Information Commissioner of Canada

Commissaire à l'information du Canada

ANNUAL REPORT 2011–2012

INFORMATION COMMISSIONER OF CANADA

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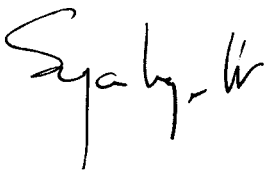
September 2012

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

Dear Mr. Speaker:

I have the honour to submit to Parliament, pursuant to section 38 of the *Access to Information Act,* the annual report of the Information Commissioner, covering the period from April 1, 2011, to March 31, 2012.

Yours sincerely,



Suzanne Legault
Information Commissioner of Canada

September 2012

The Honourable Andrew Scheer, M.P.
Speaker of the House of Commons
Ottawa ON K1A 0A6

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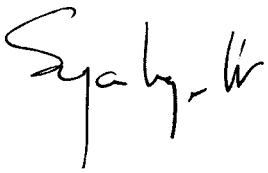


Suzanne Legault
Information Commissioner of Canada

CONTENTS

MESSAGE FROM THE COMMISSIONER

The year 2011–2012 yielded significant transformation in access to information internationally, at the federal level in Canada, and in the work of my office.

The number of countries adopting freedom of information legislation continued to grow, while still others incorporated the principles of open government into their governance structures. As technology and the economy bring together international communities, these advances will facilitate dialogue on issues of importance, such as the environment, health, security and free trade, and increase governments' accountability to their citizens.

Following on persistent advocacy by all information commissioners across the country, Canada joined this international movement in 2011. The federal government, along with many provincial and municipal jurisdictions, embarked on a concerted effort towards open government and signed on to the Open Government Partnership. My colleagues and I hope that, over time, this initiative will foster the development of a culture of openness among government institutions.

This focus on open government came just as we witnessed, for the first time in 10 years, a reversal of the declining performance of federal institutions in their fulfillment of their obligations under the *Access to Information Act*. Although this improvement was only slight, and the access to information system remains fragile, it is nonetheless noteworthy. I attribute this improvement, which has been one of my main goals as Commissioner, to many factors, including the successful implementation of our report card recommendations, both by the Treasury Board Secretariat and by institutions, and the scrutiny of the House of Commons Standing Committee on Access to Information, Privacy and Ethics, the media and Canadians. Most importantly, however, the enhanced performance is the direct outcome of willingness and commitment among those at the most senior institutional levels to actually achieve better results, and of the continued commitment of access professionals to respond to requesters.

As a result of this improved performance, and due to the ongoing efforts of my staff, the make-up of our complaints inventory has been changing in recent years, particularly the last, as I had anticipated. This means that our caseload is now almost exclusively composed of complex files. Three key categories of these necessitated specific action this year: cases dealing with national security, defence and international affairs (17 percent of the total at the start of the year), complaints against the Canada Revenue Agency (15 percent) and complaints against the Canadian Broadcasting Corporation (20 percent). As this report shows, we developed or enhanced a number of strategies to effectively investigate these complaints. I also increased our legal capacity

in support of our investigative function. Through these efforts, we completed close to 1,500 files.

Despite a number of positive developments in the year just past, 2012–2013 promises to present its fair share of challenges. The implications of the cost containment measures in the 2010 federal budget and the funding reductions announced in Budget 2012 have required me to do a complete review of my office's corporate and investigative functions. As a result, my overall staff complement will have to be reduced by 11 percent by the end of 2013. The effect of funding reductions is also becoming evident across institutions, as they struggle to respond in a timely manner to our investigations. This will, without a doubt, have an impact on my ability to carry out my mandate.

In addition, while institutions have made progress meeting their obligations under the Act, much remains to be done to achieve a level of performance at least akin to past peaks, in terms of timeliness and disclosure. In light of limited resources and the increased complexity of the complaints we receive, the collaboration of institutions will be even more crucial to the successful operation of the oversight model set out in the Act.

As Canada marks the 30th anniversary of the Act, it is time for me to take stock, as my predecessors have done before me, of longstanding and unresolved shortcomings in the legislation from an oversight perspective, and to assess advances in access to information both nationally and internationally and their implications for the law. I will do this with a view to making recommendations to Parliament on how to better fulfill the commitment embedded in the Act to timely disclosure of information to requesters.

In light of all of this, my focus for 2012–2013 will remain on achieving my strategic goals of reversing the declining trend in timeliness and disclosure of government information, of delivering exemplary service to Canadians and of creating an exceptional workplace.

In closing, I would like to thank my team for their hard work, support and dedication over this past year. In particular, I would like to pay tribute to Andrea Neill, who was Assistant Information Commissioner from 2007 to 2012. Ms. Neill has been a devoted and loyal colleague, and an ardent defender of requesters' rights throughout her career. She will be sorely missed, and we wish her all the best in her future endeavours.

WHO WE ARE AND WHAT WE DO

The Information Commissioner is an Agent of Parliament appointed under the *Access to Information Act*, Canada's freedom of information legislation. The Commissioner reviews complaints made by requesters who believe that federal institutions have not respected their rights under the Act.

The Commissioner promotes access to information in Canada, through ongoing dialogue with Parliament, institutions and Canadians, and through initiatives such as Right to Know Week.

Canada's current Information Commissioner, Suzanne Legault, began her seven-year term on June 30, 2010, after serving one year as Interim Commissioner.

The Commissioner is supported in her work by the Office of the Information Commissioner (OIC), an independent public body set up in 1983 under the *Access to Information Act* to respond to complaints from the public about access to government information.

We conduct efficient, fair and confidential investigations into complaints about federal institutions' handling of access to information requests. We bring cases to the Federal Court to clarify important principles of law or legal interpretation.

OUR MISSION

Defend and protect the public's right of access to public sector information by conducting efficient, fair and confidential investigations, by providing expert advice to Parliament, and by advocating transparency to ensure government accountability and citizens' participation in democracy.

OUR VISION

Canadians benefit from a leading access to information regime that values public sector information as a national resource, that is recognized for its state-of-the-art legislative framework, and that upholds information rights to ensure government transparency, accountability and citizen engagement.

OUR VALUES

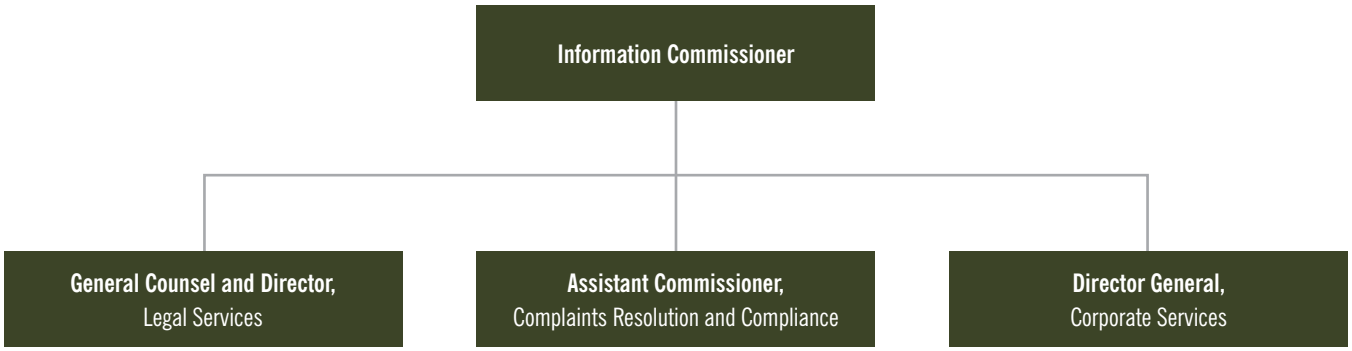
Excellence: Serve with competence, efficiency and diligence

Leadership: Champion efforts to modernize access to information

Integrity: Act with reliability, impartiality and honesty

Respect: Demonstrate courtesy, fairness and collaboration

—Developed with significant input from OIC employees during our strategic planning exercise in the winter of 2010–2011



Our work is guided by the three pillars of our 2011–2014 strategic plan (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor-stategic-planning-plan-strategique_2011-2014.aspx):

» Provide leadership and expertise to reverse the declining trends in timeliness and disclosure of public sector information, in order to develop a leading access to information regime.

» Deliver exemplary service to Canadians by conducting efficient, fair and confidential investigations and effectively address issues of non-compliance with the legislation.

» Create an exceptional workplace.

OUR ORGANIZATION

The OIC is funded through annual appropriations from Parliament. Three quarters of our $12-million budget is allocated to salaries. As of March 31, 2012, we counted a workforce of 91 full-time equivalents.

The OIC's organizational structure is shown in the diagram above.

Legal Services represents the Commissioner in court and provides legal advice on investigations, and legislative and administrative matters. It closely monitors the range of cases having potential litigation ramifications. It also provides investigators with reference tools on the evolving technicalities of the case law.

The **Complaints Resolution and Compliance Branch** investigates complaints about the processing of access requests, conducts dispute resolution activities and makes formal recommendations to institutions, as required. It also assesses federal institutions' compliance with their obligations and carries out systemic investigations and analysis.

Corporate Services provides strategic corporate leadership in the areas of human resources and financial management, communications, internal audit, and information management and technology. It conducts our external relations with, among others, Parliament, governments and the media. It also manages our access to information and privacy function.

COMPLAINTS AND INVESTIGATIONS

Under the *Access to Information Act*, anyone who makes a request for information to a federal institution and is dissatisfied with the response or the way it was handled has the right to complain to us. We receive complaints in three broad categories.

ADMINISTRATIVE COMPLAINTS

- Extensions: The institution extended the time it required to process the request.
- Delays: The institution failed to provide access to the information within the time limit set out in the Act.
- Fees: The fee the institution proposed to charge was unreasonable.
- Miscellaneous complaints (e.g. that the institution did not provide the information in the requester's official language of choice).

REFUSAL COMPLAINTS

- Exemptions: The institution withheld the records under specific provisions of the Act. For instance, the information relates to the safety of individuals, national security or commercial interests, or the records contain personal information or will be published within 90 days.
- No records: The institution found no documents relevant to the request.
- Incomplete response: The institution did not release all the records that matched the request.
- Excluded information: The institution did not disclose information that is excluded from the Act, such as publications, or library or museum material.

CABINET CONFIDENCE EXCLUSION COMPLAINTS

» Access to records refused: The institution did not disclose a document that contains a Cabinet confidence, which is excluded from the Act.

The Act requires that we investigate all the complaints we receive. Those investigations must be thorough, unbiased and conducted in private. Although there is no deadline in the law for when we must complete our investigations, we strive to carry them out as quickly as possible. This includes reviewing the records at issue, providing institutions the opportunity to make representations, seeking representations from the complainant and, when necessary, making formal recommendations to the heads of institutions before reporting the results of our investigations.

The Commissioner has broad investigative powers and a wide range of tools at her disposal to successfully resolve complaints, including mediation. In fact, it is through mediation that we successfully conclude the vast majority of our investigations.

The Commissioner may not order a complaint to be resolved in a particular way. When other methods of resolving a complaint fail and an institution does not follow our recommendations on disclosure of information, the Commissioner or the complainant may ask the Federal Court to review an institution's decision to withhold information.

HIGHLIGHTS

The year 2011–2012 was one of transition for the Office of the Information Commissioner in many ways. We made a conscious decision to tackle some of our most complex files. We also entered 2011–2012 with our inventory composed largely of refusal files (those about information being exempted or excluded, no records or no response). Over the year, we also received fewer administrative complaints than we had in the previous two reporting periods.

Our evolving caseload challenged us to find new and more efficient ways of investigating the more complex refusal complaints (Chapter 1). The net result was that for the third year in a row we were able to close more files than we received. In total, we closed 1,496 files, which allowed us to make a further, albeit small, dent in our inventory.

SUMMARY OF CASELOAD, 2009–2010 TO 2011–2012

	Complaints received			Commissioner-initiated complaints			Total		
	2009–2010	2010–2011	2011–2012	2009–2010	2010–2011	2011–2012	2009–2010	2010–2011	2011–2012
Complaints carried over from the previous year	2,513	2,083	1,833	1	3	20	2,514	2,086	1,853
New complaints	1,653	1,810	1,460	36	18	5	1,689	1,828	1,465
Complaints discontinued during the year*	575	692	642	0	0	0	575	692	642
Complaints settled during the year	n/a	18	34	n/a	0	0	n/a	18	34
Complaints completed during the year with findings	1,508	1,350	819	34	1	1	1,542	1,351	820
Total complaints closed during the year	2,083	2,060	1,495	34	1	1	2,117	2,061	1,496
Total inventory at year-end	**2,083****	**1,833**+**	**1,798**	**3**	**20**	**24**	**2,086**	**1,853**	**1,822**

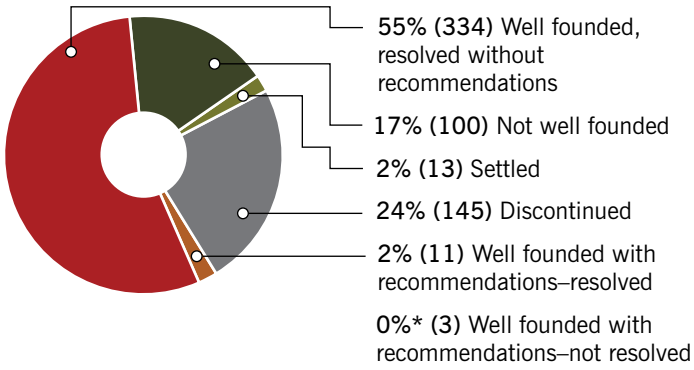
*We discontinue complaints at the request of complainants, often after a substantial amount of investigative work has been put into the file.

