Information Commissioner of Canada
Commissaire à l'information du Canada

INTERFERENCE

with Access to Information

Part 1

A special report to Parliament
by Suzanne Legault
Information Commissioner of Canada
March 2011

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Office of the Information Commissioner of Canada
Commissariat à l'information du Canada

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

Dear Mr. Speaker:

Pursuant to section 39 of the *Access to Information Act*, I have the honour to submit to Parliament a special report entitled *Special Report Number 1: Interference with Access to Information*.

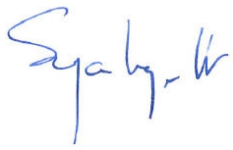
The report is the first of three I intend to table on the subject of interference with the administration of the *Access to Information Act*. It focuses specifically on an investigation conducted by my Office following a complaint regarding the processing of an access request by Public Works and Government Services Canada. It highlights a case of interference of the right of access by a staff member in a Minister's Office and provides background information regarding the political and bureaucratic environments and legal framework in which the allegations occurred.

The report also illustrates gaps in the legislation. Among them is one that limits my ability to ensure that possible offences under the Act are the subject of a criminal investigation by the appropriate authority. To address this and two other outstanding issues, I am recommending, among other things, a review of these sections of the *Access to Information Act*.

Two subsequent reports will address respectively allegations of interference in a broader context at PWGSC and interference as a systemic issue causing delays.

I would kindly ask you to table the report in the House of Commons on Monday, March 21, 2011. I have also asked the Speaker of the Senate to table the report in the Senate on the same day.

Yours sincerely,



Suzanne Legault
Information Commissioner of Canada

Encl.

c.c.: Ms. Audrey O'Brien
Clerk of the House of Commons

Office of the Information Commissioner of Canada
Commissariat à l'information du Canada

The Honourable Noël Kinsella, Senator
The Speaker
Senate
Ottawa ON K1A 0A6

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Message from the Commissioner

Access to information is fundamental to democracy, as a way for citizens to keep their governments accountable.

Political interference with the access process, which was set up in the *Access to Information Act*, to operate without bias or partisanship, undermines this accountability.

The investigation that is the subject of this special report centres on an incident of interference with an access request by a political staff member in a Minister's office. The case also puts into sharp focus the consequences of public officials not exercising their duty to say "no" to inappropriate requests from those who have no authority to make them.

The results of the investigation highlight a significant limitation in the Act. The law was drafted such that it is very difficult for the Information Commissioner to ensure that political staff members are held accountable for interference with the Act. In particular, the confidentiality provisions of the Act make it impossible for the Commissioner to directly refer matters of interference involving political staff members to law enforcement agencies for investigation and possible criminal prosecution.

To address this gap, as well as other deficiencies, I am recommending a review of the relevant sections of the *Access to Information Act* to ensure that the Information Commissioner may respond fully and appropriately to all instances of interference.

I will take up the theme of interference again in subsequent reports – looking at other instances of interference with the access process at PWGSC and also at interference as a systemic issue that affects the access system as a whole.

Executive Summary

This special report relates to an investigation by the Information Commissioner of Canada into a complaint by a journalist when she found that a member of the Minister's political staff at Public Works and Government Services Canada (PWGSC) interfered with the right to access information under the *Access to Information Act*.

The report also explores a number of issues that touch on the federal access to information system in Canada more generally and that, particularly in the context of this investigation, highlight the need for amendments to the Act.

Complaint

In the summer of 2009, PWGSC received a request under the Act for information that Access to Information and Privacy (ATIP) staff identified as being in the *Asset Report Card 2007/2008*. They decided that the entire report should be disclosed but retrieved the release package from the mailroom following an email sent by a member of the Minister's staff to "unrelease" the report and only release one section of it.

After a delay of 82 days, the journalist who submitted the request received one out of fifteen chapters of the report (well beyond the legislated 30-day response date). Several months later after making two more requests he received the entire document. As a result of the manner in which his request was processed, the journalist was concerned that there may have been interference with the processing of his request. He did two things: he made an additional request for the processing file relating to his original access request, and he made a complaint to the Information Commissioner.

Findings

As a result of her investigation, the Commissioner concluded that a member of the Minister's office interfered with the release of records under the Act by instructing officials to retrieve the original release package and later directing them to release only one chapter of the report. Ministerial staff members have no authority to make any decision under the Act or give any direction to institution officials.

The Commissioner also found that the actions and inaction of some PWGSC officials resulted in an unjustified delay of several months in releasing the requested information. This is contrary to the legal duty of all public officials to assist requesters to receive information in a timely manner, as set out in the Act.

In reporting her findings, the Commissioner made five recommendations to the Minister. First was a recommendation that the Minister refer the interference with the processing of the request to the RCMP as the Information Commissioner does not have this authority under the current law. The remaining recommendations focus on internal training, policies and procedures that PWGSC should develop or enhance to avoid the recurrence of a similar incident. The Minister accepted all of the recommendations and the institution developed a comprehensive action plan aimed at preventing such interferences from occurring in the future.

Broader Context

A number of factors were at play in this investigation, including the roles, responsibilities and authority of the players involved. As this case shows, there are serious consequences for the rights of requesters when political staff members overstep their mandate and compromise a

process that was designed to be objective and non-partisan. An equal concern is the impact of public officials not exercising their duty to say “no” to inappropriate requests from those who have no authority to make them.

Legal Issues

The investigation into this complaint highlighted difficulties caused by a number of provisions in the Act. In the circumstances of this matter, these provisions prevented the Commissioner from disclosing information concerning the possible commission of an offence under the Act, by a political staff member, to the Attorney General.

In this report, the Commissioner makes several recommendations to address the legislative impediments set out in the Act.

First, she recommends a general review of the confidentiality obligations in the Act, which will take into account changes that have arisen since the Act came into force nearly 28 years ago. Second, she recommends that the limits in the Act that prevent her from disclosing information about the possible commission an offence under the Act be removed. In particular, she recommends that she be allowed to disclose information to an appropriate law enforcement agency about *any person* who commits an offence under the Act, and not just directors, officers and employees of a government institution, as the Act currently provides.

Finally, the Commissioner recommends that heads of government institutions be required to notify the Commissioner whenever they are informed of the possible commission of an offence under the Act in their institution.

1. Report of Findings

In October 2009, the Information Commissioner received a complaint concerning an alleged delay / deemed refusal in the processing of a request and interference with requesting or obtaining access to records under the *Access to Information Act* (the Act). The complaint involved Public Works and Government Services Canada (PWGSC).

This report provides the results of the Commissioner's investigation of the complaint regarding PWGSC Request 125.

Background

On June 15, 2009, PWGSC received a request under the *Access to Information Act* for

> "All analyses created since January 1, 2008 on the relative difference between PWGSC operating expenses and the average operating expenses indexed by the Canadian Building Owner and Managers Association" ("Request 125").

The analyses requested were contained in a report entitled "Asset Report Card 2007/2008" and comprised 133 pages (the Report). On July 15, 2009, the requester received a notice for payment of fees to cover photocopying of 137 pages (the institution made an error by charging for 137 pages instead of 133 pages). The Department received the fee payment on July 23rd. Eighty-two days later, on October 13, 2009, PWGSC disclosed to the requester chapter 11 of the Report which consisted of 15 pages, and reimbursed the fees paid.

The Investigation

On October 26, 2009, the Information Commissioner received the complaint alleging a delay in responding to Request 125. The complainant questioned why PWGSC had removed 107 pages from the *Asset Report Card 2007-2008* that had been disclosed to him on October 13, 2009. He also alleged interference of some kind in the processing of his request.

This report deals with the following issues:

I. Was the processing of Request 125 in accordance with the time limits provided for in the *Access to Information Act*? Was PWGSC in a deemed refusal situation with respect to this request?
II. Did PWGSC officials fulfill their duty to assist the requester as mandated by section 4(2.1) of the Act?
III. Were the processing and decisions regarding Request 125 in accordance with the delegations of authority from the Minister under section 73 of the Act?
IV. Was there interference with the right of access to the records requested for Request 125?

In investigating these issues, staff in the Office of the Information Commissioner (OIC) reviewed numerous documents, sought and obtained the complainant's representations and those of the Department. They examined a number of individuals involved in the processing of Request 125. The examinations were conducted under oath and transcribed by a court reporter. In addition, all persons examined were represented by counsel of their choice, and were given the opportunity to comment and make representations on the OIC's preliminary findings of fact and conclusions.

Series of Events That Unfolded in Request 125

When PWGSC processed the access request, there was a lapse of 82 days from the date the requester paid his fees to the date the Department sent him its response. The statutory due date was July 23, 2009, and the Department did not claim an extension under section 9 of the Act. So what happened in those 82 days? The investigators ascertained the following from the information and evidence they gathered.

On the same day that PWGSC received the access request (June 15, 2009), the Access to Information and Privacy (ATIP) Directorate sent a tasking notice to the Real Property Branch, which was the office of primary interest (OPI) in this request. The Real Property Branch responded to the ATIP Directorate on June 25th by providing the entire Asset Report Card 2007-2008 comprised of 133 pages and 15 chapters. No exemption was applicable to any part of the document. An ATIP analyst contacted the requester on June 29th to inquire as to his language of preference for a copy of the Report and told him the disclosure package contained 132 pages.

In the meantime, during a weekly ATIP meeting that was held on June 30th, the Minister's then Parliamentary Affairs Director tagged Request 125 filed by the "media" (source of the request) as an ATI request he wanted to be informed about. Request 125 was then designated as a high profile ATI request under what the Department called the "purple file" process.

"Purple File" Process

This is how the "purple file" process worked at the time: the ATIP Directorate prepared a list of all ATI requests received during a week that described the ATI requests and contents. The list was sent to the Deputy Minister's Office and the Minister's Office. The identification of ATI requests for review was normally done at an ATIP weekly meeting. Persons who attended the ATIP weekly meeting included representatives of the Minister's Office, Deputy Minister's Office, ATIP Directorate and Communications. The requests so identified were labelled as Interesting/High Profile. Following the ATIP weekly meeting, the ATIP Directorate prepared the "purple file" with the records to be released and a Notice of Release was attached to the outside of the file. The Notice of Release entitled "Access to Information Request – Interesting – High Profile" stated in part:

1) Enclosed, **for your information**, is a copy of the proposed letter of final reply along with the records.
2) **Please review the document to ensure that you are aware of and prepared for any potential impact on the Department that may result from the disclosure of this material.**
3) Note that the ATIP Directorate intends to respond to this request **6 working days** after the date of this notice.

The Notice of Release also set out the ATIP Directorate's decision on the disclosure of the records and an ATIP official signed off approval for the ATIP Directorate. The Assistant Deputy Minister (ADM) from the responsible OPI signed off that the file had been "reviewed". The purple file was then "forwarded" to the Deputy Minister's Office and the Minister's Office for review and signatures. When this process was put in place, senior management was advised of the time allotted for their review and that undue delays would not be tolerated. Compliance with this "zero tolerance" policy was supposed to be monitored and reported to the Departmental Policy Committee on a semi-annual basis.

On or about July 3, 2009, the ATIP Chief, in exercising his delegated authority under the Act, decided to release the entire Report to the requester (15 chapters; 133 pages). Since this request was identified as "high profile" by the Minister's Parliamentary Affairs Director during the weekly ATIP meeting, the ATIP Directorate did not send its response to the requester right away. Instead, it sent the "purple file" containing the entire Report with an attached Notice of Release for review and sign-off by the Real Property Branch (the OPI), the Deputy Minister's Office and the Minister's Office. The Notice of Release stated: "The Real Property Branch and the Access to Information and Privacy Directorate have reviewed the document and we both agree that the Asset Report Card may be released in its entirety to the applicant of this request".

