In the clarification letter, Treasury Board withdrew its request to be provided with a copy of the original access requests for audit reports. However, Treasury Board continued to insist that all other information it had asked for in its first (February 14) directive, be provided.

As part of this damage control exercise, Treasury Board and the Privy Council Office worked hand-in-glove. Meetings were held several times a week to enable PCO's communications officials to review the information collected by Treasury Board. Communications strategies were carefully developed before the audits themselves were disclosed to the requesters.

There is nothing inherently improper about the government's desire to develop a consistent, unified position on any matter. The problem arises, however, when the communications concerns of the government are allowed to take precedence over the public's right to timely access to information.

Easy For You to Say!

When it comes to meeting response deadlines, officials often wonder aloud how they can be expected to meet growing workloads of requests with static or dwindling resources. This Commissioner has not been deaf to

these concerns. During the past year, the Information Commissioner has provided departments with a detailed approach to the responsible use of the Act's provisions allowing extensions of time for answering access requests.

That approach is as follows:

Defining "reasonable", "unreasonable" and "large number of records"

In deciding how to administer the extension provisions set out in subsection 9(1), institutions must operationalize the following tests:

"reasonable period of time",
"large number of records", and
"unreasonably interfere with
operations".

These tests are objective tests cast in subjective terms. Their meaning will vary depending on the circumstances and the context of each specific institution and request. The following factors will aid institutions in assessing whether the tests for extensions have been met:

1) Reasonable Period of Time

- i) If the extension is claimed under paragraph 9(1)(c), an extension of 60 days will be considered reasonable because the statute sets out specific times for 3rd party consultations which enable the consultations to be completed within 60 days;
- ii) if the extension is claimed under paragraphs 9(1)(a) or (b), the duration of extensions should be consistent with historical experience in the institution in processing similar requests;

-
- iii) if the extension is claimed under paragraph 9(1)(b), the duration of the extension should ordinarily not be more than 30 days (which would be the response period if the consulted institution had received the request directly) and rarely, if ever, should such an extension be more than 60 days, taking into account the fact that third parties have a maximum of 60 days to make their views known. In other words, unless a compelling case can be made, other institutions should not be given longer to express their views concerning a request than are third parties; and
 - iv) in deciding what is a reasonable period of time for an extension, the institution should calculate the time needed to process the request using the available resources in ATIP and in the relevant OPI(s). Extensions are not appropriate, however, to compensate for inadequate resourcing to meet the institution's ordinary ATI workload.

It is important to bear in mind that, except in the case of third party information (see subsection 27(4)), only one extension may be claimed and it must be claimed within 30 days of the receipt of the request. If the extension is inadequate or if it is not claimed at the proper time, the request will be deemed to have been refused by virtue of subsection 10(3).

2) Large Number of Records

There is no magic number of records which qualify as a "large number". Historically, however, the Information Commissioner has rarely accepted 500 or fewer records as being a large number. On the other hand, it has not been unusual for the Commissioner to accept 1,000 or more records as being a large number. No matter what the number of records may be, if an institution wishes to make a case for an extension based on a large number of records, it should take into account the following factors:

- (a) are the records easily reviewed, despite the number of pages, due to their homogeneity [example: a large computer printout where review of one or two pages results in a uniform approach to be applied to all pages];
- (b) have the records been reviewed in response to a previous request;
- (c) does the number of records exceed the average number of records requested per request in the institution;
- (d) does the number of records exceed the number which, historically, the institution has been able to process in 30 days; or
- (e) would processing the request in 30 days unreasonably interfere with the operations of the institution?

3) Unreasonable Interference with Operations

For the purposes of 9(1)(a), the processing of an access request may be considered to unreasonably interfere with the institution's operations if processing the request within 30 days would require:

- i) Transferring resources to ATIP from other operational areas;
- ii) diverting OPI subject matter expertise to the detriment of the OPI's core functions; or
- iii) devoting such a high proportion of ATIP resources to responding that the processing of other requests is negatively affected.

As a general rule, when an institution's information holdings are well managed, the ATIP unit is adequately resourced, and processing procedures are streamlined, extensions should only be required for a low percentage of requests. As a rule of thumb, the longer the extension, the greater the likelihood that there will be a complaint to the Commissioner.

Notice of Right of Complaint

Subsection 9(1) requires institutions to notify requesters, in the notice of extension, that the person has a right to make a complaint to the Commissioner about the extension. The Information Commissioner recommends that all such notices remind requesters that complaints to the Commissioner must be made within one year from the date of the request.

Managing Consultations

In order to ensure that response periods extended under 9(1)(b) are met, consultations with other institutions or governments must be carefully managed. Before claiming an extension, the institution or government to be consulted should be asked to estimate the time it will need to provide its views. The consulting institution must decide whether the estimate is reasonable before using it as a basis for claiming an extension. However, once the extension is applied, the consulting institution or government has an obligation to answer the request within deadline, whether or not the consulted institution has provided its views by the deadline.

Institutions should bear in mind that they have an obligation to respond in a timely manner to consultation requests from other institutions. Other governments cannot be easily held to specific response periods. However, responses cannot be held up unreasonably awaiting the reaction of a foreign government. When such consultations are frequent, it may be prudent to seek umbrella memoranda of understanding to ensure timely responses to consultations.

The management of consultations with third parties (where the extension is taken under paragraph 9(1)(c)) is governed by the times set out in sections 27 and 28. These times should not be modified by institutions for the purpose of accommodating the third parties' conveniences or to give the institution additional time to persuade the third party to the institution's view. In sections 27 and 28, Parliament has

struck a careful balance between the rights of requesters to receive a timely response and the rights of third parties to protect their interests; institutions should not upset this balance by deviating from the times therein set out.

You Can't Disclose What You Can't Find

In the cat-and-mouse game which persists between members of the public who want to see information and the officials who want them to see as little as possible, there are three hurdles which must be overcome by the information seekers: delay, excessive application of exemptions (blacking out/censoring) and inability to find the requested records. The last, is now the most worrisome hurdle. Information management in the federal government is in such a sorry state that the term has almost become an oxymoron. There is a record-keeping crisis and it threatens the viability of the right of access. As well, it threatens the government's proposal to be the most wired government in the world by 2004.

The whole scheme of the *Access to Information Act* depends on records being created, properly indexed and filed, readily retrievable, appropriately archived and carefully assessed before destruction to ensure that valuable information is not lost. If records about particular subjects are not created, or if they cannot be readily located and produced, the right of access is meaningless. The right of access is not all that is at risk. So, too, is our ability as a nation to preserve, celebrate and learn from our history. So, too, is our governments' ability to deliver good governance to the citizenry.

What are the reasons for the crisis? Years of government restraint and downsizing have been devastating to the records management discipline. The first to go in the downsizing were the information handlers, librarians, records clerks, filing secretaries, and so forth. Second, there is a great divide between the so-called "IT" (information technology) professionals and the so-called "IM" (information management) professionals and the IT-types have been dominating the agenda recently because of Y2K. Third, an irrational fear of access leads many officials (often at the most senior levels) to avoid making records; and finally, personal computing has reduced the ability of institutions to exercise central control over the filing, indexing and destruction of records. These factors have eaten away the foundation on which, in the past, a professional public service was built. This foundation was the professional tradition of carefully documenting actions, considerations, policy evolution and advice; it was the tradition of maintaining, contributing to and using a recorded, institutional memory.

The irony of this state of affairs is not lost on this Commissioner, as one who was privileged to have a role in giving shape and form to the access law as a Member of Parliament. The introduction of the *Access to Information Act* and the *Privacy Act* was seen as the coming of age of an "information paradigm" in modern government. These laws represented a modernization of the Canadian public administration in preparation for what was then an emerging information age. Both of these laws contained sections requiring good management of government information.

The access law requires government institutions, on an annual basis, to inventory the organization and nature of their information holdings; to describe their record groups and manuals and to publish an index to holdings and access points. Most noteworthy, and unlike the U.S. Freedom of Information Act, the Canadian law is unambiguous in its coverage of information in electronic format. All of this was seen, in the late 70s and early 80s as a legally mandated, government-wide locator system. Canadians were being assured that the government would know what records it holds and how to find and retrieve them in response to access requests. Making this modernized government information system work was a job given to Treasury Board. And this, too, was a carefully considered move.

In the wake of the recommendations of the Glassco Commission, the Treasury Board Secretariat was created in 1968 as a separate central agency, distanced from the Department of Finance. One of its primary roles was to improve the general management of government. Effective information management and publication policies were seen as a cornerstone to improving the general management of government.

The good news is that TBS developed, in the late 1980s, a comprehensive policy governing the management of government information holdings. It asks all government institutions to:

- manage its information holdings as a corporate resource to support effective decision-making, meet operational requirements and protect the legal, financial and other interests of the government and the public;

- make the widest possible use of information within the government by ensuring that it is organized to facilitate access by those who require it, subject to legal and policy constraints such as the *Privacy Act*.
- maintain a current, comprehensive and structured classification system to serve as a locator and an inventory;
- identify and conserve information holdings that serve to reconstruct the evolution of policy and program decisions or have historical or archival importance, following all requirements of the *National Archives Act*.

The bad news is that Treasury Board has taken no steps since to ensure that the policy is being followed or updated to keep pace with the challenges of electronic governance. The National Archivist, the Information Commissioner, the Auditor General, the historian and librarian communities, have all been telling Treasury Board that there is an ever-widening gap between the policy and the reality. They have been telling government that there is a crisis here, which calls for a government-wide response. A vibrantly democratic state in the "Information Age", must have a healthy information management system. The Government of Canada has not confronted this challenge as it strives to be a player in this "virtual world".

Only recently has there been any reason to believe that Treasury Board has heard these concerns. A joint initiative is underway between the National Archivist and Treasury Board's Chief Information Officer, to identify and assess issues associated with the

management of government information. A report and action plan was issued at the close of the reporting year. It remains to be seen what will come of it. But there appears to be little stomach for devoting the kind of resources and leadership necessary to tackle the crisis. The issue has no political "sex appeal".

In this Commissioner's view, the key policy question for the new century in access to information is this: Can there be a meaningful right of access in the absence of legislated and enforced information management rules? The time is right, for an Information Management Act, designed to regulate the entire life cycle of government-held information. Such an Act would start with the birth of information. It would require public officials to return to the practice which used to be a hallmark of their professionalism, i.e. to document the functions, policies, decisions, procedures and transactions in which they are involved. It would regulate information during its life by addressing its organization, retrieval, use, accessibility and dissemination. Finally, such an Act would address the disposal of information by addressing archival and destruction issues. From this challenge we must not shrink if the notion of information rights is to have any practical meaning.

At the very heart of the problem of how to bring back a professional approach to information management in the federal public service, is the issue of attitude. The love of secrecy is so deeply entrenched that extraordinary steps are taken by public servants to maintain it even in the face of a legislated right of

access. The most troubling of these steps is entirely contrary to the professional tradition of public servants—it is the adoption of the practice of not keeping records. Many of the most senior, influential, deliberative and decision-making committees in government have ceased the practice of creating agendas, keeping minutes and tabling of briefing notes and papers to assist discussion. There appears to be no operational reason for overturning years of practice by these committees other than the desire to avoid the scrutiny and accountability which sometimes occurs through access to information disclosures. The attitude truly has become: "Why write it, when you can speak it? Why speak it when you can nod? Why nod, when you can wink?"

Go Directly to Jail!

The attitude of paranoia about the negative consequences of openness for governance can cause some officials to cross the line from unprofessional behaviours (such as not creating records or not taking care to file them properly) to illegal acts (such as hiding, altering or destroying requested records).

In March of 1998, the House of Commons identified the boundary line when it unanimously passed Colleen Beaumier's private member's bill which added subsection 67.1 to the *Access to Information Act*. This is the offence which is therein set out:

- 67.1** (1) No person shall, with intent to deny a right of access under this Act,
- (a) destroy, mutilate or alter a record;
 - (b) falsify a record or make a false record;

-
- (c) conceal a record; or
 - (d) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (a) to (c).

(2) Every person who contravenes subsection (1) is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding \$10,000, or to both; or
- (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding \$5,000, or to both. S.C. 1999, c. 16, s. 1.

As of the end of March 2000, no one had been charged under this provision and the Commissioner has not yet found it necessary to inform the Attorney General of Canada of any suspected infringement of this section. That is not to say that there have not been some losses of records in suspicious circumstances. One was the subject of investigation this year and a case summary may be found at page 44. Two investigations are in progress concerning the possible hiding or destruction of records which were the subject of access requests. Their outcome will be reported next year.

Washing One's Own Dirty Laundry

Any careful observer of the process by which Colleen Beaumier's bill came to pass would appreciate that the bill—and its widespread support—was born of

outrage. Members of Parliament and the public were outraged by the behaviour of some public officials who altered or destroyed records to undermine the right of access. Such incidents occurred at National Defence, Health Canada and Transport Canada. All were carefully investigated and revealed to the public by the Office of the Information Commissioner. None would have come to light in the absence of courageous "whistleblowers" on the inside and an independent, impartial investigative body on the outside.

It was no coincidence that Ms. Beaumier's bill was an amendment to the *Access to Information Act* rather than to the Criminal Code. She and all members of Parliament intended that allegations of infringements of subsection 67.1 be handled independently of the institutions in which they arise. The potential for improper interference with evidence and witnesses is simply too great in the case of this offence, for government institutions to attempt to investigate themselves when an allegation of possible infringement of subsection 67.1 is made.

Yet, that is exactly how government intends to react. The lead institutions when it comes to access to information policy—Treasury Board and Justice Canada—have decided, as a matter of policy, that government institutions will wash their own dirty laundry. In its directive of September 17, 1999, Treasury Board set out its guidance on how departments should interpret 67.1 and how they should react to possible infringements. Here is the Board's advice:

"The Information Commissioner has suggested that his office be notified of any allegations of a contravention of subsection 67.1 of the *Access to Information Act*, however, we have not accepted this suggestion. We continue to advise institutions to treat such allegations in the same way any allegation of criminal activity is treated under the Government Security Policy; once the Deputy Minister has been made aware of the allegation he/she will make a decision on notifying the appropriate law enforcement agency."

There you have it. Don't call the Commissioner; investigate internally and then the Deputy Minister will decide whether to call in an independent law enforcement agency. The Prime Minister's department took the lead by informing all its officials that allegations of suspected contraventions of subsection 67.1 should be made to PCO's Director of Security Operations who would be responsible for conducting an in-house investigation into the matter. Would the results ever become public? Would the access requester be notified? As it turns out, the answer is: Not necessarily.

The folly of the government's approach is immediately apparent to anyone having knowledge of even recent history. Remember that, in the records alteration incidents at ND, senior officers, including officials of the Judge Advocate General's office were informed that orders had been given to destroy records, yet no remedial action was taken by them.

Recall, as well, that the other incidents of improper records destruction which have come to light in recent years, have all involved senior officials. During those investigations, the deputy heads of the relevant institutions rallied around their executive members rather than dispassionately reviewing the evidence and taking remedial action. It is human nature to refuse to believe that someone with whom one works closely could engage in a wrongdoing.

No, in this area, the government has not developed wise public policy. This self-investigation approach has all the appearance of damage control; it is bound to be mistrusted and viewed with cynicism—deservedly so.

Saner Heads Prevail

Happily, not all Ministers want their departments to follow the Treasury Board Policy. The Minister of National Defence has decided that, in his department, the following steps will be taken when there is a concern about possible wrongful records destruction:

1. The Minister will be informed;
2. the requester will be informed of the event(s) and of the right to complain thereof to the Information Commissioner; and
3. the decision about how best to investigate the circumstances will be taken in consultation with the Office of the Information Commissioner.

It would seem that saner heads prevail elsewhere, as well. Recently, the Minister of Finance decided against an internal investigation of allegations that records requested from his department

under the access law had been hidden. Rather, the Minister chose to leave the investigation in the hands of the Information Commissioner in order to ensure himself and the public of independent, impartial and thorough results.

One can only hope that these two "defections" from the party line will encourage the President of Treasury Board to take another, careful look at the policy on dealing with allegations of wrongful records handling practices.