**Includes 127 complaints on hold pending ongoing litigation.

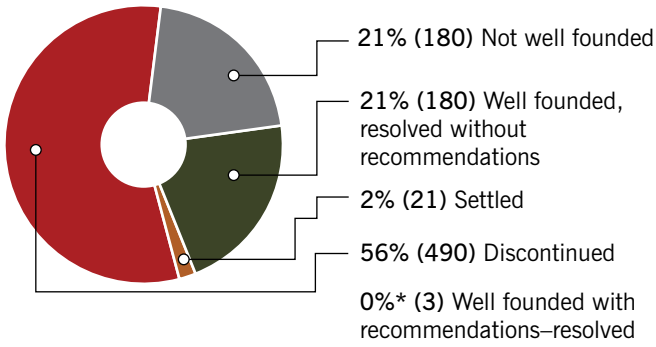
+Includes 190 complaints on hold pending ongoing litigation.

OUTCOME BY TYPE OF COMPLAINT, FOR COMPLAINTS CLOSED BETWEEN APRIL 1, 2011, AND MARCH 31, 2012

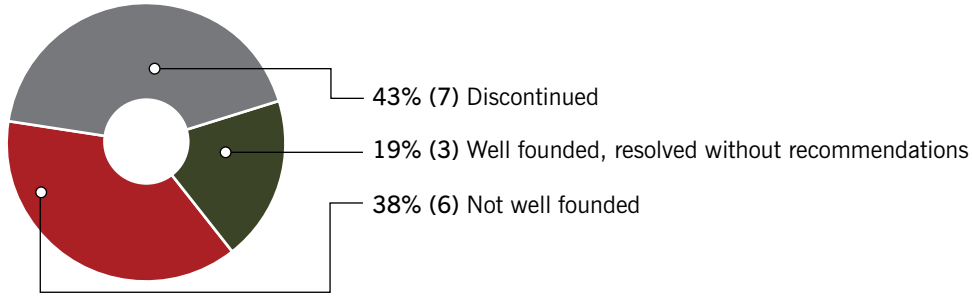
Outcome of administrative complaints (606 complaints)



Outcome of refusal complaints (874 complaints)



Outcome of Cabinet confidence exclusion complaints (16 complaints)



*Percentages are rounded to the nearest whole number.

ENSURING COMPLIANCE WITH THE ACT

Our core business is investigating complaints. Among the cases we completed this year (Chapter 2) are those that illustrate important principles in the *Access to Information Act* that institutions must respect when processing requests, such as the duty to assist and the proper application of exemptions, as well as procedural issues, such as the requirement to retrieve and review all responsive records, regardless of whether any of them will actually be released. We also prepared our third major report on institutions' timeliness in responding to access to information requests. This report found signs of improvement among 18 institutions that we re-assessed after their performing at the average level or worse in 2008–2009.

PURSUING IMPORTANT PRINCIPLES OF LAW

Important decisions on the issue of access to information were rendered in 2011–2012 (Chapter 3). One from the Supreme Court of Canada concerned the status of ministerial offices, while a second reviewed the obligation to notify third parties about the application of the exemption limiting the disclosure of information provided by them. Two cases provided guidance on the exercise of discretion under the international affairs and defence exemption found in section 15 of the Act. In another case, the Federal Court of Appeal confirmed the Commissioner's authority to compel the production of documents that were subject to the exclusion found in section 68.1.

ENGAGING WITH STAKEHOLDERS

The Commissioner uses a variety of venues to work with partners and interested parties to bolster the case for access to government information—both in Canada and abroad (Chapter 4). Of note in 2011–2012 was the 7th International Conference of Information Commissioners, which we co-hosted in October 2011. Among the fruits of the Commissioner's engagement efforts are that she can offer to Parliamentarians, upon request, her perspective on national and international developments in the world of access to information, with the goal of contributing to the development of a leading access regime in Canada. The Commissioner appeared before parliamentary committees five times in 2011–2012.

ENSURING OPERATIONAL INTEGRITY AND CORPORATE SUPPORT TO INVESTIGATIONS

We continued to practice sound governance and stewardship of our limited resources (Chapter 5). Our work in these areas has provided a solid foundation for our core business—investigations—and will help us ensure ongoing operational integrity. In 2011–2012, for example, an internal audit of our investigative function proved crucial to our ongoing efforts to improve our performance.

1. SHARPENING OUR FOCUS ON COMPLEX FILES

Providing exemplary service to Canadians who complain to us about how institutions have handled their access to information requests is our overarching goal (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor-stategic-planning-plan-strategique_2011-2014.aspx#7).

The year 2011–2012 was one of transition for us in many ways. We made a conscious decision to tackle some of our most complex files. These included cases involving exemptions for national security, defence and international affairs, and a large group of complaints focused on the Canada Revenue Agency and the Canadian Broadcasting Corporation. We also pursued a single investigation into an instance of political interference with the access process, and sought to close the remaining, most complex, files in our inventory, dating from before April 1, 2008. These alone presented considerable challenges to our investigators, due to the subject matter, volume of pages and the passage of time.

We also entered 2011–2012 with our inventory composed largely of refusal files (those about information being exempted or excluded, no records or no response). Overall, these tend to require more extensive investigations than do administrative complaints and, consequently, take more time. Over the year, we also received fewer administrative complaints than we had in the previous two reporting periods.

This change in the content of our inventory is among the fruits of our success in effectively investigating administrative complaints (those dealing with delays, fees, time extensions and miscellaneous matters), as we had intended to do when we brought in our new business model in 2008.

At the same time, however, our evolving caseload challenged us to find new and more efficient ways of investigating the more complex refusal complaints. These are detailed below. The net result was that for the third year in a row we were able to close more files than we received. In total, we closed 1,496 files, which allowed us to make a further, albeit small, dent in our inventory. Since April 1, 2008, we have reduced our inventory by 21 percent, closing more than 7,400 complaints.

FACTS AND FIGURES OF INTEREST

- We closed nearly 1,500 files, with an emphasis on complex cases.
- We have closed more than 7,400 complaints since April 1, 2008, and reduced our inventory by 21 percent over that time.
- We achieved 99 percent of this result by working cooperatively with institutions and complainants to satisfactorily resolve complaints.
- We have closed all but 51 of the most complex complaints we had on file, from prior to April 1, 2008.
- Eighty-eight percent of our inventory of complaints is made up of complaints involving an institution refusing to release information to requesters. Just five years ago, refusals accounted for only half of complaints.

THE CHANGING COMPLAINTS PICTURE

Incoming complaints in 2011–2012 dropped 20 percent from 2010–2011—from 1,828 to 1,465 (**Figure 1**). Except for in 2010–2011—when we received an unusually high number of complaints in July 2010, due to one requester making 237 complaints—the number of new complaints has consistently declined over the last four years.

FIGURE 1: SUMMARY OF CASELOAD, 2009–2010 TO 2011–2012

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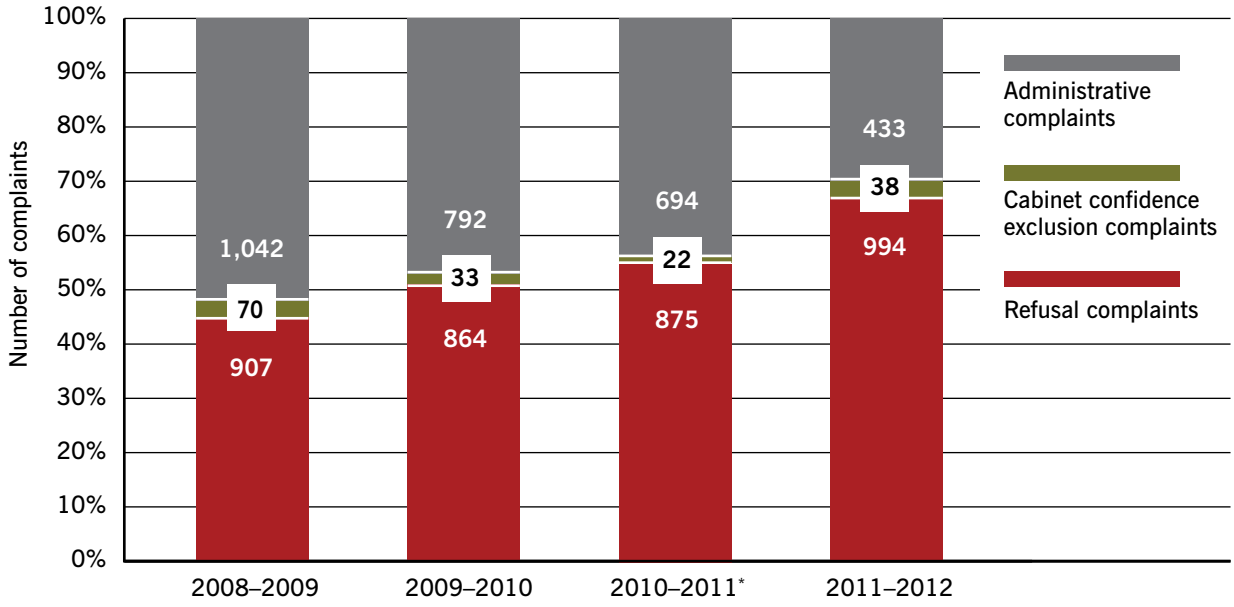
**Includes 127 complaints on hold pending ongoing litigation.
+Includes 190 complaints on hold pending ongoing litigation.

This decrease is largely accounted for by a reduction in the number of administrative complaints we received. This is consistent with the trends we have observed across all institutions—in particular those we studied for our report cards process that implemented our recommendations. In 2011–2012, we had 433 new administrative complaints to investigate, compared to 931 in 2010–2011. This decrease continues what we see as a positive downward trend: since 2008–2009 the number of new administrative complaints has dropped by 58 percent. In particular, the number of complaints about institutions' use of time extensions decreased 77 percent, from 630 in 2008–2009 to 147 in 2011–2012.

Over the same period, we received between 860 and 1,000 refusal complaints each year, including 994 in 2011–2012. With the drop in administrative complaints, then, refusal complaints have accounted for an increasingly large proportion of the complaints we have registered each year (**Figure 2**). In 2009–2010, for example, there was a near-even split between administrative and refusal complaints registered. Now, however, the ratio is closer to 70:30. (Cabinet confidence exclusion complaints—our third category of complaint—have accounted for between 2 percent and 3.5 percent of complaints registered in each of the past four years.)

Another significant trend we noticed was that complaints about missing records accounted for only 18 percent of the refusal complaints we received in 2011–2012, compared to 36 percent in 2008–2009. These are less complex than other refusal complaints, such as those about the use of exemptions. This decrease, in combination with a corresponding increase in exemption complaints we received, left us with a greater percentage of complex refusal files to investigate than in previous years.

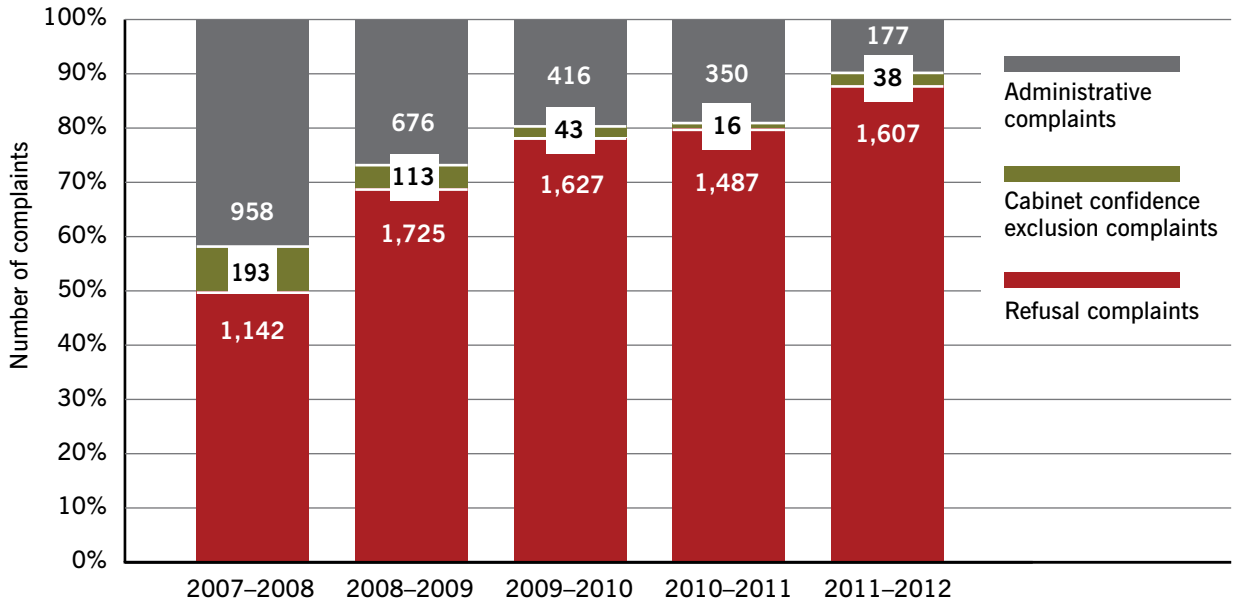
FIGURE 2: TREND IN COMPLAINTS REGISTERED, 2008–2009 TO 2011–2012



*The 237 delay complaints we received in July 2010 have been removed for comparison purposes.

The net result of the decrease in administrative complaints, combined with our efforts to improve how we process this type of complaint, is that our inventory of files is now largely composed of refusal cases. As **Figure 3** shows, refusal complaints made up 88 percent of the inventory at year-end, administrative files were at 10 percent and the remaining 2 percent were Cabinet confidence exclusion complaints. This is a significant and positive change from five years ago, when administrative complaints accounted for 42 percent of our inventory and refusals for 50 percent. This means that our work is focused on the disclosure of substantive information rather than administrative matters.