The Real Property Branch signed off on the file July 3rd. The Deputy Minister's Office received the file on July 9th and signed off on July 10th without any comments. The Minister's Office received the file on July 10th. The Parliamentary Affairs Director signed the Notice of Release on July 17th on behalf of the Minister's Office without any comments. The "purple file" was returned to the ATIP Directorate, well after the allotted six working days for review and sign-off had expired.

At a weekly ATIP meeting held five days after he signed the Notice of Release on Request 125 (July 22nd), the Parliamentary Affairs Director questioned the ATIP official's decision to release the entire Report by asking which OPI provided the records to the ATIP Directorate and how they came to be in the OPI's possession, and why the records were responsive to the request when there is no analysis found or no reference to BOMA (Building Owners and Managers Association) Canada. The ATIP Acting Manager informed the Director that same day that the complete section 11 of the document dealt with the Canadian Private Sector Comparisons and BOMA comparisons and that the OPI was the Real Property Branch. She said she would get back to him with an answer to his question about how the OPI came into possession of the records, which she did on July 27th.

While the "purple file" review was underway, the ATIP Directorate sent the requester a fee notice on July 15th, requesting payment for 133 pages. It received the payment on July 23rd. The ATIP Directorate processed the payment on that same day, which became the last day of the statutory deadline for responding to Request 125.

A letter dated July 23, 2009 enclosing the entire Report was signed by the ATIP Chief. This release package was given to Reception to prepare for mailing and then sent to the mailroom to be mailed to the requester. However, this release package never made it out of the mailroom because of what happened next.

Unreleasing the Release Package

When the Acting ATIP Manager sent an email to the Director of Parliamentary Affairs on July 27th to answer his question about how the OPI came to be in possession of the Report, the Director sent her an email that read: "Then only section 11 should be released and not any of the rest of the document." The ATIP Acting Manager responded to this email by informing him that "The record has been released." The Director then asked "When was it released?" and the reply was "This morning". Two minutes after receiving this email reply, the Director sent another email to the ATIP Acting Manager:

> "Well unrelease it and only release section 11!!!!
> What's the point of asking for my opinion if you're just going to release it!
> Call it back from PCO."

The ATIP Acting Manager replied: "This was never sent to PCO?". Twenty-five minutes later, the Director replied: "Just got the explanation."

The emails of the Director of Parliamentary Affairs prompted departmental officials to discuss what to do about his two directions to the ATIP Directorate to "unrelease" the release package and "only release section 11". An ATIP Chief called him and explained that the ATIP Directorate could not provide only part of the document as there were no exemptions. However, shortly after this telephone call, the ATIP Director, accompanied by the ATIP Chief, went to the mailroom, had it unlocked and retrieved the disclosure package. The ATIP Director took the package to his office where it remained for several months. He informed his manager, the Acting Director General of Executive Services, who asked how angry the Minister's Office was. The Acting Director General then informed the ADM of Corporate Services and Policy Branch of the steps taken in an email, and advised that if the release package was mailed out "there may be some backlash from the MO" (i.e. Minister's Office).

82 Days to Release One Chapter of the Report

From the day the disclosure package containing the entire Report was taken out of the mailroom until October 13th when only chapter 11 of the Report was disclosed to the requester, departmental officials took a total of 82 days beyond the statutory deadline to decide what to do with the request. In that time, departmental officials held several discussions and exchanges in considering how to address email directions of the Director of Parliamentary Affairs. They considered calling the requester and offering him the entire report or only chapter 11 but that call was never made. The ATIP Director issued a stop work order to various ATIP officials (on July 29th) to not take any action until he debriefed them.

The ATIP Directorate then prepared a draft memorandum to the ADM of Corporate Services and Policy Branch. This draft memorandum was provided to the Director General of Executive Services who discussed it with the ADM on October 7th, but it was not provided to the ADM. The draft memorandum set out two options:

1. Disclose the complete report – The requester has paid the fees and is expecting to receive the complete report in response to his request.
2. Disclose section 11 of the report only – This may be possible with the requester's agreement given that section 11 can be provided free of charge and the fees paid could be reimbursed. However, since he is from the Media, he would likely want to know why he cannot get the entire record and what it contains before agreeing to receive the relevant section only. Nothing can stop the requester from obtaining access to the document. He may perceive this as though the Department is not being open and transparent, and is trying to withhold information that can be disclosed. This may also lead to a complaint investigation with the Office of the Information Commissioner.

The draft memorandum to the ADM stated that the next step was to disclose the entire Report because:

> "…the ATIP Directorate has decided that the complete report will be disclosed to the requester. In accordance with the authority delegated by the Minister under the Act, the decision has been made in a fair, reasonable and impartial manner with respect to the processing of this request."

However, the “next step” was never taken. As a result of advice from the ADM conveyed to the Director General who then conveyed it to the ATIP Directorate, only chapter 11 of the Report was disclosed in response to Request 125. It should be noted that at no time during the processing of Request 125 did the ADM have delegated authority to make decisions under the Act.

Two More Access Requests Made to Obtain the Entire Report

When the requester received the Department’s response, he noticed that the front end of the Report was not in the release package so he submitted a second access request on October 30, 2009 to obtain pages 1 to 113. PWGSC disclosed these pages to him on November 20, 2009. In reviewing the table of contents from this second release package, the requester noticed that there were more pages of the Report that were not disclosed to him. He then submitted a third request on November 26, 2009 to obtain the “pages 124 to the end of the document, including any appendices, charts, etc.” PWGSC disclosed this last portion of the Report to the requester on January 7, 2010.

In addition to the three requests that he made in order to obtain the entire Report, the requester submitted an additional request to PWGSC for the processing file related to his Request 125. He did this on October 23, 2009, shortly after receiving the first disclosure package that contained only chapter 11 of the Report. PWGSC disclosed to him the processing records related to Request 125 on January 29, 2010.

PWGSC’s Representations

After gathering this evidence, we reached a number of preliminary findings of fact and conclusions. We then sought and obtained the Department’s representations. The Department expressed deep disappointment with the result achieved in the processing of Request 125, particularly given the aggressive action plan that it had implemented in 2007 to address its backlog, reduce delays and improve its compliance rate under the Act (it stated that 95% compliance rate was achieved two years in a row).

The Department highlighted two problems in what it considered to be a unique and anomalous set of circumstances that contributed to the handling of Request 125 against a backdrop of a department already making an exemplary commitment to being a top performer in discharging its ATIP responsibilities.

First, the Department stated that it experienced a problem with the timing of arrivals of new staff and staff turnover in key areas of the access to information program. It represented that the summer of 2009 was a period of unique and widespread transition in the Department’s ATIP program. The realities of the staff turnover were compounded by the holiday season, which in turn resulted in a series of regrettable decisions. It added that the resulting delay was unacceptable, especially for a department that prides itself on being a top performer. In the view of the Information Commissioner, a lack of knowledge or experience with the Act and acting appointments do not excuse PWGSC from its duty to assist requesters as mandated by the Act. Indeed, it is the responsibility of senior management to put an extra effort into addressing problems arising from these or other situations to ensure that requesters’ rights are not affected.

Second, the Department identified a “drift” in the communications heads up process, (i.e. the “purple file” process) that it had in place at the time of Request 125 whereby the Deputy Minister’s Office and the Minister’s Office flag ATI requests of interest so they are aware of disclosures that are about to take place and to provide time to prepare whatever communication

products or House cards that may be necessary for the institution to present prior to disclosure being made to the requester.

The “purple file” process was implemented in the wake of the Information Commissioner’s findings in the Canadian Newspaper Association (CNA) investigation and our 2007-2008 Report Card exercise.

In the Report Card exercise, former Information Commissioner Marleau had recommended to PWGSC that it cease immediately to delay the processing of requests categorized as interesting or high profile and that it should measure the actual time it takes to complete these requests and any resulting delays. PWGSC agreed with the Commissioner’s recommendations and provided the OIC with an action plan which was published in its special report to Parliament entitled “*2007-2008 Report Cards on Systemic Issues Affecting Access to Information in Canada”* (February 2009). The action plan identified procedures that were intended to not delay the processing of requests that were categorized as interesting and high profile. These procedures became known as the “purple file” process.

This purple file process creates a high-risk environment for potential influence or interference with ATIA release decisions and timely disclosure under the Act. In the Commissioner’s view, a more appropriate process that would prevent a future occurrence and protect requesters’ rights under the Act would be one in which no meetings take place between exempt staff and ATIP officials, no approvals or sign-offs are sought from exempt staff, and any communications issues that exempt staff may have with respect to completed requests are not addressed with the ATIP Directorate.

In its representations, the Department identified a number of corrective measures that it has taken as well as other measures that are underway to address the problems encountered in Request 125. These measures, which are described in the attached Appendix, will put the Department in a good position to prevent future occurrences and improve compliance with the Act. The Department’s modifications to its communications heads up procedures are worth mentioning here.

According to the Department, the “purple file” containing the disclosure package is now sent simultaneously, and for information only, to senior management and the Minister’s Office four working days before it is released. No monitoring or reporting is required as the package is released after four working days. Also, the ATIP weekly meetings are chaired and organized by the Communications Directorate (not the ATIP Directorate). The Minister’s Office is no longer represented at these meetings. Designations of requests as “high profile” or “interesting” are no longer used. The source of the access request is no longer identified in the reports of ATIP requests. The Minister’s Office has no direct contact with the ATIP Directorate. The ADM of Corporate Services and Policy Branch, who now has full delegated authority for the ATIP program, handles all questions from the Minister’s Office, and any other unresolved issues from program areas. The Communications Directorate holds a weekly meeting with the Minister’s Communications staff to inform them of media requests and of incoming access to information requests identified by PWGSC as possibly needing communication products.

The Information Commissioner is pleased to see that the Department’s action plan addresses several of the issues and concerns that were raised in this investigation, in particular, the changes to the communications heads up procedures which are intended to eliminate the risk of interference by exempt staff. That said, she will be in a better position to comment

further on these procedures generally when the OIC completes its investigation of the complaint the Commissioner subsequently initiated on October 8, 2010 (pursuant to subsection 30(3) of the Act) with respect to possible interference with other access requests at PWGSC.

Findings of Fact and Conclusions

From the information and evidence gathered in this investigation, the OIC reached a number of findings of fact and conclusions which can be summarized as follows:

The first main conclusion is that the Director of Parliamentary Affairs of the then Minister of Public Works interfered with requesting or obtaining access to a record under the Act. He interfered when he wrote an email to PWGSC officials in which he directed them to not release a record in its entirety, namely the *Asset Report Card 2007-08*, which was the subject of Request 125. He interfered when he directed ATIP staff to "unrelease" the disclosure package containing the entire report (15 chapters), and when he directed them by email to release only chapter 11. His interference resulted in the non-disclosure of the record for a period of time, and placed PWGSC in a deemed refusal situation, thereby denying the requester's right of access to information under the Act. The Director of Parliamentary Affairs at the time had no delegated authority to make any decisions on access to information matters, no legal authority to challenge interpretations of the Act by departmental officials who had proper delegated authority, and no legal authority to reverse a decision properly made under the Act by departmental officials having delegated authority to do so.

