Information Commissioner of Canada

Commissaire à l'information du Canada

Annual Report Information Commissioner 2001-2002

Annual Report
Information Commissioner
2001-2002

"Democratic progress requires the ready availability of true and complete information. In this way people can objectively evaluate their government's policy. To act otherwise is to give way to despotic secrecy."

Pierre E. Trudeau

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

Subsection 2(1)
Access to Information Act

June 2002

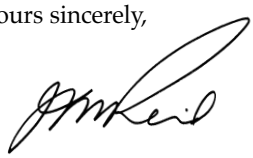
The Honourable Daniel Hays
The Speaker
Senate
Ottawa ON K1A 0A4

Dear Mr. Hays:

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

This report covers the period from April 1, 2001 to March 31, 2002.

Yours sincerely,



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

June 2002

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

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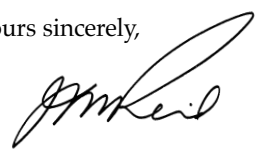
Yours sincerely,



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

2001-2002 ANNUAL REPORT

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MANDATE

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

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

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

CHAPTER I
PERFORMANCE OVERVIEW

Annual reports of Information Commissioners are, traditionally, a time for giving Parliament and citizens a "report card" on the performance of the federal government under the *Access to Information Act*. This report follows the tradition. But, too, the mid-point of an Information Commissioner's term offers an opportunity to report on his own performance as an independent watchdog over the rights and obligations contained in the *Access to Information Act*. As frought with difficulty as is any self-assessment, a good faith effort will be made in these pages to reflect dispassionately upon the performance of the Information Commissioner since 1998.

First, the government's "report card".

The Government's Performance

When the Going Gets Tough

A member of a public interest think tank in Mexico visited the Office of the Information Commissioner this year to learn more about our *Access to Information Act*. Mexico is actively considering joining the small, but growing, club of nations which have had the courage to give their citizens a legal right of access to government-held records.

On the way from the Ottawa airport to the city, the visitor's taxi driver asked the purpose of the visit and, when told, admitted that he had never heard of Canada's *Access to Information Act*. The Mexican visitor then asked the taxi driver whether he believed he had a right to know, for example, how much had been spent paving and maintaining the highway on which they were driving. The taxi driver replied: "Of course, I just never knew why we are able to find out so much."

The visitor from Mexico was enormously impressed by this response. It was his dream that one day, in Mexico, taxi drivers would accept, as a given, the right to know. The reverse is now the case. Sometimes it takes a visitor's perspective to remind us how precious are the rights we have.

Yet, we have learned this year that our "right to know" is very fragile.

During this reporting year, the going got tough, tougher than ever, for the public's "right to know". Quietly, firmly, the government shut the door on 19 years of public access to the records showing how ministers and ministerial staffers spend public money (see pages 20 to 22 for details). Even more troubling, the government took advantage of the tragic events of September 11, 2001, to give itself the power to (1) remove whole classes of records from the coverage of the *Access to Information Act* and (2) "discontinue" any investigation which the Information Commissioner may be conducting which touches upon information relating to national defence, security or international relations. The phrase "took advantage of" is used deliberately, because the derogation from the right of access contained in Bill C-36 was not needed to assist in the so-called war on terrorism, a view more fully explained at pages 15 to 20.

The right of access continues to be eroded through the creation of new institutions, to carry out public

functions, which are not made subject to the *Access to Information Act*. For example, this year's Bill C–27 creates the Waste Management Organization to manage nuclear fuel wastes. The bill does not add this organization to the schedule of institutions covered by the *Access to Information Act*. The government offered no reason for denying Canadians a right of access to records held by this new institution.

The Waste Management Organization joins a growing list of entities which conduct public or quasi-public duties and which fall outside the coverage of the access law. Some such entities, created during the term of the current government are:

- Nav Canada
- Canadian Blood Services
- Genome Canada
- Canadian Millennium Scholarship Fund
- Canadian Foundation for Innovation
- Canadian Pension Plan Investment Board
- A number of Airport Authorities
- St. Laurence Seaway Management Corporation
- Canadian Foundation for Climate and Atmospheric Sciences

In previous annual reports, reference has been made to the case of a public official of deputy minister rank who wrote a letter to an access requester which the recipient found to be threatening. (Annual Reports 1999/2000 at p. 9 and 2000/2001 at p. 114). The official also refused to tell the Information Commissioner how he came to know the identity of the access requester and he went to Federal Court (at taxpayer expense) seeking to prevent the commissioner from forcing him to reveal his source. The court upheld the Information Commissioner's authority to pursue the matter and, in this reporting year, the investigation was completed.

The saga, reported in detail at pages 22 to 24, speaks volumes about the disdain which persists, in some quarters of senior officialdom, for the rights of citizens to obtain information about public officials. It also illustrates the hostility which persists towards the independent review powers of the Information Commissioner.

This was not the only "shame on you" story. Certain officials of Finance Canada gave intentionally misleading answers to requests for records related to allegations of a possible conflict of interest on the part of the Minister of Finance. In one case, the department said it had no records when, in fact, it did. In another, there were no records in Finance but the department knew where they were (Archives, Office of Ethics Counsellor) and did not tell the requester. Obtaining access to records should not be a game of "hide-and-seek" with government. Rather, it should be a matter of helpful, forthright service. The details of this case are reported at pages 24 to 27.

Requesters are, with increasing frequency, being confronted with a new way to deny their access requests. Some departments have begun invoking extensions of several years beyond the 30-day response deadline. These departments then assert the legal position that, no matter how unreasonable the extension period, there is no constructive refusal which can be reviewed by the commissioner or the Federal Court. This troubling new development is discussed at pages 27 to 29.

And all the while, behind closed doors, the government's Task Force of bureaucrats toiled at formulating recommendations for changes to the *Access to Information Act*. In the pages of this report, last year, a warning was sounded about the wisdom of pursuing reform of the access law by means of this insider review process. The harsh attacks made this year by the government, against the right to know, heighten the concern that, no matter how well the Task Force does its work, no serious effort will be made by this government to modernize and strengthen the *Access to Information Act*. Worse, suspicion is understandable that the rights contained in this law may be further eroded in the guise of "reform".

It should be noted that the Report of the Task Force may well be in the public domain by the time this report is tabled in Parliament. At the time of this writing, however, the Task Force had not issued its report and, consequently, no reaction to the Task Force is offered in these pages. The commissioner will inform Parliament and the public of his response to the Task Force Report, in a special report to Parliament to be tabled in the Fall of 2002.

There is positive news, too, to report. More requests than ever before were received by government, yet a lower percentage of them became complaints to the Information Commissioner's office. Again this year, it was possible for the vast majority of complaints to be resolved without recourse, by the commissioner, to the Federal Court. All of this speaks of an improved professionalism in the administration of the Act by government and greater trust and respect among requesters, government institutions and the Office of the Information Commissioner.

Continuing on the positive side (and despite the new issue of unreasonably long extensions referred to above), the intransigent, systemic problem of delay in answering access requests, shows signs, finally, of improvement. Last year, 43.1 percent of complaints received by the IC concerned problems of delays or unreasonable extensions of time. In this reporting year, the percentage dropped to 28.8 percent. Aiding this improvement was an increased allocation of resources to the access to information units in departments which had been, for years, sorely under-resourced and overworked. Although the resource gap is still a real problem, important steps have been taken by the government to put the resources in place to enable the rights contained in the access law to be delivered to Canadians. Some additional resources were also given to the Information Commissioner; a gap remains between the workload of complaints and the available resources to handle it.

This year the Office of the Information Commissioner conducted reviews and completed report cards on six government institutions. All institutions reviewed, but one, showed improvement over the report cards in the preceeding years. Details about the report card results are found at pages 29-30 and 113-149.

Yet, this improved performance in answering requests on time may have come at the expense of careful application of exemptions. Too often, departmental access to information units do not have the time or delegated authority to play an effective "control" function over the invocation of exemptions. Too often, the degree of secrecy recommended by the

operational personnel having charge of the requested records is rubber-stamped by the access to information professionals. Too often, departments make the strategic decision not to carefully, critically assess whether exemptions are justified until a complaint is received by the Information Commissioner. This strategic decision conserves resources but it also means that only 10 percent of requests (the percentage which, traditionally, become complaints) get careful attention. What happens to the other 90 percent? Most requesters accept on faith that public officials will apply the law carefully and fairly. Is that faith justified?

More study of this concern will be undertaken in the coming year and the results will be reported in these pages next year.

Finally, on the positive side, concerted efforts are being made on several fronts to address the sorry state of information management in the government of Canada. As the reporting year drew to a close, Treasury Board ministers were preparing to consider adopting a revised, strengthened policy governing the management of government information. The existing policy, adopted in 1987 and amended in 1994, had a number of shortcomings.

The existing policy was written, primarily, with so-called IM (information management) professionals in mind. However, in the current environment, where the desktop of most public servants has become computerized, where more and more services are delivered electronically, where communications among public officials are conducted electronically, in this environment, all employees, not just IM professionals, must be effective information managers.

As well, the existing policy is largely silent concerning the accountability purposes of good information management. Little is said about monitoring compliance, responsibility for results and the obligation to create records reflecting the actions and decisions of public officials.

The concerns expressed over recent years by the Auditor General, the National Archivist and the Information Commissioner appear to have been heard. The new Management of Government Information Policy is a serious effort to address these concerns and it deserves kudos. One of its key features is the requirement that the activities of public officials be adequately documented. This new requirement will improve government transparency and accountability.

Good policies, though, need champions if they are to be effectively implemented. Treasury Board has established an "IM champions committee" of representatives of some 15 of the major departments to help ensure that their organizations are "ready" for the new push to improve information management. There is an IM policy centre in Treasury Board Secretariat working to develop and promote standards (a meta data standard has been adopted), tools (such as RDIMS and EMS as domain shared systems) and an IM resource centre web-site.

All of this positive activity, however, is just the beginning. The reform of information management is not well-resourced and there is no statutory compulsion to get on with the job. Vigilance will be required to ensure that the fledgling efforts to improve IM continue to grow and to "go the distance".

Overall Grade for Government

Some generalities about government respect for the public's right to know can be made. Front line officers and middle managers are getting on with the job, making the administration of the *Access to Information Act* an integral part of departmental processes. Public servants at these levels are, for the most part, service-oriented, comfortable with a client-centered philosophy of public administration and take pride in delivering the access to information program as successfully as they deliver other programs to Canadians.

Yet, at the senior level of government, there remains a more hostile attitude towards the right of access. Of course, generalities are unfair and fail to acknowledge that, even at the senior levels and in Cabinet, there are self-assured individuals who lead by example when it comes to respect for the *Access to Information Act*. The fact remains, however, that there is a reluctance to write things down (for fear of access) and an oversensitivity to preserving the good "image" of a minister, the government or the department. It is a fact that the Clerk of the Privy Council insists on the broadest possible interpretation of the scope of cabinet secrecy. As well, the Prime Minister is personally committed to insulating his office and offices of ministers from the Act's coverage and from the Information Commissioner's investigative jurisdiction. These "hostilities" at the top stand in the way of the good-faith efforts, at more junior levels, to get on with a cultural change to open government.

On balance, then, the commissioner gives the government a grade this reporting year of "C"—not a failure, but much room for improvement. Here are the details, the positives and the negatives. Let the reader be the own judge of the fairness of this grade.

Performance Negatives

Antiterrorism and Secrecy

In the weeks following the horrific events of September 11, 2001, the government rushed to put in place legislative tools for use in the so-called "war on terrorism". One of those initiatives was the antiterrorism bill (Bill C-36), introduced into the House of Commons on October 14, 2001. Contained in that Bill was a sweeping derogation from the right of access contained in the *Access to Information Act*.

As first introduced, section 87 of Bill C-36 would have authorized the Attorney General of Canada "at any time" to "issue a certificate that prohibits the disclosure of information for the purpose of protecting international relations or national defence or security". That same provision also stated that the *Access to Information Act* would not apply to any such information.

The first version of section 87 of Bill C-36 contained no time limits on the period of secrecy. As well, it removed the authority of the Information Commissioner and the Federal Court of Canada to review the information covered by a certificate for the purpose of providing an independent assessment of whether or not secrecy was justifiable.

This unprecedented shift of power, from individual Canadians to the state, came under intense scrutiny by the Standing Committee on Justice and Human Rights of the House of Commons and by a special committee of the Senate, which was struck to conduct a pre-study of the Bill. The then Minister of Justice was asked to explain the reason for this new blanket of secrecy.

In all of her evidence before the committees of the Senate and the House of Commons, the minister offered only one explanation. The explanation is most exhaustively set out in her response to a question posed by Mr. Michel Bellehumeur during the former minister's appearance before the Justice and Human Rights Committee on October 18, 2001. Mr. Bellehumeur asked the minister why she proposed to remove from the scope of the *Access to Information Act* (and from review by the Information Commissioner and the courts) the very type of information which the exemption contained in section 15 of the access law was designed to protect from disclosure. The minister answered as follows:

> "No, what section 15 does is, in fact, leave open, it creates a loophole in terms of the possibility of disclosure of information that may have been provided to us by our allies and in fact we know that in relation to these sensitive matters where in fact one must work with one's allies – one is gathering intelligence, one shares intelligence – much of this speaks to the national security, not only of this country, but of other countries, and to the very lives of perhaps informants and others. Unless we can guarantee to our allies that that kind of limited, exceptionally sensitive information will not be subject to public disclosure, we will not get that information and we will not be able to fight terrorism as effectively as we should.
>
> I'm afraid, Mr. Chair, that under existing access legislation, there is a loophole created because it permits the Access Commissioner to make certain recommendations. In fact, as far as we're concerned, that is not sufficient for our allies and we must do that which is necessary to ensure we have the best information and we are protecting that exceptionally sensitive information."

The Information Commissioner and others challenged the minister to explain the "loophole" – it could not be the commissioner, as he has no power to order the disclosure of records. The commissioner reminded the minister of a very recent government-commissioned study which concluded that the *Access to Information Act* posed no risk of possible disclosure of sensitive intelligence information, that no such information had ever been disclosed under the Act in the 18 years of its life and that the *Access to Information Act* régime offered as much or more secrecy to intelligence information as do the laws of our allies.

The only "loophole", thus, could be the possibility that a misguided judge of the Federal Court would order the disclosure of sensitive intelligence information, notwithstanding a clear exemption of such information contained in the access law. Given the Federal Court history of applying sections 13 and 15 of the access law and the presence of appeal mechanisms to the Federal Court of Appeal and Supreme Court of Canada, the "misguided judge" theory had no rational basis. Moreover, there was an air of unreality to the former minister's suggestion that our allies had asked the government to give them a "guarantee" by plugging the "misguided judge" loophole. The Information Commissioner asked the former minister to produce the evidence of any such request; none was forthcoming.

The minister could not produce the evidence because our major allies and suppliers of intelligence also operate under freedom of information laws,

which include avenues of independent review. They understand that the purpose of these laws is to remove the caprice from decisions about secrecy, by subjecting such decisions to a legislative and judicial system of definition and review. The allies want no more than the simple assurance from Canada that intelligence information which needs to be protected can be protected. Not a single ally doubts Canada's ability to do so under the existing *Access to Information Act*.

In the face of the criticism, the former minister went back to the drawing board and made a number of changes. It would be a mistake to assume, however, that these changes amounted to concessions to her critics. In fact, the amendments broadened the sweeping scope of secrecy certificates and increased the power of the Attorney General to interfere with the independent investigations of the Information Commissioner.

First, the scope was broadened by changing the permitted purposes for a secrecy certificate from:

> Version #1: "for the purpose of protecting international relations, national defence or security".

to:

> Version #2: "for the purpose of protecting information obtained in confidence from or in relation to a foreign entity as defined in subsection 2 (1) of the *Security of Information Act* or for the purpose of protecting national defence or national security".

To fully appreciate the breadth of Version #2, one must carefully read subsection 2 (1) of the *Security of Information Act*. It defines "foreign entity" as

> "a) a foreign power
>
> b) a group or association of foreign powers, or of one or more foreign powers and one or more terrorist groups, or
>
> c) a person acting at the direction of, for the benefit of or in association with a foreign power or a group or association referred to in paragraph (b)."

The effect of this change from Version #1 to Version #2 is to give the Attorney General the power to cloak in secrecy information on any subject provided in confidence by any person, group or foreign power.

Second, the former minister amended Bill C-36 to provide that, where a secrecy certificate is issued after an investigation of a complaint has been commenced by the Information Commissioner, "all proceedings under this Act (the *Access to Information Act*) in respect of the complaint, including an investigation, appeal or judicial review, are discontinued". As originally introduced, Bill C-36 contained no such provision. In the original version, the Information Commissioner could continue his investigation (and the courts could continue their reviews) with the only restriction being that neither could have access to the information covered by the certificate.

The troubling significance of this change requires some explanation of the nature of most complaints to the Information Commissioner. Access requesters, typically, do not request access to a specific record. Rather, they typically request access to records on a particular subject such as, for example: the steps being taken by Health Canada to respond to the threat of terrorism by anthrax or changes being made by Transport Canada to policies on air

passenger screening or the policy of the Canadian Forces with regard to prisoners taken in Afghanistan.

Hence, it is usual that a number and variety of records are identified as being relevant to an access request; it is also usual for a variety of exemptions under the *Access to Information Act* to be relied upon to justify any refusals to give access. In all such cases, the requesters have a right to complain to the Information Commissioner and to expect an independent, thorough investigation of the denial of access.

Here is the rub: if, during the commissioner's investigation, a secrecy certificate is issued with respect to even one record of all those covered by the access request, the commissioner's investigation is discontinued in its entirety. If the matter has proceeded past the investigation stage and on to a Federal Court review, the issuance of a secrecy certificate, for even one record, has the effect of discontinuing the entirety of the Federal Court review.

Let this sink in for a moment. The federal government has given itself the legal tools to stop in its tracks any independent review of denials of access under the *Access to Information Act*. The interference is not even limited to the information covered by the secrecy certificates.

Yes, the former minister protested that this outcome was not what she intended. She said she intended that the commissioner's investigations and court reviews would be discontinued only insofar as they relate to the information covered by the secrecy certificates. It was pointed out to her that, if a more limited effect was intended, the form of the words used in the amendment to the companion provision contained in the *Privacy Act* should be followed. With respect to proceedings under the *Privacy Act*, the amended Bill C-36 provides that, when a secrecy certificate is issued after the commencement of an investigation by the Privacy Commissioner:

> "all proceeding under this Act in respect of that information, including an investigation, audit, appeal or judicial review, are discontinued".

The former minister urged Parliamentarians and the Information Commissioner to trust her word that the amendment to the *Access to Information Act* (which reads: "in respect of the complaint") has the same effect as the amendment to the *Privacy Act* (which reads: "in respect of that information"). The former minister said her word was enough; there was no need to correct the obviously inconsistent language.

This was not the only "trust me" aspect of the former minister's explanations about her amendments. She told the committees that, in an effort to ensure as little interference as possible with the work of the Information Commissioner, she had changed the original version of the Bill, which allowed the Attorney General to issue a secrecy certificate "at any time". Here is the limit she imposed:

> "The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament."

On November 20, 2001, the former Minister of Justice gave the Justice Committee her opinion as to the effect of this provision on investigations by the Information and Privacy Commissioners. She said:

> "Also, under the amendments we are proposing to Bill C-36, the certificates could no longer be issued at any time, which is the present language, but only after an order or decision for disclosure in a proceeding. The result is that the certificate could only be issued after the judicial review of an access or privacy request."

The former minister's view, then, was that a secrecy certificate could not be issued during the commissioner's investigation or during a Federal Court review under the Access Act. A certificate, according to the former minister, could only be issued in the event the Federal Court were to order the disclosure of the previously withheld information.

If the words of the amended Bill had clearly stated what the former minister said she intended them to say, the Information Commissioner would have much less to complain of …alas, they do not. The Information Commissioner drew the minister's attention to the fact that the commissioner holds the power of a superior court of record to compel production to him, for investigative purposes, of any information he deems relevant to an investigation. The commissioner pointed out to the former minister that, in the absence of clarifying words, such as "disclosure to the public or a member of the public", it would be open to the Attorney General to issue a secrecy certificate for the purpose of resisting an order made by the Information Commissioner requiring that records be provided to him.

The commissioner also reminded the former minister that she herself, in three Federal Court cases, was arguing that certain national defence and security information should not be disclosed to the commissioner. She made the argument in those cases that compliance with the commissioner's order for production of the records in those cases constitutes a "disclosure" for the purposes of the secrecy certificates issued under the previous sections 37 and 38 of the *Canada Evidence Act*.

In her appearance before the Senate Special Committee on December 4, 2001, the former minister attempted to answer this concern. She stated:

> "Second, Mr. Reid has made reference to Crown arguments in litigation to suggest that the Attorney General could use the certificate process to terminate his investigations. As you can appreciate, I cannot comment on matters before the courts. However, I can remind this committee of the original purpose of the certificate scheme, namely, to protect a narrow class of highly sensitive information following the issuance of an order or decision that would result in its disclosure.
>
> The critical words of the Bill refer to an order or decision that would result in the disclosure of the information. This would be a critical test that I, as Attorney General, would have to be satisfied with on a case-by-case basis before issuing a certificate."

Could there be a less resounding refutation of the Information Commissioner's concerns! While it is unclear exactly what this statement means, it is clear that the former minister did not deny that this amended version of Bill C-36 (now in law) gives the Attorney General the power to use a secrecy certificate to resist giving records to the Information Commissioner.

This brings us to a consideration of the final "concession" which the former minister made to the critics of the original version of Bill C-36. An

amendment was introduced creating an opportunity for a party to a proceeding (in relation to which a secrecy certificate is issued) to seek from a judge of the Federal Court of Appeal, an order varying or canceling a secrecy certificate.

If this form of independent review is the "quid" for the "quo" of cutting off independent review under the *Access to Information Act*, it is woefully inadequate. The reviewing judge is not permitted by this amendment to conduct any of the usual types of judicial review of an administrative decision (de novo, legality, correctness); rather the reviewing judge's sole authority is to review the information covered by the certificate for the purpose of deciding whether or not it "relates to":

1. information disclosed in confidence from, or in relation to, a foreign entity;
2. national defence; or
3. security.

One would be hard pressed to imagine any operational information held by any of our investigative, defence, security, intelligence, immigration or foreign affairs institutions, which would not "relate to" one or more of these three broad categories. This "relates to" form of judicial review does not authorize the reviewing judge to make any independent assessment of the sensitivity of the information or of the Attorney General's purpose in issuing the certificate. This form of judicial review is significantly less rigorous than the independent review of secrecy certificates available in our major allied countries. This form of review has been aptly termed "window dressing" because it does not subject the Attorney General to any meaningful accountability for the use of certificates.

In times of emergency or threat, it is sometimes necessary for states to take rights away from citizens and give new powers to governments. But, too, history is replete with examples of unnecessary power grabs by states in the guise of protecting the welfare of the collectivity. The challenge for any healthy democracy is to resist the temptation of states to overreach. Our government failed the challenge when it gave itself the power, through the secrecy certificate, to escape independent scrutiny of its decisions to keep secrets from its citizens. "Trust me", the former minister said; these provisions will be rarely, carefully and fairly used! The bill having now been passed into law, we have no choice but to trust, because we have lost the ability to independently verify that our trust is well founded.

Ministers' Offices: The Expanding Zone of Secrecy

For almost 19 years, Canadians have used the *Access to Information Act* to obtain records about the travel expenses incurred by prime ministers, ministers, ministerial staff, office holders and public servants. There was no objection, no complaining and no distinctions. Some were caught with their ethical pants down (recall the former head of the Canada Labour Board who was forced to resign when an access request shed light on his profligate spending). Others gave clear evidence to the public of their careful husbandry of the public's money. Overall, a new honesty and frugality was introduced into public life.

In this reporting year, the government decided to change all that. No longer would the expense records of prime

ministers, ministers and ministerial staff be disclosed. The government decided that it was under a legal obligation to protect the privacy of these individuals and it points to a 1997 decision of the Supreme Court of Canada as being the source of that obligation. But this only begs the question: Why wait three years after the Supreme Court of Canada decision to start protecting the privacy of these senior officials?

The trail leads directly to the PMO, and it takes us into the heart of the controversy sparked by access requests for the Prime Minister's agenda books. The new travel expense secrecy, as it turns out, is just an unfortunate casualty of the "agenda books" case – consistency with the Prime Minister's position on agendas (that his office and ministers' offices are zones of secrecy) was taken as demanding that all records about the Prime Minister, ministers and their staffs, be cloaked in secrecy.

Here is how the new approach was developed: First, all ministers were informed that they should cease disclosing their agendas (as they had been doing on a routine basis, subject to applicable exemptions). Second, all departments were told by PCO that, if the Information Commissioner were to seek access to any records held in ministers' offices, access was to be refused, PCO was to be notified and the resistance would be quarterbacked from the centre of government. Finally, the PMO intervened with the PCO which, in turn, intervened with the Treasury Board (the latter being responsible for access to information policy directives) with the result that existing policies calling for disclosure of expense and other records relating to ministers and their staffs were reversed. The Treasury Board also obliged PCO by reversing its long-standing policies concerning the status, under the access law, of records held in ministers' offices.

These changes were as surprising and troubling to the access professionals in departments as they were to members of the public whose preexisting rights disappeared by government fiat. The new travel expense policy made starkly clear the troubling implications for openness and accountability of the Prime Minister's theory that ministers are not part of the departments over which they preside.

It has been said that a foolish consistency is the hobgoblin of little minds, and several ministers, including the President of Treasury Board, seemed to be struck by the odd result of applying the theory of the "agendas" case to the travel expense case. These ministers instantly recognized their obligation to account to the public for their expenditures of public funds. They said they would "consent" to the disclosures of their expense records and they encouraged their colleagues to do the same.

In the end, ministers chose not to give consent and public concern grew as did the concern of members of the Public Accounts Committee who called on public officials to explain. Just days before their appearance, a new instruction was issued by the Prime Minister. He told his ministers that they and their exempt staff should give consent for disclosures of expense records.

The Prime Minister's instruction was made known to the House of Commons on March, 15, 2002, by Minister Robillard, President of Treasury Board. She said:

> "Mr. Speaker, this government is of the view that information about government expenses should be made public, so, while respecting the *Access to Information Act* and the *Privacy Act*, the Prime Minister has asked all his ministers and their political staff to release information related to their expense records."

Is there any legal merit to the new privacy policy on travel expenses? The Information Commissioner is currently investigating complaints from persons who were denied access to such information. The results of those investigations will be reported in next year's report. Whatever be the legalities, the optics are terrible; ministers are placed in a bind not of their own making, conjecture abounds about what ministers and their staffers may be hiding and public cynicism about the honesty and integrity of their government grows.

As Canadians wait for commissioners, parliamentary committees, lawyers and judges to sort out where the line is properly drawn between the privacy rights and accountability obligations of elected officials and their staffs, Canadians instinctively know what is ethically right. No matter that ministers may decide to "consent" to disclose their expense records, Canadians will not easily accept an accountability régime which depends on the grace and favour of those who spend public money. In a healthy democracy, such a régime does not pass the smell test!

Poor Treatment of Access Requesters

The fragility of the right of access was also illustrated in this reporting year by the disdain showed towards some access requesters by certain senior officials of the government of Canada. What is written in the law is one thing; how public officials behave under the law is another. Here are the details of two troubling incidents:

Incident #1: Intimidating a Requester

An access requester, in September of 1997, made identical access requests to PCO and F&O for:

> "all information respecting the terms of Mr. Bill Rowat's secondment or transfer to the government of Newfoundland, and specifically any conflict of interest restrictions, guidelines or limitations placed on Mr. Rowat in connection with his former duties as Deputy Minister of Fisheries and Oceans or in connection with his role as a federal official in interdepartmenal committees respecting the Voisey's Bay nickel development project in Labrador".

The requester also asked Fisheries and Oceans Canada to disclose the expense reimbursement claims made by Mr. Rowat during a period when he was deputy minister of that department. Neither department provided records within the response deadline set out in the Act. (It was later learned that the delays were caused, in part, by extensive consultations with Mr. Rowat, who was then on loan to the government of Newfoundland and Labrador. Fisheries and Oceans went so far as to allow Mr. Rowat to work on the media lines being prepared prior to disclosure of the requested records. F&O also acceded to Mr. Rowat's suggestion that records relating to a specific trip be removed from the disclosure package. Those records should not have been removed and were disclosed during the commissioner's investigation.)

It was not, however, the slow service or deference to Mr. Rowat which prompted the complaint to the Information Commissioner. After the requests had been made, and before

answers were given, the access requester received a letter (on paper bearing no letterhead) from Mr. Rowat. The letter stated the following:

> "It has come to my attention that you and/or your organization are collecting a comprehensive file on my personal and professional activities. Will you please:
>
> - notify me in writing if, in fact, you are preparing a file, which in any way concerns me.
> - If so, advise me of your intended purpose and use of that information.
> - Provide me with a copy of all current information you have in your files that pertains to me.
> - All requests or approaches you have in train to collect information on me and my activities and provide me such information when it is received by you.
>
> I am providing a copy of this letter to the Canada Privacy Commissioner."

The access requester found this letter to be intimidating and became concerned that one or more officials of PCO or F&O had improperly disclosed the requester's identity to Mr. Rowat. This prompted the complaint.

At the outset, it was expected that the investigation of this complaint would be straightforward: Mr. Rowat would tell the commissioner who had disclosed the requester's identity to him and the commissioner would assess whether or not there was any impropriety associated with the disclosure. Alas, the investigation became one of the longest and most complicated in the history of the commissioner's office. Here is a list of the major surprises in chronological order:

1) Mr. Rowat refused to disclose to the commissioner the identity of his source stating that his source was "a senior media contact" and that he did not wish to "destroy a good contact";

2) Mr. Rowat was cited for contempt for refusal to answer the commissioner's question and the commissioner made arrangements to try Mr. Rowat for the offense of contempt;

3) Mr. Rowat asked the Federal Court to stop the investigation and declare unconstitutional the commissioner's power to try and punish the offense of contempt. The Privy Council Office agreed to fund Mr. Rowat's court challenge;

4) The Federal Court dismissed Mr. Rowat's application and authorized the commissioner to proceed to try Mr. Rowat for contempt;

5) Mr. Rowat reconsidered his refusal to answer and agreed to appear to answer the question as to the identity of his source;

6) Mr. Rowat offered a surprising answer: He stated that he had forgotten the identity of the source, saying that he met the source only on one occasion at the Ottawa Press Club bar and had, almost immediately, forgotten the person's name. Mr. Rowat testified that he would not even recognize the person if he saw him again;

7) The commissioner informed the Federal Court of Mr. Rowat's loss of memory and the court made a punitive award of costs against Mr. Rowat. The Privy Council Office authorized the payment of this penalty out of public funds, adding to the burden on the taxpayer;

8) The investigation determined that several officials of F&O and PCO had communications with Mr. Rowat during the processing of the access requests at issue;

9) The investigation determined that certain officials of PCO and PMO, who had no legitimate need to know the requester's identity, had asked for and were given the requester's identity. These officials were the Executive Assistant to the former Clerk of the Privy Council, Jocelyne Bourgon, and the Executive Assistant to the former Chief of Staff to the Prime Minister, Jean Pelletier;

10) The disclosures referred to in (9) were in contravention of a pre-existing undertaking given by PCO to develop a policy restricting the disclosure of requester identities.