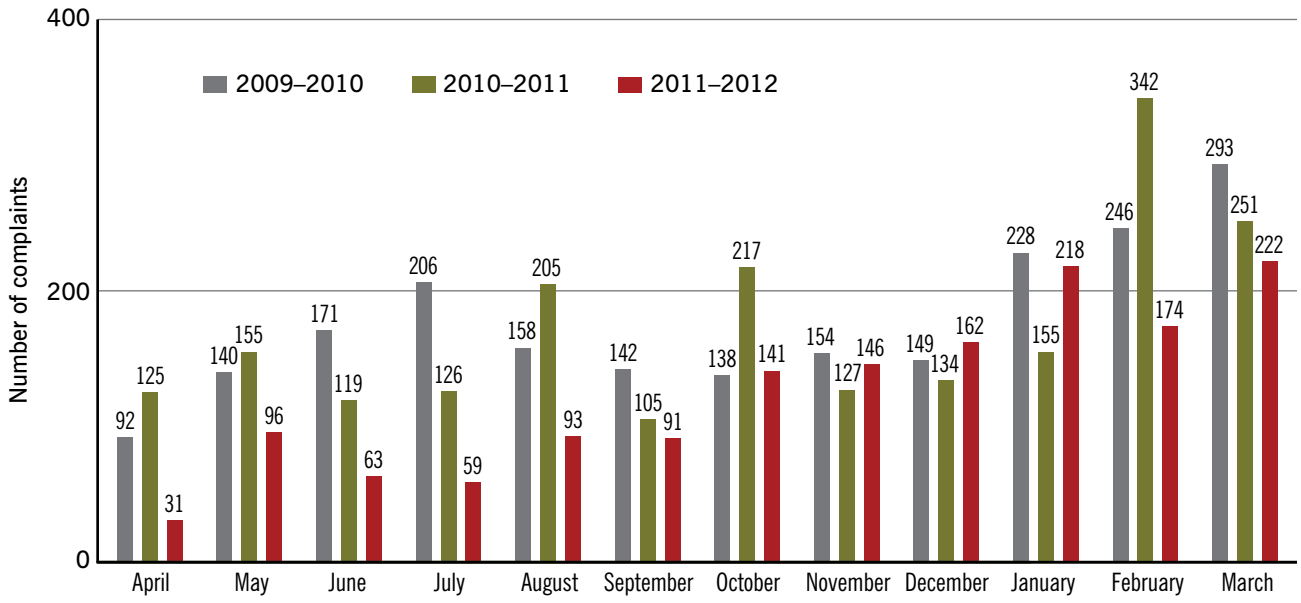
FIGURE 3: TREND IN YEAR-END INVENTORY, 2007–2008 TO 2011–2012



OUR PRODUCTIVITY

We closed fewer files during this year of transition than during previous years, as **Figure 4** shows. Recognizing this, we made some internal adjustments in order to increase the volume of files we could complete each month. As the year went along, and notwithstanding the complexity of the files, we were able to generally return to the results we had achieved in previous reporting periods.

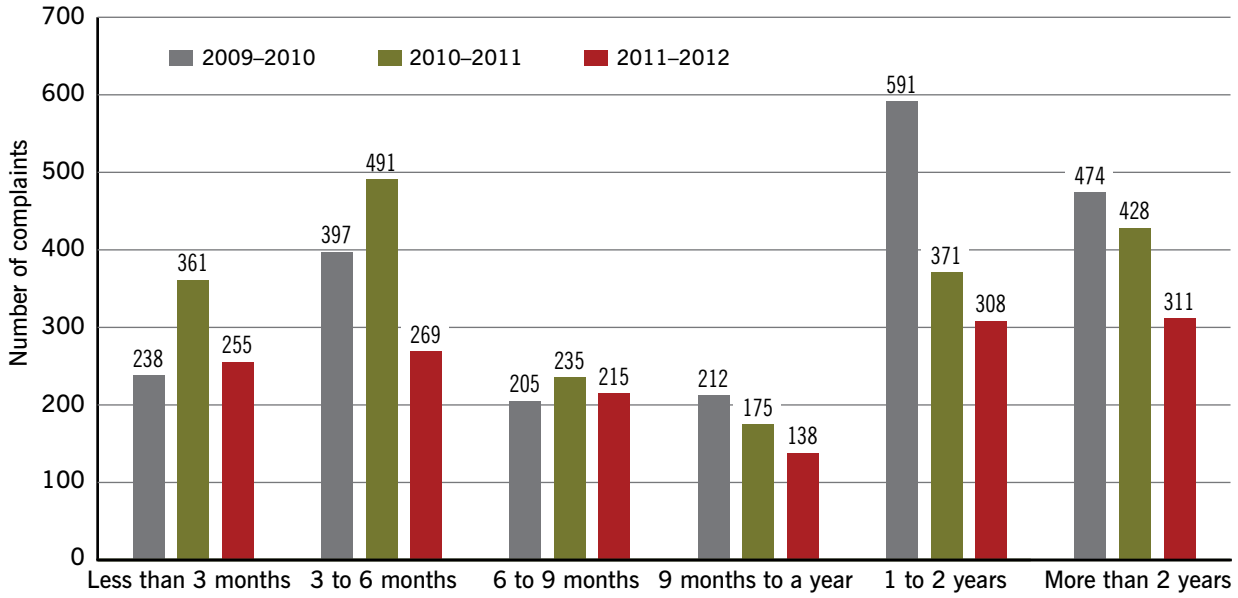
FIGURE 4: COMPLAINTS CLOSED BY MONTH, 2009–2010 TO 2011–2012



Overall, the average turnaround time for complaints was 432 days, up from 413 in 2010–2011. Given that some of the files we closed this year were several years old, this result was not unexpected. However, we closed 49 percent of our files within nine months (**Figure 5**). In addition, the median turnaround time for all files, which better represents the service complainants can expect from us, was 276 days (about nine months) in 2011–2012. We continue to focus our efforts on improving this performance.

During 2011–2012, we also worked toward our goal of closing 85 percent of administrative complaints within 90 days. In the face of a decrease in the number of investigators dedicated to these complaints in the first half of the year, we were able overall just to maintain our productivity but not improve upon it (28 percent closed in 90 days compared to 32 percent the year before). We did return to a full complement of investigators by the end of the year and also sought throughout the reporting period new ways to streamline the process and developed new tools for investigators, such as report templates. Figures for the first quarter of 2012–2013 already show a definite improvement.

FIGURE 5: TURNAROUND TIMES FOR COMPLAINTS CLOSED, 2009–2010 TO 2011–2012



STRATEGIES TO TACKLE OUR CASELOAD

As the change in our caseload became apparent and we decided to tackle some of our oldest and most complex files, we assessed how to use our resources most effectively. We developed a number of new strategies for the investigation of refusal complaints while maintaining and fine-tuning our existing approaches.

To this end, we had an independent audit of our investigative function done in the spring of 2011. The audit confirmed the soundness of our processes and performance measures. It also provided the impetus to improve file documentation and environmental scanning to support effective and timely case management. In response, we prepared an overarching plan for investigations in 2011–2012 that helped us focus our activities and set goals for us to meet.

Older cases

As we entered 2011–2012, we had 115 cases left in our inventory dating from before April 1, 2008. These were among our most complex files, due to the issues involved and the passage of time since the initial access requests had been made. In fact, we had to restart investigations from the beginning in a number of instances.

Many of these files featured a large volume of records, some with more than 10,000 pages each, and a large proportion involved the application of discretionary exemptions. Assessing each record in light of these exemptions and the passage of time was time-consuming. Our Strategic Case Management Team closed 64 such files in 2011–2012.

The remaining 51 complaints involve, among other things, issues relating to national security, defence and international affairs, or were on hold until recently, pending the resolution of litigation before the Federal Court of Appeal and the Supreme Court of Canada.

Complaints related to national security, defence and international affairs

Complaints about institutions' use of exemptions under sections 13 and 15 of the *Access to Information Act* involve sensitive information concerning national security, defence and international affairs. These files come in at a steady rate of between 100 and 150 per year. However, they tend to require lengthy investigations and, as a result, have accumulated, such that we had more than 300 in our inventory at the beginning of 2011–2012 (or 17 percent of the total).

In July 2011, we assembled as a pilot project a special team dedicated to these complaints, in particular those involving subsection 15(1). This team, limited to eight investigators by the terms of the *Access to Information Act*, focused on complaints against six institutions (Foreign Affairs and International Trade Canada, Library and Archives Canada, National Defence, Privy Council Office, Canadian Security Intelligence Service and Canada Revenue Agency) that collectively accounted for more than 70 percent of our inventory of these complaints at the beginning of the year. We designed a process that would allow us to work through these files as quickly and effectively as possible while minimizing the impact on the institutions. We accomplished this by assigning specific investigators to institutions, thereby limiting the number of contact points, and by providing institutions with more information about our requirements at the front end of the investigative process.

At the start of the project, we drafted an advisory notice outlining our approach (http://www.oic-ci.gc.ca/eng/inv-inv_advisory-notices-avis-information_special-delegations-speciales.aspx) and consulted with the institutions. We incorporated much of their feedback into our processes and documentation. We are striving to foster open dialogue with institutions and to promote the disclosure of information, when releasing records would be in

MAKING FULL USE OF OUR POWERS

We have broad investigative powers under the *Access to Information Act*, and we invoke them as needed when addressing complaints. These powers range from requesting relevant records from institutions, and compelling their production when necessary, to speaking with individuals in private, conducting interviews, providing complainants and institutions with an opportunity to make oral and written representations, as well as seeking affidavit evidence.

In some cases, we hold formal inquiries to gather evidence, subpoenaing witnesses and documents, as required. If we find evidence of the possible commission of an offence, we may disclose information to the Attorney General of Canada.

When we determine that a complaint is well founded, the Commissioner reports her findings to the complainant and the institution. When she chooses to make formal recommendations to the head of the institution to resolve the issue (subsection 37(1) report), she provides him or her with an opportunity to respond before issuing her report to the complainant.

In 2011–2012, the Commissioner issued such a report for 17 complaints, which is an increase from 9 the year before and only 3 in 2009–2010. We also issued subpoenas for records or for witnesses to appear in two cases. This compares to one case in which we issued subpoenas over the previous two years. We initiated three cases before the Federal Court and intervened six times in cases before the Federal Court, the Federal Court of Appeal and the Nova Scotia Court of Appeal. While our use of these various tools has grown in recent years, we note that these cases equal only a small fraction of the nearly 1,500 complaints we closed in 2011–2012.

the public interest. Although this approach is to some extent more formal than that for many of our other investigations, we are finding that it is allowing us to advance files that have lingered for many years in a manner consistent with the recent jurisprudence of the Federal Court.

Our approach has shown signs of early success. We closed 109 of these files this year, discontinuing 71, completing 31 with findings and settling 7. Among the total were 54 files dating from 2008–2009 or before. In 23 instances, requesters received, as a result of our intervention, more information than had originally been disclosed.

With files related to national security, defence and international affairs comprising 20 percent of our cases at year-end, we have made this pilot project permanent.

Portfolio approach

In recent years, we have followed a portfolio approach, grouping complaints by institution or type of complainant, to develop expertise and efficiency in dealing with them. In 2011–2012, we used this approach to begin to address a large number of complaints that accounted for more than 30 percent of the inventory and involved two institutions—Canada Revenue Agency (CRA) and Canadian Broadcasting Corporation—and have made some progress. For example, using this approach, we were able to close 160 complaints against CRA from a single complainant. We intend to expand the use of the portfolio approach and refine it according to institutions' business lines, exemptions invoked and subject matters.

Early resolution of complaints

This year, we expanded the focus of our Early Resolution team to include refusal complaints dealing with a small volume of records or a limited number of exemptions. This initiative was very successful, with the team closing 20 percent of these refusal files in fewer than 90 days. We will pursue this strategy in the coming year.

Delay complaints

This year, we increased the formality of our process for investigating complaints into delays—both extensions and deemed refusals. While, in the past, we spent long periods of time attempting to negotiate "commitment dates" (dates by which an institution commits to respond to a request that is late), we are now issuing more formal requests for work plans, including commitment dates. When an institution does not respond to our request or provides us with what we determine to be an unrealistic or unreasonable plan, we bring our concerns to the attention of the head of the institution. As the investigation summaries in Chapter 2 show, we addressed important issues in this manner, including excessive delay, improperly managed consultations and inadequate resourcing levels in access to information offices. We note that, in some instances, this formal process is the only way in which we can make the senior management of an institution aware of serious procedural and resourcing issues. Our approach has resulted in a number of positive developments in those institutions.

Moving to a proactive, more formal process

We strive to resolve matters with institutions informally. This approach, of course, depends on the willingness and ability of institutions to respond to our queries. In the face of delayed or insufficient responses in some instances this year, we increased the formality of our process. To mitigate the impact on institutions, however, our goal is to do more work at the front end of an investigation to ensure that our queries are targeted and that institutions are made better aware of our concerns.

Although this manner of proceeding has been very successful with a number of institutions, it has not been well received in all cases. Certain institutions have questioned and at times resisted our inquiries and have sought to limit our investigations to one point of contact within their access to information office. When the number of complaints against an institution is small, this might be feasible; however, in many instances it would be a hurdle to our staff and delay the completion of investigations.

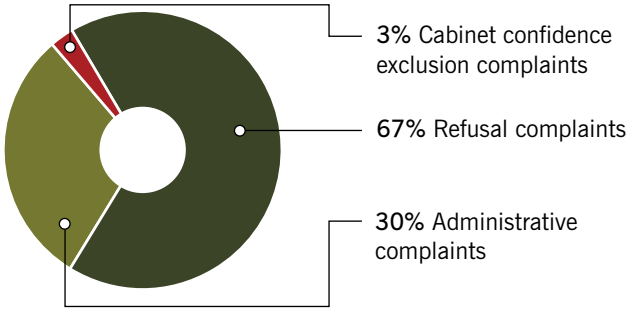
Legal capacity

In 2011–2012, given the increased complexity of our inventory, we augmented our internal legal capacity to support the investigative function and conduct litigation at all court levels. This has lessened our reliance on costly external professional services. See Chapter 3 for information about our legal activities in 2011–2012. We were more active before the courts during the year than previously, particularly in the context of section 44 applications by third parties seeking to prevent the disclosure of what they claim is confidential proprietary information held by government institutions.