Should Census Records be Secret Forever?

Over the past year a policy battle was waged over whether or not to pull back the complete blanket of secrecy which section 17 of the *Statistics Act* has thrown over census records since 1901.

This issue is important for many researchers and genealogists. This particular instance of secrecy does not directly diminish the accountability of governments to the citizens. It is, nevertheless, a good illustration of a situation where the legitimate need for some secrecy (to protect individual privacy) has not been adequately balanced against the legitimate interests in having census records made available for public use and consultation.

Former Privacy Commissioner, Bruce Phillips, has urged government not to remove the blanket of secrecy from census records.

He argued that there have always been, and will be in the future, highly sensitive questions put to citizens in the census. Since answering is compulsory, Mr. Phillips felt that the "quid" for the

"quo", should be an iron-clad guarantee of anonymity for respondents. Must it be all or nothing?

At present, there is no public right of access to the responses which have been given to every census since 1901—at least not in a form in which the identities of the respondents could be determined. The prohibition arises from the interplay of one section of the *Statistics Act* (section 17) with one section of the *Access to Information Act* (section 24).

The *Access to Information Act* contains a "notwithstanding-any-other-Act-of-Parliament" clause and, hence, takes precedence over secrecy provisions contained in any other statute. Section 17 of the *Statistics Act* places a blanket of secrecy over nominative census records. All things being equal, the *Access Act* would take priority, and the blanket of secrecy would be lifted.

However, the *Access to Information Act* contains a sweeping, catch-all provision. Section 24 requires that secrecy be maintained with respect to information made secret by another statute, if that other statute is referenced in Schedule II of the *Access to Information Act*. As you might have guessed, section 17 of the *Statistics Act* is listed in Schedule II of the *Access Act*. Thus, it is obligatory that secrecy be maintained with respect to census information—there is no discretion, there is no injury test and there is no time period after which disclosure may be made. Even the most closely held secrets of Cabinet do not enjoy this much protection from disclosure.

It is somewhat amazing to note that there appear to be no documents, no

letters, no formal governmental documents, no newspaper articles, no private correspondence and no speeches on the reasons for section 17 of the *Statistics Act*. Further, what is more surprising is that the amendment only dealt with future censuses, and left past censuses open. Because nature abhors a vacuum, there have been many interpretations as to why this clause was enacted but the truth is, unless some other information from the period surfaces, we shall never know.

There has been one little bit of information that has surfaced, however. Section 23 of the Instruction to Officers, Commissioners and Enumerators (published in the Canada Gazette April 1911) contains section 36. It stated that "clear and legible records" were to be kept because "the census is intended to be a permanent record, and its schedules will be stored in the Archives of the Dominion." Section 36, by the way, fell in the part of the Instruction titled, "Instruction Relating to All Schedules". In section 16 of the Instruction, it is noted that the census "will have value as a record for historical use in tracing the origin and rise of future towns." There certainly was cause for protecting the confidentiality of the collected census information over the uses that governments might find helpful, such as taxation and allocation of benefits. Yet, nowhere is there any documented indication that the Amendments of 1905 were designed to permanently hide the answers from Canadians after a reasonable period of time, however that might be defined.

It is, however, possible to offer an informed suggestion as to why section 17 of the *Statistics Act* was listed in Schedule II of the *Access Act*. Simply put, in the early 80's, Statistics Canada made the case to the then Minister of Communications, who sponsored the Bill, that any loss of absolute secrecy would discourage voluntary participation in the census. Any significant increase in the non-participation rate would, according to Statistics Canada, put the very existence of a reliable, national census at risk. This continues to be the fear of the Chief Statistician, and it is a reasonable position for him to take.

When Parliament passed section 24 of the *Access Act* (with its power to bootstrap in the secrecy provisions of the other Acts) it recognized the very real danger it posed to the concept of openness. Thirty-three provisions were listed when the Act was passed. As a result, Parliament wrote into the Act a requirement that a Parliamentary Committee review every provision set out in Schedule II within three years after the Act came into force.

Consequently, in 1986, the Justice Committee issued a report concerning the appropriateness of section 24 and the various provisions which had been included in Schedule II—including section 17 of the Canada Evidence Act.

The Committee came to a rather startling, unanimous conclusion, as follows:

"We have concluded that, in general, it is not necessary to include Schedule II in the Act. We are of the view that, in every instance, the type of information safeguarded in an enumerated provision would be adequately protected by one or more of the exemptions already contained in the *Access Act*." (p. 116)

Despite that general conclusion, the Parliamentary Committee got cold feet when it came to three particular areas of secrecy, one of which being the secrecy of census records. The Committee put it this way:

"Despite our view that the interests protected by the Schedule II provisions could adequately be protected by other existing exemptions in the *Access Act*, we are persuaded that there should be three exceptions to the conclusion. The sections of the *Income Tax Act*, the *Statistics Act* and the *Corporations and Labour Unions Returns Act* which are currently listed in the Schedule deal with income tax records and information supplied by individuals, corporations and labour unions for statistical purposes. Even though the exemptions in the *Access Act* afford adequate protection for these kinds of information, the Committee agrees that it is vital for organisations such as Statistics Canada to be able to assure those persons supplying data that absolute confidentiality will be forthcoming." (p. 117)

This "abundance of caution" reason for the blanket secrecy of census records, does not stand up to scrutiny. The exemption provisions contained

elsewhere in the *Access Act* provide reasonable and sufficient protection for all sensitive information held by government. There is nothing contained in census records which makes them more sensitive than the thousands of other kinds of personal information held by government about such matters as criminal records, medical conditions or financial transactions, or even in the recently revealed and recently dismantled HRDC longitudinal database.

If section 17 of the *Statistics Act* were to be removed from Schedule II, what would the rules then be for census records? The short answer is this: census records in nominative form would be available from the National Archives, 92 years after the taking of the census. This result comes from reading paragraph 19(2)(c) of the *Access Act* together with paragraph 8(2)(b) of the *Privacy Act* and paragraph 6(d) of the *Privacy Regulations*. This period of protection represents a reasonable balance between the privacy expectations of individual respondents and the public interest in having access to census records for research purposes.

There is comfort to be taken from the fact that Canada's Chief Statistician agrees that, for the future, blanket secrecy is not required to secure voluntary participation in the census. He has told the Expert Panel on Access to Historical Census Records that, as long as the period of secrecy exceeds average life span, it is unlikely that fears of privacy invasion will deter participation. That certainly is the experience of most other western democracies.

Of course, there remains the issue of whether the rules should be relaxed retroactively. The Chief Statistician believes that his ability to sell the new rules, prospectively, will be seriously undermined if people believe that the rules could be changed, retroactively, at any time, in the future.

Yet, we must also keep in mind the positive reasons for making census records available after a suitable period of "quarantine". Take for example the views of the Association of Canadian Archivists, which feels strongly that there is a compelling case for changing the secrecy rules. In a recent letter to Canada's Privacy Commissioner, the ACA said:

"We represent researches from every walk of life, from genealogists looking for information on their ethnic heritage to media striving to bring a historical perspective to their news, to doctors tracing genetic diseases through familial lines. Census material that has already been released (from the New France Census of the 1600s to 1901) provided for personal and family histories, for the discovery of community, and for the telling of the wider history of our country. Moreover, census materials are useful in research to promote understanding of, and to redress wrongs done to, ethnic and aboriginal groups." (March 19, 2000)

The Canadian Historical Association (CHA) was equally eloquent, in its brief to the Expert Panel, as to the importance to the country of relaxing—even

retroactively—the census secrecy rules. As well, the CHA has researched the history of the so-called "promise" of confidentiality made by the Wilfred Laurier Government in advance of the 1906 special western census. It found no evidence for the notion that census records would be kept secret forever.

In the absence of any public or private debate on these clauses in 1905, it seems to this Commissioner that the legislation was not intended to apply, in perpetuity, to every subsequent census, nor was it intended to block transfer of census records to the National Archives.

Yet, for better or worse, Canadians have, since the 1901 census, been given a legal assurance of secrecy reaffirmed as recently as 1983 when section 17 of the *Statistics Act* was included in Schedule II of the *Access Act*. There exists a de facto expectation of privacy with respect to post-1901 census records. Perhaps the appropriate deference to that expectation could be given by making a distinction between the long and short-form records. For the future, all census records would be accessible after 92 years. For the past, census records would be available after 92 years with the exception of long form responses which, after all, contain the more sensitive personal information. In this way a balance can be reasserted between the right to privacy and the public's right of access.

Summary

Fiscal year 1999/2000 has been a challenging year for the Office of the Information Commissioner and for the *Access to Information Act*. Not only did the government fail to come forward with long-promised reforms to the law, it moved to defeat a private member's bill which proposed a comprehensive reform package. The Bill would have given the Justice and Human Rights Committee the perfect opportunity to hold public hearings on reform of the access law and bring the law into the 21st century.

And, too, the lead agencies of government did everything in their power—from withholding of resources to legal

challenges—to undermine the effective functioning of the Office of the Information Commissioner. A watchdog is perfectly acceptable to government, it would seem, until it bites!

Yes, the culture of secrecy is strong, but there are some positive signs. It would appear, finally, that departments are serious about solving the perennial problem of delayed access responses. And, too, the support for the right to know shown by the Courts has remained unwavering. Securing compliance with the *Access to Information Act* will be a highly adversarial struggle for some time to come—but a positive outcome is in no real doubt.

INVESTIGATIONS

In the reporting year, 1,359 complaints were made to the Commissioner against government institutions (see Table 1), 49 per cent of all completed complaints being of delay (see Table 2). Last year, by comparison, 49.5 per cent of complaints concerned delay. It is clear that there remains a system-wide, chronic problem of non-compliance with the Act's response deadlines. Solving this problem remains the office's first priority.

Resolutions of complaints were achieved in the vast majority of cases (99.9 per cent of cases, to be precise). Table 2 indicates that 1,529 investigations were completed. In three cases it proved impossible to find a resolution. These will be brought before the Federal Court for resolution.

As seen from Table 3, the overall turnaround time for complaint investigations increased to 4.34 months from the previous year's 3.99 months. This turnaround time is not acceptable; it does not meet the three-month period recommended by the Standing Committee on Justice and the Solicitor General in 1987. As well, Table 1 reminds us that there continues to be a troubling backlog of incomplete investigations. Last year, it was 742, this reporting year 571 complaints. If resources for additional investigators are not forthcoming from government, Canadians risk being deprived of an effective and timely avenue of redress for abuses of access rights.

During the previous reporting year, the office conducted a thorough review of its resource needs in cooperation with

Treasury Board. This so-called A-base review resulted in a submission to the Board for additional resources. Treasury Board Ministers decided to award only half of the requested amount. No rationale was provided.

The five institutions subject of the most complaints in 1999/2000 are:

• Health Canada	307
• National Defence	216
• Indian and Northern Affairs Canada	167
• Citizenship and Immigration Canada	135
• Canada Customs and Revenue Agency	78

All of these institutions were on the "top five" list last year, as well.

The 1998/1999 list was:

• Health Canada	336
• National Defence	289
• Indian and Northern Affairs Canada	158
• Revenue Canada	131
• Citizenship and Immigration Canada	110

Two institutions in the top five received more complaints this year over last. Indian and Northern Affairs Canada received five per cent more complaints; Citizenship and Immigration received 19 per cent more.

The three other institutions on the top five list received fewer complaints this year over last: Revenue Canada received 40 per cent fewer; National Defence received 25 per cent fewer and Health Canada received nine per cent fewer.

In this reporting year, the Information Commissioner issued a special report to Parliament containing a "report card" on the response-time performance of the following institutions:

- Citizenship and Immigration Canada
- Department of Foreign Affairs and International Trade
- Health Canada
- National Defence
- Privy Council Office
- Canada Customs and Revenue Agency
- Transport Canada
- Human Resources Development Canada

The text of the report card is available on request from the Office of the Information Commission or by consulting the office's website. For a summary of the results see pages 14-15.

Investigative Formality

During the reporting year, eight subpoenas were issued: One to a deputy head of an institution, two to institutional officials, three to individuals representing private sector entities and two to an institution for the production of records.

The Commissioner continued his zero tolerance approach to delays. Ministers and Deputy Ministers were called upon to explain cases of unreasonable delay. Their explanations were received directly and not through the buffer of intermediaries. This year, however, it was not necessary to issue subpoenas in order to obtain the cooperation of senior officials in explaining the reasons for, and solution to, cases of delay. All subpoenas this year were issued during investigations into complaints of

improper exemptions or complaints of incomplete or misleading responses.

On-site Viewing

During the reporting year several institutions asked whether the Information Commissioner would agree to review records at the premises of the government institution. These institutions believed that the records contained highly sensitive information the security of which could best be assured by retaining them at the home institution.

The Commissioner insisted in these cases that the records be removed to the premises of the Information Commissioner for review. He took this approach for two reasons: First the investigative review of records which the government wishes to keep secret is a detailed review involving consultations among the investigator, management and legal advisors as well as the review of precedents. It is simply impractical to conclude a detailed, consultative review of this nature outside the premises of the Information Commissioner.

Second, the Commissioner noted that—as required by law—his premises and personnel meet the very highest security standards appropriate to the most sensitive information held by government. Records held on the premises of the Information Commissioner, receive a level of protection which is equal to or greater than the records would receive at their home institution.

The general rule, then, is that exempted records and all other records which the Commissioner wishes to review as part of his investigations, will be removed from their home institution to the premises of the Information Commissioner. If institutions wish to take charge of the delivery of records to and from the Commissioner, they may do so unless the Commissioner wishes to proceed otherwise.

10-day Return

Also this year, one institution tested the limits of subsection 36(5) of the *Access to Information Act* which states as follows:

"Any document or thing produced pursuant to this section by any person or government institution shall be returned by the Information Commissioner within ten days after a request is made to the Commissioner by that person or government institution, but nothing in this subsection precludes the Commissioner from again requiring its production in accordance with this section."

In the 17 years since the Act's passage, this provision has been interpreted as applying to original documents and other "things" to which there is a right of ownership vested in the person or institution who was required to produce it. Consequently, when institutions provided copies of records to the Information Commissioner, they did not ask for or expect them to be returned until the completion of the investigation.

Usually, in fact, the practice is for the records provided to the Commissioner

during an investigation to be returned or destroyed at the end of the investigation—unless, of course, Federal Court review is anticipated.

This year, however, PCO asked the Information Commissioner to return within 10 days even the copies of records which PCO provided during an investigation. Since, on average, it takes the Commissioner some four months to complete an investigation, the prospect of sending back copies to PCO, and then asking for their return, and so forth throughout the duration of the investigation, seemed entirely ludicrous.

It appeared that PCO's goal in that case was to ensure that, by the end of an investigation, the Information Commissioner would not hold in his possession any of PCO's records. Thus, the Information Commissioner could not file any such records with the Federal Court in support of any challenge he might make to PCO's refusal to disclose request records. PCO hoped, by this approach, to gain full control over what records would be provided to the Federal Court in the context of a review under section 42 of the *Access to Information Act*.

The Commissioner informed PCO that he did not accept its interpretation of subsection 36(5) and that he did not intend to engage in this game of moving records back and forth between his office and PCO every ten days. He told PCO that, whenever he obtained a request to return a copied set of records, he would return the set once, as a courtesy, but retain a copy for use during the investigation. Originals, of course, would be treated in accordance with subsection 36(5) as intended.

It is to be hoped that government institutions will only make a request for return of original records under subsection 3(5) when they have a legitimate operational need for the records. It is to be preferred that institutions provide the Commissioner

with copies of originals (unless otherwise requested) which copies will be returned or destroyed at the end of the investigation or related Federal Court for review, should one ensue.