At the end of the day, the commissioner concluded that, when Mr. Rowat wrote his letter to the access requester, Mr. Rowat knew the addressee had made requests for information about him under the *Access to Information Act*. Second, he concluded that Mr. Rowat knew or should have known that the letter was intimidating by its nature. Third, the commissioner concluded that it is inappropriate for any senior official to subject any person exercising rights under the Access Act to any form of harassment, threat, reprisal or penalty. Fourthly, the commissioner concluded that it was a public official, not a stranger in a bar, who disclosed the requester's identity to Mr. Rowat. Finally, the commissioner concluded that Mr. Rowat had no legitimate need to know the identity of the person who had made access requests for information concerning him. The disclosure of the requester's identity to him was inappropriate and the official(s) who made the disclosure were responsible for setting in train the series of events which resulted in Mr. Rowat's unfortunate decision to write an intimidating letter to a person who was exercising a legal right.

In the end, however, the commissioner could not determine with certainty the identities of the public official(s) who had disclosed the identity to Mr. Rowat. He contented himself with recommendations to the Prime Minister and Minister of Fisheries and Oceans for improved policies and education concerning the protection of requester identities. These recommendations were accepted and are being implemented.

Incident #2: Misleading a Requester

In late April and early May of 1999, allegations were made in the House of Commons, and repeated in the media, that the Hon. Paul Martin, P.C., may have been in a conflict of interest when he allegedly participated in cabinet deliberations relating to compensation for recipients of tainted blood and blood products. The source of the alleged conflict of interest was that Mr. Martin, prior to his election to Parliament, had been a member of the Board of Directors of the Canada Development Corporation (CDC) at a time when CDC owned Connaught Laboratories, a supplier of blood and blood products. It was alleged that Mr. Martin may have participated in meetings of the CDC Board of Directors where there were discussions of the safety of its blood products and how the company should react to concerns relating thereto.

Those allegations of conflict of interest prompted Mr. Martin, the Minister of Finance, to ask his officials (exempt staff and departmental officers) to conduct a thorough search within the

department, throughout government and in the private sector, for any records which could shed light on the allegations. In particular, the minister asked his officials to find copies of the minutes of the CDC Board of Directors during the period of his tenure thereon, and to make those minutes public as soon as possible.

The allegations prompted both the Minister of Finance and an opposition member of Parliament, acting independently, to ask the Prime Minister's Ethics Counsellor to investigate the allegation of conflict of interest. The Ethics Counsellor commenced his investigation in late May of 1999. As part of his investigation, the Ethics Counsellor commenced a search for relevant records including copies of minutes of meetings of the CDC Board of Directors. The Ethics Counsellor sought, and was promised, the cooperation of officials of Finance Canada in locating relevant records.

The public allegations of conflict of interest also prompted certain political researchers and a tainted blood victims group to submit requests to Finance Canada, under the *Access to Information Act*, for minutes of meetings of the Board of Directors of CDC and Connaught Laboratories. Between May and July of 1999, Finance Canada received four such access requests. These requests imposed a legal obligation upon the Minister of Finance and his officials to search for and locate all requested records held by Finance Canada and to disclose them, unless exemptions could be properly claimed under the Act.

The confluence of these factors – the minister's direction, the Ethics Counsellor's investigation and the access to information requests – resulted in there being a high priority placed within Finance Canada upon the search for CDC minutes. These factors also gave rise to a high degree of senior level interest, within the department and minister's office, concerning the outcome of the search, the processing of the related access requests and the progress of the Ethics Counsellor's investigation.

The requests were answered in July and August of 1999. The requesters were all given the same response: "I must inform you that after a thorough search, no records were found to respond to your requests." That appeared to be the end of the matter until, some eight months later, an extraordinary event occurred.

A memo came to light of a telephone conversation which had taken place on July 6, 1999, between the Deputy Ethics Counsellor and Finance Canada's Access to Information Coordinator. That memo seemed to indicate that a set of CDC minutes had been given to Finance Canada on June 7, 1999, (before the access requests were answered), by the Office of the Ethics Counsellor. The memo seemed to indicate that the Deputy Ethics Counsellor was expressing to the Finance official his discomfort with the Finance department's proposal to tell the access requesters that "no records were found".

The coming to light of this memo caused the requesters and the Information Commissioner to doubt the veracity of the responses given by Finance Canada eight months earlier. An investigation commenced; here are the details.

Before the access requests were answered, a set of CDC board minutes was tracked down at the offices of Nova Corporation in Calgary. An official of

Finance Canada, accompanied by an official from the Office of the Ethics Counsellor, visited Nova Corporation on June 4, 1999. A copy of the minutes was made and it was taken back to the Office of the Ethics Counsellor. The Finance official testified that he took pains not to bring a set back to Finance Canada because he knew the department had received access requests for them and he did not want these newly found records to be captured by those requests.

However, on June 7, 1999, the Finance official who had visited Nova Corporation was instructed by his superior to obtain a set of the minutes from the Office of the Ethics Counsellor. The superior intended to brief the most senior officials of the department on the minutes and wanted to have copies available for the briefing. On that date, June 7, 1999, the Office of the Ethics Counsellor did send a set of CDC Board minutes to Finance Canada, copies were made by Finance Canada officials and they were distributed at the briefing of Finance officials held on that date.

Present at the meeting of June 7, 1999, were the Deputy Minister of Finance, Assistant Deputy Minister (Law), Assistant Deputy Minister (Economic Development and Corporate Finance), Director (Corporate Finance and Privatization) and the Departmental Secretary. The evidence is that everyone present was fully aware that the department was seized of access requests for the very records which were distributed at the meeting. Yet, at the end of that meeting, it was understood that the original set of minutes would be returned to the Ethics Counsellor and all copies would be destroyed.

As it turned out, the Office of the Ethics Counsellor refused to accept the proposal to return the records and the Finance officer who had originally located the records at Nova Corporation placed the originally received set of CDC Board minutes into his file. All other copies were destroyed. Consequently, when the "no records were found" responses were given, records had, in fact, been found; they were in the files of Finance Canada and the most senior officials of the department were aware of the "disconnect" between the facts and the responses.

Finance Canada was neither embarrassed nor apologetic when these facts came to light. Refuge was taken in a legal argument as follows: although CDC minutes had been found before the answers were given, they did not come into the possession of Finance Canada before most of the requests had been received. Finance Canada argued that the date of receipt was the "cut-off" date for its search and that it was under no obligation to acknowledge the existence of any records located thereafter.

In fact, the first draft of the response letters included the qualifying words "as of the date of receipt" after the words "no records were found". However, the Assistant Deputy Minister (Law) removed these qualifying words in order, in his words, to "avoid confusing" the requesters.

Even this legal technicality did not justify the answer to one of the requests. One request had been received after the date on which the set of CDC Board minutes had come into the possession of Finance Canada. By way of explanation in this case, Finance Canada simply said that everyone assumed that the instruction to send back the original and destroy the copies

had been followed. Those responsible for answering the request said that the officer charged with returning the records to the Ethics Counsellor did not tell anyone that he had failed in that task and that he had kept a copy in his files.

The commissioner was not much impressed by these justifications. He concluded that the answers given to the requests for CDC Board minutes were so bereft of helpful information that he found them to be intentionally misleading. Officials chose not to inform the requesters about the legalistic, "cut-off-date" approach being taken; they also chose not to tell the requesters that CDC Board minutes had been found at Nova Corporation and were either in Finance files, in the files of the Ethics Counsellor, or both.

The commissioner did not disagree with the view that it is generally reasonable to treat the date of receipt of an access request as the cut-off date for search purposes. However, he expressed the view that departments are under a "good service" obligation to inform requesters, when the fact is known, that additional relevant records came to light after the date of receipt of an access request. Requesters would then be able to submit a new request, should they so desire.

As well, he expressed the view that departments are under a "good service" obligation to inform requesters, when the fact is known, that records may be held elsewhere in government. Indeed, there is a legal obligation under subsection 8(1) of the *Access to Information Act* to consider whether or not to transfer an access request, within 15 days of receipt, to another government institution having a greater interest in the records.

If all of this was not sufficiently troubling, it also came to light that the CDC minutes provided to Finance by the Ethics Counsellor were not the only CDC minutes held by Finance. All along, a file containing CDC minutes was in a file cabinet in the area of the department responsible for dealings with Crown corporations. Despite the extensive searches in response to the access requests, these records were not found until after the commissioner's investigation was underway.

It is disheartening after 19 years of living with the access law to have to remind senior officials of government that responses to access requests should be as forthcoming and helpful as is reasonably possible. The silver lining in this dark cloud is that there was no evidence that the minister had any involvement in, or knowledge of, his department's strategy in answering these access requests. As well, the minister accepted the commissioner's recommendations to conduct appropriate training for his officials, to establish some new procedures designed to prevent a recurrence and to commission an independent review of the department's information management policies, practices and procedures.

Delays: The Bad News

It is clear in the *Access to Information Act* (subsection 10(3)) that requests not answered within statutory deadlines are deemed to have been refused. This is a statutory recognition of the reality that unauthorized delays constitute constructive refusals even though the receiving institution has not actually refused to give access. This notion of "deemed" or "constructive" refusal is important, in legal terms, because some of the Information Commissioner's investigative jurisdiction and all of the Federal Court's review jurisdiction

rests on there having been a "refusal" of access to a record requested under the *Access to Information Act*.

Consequently, if a department fails to respond to an access request within 30 days, or within an extended period of time authorized by the Act, the Information Commissioner and the Federal Court have jurisdiction to proceed in the same manner and to the same extent as if there had been an actual refusal to give access. This much can be said with certainty based on the previously mentioned decision of the Federal Court of Appeal in *Information Commissioner of Canada* v. *Minister of National Defence* (1999) F.C.J. No. 522.

This year, a new, and troubling, wrinkle was added. Citizenship and Immigration Canada claimed three-year extensions of time (beyond the ordinary 30-day deadline) to respond to a number of requests from the same requester. The complainant objected to the length of the extension and complained to the Information Commissioner. During the investigation, the commissioner formed the view that the extensions were improper for two reasons. First, the criteria for claiming an extension of time had not been met (the department had grouped all requests from the individual in coming to the conclusion that a large volume of records was involved; the Act requires that this determination be made on a request-by-request basis). Further, he concluded that the three-year duration applied to every request was unreasonable.

Having made the determination that an extension was not properly claimed and that the duration was unreasonable, the commissioner determined that there had been a "constructive" or "deemed" refusal to provide access. He, thus, proceeded to a second phase of investigation which is designed to assess whether or not there is justification under the exemption and exclusion provisions of the Act for refusal to give access. This second phase, according to the previously referred to Federal Court of Appeal decision is a pre-condition for opening to the commissioner and the complainant the right to seek Federal Court review of a government institution's refusal to give access to requested records.

At this point, the department raised an objection. It took the position that even an unreasonably long or improperly claimed extension of time does not become a "constructive" or "deemed" refusal until the extended period lapses without a response having been given. Thus, the department challenged the commissioner's jurisdiction to move to the "deemed refusal" phase of his investigation after he had determined the duration of the extension to be unreasonable.

This year, the matter was heard by the Federal Court, Trial Division, and a decision was rendered by Justice Kellen. Justice Kellen accepted the position put forward by Citizenship and Immigration Canada and concluded that there could be no "constructive" or "deemed" refusal unless the department failed to answer within the three-year extension it had claimed. The judge ruled that, no matter how unreasonable the period of the extension, the Information Commissioner could not investigate the delay as a "deemed refusal" and neither could there be any recourse to the court to challenge the delay as a "deemed refusal", until the extended time period had elapsed.

Justice Kellen took the view that the only recourse open to the commissioner

under the law is to report instances of unreasonable extensions to Parliament.

The implications of this decision are enormously troubling for the right of access. Departments are now free, with impunity, to invoke long extensions to the 30-day rule. Moreover, they could, by extension of the reasoning in this case, demand exorbitant fee deposits without fear that the commissioner or the courts could consider such an action to be a "constructive" refusal for which there is a remedy.

Already the effects of this decision are being felt, as long extensions are invoked by other departments.

Since this ruling flies so squarely in the face of Parliament's express intention that access should not be denied by being delayed, the Information Commissioner has appealed the decision.

Performance Positives

Delays – the Good News

This year, the Office of the Information Commissioner conducted follow-up reviews in six departments for the purpose of preparing "report cards" on their performance in meeting response deadlines under the *Access to Information Act*. The six departments are:

1. Canada Customs and Revenue Agency (CCRA)
2. Citizenship and Immigration Canada (CIC)
3. Department of National Defence (ND)
4. Foreign Affairs and International Trade (DFAIT)
5. Fisheries and Oceans Canada (F&O)
6. Transport Canada (TC)

The grading scale used is based on the percentage of access requests received by a department which are not answered within 30 days or within the extended deadline chosen by the department. Here is the scale:

% of requests answered late	**Comment**	**Grade**
0-5%	ideal	A
5-10%	substantial	B
10-15%	borderline	C
15-20%	below standard	D
over 20%	red alert	F

Summary of Report Card Results

The following chart shows the percentage of late answers (and corresponding guide) for this reporting year as compared with last.

Department	**Apr. to Dec. 2000**	**Apr. to Dec. 2001**
CCRA	14.9 (C)	9.6 (B)
CIC	19.7 (D)	13.0 (C)
ND	17.0 (D)	11.8 (C)
DFAIT	29.3 (F)	17.7 (D)
F&O	32.8 (F)	42.2 (F)
TC	23.7 (F)	11.7 (C)

With one exception, all got a better grade this year. Fisheries and Oceans, regrettably, performed more poorly this year than last. However, even in the case of Fisheries and Oceans, the commissioner's review showed that the business plan and resources are now in place to enable F&O to turn the corner next year. (Details about the results of all six report cards are set out in Chapter VII, page 113.)

Since 1999, the commissioner's office has completed report cards and report card follow-ups on nine departments. In addition to the six mentioned above, report cards were completed on Privy Council Office, Health Canada, and Human Resources Development Canada. Follow-ups were not undertaken this year on the latter three departments because they each received an "A" in previous reviews.

Together, these nine departments account for a large proportion of the access requests received by government in 2001-2002. Good performance by this group has an enormously positive effect on the performance of the entire access system.

Departments with a management (operational or business) plan to reduce the number of delays are the most successful in their efforts to improve. Each department has taken a somewhat different approach, and this is understandable given differences in the number and types of requesters, the nature of records held, and the size and degree of centralization of the department.

But there are some common features of "good" ATI improvement plans. There must be senior level commitment to, and monitoring of, improved performance. The evidence of such commitment is the allocation of needed human and financial resources. Putting the resources in place, to meet the forecastable workload of access requests – both in the ATI units and in the operational units where searches and initial reviews are undertaken – is key to any good plan.

As well, effective ATI improvement plans include careful attention to i) minimizing the action/decision points in the system, ii) educating everyone involved in processing requests as to what is expected of them and the amount of time available to them for the purpose, and iii) generating statistical reports to enable managers to monitor performance, identify bottlenecks and take corrective action before complaints are made to the commissioner.

This year, as in the past, one of the common reasons for delayed and inadequate answers to access requests, is the poor state of records management in many departments. Departmental access coordinators tell the commissioner that central records registries are unreliable and that electronic records are rarely included in the departmental records systems or properly conserved even in the operational units where they are created. Searches for records in response to access requests are time-consuming as a result and there can be little certainty that the searches have located all relevant records.

This deficiency, as reported last year, not only undermines the right of timely access to records, it eats away at the effectiveness and efficiency of all aspects of government business. The department responsible for ensuring that all government records are managed so as to facilitate the right of access is Treasury Board. The Board is fully aware of the problem and is developing helpful, detailed guidance to assist departments in addressing the records management "crisis".

Better Assessment Tools

During this year's reviews, departmental officials asked the Information Commissioner to distill a set of "best practices" from past years' report cards. These could become a helpful self-assessment guide for departmental ATI officials and managers. As well, departmental officials asked for the commissioner's office to provide a guideline on routine disclosure and active dissemination of information. There is a widespread feeling that more of the public's information needs could be met outside the *Access to Information Act*.

Finally, departmental officials asked the Information Commissioner to expand the benchmarks used to grade the

performance of departments. At present, report card grades depend entirely on the percentage of access requests which were not answered on time. Officials felt that other benchmarks might be helpful in assisting departments and the commissioner to get a multi-dimensional appreciation of a department's performance. Some of the other factors which have been suggested are: number of pages of records disclosed; percentage of requested information which was exempted; and the amount of information disclosed informally or proactively disseminated.

All of these constructive suggestions merit careful review and the office of the commissioner undertakes to do so in the coming year.

A final word on the issue of delay. All departments identified the cabinet confidence review process as a major and worsening source of delay in the system. Whenever a department identifies a record, in response to an access request, which might contain a cabinet confidence, there must be a consultation with the office of the counsel to the Privy Council Office. There is now a wait of up to six months before PCO will even begin a consultation. PCO has not yet allocated sufficient resources to keep up with this workload and there is, as a result, an adverse effect on the entire system. PCO is not insensitive to this problem and it is to be hoped that it will be addressed in the coming year.

Treasury Board Initiatives

In terms of its profile and resources, the access to information policy center within Treasury Board has been strengthened. It is now an autonomous division called Information and Security Policy Division. An experienced former access to information coordinator leads five senior policy officers (up from four last year).

This year, regular meetings with an advisory committee of some 20 departmental coordinators were reinstated. Its mandate is to act as a consultative group on access and privacy issues, a forum for sharing best practices in the management of access requests and a means by which Treasury Board may insure a consistency of approach to types of access requests. This year, the advisory committee was consulted on several occasions by the Access to Information Review Task Force.

Treasury Board, also this year, introduced a program of awards for excellence in the access to information and privacy community. The first awards will be given in 2002 at the annual TBS sponsored access to information and privacy conference. The award categories are: outstanding dedication, excellence in service and innovation, and leadership and community spirit. Kudos to Treasury Board for this gesture of honour, gratitude and respect towards the unsung heroes in the access to information régime.

Also worthy of note and praise is the Treasury Board's provision of continuous learning opportunities for the access to information community. Since the training program was launched in September 2000, the number of sessions has doubled. There are lunch-and-learn, half-day and full-day sessions on a variety of topics. Even more education and training initiatives are being planned through consultations with a training advisory group and careful review of the results of a survey of the access

community which covered training needs, among other matters.

Finally, as mentioned previously, the Treasury Board has taken steps to address the crisis in information management in government.

The Commissioner's Performance

Losing Patience about Delays

In 1998, when this commissioner began his seven-year term of office, his first priority was to solve the chronic, worsening problem of delay in answering access requests. The outgoing commissioner, John W. Grace, had referred to the phenomenon of delay as a "silent, festering scandal." Canada's first information commissioner, Inger Hansen, had also identified the problem of delay as a grave threat to the public's right of access.

This Information Commissioner promised members of Parliament (during their pre-appointment review of his suitability) that he would take on the delay problem with vigour. He promised to inform Parliament, by means of report cards, about the performance of specific departments. These report cards would identify specific causes of delay, those with failing grades, make constructive suggestions for improvement and track remedial action in subsequent years.

The commissioner delivered on this promise. Since 1998, 26 report cards have been completed and tabled in Parliament.

As well, the commissioner promised to take a harder line in investigations of individual complaints of delay. Prior to 1998, complaint investigations involved negotiating a reasonable, revised response deadline (a departmental commitment). If the revised deadline was not met, further negotiations were undertaken for a second revised date. Only if that second date was also missed, would the aid of the Federal Court be sought to force an answer. Inevitably, however, the answers were given before the court process could wend its way to a hearing.

In 1998, this commissioner adopted the one-chance-to-correct approach to delays. Under this approach, failure by a department to honour the revised response date negotiated with the commissioner, or failure to give a commitment to a fixed response date, would trigger a "deemed-refusal" investigation. The Federal Court of Appeal describes such an investigation as follows:

> "…as soon as the institution failed to comply with the time limit, the commissioner could have initiated his investigation as if there had been a time refusal. He does have powers to investigate including, at the beginning of an investigation, the power to compel the institution to explain the reasons for its refusal."
>
> *(Information Commissioner of Canada* v. *Minister of National Defence* (1999) F.C.J. No. 522 (F.C.A.), para. 21)

In other words, departments were given one fair opportunity to answer a delayed response by a reasonable, but fixed, date. Failure to take advantage of that opportunity would require senior officials of the department to justify, in formal proceedings, the legal basis for what the law deems to be a refusal to grant access.

After this less-tolerant approach was adopted, two instances arose (both in 1999) where deputy ministers were required to appear and give evidence

under oath concerning delayed responses. On both occasions, the access requests in issue were answered by the date of the appearances. No deputy ministers have been asked, since, to give evidence in a case of delay. Since those two instances, departments routinely give and respect revised response date commitments.

There is no doubt that there was a certain resentment against the Information Commissioner's approach which arose among the deputy minister cadre. Yet, the new approach (report cards + tougher investigative approach) is solving, finally, the long standing, chronic problem of delay in the system.

For example, the complaints of delay to the commissioner have traditionally run in the range of 50 percent or more of the total complaints. This year, that figure has dropped to 28.8 percent. The results of the report cards also show dramatic turnarounds. All major departments have had infusions of new resources to meet workload demands, and the report card results were instrumental in convincing ministers to seek, and Treasury Board to grant, the much needed infusion of resources.

The positive effects of the report cards can be seen from the following chart:

	1998-1999	1999-2000	2000-2001	2001-2002
CCRA	F	F	C	B
CIC	F	F	D	C
DFAIT	F	F	F	D
F&O	–	–	F	F
HCan	F	A	–	–
HRDC	–	A	–	–
ND	F	F	D	C
PCO	F	A	–	–
TC	–	F	F	C

In 1998-99, all six departments reviewed received an "F." By the next year, two of these experienced dramatic improvements and received "A's". Those which continued to get failing grades, were showing significantly lower percentages of late answers. By last year, only two of the original six received a grade of "F" and, this year, all of the original six departments were out of the "failing" category. A similar pattern of improvement is emerging with respect to F&O and Transport Canada.

Next year, those who have not yet received an "A" will be reported on again as well as those who achieved an "A" in the past to see whether or not there has been slippage.

Delays in the Commissioner's Office

Practicing what one preaches is essential for any regulatory or oversight body. Canadians are not much impressed if their complaints against government are not dealt with in a timely manner. On this point, the commissioner has not had much success. Since the beginning of his term in 1998, the average time it takes to complete an investigation has risen from 3.9 months to 7.8 months in this reporting year. Equally troubling, the backlog of cases which remained incomplete at year's end has grown from 742 in 1998 to 922 last year. In this year, a backlog of 729 cases exists.

Every conceivable productivity improvement has been introduced: conversion of management, policy, public affairs positions to investigator positions; introduction of a rigorous time-management system for investigations; improved training and work tools for investigators and greater reliance on computerized approaches to case management, precedents and report preparation. Independent consultants and officials

of Treasury Board Secretariat have reviewed the office's utilization of its resources.

There is agreement on this point: 25 investigators cannot handle expeditiously some 1,200 to 1,500 complaints per annum of increasing complexity, against in excess of 150 government institutions with offices spread across Canada and the world. Without additional investigators and without more rapid responses by departments to investigators' questions and requests, turnaround times and backlogs will not improve to an acceptable level. Parliament has been alerted to the difficulties being experienced by the Information Commissioner in obtaining the level of funding required from Treasury Board to meet his statutory workload. More will be said in Chapter II concerning the need for more timely cooperation from the departments during investigations.

The resource problem does not only manifest itself in the inadequate numbers of investigators. It also negatively affects the ability of the commissioner's office to play a constructive role in the system through research, education, public information and provision of advice to government and Parliament on legislative proposals.

Canadians have every right to expect timely investigations just as they have a right to expect timely answers to their access request. This commissioner takes no pride in his record in this regard. But this commissioner is entirely dependent for resources upon the government which he is charged with investigating. In the end, through the purse strings, the government controls the effectiveness of the Office of the Information Commissioner. This is the point where the theory of the commissioner's independence runs afoul of the reality of his dependence upon the government of the day.

No provincial ombudsman or access to information commissioner is in this invidious position. Provincial legislatures, not government management boards, provide funds to their independent officers. Perhaps, it is time for this approach to be adopted at the federal level. One way or another, the time is certainly here for a reasonable infusion of resources to the Office of the Information Commissioner in the same way that the major departments of government have received an infusion of resources to solve their delay problems.

Resolving Complaints Without Recourse to the Courts

Although the Canadian *Access to Information Act* was modeled in large measure on the U.S. *Freedom of Information Act*, the two differ in one major respect. In the U.S., aggrieved requesters must seek their remedy from the U.S. federal courts. The Canadian approach was to adopt a specialized ombudsman for access complaints in an effort to minimize the financial burden on requesters and the work burden on the Federal Court. Consequently, information commissioners measure their effectiveness, in part, on the degree to which they are able to resolve complaints without recourse to the Federal Court.

Last year, the commissioner investigated 1,337 complaints. In only two cases did it prove impossible to achieve a resolution without recourse to the courts. This year, again, only two cases out of 1,163 investigations could not be resolved. This represents a 99.95 percent success rate.

For a full picture, one must also take into account the number of occasions when complainants are dissatisfied with the outcome of the commissioner's investigation, and proceed, on their own, to take the matter to Federal Court. Last year, 5 cases were taken to Federal Court by individuals whose complaints against government had not been supported by the Information Commissioner. This year 9 such cases were launched in Federal Court. By this measure, too, the alternative (to the courts) dispute resolution service offered by the Office of the Information Commissioner continues to be highly effective.

The Quality of the Relationship with Government

Previously, it was mentioned that some deputy ministers reacted negatively to being implicated in delay investigations. In addition to that irritant in relations, the commissioner encountered resistance by the Prime Minister and his officials when the commissioner attempted to see records and ask questions about the Prime Minister's denial of an access request for his agenda books. (Some 27 cases taken by the Crown against the Information Commissioner are currently before the Federal Court seeking to challenge a number of aspects of this investigation.) The resistance manifested itself in the refusal by five witnesses to voluntarily assist the commissioner with his investigative inquiries.

These two instances, in four years, where senior elected and non-elected officials found themselves compelled to give evidence to the Information Commissioner, under oath, sounded a sour note in relations between the Office of the Information Commissioner and the leadership of government.

It is fair to say that these two instances have put a strain on the spirit of mutual trust and respect without which the commissioner's investigations/dispute resolution work can become very tough sledding for all concerned. The commissioner regrets what he sees as an unwillingness to cooperate with his investigations. The leadership of government regrets what it sees as overreaching or overzealousness by the commissioner in his investigations. As with most issues of trust, the path to resolution will be found through keeping lines of communication open and bearing down on the problem not on the people.

Demystifying the Process:

Procedural Guidelines

For his part, the commissioner will take some concrete steps to demystify the investigative process. First, procedural guidelines will be published in the coming year. These guidelines will outline the usual approaches taken by the commissioner in investigating various types of complaints; explain the reasons for them and for deviations therefrom; describe the roles, rights and obligations of witnesses and counsel in the process; clarify the nature of the commissioner's powers as well as how and when formal powers may be used and describe the means by which the commissioner balances his obligation to investigate in private against his obligation to report results to complainants, government and Parliament.

Training

Second, the commissioner will seek funds from Treasury Board to enable him to develop and offer ongoing training materials and modules, concerning the investigative process, for ministerial exempt staff, seniors officials, line managers and access

professionals. Ideally, the training would be done in cooperation with the Treasury Board training program.

Precedents

Finally, the commissioner will evaluate how best to communicate his "jurisprudence" to the access community and public. At present, cases having precedential value are published annually in summary form (and indexed by section of the Act), in the commissioner's report to Parliament. The confidentiality constraints placed on the commissioner by sections 62 to 64 of the *Access to Information Act* do not permit the commissioner to disclose information he learns during investigations except in reports to:

1) complainants;

2) the government institutions against which complaints are made;

3) Parliament in an annual report; and

4) Parliament in a special report.

However, within those constraints, efforts will be made to find the most helpful vehicle and form for making the commissioner's precedents available to interested parties. In this regard, too, needed additional resources will be sought from Treasury Board.

CHAPTER II:
OPERATIONS – THE YEAR IN REVIEW

In the reporting year (2001-2002), 1,049 complaints were made to the commissioner against government institutions (see Table 1). Table 2 indicates that 1,232 investigations were completed, 28.2 percent of all completed complaints being of delay. Last year, by comparison, 43.1 percent of complaints concerned delay. This significant drop in the number of delay complaints is indicative of a generally improving performance by government in meeting response deadlines.

In addition to the complaints received this year, the office responded to 3,396 inquiries.

Resolutions of complaints were achieved in every completed investigation with only two exceptions. Those cases are reported at pages 52 to 54 and 55 to 58. With the consent of the requesters, they will be brought before the Federal Court for review.

As seen from Table 3, the overall turnaround time for complaint investigations increased to 7.8 months from 5.4 months last year. Parliament was alerted last year to the deterioration in the office's ability to deliver timely investigations due to resource constraints and a heavy burden of complex investigations and investigations where it proved difficult to secure informal cooperation from government.

Table 1 reminds us that there continues to be a troubling backlog of incomplete investigations. Last year it was 922, this year it is 729. Even though progress was made this year in reducing the backlog, it remains at an unacceptable level and effects the completion time of all cases. Some of the progress in reducing the backlog is due to an infusion of new resources from Treasury Board. At this writing, the commissioner is endeavouring to convince the Treasury Board that there is some further way to go before his office is adequately resourced to effectively fulfill its mandate.