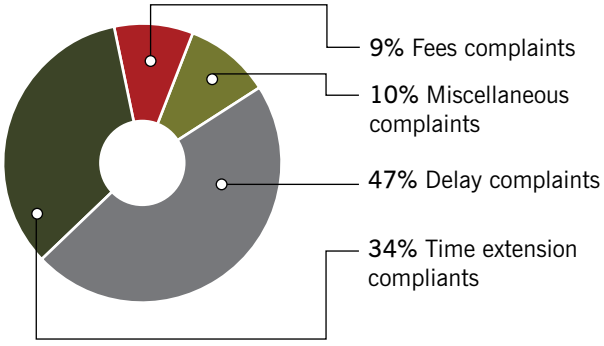
OTHER FACTS AND FIGURES OF NOTE

COMPLAINTS REGISTERED, APRIL 1, 2011, TO MARCH 31, 2012

By type of compaint

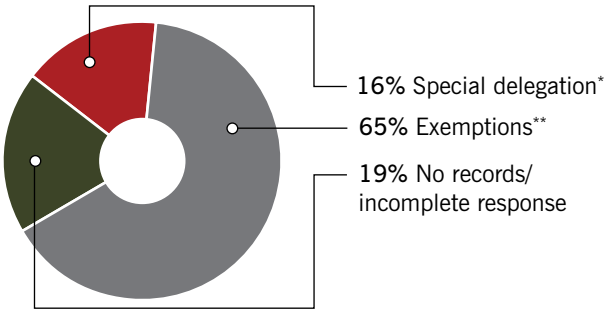


Breakdown of administrative complaints



These graphs show the breakdown of the complaints we received in 2011–2012. As noted above, we received far fewer administrative complaints than in previous years, while the number of refusal complaints that came in remained in the range we have seen over the past few years. Within the pool of refusal complaints, we received 43-percent fewer no records/incomplete search complaints compared to 2008–2009. This was balanced by a corresponding increase in exemption complaints, which contributed to the overall increase in complexity of the files in our inventory.

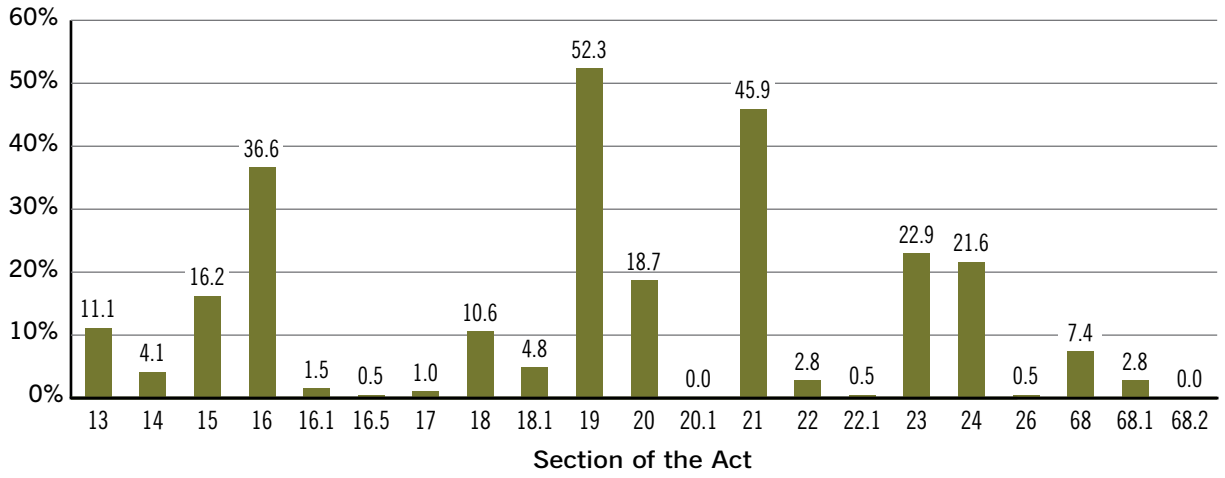
Breakdown of refusal complaints



*Complaints involving sensitive information concerning national security, defence and international affairs

**Includes section 68, 68.1 and 68.2 exclusions

EXEMPTIONS AND EXCLUSIONS CITED IN REFUSAL COMPLAINTS, 2011–2012

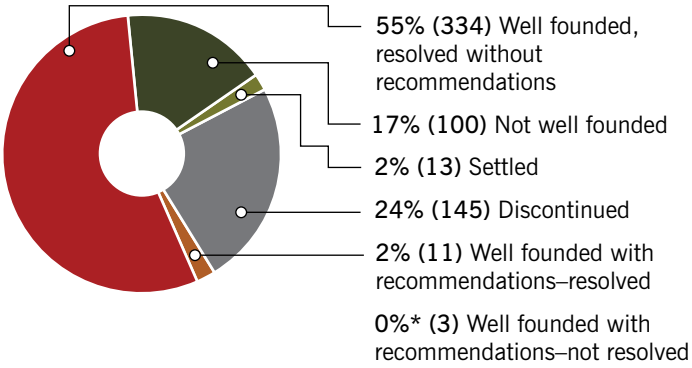


Note: The sum of all percentages may exceed 100 percent, because a single complaint may cite multiple exemptions.

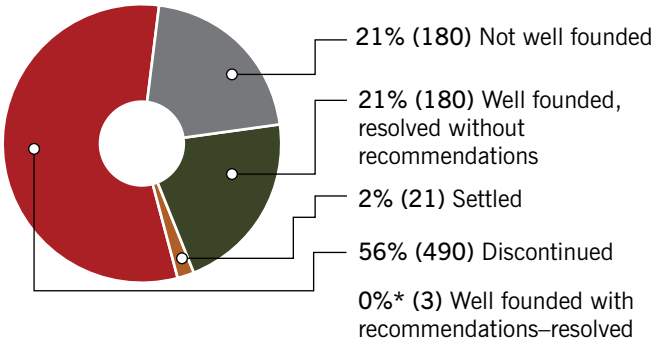
As we sharpen our focus on refusal complaints, we note the distribution of exemptions and exclusions (those under sections 68, 68.1 and 68.2 of the *Access to Information Act*) associated with refusal complaints. This pattern, which is similar each year, highlights the most common reasons institutions withhold information.

OUTCOME BY TYPE OF COMPLAINT, FOR COMPLAINTS CLOSED BETWEEN APRIL 1, 2011, AND MARCH 31, 2012

Outcome of administrative complaints (606 complaints)

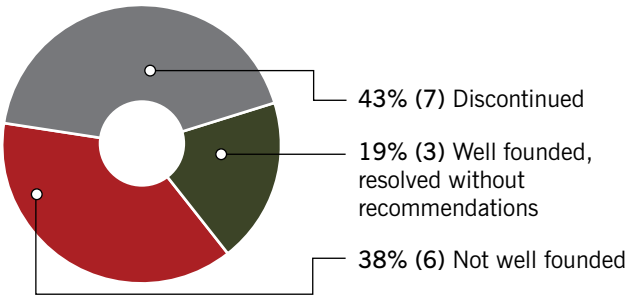


Outcome of refusal complaints (874 complaints)



These graphs show the outcomes of the various types of complaint we investigate. The pattern has been fairly constant over the last three years. One exception, however, has been an increase in the proportion of refusal complaints we have discontinued over that period, from about 35 percent of complaints in 2009–2010 to 56 percent in 2011–2012. This change can be attributed, in large part, to our taking a portfolio approach to complaints involving the Canada Revenue Agency and the Canadian Broadcasting Corporation. We consolidated files according to subject matter and discontinued the individual complaints. Doing this facilitated the review of records by institutions, thereby reducing delay and ensuring faster resolution of the complaint.

Outcome of Cabinet confidence exclusion complaints (16 complaints)



*Percentages are rounded to the nearest whole number.

NEW COMPLAINTS IN 2011–2012, TOP 15 INSTITUTIONS*	
Canada Revenue Agency	324
National Defence	74
Canadian Broadcasting Corporation	71
Royal Canadian Mounted Police	68
Citizenship and Immigration Canada	66
Correctional Service of Canada	65
Foreign Affairs and International Trade Canada	56
Health Canada	49
Aboriginal Affairs and Northern Development Canada	47
Department of Justice Canada	47
Canada Post Corporation	46
Public Works and Government Services Canada	45
Canada Border Services Agency	36
Privy Council Office	36
Industry Canada	34
Others (73 institutions)	401
Total	1,465

*Includes five Commissioner-initiated complaints

This chart lists the 15 institutions about which we received the most complaints in 2011–2012. Although the overall number of institutions subject to complaints has increased from 81 to 88 since 2008–2009, the top 15 institutions have remained fairly constant and accounted for roughly three quarters of all new complaints each year. The Canada Revenue Agency has been, by far, the number one subject of complaints over the past four years, with National Defence and the Canadian Broadcasting Corporation regularly appearing among the top five.

COMPLAINTS COMPLETED WITH FINDINGS IN 2011–2012, BY INSTITUTION*	Overall	With merit	Not well founded
Canada Revenue Agency	75	50	25
Transport Canada	57	48	9
Royal Canadian Mounted Police	54	32	22
Canadian Broadcasting Corporation	51	25	26
Correctional Service of Canada	49	28	21
National Defence	46	23	23
Canada Post Corporation	40	37	3
Health Canada	40	34	6
Public Works and Government Services Canada	40	20	20
Aboriginal Affairs and Northern Development Canada	32	31	1
Industry Canada	31	21	10
Citizenship and Immigration Canada	30	21	9
Privy Council Office	26	21	5
Canada Border Services Agency	25	14	11
Foreign Affairs and International Trade Canada	23	18	5
Department of Justice Canada	23	9	14
Others (59 institutions)	178	102	76
Total	820	534	286

*Includes one Commissioner-initiated complaint

This chart shows the outcomes for the 16 institutions for which we issued the most findings in 2011–2012.

2. ENSURING COMPLIANCE WITH THE ACT

Our core business is investigating complaints, in support of our mission to defend and protect the public's right of access to public sector information (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor-stategic-planning-plan-strategique_2011-2014.aspx#3). This chapter includes examples of noteworthy complaint investigations we completed in 2011–2012. These cases illustrate important principles in the *Access to Information Act* that institutions must respect when processing requests, such as the duty to assist and the proper application of exemptions, as well as procedural issues, such as the requirement to retrieve and review all responsive records, regardless of whether any of them will actually be released. On page 27 is a review of our work on our annual report cards and our ongoing systemic investigations.

FEES

Foreign Affairs and International Trade Canada (DFAIT) received two requests for briefing books provided to the Minister of Foreign Affairs on Afghanistan and the Geneva conventions. Our investigation of the subsequent complaints concerned three issues: DFAIT's authority to charge fees for the search and preparation of electronic records, DFAIT's apparent practice of automatically charging preparation fees for any request of 500 or more responsive pages and the fees charged to the complainant.

Subsection 11(2) of the Act allows institutions to charge search and preparation fees for "non-computerized" records in accordance with subsection 7(2) of the *Access to Information Regulations*. However, for this request, DFAIT had applied these fees to electronic records, such as emails and word-processing files.

During our investigation, we questioned DFAIT's authority to assess fees in relation to what we determined were computerized records. DFAIT officials said that the drafters of the Regulations intended that "non-computerized" records would include any record (including an electronic record) that does not have to be produced from a machine-readable record, as described in subsection 7(3) of the Regulations.

We disagreed with this approach, based on the ordinary meaning of the word "non-computerized," which in our view cannot include records that are stored or created on a computer.

We also concluded that DFAIT's practice of *automatically* charging search and preparation fees for any request with 500 or more responsive pages was inconsistent with the proper use of the discretion given by the Act to institutions to charge fees. Although the volume of pages might be one factor to consider when assessing fees, it cannot take precedence over other factors, such as the public interest in disclosure of the information, the length of any time extensions the institution takes, whether the response to the request is overdue, and any particular circumstances the requester raises. During the course of our investigation, DFAIT agreed to waive the fees charged in response to one of the requests because the request was in deemed refusal. It refused to waive the fees in response to the other request.

Lessons learned

Although the *Access to Information Regulations* may well be outdated and have been overtaken by advances in technology, it is our view that, without modifying subsection 7(2) of the Regulations, institutions do not have the ability to charge fees for searching for and preparing computerized records.

Even when authority to charge fees exists, institutions must take *all* relevant factors into account when deciding to do so and may not decide to automatically charge them based on one factor, in this case the volume of records.

CONSULTATIONS

Industry Canada received a request in July 2009 for documents related to arrangements made by Bell Canada and Telus Corporation to jointly build and/or share wireless networks. The requester subsequently complained to us about the 210-day extension the institution took to respond to the request and that it missed that deadline. Our investigation focused on the institution's practices associated with consultations, and its overall lack of a timely response.

Despite having taken an extension to consult with other institutions about the request, Industry Canada did not begin its consultations until after the lengthy extension had expired. In addition, the institution carried out those consultations consecutively, not concurrently—waiting to complete one consultation before embarking on the next.

Industry Canada also failed to complete the consultations with third parties within the time frame set out in the Act (sections 27 and 28). In addition, officials gave extensions to third parties to provide a response to the notice and entered into negotiations with them about the terms of the proposed disclosure. Neither of these ways of proceeding is consistent with the obligations set out in section 28.

Early in the summer of 2011, we asked for and received a formal work plan from Industry Canada, setting out how and when it would respond to the request, but the institution did not meet any of its commitments. In the end, the institution responded in December 2011.

Even though Industry Canada issued a response, we wrote to the Minister of Industry outlining all of the issues uncovered during our investigation and made specific recommendations to the Minister on ways to improve its process. Industry Canada agreed to take action in response to our recommendations and committed to the following, among other things: holding consultations with multiple parties concurrently, respecting the deadlines set out in the Act for third-party consultations, beginning consultations as soon as possible, not allowing an unreasonable response time and responding to the request in the absence of a response to a consultation when the consulted institution does not respond in a timely way.