Our second main conclusion is that the actions of some PWGSC officials resulted in an unjustified delay (82 days) in responding to Request 125 that placed PWGSC in a deemed refusal situation, and resulted in the requester's right of access to information being denied under the Act. Some PWGSC officials failed in their duties and obligations under the Act by not respecting the delegated authority for the decisions made with respect to Request 125, and not assisting the requester in obtaining timely, accurate and complete information. PWGSC officials only disclosed one chapter of the Report in Request 125, and did so late – 82 days after the statutory deadline expired. The requester had to file a total of three access requests to obtain the entire report, which he only received seven months after he had requested it instead of on July 23, 2009 when the release package containing the entire report was in the mailroom ready to be mailed to him. The Commissioner noted that only one official from the ATIP Directorate who was involved in Request 125 appears to have understood these duties and obligations.

As mentioned above, the Information Commissioner considers the Department's corrective measures to be very positive steps towards ensuring that the mistakes of Request 125 are not repeated. However, in her view, PWGSC needed to take further action to ensure that it meets its obligations under the Act, and is able to do so without risk of interference.

Compliance with the Act and Duty to Assist Responsibilities

The Information Commissioner's investigation revealed that a number of PWGSC officials failed to comply with the Act and their duty to assist obligations as mandated by subsection 4(2.1) of the Act. Since the legislated duty to assist came into effect in 2007, the Commissioner has conveyed the message that leadership at the senior levels and commitment at all levels in an institution are crucial factors in ensuring compliance with the Act, and this includes the duty to assist responsibilities. Where that duty is not met, an institution needs to consider taking corrective

measures to prevent recurrences. Essential components to promote awareness and strengthen compliance with the Act and the duty to assist requirement include communication, education (particularly familiarizing new hires and those in acting positions with the ATI delegation instrument), written guidance, adequate resources, regular monitoring and reporting.

The Department identified several initiatives in its representations and departmental action plan to promote awareness and strengthen compliance with the Act. Training was identified as a key part of the Access to Information program for departmental officials as well as new Minister's Office staff. The Commissioner believes that such training should also be provided to new departmental staff and other personnel, such as contractors, about their obligations under the Act, including the duty to assist requirement and the procedures for reporting suspected contraventions under section 67.1 of the Act.

Another way to remind employees of their obligations and assess departmental compliance with the Act would be to include in their annual performance objectives their duty to assist responsibilities in the processing of access requests.

The Information Commissioner also believes that there should be a clear message conveyed from the most senior levels of PWGSC to employees and all other personnel of the legal obligation to comply with the Act and the duty to assist obligations. Senior management should also convey that it will respect and support ATIP officials in their decisions, and intervene as needed where those decisions are being challenged by others who do not have the authority to do so under the Act. Such support will, in turn, allow ATIP officials to exercise what could be called a "duty to say no" to those who do not have the delegated authority to make decisions under the Act, and to do so without any fear of reprisal.

Adequacy of PWGSC Policies and Procedures

The policies that PWGSC has in place with respect to suspected contraventions under section 67.1 of the Act are inadequate, outdated and do not align with Treasury Board (TB) policy requirements that date as far back as 1999. In this regard, it is instructive to review the TB policy requirements that were in play at the time Request 125 was processed.

On March 25, 1999, the TBS issued Implementation Report No. 65 – *Interim policy and guidelines concerning the application of section 67.1 of the Access to Information Act.* The policy required government institutions to notify all their employees of the new section 67.1 provision and their responsibilities in relation to it. It also provided that institutions develop, implement and communicate policies and procedures to follow in case of a suspected violation under this section of the Act, that the procedures provide for an appropriate investigation of any allegation, a rapid response to stop any destruction or alteration activity, and clear procedures for employees who believe they may have been asked to commit an offence. This Interim Policy set out specific guidelines on what institutional policies and procedures should include.

Six months later, Implementation Report No. 67 was issued to Access to Information and Privacy Coordinators (September 17, 1999). It provided additional information and guidance on the application of section 67.1 in the context of transitory records. It also confirmed advice given to institutions to treat possible contraventions of section 67.1 in the same manner as any allegation of criminal activity is treated under the Government Security Policy; once the Deputy Minister has been made aware of

the allegation, he/she would make a decision on notifying the appropriate law enforcement agency. It also confirmed that TBS did not accept the suggestion made by the Information Commissioner of the day that the Commissioner's Office be notified of any allegations of a contravention under section 67.1.

The new Treasury Board *Policy on Access to Information* took effect on April 1, 2008. It is a component of the government's Policy Suite Renewal Initiative being advanced by the Treasury Board Secretariat and the Canada Public Service Agency. The objective of the Initiative is to support enhanced accountability and management excellence in the federal public service and to deliver on the *Federal Accountability Action Plan* commitment to reduce the number of policies by at least 50%.

Section 6.2.10 of the Policy on Access to Information provides that heads of government institutions or their delegates are responsible for:

> Ensuring that appropriate procedures are in place in cases of an alleged obstruction of the right of access under the *Access to Information Act*. These procedures must align with the *Public Servants Disclosure Protection Act*. Obstructing the right of access is a criminal offence.

Two years later, the Treasury Board Directive on the Administration of the *Access to Information Act* came into effect (April 1, 2010). Section 6.2.28 requires each institution subject to the Act to establish internal procedures in this regard, including measures to address suspected contraventions to the right of access defined in section 67.1 of the Act.

The timing of PWGSC processing Request 125 was June to October 2009. This means that the 2008 Treasury Board Policy applied but not the specific TB Directive that came into effect in 2010. As such, the TB Policy and Implementation Reports No. 65 and 67 were the relevant policies and procedures in effect when Request 125 was processed. The Commissioner reviewed PWGSC's internal policies and sample training material that the Department provided with its representations, in particular the *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace* that was issued in 2001, and a *Policy on the Reporting of Actual and Suspected Breaches and Violations of Security* that was issued in 1997. It should be noted that these internal policies have not been updated since the TBS Implementation Reports on section 67.1 were issued, nor when the *Public Servants Disclosure Protection Act* was implemented in 2007, and not after the new TB Policy on the *Access to Inform*ation Act took effect in 2008.

The Department indicated in its representations that the departmental Policy on the *Access to Information Act* and the *Privacy Act* will be strengthened to specifically include obligations related to section 67.1. The Information Commissioner added that this initiative should be included in the Department's action plan and it should be completed on an urgent basis: the internal policies are already quite outdated; and although the timing of Request 125 (June to October 2009) pre-dates the release of the new TB Directive on section 67.1 (April 2010), it has been almost a year since this Directive was issued to government institutions. Therefore, the departmental policy needs to be updated immediately.

Monitoring and Reporting on Progress with the Action Plan

As mentioned above, in response to the recommendations that former Information Commissioner Marleau made in conducting the 2007-2008 Report Card exercise, PWGSC provided the OIC at that

time with an action plan which was published in a special report to Parliament. Information and evidence gathered in investigating Request 125 revealed that the Department did not follow up on its progress in implementing its action plan. For example, the investigation found that some employees involved in the access to information process were not aware of the Department's "zero tolerance" policy which was a measure taken to ensure that requests were not placed in deemed refusal under the Act. In addition, compliance with the "zero tolerance" policy was not being monitored and was not reported to the Departmental Policy Committee on a semi-annual basis as stipulated in the action plan.

With respect to the corrective measures that PWGSC has identified to prevent the recurrence of the type of interference which occurred during the processing of Request 125, the Information Commissioner concluded that the Department needs to monitor, follow up and report on its progress in implementing these measures (including the initiative not identified in the action plan to establish procedures that specifically address possible contraventions under section 67.1 of the Act).

The Department's annual report to Parliament on the administration of the *Access to Information Act* that it is required to table under section 72 of the Act is an appropriate mechanism to report the Department's progress. Reporting to Parliament instead of the OIC will avoid duplication in reporting since the Information Commissioner also receives and reviews departmental annual reports. Such a reporting mechanism will also encourage accountability by ensuring that progress made by the Department in the implementation of its action plan is available to the public.

Finding of Interference with Request 125

The Information Commissioner recognizes that a Minister has full authority over the management of his or her department. That said, the guidance issued by the Privy Council Office in 2008 and entitled "*Accountable Government: A Guide for Ministers and Ministers of State*" makes it clear that "[E]xempt staff do not have the authority to give direction to public servants, but they can ask for information or transmit the Minister's instructions, normally through the deputy minister." (Section 1 of chapter VI on Administrative Matters). The same document provides that "Ministers are individually responsible to Parliament and the Prime Minister for their own actions and those of their department, including the actions of all officials under their management and direction, whether or not the Ministers had prior knowledge. In practice, when an error or wrongdoing is committed by officials under their direction, Ministers are responsible for promptly taking the necessary remedial steps (…)." (Section 1 of chapter II on Portfolio Responsibilities and Support.)

The mandate of the Information Commissioner is to conduct administrative investigations into federal institutions' compliance with the Act and to make findings of fact. The Office of the Information Commissioner is not a court or tribunal, and the Commissioner has no authority to determine civil or criminal liability. That said, in conducting an investigation, subsection 63(2) of the Act gives the Commissioner discretion to disclose information to the Attorney General of Canada where she is of the opinion that there is evidence of the possible commission of an offence.

Subsection 63(2) of the *Access to Information Act*, states:

> *"The Information Commissioner may disclose to the Attorney*

General of Canada information relating to the commission of an offence against a law of Canada or a province by a director, an officer or an employee of a government institution if, in the Commissioner's opinion, there is evidence of such an offence."

« Si, à son avis, il existe des éléments de preuve touchant la perpétration d'une infraction fédérale ou provinciale par un administrateur, un dirigeant ou un employé d'une institution fédérale, le Commissaire à l'information peut faire part au procureur général du Canada des renseignements qu'il détient à cet égard.»

The information and evidence obtained during the Commissioner's investigation has led her to conclude that a ministerial staff member interfered with requesting or obtaining access to a record under the Act when he directed ATIP staff to "unrelease" the disclosure package in Request 125 containing the entire Report (15 chapters), and when he directed them to "only release" chapter 11. His interference resulted in the non-disclosure of the entire record for a period of time, and placed PWGSC in a deemed refusal situation, thereby denying the requester's right of access to information under the Act. As a member of the Minister's staff, he had no delegated authority to make any decisions on access to information matters, no legal authority to challenge interpretations of the Act by departmental officials who held the proper delegated authority, and no legal authority to reverse a decision properly made under the Act by departmental officials having delegated authority to do so.

Based on the information and evidence obtained during her investigation, the Information Commissioner is of the view that if the Director of Parliamentary Affairs in the Minister's Office had been "a director, an officer or an employee of a government institution", there would have been a sufficient basis to exercise her discretion to provide information to the Attorney General pursuant to subsection 63(2) of the Act. However, according to the current state of the law, which excludes ministerial offices and consequently ministerial staff from the application of the Act, the Commissioner was unable to do so.

That said, the Information Commissioner came to the view that the information and evidence obtained during the course of her investigation warranted that measures be taken to notify the proper authorities of the actions of the Director of Parliamentary Affairs.

Although PWGSC has not yet developed its internal procedures on section 67.1, the *Treasury Board Directive on the Administration of the Access to Information Act* is instructive in this regard. Section 6.2.28 requires that institutions outline measures in their internal procedures for dealing with suspected contraventions of section 67.1, including conducting an internal investigation, reporting a suspected contravention to the head of the government institution, and reporting to law enforcement agencies for investigation. In the Information Commissioner's view, the Royal Canadian Mounted Police was an appropriate authority for PWGSC to report this matter in light of the conclusions she reached in this investigation.