As can be seen from Table 4, complaints were made against 54 government institutions. Some 65 percent of all complaints were made against only ten government institutions. This phenomenon corresponds with the access requests received by government as a whole: a few institutions account for the bulk of all requests.

The top ten "complained against" institutions are:

1.	Citizenship and Immigration Canada	127
2.	National Defence	109
3.	Canada Customs and Revenue Agency	76
4.	Royal Canadian Mounted Police	63
5.	Public Works and Government Services Canada	56
6.	Correctional Service Canada	55
7.	Human Resources Development Canada	55
8.	Foreign Affairs and International Trade	48
9.	Treasury Board Secretariat	47
10.	Justice Canada	46

Being on this list does not necessarily mean that these institutions performed poorly. To better assess "performance" one must look at the number of complaints against each institution

which were found to have merit versus the number which were not substantiated. In this regard, it is not possible to do a directly corresponding "top ten" list based on number of meritorious complaints. Some complaint findings this year were made in relation to complaints received last year and some complaints received this year remain under investigation.

Nevertheless, if one were to list the "top ten" institutions against whom complaints were made which the commissioner found, in this reporting year, to have merit (resolved or well-founded), the list would be:

1.	Citizenship and Immigration Canada	150 of 230 completed
2.	Human Resources Development Canada	54 of 64 completed
3.	National Defence	45 of 130 completed
4.	Fisheries and Oceans Canada	42 of 58 completed
5.	Canada Customs and Revenue Agency	35 of 64 completed
6.	Royal Canadian Mounted Police	32 of 77 completed
7.	Public Works and Government Services Canada	31 of 55 completed
8.	Foreign Affairs and International Trade	29 of 46 completed
9.	Health Canada	28 of 67 completed
10.	Correctional Service Canada	27 of 54 completed

While the rankings vary between the two lists, the same institutions are represented on both lists, with two exceptions: Justice Canada and Treasury Board Secretariat do not make the top ten list of meritorious complaints. They are replaced on the latter list by Fisheries and Oceans Canada and Health Canada.

Last year, special mention was made of the difficulties being experienced by Citizenship and Immigration Canada in dealing with a large volume of access requests in an efficient manner. Since that report, additional resources and new procedures have been put in place. While Citizenship and Immigration Canada still tops both lists (number of complaints against and number of meritorious complaints against) improved performance is beginning to show. As indicated in the report card results (see pages 121 to 125), the percentage of requests received which are answered late dropped to 13 percent for the period April 1, 2000 – November 30, 2001. By comparison, in the previous year the rate was almost 20 percent.

Formality vs Informality

In this reporting year, the vast majority of investigations were conducted informally at the investigator-analyst level. In this informal mode, witnesses voluntarily answer questions without presence of counsel, institutions voluntarily provide records, witnesses are not placed on oath and verbatim recordings of evidence are not made.

Formality (subpoenas, orders for production, evidence under oath, verbatim transcripts, presence of counsel) was required this year in only four investigations – three of which concerned the accessibility of records held in ministers' offices or the Office of the Prime Minister. The other investigation where a formal approach was adopted concerned a situation where responses to access requests were in a chronic state of delay as a result of languishing for unacceptably long periods in a minister's office.

Table 1: STATUS OF COMPLAINTS		
	April 1, 2000 to Mar. 31, 2001	April 1, 2001 to Mar. 31, 2002
Pending from previous year	571	912
Opened during the year	1678	1049
Completed during the year	1337	1232
Pending at year-end	912	729

Table 2: COMPLAINT FINDINGS *(April 1, 2001 to March 31, 2002)*

	FINDING					
CATEGORY	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL	%
Refusal to disclose	277	2	312	99	690	56.0%
Delay (deemed refusal)	299	–	31	18	348	28.2%
Time extension	47	–	14	15	76	6.2%
Fees	23	–	28	17	68	5.5%
Language	–	–	1	–	1	0.1%
Publications	–	–	–	–	–	–
Miscellaneous	25	–	15	9	49	4.0%
TOTAL	**671**	**2**	**401**	**158**	**1232**	**100%**
100%	54.5%	0.1%	32.6%	12.8%		

Table 3: TURNAROUND TIME *(Months)*

	99.04.01 – 2000.03.31		2000.04.01 – 2001.03.31		2001.04.01 – 2002.03.31	
CATEGORY	Months	Cases	Months	Cases	Months	Cases
Refusal to disclose	5.99	537	7.83	534	9.76	690
Delay (deemed refusal)	3.44	749	3.33	575	4.99	348
Time extension	2.33	134	4.18	151	5.59	76
Fees	5.41	55	7.02	54	5.84	68
Language	–	–	–	–	2.33	1
Publications	–	–	–	–	–	–
Miscellaneous	4.34	55	4.61	23	7.82	49
Overall	**4.34**	**1530**	**5.40**	**1337**	**7.85**	**1232**

Last year, the commissioner issued 21 orders compelling the production of records or the appearance of witnesses. This year, the number dropped to seven as follows:

5 compelled the appearance of witnesses and the production of records

1 compelled the appearance of a witness

1 compelled the production of records

Orders were issued to a minister of the Crown, the Clerk of the Privy Council, two ministerial assistants and one access coordinator. All witnesses were invited to cooperate voluntarily, yet chose not to on the advice of counsel. None of the witnesses challenged the legality of the orders.

Table 4: COMPLAINT FINDINGS *(by government institution) Apr 1, 2001 to Mar 31, 2002*

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Agriculture and Agri-Food Canada	12	–	3	–	15
Atlantic Canada Opportunities Agency	4	–	1	2	7
Business Development Bank of Canada	2	–	3	–	5
Canada Customs and Revenue Agency	35	1	22	6	64
Canada Economic Development for the Quebec Region	–	–	3	3	
Canada Mortgage & Housing Corporation	1	–	–	–	1
Canada Newfoundland Offshore Petroleum Board	–	–	–	1	1
Canadian Environmental Assessment Agency	1	–	–	–	1
Canadian Film Development Corporation	–	–	1	–	1
Canadian Food Inspection Agency	4	–	5	2	11
Canadian Heritage	6	–	6	3	15
Canadian Human Rights Commission	–	–	2	–	2
Canadian International Development Agency	5	–	3	–	8
Canadian Radio-Television and Telecommunications Commission	1	–	1	–	2
Canadian Security Intelligence Service	1	–	8	6	15
Canadian Space Agency	–	–	1	1	2
Citizenship & Immigration Canada	150	–	75	5	230
Correctional Service Canada	27	–	26	1	54
Environment Canada	10	–	10	1	21
Farm Credit Corporation Canada	1	–	–	1	2
Finance Canada	13	–	6	–	19
Fisheries and Oceans Canada	42	–	12	4	58
Foreign Affairs and International Trade	29	–	9	8	46
Health Canada	28	–	26	13	67
Human Resources Development Canada	54	–	9	1	64

Table 4: COMPLAINT FINDINGS *(continued)*

GOVERNMENT INSTITUTION	Resolved	Not Resolved	Not Sub-stantiated	Discon-tinued	TOTAL
Immigration and Refugee Board	5	–	1	1	7
Indian and Northern Affairs Canada	4	–	4	3	12
Industry Canada	19	–	9	–	28
Justice Canada	21	–	10	4	35
National Archives of Canada	25	–	30	0	55
National Capital Commission	1	–	1	3	5
National Defence	45	–	25	60	130
National Gallery of Canada	–	–	1	2	3
National Research Council Canada	2	–	–	1	3
Natural Resources Canada	4	–	3	1	8
Office of the Inspector General of CSIS	1	–	–	–	1
Office of the Superintendent of Financial Institutions	1	–	–	–	1
Pacific Pilotage Authority Canada	–	–	–	1	1
Parks Canada Agency	1	–	–	–	1
Privy Council Office	19	–	5	2	26
Public Service Commission of Canada	–	–	1	1	2
Public Works and Government Services Canada	31	–	10	14	55
RCMP Public Complaints Commission	2	–	1	–	3
Royal Canadian Mounted Police	32	–	40	5	77
Security Intelligence Review Committee	–	–	3	–	3
Solicitor General Canada	1	–	3	1	5
Statistics Canada	2	–	1	–	3
Status of Women Canada	–	–	2	–	2
Toronto Port Authority	–	–	1	–	2
Transport Canada	14	–	9	4	27
Transportation Safety Board of Canada	1	1	–	–	2
Treasury Board Secretariat	11	–	7	–	18
Veterans Affairs Canada	1	–	2	–	3
Western Economic Diversification Canada	1	–	–	–	1
TOTAL	**671**	**2**	**401**	**158**	**1232**

Table 5: GEOGRAPHIC DISTRIBUTION OF COMPLAINTS
(by location of complainant) April 1, 2001 to March 31, 2002

	Rec'd	Closed
Outside Canada	4	10
Newfoundland	13	23
Prince Edward Island	0	2
Nova Scotia	44	37
New Brunswick	3	6
Quebec	91	96
National Capital Region	442	500
Ontario	166	223
Manitoba	64	56
Saskatchewan	19	11
Alberta	47	46
British Columbia	148	217
Yukon	2	1
Northwest Territories	5	3
Nunavut	1	1
TOTAL	**1049**	**1232**

Some counsel take the view that their right to be present during the evidence of their client (before the commissioner) is strengthened if the client has been ordered (subpoenaed) to appear. The commissioner has never refused a witness the opportunity to be assisted by his or her own counsel and, so, this added formality is entirely unnecessary.

That being said, investigators are not trained as lawyers (with rare exceptions) and are not trained to respond to and rule on legal objections made in the course of interviews. They are trained in interviewing, communicating, negotiating and persuasion techniques. Consequently, when a witness insists on having counsel, the investigator, too, may feel the need for legal assistance. Thus, there may be an escalation of formality.

It is to be hoped that, with the publication of procedural guidance (as discussed on page 35) and an ongoing effort to demystify the investigative process, it will be possible to keep the high level of informality in the system which has been its hallmark and strength over the years.

One further pressure for increased formality relates to the increasing duration of investigations. As mentioned at page 34, one of the reasons for this phenomenon is slowness by institutions in responding to investigative requests for meetings, explanations and documentation. The commissioner's office has been told by access coordinators that their first priority is to process access requests within deadline; that means putting a low priority on meeting investigator requirements. Put another way, institutions often do not "factor in" to their resource needs the need to meet investigator requirements. While this may enable departments to be more effective in meeting their response deadlines, it contributes to the longer duration of investigations.

In the coming year, the commissioner will establish service standards which

he will expect government institutions to meet in responding to investigative requirements. Meeting these standards may have a resource impact on some investigations as well as in request processing.

CHAPTER III:
CASE SUMMARIES

1. Who Received Performance Bonuses?

File 3100-14699/001

Background

A representative of an employee association asked the National Research Council of Canada (NRC) for a list of the 1093 individuals who received performance bonuses in 2000. The requester did not seek the performance rating of any person nor the amount of the bonus received by any individual. In response, NRC refused to disclose the requested information on the basis that such information is "personal information" which qualifies for exemption under subsection 19(1) of the *Access to Information Act*.

The requester complained to the Information Commissioner arguing that, unless there is some transparency in the awarding of performance bonuses, there is the potential for abuse and misapplication of the program. The complainant pointed out that NRC had previously disclosed names of persons who had received awards under the department's internal awards program, awards based on criteria substantially the same as the criteria used to award performance bonuses.

Legal Issues

This complaint required the Information Commissioner to consider the following issues:

1) Does the list of recipients of performance bonuses constitute "personal information" as defined in section 3 of the *Privacy Act*? In particular, does a performance bonus constitute a discretionary benefit of a financial nature? If so, paragraph 3(l) of the *Privacy Act* removes such information from the definition of "personal information".

2) Even if the withheld information is "personal information", do any of the provisions of subsection 19(2) of the *Access to Information Act* authorize disclosure?

With respect to issue #1, the investigation revealed that performance bonuses were based on two criteria. First, all employees who received a performance rating of "outstanding" or "superior" qualified for a performance bonus. Second, certain employees who did not receive one of those two performance ratings could still qualify for a bonus based on team accomplishments which have contributed to the success of NRC. Performance bonuses in this second category were determined subjectively by senior managers based on the recommendations of an awards committee.

Given these facts, the commissioner determined that the employees who received bonuses for individual or team accomplishments, rather than based on performance ratings, had received a "discretionary benefit of a financial nature". On the other hand, the commissioner concluded that those who had received a performance bonus based on their performance rating received an "entitlement" under the performance bonus policy rather than a "discretionary benefit". Consequently, the names of entitled recipients were "personal information" while the names of discretionary recipients were not.

With respect to issue #2 (the applicability of subsection 19(2) of the *Access to Information Act*), the investigation

determined that, prior to the formal access request, NRC had released the names of some of the performance bonus recipients to the requester. The disclosures were made based on the fact that some recipients had given consent for disclosure in response to a number of vaguely worded communications from management which did not clearly explain to employees the purpose of consent nor the employees' options.

The commissioner concluded that the previous consents did not extend to a request under the *Access to Information Act*, the consents had been limited and the disclosures were made informally and not to the public at large. Similarly, the commissioner concluded that the names previously disclosed could not be considered as "publicly available" because the disclosure was entirely internal to the NRC.

In the end, the commissioner recommended disclosure of the names of the individuals who had received performance bonuses based on individual or group accomplishments (discretionary benefits). The commissioner also took the view that disclosure of this list would provide adequate transparency to allow the employee association to assess the fairness of the program. NRC agreed and accepted the commissioner's recommendation.

Lessons Learned

When subjective criteria become part of a performance bonus program, the awards given thereunder constitute "discretionary benefits of a financial nature" and, hence, cease being protectible personal information.

2. Assessing Environmental Impact of CANDU Reactors

File 3100-13256/001

Background

A researcher applied to Natural Resources Canada (NRCan) for access to certain records about Atomic Energy of Canada Limited's (AECL) bid to sell CANDU reactors to Turkey. Among the requested records was a report, prepared by a consultant to NRCan, which critiqued the environmental assessment prepared by AECL in support of its bid.

NRCan refused to disclose the report on the basis that it contains information supplied to the consultant in confidence by AECL and that disclosure of it could be prejudicial to AECL's competitive position and could interfere with AECL's contractual negotiations with Turkey. The exemptions under the Act relied upon, thus, were paragraphs 20(1)(b), (c) and (d).

The requester objected to this response and complained to the commissioner. The requester pointed out that, in the past, he had been given a report by the same consultant concerning AECL's environmental assessment of a CANDU sale to China. He also argued that there is a strong public interest in ensuring that full environmental assessments are undertaken before nuclear reactors are sold to other countries. Finally, during the investigation, it was learned that Turkey had already announced that it would not purchase a CANDU reactor from AECL.

Legal Issues

1) When AECL supplied information to the consultant, did it, by extension, supply it to NRCan for the purpose of paragraph 20(1)(b)?

2) Could the injury tests set out in paragraphs 20(1)(c) and (d) be demonstrated in the context of the announced refusal by Turkey to proceed with the AECL bid?

Before the commissioner could make findings on these issues, AECL withdrew its objection to disclosure and NRCan disclosed the report, in its entirety, to the requester.

Lessons Learned

The tests for exemption set out in paragraphs 20(1)(b), (c) and (d) are not easily met and there is a significant amount of jurisprudence on their proper interpretation. Government institutions need to challenge third parties to demonstrate clearly that there is sufficient evidence to satisfy the tests contained in these examples. Sometimes government institutions who have a regulatory relationship with third parties feel reluctant to play this "challenge" role, preferring to let the commissioner do so if there is a complaint about excessive secrecy. Such a reluctance is not in keeping with the obligations on government institutions to put the burden of proof on the party resisting disclosure.

3. Duplicate Vehicle Registrations

File 3100-15106-001

Background

A person involved in a project to stop stolen vehicles from obtaining new VIN numbers, asked Statistics Canada how many vehicles in Canada are concurrently registered in more than one province. Statistics Canada holds this information as a result of studies it conducted into the extent to which motor vehicle registration statistics are inflated as a result of multi-province registration.

In response, Statistics Canada refused to disclose the requested information. It told the requester that it had derived the information from provincial and territorial motor vehicle registration files and that the governing agreements only entitled Statistics Canada to disclose statistical aggregates.

Statistics Canada verified with the provinces and territories that the motor vehicle registration files had been supplied in confidence and could not be released. Given those circumstances, Statistics Canada took the view that the requested information qualified for exemption pursuant to paragraph 13 (1)(c) of the *Access to Information Act*.

For his part, the requester argued that the statistics on duplicate registrations had not been supplied by the provinces and territories to Statistics Canada. He argued that the requested information was a statistical analysis derived from the provincially supplied data.

Legal Issue

Was the requested information, as to the number of duplicate vehicle registrations, supplied in confidence by provinces and territories to Statistics Canada? The commissioner determined that, as a matter of fact, the precise information requested had not been supplied to Statistics Canada by the provinces or territories. He also found that, even if it had been, disclosure of it would not contravene the governing agreement since the request was for a "statistical aggregate" and disclosure of such information is permitted by the agreement.

Having considered the commissioner's views, Statistics Canada reconsidered and disclosed the requested information to the requester. Statistics Canada did not concede that paragraph 13(1)(c) had been improperly applied. Rather,

it based its reversal of position on its success in getting the provinces and territories to consent to disclosure.

Lessons Learned

When applying the Act's exemptions, it is necessary to give them a limited and specific interpretation. When exemptions protect information supplied to government by others (sections 13 and 20), care should be taken to apply the exemptions only to the precise information which was supplied and not to derivative information or independent analysis. Moreover, when the nature of the confidentiality understandings are set out in agreements, these agreements are more persuasive in determining the extent of confidentiality expected than are statements of intent given by the suppliers after the access request has been made.

4. The Collection of Duties on International Mail

File 3100-13546/001

Background

A corporation asked the Canada Customs and Revenue Agency (CCRA) for a copy of an agreement between the CCRA and Canada Post Corporation (CPC) concerning the processing of international mail and parcels. Under the agreement, CPC was remunerated for acting as agent for CCRA for the purpose of levying and collecting customs duties. After consulting with CPC, CCRA disclosed portions of the agreement but denied the majority of it at the request of CPC who alleged that the requester was a competitor.

The requester complained to the Information Commissioner about the denial of access.

Legal Issue

In order to justify its refusal to disclose portions of the agreement, the burden fell to CCRA to demonstrate, under paragraph 20(1)(c) of the Act, that CPC would suffer competitive harm from disclosure. Could it discharge that burden on the facts of this case?

Both CCRA and CPC argued that the requester was acting on behalf of the United Parcel Service (UPS), a competitor of CPC. They alleged that UPS was seeking the information for use in an unfair competition challenge under Chapter 11 of the North American Free Trade Agreement (NAFTA) seeking some $230 million in damages against Canada. The postal agreement to which access was denied (and the form of relationship between CPC and CCRA) is among the issues at play in the NAFTA litigation.

For its part, the requester argued that there is no competition for the services provided by CPC under the requested agreement. The requester pointed out that the *Customs Act* permits CCRA to enter into an agency agreement with CPC regarding the processing of international mail, but does not authorize CCRA to go to competitive tender for such service. Consequently, according to the requester, there is no possibility of competitive harm to CPC from disclosure of the details of the agreement.

In response, CCRA agreed that there could be no competition to CPC in this service without legislative amendment and the concurrence of CPC (since mail processing facilities are owned by CPC). However, CCRA pointed out that neither CCRA nor CPC was under any obligation to continue with the current agreement. As well, CCRA pointed out that additional parties

could be introduced by either CCRA or CPC to complete clerical or administrative workload without legislative change. In such an event, the withheld information could be used to advantage (and the disadvantage of both CPC and CCRA) in the bidding for such work.

During the investigation, most of the agreement was disclosed. What remained withheld were portions of the agreement showing the method by which CPC's compensation is calculated. The commissioner determined that disclosure of the specific financial arrangements in the agreement could enable another company, interested in providing services to CCRA, to use the information to its advantage and to the detriment of CPC. On that basis, the complaint was found to be resolved.

Lessons Learned

It is generally the case that the paragraph 20(1)(c) exemption may not be used unless the third party to whom the information relates is engaged in a competitive business. However, even when portions of a third-party's business are "exclusive", it may be possible to demonstrate that disclosure would result in prejudice to the "non-exclusive" portions of the business. At all times, however, the burden of proof rests on the party asserting secrecy to show, at the level of a probability (by concrete evidence, not mere assertions), that disclosure could reasonably be expected to prejudice the third-party's competitive position.

5. Knowing Who to Ask

File 3100-15873/001

Background

A television producer made a request to the RCMP seeking records about the 1985 visit to Quebec City of former U.S. President Ronald Reagan. The RCMP responded by saying that all such records were exempt from access pursuant to paragraph 16(1)(a) and subsection 16(2) of the *Access to Information Act*. These provisions authorize withholding of information relating to lawful investigations or information the disclosure of which could facilitate the commission of an offence. The requester objected to this blanket of secrecy and complained to the Information Commissioner.

Early in the investigation, it became clear that, within days of receiving the access request, the RCMP had determined that the relevant records had been transferred to the National Archives of Canada. Before invoking exemptions under paragraph 16(1)(a) and subsection 16(2), officials of the RCMP had not bothered to retrieve and review the records, as section 25 of the Act (line-by-line review) requires. Moreover, the RCMP had not referred the requester to the National Archives as the institution having control of the records.

Legal Issue

When an institution receives an access request for records which have been transferred to the National Archives, what are its obligations?

The RCMP acknowledged that exemptions should not be invoked unless relevant records have been reviewed. This review is necessary to ensure that the mandatory obligation set out in section 25, is respected. Section 25 requires government institutions to disclose any part of a record that does not contain, and can reasonably be severed from, any part that contains exemptible information.

As well, the RCMP acknowledged that it had not properly considered the

provisions of section 8 of the Act. Section 8 gives institutions the discretion, within 15 days after a request is received, to transfer the request to another institution having "a greater interest in the record".

The Information Commissioner found that the records had been formally transferred by the RCMP to the National Archives in 1994 and 1995. Therefore, he concluded that the Archives had the "greater interest" in the records. He also noted that the RCMP knew of the transfer of the records to the Archives well before the 15 days had elapsed within which a transfer of an access request may be made. Even if he were wrong in this view, the commissioner concluded that it was inappropriate for the RCMP to invoke exemptions to justify secrecy without having retrieved and reviewed the records.

Since, in the end, the RCMP expressed regret to the requester, refunded his fee and told him that the National Archives held the relevant records, the commissioner concluded the matter to be resolved.

Lessons Learned

When the workload of access requests gets heavy, it may be tempting for some institutions to "cut corners" when it comes to retrieving and reviewing records which are of a type likely to qualify for exemption. However, giving in to this temptation is entirely contrary to the requirements of the *Access to Information Act*. Unless a search for, and review of, records is undertaken, it is not possible to determine whether or not a request should be transferred to another institution having a greater interest in the records. As well, unless records are reviewed, it is not possible to ensure that the severance requirement in section 25 has been respected. The fact that records are likely to be withheld does not remove the obligation to search for and review them in response to an access request.

6. The Art of Fee Estimation

File 3100-16210/001

Background

An individual asked the Immigration and Refugee Board (IRB) to provide copies of all classification and staffing requests processed by the headquarters Human Resources Branch between January 1, 1998 to July of 2001. In response, the IRB notified the requester that fees in the amount of $6,530 were estimated and asked the requester for a deposit of $3,265 before the request would be processed.

The requester was of the view that the fee estimate was unreasonable and that the department had a computerized system in the human resources area which would make search time minimal. For its part, the IRB maintained that it would take 658 hours of search time of which only five hours are included with the five dollar application fee. The remainder, according to the IRB, are chargeable at ten dollars per hour for the total of $6,530.

Legal Issue

Was the fee of $6,530 authorized by subsection 11(2) of the Act? Subsection 11(2) authorizes an institution to charge a fee "for every hour in excess of five hours that is reasonably required to search for the record or prepare any part of it for disclosure, and may require that the payment be made before access to the record is given".

As is often the case, the investigation determined that the IRB had a different concept of what the requester wanted than did the requester. The

commissioner clarified for the IRB that the requester was only interested in classification and staffing actions which were processed by headquarters (by virtue of the regions not having authority to process the requests or the positions being the responsibility of Corporate Staffing and Classification).

With this new set of parameters, the IRB changed the search time estimate from the original 658 hours to 11 hours. Consequently, taking into account the five non-chargeable hours, the fee estimate dropped from $6,530 to $60. The commissioner concluded that the original fee estimate had not been reasonable. In his view, a knowledgeable employee of the institution should have understood the request in the more limited way intended by the requester. That said, the commissioner concluded that the revised estimate was reasonable and, on that basis, concluded the matter as resolved.

Lessons Learned

When requests appear to require a search through a large volume of records and attract high fees, a careful effort should be made to communicate with the requester to ensure that the request is well-understood and to ensure that the requester has an opportunity to narrow the request. While it may seem time consuming in the short run to open a dialogue with requesters about the scope of their requests, it is often a time saver in the long run – especially if the matter ends up as a complaint to the commissioner and an investigation ensues.

7. The Flip Side of the Coin

File 3100-14856/001

Background

A taxpayer requested copies of sections of a manual used by officials of Canada Customs and Revenue Agency (CCRA) to determine matters relating to the non-resident and deemed-resident assessment sections of the *Income Tax Act*. The manual, known as T.O.M. (Taxation Operations Manual), contains policies and procedures for applying and enforcing the *Income Tax Act*. In response, CCRA disclosed some of the requested information but exempted much of it on the grounds that disclosure could be prejudicial to the enforcement of the *Income Tax Act*.

The requester was unsatisfied with this response. He was of the view that the policies, methods and procedures employed by CCRA officials, in determining the residency of an individual for income tax purposes, should not be secret. Consequently, he complained to the Information Commissioner as follows:

> "– I have a right to know what the rules are, the actual rules not the published ones and, just as importantly, how they will be applied."

Legal Issue

May paragraph 16(1)(c) of the Act – the law enforcement exemption – be relied on to keep secret information which individuals need to know in order to properly understand, and comply with, the *Income Tax Act*?

For its part, CCRA explained that its residency determination process involves considering information about an individual's "ties" to Canada or to other countries. These ties are categorized as "primary" and "secondary" and, residency will be

determined based on the number and combination of "ties". However, CCRA maintained that, were it to disclose the number and nature of these "ties", individuals could "manipulate the system – to avoid paying Canadian income tax".

On the other hand, the taxpayer/requester argued that he could not properly arrange his affairs or challenge CCRA's determination rulings without having access to the rules of the game. Indeed, the taxpayer expressed concern that secrecy fostered a "shifting sand" of rules which could be turned against the taxpayer at any time.

The Information Commissioner formed the view that Canadians should know the "rules of the game". He concluded that the institution's fear, that the taxpayer could manipulate the system, is outweighed by the concern that secrecy could allow the system to manipulate taxpayers. In the commissioner's view, this type of secrecy was not what Parliament intended to protect when it enacted paragraph 16(1)(c) of the *Access to Information Act*.

After reflecting upon the commissioner's concerns, CCRA decided to release most of the previously withheld information. Within the T.O.M.'s, however, there are income thresholds or tolerances which guide CCRA's enforcement actions. Disclosure of these, according to CCRA, would impede its enforcement of the *Income Tax Act*.

The commissioner accepted the legitimacy of the limited amount of remaining secrecy and recorded the matter as resolved.

Lessons Learned

Government institutions have a right to keep information secret in order to protect the integrity of their law enforcement duties. However, that legitimate sphere of secrecy does not extend to the "rules of the game" which citizens are expected to obey and against which their obligations and entitlements will be assessed. The exemption in paragraph 16(1)(c) does not authorize institutions to maintain systems of secret law even if to do so would make life easier for the government.

8. The Scope of Cabinet Secrecy

File 3100-13828/001

Background

Public officials of deputy minister rank are entitled to a special benefit known as the Special Retirement Allowance (SRA). This benefit doubles the recipient's ordinary pension entitlements for the years of service as a deputy minister, to a maximum of ten years.

A retired public official, of deputy minister rank, who did not receive the SRA wanted to know why he did not qualify. He asked the Privy Council Office (PCO) for access to records setting out the SRA entitlement requirements.

In its response, PCO disclosed some records which describe the SRA but it refused to disclose the terms of the SRA as approved by Treasury Board in July of 1988. PCO claimed that this record is a cabinet confidence and, hence, excluded from the right of access by virtue of paragraph 69(1)(a) of the *Access to Information Act*. The requester complained to the Information Commissioner.

Legal Issue

Does a record containing the terms and conditions of a publicly announced benefits program, qualify as a cabinet confidence for the purposes of paragraph 69(1)(a) of the *Access to Information Act*? PCO's argument was straightforward. Since the withheld record had been certified as a cabinet confidence by the Clerk of the Privy Council, there was no room for debate. In PCO's view, a cabinet confidence is any record the Clerk says is a confidence and no commissioner or court has the authority to second guess the Clerk.

The requester, on the other hand, argued that the terms of a publicly announced decision of Cabinet cannot be considered a cabinet confidence. In the requester's view, such records are not captured by either the opening words of subsection 69(1) or by any of the enumerated types of records.

During the investigation it was determined that the SRA was not authorized by legislation but, rather, by a decision of Treasury Board. The decision, in fact, is in the form of an approval of an eight-page memorandum which contained the SRA proposal. The eight-page memorandum, which was approved by Treasury Board on July 14, 1988, is acknowledged to be the authoritative document setting out the terms of the SRA. It is this document which was withheld from the requester as a cabinet confidence.

As well, during the investigation, the PCO witness responsible for determining entitlement to SRA testified that he relied upon this eight-page memorandum in making determinations concerning eligibility. Moreover, the witness confirmed that the content of the withheld record has been reproduced in public documents and are made known to beneficiaries and potential beneficiaries on request.

The commissioner concluded that the withheld record constitutes a decision of cabinet that has been made public. As such, the commissioner found it does not qualify for exclusion from the right of access pursuant to paragraph 69(1)(a) of the *Access to Information Act*. Second, the commissioner observed that, even if the record were to be classed as a cabinet confidence, any privilege attached thereto has been effectively waived by the degree of publicity already given to its contents by the government.

Finally, the commissioner observed that, even if the record were properly classed as a cabinet confidence, there is a compelling public interest in the privilege being waived by the government. In particular, there is a public interest as it relates to accountability, to have access to the source document establishing a special economic benefit for the most senior public servants.

For these reasons, the commissioner found the complaint to be well-founded and recommended to the Prime Minister that the record be disclosed. The Prime Minister refused to accept the recommendation.