Although it took Industry Canada more than two years to respond to the request, we are pleased that it agreed with the Commissioner's recommendations and has modified its practices in the manner recommended by the Commissioner.

Lessons learned

Institutions must manage consultations with other government institutions and third parties according to the legislative provisions of the Act and the duty to assist requesters. Consultations should be conducted concurrently and at the earliest opportunity in the processing of a request. The consulting institution should make clear that in the absence of a timely response to a consultation request, it would decide whether or not to release the records.

Third-party consultations must also be conducted in a manner that respects the timelines set out in section 28 of the Act. This precludes extensions, multiple notices and negotiations with third parties. The entire consultation should take approximately 60 days, based on the timelines set out in the Act.

RECORDS RETRIEVAL

The Canadian Broadcasting Corporation (CBC) received a request in November 2010 for information about any financial assistance it had given to support films and documentaries about, among other subjects, the Quebec Nordiques. The subsequent complaint focused on the CBC's response to the request, in which the institution said that it *might* not have any such records, and that even if the records did exist, they would most likely be excluded from disclosure under section 68.1 of the Act (which excludes information about the CBC's journalistic, creative or programming activities from the Act).

The complaint focused on the CBC's failure to retrieve any responsive records. During our investigation, we discovered the CBC had published guidelines indicating that it would refuse access to records that would be excluded under section 68.1 without retrieving them to confirm whether or not the exclusion would apply. This practice is contrary to section 25 of the Act, which requires institutions to disclose portions of records that may be reasonably severed. It is also contrary to the duty to assist requesters, which requires institutions to provide accurate and complete responses to requests for information. In addition, it could hinder our ability to investigate complaints in a timely manner and risks records being disposed of under the institution's disposal policy, thereby compromising requesters' rights

under the Act. Our position was confirmed by a recent Federal Court of Appeal decision (paragraph 53; see page 33), which concluded that institutions must retrieve all responsive records so as to determine whether any exemptions or exclusions apply and whether severance is possible.

The CBC has modified its guidelines. These now require that the requested records be retrieved and provided to the access to information office, despite the possibility of their being excluded under section 68.1 of the Act.

Lessons learned

Officials must retrieve and process *all* responsive records even when they are of the initial view that the records will be exempted or excluded. The principle of severance found in section 25 requires no less. Complying with the Act in this manner also ensures the integrity and efficiency of the investigative process, which is intended to protect requesters' rights.

STAFFING SHORTAGES

In July 2009, Transport Canada received a request for information about the investigation of an accident that had occurred the previous year. The requester complained to us 18 months later when she still had not received a response.

Our investigation found that Transport Canada had neglected the request for extended periods of time. We learned that this had happened because the institution did not have enough staff to handle the volume of requests it had to process. Indeed, the analyst handling this request had more than 60 other requests assigned to her. Following our intervention, Transport Canada agreed to respond by a specific date but, given the already lengthy delay, we kept our complaint file open to ensure that the date was met. In the end, Transport Canada met its commitment date but it had to reassign the file to a consultant to be able to do so.

Lessons learned

This investigation shows that institutions must devote adequate resources to fulfilling their duties under the Act. When an access to information office is understaffed, the right of requesters to a timely response is likely to be violated—in this case, severely.

AGGREGATE COSTS AND POSSIBLE HARM UNDER SUBSECTION 16(2)

In 2011–2012, we investigated two complaints into whether institutions had properly withheld information under subsection 16(2) of the Act (law enforcement and investigations) about the costs of certain security operations.

Both institutions—the Royal Canadian Mounted Police (RCMP) and the Canadian Air Transport Security Authority (CATSA)—claimed that releasing information about the aggregate costs of security operations could compromise their objectives by making it possible to determine human resource levels and deployment strategies, thus revealing gaps in security. In neither case, however, was the institution able to provide a cogent and evidence-based explanation that this was a probable outcome.

Lessons learned

Institutions must provide evidence of a reasonable expectation of harm that would result from disclosing aggregate costs; speculating about possible harm that may occur due to information derived from the released records is insufficient.

SOLICITOR-CLIENT PRIVILEGE

The Canadian Wheat Board (CWB) received a request in March 2010 for the legal fees, internal and external, associated with the termination of an employee. The subsequent complaint focused on whether the CWB correctly refused to release any information, on the grounds that it was protected by solicitor-client privilege.

This investigation took longer than it should have because the CWB did not want to provide us with the responsive records over which it had claimed solicitor-client privilege. Indeed, we did not receive the records until after we had issued a production order.

Upon reviewing the responsive records, we were unconvinced that the CWB had properly applied the solicitor-client privilege exemption (section 23) to all the withheld information. We based our view on recent jurisprudence that held that when it can be shown that privileged communications cannot be deduced from the disclosure of the fees, the fees are considered "neutral information" and are no longer protected by the privilege. In our view, disclosure of the aggregate amount of fees in this instance would not reveal privileged communications. Consequently, we recommended that the CWB release the total amount of fees paid. The CWB subsequently released the aggregate costs.

Lessons learned

When it can be determined that aggregate fees constitute "neutral information" they are not privileged. Moreover, this case shows that we will not hesitate to issue production orders for records when required.

PROPER USE OF EXEMPTIONS: SECTIONS 16 AND 19

In December 2010, the Commission for Public Complaints Against the RCMP (CPC-RCMP) received a request for the audio recording of a conversation between an RCMP constable and a dispatcher instructing the officer to respond to the scene of reported gunshots. As a result of the incident, two individuals died. The requester received a copy of the transcript of the call and complained to us when the CPC-RCMP refused to release the audio recording. The institution claimed the information was exempt under both section 16 (law enforcement and investigations) and section 19 (personal information). However, our investigation found that the information in the recording did not qualify for either exemption.

We concluded that the recording did not fall within the scope of section 16 because, among other reasons, we were of the view that releasing the audio recording could not harm the investigation, since a written transcript had already been disclosed to the requester. We also determined that all disciplinary investigations were concluded.

We also found that section 19 did not apply to the audio recording, since it was made in the course of professional duties by two members of the RCMP and therefore did not constitute personal information, as defined in the *Privacy Act*.

We wrote to the head of the CPC-RCMP and recommended the release of the audio recording. The institution accepted our recommendation and subsequently released the audio recording to the requester.

Lessons learned

Institutions must demonstrate a reasonable expectation of harm to an ongoing investigation when relying on section 16. Moreover, an audio recording made in the course of professional activities did not, in this instance, constitute personal information.

PROPER USE OF EXEMPTIONS: SUBSECTION 20(1)

Telefilm Canada received a request in September 2007 for the service agreement between it and the Canadian Television Fund. The requester subsequently complained to us when Telefilm Canada refused to release large sections of the document because they contained either personal or third-party information.

With regard to the personal information, the institution eventually agreed to seek the consent of the individual concerned and release the information.

With regard to the third-party information, we found that Telefilm Canada had not shown that the withheld information was properly covered by subsection 20(1). In particular, we concluded that the information was not of a financial, commercial, scientific or technical nature, nor was it information supplied to the institution by the third party. After receiving formal recommendations from us, Telefilm Canada released the outstanding third-party information.

Lessons learned

When an institution claims that information is personal information we will ask that it seek consent for release whenever it is reasonable to do so. Also, information that is the result of a contractual negotiation and is included in a contract is not information *supplied* by a third party.

PROPER USE OF EXEMPTIONS: SUBSECTION 15(1)

The Canadian International Development Agency (CIDA) received a request in July 2011 for all records about the Canada Fund for Local Initiatives in Honduras for 2011–2012.

CIDA consulted with DFAIT about this request and, based on its initial, informal advice, withheld the records in their entirety, citing subsection 15(1) (international affairs and defence) and paragraph 21(1)(c) (negotiations by the government). Later, however, in a formal response to the consultation, DFAIT recommended that CIDA release all but one paragraph of the records, which it did. The requester complained to us about CIDA's decision to withhold that information.

During our investigation, we asked CIDA to revisit its use of subsection 15(1) to withhold the one paragraph, which

contained an assessment by Canadian officials of the operations of a Honduran partner. After consulting with DFAIT, CIDA agreed that, with the passage of time, disclosing this information would no longer harm the conduct of international affairs.

Lessons learned

When applying section 15(1), institutions must not rely solely on the advice provided by consulted institutions but must ensure that they make a decision based on their assessment of the records and the proper exercise of discretion. In the end, CIDA properly acknowledged that the passage of time had rendered the information releasable and accordingly provided it to the requester. In our view, this is consistent with the duty to assist.

INFORMAL VERSUS FORMAL ACCESS

A taxpayer's representative received a notice from the Canada Revenue Agency (CRA) in December 2010 that it would be auditing one of his clients. The representative asked that CRA supply him, at the end of the audit, with a copy of the supporting material. The CRA auditor informed the representative that he had to make a formal access to information request for such records, which the representative subsequently did. The representative also complained to us about CRA's position that requests for taxpayer information had to be made pursuant to the *Access to Information Act*.

We concluded that the position set out by the auditor was inconsistent with subsection 241(5) of the *Income Tax Act*, which allows CRA to provide taxpayers, or an authorized representative, with their own tax information.

Had CRA provided the requested information informally, the requester would have received it without paying any fees. CRA subsequently agreed to waive the fees and reimbursed the requester. It has also provided training on this issue to employees.

Lessons learned

In line with the duty to assist and the principle that the Act complements other means of accessing government information, officials should, when they have the ability to do so, make every reasonable effort to provide information informally. Institutions should also include this point in access awareness training.

INADEQUATE SEARCH FOR RECORDS AND COOPERATION WITH THE INVESTIGATIVE PROCESS

In December 2007, National Defence received a request for all records indicating where and to whom copies of specific reports from DFAIT about democracy and human rights in Afghanistan were circulated within the institution. National Defence conducted three searches for the records but maintained that no records could be found. We carried out an investigation into the requester's complaint about this response, during the course of which the requester said that he would be satisfied to receive the names and contact information for National Defence officials responsible for Afghanistan policy. The institution provided this information and we closed the file.

That would have been the end of the matter, except that in November 2009 the House of Commons Special Committee on the Canadian Mission in Afghanistan heard from a retired general that his staff routinely received Afghanistan-related reports from DFAIT and that "easily 100 people around this town as well as in theatre must have also seen these reports at the time." In January 2010, in light of this and other information, the Information Commissioner initiated a complaint to investigate whether National Defence had, in fact, conducted a thorough search for the records and whether the information subject to the request did exist and should have been disclosed.

In the course of the investigation, it became clear that some access officials at National Defence had a limited understanding of the institution's information delivery and information holding systems, and that this had negatively affected their ability to search for the records in question. It also became clear that a relatively simple request to the originating institution, in this case DFAIT, would have allowed access officials to identify possible records. Given the passage of time, it became clear that no responsive records were still in existence.

We issued formal recommendations to the Minister of National Defence in light of our findings—that training be provided to National Defence staff about the duty to assist, that access office staff learn about and remain familiar with the institution's various information distribution systems, and that the Minister ensure that access officials cooperate with us in all future investigations, which had not been the case with this file.

The Minister forwarded our recommendations to the access coordinator for response. It is our view that, since our findings and recommendations were, in large part, critical of the access office, it would have been more appropriate to have them addressed at a higher level. In addition, the response we did receive did not adequately address our concerns or indicate whether our recommendations would be followed. In light of this, we considered this complaint to be well founded but not resolved.

Lessons learned

Access analysts must ensure that they are familiar with the methods of information distribution within their institutions. They must also ask the proper questions when seeking records from program areas.

It is also essential for senior leaders in institutions to ensure that their access to information offices are functioning properly and working with the Commissioner to resolve complaints in a timely and constructive manner.

When recommendations are made to the head of an institution about the functioning of its access office, persons at a senior level should deal with them.

WHAT IS A REASONABLE SEARCH FOR RECORDS?

In 2008, Library and Archives Canada (LAC) received a request for information about a man who attempted to sabotage a B.C. smelting operation in 1939. The requester complained to us when LAC withheld information. He was also concerned about the possibility of missing records.

Since the initial response only provided 165 pages of records, we questioned the completeness of LAC's search through its holdings. As a result of our intervention, LAC carried out additional searches and expanded the record groups it reviewed. The requester received seven supplementary releases as a result of these efforts. In addition, LAC decided to no longer rely on subsections 13(1) (information obtained in confidence) and 19(1) (personal information) to withhold records. It also released almost all of the information it had initially withheld under subsection 15(1) (defence of Canada).

We concluded that, although the requester was not satisfied with the search conducted by LAC, the institution had, in the end, conducted a reasonable search when it reviewed seven additional record groups and explained why records might not have been preserved.

Lessons learned

While the original search LAC conducted was not adequate, the analyst was extremely professional and conducted multiple additional searches and communicated extensively with the requester according to the duty to assist. In the end, we concluded that LAC provided the requester with a meaningful response to his request.

INADEQUATE SEARCH FOR RECORDS: RECORD RETENTION AND BACK-UP SYSTEMS

On November 3, 2010, CRA received a request for electronic records identified in a discussion forum on international tax operations issues. The records were located on CRA's intranet site.

CRA tasked the appropriate areas for the requested records but determined that the discussion forum identified in the request had been removed from CRA's intranet site in approximately February 2009. As such, on November 30, 2010, CRA responded to the requester, advising that no records deemed responsive to his request were located, since the discussion forum identified no longer existed. On December 15, 2010, the requester complained to us about this response.

It was CRA's view at the time that it was not required to search for records anywhere other than its live server and that any back-ups were done for emergency restoration purposes only. Therefore, the records could not be considered under its control for the purposes of the *Access to Information Act*.

There were many complex issues to address in this investigation, involving such things as electronic records, retention periods, back-up tapes and training, as well as the duty to assist.