Recommendations

On February 14, 2011, the Information Commissioner wrote to the Minister of Public Works and Government Services pursuant to subsection 37(1) of the Act and reported to her that she found the complaint to be well founded. She recommended to the Minister that she take the following actions:

Recommendation 1
Refer the matter of the former Director of Parliamentary Affairs' interference with Request 125 to the Royal Canadian Mounted Police as an appropriate law enforcement agency.

Recommendation 2
Communicate to all PWGSC employees and other personnel, including ministerial staff that senior management will respect and support ATIP officials in their decisions, and intervene as needed where those decisions are being challenged by others who do not have the delegated authority to do so under the Act. This message should also serve to remind employees and other personnel, including ministerial staff, of their obligations to comply with the Act, including their duty to assist responsibilities.

Recommendation 3
Establish internal procedures immediately that specifically address suspected contraventions under section 67.1 of the Act. These procedures should align with the Department's *Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace (2001)* and its *Policy on the Reporting of Actual and Suspected Breaches and Violations of Security (1997)*, which also need to be updated. These procedures should indicate the roles and responsibilities of PWGSC officials having the delegated authority for decisions under the Act. They should also outline measures for investigating and reporting suspected contraventions under the Act by employees and other personnel, including ministerial staff. The procedures should be communicated across the Department, including ministerial staff, and addressed in all training and briefing sessions about the Act that are given to departmental employees and other personnel, including ministerial staff.

Recommendation 4
Provide training to new departmental staff and other personnel, such as contractors, about their obligations under the Act, including the duty to assist requirements [section 4(2.1) of the Act] and the procedures for reporting suspected contraventions under section 67.1 of the Act.

Recommendation 5
Report the Department's progress in implementing its action plan in its annual report to Parliament on the administration of the *Access to Information Act*.

On February 25, 2011, the Minister informed the Information Commissioner that she accepted her recommendations and directed her Deputy Minister to ensure their implementation. On February 28, 2011, the Department referred the matter of the interference of the former Director of Parliamentary Affairs with Request 125 to the Commissioner of the Royal Canadian Mounted Police.

The Information Commissioner's investigation of the complaint regarding PWGSC Request 125 has been concluded. In reporting the results to the complainant, the complaint was recorded as well founded, with recommendations made to the head of the institution, and resolved. The complainant was also informed that the Information Commissioner intended to report the matter to Parliament.

Appendix: Corrective Measures Identified by PWGSC to Address the Problems Raised in the Investigation Relating to the Processing of ATIA Request 125

1. Senior Management Review
The Department stated that review of files by senior management of release packages prepares them to respond to issues that may stem from the release of access to information packages. This new process, along with the modified structure of the weekly meeting, addresses the concerns the OIC raised regarding the Department's previous process know as the "purple folder" and reduces the possibility of undue influence or interference. These measures include:

- The review package is sent simultaneously (for information only) to the Communications Directorate, the responsible ADM, the Associate Deputy Minister's office and the Minister's Office, giving them a four-day heads-up (instead of six days) prior to disclosure.
- The time taken for the senior review is no longer monitored or required because the process is time-limited. All packages are released, without exception.
- The performance of the mechanism at the senior management table is regularly discussed with a view to pre-empting any "drift".

2. Delegation
- Further authority is delegated to the ATI chiefs for disclosure decisions for routine requests on third-party information in order to streamline decisions.
- Full delegation to the ADM of the Corporate Services and Policy Branch to align the authority delegation with the management structure and to ensure that the ATIP office is fully supported in its role by senior management.

3. Accountability
- The Minister's Office has no direct contact with the ATIP office. The ADM of the Corporate Services and Policy Branch now handles all questions from the Minister's Office and any otherwise unresolved issues from program areas.

4. ATI Weekly Meetings
- The objective of the meetings, which is to identify new requests as possibly necessitating the development of communication products, is clearly communicated and understood.
- Designations of requests as "High profile" or "interesting" are no longer used.
- Meetings are now chaired and organized by the Communications Directorate (not the ATIP Directorate). The participants are the Director General of Communications, Director General of Executive Services, ATIP director and manager, offices of primary interest and Associate Deputy Minister's office.
- The Minister's Office is no longer represented at these meetings.
- Files identified at these meetings are sent to senior management under the heading "senior management review".
- The Communications Directorate holds a weekly meeting with the Minister's Communications staff to inform them of ongoing media requests, and of the incoming access to information requests identified by PWGSC as possibly needing communication products.

5. ATI Reports
- Weekly reports on ATI requests have been streamlined to reduce the administrative burden on the ATIP office. Key information remains available to senior management for effective monitoring, and in order to

promote a culture of management accountability.
- ATI weekly reports which are sent to all senior management now include: new and consultation requests, new complaints, requests closed from the previous week, late requests report, status reports on requests to be released and that may be at risk of being late.
- The request source is no longer identified in the reports.
- The frequency of reports on ATI performance to the senior management committee has increased from two to four times a year.

6. ATIP Redaction Software
- PWGSC purchased redaction software that will facilitate the work of ATI officers. Since numerous departments are using this tool, it is expected to assist with the attraction and retention of employees.

7. ATIP Directorate Organizational Structure
- Further work is needed to design the organizational structure to ensure maximum efficiency and quality of decisions. PWGSC is working to create and implement a structure that aligns with best practices in the ATI community, strengthens the administration of the Act and provides a more seamless operation. A new structure, along with the new software, will not only improve performance but also help retain and attract ATIP professionals.
- The Department will avail itself of the assistance of an ATI expert who will conduct an in-depth review of the existing and proposed structure and of the process mechanism. This will ensure that PWGSC has the ongoing expertise to deliver on its access to information obligations, despite the skills shortage in this area.

8. Other Initiatives to Increase Awareness and Knowledge of the ATI Program

A) Training
- One person dedicated to developing training tools and providing training to departmental staff (275 employees since August 2010);
- Director General of Executive Secretariat and ATIP Director deliver information sessions to other departmental management teams on the access and privacy legislation, policy and its application;
- Minister's Office staff receive ATIP training upon arrival. Topics covered include ATIP in the PWGSC context, legislative objective, principles and requirements, roles and responsibilities of the ATIP Directorate and office of primary interest, exemptions, departmental processes and streamlining initiatives that have been implemented.
- Training content will be revised to stress ATI elements that were shown to be insufficiently understood in the processing of file 125, such as the duty to assist requesters.

B) Posting Summaries of ATI Requests
- In accordance with the Information Commissioner's recommendation to the Treasury Board of Canada, posting on its website a list of summaries of all the received and completed ATI requests.

2. General Context

Allegations of Political Interference

The processing of Request 125 by Public Works and Government Services Canada (PWGSC) triggered a complaint investigated by the Information Commissioner involving allegations of political interference in the administration of the *Access to Information Act*. The complainant, a journalist, had requested information that departmental officials had identified as being the subject of a report. Eighty-two days after the statutory deadline for responding to his request had expired, he received only one chapter of the report. It was only after two subsequent requests and several months later, that the journalist received the full report.

To better understand what had transpired during the processing of his requests, the journalist made an additional application for the departmental processing file. In examining it, he discovered that the Minister's Director of Parliamentary Affairs, a member of the political staff with no authority in access to information matters, had sent an e-mail to departmental officers directing them to "unrelease" the full report and to release only one chapter. Departmental officials followed these directions. They retrieved the original disclosure package from the mailroom and disclosed one chapter of the report to the requester 82 days later.

Political interference is not a concept specifically defined in the *Access to Information Act*. It may be viewed as occurring when staff in Ministers' offices, who cannot exercise any authority under the Act, attempt to impede the right of access for partisan or any other purposes contrary to the intent of the legislation, whether or not they are successful in those attempts. Political interference can potentially take the form referenced in paragraph 67.1(d) which is "to direct, propose, counsel or cause any person in any manner to do" any of the prohibited conduct, such as destroying, falsifying or concealing records. This is due to the fact that political staff members wield the influence associated with the Minister's office and may purport to speak on behalf of the Minister. Although political interference does not always amount to conduct that is an offence under s. 67.1 of the Act, any interference with requesting or obtaining access to records under the Act may result in a denial of the right of access.

Given the gravity of the complaint related to Request 125 and subsequent allegations of political interference in other cases, the Information Commissioner designated it as high priority. The investigation of Request 125 has been conducted amid a plethora of media headlines. Also contributing to its high public profile was the decision of the Standing Committee on Access to Information, Privacy and Ethics (ETHI) to embark on a study regarding allegations of political interference and to call Witnesses to testify before it while the Commissioner's investigation was underway.

Background

The fundamental purpose of the *Access to Information Act* is "to provide a right of access to information in records under the control of a government institution." To obstruct this right of access is not only contrary to government policy, but a serious offence under the Act.

Investigations of political interference are conducted in the context of various factors. These include statutory provisions regarding the duty to assist and the delegation of authority, as well as cultural

and environmental considerations. The latter often reflect tensions within institutions between political staff, program officials and access to information personnel.

Sanctions

Sanctions for obstructing the right of access were introduced into the Act in 1999 by means of a Private Member's Bill proposed by Ms. Colleen Beaumier (Liberal, Brampton West, Ontario). The Bill was intended to respond to situations analogous to those that had been identified in the 1997 reports of the Krever Inquiry and the Somalia Commission of Inquiry on the subjects of tainted blood and the military abuse of prisoners respectively. Both inquiries had documented instances of the withholding, alteration or destruction of key records pertinent to the decision making processes.

The list of the actions that constitute obstruction and the penalties are outlined in section 67.1 of the *Access to Information Act*:

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

The Treasury Board *Directive on the Administration of the Access to Information Act* requires institutions to prescribe measures in internal procedures for dealing with suspected contraventions of section 67.1.

Duty to Assist

The investigation of Request 125 examines whether or not PWGSC fulfilled its obligation to assist the requester. The principle of the duty to assist was added to the *Access to Information Act* in 2007 pursuant to a provision in the *Federal Accountability Act*. The duty requires institutions to make every reasonable effort to help applicants receive complete, accurate and timely responses to requests, without regard to their identity. The Treasury Board *Directive on the Administration of the Access to Information Act* further defines the concept of assisting to include offering applicants reasonable assistance throughout the request process, informing them when their requests need to be clarified and applying limited and specific exemptions. It also requires institutions to inform all personnel of their responsibilities concerning the duty and to develop and implement "written procedures and practices that will effectively assist applicants."

Institutional Tensions

The processing of Request 125 clearly illustrates the tensions that can arise when Access to Information and Privacy (ATIP) Coordinators, who are generally the institutional officials responsible for rendering decisions regarding the disclosure or non-disclosure of information, must balance the need to serve the public

interest inherent in the legislation while simultaneously dealing with conflicting organizational interests and a hierarchical structure. The role and status of Coordinators has often been studied.

In 2004, the proposed *Open Government Act* contained a specific provision related to the role of the Coordinator. Under the heading "duty to ensure proper discharge of Act", the Information Commissioner commented that the

> provision underlies the importance of the duties of the Open Government Coordinator, and ensures that senior management of the government institution also respect and enforce the rights and obligations set out in the Act. This provision is intended to bring home to coordinators that Parliament expects them to be the open government "conscience" of their institutions.

In the *Second Report of the Commission of Inquiry into the Sponsorship Program and Advertising Activities 2006: Restoring accountability*, Justice Gomery endorsed an amendment to the *Access to Information Act* to specify that

> each head, deputy head and access to information coordinator must "ensure to the extent reasonably possible, that the rights and obligations set out in this Act are respected and discharged by the institution." It is particularly important to emphasize the obligations of access to information coordinators in order to ensure their authority within every Government institution.