The commissioner will, if the consent of the requester is obtained, ask the Federal Court of Canada to review the Prime Minister's refusal to disclose this record. The results, or the progress of the case, will be reported in next year's annual report.

Lessons Learned

At this stage in the progress of this case, the most that can be said is that the section 69 exclusion for cabinet

confidences places an enormous amount of discretionary power to cloak records in secrecy in the hands of the Prime Minister and Clerk of the Privy Council. With this power comes a heavy onus of responsibility to wield the power of secrecy in a way which does not infringe a fundamental purpose of the *Access to Information Act* (as set out in section 2) which is that "exceptions to the right of access should be limited and specific". This case calls into question the care with which the cabinet confidence exclusion is being exercised.

9. Obtaining Data on the Handling of Access Requests

File 3100-16426/001

Background

Many government institutions track the processing of access requests by means of a computer software package known as ATIPflow. The ATIPflow data base, thus, contains a wealth of information from which institutions create tracking and management reports of various kinds.

An academic researcher made an access request to Human Resources Development Canada (HRDC) for a report containing a number of data elements from its ATIPflow system. HRDC did not have the software which would allow it to generate electronically the specific report. Rather, the requested report would have to be generated manually, from a multitude of screens, at a significant cost. HRDC notified the requester that a fee of $1,250 had been assessed.

The requester found this approach to be inefficient. He contacted the president of the firm which produced and maintains ATIPflow. The president agreed to develop a report template which would enable ATIPflow to produce the required report electronically. Even though the report template would cost the requester $3,000, more than double the manual fee estimate, he offered to pay for the template and give it for free to HRDC. Whether this offer was selfless generosity, or shrewd anticipation of future requests, is unknown.

The requester's plan fell apart, however, when the company which produces ATIPflow advised that it was no longer prepared to develop the report template for the requester. The requester alleged that HRDC and other federal access to information offices had expressed concerns to the firm and, thus, undermined his right of access. He asked the commissioner to investigate.

Legal Issues

When requests are received for information held in electronic data-bases, are institutions under an obligation to find the most cost-efficient retrieval method? More particularly, in this case, was manual generation of the requested information (at a cost of $1,250) an acceptable approach?

HRDC argued that it was under no legal obligation to acquire new "report template" software in order to satisfy an access request. It made the point that, in addition to the cost of the software, additional human resources and system downtime would be incurred. HRDC maintained that it had no operational need for the report template required to answer the access request and, hence, no obligation to acquire it.

For his part, the requester simply argued that, since he was willing to pay for the new software, why would HRDC not avail itself of this new work tool.

The commissioner took note of subsection 4(3) of the Act. It requires government institutions to produce records held in electronic databases, but only to the extent it is able "using computer hardware and software and technical expertise normally used by the government institution". In this case, the commissioner was satisfied that the new report template software was not "normally used" by HRDC. Hence, he concluded that HRDC was under no obligation to acquire and use it in response to the access request.

Nevertheless, the commissioner was not satisfied that HRDC had fully assessed its in-house "technical expertise" for extracting the requested information from ATIPflow in an efficient manner. HRDC reviewed its own expertise and discovered that a capability did exist to generate the requested information more efficiently and accurately than the manual, screen-by-screen approach. The new approach reduced the fee estimate from $1,2500 to $60 – which the requester readily paid.

As a result, the commissioner recorded the complaint as resolved.

Lessons Learned

Frequently, access requests are for records which do not exist at the time they are requested. Rather, the requests seek to have certain records or reports created from electronic data bases. Government institutions are not required to acquire software, hardware or expertise in order to generate such reports. However, when departments have the in-house capacity to do so, they must proceed to generate the reports in the most accurate and least costly manner.

10. Status of Air Traffic Control Communications

File 3100-13765/001

Background

A lawyer representing the widow of a pilot who died in an air crash made a request to the Transportation Safety Board (TSB), under the *Access to Information Act* (the Act), for the audio tapes and transcripts of the voice communications between the pilots of two aircraft and the air traffic controller. The two aircraft in question were involved in a mid-air collision over Penticton, B.C., on August 20, 1999.

In response to the request, the TSB decided that the contents of the requested records constitute the personal information of the pilots and controllers. The Board sought consent from the persons whose voices were on the tape, for disclosure. The widow of one of the pilots gave consent for disclosure to her lawyer, the others did not. Consequently, the Board disclosed to the requester only the portions of the audio tape and transcript which contained the words spoken by the pilot whose widow had given consent. The remaining material was withheld pursuant to subsection 19(1) of the Act.

Legal Issue

Does the privacy exemption (subsection 19(1)) authorize disclosure of radio communications made over an open channel, for the purpose of controlling the operation of aircraft?

In coming to a finding in this case, the commissioner first turned his mind to subsection 19(1) of the Act to determine whether the requested records contain "personal information" as that term is defined in section 3 of the *Privacy Act*. Second, he determined whether any "personal information" contained in the records may be disclosed pursuant to subsection 19(2) and whether the head of the TSB properly considered and applied that provision.

A. "Personal Information"

Transcript:

Having carefully reviewed the withheld records the commissioner formed the view that the information contained in the transcript of the air traffic control tape is not "personal" as that term is defined in section 3 of the *Privacy Act*. In the transcript, the information is not "about" individuals, but rather, about the status of the aircraft, flying/weather conditions and other matters associated with the air traffic and flight control of the aircraft. None of the information contained in the transcript, he concluded, is of the sort described in any of the sub-paragraphs of section 3 of the *Privacy Act*.

Thus, the commissioner concluded that the transcript of the air traffic control communications in this case, does not constitute "personal information" as that term is defined in section 3 of the *Privacy Act*. He found that subsection 19(1) of the Access Act does not authorize the TSB to refuse to disclose the transcript of the audio tape.

Audio tape:

The determination as to whether or not the audio tape contains "personal information" is somewhat more complicated than in the case of the transcript. It is not the content of the communications that differ but the added dimension of the sound, including the sound of the voices themselves.

The commissioner decided that the issue of whether or not an audio tape constitutes "personal information" must be determined on a case-by-case basis, giving proper weight to the requirement that the information be "about" an identifiable individual.

In this case, the commissioner found that the content of the utterances of the pilot and controllers are exclusively about the status of the aircraft, flight/weather conditions, air traffic control of the aircraft, and notification to the controllers that the accident had happened. The commissioner also found that there is nothing so remarkable in the tonal demeanor of any of the parties as to enable a listener to glean information "about" identifiable individuals from the voice sounds alone.

In this case then, the commissioner concluded that the audio recording of the air traffic control communications does not constitute "personal information" as the term is defined in section 3 of the *Privacy Act*. Consequently, he found that subsection 19(1) of the Access Act does not authorize the TSB to refuse to give access to it.

B. Subsection 19(2)

In the event that his conclusions with respect to the definition of "personal information" were found to be wrong, the commissioner went on to consider whether any provisions of subsection 19(2) authorize disclosure. With respect

to paragraph 19(2)(a), the commissioner noted that a severed version of the tape had been made reflecting the consent given by only one of the parties. Thus, no further disclosure is authorized by paragraph 19(2)(a).

He went on to note that paragraph 19(2)(c) authorizes disclosure of "personal information" without consent in situations set out in subsection 8(2) of the *Privacy Act*. The commissioner concluded that the TSB did not consider paragraph 8(2)(a) of the *Privacy Act*.

In the commissioner's view, there is a persuasive argument to be made that public disclosure of the records at issue in this case (compiled in 1999) would be one of the contemplated purposes for which such information was collected or compiled. At the time these records were collected and compiled, it was well known amongst pilots and air traffic controllers that air traffic control tapes and transcripts might be made public by TSB. TSB freely admits that it has disclosed these types of records in the past, in the discharge of its accident investigation and reporting role. It was not until January 31, 2000, "after considerable discussion and debate", that the TSB decided to become more restrictive in its disclosure policy.

In this context, according to the commissioner, even if the tapes and transcripts were "personal", paragraph 8(2)(a) of the *Privacy Act* would authorize disclosure. Given TSB's vital role in assuring the public of the safety of air transportation in Canada, the commissioner believed that disclosure of air traffic control tapes and transcripts would be, at the very least, consistent with the purpose for which such information is obtained or compiled by TSB.

Thus, the commissioner found that TSB failed to properly consider and apply paragraph 19(2)(c) of the Access Act because it did not turn its mind to paragraph 8(2)(a) of the *Privacy Act*.

Further, the commissioner found that TSB did not properly consider and apply sub-paragraph 8(2)(m)(i) of the *Privacy Act*. In this regard, TSB failed to properly weigh the privacy interest at stake because it misperceived the legal effect of subsection 29(1) of the *Canadian Transportation Accident Investigation and Safety Board Act* and subsection 9(2) of the *Radio Communication Act*.

In addition to misperceiving the legal effect of these provisions (and hence their impact on the expectation of privacy), the commissioner concluded that the TSB failed to consider other relevant factors. For example, it failed to weigh the fact that it had a policy of disclosure at the time the records were collected or compiled. It also failed to consider and weigh the fact that air traffic control communications are made over radio frequencies in an unscrambled format.

Consequently, the commissioner concluded that, if sub-paragraph 8(2)(m)(i) of the *Privacy Act* had been properly considered, there would have been ample reasons to conclude that there would have been no invasion of privacy likely to result from disclosure of these records. Consequently, even a slight public interest in disclosure, would be enough to satisfy the test for disclosure set out in sub-paragraph 8(2)(m)(i).

Finally, there is another reason for the commissioner's conclusion that secrecy is unjustified. It is the failure on the part of TSB to adequately consider the tests in sub-paragraph 8(2)(m)(ii) of the

Privacy Act. This provision authorizes disclosure of the records at issue when disclosure would clearly benefit the individual to whom the records relate. The commissioner pointed out that access to a censored version of the audio tape and transcript, has not given the requester and the widow sufficient information to enable the parties to assess and settle insurance claims, to the benefit of the deceased's estate.

For all these reasons, the commissioner found the complaint to be well-founded and recommended that the requested records be disclosed in their entirety. TSB refused to follow the recommendation. With the consent of the requester, the commissioner will ask the Federal Court to review the refusal to disclose.

Lessons Learned

It is not prudent to suggest lessons from a case which remains in dispute. However, it can be said that, all too often, institutions fail to properly consider the provisions of subsection 19(2) of the Act before invoking subsection 19(1) to withhold personal information. In particular, paragraph 19(2)(c) (by reference to subsection 8(2) of the *Privacy Act*) defines 14 circumstances in which personal information may be disclosed without the consent of the person to whom the information relates. All of these circumstances must be carefully assessed before a decision is taken to refuse access pursuant to subsection 19(1).

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CHAPTER IV:
THE *ACCESS TO INFORMATION ACT* IN THE COURTS

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 consent, to ask the Federal Court to review the matter. This year the Information Commissioner did not file new applications for review.

Individuals or the Crown are entitled to ask the Federal Court to review alleged excesses of jurisdiction by the commissioner in the conduct of his investigations. In this reporting year, such applications were made by the Crown and certain witnesses. These applications all relate to the commissioner's investigations of complaints relating to records held in the office of the Prime Minister and other ministers. Taken together with applications for judicial review filed by the Crown last year, the total of outstanding court actions by the Crown against the commissioner is 27.

The Commissioner in the Courts

Cases Completed

Canada (Information Commissioner) and TeleZone Inc. v. ***Canada (Minister of Industry)***

2001 FCA 254, Court File Nos. A-824-99 and A-832-99
Federal Court of Appeal, Strayer, Décary and Evans JJ.A., August 29, 2001

Nature of Action

This matter involves an appeal of the decision by the Federal Court to dismiss the application for judicial review by both Telezone under section 41 and the Information Commissioner under section 42 of the Act.

Factual Background

TeleZone submitted an access request for information about the decision-making process used by Industry Canada in granting a licence to provide wireless telephone services. The request for records was, in a large part, refused on the basis that the information constituted "advice" and "recommendations" which qualify for exemption from the right of access under paragraph 21(1)(a) of the Act. Following an investigation, the Information Commissioner recommended the release of most of the information sought by TeleZone. Industry Canada complied in part but refused to disclose records showing the weighting assigned to the criteria

by which the licences had been assessed. The applications for a judicial review of that decision, by both the Information Commissioner and TeleZone, was dismissed by the Federal Court Trial Division in 1999. The Information Commissioner and TeleZone appealed from that judicial decision.

Issues before the Court

1. Must a court interpret the statutory exemptions to the right of public access to information under the control of government in light of both the purpose of the Act and the countervailing values that underlie the exceptions relied on?

2. How much deference is owed by the court to the head of an institution who, pursuant to paragraph 21(1)(a) of the Act, refuses to disclose information in response to an access request? Also, generally, how much deference is owed by the court to the commissioner's conclusions and recommendations?

3. What is the scope of the minister's statutory discretion in paragraph 21(1)(a) and paragraph 21(2)(a) of the Act, particularly as it concerns records containing "advice" or "recommendations"?

4. Pursuant to section 48 of the Act, does the institution bear the burden of proving that the discretion to refuse to disclose a record was exercised in accordance with law?

5. Does the institution have a legal obligation to provide reasons for the exercise of discretion to refuse to disclose?

6. Once a minister accepts advice (as, in this case, by approving the weightings to be used in assessing the criteria) does the information lose its character as "advice"?

Findings

1. Citing jurisprudence from both the Supreme Court of Canada and the Federal Court of Appeal, the court reiterated the principles that the right of public access to information under the control of government institutions should be construed broadly in light of the statutory purpose set out in subsection 2(1) of the Act and, correspondingly, the exceptions should be given as narrow a meaning as is consistent with their purpose and the statutory language in which they are expressed.

2. Echoing an earlier judgment of the Court of Appeal, the court confirmed that it is the duty of the courts to give the same kind of "liberal and purposive construction" to the interpretation of the public right to access that they give to statutory rights to be free from discrimination. Noting the notwithstanding clause contained in subsection 4(1) of the Act, which gives the Act priority over any conflicting legislation, the court cited a previous judgment by the Court of Appeal which affirmed that: "Parliament intended the Act to apply liberally and broadly with the citizen's right of access being denied only in limited and specific exceptions." However, the court added this cautionary note:

> "this does not mean that the court is to redraft the exemptions found in the Act in order to create more narrow exceptions. A court must always work within the language it has been given. If the meaning is plain, it is not for this

court, or any other court to alter it. Where, however, there is ambiguity within a section, that is, it is open to two interpretations, then this court must, given the presence of section 2, choose the interpretation that infringes on the public's stated right to access to information contained in section 4 of the Act the least."

With respect to issues such as the statutory interpretation that turns "on an understanding of the fundamental principles underlying the statutory scheme" or the interpretation of the "scope of the right of access and of the exemptions" or "questions respecting the operation of the statute", the court found that these issues are better dealt with by a "body independent of the executive rather than the institution resisting the request for access". On these questions of law, therefore, the court is the final arbiter and "correctness" is the appropriate standard of review, "especially given that the decision under review is that of a protagonist, not of an independent agency". Admitting that by virtue of his independence, legal powers, process and expertise, the Information Commissioner possesses a greater claim to judicial deference than those of a minister, the court hastened to note that nonetheless "while the court will consider the commissioner's reports with care, the court is entitled to differ from the commissioner on questions of law, mixed law and fact, without having to satisfy itself that the commissioner's conclusion was unreasonable".

On the other hand, the court noted, it is not for the court to substitute its opinion for that of the head of a government institution in exercising his or her statutory discretion under the Act.

"The Minister and his advisers are well placed to assess whether, if government is to operate effectively to advance the public interest, it is necessary for the effective working of the internal processes of government to maintain a measure of secrecy for communications between officials, and between officials and the Minister in developing policy."

However, while a policy of deference to expertise is maintained by the court in reviewing a minister's exercise of discretion under paragraph 21(1)(a) of the Act, the court noted it would be unhesitant to review the minister's discretion if it concluded that the latter was "clearly wrong" or that the decision was made in "bad faith, breach of natural justice" or "irrelevant considerations by the decision-maker".

3. Interpreting paragraph 21(1)(a) of the Act, the court held that by "exempting 'advice' and 'recommendations' from disclosure, Parliament must be taken to have intended the former to have a broader meaning than the latter, otherwise it would be redundant". However, because "advice" appears in "a paragraph limiting the right of access to government records, it should be given a narrow meaning in accordance with the provision in subsection 21(1) that exemptions 'should be limited and specific' ". According to the court, it includes "an expression of opinion on policy-related matters but exclude(s) information of a largely factual nature". Therefore, the court surmised, "the benefit of paragraph 21(1)(a) should be reserved for the opinion, policy or normative elements of advice, and should not be extended to the facts on which it is based". By way of further clarification, the court added that, for instance, "a memorandum to the minister stating that something needs to be decided,

identifying the most salient aspects of an application, or presenting a range of policy options on an issue, implicitly contains the writer's view of what the minister should do, how the minister should view a matter, or what are the parameters within which a decision should be made. All are normative in nature and are an integral part of an institutional decision-making process."

Turning its attention to paragraph 21(2)(a), the court noted that Parliament expressly provided that a record otherwise falling within the four corners of that provision must be disclosed if it contains a statement of reasons for a decision that affects the rights of a person. However, it emphasized that this statutory provision only applies "when a decision has been made that affects the rights of a person". The court went on to say, that "since TeleZone had no legal right to be awarded a discretionary licence, it cannot be said that it had any other rights that were adversely affected by the decision".

4. While noting that section 48 places on the head of the government institution the burden that a record is within an exemption, for instance, it contains "advice or recommendations" for the purpose of paragraph 21(1)(a), the court held that it is quite another matter to expect the head of the government institution to prove "that the decision not to disclose the exempted documents was made lawfully in the exercise of the statutory discretion". According to the Court of Appeal, when "in review proceedings instituted under sections 41 and 42 the minister has discharged the burden of establishing that a document falls within an exemption, the proceeding must be dismissed unless the applicant satisfies the court that the minister has failed lawfully to exercise the discretion to disclose an exempted document".

5. The court held that an institution has a "legal duty to give reasons for the discretionary refusal to disclose, when reasons are requested and fairness requires that they be given" because "the court cannot effectively exercise its statutory function of reviewing refusals to disclose information without some knowledge of the discretionary decision-making process". However, the reasons need not show "explicitly that the minister or his delegate considered the purposes of the Act and determined that the harm of disclosure outweighed the public interest in disclosure". In the instant case, the court concluded that the correspondence and memoranda "provided a sufficiently clear account of why the officials were opposed to disclosure as to enable the appellants to understand the basis of the decision and the court to perform its review function".

6. The court held that information which constituted "advice" in the past continues to qualify for the advice exemption even if its character changes subsequently. However, if a separate decision record had been created, that separate record would not be "advice".

Judicial outcome

Dismissing the appeals, the Federal Court of Appeal concluded that the refusal to disclose the final weightings by Industry Canada was not an unlawful exercise of discretion.

Future Action

The Information Commissioner has sought leave to appeal the decision to the Supreme Court.

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

2001 FCA 253, Court File No. A-43-00
Federal Court of Appeal, Strayer, Décary and Evans JJ.A., August 29, 2001

Nature of action

This matter involves an appeal of a decision by the Federal Court Trial Division allowing the Information Commissioner's application pursuant to subsection 42(2) of the Act.

Factual background

Originally, the requester requested information pertaining to Direct-To-Home (DTH) and Direct Broadcast Satellite (DBS) services. Some records were released to the requester while others were withheld under various exemptions under the Act. During the course of the subsequent investigation by the Information Commissioner, Industry Canada indicated its willingness to disclose the evaluation criteria while maintaining the exemption of the weighting percentages. However, the Information Commissioner found that the percentage weighting did not properly qualify for exemption from the right of access under paragraph 21(1)(a), as these weightings did not constitute "advice" or "recommendations". With the consent of the requester, the Information Commissioner applied to the Federal Court Trial Division for a review of that decision. The requester, Mr. Patrick McIntyre, was added as a party to this application when he filed a notice of appearance with the court.

At trial, the court ruled in favour of Mr. McIntyre and the Information Commissioner, emphasizing that the nature of the evaluation criteria and weighting, which were prepared by officials in the ministry, actually changed from "advice and recommendations" when the minister approved them; once approved, they became his decisions rather than "recommendations" to him and they no longer fell within paragraph 21(1)(a) of the Act.

The Minister of Industry appealed the decision to disclose the percentage weighting to the requester. This appeal was heard immediately after the consolidated appeals in *Canada (Information Commissioner)* v. *Canada (Minister of Industry)* and *3430901 Canada Inc. & TeleZone Inc.* v. *Canada (Minister of Industry)* (court files A-824-99 and A-832-99).

Issue before the Court

1. Did the documents containing the final weightings lose their character as "advice and recommendations" pursuant to paragraph 21(1)(a) of the Act after the minister decided to adopt them as the basis of his decision to award the licence to the applicant?

2. Was the minister's discretion to disclose lawfully exercised?

Findings

Since the reasons for the decision in *Canada Inc. & TeleZone Inc.* v. *Canada (Minister of Industry)* (court file A-832-99) are applicable to the disposition of this appeal, it is not necessary to repeat them in detail here.

The court noted that the documents in dispute were part of the final version of a slide deck and briefing note prepared for the advice of the minister by senior officials setting out the evaluation criteria, and the weightings assigned to them, for use in determining the award of licences. When created, the court added, these documents clearly contained "advice and recommendations" to the minister within the meaning of paragraph 21(1)(a). Paraphrasing the decision given in

TeleZone (cited above), the court concluded that paragraph 21(2)(a) of the Act did not apply because "the contents of the documents did not lose its character as advice with the minister's apparent adoption of the slide deck as the basis of his decision to award the licence" and "the decision to award the license did not affect anyone's legal rights".

Drawing again attention to the reasons given in TeleZone, the court confirmed that the reverse onus provision in section 48 of the Act does not apply to the review of the exercise of the discretion to withhold an exempt document. Writing for the unanimous bench, Justice Evans noted that it is "not the court's function to substitute its view for that of the minister's delegate on how a statutory discretion should have been exercised". The Appeal Court concluded that "judicial intervention in the exercise of this administrative discretion on the ground of unreasonableness is not warranted, unless the weight attached to the public interest in non-disclosure was quite disproportionate in view of the nature of the limitation on the right to access that thereby would be involved". However, he wrote, "In my view, the exercise of the minister's discretion was not shown to be unreasonable."

Judicial Outcome

The application was allowed.

Future Action

The Information Commissioner has sought leave to appeal the decision to the Supreme Court.

Attorney General of Canada and Janice Cochrane v. ***Canada (Information Commissioner of Canada)***

2002 FCT 136, Court File Nos. T-2276-00 and T-2358-00
Federal Court Trial Division, Kelen J., February 6, 2002

Nature of action

This matter involves two applications for judicial review under section 18.1 of the *Federal Court Act* to set aside two Information Commissioner's Orders with Respect to Production of Records issued pursuant to section 36 of the Act.

Factual background

In March 2000, a number of requests were made to Citizenship and Immigration Canada (CIC) for access to records concerning the Immigrant Investor Program. Under paragraph 9(1)(a) of the Act, CIC extended the time limit in which it could respond to the requests to three years. Following an investigation which determined such a delay to be unreasonable, on September 20, 2000, the Information Commissioner recommended that responses be given by specified dates. He also informed the minister that failure to resolve the matter (by acceptance of the recommendation) would necessitate a "phase two" investigation into a matter which the Act "deems" to have been a refusal.

After rejection of the recommendation, on November 22, 2000, the Information Commissioner issued an Order with Respect to Production of Records to Ms. Janice Cochrane, the Deputy

Minister, CIC, requiring the production of the records relevant to the access request. The Attorney General and CIC asked the Federal Court to review this order. Acting on its own self-initiated complaint, the Information Commissioner issued a second Order with Respect to Production of Records. The Attorney General and CIC also asked the Federal Court to review this order.

Issues before the Court

1. How much judicial or curial deference should the court give to decisions of the Information Commissioner?

2. Was the first Order with Respect to Production of Records in excess of the jurisdiction of the Information Commissioner? Does the commissioner's investigation end when the results are reported to the head of the institution or when the results are reported to the complainant?

3. Did the Information Commissioner have the jurisdiction to issue the second Order with Respect to Production of Records on the basis that he had self-initiated a new complaint pursuant to subsection 30(3) of the Act, which arose from the results of his first investigation, namely that the extension of time was unreasonable and therefore constituted a "deemed refusal"? An underlying question is whether an "unreasonable extension" is a "deemed refusal" under the Act.

4. Were the Orders with Respect to Production of Records intended to turn a recommendation-making power into an order-making power?

5. Absent a power to seek judicial review of whether an extension of time is unreasonable, is the Information Commissioner prevented from taking another course of action?

Findings

1. Relying on an earlier decision by the Supreme Court of Canada, the court confirmed that the appropriate standard of review for decisions of the Information Commissioner to proceed with an investigation is that of "correctness" and, as a result, these decisions are afforded little deference. The "correctness standard" means that the reviewing court must agree with the decision under review. If it does not, the decision is in error and will be quashed.

2. Noting that the power to issue an Order with Respect to Production of Records found in paragraph 36(1)(a) and subsection 36(2) of the Act is "in relation to the carrying out of the investigation", the court observed that "when the investigation is completed, the subpoena power is therefore exhausted". The court held that the investigation into the first complaint was completed on September 20, 2000, when the commissioner reported the results to the minister. The court did not accept the commissioner's view that he retains investigative jurisdiction until the results are reported to the complainant.

3. Noting that Parliament had clearly provided for "deemed refusals" in subsection 10(3) but not elsewhere in the Act, the court went on to say that a "deemed refusal" is when a department "fails to give access to the record within the time limits set out in the Act". Since "in this case the extended time limit had not expired, there can be no 'deemed refusal' to give access". According to the court, under the Act there is no provision for the Information Commissioner "to deem an unreasonable extension of time as a refusal". Having made his findings that the extensions were unreasonable

and making recommendations for shorter periods, that was the end of the Information Commissioner's "jurisdiction with respect to the investigation of the requester's complaints". Therefore, according to the court, the Information Commissioner "did not have the jurisdiction to self-initiate a complaint with a 'deemed refusal' and did not have the jurisdiction to issue the second subpoena in relation to the second investigation".

4. The court concluded that it was "not proper use of the subpoena power to summons the 270,000 pages of documents which CIC stated it could not process on an immediate basis". It also observed that, in doing so, the Information Commissioner effectively required "the department to produce the documents which the respondent had recommended to be produced by December 6, 2000, but which the deputy minister respectfully said was not possible". According to the court, in the case at bar, the Information Commissioner "overstepped his role and legal jurisdiction by ordering a government institution to implement his recommendations when the government institution indicated that it would not be able to implement the recommendation".

5. The court pointed out that, in the case of complaints that an extension of time is unreasonable, the Information Commissioner has the power to investigate such complaints and to make findings and recommendations to the department involved. However, he does not "have the power to seek judicial review of whether an extension of time is unreasonable". Instead, the court observed, the Information Commissioner's sole recourse is to "report to Parliament that a particular department is not acting in a reasonable manner with respect to the objectives of the Act" and "publicly make highly critical comments about government departments".

Judicial Outcome

The application was granted. According to the Federal Court, the two subpoenas or orders for the production of documents were made without jurisdiction. They were set aside.

Future Action

The Information Commissioner has appealed this decision to the Federal Court of Appeal.

Information Commissioner of Canada v. ***The Attorney General of Canada and Janice Cochrane***

Court File No. A-832-00
Federal Court of Appeal, Linden, Sexton and Sharlow JJ.A., November 28, 2001

Nature of action

This matter involves an appeal of an order issued on December 14, 2000, by the Federal Court Trial Division staying an Order with Respect to the Production of Records issued by the Information Commissioner of Canada in furtherance of his investigations into both "deemed" and "actual" refusals by Citizenship and Immigration Canada (CIC) to disclose records in 25 separate complaints.

Factual background

By motion in the Federal Court Trial Division, CIC sought to have the Order with Respect to the Production of Records stayed in the context of litigation seeking to squash the very same order for want of jurisdiction on the part of

the Information Commissioner to investigate "deemed refusals" to disclose records after CIC had taken a three-year extension of time. (See summary in 2000-2001 Annual Report at page 119). On December 17, 2000, a week before the motion was heard, CIC advised the Information Commissioner by letter that it would cooperate fully with the latter's investigations into "actual" refusals to disclose records. Even though a copy of that very letter was with the Motions Judge, the latter failed to distinguish between "actual" and "deemed" refusals and granted the motion staying the Order with Respect to the Production of Records targeting both the "actual" and the "deemed" refusals to disclose records. The Information Commissioner appealed that decision, on the basis that the Motions Judge had erred in law in granting the stay in relation to "actual" refusals.

Issue before the Court

Did the Motions Judge err in granting a stay of the Order with Respect to the Production of Records concerning "actual" refusals?

Findings

At the appeal hearing, the court ordered a modification to the original Trial Division order stipulating that it did not apply to an investigation of a complaint by the Information Commissioner with respect to an "actual" refusal to disclose records. The Crown admitted that it would suffer no harm from the granting of this appeal.

Judicial Outcome

The appeal was granted.

Canada (Information Commissioner) v. ***Canada (Canadian Cultural Property Export Review Board)***

2001 FCT 1054, Court File No. T-785-00
Federal Court Trial Division,
Rouleau J., September 27, 2001

Nature of action

This matter involves an application for judicial review under section 42 of the Act of a refusal by the Canadian Cultural Property Export Review Board (CCPERB) to release records pertaining to the Board's review, and approval, of a tax credit request in relation to a donation of archives and memorabilia by Mr. Mel Lastman and his family. In refusing disclosure, the Board relied upon sections 19 and 24 of the Act as well as section 241 of the *Income Tax Act*.

Factual background

In 1998, the former mayor of North York, Ontario, approached the municipal authorities indicating his desire to donate a series of documents. Eventually, the CCPERB convened a review board to determine if the collection of documents would be of archival value and whether it met the criteria under the *Cultural Property Export and Import Act* to be certified as a donation. After reviewing the opinion submitted by experts, the Board advised Mr. Lastman that the collection met the criteria and confirming its fair market value, forwarded the required cultural property income tax certificate. The amount of the tax credit was subsequently made public at a press conference held by Mr. Lastman. In September 1998, a journalist requested access to a number of records concerning this transaction, including a copy of the appraisal report of the fair market value of the archival property. Arguing that the

records at issue constitute personal information, as defined in the *Privacy Act*, the Board, relying on sections 19 and 24 of the Act, refused disclosure (section 24 refers to section 241 of the *Income Tax Act*). After investigating the resulting complaint, the Information Commissioner recommended disclosure of the records containing information which Mr. Lastman had already disclosed.