During the course of the investigation, we asked CRA to conduct a more thorough search, geared toward identifying and reviewing CRA's record retention policy as well as its disposition authority and comparing them to Treasury Board policy and LAC directives and best practices. As a result, we discovered that CRA did in fact have the requested records.

During its secondary search for the records and after consulting with its internal information technology and records management staff, CRA was able to locate the requested records and successfully recreate the live environment required to bring them back to readable format. This outcome was satisfactory to the complainant.

Lessons learned

When conducting a search for records, institutions must search any and all systems within their control and capability to search. It is not sufficient to simply search what is live and readily available. Back-up tapes, CDs, DVDs as well as any archived records within the institution's control must also be searched in order for an institution to have conducted a thorough search and met its obligation under the *Access to Information Act*.

CONTROL OF RECORDS

The Canadian Human Rights Tribunal (CHRT) received a request in August 2010 for a copy of a consultant's report it had received from the Attorney General of Canada in connection with a human rights dispute. The CHRT responded to the requester that it could not release the report, since it had returned it to the Attorney General.

Our investigation focused on whether the CHRT had control of the records being sought at the time it received the request. As it turns out, the CHRT is comprised of two sides that act relatively independently of each other: the corporate side, including the access office, and the quasi-judicial Tribunal side. Due to the lapse in time between when access requests come in and when they are communicated to subject matter experts, the Tribunal Registry was informed of the request for the report on the day after it had returned the document to the Attorney General.

We concluded that since the report was physically located in the Registry of the CHRT at the time of the request, it was under the control of the institution, which consequently had a legal obligation to process it.

Lessons learned

When an institution receives a request, and the record is in its possession when the request is received, it cannot claim that the record is not under its control. This case highlights the importance of the timely communication of requests in safeguarding the rights of requesters.

REPORT CARDS

During 2011–2012, we prepared our third major report under the Three-Year Plan for Report Cards and Systemic Investigations (http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_3_yrs_plan.aspx).

This report re-assesses the performance in 2010–2011 of 18 institutions that performed at the average level or worse in the 2008–2009 report card exercise (http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2008-2009.aspx). We found signs of improvement among the institutions in terms of the timeliness of their responses to access to information requests. For example, the average time institutions took to complete requests received during the reporting year decreased in 12 institutions compared to 2008–2009. Of particular note was that two institutions—the Royal Canadian Mounted Police and Environment Canada—were able to respond to new requests received in 2010–2011 in, on average, fewer than 30 days, the time frame set out in the *Access to Information Act*.

In terms of overall compliance, we are pleased to see that 13 institutions got a better grade than in 2008–2009. Two stayed at the same grade and three got a lower grade (see Figure 5, here: http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_measuring-up-etre-a-la-hauteur_4.aspx).

We also followed up on six system-wide issues (leadership, delegation orders, consultations, time extensions, resources and records/information management) that we identified in our 2008–2009 report. We issued recommendations in these areas to the Treasury Board Secretariat (TBS), as the system administrator, to prompt improvements across institutions. One key target of our recommendations was the statistical information that TBS collects each year about access activities in institutions, and how this information needed to be augmented to provide a more complete picture of access operations. TBS added elements to its annual statistical questions, including number of pages processed, complexity of requests and deemed refusals. The results will be published in the Fall 2012 *InfoSource Bulletin* (http://www.infosource.gc.ca/bulletin/bulletin-eng.asp).

We tabled our special report containing the report cards in Parliament in May 2012 (http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_measuring-up-etre-a-la-hauteur.aspx). Later in 2012–2013, we will wrap-up our work under the three-year plan with re-assessments of the performance of Canada Post and the Canadian Broadcasting Corporation. These institutions received very poor grades in the 2009–2010 report cards.

In light of the general improvement we found, however, we have suspended the report cards initiative for at least two years, in order that we may dedicate all our investigative resources to pursuing individual complaints. Nonetheless, we will remain vigilant in our oversight role and continue to address the issue of timeliness through specific investigations and ongoing meetings with institutions' senior officials, and will monitor the trends TBS's expanded statistics bring to light.

We will also review institutions' annual reports to Parliament on their access to information operations, since we recommended to those institutions that were the subject of our 2010–2011 report cards that they report in that vehicle on their progress implementing our recommendations. In addition, we call on Parliament and TBS to review these reports and act on concerns. This oversight is crucial, due to the fragility of the access system, particularly in light of recent budget cuts, which may have a negative effect on the access to information system. In addition, despite indications that Canadians are receiving more timely service from the access to information system, we have outstanding concerns about certain institutional practices.

SYSTEMIC INVESTIGATIONS

We continued to pursue systemic investigations in 2011–2012. One is on delays caused by consultations conducted with other government institutions, and the associated time extensions. The second is on interference with processing access to information requests. We expect to complete both these investigations in 2012–2013 and report our results to Parliament.

3. PURSUING IMPORTANT PRINCIPLES OF LAW

In support of our mission, we bring forward and intervene in court cases to defend or clarify important principles that underlie the fundamental right of access to government information, while contributing to the development of jurisprudence that favours disclosure (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor-stategic-planning-plan-strategique_2011-2014.aspx#3). We also strive, in concert with becoming a centre of investigative expertise, to develop and augment our legal knowledge and skill, in order to support our investigative function (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor-stategic-planning-plan-strategique_2011-2014.aspx#6).

A fundamental principle of the *Access to Information Act* is that decisions on disclosure should be reviewed independently of government. The first level of review is by the Office of the Information Commissioner through our investigation process. Once an investigation is completed and the findings are reported, there is a second level of review of refusals to grant access to records before the Federal Court.

Court proceedings under the Act may be commenced in a number of instances:

» When we conclude that a complaint is well founded and the institution does not act upon our formal recommendation to disclose records, we may, with the complainant's consent, seek judicial review by the Federal Court of the institution's refusal.

» When the complainant, upon receiving our investigation report, is not satisfied with the Commissioner's findings, the complainant may seek a judicial review of the institution's refusal.

» The Act also provides a mechanism by which a third party may apply for judicial review of an institution's decision to disclose information that the third party believes should be withheld.

We may also be involved in other types of proceedings:

» We may seek leave to intervene in proceedings that relate to access to information.

» We may be called upon to defend the Commissioner's jurisdiction or powers.

As shown in the summaries below, important decisions on the issue of access to information were rendered in 2011–2012. Two of these were by the Supreme Court of Canada: one concerning the status of ministerial offices and another that reviewed the obligation to notify third parties about the application of the exemption limiting the disclosure of information provided by them. Two cases, one before the Federal Court and one before the Federal Court of Appeal, provided guidance on the exercise of discretion under the international affairs and defence exemption found in section 15 of the Act. In another case, the Federal Court of Appeal confirmed the Commissioner's authority to compel the production of documents that were subject to the exclusion found in section 68.1.

We participated in a number of court proceedings. We also closely monitored other cases with potential ramifications for the Office of the Information Commissioner or for access to information in general, including cases started under section 44 of the Act in which third parties challenged institutions' decisions to disclose requested information.

DECISIONS

Third-party information

Merck Frosst Canada Ltd. v. Minister of Health, 2012 SCC 3 (33290) (See also "Third-party information" in our 2010–2011 annual report: http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2010-2011_9.aspx.)

In 2000 and 2001, Health Canada received access requests concerning the submission of a new drug developed by Merck Frosst. Following receipt of the requests, Health Canada informed

the pharmaceutical company of its intention to disclose a portion of the records. Merck Frosst opposed the disclosure of information in general categories such as manufacturing techniques, chemistry, dates, controls and file numbers. Merck Frosst also opposed the disclosure of pages that had already been forwarded to the requester without prior consultation.

Under section 44 of the *Access to Information Act*, Merck Frosst filed applications for judicial review to prevent the Minister from disclosing the requested records. The Federal Court ruled on those applications in October 2006, and the decisions were subsequently appealed.

The Federal Court of Appeal determined that section 27 of the Act, which concerns notices to third parties, requires an institution to communicate with a third party only in cases in which a document contains or may contain trade secrets or confidential information of a financial, commercial, scientific or technical nature.

The Court of Appeal also determined that the records in question did not meet the criteria of section 20 of the Act, which is the exemption for third-party information. In the view of the Court, the evidence submitted by Merck Frosst, which bore the burden of proof, was not sufficient.

Merck Frosst appealed to the Supreme Court, which considered two issues: First, when must a government institution give notice to a third party concerning an access to information request, and what sort of review of the record is required of the institution? Second, did the Federal Court of Appeal err in its application of section 20 of the Act?

The Supreme Court dismissed the appeal but clarified that an institution should issue a notification to a third party when there is any doubt about whether information relating to a third party should be released. An institution must also give notice to a third party when it intends to disclose information pursuant to the public interest override found in subsection 20(6) of the Act or when the institution intends, in accordance with section 25 of the Act, to sever and disclose information concerning third parties, but is not convinced that the criteria in subsection 20(1) of the Act have been met. The Court also observed that an institution must conduct a sufficient review of the requested material before deciding whether to give notice to a third party.

In reviewing the application of section 20 of the Act, the Supreme Court concluded that Merck Frosst had not provided evidence to show that the information at issue contained trade secrets (paragraph 20(1)(a)) or financial, commercial, scientific or technical information (paragraph 20(1)(b)).

The Supreme Court confirmed that the exemption in paragraph 20(1)(c) requires a third party to demonstrate "a reasonable expectation of probable harm." A third party relying on this exemption must show that the risk of harm is more than a mere possibility but need not establish on a balance of probabilities that the identified harm will, in fact, occur. Merck did not meet the requirements in this case.

Finally, with respect to severance under section 25, the Supreme Court noted that the determination of whether information subject to the disclosure obligation "can reasonably be severed" from protected third-party information involves both a semantic and a cost-benefit analysis. The information released post-severing must not be meaningless.

Discretion and subsection 15(1)

Attaran v. Minister of Foreign Affairs, 2011 FCA 182 (A-198-09) (See also, "General right of access" in our 2008–2009 annual report: http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2008-2009_19.aspx.)

Professor Amir Attaran challenged the decision by Foreign Affairs and International Trade Canada (DFAIT) to release redacted versions of its annual human rights report on Afghanistan for 2002 to 2006. The Federal Court ordered DFAIT to disclose information in those reports that was already in the public domain, but otherwise dismissed the application.

The requester appealed to the Federal Court of Appeal, which considered whether the Federal Court erred in finding that the Minister's discretion under the national security exemption found in subsection 15(1) of the *Access to Information Act* was reasonably exercised.

The Federal Court of Appeal held that DFAIT had failed to exercise its discretion under subsection 15(1) of the *Access to Information Act*. Institutions must provide evidence to show that consideration was given to all relevant factors for and against disclosure. Generic statements will not satisfy the Court that the institution exercised its discretion.

In this case, the Federal Court of Appeal was of the view that no evidence was provided to demonstrate the exercise of discretion. The Federal Court of Appeal set aside the Federal Court judgment and returned the matter to DFAIT for the purpose of allowing it to exercise the discretion conferred under subsection 15(1).

The Minister of Foreign Affairs' application for leave to appeal to the Supreme Court was dismissed on March 29, 2012 (34402).

Third-party information

Hibernia Management and Development Company Ltd. v. Canada-Newfoundland and Labrador Offshore Petroleum Board and Information Commissioner of Canada, 2012 FC 417 (T-1384-10) (See also, "Environment, security and third-party information" in our 2010–2011 annual report: http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2010-2011_9.aspx.)

Hibernia Management and Development Company Ltd. (HMDC) is an oil drilling company that operates in the Hibernia field off the southeast coast of Newfoundland. The Canada-Newfoundland and Labrador Offshore Petroleum Board manages Newfoundland and Labrador's offshore oil resources on behalf of the Government of Canada and the provincial government. The Board received a request for access to certain records, specifically records relating to safety and environmental protection audits, and inspections of drilling operations carried out by the Board since January 2008. The Board asked for HMDC's observations concerning documents that might contain third-party information. HMDC applied for judicial review to prevent the Board from disclosing the records in question. The Commissioner was granted party status.

The Federal Court considered three issues:

- Are the records subject to the exemption in subsection 24(1) of the *Access to Information Act*, which incorporates by reference section 119 of the *Canada-Newfoundland Atlantic Accord Implementation Act*?
- Are the records subject to the "confidential, commercial or technical information" exemption in subsection 20 of the *Access to Information Act*?
- Do the records contain personal information subject to the exemption in subsection 19(1) of the *Access to Information Act*?

The Federal Court determined that the documents did not qualify as privileged under section 119 of the *Canada-Newfoundland Atlantic Accord Implementation Act* because the documents were not produced or provided by HMDC. They were produced by the Board based on its audit and contain independent observations made by the Board.

The Federal Court found that HMDC did not provide sufficiently clear and direct evidence to meet the requirements of paragraph 20(1)(b) of the *Access to Information Act*. Further, it found that the Board had properly redacted all personal information as required by subsection 19(1) of the Act, and severed and released all remaining information under section 25 of the Act.

In written submissions to the Court, the Information Commissioner noted that the public has an interest in knowing whether third parties who receive benefits from the government through operation licences comply with the associated conditions as well as whether the government is fulfilling its mandate in promoting safety and environmental protection at these operations. The Court agreed that this public interest further supported the disclosure of these documents.

The Federal Court concluded that the Board's decision was correct, and dismissed the application.

No appeal was filed with the Federal Court of Appeal before the 30-day deadline.

Discretion and subsection 15(1)

Bronskill v. Minister of Canadian Heritage, 2011 FC 983 (T-1680-09) (See also, "Expiration dates" in our 2010–2011 annual report: http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2010-2011_9.aspx.)

Journalist Jim Bronskill made a request to Library and Archives Canada (LAC) for the security files of the Royal Canadian Mounted Police (RCMP) on Tommy Douglas, who died more than 20 years ago. LAC provided the requester with information that was heavily redacted under subsection 15(1) (international affairs and defence) and subsection 19 (personal information) of the *Access to Information Act*. The requester complained about these redactions.