Justice Gomery was reacting to evidence received during the course of his inquiry. It revealed that the PWGSC Access to Information Coordinator and her staff had been subjected to considerable political and bureaucratic pressures to narrowly interpret a request made by the journalist responsible for revealing irregularities surrounding the sponsorship program. The access to information officials believed that it was unethical to narrow the interpretation solely for the purpose of redacting much of the sensitive or potentially embarrassing information. The Coordinator refused to accede to the pressures but had to resort to engaging private counsel for guidance and to guard against possible reprisals.

On a broader scale, Justice Gomery's report singled out Ministerial staff for greater scrutiny and accountability. He stated that political staff should not be directing bureaucrats on how to perform their duties or how to interpret the law and recommended that a code of conduct be developed to clarify their roles. He also stressed that ultimately the Prime Minister and Ministers bear responsibility for the actions of their staff.

Delegation and the Exercise of Discretion

Under the *Access to Information Act*, responsibility for the administrative and decision making processes and finally, for exercising discretion regarding the disclosure or non-disclosure of information is specified in formal delegation orders pursuant to section 73. It states:

> The head of a government institution may, by order, designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order.

The "head of a government institution" is the Minister responsible for a department or agency, or the chief executive officer of an organization. When a decision is made to delegate powers under the Act, the head

signs a formal delegation order authorizing one or more officers or employees occupying particular positions to exercise or perform the duties and functions enumerated in the order. Once an order is signed, the powers that have been delegated may only be exercised or performed by the head of the institution or by the designated officers or employees. Delegates are accountable for any decisions they make, while responsibility continues to rest with the head.

Officials in Ministers' offices are commonly referred to as Ministerial, exempt or political staff. By explicitly referring to "officers or employees of that institution", the current state of the law precludes Ministers' staff from being delegated any responsibilities.

There are more than forty powers, duties and functions in the *Access to Information Act* that can be delegated. To ensure optimum compliance, institutions develop orders specific to the unique requirements of their mandates and organizational structures. They also delegate authority for decision making and assign accountabilities to officials at appropriate levels within their organizations.

Roles and Responsibilities of Institutional Officials

All officers and employees within federal institutions share responsibility for complying with the *Access to Information Act*. Heads and deputy heads in particular are responsible for promoting a culture of openness and for supporting a well coordinated and effective management of access functions. Experience confirms that senior management leadership is a critical component of success in administering the legislation.

Access to Information and Privacy Coordinators generally have delegated authority for responding to requests and must do so in a fair, reasonable and objective manner. They establish procedures aimed at complete, accurate and timely responses to requests by ensuring that all records relevant to the request are identified and reviewed, determining whether any exemptions must be invoked, conducting consultations and applying the principle of severability. Throughout the process, they document all decisions and actions.

Coordinators are the central point of service for the day-to-day administration of the legislation. They provide the principle link with individuals exercising their rights pursuant to the Act and are responsible for communicating with and ensuring that every reasonable effort is made to assist requesters while, at the same time, protecting requesters' identities. Depending upon the size of the institution and the volume of requests it receives, a Coordinator may be supported by a team of analysts.

Collaboration with several groups of officials throughout the institution is necessary when processing requests. Program officers are the source of records, as well as of the expertise required to make recommendations regarding the nature of the records and the consequences of disclosure. Lawyers assist in the interpretation of the provisions of the Act and advise when case law has an impact on how the institution administers it.

Communications officers and Ministerial and deputy ministerial staff may also be involved in the access process. In the early stages, they may review the texts of incoming requests to determine if any of the topics are likely to become the subjects of media, Parliamentary or public attention and require further explanation. However, it is important to emphasize that communications activities must not, in any way, influence the content or volume of

information being disclosed or delay its release.

Political Staff

In 2008, the Prime Minister's Office updated and issued a document entitled, *Accountable Government: A Guide for Ministers and Ministers of State*. The Guide instructs that "exempt staff [members] do not have the authority to give direction to public servants, but they can ask for information or transmit the Minister's instructions, normally through the deputy minister." It also states that

> In meeting their responsibility to respect the non-partisanship of public servants, exempt staff [members] have an obligation to inform themselves about the appropriate parameters of public service conduct, including public service values and ethics, and to actively assess their own conduct and any requests they make to departmental officials in the light of those parameters.

On February 9, 2010, amid growing controversy about political interference in the administration of *the Access to Information Act* resulting from Request 125, the Prime Minister's Chief of Staff issued a memorandum to all Ministers' Chiefs of Staff. He reiterated the instructions above and reminded them that no political staff had delegated authority to make decisions pertaining to the Act. These instructions are also reflected in section 10.2 of the *Policies for Ministers' Offices* that was amended in January 2011.

The memorandum did not allay scepticism that the practice was entrenched and was unlikely to abate. Several articles, including one entitled *Access czar investigating allegations of political interference* (*Hill Times*, March 1, 2010), cited political staffers as stating that the PWGSC case was not unique, that interference was standard operating procedure and that the recent direction was "disingenuous" since they were being "told publicly to 'respect the process'" but were "expected to find ways to thwart the process."

Media Attention

The complainant behind Request 125 is a journalist who is a knowledgeable and experienced user of the *Access to Information Act*. His discovery of possible political interference in the access to information process unleashed a flurry of media headlines ranging from *Code of conduct sought for 'amoral' political aides* (*Ottawa Citizen*, February 16, 2010) to *Cabinet ministers' offices regularly interfere in ATI requests says Tory staffer (The Hill Times*, February 22, 2010). These allegations fuelled suspicions that had been intensifying over the years that interference by unauthorized officials had become a systemic problem.

The right to information under the Act devoid of any undue influence was the subject of an earlier complaint by the Canadian Newspaper Association (CNA). In 2005, the CNA requested that the Information Commissioner investigate the existence of secret rules in the federal public service for processing media requests. Association members claimed that internal procedures for reviewing and processing their requests amounted to systematic discrimination and resulted in unfair and unjustifiable delays.

The Commissioner's investigation was unable to conclude that secret rules or a government-wide practice specifically directed against media requests existed. However, it did determine that requests labelled as "sensitive", "of interest", "amber light" or with other labels indicating a need for "special handling" were subject to unwarranted delays in processing. The

investigation found that the media was not singled out but was a part of a wider problem affecting other groups as well, notably Parliamentarians, academics and lawyers.

Based on the findings of the investigation, the Commissioner made a recommendation to the 20 institutions, which included PWGSC, involved in the complaint:

> That subject to section 9 of the Act, any government institution which categorizes or labels access requests in any way, and which may lead to any form of special handling, shall undertake not to delay the processing of these requests.

A second recommendation was directed to the President of the Treasury Board:

> That the President of the Treasury Board undertake a study of how the institutions which categorize or label access requests for special handling, with no detriment to the timely processing of access requests, organize the process, with a view to issuing Best Practices to all government institutions.

The President accepted the recommendation and issued the *Report on the TBS Study of Best Practices for Access to Information Requests Subject to Particular Processing*. The report lists 18 best practices, including establishing processes designed only to notify officials of the disclosure of information rather than for approval, maintaining separate and distinct requirements for access to information and communications functions, and providing training and briefing sessions to all personnel regarding their roles and responsibilities.

Parliamentary Oversight

Matters related to the *Access to Information Act* are reviewed and studied by the Standing Committee on Access to Information, Privacy and Ethics. On April 1, 2010, it adopted the motion:

> That the committee conduct a study regarding allegations of systematic political interference by the Minister's offices to block, delay or obstruct the release of information to the public regarding the operations of government departments and that the committee call before it: Honourable Diane Finley, Minister of Human Resources and Skills Development. At a separate meeting or meetings: Dimitri Soudas, Associate Director, Communications/Press Secretary, Prime Minister's Office; Guy Giorno, Chief of Staff, Prime Minister's Office; Ryan Sparrow, Director of Communications, Office of the Minister, Human Resources and Skills Development Canada; Sebastien Togneri, former Parliamentary Affairs Director, Public Works Canada; Patricia Valladao, Chief, Media Relations, Human Resources and Skills Development Canada; and That the committee submit a report to the House of Commons on its findings.

During April and May, Committee members heard from witnesses at both the political and bureaucratic levels. The former Director of Parliamentary Affairs at PWGSC, who had been involved in Request 125, testified on two occasions. He admitted he had sent a “stupid e-mail” and that it had been a mistake on his part. He also indicated it had been an isolated incident. Several months later, documents provided to the Parliamentary Committee were obtained by the Canadian Press

which, in turn, reported that the political official had repeatedly influenced the disclosure of government information.

The Committee's study of allegations of interference was impacted in late May by a new government policy. The Prime Minister's Associate Director of Communications was scheduled to appear before the Committee on the 25th. However, on that day, the government instituted a policy advising Ministers that political staff should not testify at committees and that they should attend on their behalf. This policy ignited a controversy regarding Ministerial responsibility for their staff versus the authority of Parliamentary committees to compel witnesses to appear before them.

Conclusion

In the PWGSC Request 125 case, the Information Commissioner concluded that there was political interference in the processing of the journalist's access request.

Real or perceived political interference in the administration of the *Access to Information Act* has been a long standing issue. When it occurs, it often creates an adversarial environment between political and bureaucratic personnel within institutions. In its more egregious manifestations, it has directly contributed to the erosion of individuals' rights to government information.

The Act is clear. It requires that the review and disclosure of records relevant to requests be conducted in an objective and non-partisan manner by officers and employees authorized to do so. By introducing criminal sanctions for obstructing the right of access, Parliament explicitly signalled that interference would not be tolerated and would be punished accordingly.

The investigation of PWGSC Request 125 was conducted in the context of the environment and statutory and policy requirements outlined above. It highlights circumstances that can result in non-compliance with the principles and practices inherent in the *Access to Information Act*.

Ultimately, the incident should serve to educate political staff on the importance of respecting the intent of the Act and the roles of the officers and employees responsible for administering it. It should also reinforce the fact that those charged with administering the Act have a responsibility to resist any pressures that would prevent them from properly discharging their obligations. All parties should understand that there can be serious consequences for failing in their duties.

3. Legal Constraints

The Information Commissioner's Legal Obligations

Following the investigation of the complaint about PWGSC that is discussed in this report, the Information Commissioner has found herself in a situation where, as a result of performing her duties under the Act, she has come to the opinion that she has obtained evidence showing the possible commission of an offence under the Act. Being in this situation has had the effect of highlighting some legislative constraints which have limited her ability to communicate information that would permit a criminal investigation to be conducted so that the *Access to Information Act* may be properly enforced.

The following sections describe the relevant portions of the Act that are at play in this situation and serve to explain why the Information Commissioner has found that she may not take appropriate steps to ensure that a criminal investigation is conducted into this matter of a possible offence to the *Access to Information Act*. These provisions of the Act will show that, when taken together, they have left a gap in the Information Commissioner's ability to ensure that possible offences under the Act are the subject of a criminal investigation by the appropriate authority.

Offences to the *Access to Information Act*

The *Access to Information Act* contains two offences. The first has been in place since the Act came into force, some 28 years ago. It prohibits the obstruction of the Information Commissioner and anyone acting on her behalf or under her direction in the performance of their duties and functions under the Act. Contravention of this provision is punishable on summary conviction with a fine of up to $1000. This offence sets out the consequences of impeding the Information Commissioner in the performance of her duties or functions. The *Access to Information Act* provides a series of broad and extraordinary powers[1] to the Commissioner so that she may carry out her investigations and accomplish her mandate even in situations where persons do not want to voluntarily cooperate in her investigations. The offence provision provides an enforcement mechanism to ensure that the Commissioner is able to properly fulfill her mandate under the Act.[2]

In 1999, a second offence was included in the *Access to Information Act* (s. 67.1). This offence prohibits all persons from destroying, mutilating, altering, falsifying or concealing records with the intent of denying a right of access under the Act. It also forbids directing, proposing or causing anyone else to do any of the prohibited acts. Contravention of this provision can result in prosecution either as an indictable offence or as an offence punishable on summary conviction. The maximum penalty for committing the offence is two years of imprisonment and a fine of $10,000.