Table 1

STATUS OF COMPLAINTS

	April 1, 1998 to Mar. 31, 1999	April 1, 1999 to Mar. 31, 2000
Pending from previous year	423	742
Opened during the year	1670	1359
Completed during the year	1351	1530
Pending at year-end	742	571

Table 2

COMPLAINT FINDINGS (April 1, 1999 to Mar. 31, 2000)

CATEGORY	FINDING				TOTAL	%
	Resolved	Not Resolved	Not Substantiated	Discontinued		
Refusal to disclose	276	3	222	36	537	35.0
Delay (deemed refusal)	685	–	27	37	749	49.0
Time extension	70	–	59	5	134	8.8
Fees	31	–	16	8	55	3.6
Language	–	–	–	–	–	–
Publications	–	–	–	–	–	–
Miscellaneous	26	–	26	3	55	3.6
TOTAL	1088	3	350	89	1530	100%
100%	71.2	0.1	22.9	5.8		

Table 3

TURN AROUND TIME (Months)

CATEGORY	97.04.01 – 98.03.31		98.04.01 – 99.03.31		99.04.01 – 2000.03.31	
	Months	Cases	Months	Cases	Months	Cases
Refusal to disclose	6.23	576	5.86	526	5.99	537
Delay (deemed refusal)	2.19	594	2.50	669	3.44	749
Time extension	3.05	93	2.80	71	2.33	134
Fees	5.81	64	5.69	45	5.41	55
Language	8.04	3	–	–	–	–
Publications	–	–	–	–	–	–
Miscellaneous	3.36	49	4.54	40	4.34	55
OVERALL	4.16	1379	3.99	1351	4.34	1530

Table 4

COMPLAINT FINDINGS

(by government institution) (April 1, 1999 to March 31, 2000)

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Substantiated	Discontinued	TOTAL
Agriculture and Agri-Food Canada	16	–	3	–	19
Atlantic Canada Opportunities Agency	3	–	2	1	6
Atomic Energy Control Board	1	–	–	–	1
Business Development Bank of Canada	1	–	1	1	3
Canada Customs and Revenue Agency	45	–	22	11	78
Canada Deposit Insurance Corporation	1	–	–	–	1
Canada Information Office	–	–	–	1	1

continued...

Table 4 (continued)

COMPLAINT FINDINGS

(by government institution) (April 1, 1999 to March 31, 2000)

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub- stantiated	Discon- tinued	TOTAL
Canada Mortgage & Housing Corporation	1	–	1	1	3
Canada Ports Corporation	5	–	1	–	6
Canadian Commercial Corporation	–	–	–	1	1
Canadian Cultural Property Export Review Board	–	1	–	–	1
Canadian Environmental Assessment Agency	2	–	–	–	2
Canadian Film Development Corporation	–	–	1	–	1
Canadian Food Inspection Agency	8	–	5	–	13
Canadian Heritage	4	–	4	–	8
Canadian Human Rights Commission	1	–	–	–	1
Canadian Human Rights Tribunal	1	–	–	–	1
Canadian International Development Agency	2	–	2	–	4
Canadian Museum of Civilisation	2	–	–	–	2
Canadian Security Intelligence Service	3	–	8	1	12
Citizenship & Immigration Canada	91	1	19	24	135
Correctional Service Canada	28	–	18	–	46
Environment Canada	15	1	9	1	26
Farm Credit Corporation Canada	–	–	1	–	1
Finance Canada	8	–	5	–	13
Fisheries and Oceans Canada	26	–	16	–	42
Foreign Affairs and International Trade	28	–	14	1	43

continued...

Table 4 (continued)

COMPLAINT FINDINGS

(by government institution) (April 1, 1999 to March 31, 2000)

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub- stantiated	Discon- tinued	TOTAL
Health Canada	294	–	9	4	307
Human Resources Development Canada	10	–	7	1	18
Immigration and Refugee Board	9	–	3	–	12
Indian and Northern Affairs Canada	125	–	34	8	167
Industry Canada	21	–	2	1	24
Justice Canada	28	–	17	1	46
National Archives of Canada	10	–	41	2	53
National Defence	149	–	52	15	216
National Film Board	–	–	1	–	1
National Parole Board	1	–	–	–	1
National Research Council Canada	–	–	1	–	1
Natural Resources Canada	4	–	5	–	9
Office of the Inspector General of CSIS	–	–	1	–	1
Office of the Superintendent of Financial Institutions	–	–	1	–	1
Privy Council Office	22	–	2	1	25
Public Service Commission of Canada	1	–	2	–	3
Public Works and Government Services Canada	21	–	4	2	27
RCMP Public Complaints Commission	5	–	–	–	5
Royal Canadian Mint	–	–	1	–	1
Royal Canadian Mounted Police	22	–	16	3	41

continued...

Table 4 (continued)

COMPLAINT FINDINGS

(by government institution) (April 1, 1999 to March 31, 2000)

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub- stantiated	Discon- tinued	TOTAL
Solicitor General Canada	6	–	–	2	8
Statistics Canada	1	–	1	–	2
Status of Women Canada	1	–	–	–	1
Transport Canada	44	–	12	6	62
Transportation Safety Board of Canada	2	–	–	–	2
Treasury Board Secretariat	17	–	2	–	19
Vancouver Port Authority	1	–	–	–	1
Veterans Affairs Canada	2	–	3	–	5
Western Economic Diversification Canada	–	–	–	1	1
TOTAL	1088	3	350	89	1530

Table 5

GEOGRAPHIC DISTRIBUTION OF COMPLAINTS

(by location of complainant) (April 1, 1999 to March 31, 2000)

	Rec'd	Closed
Outside Canada	82	64
Newfoundland	17	16
Prince Edward Island	0	1
Nova Scotia	84	65
New Brunswick	6	8
Quebec	263	249
National Capital Region	488	757
Ontario	168	165
Manitoba	60	33
Saskatchewan	7	6
Alberta	30	26
British Columbia	152	140
Yukon	1	0
Northwest Territories	1	0
TOTAL	1359	1530

THE ACCESS TO INFORMATION ACT IN THE COURTS

A: The Role of the Federal Court

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

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

Chart 1

ACCESS APPLICATIONS (1983-2000)

Year	Files Opened	Files Closed	Back- log
1983	2	0	2
1984	13	6	9
1985	31	12	28
1986	55	14	69
1987	30	39	60
1988	67	62	64
1989	36	30	70
1990	57	34	93
1991	45	24	114
1992	59	60	113
1993	54	79	89
1994	34	41	80
1995	33	45	68
1996	32	39	61
1997	37	46	52
1998	76	36	92
1999	43	71	64

consent, to ask the Federal Court to review the matter.

This reporting year the commissioner's office investigated 1,530 complaints. Only three cases could not be resolved to the Commissioner's satisfaction and these resulted in three new applications for review being filed by the Commissioner. In addition, one application for federal government review was made in relation to a complete review in fiscal year 1998-1999. Eight applications for Court review were filed by dissatisfied requesters. Third parties opposing disclosure filed 31 applications.

I. Case Management of Access Litigation in the Federal Court

Chart 1 shows the number of access applications received and disposed of for the years 1983-2000.

The Federal Court is to be congratulated for dealing with access litigation in a timely manner. The backlog of cases is diminishing. It appears that access litigation is well served by the new Federal Court Rules (1998) which ensure that all access cases are efficiently managed.

B: The Commissioner in the Courts

I. Cases completed

Information Commissioner of Canada v. President of the Atlantic Canada Opportunities Agency (A-292-96) Court of Appeal

(See the 1994-95 Annual Report p. 23, the 1995-96 Annual Report p. 22 and the 1998-99 Annual Report p. 32 for more details). In this case, the Information Commissioner appealed the March 18,

1996 decision of Madam Justice McGillis in which she dismissed his application against the President of the Atlantic Canada Opportunities Agency (ACOA) for the disclosure of the actual number of jobs created by the companies which received funding from ACOA under the ACTION program. This program was designed to encourage small and medium-sized businesses in Atlantic Canada. The Court of appeal heard the Information Commissioner's appeal on November 17, 1999 and rendered its decision in his favour on the same day.

It was held that the Trial Judge erred in finding that the information was exempt from disclosure under paragraph 20(1)(b) of the Act (namely, commercial information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party). She was found to have mistakenly relied upon unsworn statements by a few of the companies that the information was consistently treated as confidential. The burden was on ACOA to prove to the Court with direct evidence, that the information was confidential in nature and was consistently treated as confidential by the third parties. Consequently, the Court of Appeal ordered ACOA to disclose the actual number of jobs created.

Petzinger v. Information Commissioner of Canada and the Attorney General of Canada (A-692-97, A-693-97 and A-728-97) Court of Appeal

(See the 1997-1998 and the 1998-1999 Annual Reports, pp. 34-35 and 34 respectively for the background and past developments in this case before the Trial Division and before the Court of Appeal)

National Defence's access coordinator, Bonnie Petzinger appealed three orders of Mr. Justice MacKay, namely his orders striking out the entire case as disclosing no reasonable prospect of success and denying Ms. Petzinger the right to amend the type of relief she was asking the Court to grant against the Information Commissioner. Mr. Justice MacKay found no evidence that Ms. Petzinger's rights had been affected by the Information Commissioner's report and recommendation. He determined that the Commissioner's investigative process had been conducted in a lawful manner and that Ms. Petzinger should not have challenged the recommendation on its merits or on its appropriateness as she only had the right to dispute the lawfulness of the investigation.

The Court of Appeal heard Ms. Petzinger's appeal on January 12, 2000 and delivered its reasons the same day, finding in favour of the Information Commissioner. The three judge panel held that Mr. Justice MacKay had the discretion to strike out Ms. Petzinger's case. The panel found that Ms. Petzinger failed to demonstrate that her reputation had been prejudiced by the Information Commissioner's recommendation. The Commissioner had found that Ms. Petzinger's involvement in a labour dispute involving the requester gave rise to a reasonable apprehension that she might be biased in handling his access to information requests. The Commissioner recommended that Ms. Petzinger cease her involvement in the processing of the requester's access requests.

***Information Commissioner of
Canada v. Minister of National Defence
(A-785-96) Court of Appeal***

(The details of this case are reported in the 1996-97 Annual Report at pp. 31-32 and the 1998-99 Annual Report at pp. 31-32.)

This case arose when National Defence failed to respect the *Access to Information Act's* deadlines for responding to an access request and then failed to respond to a number of deadlines negotiated with the Information Commissioner. This situation was termed a "deemed refusal" by the Act. The Information Commissioner took National Defence to Court, on behalf of the requester, to compel the department to respond to the specific access request. Twenty days after the application was filed, National Defence informed the requester of its decision to refuse access to the records.

The Information Commissioner still, however, had some unanswered questions such as what are the consequences of a department's failure to respond to access requests on time and may a department claim exemptions after the conclusion of the Commissioner's investigation of a deemed refusal but before the hearing in Court.

While the Trial Division agreed that the delay in responding to the access request was excessive, it found that the decision of National Defence was not a "deemed refusal" to disclose based on a continuing failure to provide access to the documents but rather a decision to refuse disclosure made beyond the time limitation. This did not prevent

the government institution from claiming exemptions under the Act as the Commissioner had the opportunity to review the propriety of the exemptions. The Court also held that it could not review the appropriateness of these exemptions but rather, they should be sent back to the Commissioner for investigation. The Court found that the application for review was premature as the Commissioner should have investigated the exemptions before asking the Court to review them.

The Commissioner appealed this decision to the Federal Court of Appeal but his appeal was dismissed on April 19, 1999. In doing so, the Court of Appeal concluded that a late response amounts to a refusal. Consequently, the Commissioner's application to the Court was premature because he was required under sections 41 and 42 to have first investigated the merits of the government institution's refusal to provide access. The Court noted that the Information Commissioner has broad investigatory powers which he should use to compel the Minister of National Defence to justify his refusal to disclose information. In effect, then, the Court of Appeal decided that the Commissioner has the power to force institutions to answer access requests. Furthermore, the government institution may not invoke discretionary exemptions after the Commissioner's investigation has been completed.

Information Commissioner of Canada v. Minister of National Defence
(T-252-99, T-254-99, T-255-99, T-256-99, T-257-99, T-258-99, T-259-99, T-260-99, T261-99) Trial Division

This case, also involved a situation of 'deemed refusal' by National Defence in which the Information Commissioner's investigation revealed that the department had failed, without proper justification, to respond to the access requests within the time limitation specified in the Act. The Information Commissioner had recommended that National Defence respond to the requests by providing complete reasons to the requester by a particular date negotiated with the Commissioner. National Defence failed to comply with this negotiated deadline and the Information Commissioner applied to the Federal Court Trial Division for a review of this deemed refusal. (The details of this case were reported in the 1998-99 Annual Report at pp. 29-30.) However, as a result of the decision of the Court of Appeal in A-785-96, discussed above, the Information Commissioner had no choice but to discontinue his application for review before the Trial Division on May 14, 1999.

Le Commissaire à l'information du Canada v. Le Président de "les Ponts Jacques Cartier et Champlain Incorporée
(T-732-99) Trial Division

This case involved a refusal by the President of the Jacques Cartier and Champlain Bridges Inc. of a 1997 internal audit report prepared by the firm of Raymond Chabot Martin

Paré. The refusal was based on paragraphs 21(1)(a), (b) and (d) and section 22 of the *Access to Information Act*. Paragraph 21(1)(a) relates to advice or recommendations, (b) relates to internal consultations and/or deliberations, (d) relates to plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation. Section 22 is an exemption relating to information about testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted if the disclosure would prejudice the use or results of particular tests or audits.

After investigation of the complaint, the Information Commissioner recommended the release of the requested records. When the government institution indicated that it would not follow the recommendation, the Commissioner filed an application in the Federal Court (Trial Division) for a review of that decision.

On January 26, 2000, Mr. Justice Blais of the Federal Court found in favour of the Information Commissioner. He applied paragraph 21(2)(b) to determine that, since the report had been prepared by a private consultant or advisor who was not an employee of the government institution at the time the report was prepared, the exemptions in subsection 21(1) could not be used to prevent the release of the information. The Trial Judge also found that the government institution was not justified in relying upon section 22 because the report in question

contained results of an internal audit rather than testing or auditing procedures, techniques or details of specific tests to be given or audits to be conducted. Furthermore, the government institution could not prove that the release of the information would prejudice the use or results of particular tests or audits. The records were ordered disclosed.

II. Cases in progress – Commissioner as Applicant

The Information Commissioner v. The Minister of Citizenship and Immigration (T1569-99) (Trial Division)

A former director of the department's Vegreville's office (CPC Vegreville) made an access request to Citizenship and Immigration Canada for all written records, including interview notes relating to an administrative review of CPC Vegreville which had been conducted in 1996.

After the intervention of the commissioner's office, the Department disclosed just over half of the records relevant to the request. The Minister justified the non-disclosure of the remaining records on the grounds that their disclosure would be injurious to future investigations of alleged discriminatory practices. She also asserted that the opinions or views expressed in some of the records constituted exempt personal information.

After an investigation into the matter, the Commissioner recommended the disclosure of all records or portions thereof which contain views or opinions expressed

by others about the requester. He also recommended that all other portions of the records that contain views or opinions on any matter given by public officials in the course of their employment be disclosed to the applicant.

As a result of this recommendation, a further 337 pages of records containing opinions about the requester were released. However, the names of the persons expressing the views or opinions about the requester were not disclosed. The Minister relied on several new exemptions for this non-disclosure.

First, the Minister concluded that, by revealing the names of the employees, the Minister would disclose exempt personal information, namely, the names of individuals who participated in the investigation. The Minister also relied on the exemption for information, the disclosure of which could reasonably be expected to threaten the safety of individuals. Finally the Minister concluded that the release of the records could reasonably be expected to harm a third party, namely the company hired to perform the administrative review.

The Commissioner concluded that the Minister wrongly applied the exemptions in sections 19(1), 16(1)(c), 17 and 20(1)(c) and (d) and, with the consent of the requester, has brought an application for judicial review of the decision of the Minister.

This case raises several issues: first, did the Minister or her delegate properly exempt information pursuant to subsection

19(1) of the *Access Act* and paragraph 3(i) of the *Privacy Act*? Second, was the administrative review an "investigation" as defined in subsection 16(4) of the Act? If so, did the Minister err in exercising her discretion in paragraph 16(1)(c) because the investigation was completed at the time the access request was made? Third, did the Minister err in exercising her discretion in section 17 of the *Access Act*? Finally, has the Minister established that the disclosure of the requested records could reasonably be expected to cause probable harm to the company that conducted the administrative review?