Issues before the Court

1. Is the tax certificate a "discretionary benefit of a financial nature" and, hence excluded from the definition of "personal information" by virtue of paragraph 3(l) of the *Privacy Act*?

2. Even if the information is "personal information", is disclosure required by paragraph 19(2)(b) of the *Access to Information Act*?

3. Does section 241 of the *Income Tax Act* prevent disclosure?

Findings

The court found that the information withheld by CCPERB fell within the exception set out in paragraph 3(l) of the *Privacy Act*, in that information relating to any discretionary benefit of a financial nature conferred on an individual, including the name of the individual and the exact nature of the benefit is disclosable. Noting that Mr. Lastman's career as a public official and businessman is in the public domain and that Mr. Lastman had disclosed the amount of the tax certificate, the court concluded: "It seems clear that the information in question must still be disclosed by virtue of it being publicly available within the meaning of paragraph 19(2) of the Act." The court rejected the arguments advanced under the *Income Tax Act* noting that "taxpayer information refers to information about specific taxpayers obtained through tax returns and collected during tax investigations which would reveal the person's identity". Where that information has been publicly disclosed by the taxpayer himself or "is generally known to be in the public domain and be compiled with some effort, that individual's privacy cannot be said to have been breached".

Judicial Outcome

The application was allowed.

Future Action

On October 29, 2001, the Board filed an appeal (A-633-01) as well as a motion for a stay of the instant decision. The Federal Court of Appeal dismissed the motion noting that "whatever may be the merits of the appellant's irreparable harm arguments in the case of confidential information, they do not apply to the usual facts here. Mr. Lastman made the information public. The appellant's arguments do not establish irreparable harm when the information is already public." The records at issue have been released to the requester. The Information Commissioner has filed a motion requesting that the appeal be dismissed on the ground of mootness.

The Federal Court of Appeal granted the Information Commissioner's motion and dismissed the appeal with costs.

Cases in progress

Commissioner as Applicant/Appellant

The Information Commissioner of Canada v. ***The Commissioner of the Royal Canadian Mounted Police and Privacy Commissioner of Canada***

SCC 28601
Supreme Court of Canada

(See 2000-2001 Annual Report, p. 111 and 1999-2000 Annual Report, p. 47 for further details.)

The commissioner sought leave to appeal the decision of the Federal Court of Appeal in court file A-820-99 to the Supreme Court of Canada. Leave to appeal was granted on September 13, 2001. The central issue in this appeal is whether the RCMP may invoke the privacy exemption (subsection 19(1) of the *Access to Information Act*) to withhold a list of previous postings of RCMP officers. This case is set to be heard during the fall of 2002. The result of the appeal will be reported in next year's annual report.

The Information Commissioner of Canada v. ***Canada Post Corporation and Minister of Public Works and Government Services Canada and Peter Howard***

A-489-01
Federal Court of Appeal

This is an appeal of an order of Madam Justice Tremblay-Lamer varying the confidentiality order issued by Mr. Justice Blanchard in court file T-2117-00.

On May 1, 2000, the Minister of Public Works and Government Services Canada (PWGSC) received a request for access to a specific report which had been provided to it by Canada Post. The request was denied as being a cabinet confidence and the requester complained to the Information Commissioner.

During the Information Commissioner's investigation, the Minister of Public Works changed his position and determined that some of the requested information was not excluded pursuant to section 69. Notices pursuant to sections 27 and 28 were sent to Canada Post indicating that PWGSC intended to disclose some of the requested information.

On October 23, 2000, Canada Post applied to the Federal Court of Canada pursuant to section 44 of the Act seeking to block disclosure. On December 7, 2000, in the course of the proceedings, Mr. Justice Blanchard issued a confidentiality order. The Information Commissioner was not a party to these proceedings.

On August 17, 2001, in the course of the commissioner's ongoing investigation into the refusal to disclose some of the requested information, PWGSC refused to provide records to the commissioner because of the confidentiality order issued by Justice Blanchard. The commissioner took the view that the confidentiality order did not justify refusal to provide records to him. He issued a subpoena duces tecum requiring the ATIP coordinator at Public Works and Government Services Canada to produce the information.

The minister filed a motion for a variance of Mr. Justice Blanchard's confidentiality order in order to comply with the subpoena. The Information Commissioner was granted leave to intervene on the motion and opposed the motion arguing that there was no conflict between the confidentiality order and the subpoena. The commissioner's reason for opposing the

motion was to ask the court to settle, for the future, the principle that disclosure of records to the commissioner does not violate any confidentiality order which is issued in a parallel section 44 case.

On August 23, 2001, the Motions Judge, Madam Justice Lamer, agreed that there was no conflict between the confidentiality order and the subpoena but, by abundance of caution, she varied the confidentiality order. The Information Commissioner appealed that decision in order to seek a more definitive direction for future cases.

The Information Commissioner of Canada v. ***The Minister of Citizenship and Immigration and P. Pirie***

A-326-01
Federal Court of Appeal

(See 2000-2001 Annual Report, p. 110 and 1999-2000 Annual Report, p. 43-44 for more details.)

In this case, the Information Commissioner has appealed the decision of Madam Justice Dawson, dated May 4, 2001, in which she found that paragraph (i) of the definition of "personal information," found in section 3 of the *Privacy Act*, precluded the release to Mr. Pirie of the names of certain individuals who expressed opinions about Mr. Pirie in the course of a workplace administrative review. Justice Dawson concluded that only the names of persons who had a job responsibility to express views about Mr. Pirie should be disclosed.

The Information Commissioner takes the view that paragraphs 3(e) and 3(g) of the *Privacy Act* make it clear that the identities of all persons expressing views or opinions about an individual become the personal information of the individual and, hence, are accessible by the subject individual. The Privacy Commissioner of Canada sought, and was granted, leave to intervene. In his memorandum of fact and law, the Privacy Commissioner supports the position taken by the Information Commissioner. The result of the appeal will be reported in next year's annual report.

The Minister of Environment Canada v. ***The Information Commissioner of Canada and Ethyl Canada Inc.***

A-233-01
Federal Court of Appeal

(See Annual Report 2000-2001 p. 107 for more detail about the proceedings in Trial Division.)

On April 12, 2001, the minister filed an appeal of the order of Mr. Justice Blanchard requiring the minister to disclose certain information which had been withheld as constituting cabinet confidences. Mr. Justice Blanchard found that the refusal to disclose constituted an effort to circumvent Parliament's intention that background information presented to cabinet should be disclosed once the relevant decisions are made public ([2001] 3 FC 514 (TD)). This appeal is ready for hearing since December 12, 2001. The outcome will be reported in next year's annual report.

The Information Commissioner of Canada v. ***The Attorney General of Canada and Brigadier General Ross***

T-656-01, T-814-01 and T-1714-01
Federal Court Trial Division

These three applications for judicial review were made by the Information Commissioner and seek to quash certificates issued by an employee of

the Prime Minister pursuant to former sections 37 and 38 of the *Canada Evidence Act*. These certifications claim that it would be injurious to national defence or national security to provide certain information to the Information Commissioner in the course of his private investigations. This is the first time since the coming into force of the *Access to Information Act* that such an objection has been made to a commissioner during his investigations.

In his Notices of Application, the Information Commissioner has taken the position that production of the withheld documents to him would not constitute "disclosure" and would not jeopardize any public interest. No date for a hearing has been set.

However, a new development may resolve the matter. The *Anti-Terrorism Act*, which came into force on December 18, 2001, abrogated sections 37 and 38 of the *Canada Evidence Act*. No comparable certificates have been issued under the amended Act. At this writing, there is some indication that the Crown may be prepared to produce the records to the commissioner.

The Information Commissioner of Canada v. ***The Executive Director of the Canadian Transportation Accident Investigation and Safety Board***

T-465-01
Federal Court Trial Division

(See Annual Report 2000-2001, p. 116, for more details.)

In this case, the Information Commissioner has, pursuant to section 42 of the Act, asked the Federal Court to order the disclosure to a journalist of audiotapes and transcripts of conversations between a pilot and air traffic controllers relating to the crash of a Kelner Airways flight near Clarenville, Nfld. The institution relied on subsection 19(1) to withhold the requested information since, in its view, the content of the transmissions is the personal information of the persons involved in the communication.

By way of this motion, Nav Canada sought an order adding it as a party to this application pursuant to rules 303(1)(a) and 104(1)(b) of the Federal Court Rules, 1998. Nav Canada records all conversations between its air traffic controllers and air crews. The judge found that Nav Canada is directly affected by the relief sought by the commissioner and added it as a party respondent.

The Information Commissioner's appeal (A-382-01) from the order granting Nav Canada full party status was dismissed.

The case will continue before the Trial Division and the results will be reported in next year's annual report.

The Commissioner as respondent in Trial Division

The Attorney General of Canada et al. v. ***The Information Commissioner of Canada***

T-582-01, T-606-01, T-684-01, T-763-01, T-792-01, T-801-01, T-877-01, T-878-01, T-880-01, T-883-01, T-887-01, T-891-01, T-892-01, T-895-01, T-896-01, T-924-01, T-1047-01, T-1049-01, T-1083-01, T-1448-01, T-1909-01, T-1910-01, T-1254-01, T-1255-01, T-1640-00, T-1641-00, T-2070-01
Federal Court Trial Division

At last count, the Attorney General and various individuals, who have appeared as witnesses before the Information Commissioner in investigations concerning records held in the offices of the Prime Minister and ministers, had filed 27 applications for judicial review seeking the determination of five legal issues. More specifically, these applications seek declarations:

i) that specific documents are not under the control of a government institution,

ii) that the commissioner does not have the jurisdiction to issue certain confidentiality orders,

iii) that the commissioner does not have the jurisdiction to photocopy certain documents provided to him pursuant to a subpoena duces tecum,

iv) that the commissioner may not require the production of records which allegedly qualify for solicitor-client privilege, and

v) that the commissioner may not ask certain questions during his investigations.

Given the complexity of this litigation, the Associate Chief Justice appointed Mr. Justice McKeown to manage all 27 files, and the 3 applications brought by the Information Commissioner (see page 86). In August 2001, both the commissioner and the Attorney General brought procedural motions before the case management judge. The Attorney General sought to consolidate all 27 procedural files as well as the three applications brought by the Information Commissioner challenging the sections 37 and 38 objections, into one "super" file dealing with seven distinct legal issues. She also sought production of transcripts of the evidence heard during private proceedings before the commissioner, to be provided to the court, the Attorney General of Canada and to counsel for the Attorney General.

The commissioner opposed this motion. In his opinion, the consolidation proposed by the Attorney General would be unworkable given the number of files and the distinct legal issues raised therein. With respect to the request to produce the transcripts of his private proceedings, the commissioner argued that he is precluded from providing any information to the court by sections 62 and 65 of the Act because the application was not brought under the Access Act but under the *Federal Court Act*. The commissioner further argued that, given the provisions of the Act and earlier jurisprudence of the Supreme Court of Canada, the Federal Court is precluded from requiring the production of this information in accordance with the Federal Court Rules, 1998. The Information Commissioner also argued that the Attorney General is legally precluded from having access to the confidential transcripts and that the Charter argument advanced by the applicants did not require production of the confidential transcripts.

The court held that there is insufficient common evidence to justify consolidation of all 30 applications, and found that the Information Commissioner would be substantially prejudiced if the applications were consolidated. Specifically, the court held that the applicants could improve their position by indirectly obtaining disclosure of evidence which they had not shown to be necessary in those applications, and that this would be contrary to the spirit and letter of the confidentiality provisions set out in the *Access to Information Act*. The court ordered the applications be consolidated into seven groups to be heard serially.

As regards the filing of confidential transcripts, the Information Commissioner was ordered to file his confidential transcripts in four of the seven groups of applications. The court found, *inter alia*, that the Act did not preclude a court from obtaining a confidential transcript; as such, there was no conflict between rules 317 and 318 and the confidentiality provisions of the Act. Although the court found that the applicants had only identified certain portions of the transcripts as relevant to the determination of the applications, the transcripts in their entirety were nevertheless ordered to be filed with the court. Further, the court ordered the production of the transcripts in a group of three applications not subject to rules 317 and 318 of the Federal Court Rules (1998) which were brought by the Information Commissioner to determine whether the government of Canada may properly refuse to provide some information required by the Information Commissioner in the conduct of his private investigation. (See page 86 for details.) This ruling regarding the filing of confidential transcripts has been appealed by the commissioner.

In his motion, heard at the same time, the commissioner sought to have the law firm of Borden Ladner Gervais LLP removed as counsel of record. This motion was brought because of the commissioner's concern that counsel could not properly represent the witnesses and the Crown at the same time without being in conflict with their confidentiality obligations to the individual witnesses. It is the Information Commissioner's view that the Crown, as represented by the Attorney General, does not have the right to be privy to the private evidence of individual witnesses who are Crown employees.

At the same time, the commissioner also sought to have the Attorney General removed as an applicant in these applications for judicial review. The commissioner took the position that the Attorney General, representing the Crown, is neither an affected party nor a necessary party to these applications.

The applications to remove certain counsel as solicitors of record and to strike the Attorney General of Canada as a party were denied. The court concluded that the Information Commissioner's Orders of Confidentiality adequately protect the confidentiality of the Information Commissioner's investigation process and ensure that no confidential evidence would be provided to the Attorney General of Canada.

On the issue of standing, the court held that the Attorney General "as well as seeking remedies in all these applications pursuant to her obligation to ensure that the public interest is protected, is also acting pursuant to her authority to regulate and conduct 'all litigation for or against the Crown or any department'". Further, the court

held that the Attorney General was not seeking access to confidential information but was seeking to have the confidential information reviewed by a court in order to determine whether there has been an abuse of discretionary powers by the Information Commissioner. The Attorney General was seeking to have judicial review of the procedural role of the Information Commissioner, and as such, was entitled, according to the Court, to bring the applications for judicial review.

The solution fashioned by the court was to preserve the Information Commissioner's confidentiality orders by allowing counsel for the Attorney General to view the confidential transcripts in accordance with the Information Commissioner's orders of confidentiality.

Mertie Anne Beatty et al.
v. *The Chief Statistician et al.*

T-178-02
Federal Court Trial Division

This application was filed, pursuant to section 18 of the *Federal Court Act*, on February 5, 2002, seeking the issuance of an order requiring the 1906 Census data to be transferred from Statistics Canada to the National Archives. The applicant would have a right of access to the records if they were held by the National Archives. The Information Commissioner was named as a respondent party even though he has no power to compel the disclosure of the records. The Information Commissioner takes the position that he has improperly been named as a respondent since there are no orders or relief sought against the Information Commissioner in this case.

Commissioner as an intervener

The Attorney General of Canada et al. v. ***Babcock et al.***

SCC 28091
Supreme Court of Canada

On May 25, 2001, the Information Commissioner sought leave to intervene in this appeal to the Supreme Court of Canada. On June 18, 2001, the Information Commissioner was granted leave to intervene in this case which raised the proper interpretation of section 39 of the *Canada Evidence Act* with respect to the validity of a certificate issued by the Clerk of the Privy Council and asserting cabinet confidence.

The background of this case is as follows:

On June 6, 1990, the Treasury Board made a decision to authorize higher pay compensation for Toronto LA's. Babcock and the other Vancouver lawyers alleged that, as a result of that decision, the salary increase was withheld from them and they have, since 1990, received lower salaries than those provided to legal officers of the same classifications and who perform equivalent work, of equivalent worth, and with equivalent responsibilities, in Toronto. Babcock et al brought an action in the Supreme Court of British Columbia seeking a remedy for the alleged discriminatory treatment.

During the proceedings before the Supreme Court of British Columbia, on August 20, 1998, the Clerk of the Privy Council certified under section 39 of the *Canada Evidence Act* that 51 documents contained information constituting confidences of the Queen's Privy Council and objected to the disclosure of the documents and the information contained therein. Some

of these 51 documents had previously been disclosed by the Crown to the other side.

On Babcock et al's motion to compel disclosure of all documents listed in the certificate, the chambers judge held that section 39 applied to the proceeding and was constitutionally valid. He refused to question the validity of the certificates even though they concerned records already disclosed.

On appeal, the majority held that the protection of section 39 had been waived for all documents covered by the certificate and ordered them produced. The court also held that the certificate was defective, as it was not sufficient that the section 39 certificate describe cabinet documents simply by tracking the language of the section. The Attorney General was granted leave to appeal before the Supreme Court of Canada.

The Information Commissioner sought and was granted leave to intervene in the matter. Given the commissioner's experience with the manner in which section 39 of the *Canada Evidence Act* is applied by the Clerk of the Privy Council, the commissioner argued that the court should not interpret section 39 as an absolute bar to judicial review of secrecy certificates issued thereunder.

Canada Tobacco Manufacturer's Council A and B (Confidential) v. ***The Minister of National Revenue, The Information Commissioner of Canada and Robert Cunningham***

T-877-00
Federal Court Trial Division

(See Annual Report 2000-2001, p. 119, for further details.)

This application for review has been ready for hearing since May 2001 but has not yet been set down for trial. The outcome will be reported in next year's annual report.

Court Cases Not Involving the Information Commissioner

Atlantic Prudence Fund Corp. v. ***Canada (Minister of Citizenship and Immigration)***

2001 FCT 556, Court File Nos. IMM-2294-96, IMM-2296-96, and IMM-2297-96
Federal Court Trial Division, Hugessen J., April 12, 2001

Nature of action

This matter involves a motion asking the court to direct the administrator of the court to send the Information Commissioner a letter asking him to expedite the investigation of a complaint filed by Atlantic Prudence Fund Corp.

Factual background

Having brought applications for judicial review with regard to certain ministerial decisions made under the *Immigration Act*, Atlantic Prudence made a request for access to certain records it needed for the court proceeding. In response, the minister invoked certain exemptions to refuse to disclose portions of some of the documents requested. Atlantic

Prudence filed a complaint with the Information Commissioner. Dissatisfied with the time taken to complete the investigation of its complaint by the Information Commissioner, Atlantic Prudence asked the court handling its judicial review application to direct its administrator to write to the Information Commissioner.

Issue before the Court

Does the court have jurisdiction to make such an order?

Findings

Noting that it would be inappropriate for the court "to attempt to use its 'persuasive' powers towards an official whose decision the court may ultimately be called upon to judge", the court did not address the issue of jurisdiction. However, the court added that, to order the administrator to send such a letter would "interfere with that very independence which is a necessary part of the commissioner's function and credibility. It would be a misuse of the court's authority."

Judicial outcome

The motion was dismissed.

Rubin v. ***Canada (Minister of Foreign Affairs and International Trade)***

2001 FCT 440, Court File No. T-2304-98
Federal Court Trial Division,
Blanchard J., May, 2001

Nature of action

This matter involves an application, under section 41, of a decision by the Minister of Foreign Affairs and International Trade (DFAIT) seeking the review of the decision by the minister to deny access to records concerning the sale by Atomic Energy of Canada Limited (AECL) of nuclear reactors to China.

Factual background

In response to an access request for certain records relating to the sale of nuclear reactors to China, DFAIT refused to disclose a "survey report", relying on the exemptions set out in subsections 20(1) and 13(1) of the Act. As well, DFAIT informed the requester that it could not give access to a "Shanghai report" because the report had been returned to AECL. The requester complained to the commissioner who upheld DFAIT's position. After the application for judicial review was made by the requester, the Chinese government consented, pursuant to paragraph 13(2)(a) of the Act, to the release of the "survey report" to the requester.

Issues before the Court

1. Despite the release of the "Survey Report", can the court issue remedial directions to DFAIT concerning the late release of the report?

2. Was the "Shanghai Report" under the control of DFAIT when the access request was made and should it have been filed with National Archives?

Findings

The court was quite clear: "it is not the role of this court to order instructions to DFAIT where there is no continuing refusal to disclose the records at issue." Both sections 41 and 49, the court noted, "require, as a condition precedent, that the government institution refuse to disclose the record at issue". As observed by the court, once this "right has been provided, there is no further remedy for this court to order".

2. Relying on a decision by the Federal Court of Appeal in *Canada Post Corporation* v. *Canada* [1995] 2 F.C. 110, the court then observed that the word "control" is an undefined term in the

Act and whether or not a record "is under the control of a government institution must be determined on a case-by-case basis" and not be limited by a test as to how the information was used by a department for a limited time. What counts, said the court, is that the "document is no longer in the physical possession of the department". Without condoning "the actions of DFAIT in its failure to comply with the *National Archives Act*," the court concluded that this had no bearing on the application for judicial review which was filed pursuant to section 41 of the Act.

Judicial outcome

The application for judicial review was dismissed.

Imperial Consultants Canada Ltd. v. ***Canada (Minister of Citizenship and Immigration)***

2001 FCT 1107, Court File No. T-2158-98
Federal Court Trial Division, Hansen J., October 10, 2001

Nature of action

This matter involves an application for judicial review, under section 41, of a decision by the Minister of Citizenship and Immigration (CIC) exempting certain records under sections 13, 14, 15, 16, 19, 20, 21 and 23 of the Act.

Factual background

In response to an access request, CIC released to Imperial Consultants a total of 813 pages of which 140 pages were partially severed. It withheld 211 pages. During the course of an investigation by the Information Commissioner, on June 18, 1998, CIC released a further 155 pages with some of the pages partially severed. Following negotiations between the Information Commissioner and CIC, a further 26 pages which had been previously withheld under section 17 of the Act, were released on September 26, 1998. Reporting on the results of his investigation, the Information Commissioner then advised Imperial Consultants that it had then been provided with all the records to which it was entitled. On November 19, 1998, Imperial Consultants filed for judicial review. Three days prior to the hearings, CIC made a further release of exempted material.

Issue before the Court

Do the remaining records withheld from disclosure by CIC qualify for exemption from the right of access?

Findings

After providing a lengthy review of the legal principles applicable to a section 41 review, with respect to the records withheld by CIC, pursuant to the mandatory provisions of paragraphs 13(1)(a) and 20(1)(c), the court found that CIC had "met the burden of establishing that the information" came within the relevant provision of the Act.

With respect to records withheld pursuant to the discretionary provisions of the Act, namely section 23, subsections 15(1) and 19(1) as well as paragraphs 14(a), 16(1)(a), (b) and (c), 20(1)(a) and (b), the court "was satisfied that the information" fell within the category of information contemplated by the relevant provisions.

Lastly, the court contemplated the release of information previously withheld on a specific document pursuant to subsection 15(1), because CIC "had not demonstrated that the disclosure of the exempted information could be reasonably expected to be injurious to the conduct of international affairs".

Judicial outcome

The application for judicial review was dismissed except for the document previously exempted pursuant to subsection 15(1) which was remitted to the minister for a redetermination.

PriceWaterhouseCoopers LLP. v. ***Canada (Minister of Canadian Heritage)***

2001 FCT 1040, Court File No. T-1785-99
Federal Court Trial Division,
Campbell J., September 20, 2001

Nature of action

This matter involves an application, under section 44, for an order preventing the minister from disclosing two reports produced by PriceWaterhouseCoopers (PWC).

Factual background

Canadian Heritage contracted PWC's services for the purpose of reviewing, analyzing and recommending changes to its documents being used to contract-out or "outsource" elements of its work. This assignment was conducted within a relationship that had, as a fundamental feature, a concern for the full confidentiality of two reports produced by PWC which constitute the results of the assignment.

In performing this assignment, PWC had applied its proprietary methodologies which it had developed over an extended period of time and had always held in the strictest confidence. Indeed, anytime PWC had used the Proprietary Methodologies and Analysis in its prior assignments, it ensured that the documents derived therefrom were marked "confidential", were maintained in "confidence", and were not disclosed to any other person, except the client.

According to PWC, disclosure of either the First Draft Report or the Review Update would prejudice its competitive position by allowing a competitor to reverse engineer or work deductively to determine the means and analysis PWC used in its assignment.

Issue before the Court

To determine if the two reports contained trade secrets and therefore constitute records protected under subsection 20(1) of the Act.

Findings

Using the definition of a "trade secret" determined by the Federal Court in *Société Gamma Inc.* v. *Canada (Secretary of State)*, [1994] F.C.J. No. 589, the court held that there was "no question on the evidence that the information was guarded very closely both by PWC and Heritage Canada" and that the work product was considered by PWC to be of "such unique or 'peculiar' quality that its mere disclosure could be presumed to cause economic harm" of an undetermined value. Noting, also, that the information contained in the two reports was capable of "proving the methodology", the court held that the work product was "something of a technical nature" and containing "technical information".

The court held that the two reports contained "trade secrets" as well as "commercial information". Given the extent to which PWC had gone to keep the technical and commercial information under review confidential, the court concluded that it is clear that the information was not accessible to the public by any means and, that PWC had "consistently treated the information contained in the reports under review in a confidential manner".

The court found, therefore, that the records did meet the requirements of paragraphs 20(1)(a), (b) and (c) and were exempt from disclosure.

Judicial Outcome

The application for judicial review was allowed on the basis that the evidence demonstrated that, if disclosed, the confidential methodology employed by PWC could indeed be ascertained by a reverse engineering of the reports.

Rubin v. ***Canada (Minister of Health)***

2001 FCT 929, Court File No. T-2408-98
Federal Court Trial Division, Nadon J., August 21, 2001

Nature of action

This matter involves an application for judicial review under section 41 of the refusal by Health Canada to disclose in full a record pursuant to paragraphs 20(1)(b) and (c) of the Act.

Factual background

Faced with a request for access to the report titled "Special Review on the Safety of Calcium Channel Blockers", Health Canada first provided an edited version of the report. This version of the report, prepared in April 1997, was created for public release as a result of requests for the report. This report was not prepared in the context of, or in response to, any requests made under the Act.

During the course of an investigation into a complaint by the Information Commissioner, Health Canada agreed to conduct a second review of the report. It contacted all third parties affected by the release of the report, as well as the government of Australia. In the months following, Health Canada provided the requester with a second version of the report first indicating that some information was being withheld as it qualified for exemptions under paragraphs 20(1)(b) and (c). The Information Commissioner reported on the results of his investigation concluding that paragraph 20(1)(b) justified the refusal to disclose the information. Before the matter went before the court, Health Canada also invoked section 13 of the Act to justify its refusal to disclose.

Issues before the Court

1. Confidential Information. Was Health Canada justified in withholding portions of the requested report pursuant to paragraphs 20(1)(b) and (c) of the Act?

2. Public interest. Was the minister's discretion properly exercised under subsection 20(6) of the Act?

3. Information obtained in confidence. Could Health Canada rely on paragraph 13(1)(a) of the Act since it had not done so before the Information Commissioner?

Findings

1. Noting that the question of whether the information is confidential must be established objectively, taking into account the content and purposes of the information, as well as the context in which it was prepared and communicated, the court observed that it was up to Health Canada to "not only demonstrate that the information was consistently treated as confidential by the third parties, but also that it was kept confidential by both parties". After a careful review of the material, not unlike the Information Commissioner, the court concluded that Health Canada "was correct in refusing disclosure under paragraph 20(1)(b)". In view of that conclusion, the court noted that it did not need to

address the submissions regarding paragraph 20(1)(c).

2. The court noted that the minister had "the discretion under subsection 20(6) and section 25 of the Act to disclose the information if it was in the interest of the public". However, "it does not have the obligation or the duty to do so". The court went on to state that in absence of evidence of bad faith on the part of Health Canada, the exercise of "discretion not to disclose the information pursuant to subsection 20(6) of the Act was proper".

3. Pursuant to paragraph 10(1)(b) of the Act, the court noted, "if the head of a government institution refuses to give access to a record or part of a record, it must state in the notice to the requester the specific provision of the Act on which the refusal was based". The court went on to note that plain reading of section 10 of the Act indicates that the specific provision relied upon by an institution "must be indicated to the requester before the complaint is made to the Information Commissioner". However, in the instant case, since at the time of the investigation by the Information Commissioner the department had not relied upon paragraph 13(1)(a) of the Act, Health Canada "could not, a few months later, suddenly invoke that section again". Consequently, Health Canada was "precluded from relying on section 13 of the Act" before the court.

Judicial outcome

Concluding that Health Canada was justified in refusing disclosure, the application was dismissed by the court.

Jacques Whitford Environment Ltd. v. ***Canada (Minister of National Defence)***

2001 FCT 929, Court File No. T-1785-99. Federal Court Trial Division, O'Keefe J., May 30, 2001

Nature of action

This matter involves an application under section 44, opposing the release of an unsolicited proposal which included a section describing proposed methodology.

Factual background

An unsolicited proposal was submitted to ND by Jacques Whitford Environment (JWE). The proposal contained, among other things, a description of the methodology to be employed in satisfaction of the perceived need of ND. The proposal was not accepted by ND. However, later, ND did issue a call for abbreviated proposals in relation to work of a similar scope. The abbreviated proposal did not contain a description as to the methodology to be employed. In response to a related access request, ND first opted against disclosing the unsolicited proposal. During the course of an ensuing investigation by the Information Commissioner, ND advised the requester that, in the absence of rationale that met the criteria of subsection 20(1), it had decided to release the proposal.

Issues before the Court

1. Were the records properly exempted from disclosure under paragraph 20(1)(b)?

2. Was there a reasonable probability of material financial loss to the applicant or prejudice to his competitive position pursuant to paragraph 20(1)(c) of the Act if the unsolicited proposal were released?

3. Unless the whole of the unsolicited proposal is exempt, should some of the information contained in the document in question be severed and disclosed?

Findings

1. At the hearing, the parties agreed that the information contained in the requested records was either commercial or financial information, that it was supplied to a government institution by a third party and, that it was treated consistently in a confidential manner by the third party. To meet the full requirements of paragraph 20(1)(b), the court was called on to decide whether or not the document in question was confidential by its nature. Addressing this issue, the judge concluded that some of the information was confidential because it "is not available from sources otherwise accessible by the public, nor could it be obtained by observation or independent study by a member of the public acting on his or her own".

2. The court was not "satisfied that the evidence submitted allows the document to qualify for non-disclosure under paragraph 20(1)(c)".

3. Following an agreement by the applicant at the hearings, pursuant to section 51 of the Act, the court ordered the release of non-exempt information contained in the unsolicited proposal.

Judicial outcome

Given that information was considered confidential and was exempt pursuant to paragraph 20(1)(b), the application was allowed in part. On the other hand, the court concluded that the unsolicited proposal did not meet the requirements of paragraph 20(1)(c) and that non-exempt information contained in the unsolicited proposal must be disclosed.