This offence was added to the *Access to Information Act* as a result of a private member's bill that was drafted in response to grave concerns that had been raised by former Information Commissioner John Grace. In the wake of various findings that the right of access to government records had been thwarted through record destruction, tampering and cover-up,

[1] See s. 36. The Courts have described the powers in decisions such as the following: *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, par. 38; *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 1999 166 F.T.R. 277 (F.C.A.), par. 20

[2] Another such mechanism is the power of the Information Commissioner to find a witness in contempt of her proceedings if she encounters resistance to the use of her statutory power to compel pursuant to s. 36(1)(a) of the Act. See *Rowat v. Canada (Information Commissioner)*, 2000 193 F.T.R. 1 (F.C.T.D.).

including incidents linked to the Somalia Inquiry and the Canadian Blood Inquiry, Mr. Grace arrived at the conclusion that "the time ha[d] come to consider amending the Access Act to provide penalties for flagrant violations of this statute."[3] He echoed this sentiment by again recommending the next year that there be "a specific offence in the access act for acts or omissions intended to thwart the rights set out in the law."[4]

When it was first introduced in the House of Commons, the Bill was described by the Honourable Ms. Beaumier, the Member of Parliament who championed it, as legislation that "…would provide stiff penalties against any person who improperly destroys or falsifies government records in an attempt to deny right of access to information under the *Access to Information Act*. This bill is about the protection of our public records."[5]

The addition of this offence to the Act demonstrates a Parliamentary intent that anyone engaging in the prohibited conduct be held accountable for their acts through criminal proceedings. Yet, no consequential amendments were made to the Act when this offence was enacted and there remain unresolved questions about how the provision is to be enforced, particularly in cases where the Information Commissioner's administrative investigation uncovers evidence that such an offence may have occurred.

Despite a previous disclosure of information to the Attorney General of Canada in relation to the possible destruction of requested records[6], to the Information Commissioner's knowledge, no criminal charges have ever been laid for violations to the *Access to Information Act*.

The previous disclosure to the Attorney General, and the recommendations made in the investigation into interference at PWGSC which is the subject-matter of this Special Report have raised questions about the appropriateness of the confidentiality limitations in the Act where they limit the prospects of possible offences to the Act being criminally investigated. While the provisions serve important purposes, further exceptions may be needed to address the difficult issues raised in this Report. Other challenges to enforcement are also beginning to make themselves known as experience is gained. One of these is the difficulty in ensuring that timelines are met so that appropriate charges can be laid if there has been a breach to s.67.1 of the Act.[7]

Before exploring the limits to disclosure of information by the Commissioner with respect to offences under the Act, the Commissioner's role and the underlying purpose of the confidentiality obligations must be understood.

The Information Commissioner's Role and Function

The Information Commissioner's primary role and function under the Act is to conduct administrative investigations into complaints relating to requesting or obtaining access to records under the Act. She is an officer of Parliament "charged

[3] 1995-96 Annual Report, p. 11.
[4] 1996-97 Annual Report, p. 14.
[5] Hansard, Sept 26, 1997, Ms. Colleen Beaumier (Brampton West—Mississauga, Lib.)
[6] See summary of relevant investigation on OIC website: http://www.oic-ci.gc.ca/eng/inv-inv_not-inv-sum-som-inv-not_sum_2009-2010_8.aspx. This was the first time that the Information Commissioner disclosed information to the Attorney General pursuant to s. 63(2) in relation to the possible commission of an offence under s. 67.1 of the Act.
[7] The *Criminal Code* provides that for summary procedure offences "No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose, unless the prosecutor and the defendant so agree." (s. 786(2)). This time limit severely limits the use of the summary conviction procedure for the s.67.1 offence because investigations may not even be commenced within six months of the time that the subject matter of the proceedings arose.

with carrying out impartial, independent and non-partisan investigations" under the Act.[8] Her function in conducting these investigations is to make findings of fact and provide recommendations to the relevant government institutions to promote compliance with the Act and ensure that requesters' rights of access under the Act have been respected. In this capacity, the Information Commissioner "play[s] a crucial role in the investigation, mediation, and resolution of complaints alleging the improper use or disclosure of information under government control."[9]

The Commissioner has no power to order that requested records be disclosed or that any of the measures she recommends be implemented. Nor does the Information Commissioner have any power to enforce the Act – she does not conduct any criminal investigations relating to possible offences to the Act. In reporting the findings of her investigations, the Information Commissioner does not make any findings of civil or criminal liability.

The Act does not provide the Commissioner with the discretion to refuse to investigate complaints. As long as the complaint is related to requesting or obtaining access to records under the Act, the Commissioner must investigate. This applies even if the very subject of the complaint amounts to an allegation that an offence under the Act.

In situations involving the possible destruction, alteration or concealment of records, the Commissioner's investigation serves not only the same purposes as in any other access complaint but may also serve other important ends. Notably, these investigations can provide a manner of securing and safeguarding relevant records and of reconstructing relevant records, if necessary and possible.[10] They also allow the Commissioner to review the general administration of access requests within institutions and make recommendations on these matters where appropriate. They can also serve as a way of uncovering evidence of wrongdoing.

While the Information Commissioner is master of her procedure and she may therefore conduct her investigations as she sees fit, she must do so in compliance with the obligations set out in the Act as well as the applicable rules of procedural fairness and natural justice. Notably, her investigations must be conducted in private and the Commissioner and her staff must maintain confidentiality over any information obtained in the course of an investigation, except in the specific instances where disclosure is permitted by the *Access to Information Act*.

The Information Commissioner's Confidentiality Obligations

The *Access to Information Act* was drafted in a manner that ensures that the Information Commissioner's investigations take place in private and that she and her office are bound by stringent confidentiality obligations.[11]

The following obligations apply:

- All the Information Commissioner's investigations of complaints are conducted in private[12].
- The Information Commissioner and every person acting on her behalf or under her direction shall not disclose any information that comes to their knowledge in the performance of their duties and functions under the Act,

[8] *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441, par. 33
[9] *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441, par. 34

[10] Extracts from a speech by the Information Commissioner given to the Information Law and Privacy Section's Annual Conference on October 28, 1999 (OIC file 8367-3-1).
[11] See sections 35, 62, 64 ATIA
[12] Section 35(1)

unless the Act itself authorizes disclosure[13].

- The Information Commissioner and every person acting on her behalf or under her direction have additional confidentiality obligations with regard to any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under the Act.[14] Every reasonable precaution must be taken to avoid the disclosure of such information and such information cannot be disclosed in the course of investigations or in reports to Parliament.

The type of information encapsulated by the latter confidentiality obligation includes information that a government institution has refused to disclose under the Act and that has been provided to the Information Commissioner in the course of an investigation of a complaint. It also includes any other information that is provided to or obtained by the Information Commissioner in the performance of her duties and functions under the Act where the head of a government institution would be authorized to refuse to disclose such information pursuant to the exemptions or exclusions enumerated in the Act. [15]

These confidentiality obligations are complemented by the mandatory exemption that was added to the *Access to the Information Act* at the same time that the Office of the Information Commissioner became a government institution whose records were subject to the right of access provided by the Act. This exemption requires the Information Commissioner to refuse to disclose records containing information that she obtained or created in the course of an investigation.[16]

Together, these confidentiality provisions ensure that the information received by the Information Commissioner and her staff in the course of their duties and functions is not disclosed, except under the circumstances provided for by the Act. They provide "…a regime that will ensure that information communicated to the Commissioner remains protected to the same extent as if not disclosed to the Commissioner."[17]

These obligations of confidentiality are not limited in time; they remain even after the conclusion of investigations.[18] Courts have found in favour of upholding the confidentiality of representations made in the course of an investigation not only during the investigation but subsequently to it as well, except where the Act requires or permits disclosure.[19]

The confidentiality provisions protect the integrity of the investigative process. In

[13] Section 62

[14] See s. 64. These obligations also apply to any information as to whether a record exists where the head of a government institution, in refusing to give access to the record under this Act, does not indicate whether it exists.

[15] See s.64. This provision also applies to "any information as to whether a record exists where the head of a government institution, in refusing to give access to the record under this Act, does not indicate whether it exists." Section 47 requires the Court to take precautions against disclosing such information during the course of a review under the Act pursuant to ss. 41, 42 and 44.

[16] See section 16.1 of ATIA.

[17] *Canada (Attorney General) v. Canada (Information Commissioner)*, 2004 FC 431, par. 150

[18] One exception to the ongoing confidentiality requirement referred to by the Court is found in s. 16.1(2) of the Act in relation to records "created by or on behalf" of the Commissioner once an investigation and all related proceedings are finally concluded.

[19] *Canada (Clerk of the Privy Council) v. Rubin*, [1994] 2 F.C. 707 (F.C.A.) agreed with the Federal Court judgment reported [1993] 2 F.C. 391. The Federal Court of Appeal stated at par. 12: "… this reasoning also argues for preserving the confidentiality of representations made in the course of an investigation during as well as subsequent to the investigation unless, of course, the statute requires or permits disclosure." The FCA judgment was upheld by the Supreme Court of Canada in *Rubin v. Canada (Clerk of the Privy Council)*, [1996] 1 S.C.R. 6.

former Information Commissioner John Grace's view, the process of complaint investigation and resolution could not have functioned effectively without the candour and confidence an assurance of confidentiality serves.[20] The Courts have agreed that the purpose of the confidentiality provisions includes ensuring the Information Commissioner's credibility and effectiveness, which is consistent with the objective that access requests be resolved quickly and at minimal costs.[21] The Federal Court of Appeal has also found that the Information Commissioner's obligation to hold investigations in private is imposed in order to "promote the objective of full disclosure by the government in the course of an investigation."[22]

The Exceptions to the Information Commissioner's Confidentiality Obligations

While the confidentiality requirements are essential to the integrity of the Commissioner's process, they are subject to exceptions. Any disclosure of information that comes to the knowledge of the Commissioner or her staff in the performance of their duties and functions under the Act must be authorized by the Act. Unless the Act provides a basis authorizing disclosure of such information, confidentiality must be maintained.

The Commissioner has the discretion to disclose information in the instances provided for in the Act. She may disclose any information obtained in the performance of her duties and functions:

- Where she is of the opinion that there is evidence of the commission of an offence against a law of Canada or a province by a director, an officer or an employee of a government institution and disclosure is made to the Attorney General of Canada;
- In the course of a prosecution for an offence under the Act, for perjury in respect of a statement made under the Act or in a review before the Federal Court under the Act or an appeal therefrom;

The Information Commissioner can also disclose information obtained in the performance of her duties and functions in the following circumstances, as long as the information in question is not information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under the Act[23]:

- Where the disclosure is necessary, in the Commissioner's opinion, to carry out an investigation under the Act or to establish grounds for findings and recommendations contained in any report under the Act;
- When responding to access to information requests from those exercising their right of access to records under the control of government institutions[24].