This case has not been heard and the outcome will be reported in next year's report.

***Information Commissioner of
Canada v. Minister of Environment
Canada and Ethyl Canada Inc.***
(T-1125-99) Trial Division

In this case, Ethyl Canada Inc. requested from Environment Canada discussion papers the purpose of which was to present background explanations, analyses of problems or policy options to the Queen's Privy Council for Canada for consideration by the Queen's Privy Council for Canada in making decisions with respect to Methylcyclopentadienyl Manganese Tricarbonyl (MMT). MMT is an octane enhancer used in motor vehicle fuels.

Four documents were found relevant to the access request. On the basis of advice from the Privy Council Office (PCO), Environment Canada denied access to these documents and based its refusal on

the ground that discussion papers are no longer used in the Cabinet Papers System. They submitted that the last "Cabinet Discussion Paper" was filed with the Privy Council Office in 1984. The four documents found relevant were withheld from access as being memoranda used to present proposals to the Privy Council or as being records used to brief ministers of the Crown in relation to matters before the Privy Council.

The dispute lies in the fact that memoranda and briefing records are excluded from the *Access to Information Act*, whereas discussion papers become subject to the Act as soon as the decisions to which they relate are made public or, if such decisions are not made public, four years after the decision is made.

As mentioned in last year's annual report, the Information Commissioner took the view that PCO cannot expand the scope of Cabinet secrecy merely by ceasing to call records "discussion papers". He concluded that the former content of Discussion Papers had been moved to other records excluded under the Act. He therefore considered the complaint well-founded and recommended that the records or portions of records, relating to MMT which contain background explanations, analysis of problems or policy options presented to Cabinet in making decisions, be severed from other records constituting confidences of the Queen's Privy Council for Canada and be disclosed to the requester.

The Minister declined to follow the Commissioner's recommendation and the Commissioner and Ethyl Canada Inc. have asked the Federal Court to review the refusal.

Notwithstanding an order to PCO for the production of documents issued by the Information Commissioner in March of 1999 (during his investigation of this case), PCO did not fully comply. In January of 2000, the Federal Court endorsed the Information Commissioner's order of March 1999 and PCO was ordered to provide any further documents governed by the Information Commissioner's order to the Office of the Information Commissioner by a certain date. PCO complied in part with this order but refused to provide the Office of the Information Commissioner with a copy of their Discussion Papers Register. In February 2000, the Court ordered PCO to disclose the Register to the Office of the Information Commissioner. The hearing of the application has been set for January 15-17, 2000, and the outcome will be reported next year.

Information Commissioner of Canada v. Minister of the Environment and Ethyl Canada Inc.
(A-762-99) Court of Appeal

The Minister of the Environment v. the Information Commissioner of Canada and Ethyl Canada Inc.
(A-761-99) Court of Appeal

(see 1998-99 Annual Report p. 33 for further details)

The Information Commissioner asked the Federal Court, Trial Division to provide the parties with

directions regarding the procedure to be followed by them up until the hearing of the case at trial to secure the just, most expeditious and least expensive determination of the case. The Minister objected to any special timetable or directions as he felt that access cases should be dealt with and should progress in the same manner as any other case before the Federal Court.

The Minister also asked the Court to determine how to treat certain documents obtained by the Information Commissioner during the course of his investigation into the complaint which the Information Commissioner wished to use as evidence at trial. These documents included a list provided to the Information Commissioner by the Deputy Clerk of the Privy Council which briefly describes and enumerates all the documents on the subject of the cabinet paper system which the Privy Council decided not to produce to the Information Commissioner as these documents fell within the scope of Cabinet secrecy. PCO later issued a certificate deeming the listed documents as well as the list itself to be cabinet confidences.

The Minister asked the Court to order the Information Commissioner to return this list (as it was allegedly provided by mistake) and to prevent the Information Commissioner from using and filing other documents which he argued were covered by solicitor-client privilege. The Motions Judge ordered the Information Commissioner to return the list and prohibited him from using and filing it on the basis that the certificate operates to prevent the Court and the parties from

examining the information contained in the list.

The Court, however, allowed the documents claimed to be covered by solicitor-client privilege to be filed confidentially and determined that the judge hearing the case at trial is in the best position to decide whether these documents are indeed privileged and how they should be treated. The Minister appealed the portion of the Order in which the Motions Judge determined that the documents claimed to be covered by solicitor-client privilege should be filed confidentially. The appeal had not been heard by the end of the reporting year.

[Ed.note: On April 6, 2000, the Court of Appeal dismissed the appeal. The reasoning of the Court of Appeal will be reported in next year's annual report.]

Information Commissioner of Canada v. Minister of Industry (T-650-98) Trial Division (A-824-99) Court of Appeal

3430901 Canada Inc. and Telezone Inc. v. Minister of Industry (T-648-98) Trial Division (A-832-99) Court of Appeal

In 1998, the Information Commissioner and 3430901 Canada and Telezone Inc. (Telezone) asked the Federal Court to review the Minister of Industry's refusal to disclose records requested by Telezone. The firm had asked for all records relating to the assessment criteria and analysis that gave rise to a final decision by the Minister of Industry to provide radio spectrum licenses to provide wireless communication services. Telezone, had applied, unsuccessfully, for such a licence.

In response to Telezone's access request, some records were

disclosed but others were withheld as being "advice or recommendations" or "deliberations" under the exemptions set out in paragraphs 21(1)(a) and (b) of the *Access to Information Act*. The Information Commissioner, after investigating the matter, concluded that the corporation had a right to know what were the rules of the game in the awarding of the licences and what were the guidelines and weighting factors used in the evaluation process.

The case before the Federal Court turned on the proper interpretation of the statutory exemptions relied on by the Minister. The Federal Court gave a broad interpretation to paragraphs 21(1)(a) and (b) of the Act. Madam Justice Sharlow, for the Court, concluded that it is not always possible to distinguish between "facts", "advice", and "recommendations". She therefore concluded that a discussion of policy options that concludes with a recommendation is a "recommendation" within the meaning of paragraph 21(1)(a). She gave an even broader interpretation to the term "advice" and concluded that, based on the source and function of the records at issue, the Minister could refuse to disclose them. She also concluded that some entire memoranda were an "account of deliberations" by one or more government officials.

With respect to the scope of section 48 of the Act, which places the burden of proof in access litigation on government institutions, Madam Justice Sharlow concluded that the Minister has a right to refuse to disclose particular information

when it is established that the information comes within a statutory exception. Based on evidence adduced by the other parties, she concluded that the discretionary aspect of the Minister's decision to refuse to disclose was exercised in good faith and on a rational basis. She therefore dismissed the applications for review.

The Information Commissioner and Telezone have decided to appeal the decision of the Court. In February, 2000, counsel for the Minister of Industry has informed counsel for the other parties that, in the course of preparing documentation for an action commenced by Telezone in the Ontario Superior Court, Industry Canada has discovered additional documents that may be relevant to the request made by Telezone pursuant to the *Access to Information Act*.

The outcome of this appeal will be reported in subsequent Annual Reports.

The Information Commissioner v. The Commissioner of the Royal Canadian Mounted Police (T-635-99) Trial Division (A-820-99) Court of Appeal

An application was made to the Federal Court by the Information Commissioner under section 42 of the Act, to review the decision of the Commissioner of the RCMP to withhold the list of past postings of four RCMP officers. This information included a list of the ranks attained, the places of posting, the dates of postings, the hiring date and the total years of service for each member. The RCMP had provided the requester with information as to the current

postings of these officers but withheld the information regarding their previous postings on the grounds that this was personal information under subsection 19(1) of the *Access to Information Act* and fell within the definition of "employment history" under section 3 of the *Privacy Act*.

The Information Commissioner took the position before the Federal Court that the requested information fell within an exception to the definition of personal information in that it was "information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual." Furthermore, he argued that the Commissioner of the RCMP failed to weigh the public interest in releasing the information against the invasion of privacy to these four officers, under paragraph 19(2)(c) of the *Access to Information Act*.

Mr. Justice Cullen agreed with the RCMP that the information was personal information but acknowledged that the RCMP failed to consider whether, nonetheless, it was in the public interest to disclose the information. He, accordingly, referred the matter back to the RCMP for this purpose. The RCMP indicated one month later that it would not release the information. The Information Commissioner appealed the decision of Mr. Justice Cullen on December 10, 1999 and the outcome of the appeal will be reported in next year's annual report.

The Information Commissioner of Canada v. The Minister of Industry Canada and Patrick McIntyre (T-394-99)
Trial Division (A-43-00) Court of Appeal

(See 1998-99 Annual Report p. 30-31 for more details)

In this case, the Information Commissioner applied to the Federal Court (Trial Division) under subsection 42(2) of the *Access to Information Act* for a review of the decision of Industry Canada to withhold the weighting percentages it used when it reviewed the proposals submitted by private companies for an award of orbital slots for direct broadcast satellite services. The Minister based his decision to withhold the information on paragraph 21(1)(a) of the Act (advice or recommendations developed by or for a government institution or a minister of the Crown). The requester, Mr. Patrick McIntyre was also added as a party to this application when he filed a notice of appearance with the Court.

The case was heard on December 14, 1999 in Calgary before Mr. Justice Gibson of the Trial Division. On January 14, 2000, Gibson J. delivered his judgment in favour of Patrick McIntyre and the Information Commissioner. In his reasons, he emphasized that the nature of the evaluation criteria and weightings which were prepared by officials in the Ministry changed from advice and recommendations when the Minister approved them. Once approved, they became his decisions rather than recommendations to him and no longer fell within paragraph 21(1)(a). Gibson, J. distinguished the recent judgment

of Sharlow J. in *Information Commissioner of Canada and Telezone Corp. v. Minister of Industry* (T-650-98, A-832-99 appeal filed on December 16, 1999) as the facts differed from this case. Although Sharlow J. also dealt with a failure to disclose percentage weightings by the Minister of Industry Canada, the recommendations or advice regarding the proposed weightings had not, according to Sharlow, J., become ministerial decisions.

The Minister of Industry has decided to appeal the decision to disclose the percentage weightings to the requester. The outcome of this appeal will be reported in subsequent Annual Reports.

III. Cases in Progress – The Commissioner as respondent in Trial Division

Rowat v. The Information Commissioner of Canada and the Deputy Information Commissioner of Canada (T-701-99) Trial Division

Mr. William Rowat is a Senior Advisor to the Privy Council Office and a former Deputy Minister of Fisheries and Oceans Canada. The requests which triggered the complaint were for information about Mr. Rowat's expense claims when he was Deputy Minister and the terms of an agreement under which Mr. Rowat was seconded from PCO to the government of Newfoundland and Labrador. The complaint alleged that the identity of the access requester had been improperly disclosed to Mr. Rowat.

During the course of the investigation conducted by the Commissioner into the alleged improper disclosure, Mr. Rowat, refused to answer questions put to him about how he discovered the identity of an access requester. It was Mr. Rowat's position that the Commissioner does not have the jurisdiction to investigate an allegation of breach of confidentiality of the identity of an access requester. The Deputy Information Commissioner ruled that paragraph 30(1)(f) gives the Commissioner the authority to investigate purported breaches of confidentiality during the processing of an access request and ordered the applicant to answer. Again, the witness refused and he was cited for contempt by the Deputy Commissioner.

As a result, the applicant sought judicial review of the Deputy Commissioner's order and citation. In the application, the applicant asserts that the Deputy Commissioner has exceeded his jurisdiction. The applicant also challenged the constitutionality of paragraph 36(1)(a) of the Act which gives the Commissioner the power to compel a witness to testify.

As at the end of fiscal year 1999/2000, this application for judicial review had not been heard.

[Ed.note: Decision rendered on June 09, 2000 dismissing the application with costs. A full report will be given in next year's annual report.]

Sheldon Blank & Gateway Industries Ltd. v. Canada (Minister of the Environment) (T-1111-98) Trial Division

In this case, the Information Commissioner determined that the requester's complaint regarding the Minister's refusal to disclose certain documents was not well-founded. The requester then applied on his own to the Federal Court under section 41 of the Act for a review of the Minister's decision, as was his right. Shortly before the case was scheduled for hearing, he wrote to the Information Commissioner asking for copies of all of the correspondence/communications/records sent to Environment Canada by the Information Commissioner regarding his complaint. The Information Commissioner advised him that subsection 35(1) and sections 62 and 63 of the Act, as interpreted by the courts, clearly establish that all specifics and details surrounding the Information Commissioner's investigation, namely, any representations, records of communication and internal memorandum arising in the course of the investigation, are to remain secret.

Subsequently, the requester applied to the Federal Court to compel the Information Commissioner and an investigator on staff to attend the trial and provide testimony and to produce all records related to the case. With the permission of the Court, the counsel for the Information Commissioner appeared in court to oppose the applicants' motion to compel testimony and the production of internal documents.

Mr. Justice Campbell agreed with the Commissioner that the competence and compellability of the Commissioner and his staff is subject to section 63 of the Act

which gives the Commissioner full discretion regarding disclosure. The Trial of the refusal of the Minister of the Environment to disclose the requested information thus proceeded on November 29, 1999 without the testimony of the Information Commissioner and the investigator. The requester then asked the Court to extend his time to file an appeal of Campbell J.'s order as he had missed the limitation period to challenge that order. On January 28, 2000, the Court dismissed the request for an extension of time as the Trial had already taken place and the requester didn't demonstrate that his case merited an extension of time to appeal.

Yeager v. Correctional Service of Canada, Commissioner of Corrections and Information Commissioner of Canada (T-549-98) Trial Division

The requester filed an application for review under section 41 of the decision of the Correctional Service of Canada to exempt requested records from disclosure, as well as an application under section 18 of the Federal Court Act for a declaration that the Information Commissioner contravened his own Act when he issued his report indicating that the requester's complaint against CSC was unfounded. The requester also brought a Charter challenge against the Information Commissioner for contravening his freedom of expression.

In his materials, the requester erroneously referred to the Commissioner's report as a 'decision'. The Information

Commissioner advised the requester that it was not proper in law to make him a party when he is an ombudsman with only the power to issue recommendations to a government institution and cannot make a binding decision regarding the release of records. Although the Commissioner provided the requester with authorities to support this position, the requester persisted with the application and the Commissioner had no choice but to ask the Court to dismiss the application against him.

Subsequently, the requester engaged new counsel who asked the Court to amend the application and give him the opportunity to file new evidence and make additional arguments. The Information Commissioner appeared in Court on October 20, 1999 to challenge this request. The Order of Mr. Justice O'Keefe is still pending at the end of the reporting year.

[Ed.note: On April 20, 2000, a decision was issued striking out the Information Commissioner as a respondent. A full account will be given in the next year's report.]

C. Court Cases not involving the Information Commissioner

Aliments Prince Foods Inc. v. Canada (Department of Agriculture and Agri-Food Canada) (T-1817-98) Trial Division

This was a motion by Aliments Prince Foods (the applicant and third party) to remove the respondent department as a party for lack of standing. The

department had decided to disclose the requested material which contained information relating to the third party Aliments Prince Foods. This prompted the third party to file an application for review of that decision under section 44 of the *Access to Information Act* and subsection 18.1 of the Federal Court Act.

The Court found that, as the department made a decision authorizing the disclosure of the information requested, and had to respond to a notice of application brought by the third party under the *Access to Information Act* to review that decision, the department has a right and duty to participate in the hearing. Furthermore, Court found that the proceeding should be dealt with under section 44 of the *Access to Information Act* and not under subsection 18.1 of the Federal Court Act. Subsection 18.5 provides that, where provision is expressly made by an Act of Parliament for an appeal to the Federal Court from a decision of a federal board, commission or other tribunal, that decision is not subject to review or to be restrained, prohibited, set aside or otherwise dealt with, except in accordance with that Act.