After conducting an investigation, we determined, on the basis of the parties' representations, that the exemptions had been properly applied. The requester applied for judicial review.

The Federal Court considered three issues:

» Were the documents properly considered as subsection 15(1)-exempted documents?

» What factors are to be considered in the exercise of discretion under subsection 15(1)?

» Was the exercise of discretion reasonable in the circumstances?

The Court determined that LAC had not demonstrated that disclosure of the information would result in a "reasonable expectation of probable harm." The Court held that LAC's redactions to the documents were inconsistent, and provided a chart that identified improperly withheld documents for LAC to consider in its re-review of the records.

The Court provided a non-exhaustive list of factors to be considered in exercising discretion under subsection 15(1), including the passage of time between the creation of the record and the request, prior public disclosure of the information, and the historical value of the record.

With regard to the exercise of discretion, the Court was not satisfied that LAC had provided specific and detailed evidence to show that it had exercised its discretion. The Court found that LAC relied on the subsection 15(1) analysis provided by the Canadian Security Intelligence Service, with whom LAC had consulted. The Court concluded that the short amount of time taken by LAC (less than a week) to complete its review was indicative that no reasonable exercise of discretion was done.

The Court cautioned the Information Commissioner that in her investigations of national security claims, a "thorough and independent review must be undertaken with a critical mind, in keeping with the legislative objectives at play."

The Federal Court ordered the matter be sent back to LAC so it could review the outstanding records according to the guidance set out in the decision, including the list of factors to consider when exercising discretion under subsection 15(1). The Court also ordered LAC to indicate, in writing, to Bronskill whether it had any additional information on Tommy Douglas in its holdings.

The Minister of Canadian Heritage has appealed the decision to the Federal Court of Appeal (A-364-11). The Information Commissioner has sought leave to intervene.

Personal information

Amir Attaran v. Minister of National Defence and the Information Commissioner, 2011 FC 664 (T-1679-09) (See also, "National defence" in our 2010–2011 annual report: http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2010-2011_9.aspx.)

Professor Amir Attaran made a request to National Defence for records concerning the transfer of detainees in Afghanistan. In response, National Defence disclosed some of the information but withheld other information based on sections 15, 16, 17 and 19 of the *Access to Information Act*. The requester complained to our office. After an investigation, we determined that National Defence had properly applied section 19 of the Act and therefore did not inquire into the applicability of the other exemptions invoked by National Defence.

The requester applied for judicial review of National Defence's decision to withhold 28 photographs of Afghan detainees in their entirety under the personal information exemption found in subsection 19(1) of the Act.

The Federal Court considered whether National Defence erred in refusing to redact the detainee photographs to remove personal information and in refusing to release the photographs on public interest grounds.

The Court determined that National Defence's decision not to redact and to withhold all of the detainee photographs was reasonable. The application of the severance provision in section 25 of the Act, in the context of the removal of personal information from a photograph, involves an element of judgment, and it is a process that should err on the side of protecting the subject's privacy interests. The Court noted that in a situation such as this one, in which there is a reasonable apprehension that the personal safety of the individual or his family may be at risk from the disclosure of his identity, extreme caution is justified. The Court also found that a severance sufficient to eliminate the potential of personal identification would be so extensive as to render the images meaningless.

The Court also found that it was reasonable for National Defence to conclude that, despite the need to consider the public interest, the risks to the detainee and to the conduct of Canadian military operations were paramount.

The parties did not seek leave to appeal the decision to the Federal Court of Appeal.

Production of records

Canadian Broadcasting Corporation v. Information Commissioner of Canada, 2011 FCA 326 (A-391-10) (See also, "Production of records" in our 2010–2011 annual report: http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2010-2011_9.aspx.)

The Canadian Broadcasting Corporation (CBC) appealed a Federal Court decision upholding the power of the Information Commissioner to order the CBC to produce records, in the context of her investigative process, to which CBC had applied the exclusion relating to journalistic, creative or programming activities.

The Federal Court of Appeal considered whether the Commissioner has the authority to order the CBC to produce records, including those that, in the CBC's opinion, relate to journalistic, creative or programming activities.

The Court dismissed the CBC's appeal, noting that the exclusion for information relating to journalistic, creative or programming activities found in section 68.1 of the *Access to Information Act* is subject to an exception for information about the CBC's general administration. As a result, the Commissioner must be able to review records subject to a complaint to decide whether the information falls under the exception and could be released. The Court noted, however, that some records containing information such as journalistic sources would not, on their face, fall within the exception to the exclusion and, therefore, would be exempt from the Commissioner's power of examination.

The parties did not seek leave to appeal the decision to the Supreme Court of Canada.

Personal information

Nault v. The Minister of Public Works and Government Services Canada, 2011 FCA 263

The requester challenged a decision by Public Works and Government Services Canada (PWGSC) to refuse to disclose information stemming from a job competition. PWGSC withheld the information under the personal information exemption in section 19 of the *Access to Information Act*. This case raised the issue of whether the employment history of federal public servants prior to their entry into the public service falls within the exception to the definition of personal information found in paragraph 3(j) of the *Privacy Act*.

The requester complained to our office concerning PWGSC's refusal to disclose the information. We found that PWGSC had properly withheld the information under section 19. The requester's application for judicial review under section 41 of the *Access to Information Act* was dismissed by the Federal Court on the ground that the information in question was "personal information" within the meaning of section 3 of the *Privacy Act*.

The requester appealed to the Federal Court of Appeal, which considered whether the information was caught by the exception provided in paragraph 3(j) of the *Privacy Act*, which sets out that personal information does not include information about an individual who is or was an officer or employee of a government institution and that relates to the position or functions of the individual.

The Court held that past education and employment acquired prior to hiring by a government institution are an individual's personal assets, obtained without the involvement of the government institution that subsequently hires that individual. This information does not relate to a position or functions with a government institution, but rather concerns a position or functions with another employer or activities at an educational institution.

The Court further held that, in interpreting the *Access to Information Act* and the *Privacy Act*, one must focus on the statutory provisions at issue while, at the same time, considering the purposes of the two statutes. In this case, information relating to the incumbent of a position in a government institution and concerning his education and employment history prior to being hired by a government institution is information that Parliament has protected under the *Privacy Act*.

The requester's application for leave to appeal to the Supreme Court of Canada was dismissed on March 8, 2012 (34550).

Time extensions

Public Service Alliance of Canada v. Attorney General of Canada, 2011 FC 649 (T-1671-09)

The Public Service Alliance of Canada (PSAC) challenged the length of a time extension of 25 months taken by the Department of Justice Canada for an access to information request. PSAC complained to us that the length was unreasonable and amounted to a "deemed refusal" for access to the requested information. We found the time extension to be reasonable. The requester applied to the Federal Court for judicial review of the time extension.

The issues before the Court were whether it has the jurisdiction to review an extension before the deadline for processing a request has passed and, if so, whether the extension was unreasonable.

The Court found that there can be no refusal of access to information, and therefore no judicial review under section 41, until the deadline for processing a request has passed. Consequently, the Court concluded that it did not have the jurisdiction to hear the application, and therefore declined to address the issue of whether the extension was reasonable.

PSAC appealed the decision to the Federal Court of Appeal (A-256-11) but on May 14, 2012, filed a notice of discontinuance.

Consent to disclose

Top Aces Consulting Inc v. Minister of National Defence, 2011 FC 641 (T-724-10) and *Top Aces Consulting Inc v. Minister of National Defence*, 2012 FCA 75 (T-255-11) (Both decisions were rendered in 2011–2012.)

National Defence received a request for records relating to National Individual Standing Offers for Interim Contracted Airborne Training Services and associated contracts. The institution informed Top Aces Consulting of the request and asked that it review the documents to identify any information that, in its view, ought to be protected under the *Access to Information Act*. Top Aces agreed to the disclosure of certain records, but objected to the disclosure of its unit prices as set out in the standing offers based on subsection 24(1) of the Act. This provision incorporates section 30 of the *Defence Production Act* (DPA), which precludes the release of certain information obtained under the DPA absent the consent of the applicant.

National Defence advised Top Aces that it was going to release the unit prices notwithstanding Top Aces' objection, because a disclosure clause in the standing offers amounted to consent to disclose the information; therefore, the unit prices could not be withheld. Top Aces applied to the Federal Court to prevent National Defence from disclosing the unit prices.

The Court considered two issues:

» Does the disclosure clause in the standing offers constitute consent to the disclosure of the unit prices under section 30 of the DPA?

» If so, does this consent relieve the institution from its duty to refuse to disclose the information pursuant to subsection 24(1) of the *Access to Information Act?*

The Federal Court concluded that the disclosure clause in the Standing Offers is clear and not ambiguous, and constitutes "consent" under section 30 of the DPA. By signing the disclosure clause in the standing offers, Top Aces provided its consent; therefore, the unit prices are not exempt from disclosure by virtue of section 30 of the DPA, and the information may not be withheld pursuant to subsection 24(1) of the *Access to Information Act*.

The Federal Court of Appeal agreed with the Federal Court's conclusion that Top Aces consented to the disclosure of its unit prices pursuant to section 30 of the DPA. The Court of Appeal also confirmed that this information was therefore not "restricted" within the meaning of subsection 24(1) of the *Access to Information Act* by reason of the consent given by the appellant. However, the Federal Court of Appeal clarified that this is the case because the DPA does not provide a mechanism to request or disclose documents.

No leave to appeal to the Supreme Court of Canada was filed before the 60-day deadline.

Motion under section 683 of the Criminal Code

William Fenwick West v. Her Majesty the Queen (Docket 264962, Nova Scotia Court of Appeal) (See also, "Ad hoc Commissioner" in our 2010–2011 annual report: http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2010-2011_9.aspx.)

In his case before the Nova Scotia Court of Appeal, William West brought a motion seeking to obtain, among other things, the disclosure of information contained in the investigation files of the Office of the Information Commissioner. The Commissioner filed written representations objecting to the jurisdiction of the Court to compel production and appeared before the Court of Appeal on April 11, 2012. The applicant's motion for disclosure was dismissed on April 11, 2012.

Scope of section 18.1

Information Commissioner of Canada v. President and Chief Executive Officer of the Canada Post Corporation (T-382-11) (See also, "What is the scope of section 18.1?" in our 2010–2011 annual report: http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2010-2011_9.aspx.)

Prior to the hearing, Canada Post disclosed the information that was the focus of this case. As a result, the case was discontinued.

ONGOING CASES

Information Commissioner of Canada v. Minister of Public Safety and *Information Commissioner of Canada v. Minister of Justice* (T-146-11 and T-147-11) (See also, "Issue of protocol" in our 2010–2011 annual report: http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2010-2011_9.aspx.)

These cases were heard together on April 24, 2012.

NEW CASES

3421848 Canada Inc. et al. v. Canada (Information Commissioner) (T-936-11)

This is an application under section 18 of the *Federal Courts Act* for an order in the nature of *mandamus* requiring the Commissioner to conclude her investigation into the Canada Revenue Agency's refusal to release approximately 20,000 pages of information related to an audit. This application was scheduled to be heard on May 7, 2012, but was discontinued without costs on May 3, 2012.

Exact Air Inc. v. Transport Canada (T-1341-11)

This is an application by Exact Air under section 44 of the *Access to Information Act*, challenging Transport Canada's decision to release certain records. The Information Commissioner intervened in support of the disclosure of the information. Exact Air claims that the records should be withheld under subsections 19(1) and 20(1) of the Act. The application was discontinued by Exact Air on April 16, 2012, and all of the information at issue has been released.

Porter Airlines Inc. v. Attorney General (T-1768-11)

This is an application by Porter Airlines under section 44 of the *Access to Information Act*, challenging Transport Canada's decision to release certain records. Porter claims that the records should be withheld under subsection 20(1) of the Act. The Information Commissioner, as an intervener, has provided evidence in this proceeding relating to our investigation of a delay complaint about Transport Canada's response to the access request that is at issue in the proceeding. The Information Commissioner also will make representations in the proceeding regarding the interpretation of the obligations of government institutions when processing requests involving third-party consultations under sections 27 and 28 of the *Access to Information Act*, as well as government institutions' duty to ensure timely access to requested records.

4. ENGAGING WITH STAKEHOLDERS

The Commissioner uses a variety of venues to work with partners and interested parties to bolster the case for access to government information—both in Canada and abroad. At home, the Commissioner engages with key players at the federal level, such as the Treasury Board Secretariat, as the system administrator, on policy issues and common tools, and senior institutional officials to ensure maximum compliance with the Act. She also consults with her provincial and territorial counterparts and international colleagues on both local and global issues.

Among the fruits of this engagement are that the Commissioner can offer to Parliamentarians, upon request, her perspective on national and international developments in the world of access to information, with the goal of contributing to the development of a leading access regime in Canada (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor-stategic-planning-plan-strategique_2011-2014.aspx#6). Parliament, in turn, has provided useful follow-up on our work, particularly the report cards (see Chapter 2), through the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI).

INTERNATIONAL CONFERENCE OF INFORMATION COMMISSIONERS

In October 2011, we hosted the 7th International Conference of Information Commissioners, in collaboration with the Canadian Bar Association. This event, held for the first time in Canada, brought together more than 250 participants, including 36 international, provincial and territorial information commissioners, representatives from the Treasury Board Secretariat and Library and Archives Canada, along with academics, journalists and members of civil society groups.

Under the theme Access to Information: A Pillar of Democracy, the conference featured wide-ranging presentations on implementing access to information laws and the broader topic of freedom of information. In addition, information commissioners shared their experiences and discussed new challenges stemming from the rapidly evolving open government movement. A summary of the panel discussions can be found on our website (http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi_2012_2.aspx).

The conference culminated in the release of a joint resolution signed by information commissioners from 23 countries that calls on governments to enshrine the right to information in national laws and to put in place effective appeal mechanisms (see http://www.newswire.ca/en/story/854165/canada-endorses-an-international-resolution-on-access-to-information).