Siemens Canada Ltd. v. ***Canada (Minister of Public Works and Government Services)***

2001 FCT 1202, Court File No. T-587-00
Federal Court Trial Division,
McKeown J., November 5, 2001

Nature of action

This matter involves an application for judicial review, under section 44, of a decision by ND to release documents concerning a winning proposal submitted by Siemens in response to a Request for Proposals for the provision of in-service support on the Halifax and Iroquois class ships.

Factual background

After the award of the contract to Siemens, one of the unsuccessful bidders made an access request for records held by PWGSC in relation to Siemens' participation in the solicitation process. Siemens objected to the release of any and all records on the ground, among others, that such disclosure would violate section 30 of the *Defence Procurement Act* (DPA) which states, in part, that: "No information with respect to an individual business that has been obtained under or by virtue of this Act shall be disclosed without the consent of the person carrying on that business . . ." Section 30 of the DPA is a confidentiality provision which is protected by section 24 of the Access Act. After consideration of these objections, PWGSC determined that these documents could only be partially exempted by virtue of subsection 19(1) and

paragraphs 20(1)(b) and (c) and, further, that subsection 24(1) simply did not apply. On the issue of the DPA, PWGSC took the position that section 30 did not apply to the Siemens' documents in question as they were part of the solicitation of the contract, and not part of the actual contract.

Issue before the Court

Were the records barred from disclosure under section 24 of the Access Act as the result of the operation of section 30 of the DPA?

Findings

The court ruled that the "information in this case was obtained 'under or by virtue of this Act [DPA]' since the minister derives his authority to conduct procurements, to do all such things as appear incidental to such procurements… It is irrelevant, in my view, if the information in question constituted part of the actual contract, or was obtained as a pre-condition of the contract. It was all obtained by the minister acting under the authority given by the Act. Once the contract comes under the DPA, then section 30 does not distinguish between documents which were part of the contract and documents which were part of the solicitation." Therefore, the court concluded, the "documents should not be disclosed since the applicant has not provided its consent".

Judicial outcome

The application for judicial review was allowed.

Blank v. ***Canada (Minister of the Environment)***

2001 FCA 374, Court File No. A-608-00
Federal Court of Appeal, Strayer, Linden and Sharlow JJ.A., December 3, 2001

Nature of action

This matter involves an appeal of an order from the Trial Division which was issued in response to a section 41 application.

Factual background

Mr. Blank and his corporation, Gateway Industries, requested documents under the control of the Minister of the Environment. The documents relate to the investigation and prosecution of criminal charges, under the *Fisheries Act*, relating to effluents allegedly discharged into the Red River from a paper mill in Winnipeg owned and operated by Gateway. Some of the charges have been quashed, but others remain outstanding. Not satisfied with the disclosures obtained under the criminal process with respect to the outstanding charges, Gateway then exercised its right of access under the *Access to Information Act*. Some of the documents were released in whole or in part. Others were refused based on a number of statutory exemptions. Although the complaint was dismissed by the Information Commissioner, his investigation led to the review of approximately 7,655 pages of material.

Blank applied to the Trial Division for a judicial review under section 41 of the refusal by the minister to disclose certain documents. Prior to the court hearing in the Trial Division, the number of records at issue had been reduced to 544 pages of written records and one video tape. The application to the Federal Court was partially successful with the trial judge ordering full or partial disclosure of a further 153 pages. At appeal, approximately 113 pages or partial pages were at issue. For 112 of those pages, the claim for exemption was based on section 23 (solicitor-client privilege).

Issues before the Court

1. Some of the documents in the requested files were letters or memoranda that referred to attachments or to other documents which, in some cases, were not found in the requested files. How should these documents, incorporated by reference into requested records, be treated?

2. To what extent is the criminal law right of disclosure to an accused person, relevant in the context of proceedings under the Access Act?

3. Does the severance rule in section 25 apply to records for which an exemption is claimed under section 23 (solicitor-client privilege)?

4. With respect to the 112 pages of documents for which the minister asserted a claim of solicitor-client privilege, has the Trial Division judge correctly determined the application of section 23 and section 25?

Findings

1. The Court of Appeal disagreed with the contention that missing attachments or other documents should be treated as being within the scope of the requests. The court found that the "Information Commissioner who investigated the matter concluded that all records within the scope of the request had been identified and either disclosed or withheld on the basis of an identified exemption. The appellants have adduced no evidence to contradict the Information Commissioner's conclusion. It follows that this argument must fail."

2. The Court of Appeal recognized that the common law right of disclosure recognized by the Supreme Court in Stinchcombe [1991] "is a right that must be administered by courts having jurisdiction in criminal proceedings". The court cautioned that to try to "apply the Stinchcombe rules in the context of proceedings under the *Access to Information Act* would be to invite the Information Commissioner, and ultimately this court, to try to anticipate decisions that ought to be made, or to review decisions that have already been made, by a criminal court". In determining whether the appropriate disclosures have been made under the ATIA, the Information Commissioner, and the Federal Court, should consider only the ATIA and the "jurisprudence guiding its application and interpretation. Laws requiring disclosure in criminal proceedings can neither narrow or broaden the scope of disclosure required by the *Access to Information Act*."

3. The Court of Appeal disagreed with the notion that a record subject to solicitor-client privilege is not subject to the severance provision in section 25 which specifies that it operates "notwithstanding any other provision of the Act". The court stated that, if a document "contains a communication that is within the scope of the common law solicitor-client privilege and also contains information that is not within the scope of solicitor-client privilege, the minister cannot refuse to disclose the latter".

4. Typically, a party challenging in court a claim of solicitor-client privilege is given particulars about the documents rather than access to the documents themselves. As a result, the documents are reviewed in detail only by the court, both at the trial and appeal level. After reviewing the 112 documents in issue, the Appeal Court concluded that, save one exception, the documents in issue were letters or memoranda representing communications between solicitor and client.

Generally, however, the court agreed with the partial disclosure of general identifying information (for instance, the description of the document i.e. "memorandum" as well as the internal file identification, the name, title and address of the person to whom the communication was directed, the generally innocuous opening words and closing words of a communication, and the signature block) contained in some of the documents. Unless such identifying information is itself subject to solicitor-client privilege, its partial disclosure would "enable the litigants to know that a communication occurred between certain persons at a certain time on a certain subject, but no more".

Judicial Outcome

The Appeal Court ruled that Gateway was entitled to the disclosure of the copy of a letter from an official of Environment Canada to the City of Winnipeg. However, it dismissed the remaining issues at appeal.

Merck Frosst Canada Inc. v. ***Canada (Minister of National Health)***

2002 FCA 35, Court File No. A-542-00
Federal Court of Appeal, Richard C.J., Stone and Evans JJ.A., January 24, 2002

Nature of action

This matter involves an appeal by Merck Frosst from an order of the Federal Court Trial Division dismissing an application pursuant to section 44 of the Act.

Factual background

Merck Frosst first applied to the Trial Division for a review under section 44 of the Act for a review of the decision by the minister to release certain records in its possession which had been submitted to Health Canada by Merck Frosst as part of a New Drug Submission, on the ground that release of these records was exempted by paragraphs 20(1)(a), (b) and (c) of the Act.

Issue before the Court

At trial, did Merck Frosst discharge its burden of proving that certain information relating to the chemistry and manufacturing of the drug was confidential information within the meaning of paragraph 20(1)(b) so that it could not be disclosed by Health Canada?

Findings

Noting that the trial judge had carefully "examined all the relevant documents before him and had considered the information requested in the exemptions relied by Merck Frosst", the Court of Appeal concluded that there was "ample evidence before the judge to support a finding that" Merck Frosst had not discharged "its burden of proving that information relating to the chemistry and manufacturing data was confidential" within the meaning of paragraph 20(1)(b) of the Act. The court also held that "in the absence of a palpable and overriding error, a trial judge's findings of fact should not be disturbed on appeal. There were no such errors here."

Judicial Outcome

The appeal was dismissed.

Wyeth-Ayerst Canada Inc. v. ***Canada (Attorney General)***

2002 FCT 133, Court File No. T-19-00
Federal Court Trial Division, Hennegan J., February 5, 2002

Nature of action

This matter involves an application for judicial review under section 18.1 of the *Federal Court Act.*

Factual background

The appellant, a pharmaceutical company, produces a natural-source hormone replacement therapy sold under the trademark "Premarin" the principal active ingredients of which are a family of hormones known as "conjugated estrogens". Following a notice by Health Canada of its intention to amend the regulations under the *Food and Drug Act* which relate to conjugated estrogens so as to create a single standard applicable to both natural and synthetic source conjugated estrogen products, Wyeth-Ayerst Canada (WAC) responded to the invitation to make submissions. A requester sought access to the submission under the Access Act. Health Canada advised WAC that its submission was considered responsive to the request for information. Asserting that the requested material was of a confidential nature and that it would be commercially disadvantaged by the release of the requested material, WAC objected to disclosure. While the identity of the requester had not been disclosed, WAC hypothesized also that the party seeking the information was one of its competitors, a producer of conjugated estrogens, who may not be qualified, under subsection 4(1) of the Act to request the records.

Issues before the Court

1. Was the requester eligible to submit the access request?

2. Do the documents in question qualify for exemption pursuant to subsection 20(1)?

Findings

1. On the issue of the standing of the requester, the court held that the official at Health Canada had properly determined the eligibility of the requester in concluding that "the requester was eligible under the Act to make the request". The court went on to state: "There is no evidence to show that irrelevant or improper factors entered into her consideration of the eligibility of the requester." The Court of Appeal then concluded that the applicant had failed to show that this determination fails to meet the test of "sufficiency of proof".

2. Noting that in establishing an entitlement to an exemption pursuant to subsection 20(1) of the Act, the burden of proof is the "balance of probabilities", the Court of Appeal underscored the fact that this burden rests with the applicant at all times. However, the court said, "the affidavit evidence which has been filed does not meet the test. The affidavits are framed in very general language and furthermore, are said to be based on belief… an affidavit based on belief is not proper evidence…". To clarify matters even further, the court added: "When an applicant seeks to invoke the section 20(1) exemption, it must provide clear evidence that the facts fall within one or more exemptions named in that provision. When an applicant relies on confidentiality as the basis for exemption for disclosure, that confidential basis must be objectively shown…In the present case, the affidavits filed by the applicant provide no more than speculation as to probable harm." In conclusion, the Appeal Court observed that on the surface, at least, "much of the information sought to be withheld by the applicant is already in the public domain, either as the result of prior disclosures made by the office or pursuant to disclosures made in relation to the pharmaceutical industry, both in Canada and the United States".

Judicial Outcome

The application for judicial review was dismissed.

Delkalb Canada Inc. v. ***Canada (Agriculture and Agri-Food)***

2001 F.C.J. No. 32, Court File No. A-665-99
Federal Court of Appeal, Desjardins, Décary and Noël JJ.A., January 8, 2001

Nature of action

This matter involves an appeal from an order of the Trial Division dismissing 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 Delkalb's premises.

Factual background

At trial, Delkalb 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. Delkalb 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, Delkalb Canada argued that the information is scientific or technical, confidential in nature, has not been shared with the public and will prejudice Delkalb's position in the lawsuit if disclosed. The department invoked the exception to subsection 20(1) contained in subsection 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 Trial Court dismissed the application on the grounds that the document in issue fell within subsection 20(2). The court also found that the document did not fall within subsection 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 Delkalb and may use the information against it, it said, does not make the document confidential.

Issue before the Court

Did the Trial Division judge err in any way in his interpretation of subsection 20(2) of the Act?

Findings

After hearing submissions, the court concluded that it had not "been persuaded that the motions judge erred in any way in his interpretation of subsection 20(2) of the Act particularly with regard to the results of product or environmental testing carried out by or on behalf of a government institution". The court further noted that Agriculture Canada properly availed itself of the authority conferred on it in the regulations enacted under the *Seeds Act*, to check the quality of the appellant's seeds. This, observed the court, was the "results of product testing" as prescribed by the *Access to Information Act*.

Judicial outcome

The appeal was dismissed.

Air Transat A.T. Inc.
v. ***Canada (Transport)***

2001 F.C.J. No. 108, Court File No. T-307-00
Federal Court Trial Division, Rouleau J., January 30, 2001

Nature of action

This matter involves an application, under section 44, for a review of the decision of Transport Canada to release information concerning plant inspection reports.

Factual background

Following a field evaluation of Air Transat to determine if the latter met the standards for operating and maintaining aircraft as set forth in the Canadian Aviation Regulations, Transport Canada filed an inspection report. In response to an access request for records concerning Air Transat, Transport Canada then indicated that, with the exception of information protected by subsection 19(1) and paragraph 20(1)(d), the 1999 inspection report would be released to the requester. However, Air Transat took the position that the report fell under the exception contained in paragraph 20(1)(c) in that its disclosure could reasonably be expected to result in material financial loss or gain to the plaintiff or prejudice its competitive position. On the other hand, Transport Canada maintained that the inspection report in question was a federal government document, which was covered by the Act, and therefore it did not meet the condition of objective confidentiality.

Issues before the Court

1. Did the inspection report contain confidential information qualifying for exemption under paragraph 20(1)(b)?

2. Did the inspection report contain information the disclosure of which, pursuant to paragraph 20(1)(c), could reasonably be expected to result in prejudice to Air Transat?

Findings

The court noted that "the fact that a document is considered as a federal government document covered by the Act is not sufficient to support a conclusion that the content of the document cannot fall within the exception set out in paragraph 20(1)(b)". The court was careful to note, however, that: "A distinction should be made between the analysis done by the government organization from information obtained during the inspection and the information supplied directly by the inspectors by the third party. Where there is an inspection report, which additionally is a federal document covered by the Act, anyone seeking an exception to the Act, must prove the confidentiality of the information initially supplied as well as showing the ongoing confidentiality of the information… This must be shown by the submission of real direct evidence." In the case at hand, the court concluded that the inspection report "contained information on the operating methods… and various other technical information…" which more than satisfy the exemption based on the confidentiality of information set out in paragraph 20(1)(b). After hearing the arguments and reviewing the documents, the court opined that there was not "serious question about the consistently confidential nature of the documents supplied by the plaintiff."

2. Rejecting the claim for an exemption under paragraph 20(1)(c), the Trial Division noted that "showing that a reasonable expectation of probable harm exists requires more than a mere allegation of the type contained in the affidavits filed by the plaintiffs…in the case at bar…the plaintiffs gave no indication of the link between the information and the harm described."

Judicial outcome

The application was allowed in part.

Cistel Technology Inc.
v.***. Canada (Correctional Service)***

2002 FCT 253. Court File No. T-2360-00
Federal Court Trial Division,
McKeown J., March 5, 2002

Nature of action

This matter involves an application for judicial review pursuant to section 41 of the Act of a decision by Correctional Service Canada (CSC) to disclose all invoice details, with the exception of the individual rates and days worked and the amount attributed to each individual, for services provided by the applicant, Cistel. The applicant seeks an order that only the identity of Cistel and the overall contract price be disclosed.

Factual background

Cistel provides information technology to perform work pursuant to various contracts and standing offers on completion of which an invoice is submitted indicating the name and level of position of the Cistel employee or agent assigned to complete the work, their per diem rates, the number of days they worked on the project for a given month and the total charges invoiced for that period.

A request for "copies of all invoices for services" rendered by Cistel was received by CSC. Cistel insisted that the requested information was confidential and that its disclosure would allow competitors to determine its underlying costs and profit margin and to obtain the contractor's rates which would interfere with Cistel's future negotiations with its sub-contractors and employees. Agreeing in part, CSC decided to not disclose the per diem rates, the number of days the individual worked and the total charges broken down by individuals. CSC intended, however, to disclose other documents, some of which, such as the payment voucher and the task request/authorization, Cistel's maintained did not come within the scope of the request.

Issues before the Court

1. Whether documents which do not come within the scope of a request should be disclosed.

2. Whether the disputed records are exempt from disclosure pursuant to paragraph 20(1)(b) of the Act.

Findings

1. The Court readily agreed with Cistel that the payment voucher and the task request/authorization did not come within the scope of the request and since these documents were not invoices they should not be disclosed pursuant to this request.

2. In interpreting and applying the provisions of paragraph 20(1)(b) of the Act, the court also kept in mind the purpose of the Act as set out in subsection 2(1) noting that the case law clearly established the need that all exemptions to access be limited and specific. It also underscored the point that the burden of proof required to establish an exemption rests on the party resisting disclosure.

Relying also on the jurisprudence, the court emphasized that, to qualify for exemption under paragraph 20(1)(b) of the Act, the information supplied to government must consist of either financial, commercial, scientific or technical information, that the information must be capable of being objectively characterized as "confidential" information and, that such information must have been treated consistently in a confidential manner. Given that the information revealed in the Cistel invoice was not classified as confidential, that CSC had already agreed to remove the rate, the number of days and the amount billed with respect to each individual worker and, that the identities of Cistel support staff could be easily ascertained by competitors, the court concluded that the information remaining in dispute was not confidential. The court also concluded that Cistel had failed to establish that the disputed information had been consistently treated in a confidential manner.

Judicial outcome

The application for judicial review was dismissed except that CSC was directed not to disclose the payment vouchers and the task request/authorization forms.

CHAPTER V:
LEGISLATIVE CHANGES

Changes affecting the *Access to Information Act*

When the Act entitled: *Immigration and Refugee Protection Act* (S.C. 2001 c. 27) will be proclaimed in force, paragraph 4(1)(b) of the *Access to Information Act* will be amended to read: (b) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act* (2001, c. 27, section 202, not in force requires proclamation).

An Act to amend the *Proceeds of Crime (Money Laundering) Act* (S.C. 2001 c. 12) was proclaimed in force on June 14, 2001. It replaced subsection 60(1) of the *Proceeds of Crime (Money Laundering) Act* by the following:

> 60(1) "Despite the provisions of any other Act, except sections 49 and 50 of the *Access to Information Act* and sections 48 and 49 of the *Privacy Act*, an order for disclosure of information may be issued in respect of the Centre only under subsection (4)." (2001, c. 12, s. 3, in force 2001.06.14)

On March 27, 2002, the Act entitled: *An Act to establish a body that provides administrative services to the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court and the Tax Court of Canada, to amend the Federal Court Act, the Tax Court Act, and the Judges Act, and to make related and consequential amendments to other Acts* (S.C. 2002, c. 8) received Royal Assent. A number of other Acts are amended by its provisions, including the *Access to Information Act*. Subsection 52(1) of the Access Act is amended as follows: "…determined by the Chief Justice of the Federal Court or by any other judge of that court that the Chief Justice may designate to hear those applications". Subsection 55(2) of the Access Act is amended as follows: "…, other than the Chief Justice of that Court,…" The provisions of the Act will come into force on a day to be fixed by order of the Governor in Council.

The *Anti-Terrorism Act* was proclaimed in force on December 18, 2001 (S.C. 2001, c. 41). It allows the Attorney General to issue certain confidentiality certificates which, when issued, exclude the related records from the operation of the *Access to Information Act* and discontinues any related investigation by the commissioner or any related court review.

Proposed Changes to the *Access to Information Act*

The Senate public Bill S-8 entitled *"An Act to maintain the principles relating to the role of the Senate as established by the Constitution of Canada"* proposed to amend subsection 75(2) of the *Access to Information Act* by replacing it by the following:

> "2) The committee designated or established by Parliament for the purpose of subsection (1) shall, not later than July 1, 1986, undertake a comprehensive review of the provisions and operation of this Act, and shall within a year after the review is undertaken or within such further time as the House or Houses of Parliament that have members on the committee designated or established pursuant to subsection (1) may authorize, submit a report to Parliament thereon including a statement of any changes the committee would recommend."

[emphasis added] (2001, Bill S-8, s. 1, passed second reading in the Senate and referred to Committee, 2001.05.09)

New government institutions

During the 2001-2002 fiscal year, new government institutions became subject to the *Access to Information Act* while others, which had been abolished, were struck out. The following amendments were made to Schedule I of the Act:

Schedule I

"The Leadership Network" was struck out under the heading "Other Government Institutions" (SOR/2001-143, Canada Gazette, Part II, in force 2001.04.11)

"Office of Indian Residential Schools Resolution of Canada" was added in alphabetical order under the heading "Other Government Institutions" (SOR/2001-200, Canada Gazette, Part II, in force 2001.06.04)

"Farm Credit Corporation" was struck out under the heading "Other Government Institutions" and *"Farm Credit Canada"* was added under the heading "Other Government Institutions" (2001, c. 22, ss. 10, 11, in force 2001.06.14)

"Canada Information Office" was struck out under the heading "Other Government Institutions" and *"Communication Canada"* was added in alphabetical order under the heading "Other Government Institutions" (SOR/2001-329, Canada Gazette, Part II, in force 2001.09.01)

"Financial Consumer Agency of Canada" is added under the heading "Other Government Institutions" (2001, c. 9, section 584, in force 2001-10-24)

"Petroleum Monitoring Agency" was struck out under the heading "Other Government Institutions" (2001, c-34, s. 2, in force 2001.12.18)

"Canada Council" was replaced by *"Canada Council for the Arts"* under the heading "Other Government Institutions" (2001, c-34, s. 16(a), in force 2001.12.18)

"Office of Infrastructure and Crown Corporations of Canada" was added in alphabetical order under the heading "Other Government Institutions" (SOR/2002-43, Canada Gazette, Part II, in force 2002.01.15)

"Nunavut Surface Rights Tribunal" and *"Nunavut Water Board"* were added under the heading of "Other Government Institutions" (2002, c. 10, s. 176, in force 2002.04.30)

"Yukon Surface Rights Board" and *"Yukon Territory Water Board"* under the heading "Other Government Institutions" are struck out (2002, c. 7, ss. 77, 78, Royal Assent 2002.03.27, requires proclamation to be in force)

"Fisheries Prices Support Board" is struck out under the heading "Other Government Institutions" (2001, Bill c. 43, s. 1, second reading in Senate, referred to Committee, 2002.04.25)

"Millennium Bureau of Canada" was struck out under the heading "Other Government Institutions" (SOR/2002-71, Can. Gaz., Part II in force 02.03.31)

Statutory prohibitions against disclosure of government records

Schedule II

Schedule II of the Act contains statutory prohibitions against disclosure of government records. During the 2000-2001 fiscal year, the following amendments were made to this Schedule:

- The reference to "subsections 29(1) and 29.1(5)" opposite the reference to *"Competition Act"* was replaced with a reference to "subsections 29(1), 29.1(5) and 29.2(5)". (2001, c. 9, s. 585 in force 2001.10.24).
- The reference to "section 107" opposite the reference to *"Custom Act"* was replaced with a reference to "sections 107 and 107.1" (S.C. 2001, c. 25, s. 107, in force 2001.10.25).
- The reference to *"Proceeds of Crime (Money Laundering) Act"* was replaced by *"Proceeds of Crime (Money Laundering) and Terrorist Financing Act"* (2001, c-41, s. 76, in force 2001.12.24).

Private members' bills to reform the *Access to Information Act*

- Bill C-249 was introduced by R. Borotsik (PC Brandon-Souris). The purpose of the bill was to make all Crown corporations subject to the *Access to Information Act* by amending the definition of "Government Institutions" in section 3. The Bill was dropped from the Order Paper April 23, 2001.
- Bill C-341 was introduced by G. Breitkreuz (Canadian Alliance, Yorkton-Melville). The purpose of the bill was to:
  - make cabinet confidences mandatory exemptions as opposed to exclusions;
  - exclude from the exemption documents that refer to, but do not reveal the substance of cabinet confidences and certain other documents;
  - shorten the exemption period for cabinet confidences from twenty to fifteen years; and
  - to provide that in the Federal Court, the special procedures existing for other sensitive matters such as defence be followed for cabinet confidences and review of cabinet confidences to be handled only by commissioner, assistant commissioner or specified officers.

The bill did not proceed to second reading.

CHAPTER VI:
CORPORATE SERVICES

Corporate Management

From 1983-84 to 2000-01, the Offices of the Information and Privacy Commissioners of Canada operated under a one vote structure. Commencing with the 2001-02 fiscal year, each office operated independently of the other under their own respective vote structure but shared corporate services, based on a service usage basis. These shared services – finance, human resources, information technology, and general administration – are centralized in the Corporate Management Branch to avoid duplication of effort and to save money for both government and the programs.

However, in this reporting year, the Privacy Commissioner of Canada informed the Information Commissioner that he did not intend to continue with the "shared corporate services" model. Rather, the Privacy Commissioner prefers to have corporate services provided to him by staff who work exclusively for the Privacy Commissioner.

This departure from the traditional organizational design will increase the resource expenditure as each Commissioner (one willingly, the other not) pays individually for formerly shared services. This increased expenditure is not justified for such a small department (the Offices of the Information and Privacy Commissioners are classed as a single department by the *Financial Administration Act*). Unnecessary expenditure of public funds is especially regrettable at the hands of Officers of Parliament.

Resource Information

The branch continued to pursue innovative approaches to the delivery of its programs without adversely affecting the quality level of service to the privacy and access programs during fiscal year 2001-02.

The Information Commissioner's operating budget for the 2001-02 fiscal year was $4,538,000. Actual expenditures for 2001-02 were $4,309,855 of which personnel costs of $3,076,840, professional services expenditures of $792,961 and acquisition costs of machinery and equipment $114,010 accounted for more than 92 percent of all expenditures. The remaining $326,044 covered all other expenditures including postage, telephone and office supplies.

Expenditure details are reflected in Figure 1 (Resources by Activity) and Figure 2 (Details by Object of Expenditure).

Figure 1: Resources by Activity (2001-02)

	FTE's	Percent	Operating Budget	Percent
Access to Information	45	86%	$ 3,807,000	84%
Corporate Services	7	14%	$ 731,000	16%
Total Access Vote	52	100%	$ 4,538,000	100%

Figure 2: Details by Object of Expenditure (2001-02)

	Access to Information	Corporate Services	Total
Salaries	2,771,276	305,564	3,076,840
Transportation and Communications	85,785	58,503	144,288
Information	47,203	311	47,514
Professional Services	724,538	68,423	792,961
Rentals	120	17,127	17,247
Repairs and Maintenance	43,758	12,799	56,557
Materials And Supplies	45,642	14,682	60,324
Acquisition of Machinery and Equipment	56,766	57,244	114,010
Other Subsidies and Payments	114	–	114
Total	**3,775,202**	**534,653**	**4,309,855**

Note: Expenditure figures do not incorporate final year-end adjustments.

CHAPTER VII:
REPORT CARDS

1) Fisheries and Oceans Canada pages 114-120
2) Citizenship and Immigration Canada pages 121-125
3) Transport Canada pages 126-133
4) Canada Customs and Revenue Agency pages 134-138
5) Department of National Defence pages 139-143
6) Foreign Affairs and International Trade pages 144-149

Fisheries and Oceans Canada

Status report on access requests in a deemed-refusal situation

Background

In January 2001, the Office of the Information Commissioner issued a Report Card on Compliance with Response Deadlines Under the *Access to Information Act* to Fisheries and Oceans Canada (F&O). The report card contained a number of recommendations on measures to reduce the number of access requests in a deemed-refusal situation at F&O.

In the report card, F&O's compliance with the statutory time requirements of the *Access to Information Act* was rated as a red alert grade of F with a 32.8% new request to deemed-refusal ratio for the period April 1, 2000 to November 30, 2000. For the 2000-2001 fiscal year, the percentage increased to 38.7%.

This status report reviews the progress of the department to come into substantial compliance with the time requirements of the *Access to Information Act* since the January 2001 report card. In addition, this report contains information on the status of the recommendations made in the report card.

The following grading standard is used by the commissioner's office:

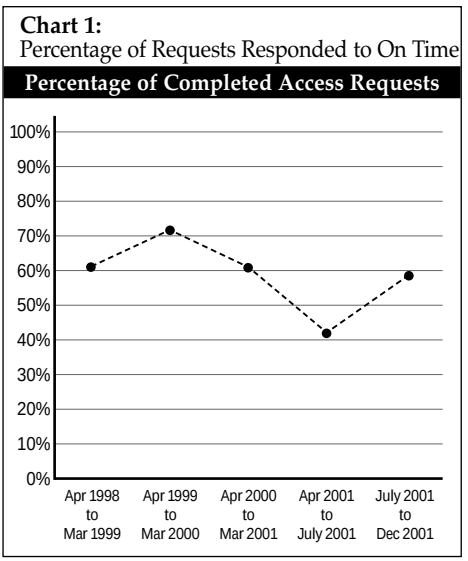
% of Deemed Refusals	Comment	Grade
0-5%	Ideal compliance	A
5-10%	Substantial compliance	B
10-15%	Borderline compliance	C
15-20%	Below standard compliance	D
Over 20%	Red alert	F

Current Status and Further Recommendations

Evidence of improvement to reduce the number of access requests in a deemed-refusal situation in the department is just starting to appear. To its credit, the department has recently made a strong commitment in additional resources and process improvements that should provide the framework essential to achieve compliance with the Act's statutory time requirements.

The trend of increasing numbers of access requests in a deemed-refusal situation appears to have finally been halted. Chart 1 illustrates the percentage of access requests responded to within the time requirements of the Act.

Chart 1:
Percentage of Requests Responded to On Time



The department has instituted a number of measures that should provide the framework for improved performance. An ATI Improvement Plan was developed and approved for implementation. Senior management has shown a strong commitment to introduce specific measures to reduce the number of access requests in a deemed-refusal situation. These measures include a streamlined approval process, extensive training and extensive technology support.

The department has increased staffing in the ATIP Unit as illustrated in Table 1.

Table 1: STAFFING

Year	Staffing
1999/2000	9.5 FTE's
2000/2001	12.1 FTE's
2001/2002	18.0 FTE's (approved)

Table 2 illustrates the increased funding made available to the ATIP Unit.

Table 2: FUNDING

Year	O & M $ (000)	Salaries $ (000)
1999/2000	288.0	437.2
2000/2001	302.0	561.1
Special Funding (a)	395.0	
2001/2001	346.3	786.0
Special Funding (a)	300.0	

(a) consultants

Although the department has shown a commitment to improved performance, the new request to deemed-refusal ratio for April 1, 2001 to November 30, 2001 was 42.4%. This percentage constitutes a red alert grade of F.

The following recommendations are made to support the efforts of F&O to process access requests within the statutory time requirements of the *Access to Information Act*.