Chippewas of Nawash First Nation v. Canada (Minister of Indian and Northern Affairs) (A-721-96) Court of Appeal

At trial, this was a section 44 application by the third party Chippewas opposing the disclosure by Indian and Northern Affairs of their correspondence, band council resolutions and minutes of band council meetings. The Chippewas argued that the information

qualifies for exemption under paragraph 20(1)(b) of the Act as being confidential financial information.

The Court of Appeal dismissed the appeal on the grounds that mere references to land in the records are not sufficient to make those records financial in nature. The Court, however, declined to provide a definition of 'financial information'. Further, it was held that fiduciary obligations (i.e. the obligation not to disclose information relating to Indian land) does not arise as the government, under the *Access to Information Act*, is acting under a public law duty. The Court also rejected a section 15 Charter challenge to subsection 13(1) of the Act. The issue of costs was remitted to the Motions Judge for redetermination as he had neglected to receive submissions on that issue.

Culver v. Canada (Minister of Public Works and Government Services)
(T-1390-98) Trial Division

This section 41 application was dismissed as the respondent institution was found to be justified in refusing to disclose portions of contracts between Standard Aero and the respondent pursuant to paragraph 20(1)(c) of the Act as its disclosure "could reasonably be expected to prejudice the competitive position" of the third party. The information in dispute consisted of "hours of work to be put into various portions of the contract and the corresponding unit price, hourly rates and monthly rates to be charged in completing the contract."

The Court focused on the confidential affidavit of a director of the third party as proof, on a

balance of probabilities, of a reasonable expectation of probable harm. Although the bid abstracts were publicly accessible in the United States once the contract was awarded, the bids did not contain the same type of information.

Clearwater v. Canada (Minister of Canadian Heritage)
(T-1-99) Trial Division

This case involved a section 41 application for a review of the preparation fees charged by the department for access to certain documents. The Court did not find an evidentiary basis that would support a finding that the applicant was assessed for activities that fell outside subsection 11(2) of the Act. No costs were awarded as the issue of whether fee complaints can be accommodated under section 41, and the issue of whether to extend time to file the application, was not new.

Dekalb Canada Inc. v. Canada (Agriculture and Agri-Food)
(T-1998-97) Trial Division

Dekalb Canada (the third party) brought an application under section 44 for a review of the decision of Agriculture Canada to release information containing the test results of hybrid corn samples taken from Dekalb's premises. The requester is a party to a law suit launched against Dekalb by farmers who have used the corn and are claiming damages.

The third party/applicant claimed that the information requested fell under paragraph 20(1)(c) of the *Access to Information Act* as third party information the disclosure of which could reasonably be expected

to result in material financial loss to or prejudice the competitive position of the party affected. Dekalb argued that the information requested relates to testing of seed varieties which have been developed as a result of its continuing research and development and that disclosure would reveal trade secret information.

Furthermore, Dekalb Canada has argued that the information is scientific or technical, confidential in nature, has not been shared with the public and will prejudice Dekalb's position in the law suit if disclosed. The department invoked the exception to 20(1) contained in 20(2) to the effect that it could not refuse to disclose a document which contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person other than a government institution and for a fee.

The Court dismissed the application on the grounds that the document in issue fell within subsection 20(2) in that it contained the results of 'product or environmental testing', was carried out by or on behalf of the government and the testing was not done as a service to a person for a fee.

The Court also found that the document did not fall within 20(1) as it did not reveal trade secrets but only provided the end results of a government inspection. The mere fact that the requester is a party in an action against Dekalb and may use the information against it, does not make the document confidential. The Court observed

that the document was not supplied by Dekalb in confidence and with the expectation that it would never be revealed to the public. Rather, it was created by Agriculture Canada and is in the nature of judgments made by government inspectors on what they observed. Whether the test results are inaccurate is irrelevant to the application for judicial review.

Do-Ky v. Canada (Minister of Foreign Affairs and International Trade)
(A-200-97) Court of Appeal

In this case, Do-Ky appealed the decision of the Trial Division which denied its application for a review of the decision of the Minister of Foreign Affairs and International Trade to withhold four diplomatic notes exchanged between Canada and another state. The foreign state in question had objected to the release of the notes because the issues discussed were sensitive topics in that country. Thus, Foreign Affairs and International Trade took the position that the notes could not be disclosed pursuant to sections 13 and 15(1) of the *Access to Information Act*. In other words, they constituted diplomatic correspondence the release of which could reasonably be expected to be injurious to the conduct of international affairs because disclosure, in the absence of a consent by that country, would risk breaching diplomatic conventions.

The Information Commissioner agreed with the department's decision and the requester Do-Ky applied under section 41 for a review of the decision of Foreign Affairs. The Trial Judge found that, although three of the notes were sent from Canada to the foreign state and only one was

sent from the foreign state to Canada, they should all be exempt as the notes together formed a conversation between governments and one half of that conversation could easily be ascertained by reading the other half. On appeal, the Court agreed that all the notes should be withheld as the government department approached the foreign state with the request for a consent to disclose all four notes and the state responded on this basis. Furthermore, the content of the notes reveal a dialogue on a specific subject. The Court did, however, emphasize that under section 15, there is no presumption that disclosure will result in harm. Rather, the party seeking to withhold the documents bears the burden of proving this fact.

Merck Frosst Canada & Co. v. Canada (Minister of National Health)
(T-971-99) Trial Division

The Motions Judge dismissed an application to amend the application for review to include a challenge to another decision made by the Minister to release certain records. The application had been made because the applicant had failed to launch an application challenging this latter decision within the time limits specified in subsection 44(1) of the *Access to Information Act*. As the evidence did not reveal that the records in issue in the latter decision were the same records as those in issue in the application for review, or that the factual circumstances surrounding the two decisions were related, or that the latter decision was made as part of an ongoing process, pursuant to Rule 302, the motion was dismissed.

Peet v. Canada (Minister of Natural Resources) *(T-827-99) Trial Division*

The Motions Judge refused the applicant's motion for further information concerning documents requested which were denied disclosure by the Minister on the grounds of solicitor-client privilege. The requester asked for the following information in order to properly prepare his case: the name of the originator of the document, name of the recipient and those to whom it was copied; the date, subject matter and nature of the document, how the document was sent; other particulars needed to identify the document and the grounds for which the claim of privilege was made.

The Motions Judge was not disposed to follow the applicant's case law as it related to the requirement for particulars in affidavits of documents to give the plaintiff the ability to determine if the claim for privilege is reasonable. She also noted that the requirements relating to affidavits of documents should not be imported into Access and Privacy applications for review. Further, the jurisprudence on disclosure of documents to the applicant's counsel does not pertain to situations where the applicant is acting for himself and in cases of solicitor-client privilege.

Varma v. Canada (Privacy Commissioner) *(T-1587-98) Trial Division*

The Trial Judge dismissed an application by a requester who challenged a "decision" of the Privacy Commissioner and asked that an order be issued by the Chairman of Canada Post to release his personal files. The application was found to be devoid of merit and an abuse of process as it was based

primarily on accusatory and racist remarks against politicians and members of the bench. Cost were awarded against the applicant in the amount of \$5000.

D. Legislative Changes

I. New government institutions

During 1999, some government institutions were renamed, created or abolished. Therefore, new government institutions became subject to the *Access to Information Act* while others were struck out. The following modifications were made to Schedule I of the *Access to Information Act*:

SCHEDULE I

"Parks Canada Agency" is added in alphabetical order under the heading "Other Government Institutions" (1998, c. 31, section 46, in force 98.12.21).

"Military Police Complaints Commission" is added under the heading "Other Government Institutions" (1998, c. 35, section 106 in force 99.12.01).

"Department of National Revenue" is struck out under the heading "Departments and Ministries of State" and "Canada Customs and Revenue Agency" is added in alphabetical order under the heading "Other Government Institutions" (1999, c. 17, sections 106 and 107, in force 99.11.01).

When proclaimed in force, "Canadian Forces Grievance Board" will be added under the heading "Other Government Institutions" (1998, c. 35, section 106, to come into force by order of the Governor in Council).

II. Statutory prohibitions against disclosure of government records

During 1999, the government made some modifications to Schedule II of the *Access to Information Act*. This Schedule contains statutory prohibitions against disclosure of government records. The following modifications were made:

SCHEDULE II

The reference in Schedule II of the Act to "subsection 39(8)" opposite the reference to "Railway Safety Act" was replaced with a reference to "subsection 39.2(1)" which provides that no person shall disclose the substance of security documents as described under the Act (1999, c. 9, section 38, in force 99.06.01).

Once the DNA Identification Act is proclaimed in force, Schedule II will be amended by adding, in alphabetical order, a reference to "DNA Identification Act" – "Loi sur l'identification par les empreintes génétiques" and a corresponding reference to "subsection 6(7)". This subsection provides that no person shall, except in accordance with the section, communicate a DNA profile that is contained in the DNA data bank or other described information (1998, c. 37, section 14, to come into force by order of the Governor in Council).

On a date to be fixed by proclamation, Schedule II will be amended by striking out the reference to "Canadian Environmental Protection Act" – "Loi canadienne sur la protection de l'environnement" and the corresponding reference to "sections 20 and 21" (1999, c. 33, section 344, to come into force by order of the Governor in Council).

[Ed.note: Section 85 of the Proceeds of Crime (Money Laundering Act) was added to Schedule II in June of 2000. Details will be reported in next year's annual report.]

III. Private Members' bills to reform the *Access to Information Act*

BILL C-206

Bill C-206 was introduced by J. Bryden (Liberal, Wentworth-Burlington), on October 14, 1999. The Bill contained a comprehensive and far-reaching set of proposals for reform of the *Access to Information Act*. The bill had first been introduced by Mr. Bryden on October 23, 1997 as Bill C-264. Bill C-206 came before the Commons for debate because it had originally received more than 100 signatures of MPs who supported Bill C-264. Mr. Bryden, however, made changes to his original bill without informing the MPs who had supported his bill before he introduced it as Bill C-206. Under the House of Commons' rules, a private member's bill is eligible to be placed in the order of precedence after the sponsor files with the clerk a list of 100 signatures of MPs who support the bill.

In the Commons, on February 7, 2000, a question of privilege was raised by a Reform MP concerning the changes made to the Bill after Mr. Bryden had obtained the 100 supporting signatures. The discussion on the bill deferred and

the issue was referred to the House Affairs Committee. In the end, Commons Speaker came back on February 8 to give his ruling. He ordered that Bill C-206 be dropped to the bottom of the Order of Precedence of the bills and motions in the list. He referred the matter to the House Procedure Committee for examination. At the end of the reporting year, the committee had not disposed of the matter.

[Ed.note: The House Procedure Committee concluded that Mr. Bryden must obtain 100 new supporting signatures, which he did. The Bill proceeded to debate at second reading where it was defeated on June 6, 2000.]

BILL C-329

Bill C-329 was introduced by R. Bailey (Reform, Souris-Moose), on November 22, 1999. It proposes to subject the Canadian Wheat Board to the provisions of the *Access to Information Act*. This bill has not progressed since its first reading.

BILL C-418

Bill C-418 was introduced by R. Borotsik (PC Brandon-Souris), on February 7, 2000. It proposes to modify the definition of "government institution" to make all Crown corporations and the Canadian Wheat Board subject to the *Access to Information Act*.

CASE SUMMARIES

(01-00) Refugees and Access to Legal Services

Background

Persons who arrive in Canada without proper documentation, such as refugee claimants, may be held in detention until their cases are heard and determined by the Immigration and Refugee Board (IRB). Detention is the responsibility of the department of Citizenship and Immigration (CIC).

While in detention, and before their hearing, detainees are informed by CIC of their right to counsel, provided with lawyer lists and afforded access to telephones. If detainees do not engage counsel, they are offered another opportunity to do so at the time of the hearing. Sometimes, hearings must be postponed if the detainee is not represented on the date of the hearing.

This background helps to explain why the Legal Services Corporation of British Columbia (B.C. Legal Aid) decided that it could improve legal service to detainees and help reduce hearing delays, by being proactive in going to detention centres to offer legal services to detainees, without waiting to be called.

In order to enable B.C. Legal Aid to offer this service, it asked Citizenship and Immigration to give it, on a daily basis, a list containing, for each detainee: name, location of detention, and primary language spoken.

When the department refused, a representative of B.C. Legal Aid made

an access to information request for such a list. The formal access request was also refused. CIC told the requester that:

1) It did not have such a list; 2) even if it did, it could not invade the privacy of the detainees by disclosing their names; 3) it was not obliged to answer requests which sought information "on a daily basis" into the future; and 4) the IRB already posts a list of individuals scheduled for a hearing.

B.C. Legal Aid complained to the Information Commissioner.

Legal Issues

The legal issues raised by this complaint were:

- i) Was CIC obliged to create a record containing the information sought by the requester?
- ii) Was CIC obliged to refuse access, by virtue of subsection 19(1) of the *Access to Information Act* in order to protect the privacy of detainees?
- iii) Was CIC obliged to provide the requested information on a "daily basis", as requested?

Obligation to Create a Record

The investigation determined that CIC routinely produces a record which contains for each detainee: the name of the applicant, primary language spoken and date of IRB hearing. The Commissioner and the department agreed that this record was relevant to the request. Thus, it was not necessary to consider whether there was an obligation on CIC to produce a record solely in order to answer an access request.

Subsection 19(1)

There was no disagreement over the fact that the requested information concerned identifiable individuals, hence, was "personal information" for the purposes of subsection 19(1) of the Act. The more difficult issue was whether any of the provisions of subsection 19(2) enabled CIC to disclose the requested personal information. Subsection 19(2) authorizes the disclosure of personal information if:

- 1) the person(s) to whom it relates consents to disclosure,
- 2) the information is otherwise publicly available, and
- 3) the disclosure is in accordance with section 8 of the *Privacy Act*.

Paragraph 19(2)(a)

In this case the requester argued that the detainees likely would consent, if asked. CIC on the other hand argued that it was up to detainees to decide whether or not to call counsel and, if so, which counsel. Since not all detainees do call on B.C. Legal Aid, CIC believed that it could not be assumed that detainees would consent.

On this issue, the Information Commissioner concluded that consent could not be assumed. Moreover, he did not feel that it would be reasonable to require CIC to canvass all detainees, on an ongoing basis, to secure a fully informed consent for disclosure. Consequently, the Commissioner concluded that paragraph 19(2)(a) did not authorize disclosure.

Paragraph 19(2)(b)

The investigation satisfied the Commissioner, as a matter of fact, that the requested information (name of detainee, location of detention and primary spoken language) was not publicly available in any other form or place. It was determined that the IRB posted some of this information publicly on the day of the related hearing but not sufficiently in advance of the hearing to suit the requester.

Consequently, the Information Commissioner concluded that paragraph 19(2)(b) did not authorize disclosure.

Paragraph 19(2)(c)

Finally, the Information Commissioner turned his mind to paragraph 8(2)(m) of the *Privacy Act* which authorizes disclosure of personal information if:

- 1) the public interest in disclosure clearly outweighs any invasion of privacy which could result, or
- 2) disclosure would clearly benefit the individual to whom the information relates.

To the requester, the benefits to the detainees and to the public interest, seemed obvious. Early legal representation for detainees could avoid the need for unnecessary adjournments before the IRB and would ensure more effective representation for the detainees. On the other hand, the requester felt that disclosure of the limited information it needed would cause slight invasion of the detainee's privacy.

CIC urged the Commissioner to take into account the broad and ongoing disclosure which was being sought. CIC argued that if it gave the lists to the B.C. legal aid it would also, for reasons of fairness, have to give it to all other lawyers. In CIC's view, 8(2)(m) of the *Privacy Act* is intended to be used sparingly and in specific instances; use of this section to require a large scale, ongoing disclosure of personal information would be, in CIC's view, out of step with the requirement that the right to privacy and the right of access be kept in balance.

CIC also argued that the detainees were already offered every reasonable opportunity to retain counsel and that there were very few delays in the IRB process due to the appearance of detainees without counsel. CIC offered to work with B.C. Legal Aid to find other ways to deal with its concerns.