Moreover, in limited instances, the Commissioner or those acting on her behalf may be compelled to disclose such information[25]. This can only happen in prosecutions for an offence under the Act, prosecutions for perjury in respect of a statement made under the Act, a review

[20] As reported in *Canada (Clerk of the Privy Council) v. Rubin*, [1994] 2 F.C. 707 (F.C.A.), par. 3
[21] *Canada (Clerk of the Privy Council) v. Rubin*, [1994] 2 F.C. 707 (F.C.A.), par. 12, agreeing with a passage from the Federal Court decision reported at [1993] 2 F.C. 391. The FCA judgment was upheld by the Supreme Court of Canada in *Rubin v. Canada (Clerk of the Privy Council)*, [1996] 1 S.C.R. 6.
[22] *Blank v. Canada (Department of Justice)*, 2005 FCA 405, par. 14.

[23] For such disclosures to be authorized the information also cannot be information as to whether a record exists where the head of a government institution, in refusing to give access to the record under this Act, does not indicate whether it exists.
[24] In such cases, the exemptions under the Act may apply, notably s. 16.1.
[25] See section 65.

before the Court under the Act or an appeal therefrom.

Even with the limitations set out in s. 64, the exceptions to confidentiality are of great utility to the Information Commissioner in the performance of her duties. They allow her to provide witnesses with an opportunity to respond to the testimony of another witness. They also allow her to mediate complaints; to report meaningfully on her findings to both government institutions and to complainants; to subsequently report to Parliament; and to provide relevant evidence to the courts during reviews of access decisions under the Act.

The conduct of recent investigations has led the Information Commissioner to explore the scope of the instances where she is given discretion to disclose information created or obtained in the course of her investigations or other duties. Questions have arisen concerning the efficacy of these exceptions and about whether she has the sufficient level of discretion required to properly play her role in promoting compliance with the *Access to Information Act*, particularly in the context of investigations which uncover evidence of the possible commission of an offence under the Act.

The main difficulty is in ensuring that the law is enforced. As we will see, the Commissioner's confidentiality obligations may hinder that goal in some instances. In other instances, the obstacle to enforcement is that possible instances of interference with access requests are not investigated outside the government institution in which they have taken place.

Challenges to the Enforcement of the *Access To Information Act*

The Information Commissioner Must be Made Aware of the Matter Before She can Uncover Evidence Relating to the Commission of an Offence to the Act

The complaint that was investigated in the matter being reported on here was brought by an access requester who, because of thorough knowledge of the Act, was able to identify that there might have been interference in processing one of the access requests. The Information Commissioner therefore became seized of the matter when he lodged a complaint. However, there remain serious concerns that in other instances of possible interference with the right of access, the Information Commissioner may never be made aware of such situations. If such matters are not reported to the Information Commissioner, the likely outcome is that they will be investigated solely within the government institution or not at all rather than by an appropriate outside authority.

Pursuant to the Policy on Government Security, when allegations of criminal activity are made within a government institution, including allegations of contraventions to s.67.1 of the Act, such matters are to be investigated internally within the institution.[26] The Deputy Head is then made aware of the situation and decides whether to notify the appropriate law enforcement agency.[27] In the case of possible offences to s.67.1 of the *Access*

[26] See paragraph 6.1.7 of the Government Security Policy at: http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=16578&section=text

[27] See Access to Information and Privacy Implementation Report No. 67, September 17, 1999, Appendix B: Additional information and guidance concerning the application of Section 67.1 of the *Access to Information Act*. These implementation reports were superseded by the coming into effect on April 1, 2010, of the Treasury Board Directive on the Administration of the *Access to Information Act*: http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=18310.

to Information Act, a former Information Commissioner has spoken out against such a procedure, calling instead for a policy that would require that the Office of the Information Commissioner be made aware of any such situation, so that it could conduct an investigation independently of the institution in which the matter arose. The Act's explicit purpose requires that decisions on the disclosure of government information be reviewed independently of government. The Information Commissioner's independence from government institutions where impugned conduct is alleged to have occurred allows her to bring a level of objectivity to the matter that may be lacking within the institution directly involved. Finally, an investigation by the Commissioner allows her to engage in fact finding and use statutory powers, if necessary, so that if there is evidence that an offence to the Act has been committed, it can be uncovered; if this occurs, the Information Commissioner can be the one to decide whether the matter should be reported to the Attorney General of Canada as warranting criminal investigation rather than having that responsibility rest entirely with the Deputy Head of the institution in question. In a previous Annual Report, the former Information Commissioner spoke out against the policy that such allegations be investigated within the institutions where they occurred, stating: "The potential for improper interference with evidence and witnesses is simply too great in the case of this offence, for government institutions to attempt to investigate themselves when an allegation of possible infringement of subsection 67.1 is made."[28]

When such a matter is brought to the Commissioner's attention, she is then afforded the opportunity of engaging in proper fact-finding which may in turn lead to the disclosure of information to the Attorney General if she is of the opinion that she has evidence of the commission of an offence under the Act.

Limits to Enforcement Due to the Confidentiality Obligations Under the Act

In the usual course, when someone becomes aware that a criminal offence may have been committed, that person may report the matter to the appropriate law enforcement agency.

The Information Commissioner finds herself in a different position – if she comes to the opinion that she has evidence of the commission of an offence and she obtained that information while performing her duties under the Act, she is bound by the Act's confidentiality obligations and may only disclose information as authorized by the Act. While she may disclose information in the course of a prosecution for an offence under the Act, prior to such prosecution, her only disclosure option is pursuant to subsection 63(2) of the Act, which provides:

> The Information Commissioner may disclose to the Attorney General of Canada information relating to the commission of an offence against a law of Canada or a province by a director, an officer or an employee of a government institution if, in the Commissioner's opinion, there is evidence of such an offence.

This provision is applicable with regard to an offence to any law. No distinction is made between disclosure by the Information Commissioner of information regarding offences to the *Access to Information Act* and information about offences to any other law.

Section 63(2) places a two-fold limitation on the Commissioner's discretion to disclose information.

[28] 1999-2000 Annual Report, p. 23

The first limitation is primarily a procedural one, namely, that the relevant information may only be disclosed to the Attorney General of Canada. The Information Commissioner is not authorized to make the disclosure directly to the body who would be charged with conducting criminal investigations of offences to the *Access to Information Act*, namely, the Royal Canadian Mounted Police. This places the Attorney General, who has no investigative mandate, in the unusual position of acting as a courier between the Information Commissioner and the appropriate criminal investigative authority. By contrast, the Federal Court has the discretion under the Act to provide information to an appropriate authority[29], such as the police force authorized to conduct the relevant criminal investigation. Similar provisions in other Acts also grant more options about the recipient of such a disclosure, notably the *Public Servants Disclosure Protection Act*, which generally allows the Public Sector Integrity Commissioner to make such disclosures to a peace officer having jurisdiction to investigate the alleged contravention or to the Attorney General of Canada.

The second limitation is more substantive. The Information Commissioner may not disclose information in relation to the actions of a person who is not an officer, director or employee of a government institution. This is so despite the wording of the offences to the Act, which prohibit every person from engaging in the offensive conduct.

The investigation into possible interference at PWGSC leading to this Special Report highlights two classes of individuals who are not covered by the relevant provision of the Act allowing disclosure, as the Information Commissioner is not relieved of her confidentiality obligations towards them by the terms of the Act: current and former members of a Minister's exempt staff and former directors, officers or employees of government institutions.

Given the current state of the law, ministerial exempt staffers, like the former Director of Parliamentary Affairs in the office of the Minister of PWGSC, are excluded from the definition of director, officer or employee of a government institution. Even if he had been a director, officer or employee of PWGSC, upon his resignation he would have ceased being so.

This has meant that the Information Commissioner was unable to exercise her discretion to disclose information received during the course of her investigation regarding a possible offence to the Act committed by the former Director of Parliamentary Affairs in the office of the Minister of PWGSC to the Attorney General of Canada.

Other gaps in the disclosure can be readily envisioned as a consequence of the restrictive wording of subsection 63(2). Other relevant persons who are not directors, officers or employees of government institutions are consultants or contractors hired by government institutions including those who are employed to provide services in the fulfillment of access to information responsibilities. Such individuals would be in positions where they could engage in conduct prohibited by the *Access to Information Act* as easily as directors, officers and employees of government institutions. Yet, given the current state of the law, if such conduct were to come to light through an investigation by the Information Commissioner, she would be prohibited by the Act from disclosing information, which in her view relates to the possible commission of such an offence by contractors, while she could disclose similar information about directors, officers or employees of government institutions.

[29] See section 47(2) of ATIA.

The provisions of the Act as currently drafted offer greater confidentiality protections to certain individuals involved in the access process than to others. This could unintentionally result in greater protection from prosecution for offences to the Act for certain individuals than for others, based solely on their employment status.

Such a limitation unduly restricts the Information Commissioner's ability to ensure that the offence provisions of the Act are enforced as the public interest warrants. In the Commissioner's view, there is no reason to distinguish between directors, officers and employees of a government institution from other persons who have engaged in conduct that may constitute an offence to the *Access to Information Act*. This is particularly so when such an offence only comes to light during an investigation by the Commissioner.

What has made this unnecessary distinction all the more glaring in the context of recent investigations is the interference by a member of a Minister's exempt staff in the processing of access requests. While the Act provides that only employees or officers of government institutions may receive delegated authority from Ministers or other heads of government institutions to make decisions in responding to access to information requests, the Commissioner has concluded that, in at least one case, a member of a Minister's exempt staff has purported to exercise authority under the Act. By giving members of a Minister's exempt staff the benefit of greater guarantees of confidentiality during and after the Information Commissioner's investigation, the confidentiality provisions work against achieving the purpose of the offence provisions of the Act.

Until legislative changes are made to the Act, the Information Commissioner will comply with her obligations as currently worded in the Act and will not disclose any information to the Attorney General of Canada about possible offences to the Act unless the person suspected of such conduct is a director, officer or employee of a government institution.

In the absence of legislative changes, in this case the Information Commissioner followed what appeared to be her best option – recommending to the Minister of PWGSC that she take the necessary steps to have the matter of the interference with Request 125 by the former Minister's Director of Parliamentary Affairs referred to the Royal Canadian Mounted Police, since the Information Commissioner could not take this step herself.

Recommendations

1. The Information Commissioner recommends that the confidentiality obligations included in the *Access to Information Act* be reviewed and amended, as required, so that they work cohesively and take into account the factors that have evolved since the Act was first put into place, including the fact that the Office of the Information Commissioner is a government institution whose records are subject to the right of access under the Act and the technological advances that permit the dissemination of information.

2. The Information Commissioner recommends that the limits imposed by s. 63(2) of the Act with regard to her ability to disclose evidence of the commission of an offence to the *Access to Information Act* itself be removed. In particular, the Information Commissioner recommends that she be enabled to:

    a. make such a disclosure to an appropriate authority; and
    b. make such a disclosure about any person who may have committed an offence to the *Access to Information Act*.

3. The Information Commissioner recommends that when an allegation that an offence to the *Access to Information Act* may have been committed is made within a government institution, the head of the government institution be required to inform the Information Commissioner of the matter.

Appendix: Selected Provisions of the *Access to Information Act*

Purpose

2. (1) 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 exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

Complementary procedures

(2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

Definitions

3. In this Act,

"government institution" means
(*a*) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and
(*b*) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*;

"head", in respect of a government institution, means
(*a*) in the case of a department or ministry of state, the member of the Queen's Privy Council for Canada who presides over the department or ministry, or
(*b*) in any other case, either the person designated under subsection 3.2(2) to be the head of the institution for the purposes of this Act or, if no such person is designated, the chief executive officer of the institution, whatever their title;

"Information Commissioner" means the Commissioner appointed under section 54;

"record" means any documentary material, regardless of medium or form;

Right to access to records

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is
(*a*) a Canadian citizen, or
(*b*) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, has a right to and shall, on request, be given access to any record under the control of a government institution.