Objective for 2002/2003

The department has shown a commitment to make changes to support the reduction of access requests in a deemed-refusal situation. It is essential to build on the measures that have been instituted to achieve substantial compliance with the statutory time requirements of the *Access to Information Act*. Further evidence of the commitment to improve performance would be the establishment of an objective to come into substantial compliance with the Act's time requirements by March 31, 2003.

Recommendation #1
F&O should establish an objective to come into substantial compliance with the Act's deadlines no later than March 31, 2003.

Deemed Refusal

Unless the precise reasons for the delays are known, it is difficult to select and prioritize measures to reduce the number of requests in a deemed-refusal situation. For example, delays by OPIs in records retrieval may be caused by reasons as diverse as lack of staffing, poor information management practices or lack of attention to ATI priorities. Until an analysis is conducted to determine the reasons for access requests in a deemed-refusal situation, priorities cannot be established for measures to support the department's commitment to a reduction in the deemed-refusal situation.

Recommendation #2
F&O should conduct an analysis to determine the specific reasons for each request in a deemed-refusal situation for the period April 1, 2001 to November 30, 2001, and then develop a plan to reduce the future number of requests in a deemed-refusal situation.

Time Extensions

Many requesters will accept a short delay when an extension of time to respond to an access request will not be met. If partial disclosure of records is made to the requester as the access request is processed, the requester knows that the request is being processed by the department. In many cases, the ATIP Unit will already be in contact with the requester for various reasons. As a matter of customer service, the ATIP Unit should notify the requester when an access request that was subject to a time extension will not be responded to within the extended time.

Recommendation #3
If an extended date will not be met, the ATIP Unit should routinely contact the requester to indicate it will be late, to provide an expected response date and the right to complain to the Information Commissioner. This will not impact the deemed-refusal status once the extension date is missed, however, it will alleviate some of the requester's frustration and perhaps avert a complaint.

Approval Process

F&O has streamlined the approval process. Table 3 compares the time allocated to various stages of the process prior to the report card and at the present time.

F&O is unable to obtain an accurate picture of the actual time taken for the various functions in Table 3 to complete their part of the access process. The inability to produce the data is due to a lack of monitoring of ATIP data input into ATIPflow. A consultant has been hired to clean up the data in ATIPflow for future reporting.

Recommendation #4
F&O institute a reporting system to OPIs and departmental management that provides information on the actual versus planned time taken for the functions involved in the access process.

Informal Access

Part of the F&O ATI Improvement Plan could deal with informal methods of providing information to the public rather than requiring an access request to be made for the information. The public would not be prevented from making a request under the Act if dissatisfied with the informal process. Decisions on informal access will require an analysis of the information that is routinely disclosed through responses to access requests. An analysis can also be conducted on the information needs of clients of F&O.

Table 3: ALLOCATION OF TIME IN THE APPROVAL PROCESS

Function	Allocated Time 1999 (calendar days)	Allocated Time 2001 (working days)
Receipt ATIP Office	1 day	1 day
Retrieval OPI	10 days	10 days
Processing ATIP Office	7 days	8 days
OPI Review/Concur	10 days (90% of requests)	0 days
Communications	1 day (35% of requests)	0 days
ATIP Approval and Mail Out	1 day	1 day

A Guideline on *Routine Disclosure/ Active Dissemination (RD/AD): A Joint Project of the Office of the Information and Privacy Commissioner/Ontario and The Freedom of Information and Privacy Branch, Management Board Secretariat* contains practices to encourage government organizations to routinely disclose or actively disseminate information. The guideline is available at the Internet sites of both organizations. Routine disclosure occurs when access to a general record is granted on a routine basis as the result of a request. Active dissemination refers to the release of information without any request.

Recommendation #5
F&O investigate methods of providing informal access to information to the public.

Status of 2001 recommendations

In January 2001, recommendations were made to F&O in the Report Card On Compliance with Response Deadlines Under the *Access to Information Act* on measures to reduce the number of deemed-refusal access requests. The status of each recommendation is described below following the text of the recommendation.

At the time that the report card was issued, there appeared to be a number of reasons for the delay problem at F&O. The reasons included insufficient information provided to and follow up by senior management, a lack of exercise of the delegation authority to make decisions under the *Access to Information Act*, a cumbersome approval process and delays by OPIs in searching for and retrieving records.

Previous Recommendation #1
The ATI coordinator is directly responsible for ensuring compliance with the *Access to Information Act* and should take a strong leadership role in establishing a culture of compliance throughout F&O. Such a role requires the unwavering support and endorsement of the minister and the deputy minister. Senior management support for the development and monitoring of an ATI Improvement Plan is one method of making a commitment to comply with the time requirements of the Act.

A new director for the ATIP unit has been hired and he has the support of the deputy minister and the departmental management team. An ATIP strategy evidenced by an ATIP Business Plan based on the report card recommendations has been approved and is being implemented.

The ATIP Unit has a new reporting relationship through the policy sector to improve the horizontal linkages with the department.

Previous Recommendation #2
Routine reporting on planned versus actual time taken to process access requests and the status of measures taken to reduce requests in a deemed-refusal situation should be instituted. The reports will provide senior management, OPIs and the ATIP Unit with information needed to gauge overall departmental compliance with the Act's and department's time requirements for processing access requests.

Case Action Manager Reports were introduced in 2000/2001 to all sectors to help track requests and ensure they are responded to in a timely manner. The reports are currently under review to ensure information is accurate and timely.

Previous Recommendation #3
The Delegation Order should be revised to reflect the intent to delegate to the ATI director and assistant ATI coordinator sole responsibility for making decisions under the *Access to Information Act*. Consideration should also be given to the delegation of administrative decisions under the Act to ATI officers.

Staff have been delegated the authority to initiate administrative decisions under the Act. Deputy director positions have been created and the delegation signing charts are under review.

Previous Recommendation #4
The ATI director should be directed by the minister, in writing, to exercise the delegation to answer requests within deadlines whether or not the approval process has been completed.

Although the minister has not directed the ATIP director to respond to requests as described in the recommendation, the director believes that as part of his job description he is required to respond to access requests within the statutory time requirements of the Act.

Previous Recommendation #5
The approval process should be reviewed to remove steps that do not add value to the process, particularly the review/concur stage and the communications review.

The response to recommendation number #6 provides information on the steps taken to streamline the approval process.

Previous Recommendation #6
The department should develop an ATI Improvement Plan. The plan should identify the sources of the delays in responding to access requests and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance. The plan should be monitored by the Senior Management Committee of the department.

ATIP Improvement Plan (May 24, 2001) was developed to respond to recommendations in the Information Commissioner's Annual Report to Parliament. The department has adopted the ATIP strategy to improve resources allocated to the ATIP Unit and to reduce response times on access requests. The plan includes :

- Redesign of the approval process. The practice of review /concur has been discontinued on access requests received after April 1, 2001. The communication process has been streamlined to improve efficiency and response time.
- Implementation of ATIP Image in 2001/2002 is planned as a means of increasing the efficiency of the ATIP Unit.
- Allocation of additional ATIP staff and ATIP O&M resources.
- Introduction of an ATIP staff training plan.
- Implementation of national training plan for OPIs.
- Relocation of the ATIP office to improve working conditions.

Previous Recommendation #7
The specific reasons for the requests in a deemed-refusal situation for this fiscal year up to November 30 should be identified and remedial measures developed for incorporation into the ATI Improvement Plan.

The director's view is that the deemed-refusal situation will improve as the new resources and process improvements take effect.

Previous Recommendation #8
An information sheet or a schedule of expected turnaround times on the e-mail to OPI clearly showing the expected turnaround times for each stage in the access process should be incorporated into the process. This might help those unfamiliar with the process to understand the tight timelines.

On receipt of an access request, OPI and regional contacts are contacted by e-mail with an attached retrieval memo outlining due dates for responses. Regular monitoring of the due dates is carried out by the assigned ATIP analyst and request status is reflected in the weekly reports.

Previous Recommendation #9
A training plan should be developed for the 2001-02 year that includes priorities, staff identified as benefiting from new or additional training, number and location of sessions and ATI responsibilities for delivery of the training.

A Training Plan was developed for both ATIP staff and OPI staff (a National Training Plan). The plan is currently being implemented.

Previous Recommendation #10
If an extended date will not be met, the ATI office should routinely contact the requester to indicate it will be late, to provide an expected response date and of the right to complain to the Information Commissioner. This will not impact the deemed-refusal status once the extension date is missed; however, it will alleviate some of the requester's frustration and perhaps avert a complaint.

The recommendation has not been addressed although the assigned ATIP analyst now determines if contact with the requester is required.

Previous Recommendation #11
Performance contracts with operational managers should contain consequences for poor performance in processing access requests.

This recommendation has not been addressed.

Previous Recommendation #12
F&O should come into substantial compliance with the Act's deadlines no later than March 31 of 2002.

Although measures are being taken to reduce the deemed-refusal situation, the department will not be in substantial compliance by March 31, 2002.

Previous Recommendation #13
ATI training should be mandatory for all new managers as part of their orientation and for all managers.

As part of the National Training Plan, ATI training is being offered through the management development training programs.

Previous Recommendation #14
The use of consultants to provide processing resources for long-term increases in the ATI workload should be reviewed to determine what the best value for money approach is to staffing for the increased workload.

Consultants are now used primarily to process the access request backlog. The use of consultants will be decreased as the backlog is reduced now that additional staffing resources have been added to the ATIP Unit.

Questionnaire and Statistical Report

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act*.

Part A:	Requests carried over from the prior fiscal period	April 1/00 to March 31/01	April 1/01 to Nov. 30/01
1.	Number of requests carried over:	134	126
2.	Requests carried over from the prior fiscal – in a deemed-refusal situation on the first day of the new fiscal:	39	68
Part B:	**New Requests – Exclude requests included in Part A**	**April 1/00 to March 31/01**	**April 1/01 to Nov. 30/01**
3.	Number of requests received during the fiscal period:	545	315
4.A	How many were processed *within* the 30-day statutory time limit?	212	135
4.B	How many were processed beyond the 30-day statutory time limit *where no extension was claimed?*	84	61
4.C	How long after the statutory time limit did it take to respond *where no extension was claimed?*		
	1-30 days:	43	42
	31-60 days:	21	16
	61-90 days:	11	3
	Over 91 days:	9	0
5.	How many were extended pursuant to section 9?	193	58
6.A	How many were processed *within* the extended time limit?	76	14
6.B	How many exceeded the extended time limit?	59	4
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	27	3
	31-60 days:	13	1
	61-90 days:	6	0
	Over 91 days:	13	0
7.	As of November 30, 2001, how many requests are in a deemed-refusal situation?	–	**68**

Citizenship and Immigration Canada

Status report on access requests in a deemed-refusal situation

Background

Citizenship and Immigration Canada has achieved a grade of C that denotes borderline compliance with the statutory time requirements of the *Access to Information Act*. The noteworthy achievement by the department is set against a backdrop of increasing numbers of access requests.

In early 1999, the Office of the Information Commissioner issued a report card on the department's compliance with the statutory time requirements of the *Access to Information Act*. In the 1999 report card, the department received a red alert grade of F with a 48.9% request to deemed-refusal ratio.

In January 2000, the Office of the Information Commissioner reviewed the status of the recommendations made in the report card and made further recommendations for measures to reduce the number of access requests in a deemed-refusal situation. From April 1, 1999 to November 30, 1999, the deemed-refusal ratio for access requests improved to 23.4%.

In January 2001, the commissioner's office again reviewed the department's progress in reducing the number of access requests in a deemed-refusal situation and issued a status report. The department had an objective in 2000-2001 of completing 70% of access requests within the timelines of the Act. The view of the Office of the Information Commissioner was that the objective fell short of what was needed to comply with the time requirements of the Act. The actual performance of the department for 2000-2001 was a 19.6% new request to deemed-refusal ratio resulting in a grade of D denoting "below standard performance".

This report reviews the progress of the department to come into substantial compliance with the time requirements of the *Access to Information Act* since the January 2001 status report. In addition, this report contains information on the status of the recommendations made in the January 2001 report.

The following grading standard is used by the commissioner's office.

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

Current Status and Further Recommendations

The department has now had approximately three years since the 1999 report card to reduce the number of access requests in a deemed-refusal situation to a level that constitutes substantial compliance with the time requirements of the *Access to Information Act*.

To the credit of the department and the Public Rights Administration Directorate, an almost 50% request to deemed-refusal ratio in 1998 was reduced to 13% for the period April 1,

2001–November 30, 2001. The department built on the momentum of the previous fiscal year where the new request to deemed-refusal ratio was 19.6% for the fiscal year.

The department has experienced a substantial increase in the number of access requests received from the public. In 1998-1999, the department received 2,477 access requests. In 2000-2001, the department received 5,746 access requests. To November 30 in this fiscal year, the department received 4,486 requests.

The following recommendations are made to assist the department in its continuing efforts to reduce deemed-refusal access requests.

Target for 2002-2003

It is now time for the department to make the final effort to come into substantial compliance with the time requirements of the *Access to Information Act* by achieving a new request to deemed-refusal ratio of 10% or better.

There is no question that the department and the Public Rights Administration Directorate are achieving significant progress in reducing the number of deemed-refusal access requests. The objective now should be to achieve substantial compliance.

Recommendation #1
CIC set a target of 10% or better for the new request to deemed-refusal ratio for 2002-2003.

ATI Improvement Plan

Tables 1 and 2 show that the department is continuing to make some progress in the reduction of time taken to respond to requests that are answered beyond the statutory time limits of the Act. Although the tables show that the number of deemed-refusal requests are somewhat the same in absolute terms, the percentage of deemed refusals is less because of the increase in the volume of requests.

There is still no overall plan that identifies the milestones, tasks, targets,

Table 1: Time to Respond to Non-extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where no extension was taken	Apr. 1999 to Nov. 1999	Apr. 2000 to Nov. 2000	Apr. 2001 to Nov. 2001
1-30 days	270	180	197
31-60 days	60	68	79
61-90 days	40	28	26
Over 91 days	18	30	26

Table 2: Time to Respond to Extended Requests in a Deemed-Refusal Situation

Time taken after the statutory time limit to respond where an extension was taken	Apr. 1999 to Nov. 1999	Apr. 2000 to Nov. 2000	Apr. 2001 to Nov. 2001
1-30 days	126	123	75
31-60 days	58	55	43
61-90 days	16	36	18
Over 91 days	10	27	7

deliverables and responsibilities for achieving substantial compliance with the time requirements of the Act. Without the identification of "trouble spots", it is difficult to focus priorities on the areas that require attention. A business plan is under development for the Public Rights Administration Directorate. The plan has identified a task to "prepare a report, distinguishing between types of requests, identifying acceptable reasons for delays, and acceptable timelines".

Recommendation #2
An ATI Improvement Plan be developed to include milestones, tasks, targets, deliverables and responsibilities for achieving substantial compliance with the time requirements of the *Access to Information Act*.

Reporting to OPIs and Senior Management

There is no routine reporting to senior management in the department on ATI actual versus planned turnaround times. Reporting to all OPIs is scheduled for January 2002.

There is a need to distribute information to OPIs and senior management on planned versus actual time taken at each stage of the access process. Without this type of information it is difficult to identify potential problems meeting the Act's time requirements. The information will also allow the Public Rights Administration Directorate to take a proactive approach to potential problems in meeting the Act's time requirements.

Recommendation #3
All OPI's and senior management receive information on a periodic basis on the planned versus actual time taken to process access requests.

Status of 2001 Recommendations

In January 2001, recommendations were made to CIC on measures to further reduce the number of deemed-refusal access requests. The status of each recommendation is described below following the text of the recommendation.

Previous Recommendation #1
The department should conduct an analysis to determine the specific reasons for each request in a deemed-refusal situation for the period April 1, 2000 to November 30, 2000, and then develop a plan to reduce the future number of requests in a deemed-refusal situation.

The department should issue an overall timing for the access process that complies with the time requirements of the Act.

The department has issued planned timelines for the processing of access requests. In 2000-2001, the department set an objective of completing 70% of the requests on time. This objective was achieved with a new request to deemed-refusal ratio of 19.6%, equivalent to a grade of D denoting below standard compliance. Measures have also been taken to make use of time extensions under the Act for files that must be obtained from visa offices. In addition, some funding has been provided to the International Division for courier services. The use of courier services rather than the diplomatic bag and DFAIT mailroom services should reduce the time taken to deliver records from Visa Offices to CIC, Public Rights Administration Branch.

CIC has engaged a consultant to review the operations of the Ontario Region ATIP organization to identify

potential streamlining and process efficiencies.

Previous Recommendation #2
CIC should develop an ATI Improvement Plan by March 1, 2001, specifically directed at the reduction of requests in a deemed-refusal situation and provide a copy of the plan to the Office of the Information Commissioner. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance.

CIC developed strategic objectives and an operational plan for the division last year and a business plan is under development for the branch. In 2001-2002 Treasury Board allocated $5.4 million to ATIP activities including some funding for registries and training. The ATIP allocation for 2002-2003 is $2.1 million.

Previous Recommendation #3
Continued improvement in performance is unlikely without more upper management participation and leadership. The deputy minister must take a hands-on role by receiving weekly reports showing the number of requests in a deemed-refusal situation, where the delays are occurring and what remedial action is being taken or proposed. The deputy minister should directly oversee the ATI Improvement Plan under which CIC will come into substantial compliance with the time requirements of the *Access to Information Act.*

The following observation was made in the report:

> Until senior management of the department are actively engaged in the measures to identify and improve the factors that lead to requests in a deemed-refusal situation in the department, it will be difficult to come into substantial compliance with the Act's timelines. Senior management should understand the nature of the problem and be involved in monitoring the success of the plan to reduce the number of requests in a deemed-refusal situation.

There is no active involvement by the deputy minister, although senior management has been supportive of the need for additional resources.

Previous Recommendation #4
Information be distributed to OPIs and other parts of the organization responsible for responding to access requests on planned versus actual performance beginning April 30, 2001.

Information is provided to international regions each week on the planned versus actual time taken to retrieve records in the region. The plan is to provide the same information to each of the regional coordinators for January 2002.

Previous Recommendation #5
CIC continue to devote the resources and effort necessary to increase its efforts to meet the time requirements of the *Access to Information Act* to come into substantial compliance with the time requirements by March 31, 2002.

Additional resources have been provided to the Public Rights Administration Branch through the Treasury Board.

Questionnaire and Statistical Report

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act.*

Part A:	Requests carried over from the prior fiscal period	April 1/00 to March 31/01	April 1/01 to Nov. 30/01
1.	Number of requests carried over:	741	812
2.	Requests carried over from the prior fiscal – in a deemed-refusal situation on the first day of the new fiscal:	286	149
Part B:	**New Requests – Exclude requests included in Part A**	**April 1/00 to March 31/01**	**April 1/01 to Nov. 30/01**
3.	Number of requests received during the fiscal period:	5746	4486
4.A	How many were processed *within* the 30-day statutory time limit?	3007	2552
4.B	How many were processed beyond the 30-day statutory time limit *where no extension was claimed?*	532	328
4.C	How long after the statutory time limit did it take to respond *where no extension was claimed?*		
	1-30 days:	288	197
	31-60 days:	105	79
	61-90 days:	48	26
	Over 91 days:	91	26
5.	How many were extended pursuant to section 9?	1860	1245
6.A	How many were processed *within* the extended time limit?	999	669
6.B	How many exceeded the extended time limit?	444	143
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	200	75
	31-60 days:	111	43
	61-90 days:	57	18
	Over 91 days:	76	7
7.	As of November 30, 2001, how many requests are in a deemed-refusal situation?	–	**114**

Transport Canada

Status report on access requests in a deemed-refusal situation

Background

In early 2000, the Office of the Information Commissioner issued a report card on Transport Canada's compliance with the statutory time requirements of the *Access to Information Act*. In the report card, the department received a red alert grade of F for its compliance with the statutory time requirements of the Act. The grade represented a 30.6% new request to deemed-refusal ratio for access requests received from April 1, 1999 to November 30, 1999.

In January 2001, a further report was provided to the department by the commissioner's office. The report reviewed the department's progress during 2000 in meeting the time requirements of the Act. Between April 1, 2000 and November 30, 2000, the new request to deemed-refusal ratio improved to 23.7%, but still grade F.

Both the January 2001 status report and report card contained recommendations on measures that the department could take to reduce the number of deemed-refusal access requests.

This report reviews the progress of the department to come into substantial compliance with the time requirements of the *Access to Information Act* since the January 2001 status report. To the department's credit, TC has achieved a grade of C for the period April 1, 2001 to November 30, 2001.

This report also contains information on the status of the recommendations made in the January 2001 status report.

The following grading standard is used by the commissioner's office.

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

Current Status and Further Recommendations

Transport Canada (TC) has made substantial progress in meeting the time requirements of the *Access to Information Act*. The new request to deemed-refusal ratio improved to 11.7%. This represents a grade of C that represents borderline compliance with the time requirements of the *Access to Information Act*. The department is encouraged to sustain its progress and achieve a grade of B or better for the fiscal year 2002-2003.

TC has increased its financial support for the ATIP Unit each year since 1999-2000 and a request for additional funding for 2002-2003 is under consideration by departmental senior management. The ATIP Unit is also investing in increased use of technology to process access requests. The department has taken a very positive approach to the provision of financial support for the ATIP Unit.

However, of particular concern to the commissioner's office is the continued use of an approval process with multiple sign-offs and concurrence

steps. As illustrated in Tables 1 and 2, the approval process continues to operate as an impediment to meeting statutory time requirements.

The time taken to respond to access requests varies among the OPIs and other groups for records retrieval and for sign-off. Tables 1 and 2 illustrate the variances.

These tables do not include the time allocated and taken by the minister's office or deputy minister's office to review files when the access request was designated as sensitive.

Now that the ATI Unit has resources and processes in place to support the access process, there are a number of measures that the department can consider to improve the new request to deemed-refusal ratio to 90% or better.

Table 1: OPI PERFORMANCE REPORT *(April 1 to October 31, 2000)*

Region/Branch	Total # of Retrievals	On time	Total # of Sign-offs	On time
Atlantic	28	20	8	6
Quebec	50	42	21	21
Ontario	57	43	24	21
Prairie & Northern	23	22	21	21
Pacific	40	30	26	17
Corporate Services	29	20	27	23
Safety & Security	133	83	60	37
Policy	50	32	37	18
Programs & Divestiture	53	49	21	18
Communications	9	5	80	43
TOTAL	**472**	**346**	**325**	**225**
		(73%)		**(69%)**

Table 2: OPI PERFORMANCE REPORT *(April 1 to November 30, 2001)*

Region/Branch	Total # of Retrievals	On time	On time (%)	Total # of Final Reviews	On time	On time (%)
Atlantic	35	25	71%	21	17	81%
Quebec	40	33	83%	20	18	90%
Ontario	45	41	91%	22	20	91%
Prairie & Northern	28	28	100%	17	16	94%
Pacific	31	17	55%	21	11	52%
Communications	2	2	100%	57	39	68%
Corporate Services	34	25	74%	87	83	95%
Policy	31	28	90%	25	19	76%
Programs & Divestiture	32	31	97%	17	14	82%
Safety & Security	135	130	96%	102	85	83%
TOTAL	**413**	**360**	**87%**	**642**	**442**	**69**

The following recommendations are made for TC's consideration.

Delegation of Authority

The ATIP coordinator has not been delegated any decision-making authority under the *Access to Information Act* with the exception of certain administrative decisions and decisions under sections 7 and 19. Experience in other departments shows that delegation of decision-making to the individual with the knowledge to make decisions under the Act reduces the time taken to respond to requests. Other departments have delegated routine administrative decisions to officers reporting to the coordinator.

Recommendation #1
The department consider further delegation to the ATIP coordinator and officers for decision-making under the *Access to Information Act.*

Approval Process

The department's process for approving a response to an access request continues to be cumbersome and in need of streamlining. As noted in the report card:

If the request was one that the deputy minister checked on the weekly summary of requests, then the briefing note, a sign-off sheet and the requested records are sent to the deputy minister's office via the ATI office for a decision.

When the ADM/RDG concurs with the recommendation of the ATI coordinator, then the briefing note, sign-off sheet and the requested records are sent via the ATI office to the director general of Executive Services for a decision.

If the ADM/RDG does not concur with the recommendation of the ATI coordinator, then the briefing note, sign-off sheet and the requested records are sent via the ATI office to the deputy minister's office for a decision.

Although various words such as "review" and "concur" are used to describe steps in the approval process, the affect of multiple "check points" prior to the release of records is to create an institutional culture of "play it safe". The addition of many steps to "sign-off" contributes to delays in the process.

Transport Canada has a processing model that allots days available to each part of the department involved in processing an access request. Of the twenty days available in the model, four days are allocated to approval, two days are allocated to ADM/RDG concurrence and one day is allocated to communications (30-40% of files). The total of seven days represents 35 percent of the time available to process an access request. This allocation of time for review, concurrence and/or approval appears in our view to be excessive.

The above process has been modified in the following manner:

If the request was one that the minister's office checked on the weekly summary of requests as being sensitive, then the briefing note, a sign-off sheet and the requested records are sent by the ATIP unit to the RDG (if the region was involved in the retrieval of records) for concurrence to the ATIP coordinator's recommendations then to the responsible ADM, then to the deputy minister's office for final review.

When the request is not on the sensitive list, and RDG concurs with the recommendation of the ATI coordinator (if the region was involved

in the retrieval of records), then the briefing note, sign-off sheet and the requested records are sent via the ATI office to the responsible ADM for approval of exemptions.

For the purposes of this status report, the original comment on the process is worth repeating.

Although various words such as "review" and "concur" are used to describe steps in the approval process, the affect of multiple "check points" prior to the release of records is to create an institution culture of "play it safe". The addition of many steps to "sign-off" contributes to delays in the process.

Transport Canada has a processing model that allots days available to each part of the department involved in processing an access request. Of the twenty days available in the model, four days are allocated to approval of NHQ records and one day is allocated to NHQ communications review of sensitive files. In 2000-01, 138 requests or 29% of the 473 ATI requests received were on the sensitive list and in 2001-02 to date, 87 or 36% of the ATI requests received were on the sensitive list. The department is considering adding a day of ATIP Unit processing time to the communications function to increase the allotted time to two days.

For records retrieved from regions, six days are allocated to approval that includes regional communication's review. The total of five days for NHQ files and six days for regional files represents 25 to 30 percent of the time available to process an access request. This allocation of time for review, concurrence and/or approval appears in our view to be excessive. Tables 1 and 2 illustrate in part how the approval process at TC contributes to the deemed-refusal situation in the department.

Recommendation #2
The department process map and review the access request process to identify stages in the process that can be handled in parallel rather than sequentially and/or that can be eliminated because value is not added to the decision-making required under the *Access to Information Act.*

Communications Function

Briefing notes and other material from the communications function may be required when information is to be released or withheld in response to an access process designated as sensitive. In Transport Canada, the communications function is part of the sequential steps in processing access requests. Currently communications is allocated one day in the process to complete the function. The department is considering allocating an additional day because of the continued failure to meet the one-day time allocation. The one day would be reallocated from the time allocated to the ATIP Unit. The result would be that approximately 10% of the access request process would be allocated to the communications function.

Other departments have successfully handled the communications function as a parallel process to the access process. This approach was discussed in the Transport Canada report card. The Office of the Information Commissioner continues to find it problematic that the communications function is a sequential part of the process.

Recommendation #3
The communications requirements associated with the access request

process be completed in parallel with the process.

ATI Improvement Plan

TC has approached the time delay problem by establishing a resource plan to deal with the delays in responding to access requests. The plan is not an overall framework that deals with all of the factors that contribute to place an access request in a deemed-refusal situation.

An overall ATI Improvement Plan is an essential component of a strategy to be in substantial compliance with the time requirements of the *Access to Information Act*. A plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance. Uncoordinated efforts to reduce the number of requests in a deemed-refusal situation are likely not as effective as an integrated group of measures established as a result of an analysis of the situation.

Recommendation #4
TC should develop an ATI Improvement Plan based on an analysis of deemed-refusal access requests to bring the department into substantial compliance with the time requirements of the *Access to Information Act* by April 1, 2003. The plan should include the identification of the sources of delays and include tasks, targets, deliverables and responsibilities.

Status of 2001 Recommendations

In January 2001, recommendations were made to Transport Canada on measures to reduce the number of deemed-refusal access requests. The status of each recommendation is described below following the text of the recommendation.

Previous Recommendation #1
The department should include specific targets for meeting the time requirements of the Act in the performance contracts of senior managers and other staff involved in the access process.

The department has chosen to make the assistant deputy ministers responsible for decisions on exemptions under the Act through the delegated authority of the minister. In addition, the minister's office indicates the access request disclosure packages that must be reviewed prior to release.

As stated in the report card recommendations and again last year, the responsibility of those involved in the access process includes meeting the time requirements of the Act as they pertain to their areas.

There is reporting by the ATI office to the deputy minister and assistant deputy ministers on planned versus actual performance in meeting the time standards.

An analysis of the access requests (see Table 2) between April 1, 2001 and November 30, 2001, indicates where delays continue to take place in the access process. These delays will continue until the access process is streamlined (as described in the report card) or allocated timelines are adhered to by those accountable for a part of the access process.

In addition (and as recommended previously) until performance contracts between the deputy and senior staff and the ATI coordinator specifically cite meeting the time requirements of the Act along with a specific objective or target, accountability is not established.

Previous Recommendation #2
The department should conduct an analysis to determine the specific reasons for each request in a deemed-refusal situation for the period April 1, 2000 to November 30, 2000, and then develop a plan to reduce the future number of requests in a deemed-refusal situation.

TC has committed increased resources to the ATIP Unit. In 1999-2000, the ATIP Unit operated with a staff of seven full-time employees and spent $41,000 on professional services. By 2000-2001, the ATIP Unit operated with a staff of 11 full-time employees and $179,000 was spent on professional services. As of September 1, 2001, the ATIP Unit continued to have a staff of 11 employees with $55,000 spent to date on professional services. An additional $156,800 was recently approved for professional services for the fiscal year.

Although additional resources have been allocated, an overall analysis was not conducted on specific reasons for each request with a deemed-refusal status. The ATI coordinator has worked with OPIs to tighten the time taken to complete their portion of the access process. In addition, ATIP liaison is being implemented to monitor and control request processing while eliminating duplication and inconsistency in data entry.

Previous Recommendation #3
TC should develop an ATI Improvement Plan by March 1, 2001, specifically directed at the reduction of requests in a deemed-refusal situation and provide a copy of the plan to the Office of the Information Commissioner. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance.