The Information Commissioner recognized that the use of the *Access to Information Act* in this case was a blunt, and not particularly appropriate, tool for accomplishing B.C. Legal Aid's purpose of offering more timely legal services to detainees. He agreed with CIC that the individual and public interest in effective legal services for detainees was already being served reasonably. Even a slight invasion of the privacy of detainees was not warranted.

Lessons learned

When access requests require an ongoing information disclosure, it is a signal that the requester has an ongoing relation with the institution receiving the request and a special need for information or service. Use of the *Access to Information Act* may be a "last resort" plea by the requester to be heard by the institution. These types of requests signal the need for the parties to work together—outside the Act—to find solutions.

While institutions are not required by law to provide responses to access requests which seek regular disclosure into the future—they should seek to satisfy a requester's ongoing information needs as a matter of good customer service.

Of course, if a requester seeks access to the personal information of others, great care must be taken to keep the rights of access and privacy in balance. An ongoing disclosure of personal information is harder to justify under paragraph 8(2)(m) of the *Privacy Act*, which addresses specific instances on a case-by-case basis.

(02-00)
**Selling Government's
Expertise**

Background

The RCMP uses commercially available publications to assist it in identifying the firearms that its members encounter in police work. In recent years, the RCMP has automated this vast library of "open source" information and stored it on a CD-ROM called the Firearms Reference Table. The RCMP began work on this CD-ROM in 1994. At a cost of almost \$3 million, 24 analysts collected and photographed various firearms and consolidated all the hard copy information available about these firearms. The CD-ROM may be the most comprehensive collection of identifying data in the world. The RCMP updates it regularly.

Police bodies around the world have shown considerable interest in the CD-ROM, and organizations have been negotiating with the RCMP about possible joint research and production of the CD-ROM. The RCMP has disclosed the CD-ROM, free of charge, to a defined group of individuals known as "verifiers." These "verifiers" are volunteers interested in, or associated with, gun clubs, shooting clubs and gun dealers. They help gun owners complete the firearm registration paperwork. To encourage individuals to volunteer as verifiers, they are given training and a copy of the CD-ROM and updates. These volunteers must in turn sign a letter of agreement on the care, use and safe keeping of the CD-ROM and upgrades.

The complainant, who did not want to become a volunteer verifier (which would have resulted in him receiving the CD-ROM for free) sought access to the CD-ROM. The RCMP denied access on two grounds:

- that the CD-ROM contained financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and that has substantial value or is reasonably likely to have substantial value; and
- disclosure of the information in the record could reasonably be expected to prejudice the competitive position of a government institution.

Legal Issues

This case raises the issue of whether or not section 18 may be relied upon to withhold records which have already been given to some members of the public.

Paragraph 18(a) and (b)

Subsection 18(a) of the Act allows the head of a government institution to refuse to disclose a record that contains financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and that has substantial value or is reasonably likely to have substantial value. Paragraph 18(b) allows the head of a government institution to refuse to disclose a record if disclosure of the information in the record could reasonably be expected to prejudice the competitive position of a government institution.

The Information Commissioner agreed with the RCMP. The RCMP provided evidence that the record had commercial value since there was continuing interest in the CD-ROM by national and international organizations as well as willingness to provide extensive funding for additional research and product development. In addition, the evidence satisfied the Information Commissioner that unrestricted disclosure of this record could reasonably be expected to prejudice the competitive position of the RCMP in view of its ongoing negotiations for partnership agreements in the research and production of future versions of the CD-ROM. The Commissioner concluded that the complaint was unfounded.

Lessons Learned

As government organizations increasingly embark on commercial ventures to generate revenues, refusals of access based on commercial value or threat to competitive position will undoubtedly increase. Mere assertions of commercial value or threat to competitive position will not be sufficient to justify the exemption. Clear, direct evidence is required.

Furthermore, the right of access contained in the Act was not intended to be used to circumvent the obligation to pay a reasonable price for what has, or could become, a commercial product with economic benefits for taxpayers as a whole.

(03-00) The Priority of Police Investigations

Background

Allegations of illegal practices by a Nova Scotia cabinet minister piqued the curiosity of a Halifax journalist. The journalist requested access to all records held by Atlantic Canada Opportunities Agency (ACOA) pertaining to any application for assistance filed by a specified company. A second request was made for all records held by ACOA pertaining to an environmental remediation and training program announced in July 1997. Within days of these requests, ACOA was informed that the RCMP was investigating both matters and the RCMP seized the relevant records.

ACOA maintained that once the records were seized by the RCMP, they were all considered to be part of an ongoing investigation and only the investigating officers could determine the relevance of the records. It refused to disclose the requested records (it had retained copies) relying on paragraph 16(1)(c) of the Act (injury to lawful investigations) to justify the refusal. The requestor complained to the Information Commissioner.

Legal Issues

Does paragraph 16(1)(c) automatically apply to any record which the RCMP has seized from a government institution during the course of an investigation? That was the issue raised in this case.

ACOA argued that it was not its responsibility to determine the relevance of the records or whether records should not be exempted under paragraph 16(1)(c). It believed that the seizure had ended the matter.

The lead RCMP investigator explained that the RCMP would need to review the information on the files taken from ACOA to determine the relevance of the information and whether further inquiries were necessary. The investigator argued that the release of any information to the complainant at that point could hinder the investigation. He estimated that it would take about three months to review all the documents for relevancy. At that time, documents that were not relevant to the investigation would be sent back to ACOA. If ACOA then received another request for those records, it could respond to the request without concern for the paragraph 16(1)(c) exemption.

The Commissioner was of the view that an approach should be taken which would balance the right of an investigative body—the RCMP—to carry out its investigation as it saw fit, and the rights of requesters to information.

The Information Commissioner considered the response of the RCMP—that it would take about three months to review all the documents—acceptable. This arrangement allowed for a discrete period of secrecy after which the records could be processed by ACOA for release under the Act.

The Information Commissioner concluded that ACOA had provided evidence that an investigation was ongoing and that its response to the complainant satisfied the criteria of paragraph 16(1)(c). The Information Commissioner concluded that paragraph 16(1)(c) would justify secrecy until the RCMP completed its review of the records to determine which records were pertinent to its investigation.

Lessons Learned

This case demonstrates the balance that departments must achieve when attempting to cooperate with investigative bodies. In determining whether an exemption under paragraph 16(1)(c) is justified, the head of an institution must show that the investigation is ongoing and must also have reasonable grounds to believe that the release of the exempted information could lead to harm.

As well, once the records are in the hands of the investigating agency, the investigating agency, not the department that received the request, determines the schedule for returning records to the government institution. If that schedule appears reasonable, the Information Commissioner will not interfere by attempting to have records processed by the originating institution at an earlier time. However, once the investigative body has concluded its review of the records and so notified the institution from which they were seized, the records should be processed for disclosure.

(04-00)
**101 Damnations—
Delays at National
Defence**

Background

One request to Department of National Defence—among 101—highlights the troubling problem of delay which the department continued to experience in the past year. The request in this case was for all documents, records, emails, etc. concerning the sale of Canadian Forces Kiowa helicopters to a private businessman or company. The requester also sought all records, discussing the seizure of those same helicopters by police.

National Defence received the request on March 31, 1998. On October 4, 1998—more than six months later—the complainant wrote to the Information Commissioner complaining that the documents requested had not been disclosed.

The complainant was not alone. His case was only one among 101. On October 6, the Information Commissioner wrote to the Deputy Minister of National Defence to seek his help in resolving the 101 complaints of delay against the department in providing access to information.

In the complainant's case, the Information Commissioner found that there was no lawful justification for the delay in responding. As a result, National Defence committed to providing a response to the complainant by January 15, 1999. The Information Commissioner wrote the complainant explaining that he considered the complaint resolved, but that he would

continue to monitor the processing of this request to ensure that National Defence honoured its commitment.

National Defence still managed to avoid pulling up its socks in scores of other cases. On November 12, 1998, the Information Commissioner wrote to the Deputy Minister of National Defence that just over half of the 101 complaints had been resolved. Some 47 complaints remained outstanding where National Defence proposed responding only in December 1998, or January, February, March or April of 1999. The Information Commissioner argued that, since the department had failed to respect earlier response deadlines in these cases, it should not now claim the luxury of additional lengthy delays. He recommended that all outstanding cases be answered by the department on or before the dates to which the department had committed or by January 15, 1999, whichever date came first.

The Deputy Minister of National Defence picked up the gauntlet and accepted the recommendation that the cases be answered by January 15, 1999. Still, he argued, some cases would likely yield significant volumes of records, including one with more than 6000 pages.

The story did not end there. On January 14, 1999, the Deputy Minister wrote to the Information Commissioner to report that, despite his department's efforts, only 15 of the outstanding files had been released. As of January 15, 1999, 23 of the 101 cases remained outstanding.

On February 10, 1999, the Information Commissioner informed the Deputy Minister that he had decided to initiate investigations in respect of the access requests that remained outstanding.

He did this because the department had failed to respect its commitments, effectively depriving complainants of the right to seek Federal Court review of the deemed refusal to give access.

The Information Commissioner issued subpoenas to the Deputy Minister and to the executive assistant to the Minister of National Defence. The subsequent investigation by the Commissioner revealed that the Minister's office had been notified in advance of the release of "newsworthy" items identified during the processing of access requests. The Information Commissioner found that much of the delay in responding to access requests was due to the time taken to "triage" such records for the Minister's office and prepare briefings and media lines for the Minister.

On March 2, 1999, the Information Commissioner summarized his concerns in a letter to the Minister:

- National Defence failed to respect statutory response deadlines in all cases; the responses in five cases were over 200 days late (410 days late in one of those five);
- the promise made by the Deputy Minister to redress the delays by January 15, 1999, was not met;
- the Deputy Minister tolerated increasingly lengthy delays in these cases so that the files could be "examined to determine whether they contain issues which must be brought to the attention of my Minister;"
- the volume of records did not in fact justify the delays;
- the executive assistant to the Minister had instructed departmental officials that no responses to access requests

were to be issued until the Minister's office had reviewed proposed responses and related communications and Question Period materials; this instruction was given "without benefit of an adequate understanding of the rights Parliament gave to citizens in the *Access to Information Act*."

Legal Issues

Is it justifiable to delay responses to access requests beyond statutory deadlines in order to ensure that Ministers have advance notice of the impending disclosure of sensitive information?

The Information Commissioner concluded that the executive assistant should not have instructed departmental officials to further delay already late responses simply to serve the convenience of the Minister's office. Furthermore, the Deputy Minister should not have tolerated or accepted the instruction when doing so resulted in unlawful behaviour.

The Information Commissioner stated his intention to recommend that the Minister immediately issue a written direction to his staff and departmental officials to the following effect:

"It is expected that those holding the delegated authority to answer access requests will exercise the authority in compliance with statutory deadlines. Reasonable efforts to ensure that the Minister's communications needs are served prior to the issuance of responses are appropriate. However, late responses to access requests shall not be further delayed in order to serve the Minister's communications needs. Furthermore, late responses shall not be further

delayed in the senior approval process within the department."

On March 11, 1999, the Minister promised to issue a directive within one week to senior officers and officials to "sensitize" them to the requirements of the *Access to Information Act* and to stress that compliance with the Act must be a priority. The Minister also assured the Information Commissioner that he and his staff would never lose sight of the importance of complying with the Act. A directive was issued on April 6.

Thus, after a tortuous process of many months, significant volume of correspondence, meetings and investigations, the Information Commissioner recorded the delay portions of the various complaints as resolved.

The Commissioner concluded that, unless a valid extension of time has been claimed under section 9, section 7 of the Act requires the head of a government institution to respond within 30 days after an access request is received. The Act creates no right for a minister or department to delay responses for political considerations, including the need to serve the communications needs of the minister.

Lessons Learned

The legal rights of requesters to timely responses must take precedence over the convenience of a department's approval and communications activities. Allowing a minister or department to delay responses simply to "vett" sensitive releases is completely antithetical to the intent of access to information legislation. If any such review is to take place, it must be done within the statutory response deadlines.

(05-00) Political Interference or Incompetence?

Background

On February 5, 1999, Jim Hart, MP, wrote to the Information Commissioner expressing his concern over the work at National Defence of Mr. Aldege Bellefeuille, a Special Assistant to the Assistant Deputy Minister (Financial and Corporate Services (FinCS)). Mr. Hart was concerned that Mr. Bellefeuille had been designated to review access to information files request by the media. Mr. Hart thought this process highly irregular, as well as being a source of delay in responding to access requests. Furthermore, he questioned the motives behind the work. Mr. Hart believed this work to be a misuse of departmental resources, and he questioned the integrity of the Access to Information and Privacy (ATIP) office at National Defence. Mr. Hart was also concerned about the possible improper disclosure of the names of requesters to the Minister.

Delay

The Information Commissioner concluded that there was no doubt that the special assistant's role in dealing with access requests represented a bottleneck in the access process. This created serious delays in responses to access requests when responses were otherwise ready to be issued.

The special assistant's main role was to review records before their release by National Defence in response to access requests and to determine whether the records contained "sensitive" matters which should be brought to the attention of the Minister before their release.

Some 95 percent of all requests were directed by the Access to Information and Privacy Coordinator to the special assistant for his review. This review took from several days to several months, depending on the workload of the special assistant and the volume and complexity of the records involved.

The special assistant worked alone in reviewing an average of about 100 files a month. He soon became swamped with this workload. Other significant delays occurred in Public Affairs (DGPA) when the special assistant identified the need for media response lines. Additional delays of a week to several months occurred in the Minister's office while the Minister's staff reviewed the documents provided by the ATIP office, the special assistant and Public Affairs, and briefed the Minister, if necessary, about the impending release of information.

On May 5, 1999, the department made written representations on Mr. Hart's complaint and indicated that the department had engaged Consulting and Audit Canada to review its current access process. The focus of this work was to find an efficient way to ensure that the Minister was made aware of sensitive documents being released while at the same time respecting the requirements of the *Access to Information Act*.

The special assistant left the department on May 15, 1999, and the Assistant Deputy Minister (FinCS) set up a new, more streamlined process to review records for the Minister's office. This process has apparently resulted in a dramatic drop in the number of files directed to the Minister's office and a major reduction in the time taken by ATIP,

Public Affairs and ministerial staff to meet the Minister's communication needs.

The Information Commissioner assured Mr. Hart that this office would continue to monitor this important issue with National Defence officials to ensure that the Minister's communication needs were not given priority over the legal right of access of requesters to receive timely responses.

The Information Commissioner also noted that the Minister had issued a direction on April 6, 1999, to the Deputy Minister and the Chief of the Defence Staff in response to other delay complaints and the Information Commissioner's office, reminding those dealing with access requests about their obligations to respond within the time limits set out in the Act.

Political Interference

Mr. Hart suggested that the liaison role of the special assistant with the Minister's office may have resulted in political interference in the access process at National Defence. The Information Commissioner interpreted "political interference" in this context to mean any direct or indirect influence by the Minister or his staff that was designed to improperly impede or influence the decisions of persons delegated to process requests under the Act.

Mr. Hart had identified two types of possible political interference. The first concerned possible deliberate efforts by the special assistant or the Minister's office to delay responses to access requests—specifically, requests by the media. The second concerned possible influence by the Minister or his staff on

decisions to release or withhold documents requested under the Act.

The Information Commissioner confirmed that, early in 1999, the Minister's executive assistant had issued instructions to departmental officials not to answer access requests—no matter how late the responses to those requests might be as a result—until the Minister's communications needs had been met. The Information Commissioner was satisfied that the executive assistant acted alone, not on instructions from the Minister. The Information Commissioner concluded that this instruction constituted improper interference with the lawful processing of access requests at National Defence. He brought his concerns to the attention of the Minister and recommended that the Minister immediately reverse the instructions. As a result, the Minister issued the direction of April 6, 1999, referred to above.

The Information Commissioner's investigation found no direct or indirect interference by the Minister, ministerial office staff or the special assistant in decisions by delegated officials to release or withhold records under the Act. Exemptions applied by the officials delegated to perform the function were not interfered with by those involved in the "sensitivity" reviews for the Minister. Only on rare occasions was the Minister's office staff requested to review the records to be released under the Act. When this did happen, it was not done to second guess the substance of release proposals.