Extension of right by order

(2) The Governor in Council may, by order, extend the right to be given access to records under subsection (1) to include persons not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate.

Responsibility of government institutions

(2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

Notice where access requested

7. Where access to a record is requested under this Act, the head of the government institution to which the request is made shall, subject to sections 8, 9 and 11, within thirty days after the request is received,
(*a*) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and
(*b*) if access is to be given, give the person who made the request access to the record or part thereof.

Extension of time limits

9. (1) The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Act for a reasonable period of time, having regard to the circumstances, if
(*a*) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution,
(*b*) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or
(*c*) notice of the request is given pursuant to subsection 27(1) by giving notice of the extension and, in the circumstances set out in paragraph (*a*) or (*b*), the length of the extension, to the person who made the request within thirty days after the request is received, which notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

Notice of extension to Information Commissioner

(2) Where the head of a government institution extends a time limit under subsection (1) for more than thirty days, the head of the institution shall give notice of the extension to the Information Commissioner at the same time as notice is given under subsection (1).

Where access is refused

10. (1) Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(*a*)
(*a*) that the record does not exist, or
(*b*) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed, and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

Deemed refusal to give access

(3) Where the head of a government institution fails to give access to a record requested under this Act or a part thereof within the time limits set out in this Act, the head of the institution shall, for the purposes of this Act, be deemed to have refused to give access.

Records relating to investigations, examinations and audits

16.1 (1) The following heads of government institutions shall refuse to disclose any record requested under this Act that contains information that was obtained or created by them or on their behalf in the course of an investigation, examination or audit conducted by them or under their authority:
(*a*) the Auditor General of Canada;
(*b*) the Commissioner of Official Languages for Canada;
(*c*) the Information Commissioner; and
(*d*) the Privacy Commissioner.

Exception

(2) However, the head of a government institution referred to in paragraph (1)(*c*) or (*d*) shall not refuse under subsection (1) to disclose any record that contains information that was created by or on behalf of the head of the government institution in the course of an investigation or audit conducted by or under the authority of the head of the government institution once the investigation or audit and all related proceedings, if any, are finally concluded.

Severability

25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

Receipt and investigation of complaints

30. (1) Subject to this Act, the Information Commissioner shall receive and investigate complaints
(*a*) from persons who have been refused access to a record requested under this Act or a part thereof;
(*b*) from persons who have been required to pay an amount under section 11 that they consider unreasonable;
(*c*) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;
(*d*) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;
(*d.1*) from persons who have not been given access to a record or a part thereof in an alternative format pursuant to a request made under subsection 12(3), or have not been given such access within a period of time that they consider appropriate;
(*e*) in respect of any publication or bulletin referred to in section 5; or
(*f*) in respect of any other matter relating to requesting or obtaining access to records under this Act.

Written complaint

31. A complaint under this Act shall be made to the Information Commissioner in writing unless the Commissioner authorizes otherwise. If the complaint relates to a request by a person for access to a record, it shall be made within sixty days after the day on which the person receives a notice of a refusal under section 7, is given access to all or part of the record or, in any other case, becomes aware that grounds for the complaint exist.

Regulation of procedure

34. Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act.

Investigations in private

35. (1) Every investigation of a complaint under this Act by the Information Commissioner shall be conducted in private.

Right to make representations

(2) In the course of an investigation of a complaint under this Act by the Information Commissioner, a reasonable opportunity to make representations shall be given to
(*a*) the person who made the complaint,

(*b*) the head of the government institution concerned, and
(*c*) a third party if
(i) the Information Commissioner intends to recommend the disclosure under subsection 37(1) of all or part of a record that contains — or that the Information Commissioner has reason to believe might contain — trade secrets of the third party, information described in paragraph 20(1)(*b*) or (*b.1*) that was supplied by the third party or information the disclosure of which the Information Commissioner can reasonably foresee might effect a result described in paragraph 20(1)(*c*) or (*d*) in respect of the third party, and
(ii) the third party can reasonably be located.

However no one is entitled as of right to be present during, to have access to or to comment on representations made to the Information Commissioner by any other person.

Powers of Information Commissioner in carrying out investigations

36. (1) The Information Commissioner has, in relation to the carrying out of the investigation of any complaint under this Act, power
(*a*) to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record;
(*b*) to administer oaths;
(*c*) to receive and accept such evidence and other information, whether on oath or by affidavit or otherwise, as the Information Commissioner sees fit, whether or not the evidence or information is or would be admissible in a court of law;
(*d*) to enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises;
(*e*) to converse in private with any person in any premises entered pursuant to paragraph (*d*) and otherwise carry out therein such inquiries within the authority of the Information Commissioner under this Act as the Commissioner sees fit; and
(*f*) to examine or obtain copies of or extracts from books or other records found in any premises entered pursuant to paragraph (*d*) containing any matter relevant to the investigation.

Access to records

(2) Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the Commissioner on any grounds.

Evidence in other proceedings

(3) Except in a prosecution of a person for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, in a prosecution for an offence under section 67, in a review before the Court under this Act or in an appeal from such proceedings, evidence given by a person in proceedings under this Act and evidence of the existence of the proceedings is inadmissible against that person in a court or in any other proceedings.

Findings and recommendations of Information Commissioner

37. (1) If, on investigating a complaint in respect of a record under this Act, the Information Commissioner finds that the complaint is well-founded, the

Commissioner shall provide the head of the government institution that has control of the record with a report containing
(*a*) the findings of the investigation and any recommendations that the Commissioner considers appropriate; and
(*b*) where appropriate, a request that, within a time specified in the report, notice be given to the Commissioner of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.

Report to complainant and third parties

(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant and any third party that was entitled under subsection 35(2) to make and that made representations to the Commissioner in respect of the complaint the results of the investigation, but where a notice has been requested under paragraph (1)(*b*) no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

Matter to be included in report to complainant

(3) Where a notice has been requested under paragraph (1)(*b*) but no such notice is received by the Commissioner within the time specified therefor or the action described in the notice is, in the opinion of the Commissioner, inadequate or inappropriate or will not be taken in a reasonable time, the Commissioner shall so advise the complainant in his report under subsection (2) and may include in the report such comments on the matter as he thinks fit.

Access to be given

(4) Where, pursuant to a request under paragraph (1)(*b*), the head of a government institution gives notice to the Information Commissioner that access to a record or a part thereof will be given to a complainant, the head of the institution shall give the complainant access to the record or part thereof
(*a*) forthwith on giving the notice if no notice is given to a third party under paragraph 29(1)(*b*) in the matter; or
(*b*) forthwith on completion of twenty days after notice is given to a third party under paragraph 29(1)(*b*), if that notice is given, unless a review of the matter is requested under section 44.

Right of review

(5) Where, following the investigation of a complaint relating to a refusal to give access to a record requested under this Act or a part thereof, the head of a government institution does not give notice to the Information Commissioner that access to the record will be given, the Information Commissioner shall inform the complainant that the complainant has the right to apply to the Court for a review of the matter investigated.

Special reports

39. (1) The Information Commissioner may, at any time, make a special report to Parliament referring to and commenting on any matter within the scope of the powers, duties and functions of the Commissioner where, in the opinion of the Commissioner, the matter is of such urgency or importance that a report thereon should not be deferred until the time provided for transmission of the next annual report of the Commissioner under section 38.

Where investigation made

(2) Any report made pursuant to subsection (1) that relates to an investigation under this Act shall be made only after the procedures set out in section 37 have been followed in respect of the investigation.

Transmission of reports

40. (1) Every report to Parliament made by the Information Commissioner under section 38 or 39 shall be made by being transmitted to the Speaker of the Senate and to the Speaker of the House of Commons for tabling in those Houses.

Reference to Parliamentary committee

(2) Every report referred to in subsection (1) shall, after it is transmitted for tabling pursuant to that subsection, be referred to the committee designated or established by Parliament for the purpose of subsection 75(1).

Confidentiality

62. Subject to this Act, the Information Commissioner and every person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their duties and functions under this Act.

Disclosure authorized

63. (1) The Information Commissioner may disclose or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information
(*a*) that, in the opinion of the Commissioner, is necessary to
(i) carry out an investigation under this Act, or
(ii) establish the grounds for findings and recommendations contained in any report under this Act; or
(*b*) in the course of a prosecution for an offence under this Act, a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, a review before the Court under this Act or an appeal therefrom.

Disclosure of offence authorized

(2) The Information Commissioner may disclose to the Attorney General of Canada information relating to the commission of an offence against a law of Canada or a province by a director, an officer or an employee of a government institution if, in the Commissioner's opinion, there is evidence of such an offence.

Information not to be disclosed

64. In carrying out an investigation under this Act and in any report made to Parliament under section 38 or 39, the Information Commissioner and any person acting on behalf or under the direction of the Information Commissioner shall take every reasonable precaution to avoid the disclosure of, and shall not disclose,
(*a*) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or
(*b*) any information as to whether a record exists where the head of a government institution, in refusing to give access to the record under this Act, does not indicate whether it exists.

No summons

65. The Information Commissioner or any person acting on behalf or under the direction of the Commissioner is not a competent or compellable witness, in respect of any matter coming to the knowledge of the Commissioner or that person as a result of performing any duties or functions under this Act during an investigation, in any proceedings other than a prosecution for an offence under this Act, a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under this Act, a review before the Court under this Act or an appeal therefrom.

Obstruction

67. (1) No person shall obstruct the Information Commissioner or any person acting on behalf or under the direction of the Commissioner in the performance of the Commissioner's duties and functions under this Act.

Offence and punishment

(2) Every person who contravenes this section is guilty of an offence and liable on summary conviction to a fine not exceeding one thousand dollars.

Obstructing right of access

67.1 (1) No person shall, with intent to deny a right of access under this Act,
(*a*) destroy, mutilate or alter a record;
(*b*) falsify a record or make a false record;
(*c*) conceal a record; or
(*d*) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (*a*) to (*c*).

Offence and punishment

(2) Every person who contravenes subsection (1) is guilty of
(*a*) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding $10,000, or to both; or
(*b*) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding $5,000, or to both.

Duties and functions of designated Minister

70. (1) Subject to subsection (2), the designated Minister shall
(*a*) cause to be kept under review the manner in which records under the control of government institutions are maintained and managed to ensure compliance with the provisions of this Act and the regulations relating to access to records;
(*b*) prescribe such forms as may be required for the operation of this Act and the regulations;
(*c*) cause to be prepared and distributed to government institutions directives and guidelines concerning the operation of this Act and the regulations;
(*c.1*) cause statistics to be collected on an annual basis for the purpose of assessing the compliance of government institutions with the provisions of this Act and the regulations relating to access; and
(*d*) prescribe the form of, and what information is to be included in, reports made to Parliament under section 72.

Delegation by the head of a government institution

73. The head of a government institution may, by order, designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution under this Act that are specified in the order.

Permanent review of Act by Parliamentary committee

75. (1) The administration of this Act shall be reviewed on a permanent basis by such committee of the House of Commons, of the Senate or of both Houses of Parliament as may be designated or established by Parliament for that purpose.

Review and report to Parliament

(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 of Commons may authorize, submit a report to Parliament thereon including a statement of any changes the committee would recommend.