TC has approached the time-delay problem by establishing a resource plan to deal with the delays in responding to access requests. The plan is not an overall framework that deals with all of the factors that contribute to the number of access requests in a deemed-refusal situation.

The proposal for the ATIP 2002-2003 service line plan requests additional resources to achieve an 80% or higher number of requests responded to within the statutory time requirements of the *Access to Information Act*. The target is stated with the provision that "it may be over-zealous when considering ongoing incremental workloads, resource levels, the increasing complexity of requests, the increasing demands on the unit to implement new technologies and improve efficiencies in preparation for GOL initiatives and the existing delegation of authority and approval process". This target has already been achieved for the period April 1, 2001 – November 30, 2001, with a new request to deemed-refusal ratio of 11.7%.

An overall improvement plan is an essential component of a strategy to be in substantial compliance with the time requirements of the *Access to Information Act*. A plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance. Uncoordinated efforts to reduce the number of requests in a deemed-refusal situation are likely not as effective as an integrated group of measures established as a result of an analysis of the situation.

Previous Recommendation #4
TC should identify measures to improve the performance of OPIs that persistently do not meet planned turnaround times. TC should examine the need to have the communications function part of the approval process.

The time taken by OPIs to retrieve records has improved substantially (see Table 2).

The department should determine what value is added by having the communications function part of the approval process. Other departments fulfill communications requirements as a parallel process rather than as a part of the approval process. The communications function at TC starts their work after the ATIP Unit has prepared the complete disclosure package. It is clear that the function acts as an impediment to the completion of access requests within the statutory time requirements of the *Access to Information Act*. Allocating up to two days for the function means that 10% of the access process is allocated to the communications function.

Previous Recommendation #5
As part of the ATI Improvement Plan, TC should establish March 31, 2002, as the target to come into substantial compliance with the time requirements of the Act.

TC has improved performance substantially and now has a grade of C that indicates borderline compliance with an 11.7% new request to deemed-refusal ratio. The grade constitutes substantial progress when compared to the 24.7% ratio for 2000-2001.

Questionnaire and Statistical Report

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act.*

Part A:	Requests carried over from the prior fiscal period	April 1/00 to March 31/01	April 1/01 to Nov. 30/01
1.	Number of requests carried over:	112	115
2.	Requests carried over from the prior fiscal – in a deemed-refusal situation on the first day of the new fiscal:	29	29
Part B:	**New Requests – Exclude requests included in Part A**	**April 1/00 to March 31/01**	**April 1/01 to Nov. 30/01**
3.	Number of requests received during the fiscal period:	473	239
4.A	How many were processed *within* the 30-day statutory time limit?	195	113
4.B	How many were processed beyond the 30-day statutory time limit *where no extension was claimed?*	42	11
4.C	How long after the statutory time limit did it take to respond *where no extension was claimed?*		
	1-30 days:	33	10
	31-60 days:	7	1
	61-90 days:	1	0
	Over 91 days:	1	0
5.	How many were extended pursuant to section 9?	203	88
6.A	How many were processed *within* the extended time limit?	78	32
6.B	How many exceeded the extended time limit?	46	3
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	21	1
	31-60 days:	9	1
	61-90 days:	5	0
	Over 91 days:	11	1
7.	As of November 30, 2001, how many requests are in a deemed-refusal situation?	–	**14**

Canada Customs and Revenue Agency

Status report on access requests in a deemed-refusal situation

Background

Canada Customs and Revenue Agency (CCRA) has achieved a grade of B that denotes substantial compliance with the statutory time requirements of the *Access to Information Act*. The impressive progress made by CCRA since the 1999 report card is a credit to the work of the ATIP director and staff and the strong senior management support for continuous improvement.

In the 1999 report card issued by the Office of the Information Commissioner, CCRA's compliance with the statutory time requirements of the *Access to Information Act* was rated as a red alert grade of F with an 85.6% request to deemed-refusal ratio.

In January 2000, the Office of the Information Commissioner reported on the status of the recommendations made in the report card and made further recommendations for measures to reduce the number of requests in a deemed-refusal situation. At that time, the statistics showed that from April 1, 1999 to November 30, 1999, the deemed-refusal ratio for access requests improved to 51.5%.

In January 2001, the Office of the Information Commissioner reviewed and reported on the progress of CCRA to come into compliance with the time requirements of the *Access to Information Act*. At that time CCRA was in "borderline compliance" with the Act (for the period April 1, 2000 to November 30, 2000) with a grade of C.

This report reviews the progress of the department to come into substantial compliance with the time requirements of the *Access to Information Act* since the January 2001 status report. In addition, this report contains information on the status of the recommendations made in the January 2001 report.

The following grading standard is used by the commissioner's office:

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

Current Status and Further Recommendations

Excellent progress has been achieved by CCRA in reducing the number of access requests in a deemed-refusal situation.

For the reporting period of April 1, 2001 to November 30, 2001, CCRA received a grade of B that denotes "substantial compliance" in meeting the time requirements of the *Access to Information Act*. The request to deemed-refusal ratio for the period was 9.85%. The improvement in reducing the number of access requests in a deemed-refusal situation was made at the same time that the volume of access requests and pages reviewed

increased substantially as shown on the Table below.

Table:
Number of Access Requests Received

Fiscal Year	Requests Received	Pages Reviewed
1999/2000	594	116,372
April – Nov. 30, 2000	477	125,164
April – Nov. 30, 2001	670	238,671

The following recommendations are made to support the continued efforts of CCRA to process access requests within the statutory time requirements of the *Access to Information Act*.

Informal Access

The Agency is developing a "forward-looking plan" (strategic plan) for ATI operations. Part of the plan will deal with informal methods of providing information to the public rather than requiring an access request to be made for the information. The public would not be prevented from making a request under the Act if dissatisfied with the informal process.

Decisions on informal access will require an analysis of the information that is routinely disclosed through responses to access requests. An analysis can also be conducted on the information needs of clients of CCRA. A copy of the report on informal access to information should be provided to the Office of the Information Commissioner.

A Guideline on *Routine Disclosure/ Active Dissemination (RD/AD): A Joint Project of the Office of the Information and Privacy Commissioner/Ontario and The Freedom of Information and Privacy Branch, Management Board Secretariat* contains practices to encourage government organizations to routinely disclose or actively disseminate information. The guideline is available at the Internet sites of both organizations. Routine disclosure occurs when access to a general record is granted on a routine basis as the result of an informal request. Active dissemination refers to the release of information without any request.

Recommendation #1
CCRA investigate methods of providing informal access to information to the public and provide a copy of the report to the Office of the Information Commissioner.

Continuous Improvement

The Agency is encouraged to build on its success in meeting the statutory time requirements of the *Access to Information Act*. The department achieved a grade of C for the period of April 1, 2000 to November 30, 2000, with a new request to deemed-refusal ratio of 14.9%. By the end of the fiscal year 2000-2001, the ratio slipped to 16% that represents a grade of D.

The Agency has shown that it is willing to make resource and senior management commitments to support the work of the ATI team. The ATI team has been innovative in its work approach. As an example, the "ATIP Consult" e-mail address for CCRA staff is an excellent method of making ATI advice widely available. The information requested can also serve as a base of information for analysis of ATI training requirements.

The Agency and the ATI team are encouraged to continue the commitment necessary to maintain its "substantial compliance" with the time requirements of the *Access to Information Act*. This objective will require the continued priority of reviewing the ATI process for potential processing improvements.

Recommendation #2
CCRA continue the resource and senior management commitment to continuously improve the time taken to respond to access requests under the *Access to Information Act* to maintain substantial compliance with the time requirements of the Act.

Training

CCRA has organized an ATI Unit to plan and conduct training and awareness sessions for CCRA staff. As organizations change and individuals assume OPI responsibilities, it is important to provide training to staff on their responsibilities under the *Access to Information Act*. The Agency is developing a three-year training plan. The agency is encouraged to develop an ATI training plan and program that are widely available throughout the CCRA.

Recommendation #3
CCRA is encouraged to develop an ATI training program widely available to agency staff through the innovative use of technology.

Status of 2001 Recommendations

In January 2001, recommendations were made to CCRA on measures to further reduce the number of deemed-refusal access requests. The status of each recommendation is described below following the text of the recommendation.

Previous Recommendation #1
The Agency should conduct an analysis of the specific reasons for requests in a deemed-refusal situation between April 1, 2000 and November 30, 2000, and develop a plan with specific measures to reduce the number of future requests in a deemed-refusal situation.

A consultant was hired in 2001 to conduct a review of the processing time lines for access requests. Among the findings, the consultant identified the following situations that had an impact on the time recorded in ATIPflow to process access requests:

- The date recorded to complete the request was improperly recorded as the following business day.
- The time allowed to lapse while the requester considered a fee estimate was not properly recorded.
- At times the pilot projects for regional processing of access requests in Vancouver and Montreal sent ATIPflow data that was not accurate.
- Where multiple OPIs were involved in a request, one OPI's search for records completed beyond the time allocated generated late data for OPIs that responded on time.

The Agency is making modifications to the recording procedures and ATIP flow to prevent the problems described above.

Previous Recommendation #2
The Agency should develop a Training Plan for 20001/02 with specific priorities for the continued reduction in requests in a deemed-refusal situation.

The Agency hired a consultant to provide ATI training across Canada. The consultant has delivered 32 sessions for 375 staff.

The Agency created a Consultation, Policy and Training Group in the ATIP Branch in the summer 2001. The first priority for the group is to gather information and data to develop a training business plan and to identify resource requirements.

The Consultation, Policy and Training Group is determining the feasibility of developing some training modules to incorporate in the human resources training programs specific to a functional area. In addition, the group will determine the feasibility of using the CCRA Intranet for the delivery of ATI training.

A training session for all ATI contacts was scheduled for December 2001 but has been rescheduled for June 2002. The group is completing a manual for OPI ATI contacts.

The Consultation, Policy and Training Group established an e-mail address – ATIP Consult – to provide CCRA staff with information on questions on the *Access to Information Act* and ATI processes within CCRA.

Previous Recommendation #3
The Agency should establish a target date of March 31, 2002, to be in substantial compliance with the time requirements of the Act.

The Agency is now in substantial compliance with the time requirements of the *Access to Information Act*. For the reporting period of April 1, 2001 to November 30, 2001, CCRA received a grade of B that reflects a new request to deemed-refusal ratio of 9.85%.

Questionnaire and Statistical Report

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act.*

Part A:	Requests carried over from the prior fiscal period	April 1/00 to March 31/01	April 1/01 to Nov. 30/01
1.	Number of requests carried over:	106	181
2.	Requests carried over from the prior fiscal – in a deemed-refusal situation on the first day of the new fiscal:	17	24
Part B:	**New Requests – Exclude requests included in Part A**	**April 1/00 to March 31/01**	**April 1/01 to Nov. 30/01**
3.	Number of requests received during the fiscal period:	819	670
4.A	How many were processed *within* the 30-day statutory time limit?	430	354
4.B	How many were processed beyond the 30-day statutory time limit *where no extension was claimed?*	74	31
4.C	How long after the statutory time limit did it take to respond *where no extension was claimed?*		
	1-30 days:	52	22
	31-60 days:	12	7
	61-90 days:	8	2
	Over 91 days:	2	0
5.	How many were extended pursuant to section 9?	197	174
6.A	How many were processed *within* the extended time limit?	120	86
6.B	How many exceeded the extended time limit?	33	15
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	26	9
	31-60 days:	4	5
	61-90 days:	1	1
	Over 91 days:	2	0
7.	As of November 30, 2001, how many requests are in a deemed-refusal situation?	–	**20**

Department of National Defence

Status report on access requests in a deemed-refusal situation

Background

The Department of National Defence, and the Canadian Forces, (ND) continues to improve its performance in meeting the time requirements of the *Access to Information Act*. ND has achieved a grade of C with a new request to deemed-refusal ratio of 11.8%.

In early 1999, the Office of the Information Commissioner issued a report card on the department's compliance with the statutory time requirements of the *Access to Information Act*. The report card contained a number of recommendations on measures that could be taken to reduce the number of requests in a deemed-refusal situation. In the 1999 report card, the department received a red alert grade of F with a 69.6% request to deemed-refusal ratio for access requests received from April 1, 1998 to November 30, 1998.

In December 1999, the Office of the Information Commissioner reviewed the status of the recommendations made in the report card and made further recommendations on measures to reduce the number of requests in a deemed-refusal situation. At that time, the statistics showed that from April 1, 1999 to November 30, 1999, the deemed-refusal ratio for access requests improved to 38.9% (although still a grade of F).

In January 2001 the Office of the Information Commissioner provided another status report to ND. At that time, ND received a grade of D with a new request to deemed- refusal ratio of 17% for the period April 1, 2000 to November 30, 2000. The grade constituted "below standard compliance" with the time requirements of the Act. The department maintained the grade of D for the complete fiscal year 2000-2001, which is an achievement compared to some other departments. The January 2001 report noted that the trend lines for reducing the number of access requests in a deemed-refusal situation were all in the right direction.

This report reviews the progress of the department to come into substantial compliance with the time requirements of the *Access to Information Act* since the January 2001 status report. This report also reviews the status of recommendations made in that report.

The following grading standard is used by the commissioner's office.

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

Current Status and Further Recommendations

ND continues to make noteworthy progress in reducing the number of access requests in a deemed- refusal situation. For the period April 1, 2001 to November 30, 2001, the new request to deemed-refusal ratio was 11.8% that

constitutes borderline compliance with the time requirements of the *Access to Information Act*. The improvements in reducing the number of access requests in a deemed-refusal situation are set against a background of increasing numbers of requests.

ND has committed resources to ATI and has provided strong management support to reduce what was a significant and burdensome number of access requests in a deemed-refusal situation. Senior management of ND and the staff of the ATIP Directorate are recognized for their hard work and sustained effort. The commissioner's office encourages ND to set an objective ratio of new requests to deemed-refusals of 10% or better.

There are a number of impediments that are hindering ND's ability to come into substantial compliance with the Act's time requirements. These impediments are not restricted solely to ND. These impediments are:

- Consultations taking much longer than planned, particularly with other governments and with the Privy Council Office
- Percentage increase in the pages processed that is significantly higher than the percentage increase in the number of access requests
- OPIs often do not know what information is retained due to a deterioration of information management practices.

To effectively use consultants to assist OPIs in their program areas, the ATIP director issued one RFP for ATI consultants. The ATI Directorate will maintain the listing of qualified consultants. The directorate also has analysts who have been temporarily placed in the OPI program area to assist with the processing of access requests.

The following recommendations are made to support the continued efforts of ND to process access requests within the statutory time requirements of the *Access to Information Act*.

Target for 2002-2003

It is now time for the department to make the final effort to come into substantial compliance with the time requirements of the *Access to Information Act* by achieving a new request to deemed-refusal ration of 10% or better.

There is no question that the department and the ATIP Directorate are achieving significant progress in reducing the number of deemed-refusal access requests. The objective now should be to achieve substantial compliance.

Recommendation #1
ND set a target of 10% or better for the new request to deemed-refusal ratio for 2002-2003.

Management of Time Extensions

The time taken to respond to requests in a deemed-refusal situation above the 30-day or extended time limit did not decrease when compared to the previous year as illustrated in Tables 1 and 2.

ND should review the circumstances that caused the delays and resulted in deemed-refusal situations for the requests in a deemed-refusal situation from April 1, 2001 to November 30, 2001. The analysis should lead to a plan and priorities to further reduce the number of requests in a deemed-refusal situation.

Recommendation #2
ND determine the reasons for delays in responding to access requests in a deemed-refusal situation from April 1, 2001 to November 30, 2001, and based on this analysis develop a plan with priorities to further reduce the delays in responding to requests.

Table 1: Time to Respond to Non-extended Requests in a Deemed-Refusal Situation			
Time taken after the statutory time limit to respond where no extension was taken	Apr. 1999 to Nov. 1999	Apr. 2000 to Nov. 2000	Apr. 2001 to Nov. 2001
1-30 days	126	39	25
31-60 days	36	1	10
61-90 days	12	0	2
Over 91 days	5	1	1

Table 2: Time to Respond to Extended Requests in a Deemed-Refusal Situation			
Time taken after the statutory time limit to respond where an extension was taken	Apr. 1999 to Nov. 1999	Apr. 2000 to Nov. 2000	Apr. 2001 to Nov. 2001
1-30 days	30	36	31
31-60 days	7	12	5
61-90 days	2	4	3
Over 91 days	2	0	5

Status of 2001 Recommendations

In January 2001, recommendations were made to ND on measures to further reduce the number of deemed-refusal access requests. The status of each recommendation is described below following the text of the recommendation.

Previous Recommendation #1
The department should conduct an analysis of the specific reasons for requests in a deemed-refusal situation between April 1, 2000 and November 30, 2000, and develop a plan with specific measures to reduce future deemed-refusal situations.

ND focused on managing the time extension process. ND wants to ensure that:

- All time extensions are taken when and where appropriate OPIs have the information that they need to make informed decisions about the length of the extension.

Previous Recommendation #2
The department should develop a training plan for 2001/02 with specific priorities for the continued reduction in the number of requests in a deemed-refusal situation.

ND instituted a comprehensive training plan. The mid-year training report indicates that approximately 1,250 personnel will receive a range of briefings scheduled for one-and- one-half hours up to two days. The personnel trained are from all parts of the organization.

Previous Recommendation #3
Information on the days allocated to each stage of the access process should be part of the information circulated with each access request.

The Information Sheet and tasking memo provide information on the number of days that the OPI tasked for the activity has to respond.

Previous Recommendation #4
Performance contracts with operational managers should require compliance with internal and legislated response deadlines for access requests.

The recommendation is not being pursued at the present time.

Previous Recommendation #5
The department should continue to devote the resources and effort necessary to build on its performance in meeting the time requirements of the *Access to Information Act* to come into substantial compliance with the time requirements of the Act by March 31, 2002.

Resources continue to be provided to the ATIP Directorate including funding for ATIPimaging $200,000).

Questionnaire and Statistical Report

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act.*

Part A:	Requests carried over from the prior fiscal period	April 1/00 to March 31/01	April 1/01 to Nov. 30/01
1.	Number of requests carried over:	201	182
2.	Requests carried over from the prior fiscal – in a deemed-refusal situation on the first day of the new fiscal:	36	42
Part B:	**New Requests – Exclude requests included in Part A**	**April 1/00 to March 31/01**	**April 1/01 to Nov. 30/01**
3.	Number of requests received during the fiscal period:	1088	920
4.A	How many were processed *within* the 30-day statutory time limit?	522	764
4.B	How many were processed beyond the 30-day statutory time limit *where no extension was claimed?*	88	38
4.C	How long after the statutory time limit did it take to respond *where no extension was claimed?*		
	1-30 days:	77	25
	31-60 days:	6	10
	61-90 days:	2	2
	Over 91 days:	3	1
5.	How many were extended pursuant to section 9?	373	406
6.A	How many were processed *within* the extended time limit?	194	262
6.B	How many exceeded the extended time limit?	84	44
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	48	31
	31-60 days:	20	5
	61-90 days:	6	3
	Over 91 days:	10	5
7.	As of November 30, 2001, how many requests are in a deemed-refusal situation?	–	**27**

Department of Foreign Affairs and International Trade

Status report on access requests in a deemed-refusal situation

Background

The Department of Foreign Affairs and International Trade (DFAIT) has made progress in reducing the number of requests that are answered beyond the time requirements of the *Access to Information Act*. DFAIT has now achieved a grade of D. This represents a substantial and encouraging departure from many years of red alert performance.

Senior management of DFAIT and the staff of the ATIP Division are recognized for their hard work and sustained effort.

In early 1999, the Office of the Information Commissioner issued a report card on DFAIT's compliance with the statutory time requirements of the *Access to Information Act*. The report card contained a number of recommendations on measures that could be taken to reduce the number of requests in a deemed-refusal situation. In the 1999 report card, the department received a red alert grade of F with a 34.9% request to deemed-refusal ratio for access requests received from April 1, 1998 to November 30, 1998.

In December 1999, the Office of the Information Commissioner reviewed the status of the recommendations made in the report card and made further recommendations for measures to reduce the number of requests in a deemed-refusal situation. At that time, the statistics showed that from April 1, 1999 to November 30, 1999, the deemed-refusal ratio for access requests improved to 27.6%. For the comparable period in 2000/01, the deemed-refusal ratio moved back to 29.3% or a red alert grade of F.

In December 1999, as part of the review of the recommendations contained in the report card, the director, ATIP Division stated that:

> "the department has focused on ensuring that systemic and attitudinal changes were made to ensure that all staff contributed to the obligations required by the Act. This has been fully supported and directed by the deputies and executive committee. Compliance with the Act has been identified by the ADM as the #1 priority of the 2000-2001 Public Diplomacy Business Plan. In spite of a more than 40% increase in requests over last year, the processing improvements and significant streamlining introduced this year have ensured that the 'deemed-refusal' rate has not had a corresponding increase."

The progress in reducing the number of requests in a deemed-refusal situation regressed for the 2000-2001 fiscal year with a new request to deemed-refusal ratio of 31.3%.

This report reviews the progress of DFAIT to come into substantial compliance with the time requirements of the *Access to Information Act* since the January 2001 status report. In addition, this report contains information on the status of the recommendations made in the January 2001 report.

The following grading standard is used by the commissioner's office.

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

Current Status and Further Recommendations

DFAIT has made progress in meeting the time requirements of the *Access to Information Act*. The new request to deemed-refusal ratio improved to 17.7% for the period from April 1, 2001 to November 30, 2001. The percentage represents a grade of D that constitutes below standard compliance with the time requirements of the *Access to Information Act*. The commissioner's office encourages DFAIT to sustain its progress and achieve a grade of B or better for the fiscal year 2002-2003.

DFAIT has made a number of substantial improvements that serve as building blocks for reducing the number of access requests in a deemed-refusal situation including:

- The ATIP Division concentrated efforts on completing the access requests that were carried over from the previous fiscal year to reduce a burdensome backlog.
- The division increased training of ATIP staff and OPI staff to make sure that the right skills were in place to support the access process. OPIs are now requesting further training. The tasking memo to OPIs was improved.
- Senior management commitment was secured through the approval of various financial measures to support the ATIP Business Plan, The Road to Improvement. A communications officer reports to the ATIP director and the communications function is handled in parallel with the access process (rather than as a sequential part of the process).

These improvements are set against a background of increased activity related to the processing of access requests as illustrated in Table 1.

Table 1: Pages Processed

Year	Pages Reviewed	Pages Released
1998/1999	58,563	38,965
1999/2000	35,987	24,090
April 1 – Nov. 30, 2000 (a)	71,729	38,068
April 1 – Nov. 30, 2001 (b)	73,848	34,974

(a) In addition, 220,000 pages related to a request were reviewed and 144,957 pages electronically severed in a parallel unit to process requests related to softwood lumber.

(b) In addition, 277,176 pages and 1.2 million (pages) export permits related to a softwood lumber request were reviewed and 76,483 pages and 1.2 million permits were released; 34,764 pages were reviewed for access consultations, given policy obligations that other departments are required to consult with DFAIT when considering the application of section 15 of the Act. This amounts to an increase of 39.1%.

The division also initiated process improvements including further case management and follow-up of access requests to improve the time taken by various parts of the organization for their respective tasks in the process. The results of some of the case management work are evident in the steady progress in reducing the time to respond to access requests beyond the Act's statutory requirements. Tables 2 and 3 illustrate DFAIT progress.

Table 2: Time to Respond to Non-extended Requests in a Deemed-Refusal Situation			
Time taken after the statutory time limit to respond where no extension was taken	**Apr. 1999 to Nov. 1999**	**Apr. 2000 to Nov. 2000**	**Apr. 2001 to Nov. 2001**
1-30 days	54	22	19
31-60 days	4	7	4
61-90 days	3	6	5
Over 91 days	1	1	0

Table 3: Time to Respond to Extended Requests in a Deemed-Refusal Situation			
Time taken after the statutory time limit to respond where an extension was taken	**Apr. 1999 to Nov. 1999**	**Apr. 2000 to Nov. 2000**	**Apr. 2001 to Nov. 2001**
1-30 days	4	15	5
31-60 days	2	6	7
61-90 days	0	1	0
Over 91 days	0	1	0

Against this backdrop of improvements, this report makes the following recommendation to assist DFAIT in its efforts to meet the time requirements of the *Access to Information Act*.

Substantial Compliance

The commissioner's office recommends that departments achieve substantial compliance with the time requirements of the *Access to Information Act*. Substantial compliance means that at least 90% of the access requests received by the department are answered within the statutory timeframes of the Act. The department is encouraged to sustain its progress and achieve a goal of at least 90% for the fiscal year 2002-2003.

Recommendation #1
DFAIT set a target of 10% or better for the new request to deemed-refusal ratio for 2002-2003.

Deemed Refusal

While DFAIT has shown improvement in reducing access requests in a deemed-refusal situation, there are further measures to be taken to come into substantial compliance with the time requirements of the Act. Until an analysis is conducted of the reasons for deemed refusals, priorities cannot be established to institute measures to sustain the department's progress.

Recommendation #2
DFAIT should conduct an analysis to determine the specific reasons for each request in a deemed-refusal situation for the period April 1, 2001 to November 30, 2001, and then develop a plan to reduce the future number of requests in a deemed-refusal situation.

Informal Access

A number of departments are establishing various measures to provide informal access to departmental information rather than requiring that a requester make a request under the *Access to Information Act*. If a requester is not satisfied with informal access, nothing prevents the requester from making a request under the Act. Departments have found that informal access is in many cases satisfactory with clients and contributes to a reduction in the number of access requests. As an example of informal

access some departments are, or are considering, placing summaries of access request disclosure packages on the departmental Internet site. Anyone can request a photocopy of the disclosure package for photocopying and shipping costs.

DFAIT dedicates resources to its access screening program in cooperation with the National Archives of Canada to ensure that the maximum number of archived departmental files are declassified and available to researchers and academics. Each year, the ATIP division hires former heads of missions to review all files that could be transferred to the Archives and to assist in the protection of any still sensitive material and declassification of all others.

The department continues to fund an outreach program within the historical section of the Communications Branch. This program provides a direct link to universities across Canada and has proved to be an unqualified success enjoying the full support of the academic community. This informal access program gives masters, doctoral students, university professors and scholars the ability to review departmental files dealing with Canada's international relations, without the formality of an access request.

This year, the ATIP Division has pursued other avenues for informal access by making certain regularly requested information (such as call-ups) are available to the public by placing it in the library on a monthly basis.

Recommendation #3
DFAIT conduct an analysis to determine if further informal access measures to certain departmental information can be instituted.

Status of 2001 Recommendations

In January 2001, recommendations were made to DFAIT on measures to further reduce the number of deemed-refusal access requests. The status of each recommendation is described below following the text of the recommendation.

Previous Recommendation #1
The department should conduct an analysis to determine the specific reasons for each request in a deemed-refusal situation for the period April 1, 2000 to November 30, 2000, and then develop a plan to reduce the future number of requests in a deemed-refusal situation.

The department used ATIPflow information to conduct an analysis of time delays. The ATIP Division reviewed all files on site for duplication and culled and moved files off site. Consultation files were reviewed and then disposed of. The purpose of the overall review in the ATIP Division was to introduce improvements to reduce the workload and to reduce the time to finalize files.

A consulting firm has been engaged to evaluate the costs of administering the Act through process mapping in order to identify possible economies and pressure points.

Previous Recommendation #2
DFAIT should develop an ATI Improvement Plan by March 1, 2001, specifically directed at the reduction of requests in a deemed-refusal situation with a copy of the plan provided to the Office of the Information Commissioner. The plan should identify the sources of the delays and include targets, tasks, deliverables, milestones and responsibilities to achieve substantial compliance.

The ATIP Division developed a Business Plan, The Road to Improvement, based on the recommendations in the 2001 status report issued by the Office of the Information Commissioner.

The ATIP Division secured funding for $150,000 to allow development of a team of officials with departmental experience to be available on short notice to assist OPIs with the screening of records. An enhanced training program is being implemented.

Previous Recommendation #3
As part of the ATI Improvement Plan, DFAIT should establish March 31, 2002, as the target to come into substantial compliance with the time requirements of the Act.

The department has achieved a new request to deemed-refusal ratio of 17.7% that constitutes a grade of D for the period April 1, 2001-November 30, 2001. For the fiscal year 2000-2001, the ratio of new requests to deemed-refusals was 36.4%.

Previous Recommendation #4
Routine reporting on planned versus actual time taken to process access requests and the status of measures taken to reduce requests in a deemed-refusal situation should be instituted. The reports will provide senior management, OPIs and the ATI Division with information needed to gauge overall departmental compliance with the Act's and department's time requirements for processing access requests.

The division is developing an electronic application to provide information to OPIs and management on the status of access requests in their respective areas. A consultant has been hired and a prototype of the software application has been developed and tested.

Previous Recommendation #5
The Delegation Order should clearly indicate to staff that the ATIP Director is responsible for decision-making under the Act.

The Delegation Order is under revision. The purpose of the revision is to strengthen the wording on the delegated authority of the ATIP director.

Questionnaire and Statistical Report

Questionnaire for Statistical Analysis Purposes in relation to official requests made under the *Access to Information Act.*

Part A:	Requests carried over from the prior fiscal period	April 1/00 to March 31/01	April 1/01 to Nov. 30/01
1.	Number of requests carried over:	156	125
2.	Requests carried over from the prior fiscal – in a deemed-refusal situation on the first day of the new fiscal:	30	44
Part B:	**New Requests – Exclude requests included in Part A**	**April 1/00 to March 31/01**	**April 1/01 to Nov. 30/01**
3.	Number of requests received during the fiscal period:	437	356
4.A	How many were processed *within* the 30-day statutory time limit?	173	125
4.B	How many were processed beyond the 30-day statutory time limit *where no extension was claimed?*	49	28
4.C	How long after the statutory time limit did it take to respond *where no extension was claimed?*		
	1-30 days:	27	19
	31-60 days:	10	4
	61-90 days:	8	5
	Over 91 days:	4	0
5.	How many were extended pursuant to section 9?	173	147
6.A	How many were processed *within* the extended time limit?	66	56
6.B	How many exceeded the extended time limit?	44	12
6.C	How long after the expiry of the extended deadline did it take to respond?		
	1-30 days:	18	5
	31-60 days:	8	7
	61-90 days:	2	0
	Over 91 days:	5	0
7.	As of November 30, 2001, how many requests are in a deemed-refusal situation?	–	**23**