Disclosure of Identities of Access Requesters

Mr. Hart alleged that there may have been improper disclosure of access requesters' identities to the special assistant and by the special assistant to the Minister's office. The Information Commissioner concluded that the special assistant did have access to the names and identities of all requesters and that, on occasion, he also informed members of the Minister's office of the identities of requesters. This occurred particularly when requests came from the media or Members of Parliament.

After the special assistant left his position, the ATIP office began to provide copies of draft response letters to the Minister's office, along with media response lines and a covering memo. This was done each time ATIP and Public Affairs (DGPA) designated a file as being sensitive and subject to review by the Minister's office. The draft response letters included the requesters' names and addresses.

The Information Commissioner then persuaded National Defence officials not to provide names of requesters routinely to the Minister's office. Nor would they provide names to anyone outside the ATIP office (including the Deputy Minister, the Assistant Deputy Minister and DGPA). However, National Defence did not rule out the possibility that requesters' names would be provided to the Minister's office if the Minister asked, since the Minister is legally the "head of the institution" under the *Access to Information Act*.

Legal Issues

Identities of Requesters

The *Access to Information Act* is silent about the use and disclosure of identities of access requesters within a department. However, the *Privacy Act* prohibits departments from using or disclosing personal information except for the purpose for which the information was collected. On that basis, the Information Commissioner concluded that disclosure of requesters' names should be limited to those who need to know this information to respond to access requests. Use of a requester's identity to prepare the Minister for questions about an impending release of information is not a consistent use of this information as defined by paragraph 8(2)(a) of the *Privacy Act*.

Instructions to Delay Responses

The Minister's executive assistant had issued instructions to departmental officials not to answer access requests—no matter how late the responses to those responses might be—until the Minister's communications needs had been met. This instruction constituted improper interference with the lawful processing of access requests at National Defence.

Lessons Learned

The ill-considered actions described above to control the flow of information out of National Defence are not unique to that department. Elsewhere in government, the perceived needs of Ministers (to have advance warning of access disclosures) are given precedence over the legal rights of requesters to received timely responses. Too often the "boss" is shown greater deference than the law.

One way to counter this tendency is for Ministers to explicitly instruct their staff not to delay access responses simply to serve the communication needs of Ministers. The other is to carefully restrict the dissemination of identities of access requesters. Ordinarily, it is not necessary for Ministers to be made aware of requester identities.

(06-00) Staying Away from the Shredders at National Defence

Background

The Information Commissioner has twice reported on the altering and destruction of documents at National Defence during the Somalia Inquiry (see our 1995-96 and 1996-97 annual reports). A more recent allegation suggested—at least until our investigation concluded otherwise — that the department had learned nothing from the public revelation of its earlier misdeeds.

The complainant, a member of the Canadian Forces, alleged that a senior Canadian Forces officer had altered and/or destroyed (or ordered someone else to alter or destroy) official National Defence and/or Canadian Forces media response lines in 1998. Media response lines (MRLs) are documents prepared for National Defence to enable it to respond to requests about information on various issues—for example, helicopter contracts or personnel issues in the Canadian Forces. The complainant alleged that the media response lines were destroyed even though the senior officer knew they should have been supplied in response to an access request.

The complainant alleged further that certain individuals may have decided not to provide a media response line which was relevant to an access request.

Because of the seriousness of these allegations, the Information Commissioner instructed his investigators to conduct sworn interviews. The investigation was wide-ranging. In addition to a detailed review of the files relating to some 12 access to information requests for media response lines, the Information Commissioner's staff interviewed a dozen witnesses. Investigators reviewed the operation of the Media Liaison Office at National Defence and compared several releases of information in response to access requests with the master file of media response lines maintained at National Defence Headquarters to see if documents relevant to a request were being withheld.

The Information Commissioner found no evidence that anyone altered or destroyed media response lines which were relevant to an access request, or that they ordered anyone else to do so. Actions that appeared suspect to the complainant, viewed from his position of only partial knowledge of the circumstances surrounding the actions, proved on further investigation not to be improper at all.

The Information Commissioner also concluded that there was no deliberate attempt to withhold media response lines from requesters. In one case reviewed by our investigators, a media response line was not released even though it was relevant to a request. This was due entirely to an oversight, not bad faith. In fact, the same media

response line had been provided to three other requesters.

Legal Issues

Subsection 67.1

At the time of the alleged destruction, alteration or withholding of media response lines, the Act contained no penalty for such conduct. However, on March 25, 1999, amendments to the Act came into force making it an offence, among other things, to destroy, mutilate, alter or conceal a record. Subsection 67.1 reads as follows:

- 67.1(1) No person shall, with intent to deny a right of access under this Act:
- (a) destroy, mutilate or alter a record;
 - (b) falsify a record or make a false record;
 - (c) conceal a record; or
 - (d) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (a) to (c).
- (2) Every person who contravenes the subsection (1) is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not including \$10,000, or to both; or
 - (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding \$5,000, or to both.

Definition of "record" – section 3

Draft media response lines that were still going through the approval process at the department were not provided to at least one requester. Some officials in the department argued that draft media response lines were not "records" that should be identified and processed under the *Access to Information Act*. However, the Information Commissioner concluded that all media response lines—draft or approved—in existence when an access request is received should be identified and processed under the Act.

Lessons Learned

This case demonstrates how misunderstandings arising from a complainant's incomplete knowledge can snowball into allegations of serious misconduct. In this case, the complainant saw certain activities relating to documents subject to an access request that, cast in a certain light and without further explanation, could appear improper. However, a further thorough investigation by this office showed that these activities were not at all improper.

Although the Information Commissioner found no misconduct under the Act, this case nonetheless serves to introduce the new offence provisions in section 67.1. Government employees who attempt to circumvent the right of Canadians to access to information held by government now face the prospect of a criminal conviction, not merely the disapproving glare of the Information Commissioner.

This case also contained an important lesson about draft documents. The Information Commissioner concluded that all media response lines—draft or approved—in existence when an access request is received should be identified and processed under the Act. This finding has significant implications for other departments. A request for records should be interpreted to mean a request for both draft and final versions of records, unless the request specifies otherwise.

(07-00)

Who Blew the Whistle?

Background

The access requester represented a company that packaged and distributed a food product. The Canadian Food Inspection Agency had, in response to a complaint, investigated the company during the year before the requester made his request.

The company believed that a competitor had initiated the complaint. It sought all information held by the department pertaining to the complaint and subsequent activities and proceedings against the company, including the name and address of the party who made the complaint, a copy of the complaint, all files and materials relating to the complaint and the subsequent investigations, and all memoranda and correspondence between the various investigating agencies. At the time of his request, the investigation in the case had been completed and charges laid.

Agriculture and Agri-Food Canada decided that the documents requested were exempt from disclosure because disclosure could reasonably be expected to be injurious to law enforcement. It felt that disclosure could deter others from coming forward in the future with complaints against companies. The department also maintained that some of the information was personal information and therefore not to be released under the Act.

Legal Issues

The principal legal issue concerned the scope of paragraph 16(1)(c): Could it apply to a completed enforcement action and could it be used to protect the identities of complainants?

In *Rubin v. Canada (Minister of Transport)*, the Federal Court of Appeal held that the words "lawful investigations" in that paragraph referred to specific investigations and not to the general investigative process. Thus, any injury to "lawful investigations" that might reasonably be expected to occur by the disclosure of information has to be injury to a specific investigation that is already underway or is about to be undertaken, not to possible future investigations.

In this case, the department relied on a different element of the paragraph 16(1)(c) exemption—"injury to the enforcement of any law of Canada." Would the reasoning be the same as in the Rubin case, which dealt with injury to "lawful investigations?" That is, is the exemption applicable only to specific, ongoing enforcement actions? If so, after a specific enforcement action is concluded and charges are laid, or the decision is made not to lay charges and the file is closed, the exemption cannot be used to refuse to release information. On the other hand, if the exemption applies to any enforcement action, including future actions, the department would be permitted to rely on the exemption even after an enforcement action was completed.

Much hinges on the purpose of the Act set out in section 2. Subsection 2(1) states that exceptions to the right of access should be limited and specific.

The Federal Court has consistently interpreted such exemptions narrowly. Accordingly, the Information Commissioner concluded that the department could no longer rely on the paragraph 16(1)(c) exemption to refuse disclosure to the complainant once the enforcement action was concluded.

The department accepted the Commissioner's recommendation and disclosed the record.

Subsection 19(1)

The Information Commissioner concluded that the department had appropriately applied the mandatory exemption under subsection 19(1) relating to personal information. Subsection 19(1) requires the head of an institution to refuse disclose any record that contains personal information as defined by section 3 of the *Privacy Act*. The information that was withheld was personal information of one of the department's investigators, and the names, addresses and telephone numbers of individuals, not associated with a company, who made complaints about the requester's products.

Lessons Learned

If disclosure of information relating to an ongoing enforcement action could reasonably be expected to be injurious to that enforcement action, it is appropriate to apply the paragraph 16(1)(c) exemption. However, once the enforcement action is concluded, the exemption no longer applies.

(08-00) Legally Sound but Unhelpful

Background

In the spring of 1999, allegations were made in the media and in the House of Commons that the Minister of Finance, the Hon. Paul Martin, might have been in a position of conflict of interest when he participated in Cabinet deliberations concerning compensation to victims of tainted blood. The alleged conflict related to Mr. Martin's former directorship on the Board of Canada Development Corporation—a parent company of Connaught Laboratories.

As a result, access requests were made to the Department of Finance for the minutes of meetings of the directors of the Canada Development Corporation from 1972 to 1990. The requester was informed that, after a thorough search, no relevant records were found. He wrote to the Information Commissioner claiming that a Department of Finance representative had sat on the Canada Development Corporation board during those years and that directors of the board received copies of the minutes of all board meetings. The complainant argued that these minutes were the property of the Department of Finance and should have been filed at the department in accordance with document retention procedures.

The investigation confirmed that the Department of Finance was represented on the Canada Development Corporation board from 1972 to 1981 by deputy

ministers. It also concluded that several thorough searches for relevant records were conducted both within and outside the department. These were conducted by experienced employees familiar with the subject-matter of the request. Still, no relevant records were found in the department's record holdings. However, some records relevant to the request were discovered at the National Archives. No mention was made about the National Archives records in the response to the requester. He was only told that no records existed at Finance.

Legal Issues

This case raised two matters: First, how intensive must searches be in response to access requests; second, are institutions under an obligation to point requesters to other institutions where the records being sought may be held.

Treasury Board Guidelines on Access to Information state as follows:

"Although the Act creates the legal requirement to process requests only if the receiving institution holds the record, assistance should be given to the requester on how to proceed with a request even if the initial request was not addressed to the appropriate government institution."

The Commissioner concluded that the department had a particular obligation to inform the requester in this case,

since the records held at Archives had originated with Finance. That being said, the Commissioner also determined that Finance had fulfilled its obligation to conduct a thorough, professional search. The search had been conducted by officials having subject-matter expertise relevant to the records they had sufficient experience and seniority to be conversant with departmental organization and all potential areas where records of the type requested could be kept, were searched.

Lessons Learned

The primary obligation on institutions which have received an access request is to cause a thorough, professional search to be conducted. If it is determined during the search that relevant records may be held elsewhere, institutions should advise a requester on how to proceed.

[Ed.note: There is a new development in this case. It has recently come to light that the Finance Department did have possession of minutes of meetings of the Board of Director of CDC at the time it answered "no records exist". A new investigation has been initiated by the Commissioner and is in progress. The results will be reported in next year's annual report.]

(09-00)
**An Unfortunate
Attachment**

Background

In this case, an unfortunate attachment—to a Cabinet document—prevented access to otherwise public documents. The complainant had requested a copy of Technology Partnerships Canada's business plan for 1998-99. Similar business plans had been released to the complainant in previous years, with only minor severances. In this case, however, the record had been attached to a Treasury Board Submission. Treasury Board is a Committee of Cabinet. Industry Canada claimed that the business plan was, thus, a Cabinet confidence and refused to disclose any part of the plan.

Legal Issues

Subsection 69(1)

Subsection 69(1) of the Act states that the Act does not apply to confidences of the Queen's Privy Council for Canada. In other words, the Act does not permit access to Cabinet submissions. However, can access to stand-alone documents be denied simply because they are attached to Cabinet submissions? The Commissioner took the view that

"stand-alone" documents which could be de-linked from Cabinet confidence records should not be swept into the section 69 exclusion. He made representations to the Privy Council Office to see if the decision would be reconsidered, given that similar business plans had been released to the complainant in previous years. Industry Canada eventually disclosed the bulk of the business plan to the complainant, with only minor exemptions. The Information Commissioner recorded the complaint as resolved.

Lessons Learned

The intent of the section 69 exclusion is to preserve the confidentiality of Cabinet deliberations. Some records are created specifically for Cabinet and they properly qualify for the exclusion. Others are created for other purposes but may be presented to Cabinet by being appended to a Cabinet record. If the appended record can be disclosed without disclosing the fact that it was considered by Cabinet or without disclosing the content of the Cabinet record to which it was appended, it should be severed and disclosed.

(10-00)
Fear of Retribution

Background

A former employee of the Canadian Museum of Civilization who had been dismissed, made a request through a union representative for access to all investigative documents related to the dismissal in order to assist in the preparation of a defence against the dismissal. Among the records requested were witness statements from individuals who had seen and/or participated in the acts which led to the employee's dismissal.

The Museum argued that all witness statements, if they existed, were exempt under a number of provisions of the Act. In particular, the Museum argued that disclosure could reasonably be expected to threaten the safety of individuals.

Legal Issues

Section 17 of the Act permits the head of a government institution to refuse to disclose any record that contains information the disclosure of which could reasonably be expected to threaten the safety of individuals.

The Museum based its decision to use section 17 on information brought to senior management that someone linked to the requester had threatened the well-being of one of the witnesses. The Museum felt that it should err on the side of caution in these circumstances, and maintain secrecy.

However, the Commissioner took the view that the Museum's approach (which it took in good faith) did not meet the section 17 test. In the Commissioner's view, the threat must be real (for example physical harm or harassment) and be reasonably likely to occur—at the level of a probability. In this case, there was no threat of physical violence. The person alleged to have made the threat was counselled by senior management against making threats to anyone linked to the individual who had been discharged and against further contact with any witness. The individual complied with that direction, and no further threats were made. While there may have been a possibility that harm would result from disclosure, it did not rise to the level of a probability.

The Museum agreed, and disclosed the records.

Lessons Learned

Section 17 must not be applied simply on the basis of a hunch, suspicion or possibility that disclosure would pose a threat to the safety of individuals. A reasonable effort should be made to assess the true nature and level of the threat and to assess whether the likelihood of harm is probable.

(11-00)

Spud Secrets

Background

The complainant had requested all information about an expert's report prepared for Agriculture and Agri-Food Canada at the request of legal counsel concerning infestation of potato crops with a strain of Potato Virus Y necrotic (PVYⁿ). The complainant also requested all correspondence concerning settlement negotiations between the federal government and a private company in a class-action lawsuit that was settled two years before the request was made. The lawsuit had been brought for losses suffered by growers of potatoes due to the alleged negligence of the department in incorrectly diagnosing PVYⁿ in their crops.

The department withheld most of the information requested on the basis of solicitor-client privilege. The records responsive to the first part of the request were almost all exempted under the litigation privilege of solicitor-client privilege. A blanket exemption under the settlement negotiations privilege of solicitor-client privilege was applied to all information which could be relevant to the second part of the request.

Legal Issues

Does the scope of the solicitor-client privilege extend to publicly available information? Second, does the litigation privilege cease when the related litigation ends?

The Information Commissioner did not agree that certain information qualified for exemption as privileged communications. This information included published scientific papers, bibliographies of scientific literature, copies of federal acts and regulations,

statistical information, department directives and policies, court decisions, affidavits, motions, court exhibits and administrative memoranda to the Minister and Deputy Minister, media lines, questions and answers and communications plans.

The department also applied a blanket exemption under section 23 of the Act to all documents concerning the settlement negotiations about the PVYⁿ issue. Settlement negotiations are included in the litigation privilege of solicitor-client privilege. The Commissioner took the view that, when litigation is completed, the litigation privilege ceases for derivative communications made in contemplation of litigation—for example, reports prepared by experts in the field—unless the documents are linked to other contemplated or ongoing litigation.

The department agreed to disclose the information which was publicly available and other information which no longer qualified for the litigation privilege. The Information Commissioner was satisfied that the records which remained withheld fell within the solicitor-client privilege exemption and that the discretion contained in section 23 had been properly exercised. The Information Commissioner recorded the complaint as resolved.

Lessons Learned

Publicly available information does not qualify for exemption as solicitor-client privileged communications. As well, when litigation is completed, the litigation privilege ceases for derivative communications made in contemplation of litigation—for example, reports prepared by experts—unless the documents are linked to other contemplated or ongoing litigation.

(12-00)
**A Little Extra Effort
Required**

Background

The complainant had requested Department of Fisheries and Oceans to provide information on polling and focus group work done for the department by a research company. The department sent the complainant a copy of the telephone survey conducted by the company, but did not send the complete, final survey report. The department had conducted an exhaustive search for the report in Ottawa and Vancouver, but could not locate it. The department was reluctant to ask the research company for the missing information. It notified the complainant that it was not within the purview of the department's activities to ask the company for a search of records outside the department concerning an access request. The department's correspondence to the complainant concluded, "Unfortunately nothing further can be done from this point. Thank you for your patience."

The investigation determined that the agreement between the research firm and the Communications Coordination Services Branch (CCSB) of Public Works and Government Services Canada, required copies of the final survey report to be provided to CCSB.

Legal Issues

Section 4

The right of access, set out in section 4 of the Act, covers all records "under the control of a government institution". In this case, F&O adopted a narrow interpretation of the term "control". It maintained that it did not have physical possession of the requested records and, hence, no control over them for the purposes of section 4. Was that interpretation proper?

The Commissioner found this to be an overly narrow interpretation. He noted the fact that the survey had been commissioned by CCSB on behalf of F&O and that the research firm was under a legal obligation to provide copies of its final report to the client. In that circumstance, the Commissioner determined that F&O had sufficient "control" over the records to enable it to obtain copies from the research firm and process them for release. The Commissioner concluded that the records were subject to the right of access even if they were not in F&O's files.

F&O agreed, to obtain the relevant records and disclose them to the requester. The complaint was considered resolved on that basis.

Lessons Learned

Circumstances arise, from time to time, wherein records which are not in the physical possession of a government institution may be subject to the right of access. For example, when the department has the legal entitlement to obtain records which it paid for but which are held by consultants, it will be required to obtain the records and process them in response to an access request.

In interpreting the term "control", it is important to bear in mind the purpose of the Act as set out in section 2, which is to "extend" the right of access to further the principle "that government information should be available to the public". This purpose explains why "control" is a broader term than "possession". If it were otherwise, records could be deliberately kept away from the physical possession of government in order to diminish the right of access.

In this regard, public officials should be aware that it is now an offence pursuant to subsection 67.1 of the *Access Act*, to conceal a record (or counsel someone to conceal a record) for the purpose of denying a right of access. Any official who seeks to isolate records from the right of access by moving them into the physical possession of an entity which is not covered by the *Access Act*, risks running afoul of this new offence provision.

(13-00)

Who's Calling? Who's Calling the Shots?

Background

A lawyer who represents clients before the Immigration and Refugee Board (IRB) had, on a regular basis since 1991, asked for and been given a listing of the business phone numbers of IRB members. In 1999, he asked again. This time, however, the IRB refused to provide the direct numbers of members. It told the requester:

"The Board is applying subsection 19(1) of the *Access to Information Act* to the *direct* telephone line numbers for the CRDD Members; only their secretaries' or assistants' numbers have been provided, following common practice in this area not to release 'decision-makers' direct lines."

The lawyer complained to the Information Commissioner.

Legal Issues

The exemption invoked by the IRB, subsection 19(1), requires government institutions to protect the information it holds about identifiable individuals (personal information). Could a business telephone number—even for an official's direct line—qualify for this protection? That was one issue raised by this complaint.

During the investigation, another issue arose. The IRB developed an argument that, even if subsection 19(1) could not be relied upon to justify the refusal to disclose, there is an overriding constitutional guarantee of the integrity

of quasi-judicial bodies which would justify secrecy. The IRB argued that its members perform quasi-judicial functions and their independence and impartiality could be compromised if citizens were given access to their direct business telephone numbers.

***Concerning 19(1)—
Personal Information***

The Commissioner reasoned that, in order for subsection 19(1) to be invoked properly, the information to be withheld must be "personal" as that term is defined in section 3 of the *Privacy Act*. The *Privacy Act* definition is very wide and includes any recorded information "about an identifiable individual". However, that broad definition is restricted by paragraphs (j) to (l) of section 3. Those paragraphs provide that, for the purpose of section 19 of the *Access to Information Act*, certain information does not constitute "personal information". The Commissioner took particular note of sub-paragraph (j)(ii) which removes from the definition of personal information:

"(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(ii) the title, business address and telephone number of the individual".

The Commissioner observed that the Act makes no special provision for the direct line phone numbers of public officials and he concluded that subsection 19(1) of the *Access Act* does not give a basis in law for the IRB to refuse to disclose the direct line telephone numbers of IRB members. The

Commissioner noted that the direct phone lines are provided at taxpayer expense and are intended for business purposes.

The Constitutional Argument

The Commissioner did not consider it necessary to determine whether or not, in law, there is a constitutional guarantee of the "integrity" of quasi-judicial proceedings. Even assuming, for the sake of argument, that there were such a principle, he found that the IRB had advanced no evidence to show that the integrity of its processes could reasonably be expected to be compromised by the disclosure of members' direct phone numbers.

In particular, despite many years of publishing and disclosing the direct numbers and despite some of the numbers being on websites and on business cards, the IRB was unable to give examples of specific infringements of members' integrity which had occurred as a result. Moreover, the Commissioner noted that there were widely accepted protocols for how individuals exercising quasi-judicial functions should deal with any inappropriate communications (including phone calls) from persons having an interest in matters before the deciders.

Consequently, the Commissioner concluded that there was no overriding constitutional argument to justify secrecy in this case and he recommended that the phone numbers be disclosed.

The IRB followed the Commissioner's recommendation.

Lessons Learned

The zone of privacy protection given to public officials is much smaller than that given to others. The reason is, of course, to ensure that citizens are able to deal with identifiable rather than "faceless" public officials and to ensure that government is as transparent and accountable as possible. Although there is a practice in government, especially at senior levels, to offer public servants a private line whose number is not published, this practice does not find a basis in the law which entitles government institutions to refuse to disclose such numbers if they are requested under the *Access to Information Act*.

This, of course, has implications for other contact information such as e-mail addresses. A complaint concerning a refusal to disclose e-mail addresses is under investigation and will be reported next year.

(14-00) Public Secrets

Background

A Toronto journalist became curious about the Canadian Cultural Property Export Review Board (the "Board") review and approval of a tax credit for the donation of the archives and memorabilia of the former mayor, Mel Lastman, of the former city of North York. The journalist had requested access to all documents pertaining to this review and approval, including appraisal reports prepared by the department or outside experts.

The Board denied access to the documents, claiming they were exempt from disclosure as personal information and that disclosure was prohibited by a provision of the *Income Tax Act*. The journalist complained to the Information Commissioner.

Legal Issues

The case raised two principal issues: First, is information about a certificate of cultural property (which entitles the recipient to claim a tax benefit in the amount of the certificate) "personal information" which section 19 requires to be kept secret? Second, is information about a certificate of cultural property collected or compiled pursuant to section 241 of the *Income Tax Act* and, hence protected from disclosure by section 24 of the *Access to Information Act*?

Subsection 19(1)

The Information Commissioner was satisfied that the vast majority of the records relevant to the request had been properly withheld under subsection 19(1) of the Act. Records relating to the portions of the donations for which no certificate of cultural property for income tax purposes was issued constituted personal information about the donors. As well, specific details about the donation for which a certificate was issued, including the donated papers themselves, constituted personal information about the donors. Much of the collection for which a certificate was granted consisted of public reporting of events in the lives and careers of the mayor and his wife. Even so, the Information Commissioner found, the collection as a whole, revealing as it did the preferences of the family in what they choose to preserve—constituted personal information about them.

However, the Information Commissioner identified 13 pages of records which in whole or part did not, in his view, qualify for exemption under subsection 19(1) from the right of access. Those 13 pages revealed that an application was made to the Board by the City of North York for a certificate of cultural importance. They indicated that the application was approved, the client, the contents of the archival funds, and the appraisal of the donation. These pages also set out the fair market value as determined by the Board under the *Cultural Property Export and Import Act*.

The Commissioner concluded that subsection 19(1) did not apply to these pages for two reasons. First, this information was not "personal" for the purposes of subsection 19(1). Section 3 of the *Privacy Act* sets out a definition of "personal information". However, the *Privacy Act* states that, when interpreting section 19 of the *Access to Information Act*, personal information does not include: "information relating to any discretionary benefit of a financial nature including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit." The Commissioner found that the certificate issued by the Board constituted a benefit of a financial nature because of its potential to reduce an individual's tax liability. Furthermore, he found that the benefit was discretionary, since not all applications were approved.

The second reason for concluding that the subsection 19(1) exemption did not apply to these 13 pages flowed from the interpretation of subsection 19(2). Certain information, including the information contained in the 13 pages, is publicly available. Paragraph 19(2)(b), authorizes the head of a government institution to disclose any record requested under the Act that contains personal information if the information is publicly available. Since the mayor had already made public statements containing the same information that was found on these 13 pages, the Information Commissioner found that the 13 pages did no more than reiterate what had already been said publicly. Thus, paragraph 19(2)(b) justified the disclosure of the information identified on the 13 pages in question.

Subsection 24(1)

Subsection 24(1) of the Act requires the head of a government institution to refuse to disclose any record that contains information the disclosure of which is restricted by any provision set out in Schedule II of the Act. Among the provisions listed in Schedule II is section 241 of the *Income Tax Act*. Section 241 protects information which has been obtained by, or on behalf of, the Minister of National Revenue for the purposes of the *Income Tax Act*. The Board's position appeared to be that the information relevant to determining whether a tax credit was appropriate had been obtained on behalf of the Minister of National Revenue and, hence, was protected from disclosure.

In his view, section 241 of the *Income Tax Act* has no application, since the certificate issued by the Board did not reveal the tax position of Mr. Lastman and it may or may not ever come into the hands of Revenue Canada under section 241 of the *Income Tax Act*.

The Information Commissioner concluded that the requested information was obtained by the Board to enable it to assess the entitlement of Mr. Lastman to a benefit. The information was not obtained by the Board on behalf of the Minister of National Revenue. The claim for exemption under subsection 24(1) was therefore not appropriate.

The Information Commissioner found the complaint to be well-founded and recommended to the Board that the 13 pages be disclosed. The Board asked

Mr. Lastman for consent and consent was refused; the Board declined to follow the Commissioner's recommendation. With the consent of the complainant, the Information Commissioner has asked the Federal Court to review the matter and order the disclosure of the 13 pages. The outcome will be reported next year.

Lessons Learned

It is premature to draw conclusive lessons from a case which is before the courts. However, Canadians should be aware that there are exceptions to the privacy protections afforded to information about them held by government. This case illustrates two of these exceptions: First, if a person chooses to "go public" with information about him or herself, then records containing such information may no longer be given the protection which would otherwise be the case under subsection 19(1) of the *Access Act*. In other words, the Act does not contemplate "public secrets".

Second, if a person receives a discretionary benefit of a financial nature from government, all information about the nature of the benefit, as well as the recipient's name, ceases to be protectible personal information. Such information will be disclosed to anyone who requests it under the *Access to Information Act*.

Index of the 1999/2000 Annual Report Case Summaries

Section of ATIA	Case No.	Description
10(1)(a)	(08-00)	Legally Sound But Unhelpful
10(3)	(04-00)	101 Damnations – Delays at National Defence
16(1)(c)	(03-00)	The Priority of Police Investigations
	(07-00)	Who Blew the Whistle?
17	(10-00)	Fear of Retribution
18(a) & (b)	(02-00)	Selling Government's Expertise
19(1)	(01-00)	Refugees and Access to Legal Services
	(13-00)	Who's Calling? Who's Calling the Shots?
23	(11-00)	Spud Secrets
24(1)	(14-00)	Public Secrets
30(1)(f)	(05-00)	Political Interference or Incompetence?
	(06-00)	Staying Away from the Shredders at National Defence
	(12-00)	A Little Extra Effort Required
69(1)	(09-00)	An Unfortunate Attachment

Glossary

Following is a list of department abbreviations appearing in the index:

AAFC	Agriculture and Agri-Food Canada
ACOA	Atlantic Canada Opportunities Agency
CCPERB	Canadian Cultural Property Export Review Board
CFIA	Canadian Food Inspection Agency
CIC	Citizenship and Immigration Canada
CMC	Canadian Museum of Civilization
F&O	Fisheries and Ocean Canada
Fin	Finance Canada
IC	Industry Canada
IRB	Immigration and Refugee Board
ND	National Defence
RCMP	Royal Canadian Mounted Police

CORPORATE MANAGEMENT

The Privacy and Information Commissioners share premises and corporate services while operating independently under their separate statutory authorities. These shared services—finance, personnel, information technology and general administration—are centralized in Corporate Management Branch to avoid duplication of effort and to save money for both government and the programs. The Branch is a frugal operation with a staff of 15 (who perform many different tasks) and a budget representing 14 per cent of total program expenditures—a five percent reduction over last year.

Resource Information

Managers continually pursue innovative approaches to the delivery of their programs without adversely affecting the quality level of service to the public.

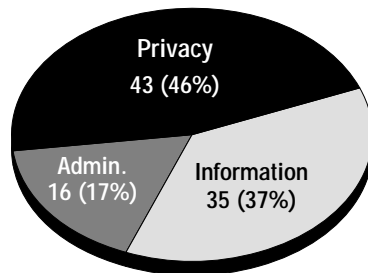
The Offices' combined budget for the 1999-2000 fiscal year was \$10,212,990. Actual expenditures for 1999-2000 were \$9,930,660 of which personnel costs of \$6,993,103 and professional and special services expenditures of \$1,137,776 accounted for more than 80 per cent of all expenditures. The remaining \$2,937,557 covered all other expenditures including postage, telephone, office and information technology equipment and office supplies.

Expenditure details are reflected in Figure 1 (resources by organization/activity) and Figure 2 (details by object of expenditure).

Figure 1

RESOURCES BY ORGANISATION /ACTIVITY (1999-2000)

Human Resources



Financial Resources

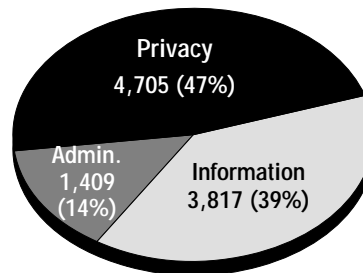


Figure 2

DETAILS BY OBJECT OF EXPENDITURE

	Information	Privacy	Corporate Management	Total
Salaries	2,253,716	2,850,369	766,018	5,870,103
Employee Benefit Plan Contributions	447,600	523,030	152,370	1,123,000
Transportation and Communication	87,344	111,970	111,605	310,919
Information	66,102	33,176	1,722	101,000
Professional and Special Services	360,298	600,401	177,077	1,137,776
Rentals	4,210	28,633	19,860	52,703
Purchased Repair and Maintenance	7,745	76,575	11,498	95,818
Utilities, Materials and Supplies	26,984	24,667	39,670	91,321
Acquisition of Machinery and Equipment	561,791	448,225	128,988	1,139,004
Other Payments	900	8,116	–	9,016
Total	3,816,690	4,705,162	1,408,808	9,930,660

* Totals are equal to those Reported in the 1999-00 Public Accounts of Canada.