Grace-Pépin Access to Information Award

During the conference, we, along with our provincial and territorial colleagues, presented the inaugural Grace-Pépin Access to Information Award to the University of Alberta's Information Access and Protection of Privacy Certificate Program.

The award, created in memory of former federal Information Commissioner John Grace (1927–2009) and Marcel Pépin (1941–1999), president and founder of the Commission d'accès à l'information du Québec, officially recognizes outstanding contributions by an individual, group or organization to promoting and supporting transparency, accountability and the public's right to access public sector information.

The next award will be handed out during Right to Know Week in September 2012. For more information on the Award, please visit the Right to Know website (http://www.righttoknow.ca/en/Content/grace_pepin_award-prix.asp).

RIGHT TO KNOW

We joined countries around the world in celebrating Right to Know Day on September 28, 2011. Provincial and territorial information and privacy ombudsman and commissioner offices coordinated efforts once again to mark Right to Know Week with numerous activities and festivities across Canada. (See http://www.righttoknow.ca/en/Content/default.asp for information on the Right to Know movement in Canada.)

EXPANDING DIALOGUE

The Commissioner and senior officials attended 22 events during 2011–2012 as keynote speakers or panellists. Among those events were the 2011 Access and Privacy Conference in Edmonton, the American Bar Association's annual meeting in Toronto, an orientation session for Senators in Ottawa, and a panel hosted by the Quebec National Assembly.

In July 2011, at the invitation of Canada's High Commissioner to Nigeria and coordinated by Foreign Affairs and International Trade Canada, the Information Commissioner met with high ranking government officials and representatives of civil society groups in that country to provide advice on implementing the country's newly proclaimed *Freedom of Information Act*.

Representatives from Canada attended, at Mexico's invitation, that country's National Transparency Week in September 2011. The Commissioner led a delegation of Canadian experts in the fields of freedom of information and open government, and made several keynote addresses.

In March 2012, the Commissioner participated in a conference in Patna, India, on the right to information, organized by the government of the state of Bihar and sponsored by the World Bank. The conference focused on Bihar's experience implementing freedom of information in a poor state with low rates of literacy.

We often host officials from foreign governments in order to share experiences in developing, implementing and maintaining access to information systems. In 2011, we welcomed representatives from Brazil, China, Indonesia and Mexico.

We have posted speaking notes and presentations from these events on our website (http://www.oic-ci.gc.ca/eng/med-roo-sal-med.aspx).

In 2011–2012, we expanded dialogue with stakeholders by taking advantage of social media. We launched our Twitter account at the end of September 2011 (@OIC_CI_Canada). Twitter allows us to interact with the public and stakeholders in real time and be aware of trends and issues of importance related to access to information and open government across the world. With 266 followers on Twitter (and 66 on Facebook, which we joined in August 2010) we hope to continue reaching out and attracting more interest in the coming year.

OPEN GOVERNMENT PARTNERSHIP

The Secretary of State of the United States and the Foreign Minister of Brazil launched the international Open Government Partnership in Washington on July 12, 2011. The Information Commissioner was invited to participate in a forum on promoting transparency held in conjunction with the launch.

In February 2012, the Commissioner, on behalf of the provincial and territorial information commissioners, sent a letter to the President of the Treasury Board containing recommendations related to the government's action plan for its work as a member of the Open Government Partnership (http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi_2012_1.aspx). Among these was the key recommendation to update the *Access to Information Act* to reflect the modern state of government and access to information. We shared that letter with the members of the international network of information commissioners.

The government tabled its action plan in April 2012 (http://open.gc.ca/open-ouvert/ap-pa01-eng.asp). It sets out commitments the government will meet over three years, under three headings: open information, open data and open dialogue.

PARLIAMENTARY ACTIVITIES

The Commissioner made five appearances before parliamentary committees in 2011–2012.

Of particular note was the Commissioner's appearance in November 2011 in front of the ETHI committee to discuss her ongoing dispute and resulting court actions with the Canadian Broadcasting Corporation. As part of her testimony, the Commissioner presented the results of a comparison of the provisions in other jurisdictions' laws on public broadcasters, and presented alternative wording for section 68.1 of the *Access to Information Act*. On March 8, 2012, ETHI tabled its report on this matter, recommending that the government amend this provision based on the expert testimony and, notably, our international comparison. The government tabled its response on May 7, 2012, agreeing to study the committee's recommendations, taking the various international models into account.

On February 16, 2012, the Commissioner had the opportunity to speak about our work and access to information more generally when she gave testimony before the Senate Committee on Banking, Trade and Commerce. Her appearance was part of the committee's review of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. She spoke of her concerns about the exemption in this law for certain information held by the federal agency that tracks financial intelligence. The Commissioner followed up her oral testimony with a detailed written submission on April 24, 2012.

The Commissioner's other two appearances before ETHI were about her 2010–2011 annual report (September 22, 2011) and about the 2012–2013 Main Estimates and the limited resources we have to carry out our mandate (March 27, 2012). Finally, the Commissioner appeared before the Standing Committee on Public Safety and National Security on November 22, 2011, on the Bill to abolish the federal gun registry.

The Commissioner tabled her annual report to Parliament on our administration of the *Access to Information Act* (http://www.oic-ci.gc.ca/eng/rep-pub-ar-ra_2010-2011_atia.aspx) and the *Privacy Act* (http://www.oic-ci.gc.ca/eng/rep-pub-ar-ra_2010-2011_privacy-prive.aspx) on June 22, 2011.

Throughout the year, Parliament considered a number of government and private members' bills that touch on access to information or propose amendments to the *Access to Information Act*. Our website contains a complete list of these bills, including those that received Royal Assent and those that are still before Parliament (http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2011-2012_12.aspx).

5. ENSURING OPERATIONAL INTEGRITY AND CORPORATE SUPPORT TO INVESTIGATIONS

Over the years, we have continued to practice sound governance and stewardship of our limited resources. Our work in these areas has provided a solid foundation for our core business—investigations—and will help us ensure ongoing operational integrity (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor-stategic-planning-plan-strategique_2011-2014.aspx#10).

AUDIT

Internal audit has proven crucial to our ongoing efforts to improve our performance. In 2011–2012, we carried out a detailed internal audit of our investigative function and prepared a comprehensive plan to address the findings (see Chapter 1). We also continued to respond to the findings of the 2010 audit of our Intake and Early Resolution Unit, and refine the resulting processes and approaches.

For more information, see the audit committee annual report on our website: (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor_audit-committee-comite-de-verification_annual-report-rapport-annuel_2011-2012.aspx).

We carried out a self-assessment against the findings and recommendations of the Office of the Comptroller General's 2011 horizontal audits of small departments and agencies. This proved to be a valuable exercise, and we shared the results with the members of our external audit committee. It was their recommendation that we continue this self-assessment, since it allows us to judge the adequacy of internal controls, processes and governance frameworks, feeds into the risk assessment process and may preempt the need for us to carry out similar audits ourselves.

The Public Service Commission conducted an audit of our staffing practices in the fall of 2011. We will publish the results in the fall of 2012.

RESOURCES

The operating budget freeze introduced with Budget 2010 has removed the limited financial flexibility we previously had. Our program and expenditure review conducted in the context of the government's Deficit Reduction Action Plan indicated that any reductions to our existing appropriations would significantly impact program results (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor_drap-pard.aspx). Nonetheless, our overall budget was cut by 5 percent, and, as a result, our overall staff complement will have to be reduced by 11 percent by the end of 2013.

Such reductions would compromise our ability to deal with the demands of our current inventory and to meet other corporate obligations, such as policy compliance. Any unexpected event that would impact our workload would create significant financial pressures on the organization.

EXCEPTIONAL WORKPLACE

Within the context of our new fiscal situation, creating and maintaining an exceptional workplace remains an important goal (see *2011–2014 Strategic Plan*: http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor-stategic-planning-plan-strategique_2011-2014.aspx). To establish how we would achieve it, we will develop in the fall of 2012 a new integrated human resource-business plan for the years 2012–2014.

Talent management is clearly our single most important requirement to fulfill business needs and foster employee satisfaction. It comprises identifying, developing and effectively using individuals' talent, based on performance reviews, competency assessments, learning objectives and career aspirations.

VALUES AND ETHICS

In 2010, our employees took the lead in defining our corporate values and value statements. In 2012–2013, we will integrate these values into our new organizational code of conduct, which will build on the 2012 Values and Ethics Code for the Public Sector (http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049) and will include guidelines on conflict of interest and post-employment. Our code of conduct will come into effect in 2012–2013.

INFORMATION MANAGEMENT/ INFORMATION TECHNOLOGY

Since 2009–2010, the continued upgrade and consolidation of our technology and information infrastructure has provided us with tools and systems to more effectively plan, manage and carry out our duties.

After successfully implementing our new electronic records management system in the spring of 2011, we began work to renew the legal case management system. We also began to modernize the architecture behind our networks and continued to enhance the security of our systems to protect the sensitive information we collect from institutions.

A major project for the year was upgrading, in the wake of a court decision, how we present material on our website. This will ensure that everything we post is fully accessible to all members of the public, including those who require assistive devices to access Web-based content.

SECURITY

A major thrust of our efforts over the past two years has been the establishment of a full-fledged security program in line with the 2009 Policy on Government Security. The program covers a wide range of activities, including business continuity planning, personnel security, physical security, contracting security, technology security, and awareness and training.

To date, we have carried out a number of risk and compliance assessments and implemented various corrective measures. In 2011–2012, we worked to finalize our corporate security policy framework and developed related plans and procedures. In 2012–2013, we will undertake staff security training.

ACCESS TO INFORMATION AND PRIVACY

Since becoming subject to both the *Access to Information Act* and *Privacy Act* five years ago, we have made every attempt to provide exemplary service to Canadians seeking information from us.

Our access to information workload has been quite different each year since 2007 (see chart, page 41); however, we were able to close nearly all of the requests within the year they came in.

In 2011–2012, we completed 44 requests on or before the end of the fiscal year. There was one complaint. (See Appendix A, page 44, for the annual report of the Information Commissioner ad hoc.) In the previous two years, there had been only one other complaint. The Information Commissioner ad hoc, who investigates complaints against us, since we do not investigate ourselves, found both to be not substantiated.

The 48 new requests we received this year are slightly more than the 46 we received in 2010–2011. However, the number of pages we had to review to complete those requests more than tripled, from 7,206 in 2010–2011 to 25,187 in 2011–2012. Even with that increased page volume, and some complex requests, we kept the average completion time down to 16 days. We carried two requests into the year from 2010–2011, and six came in right at the end of the year. We carried these over into 2012–2013. We took a total of six extensions, four of which were for 30 days or fewer, and two were for 31 to 60 days.

On the privacy side, we received five requests, one fewer than in 2010–2011, and completed all five within the 30-day statutory time limit.

We assessed the pilot project we launched in 2010–2011 to waive the five-dollar fee for submitting an access request and decided to make it permanent. We also continued to post summaries of our completed requests, along with a link for requesting the released records. In 2011–2012, requesters took advantage of this service 19 times.

For more information, consult our annual reports to Parliament on our access to information (http://www.oic-ci.gc.ca/eng/rep-pub-ar-ra_2011-2012_atia.aspx) and privacy (http://www.oic-ci.gc.ca/eng/rep-pub-ar-ra_2011-2012_privacy-prive.aspx) activities.

ACCESS TO INFORMATION ACTIVITY, 2007–2008 TO 2011–2012

	2007–2008	2008–2009	2009–2010	2010–2011	2011–2012
Number of new requests	93	113	28	46	48
Number of requests completed within the year	92	109	31	46	44
Number of pages to review	7,696	40,489	56,589	7,206	25,187
Number of consultation requests from other institutions	23	23	4	21	13
Average completion time (in days)	n/a	n/a	29	15	22
Number of complaints	10	13	1	0	1
Number of privacy requests	3	2	3	6	5

6. LOOKING AHEAD

As we move into the second year of our 2011–2014 strategic plan, we will continue to strive to meet our objectives through activities and initiatives, such as those described below, in our three key areas: leading access to information regime, exemplary service to Canadians and exceptional workplace (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor-stategic-planning-plan-strategique_2011-2014.aspx). Our work will also be guided by the imperatives set out in the Clerk of the Privy Council's annual report on the public service in terms of recruiting to fill skills gaps, developing competencies, and achieving excellence and results in our core functions (http://www.clerk.gc.ca/eng/feature.asp?pageId=300).

INVESTIGATIONS

As we grapple with our increasingly complex inventory of complaints, and expecting that we could receive between 2,000 and 2,500 complaints in 2012–2013 (5 to 6 percent of all access requests), we will continue to develop and refine strategies to work through our caseload efficiently and effectively. For example, we plan to expand our use of the portfolio approach and fine-tune it according to institutions' business lines, exemptions invoked and the subject matter of the request.

To support our investigative function, we will integrate our case management systems for investigations and litigation matters. With a similar goal, we will develop standard processes to facilitate coordination between the investigative and legal branches.

We will also closely monitor the impact of deficit reduction plans on access to information operations across the system, since they will likely affect the type and number of complaints we receive in the coming years.

A new Assistant Commissioner will be appointed in 2012–2013 to lead us in this work.

UPDATING THE *ACCESS TO INFORMATION ACT*

Canada will mark the 30th anniversary of the *Access to Information Act* in 2013. Since the Act came into force in 1983, all provinces and territories have implemented increasingly progressive access laws—joining early adopters Nova Scotia and New Brunswick, who were the first in Canada to pass freedom of information legislation. In addition, more than 90 countries have or are in the process of adopting access laws.

In the intervening years, Canada's law has been surpassed by those of its national and international counterparts. It has not kept pace with legislative, policy and technological developments.

To provide the government with input on how the Act could be brought in line with current requirements, we are conducting a review of the access laws in various jurisdictions, which we expect to complete in the fall of 2013. We will provide information on this topic to the House of Commons Standing Committee on Access to Information, Privacy and Ethics and other parliamentary committees, as requested.

OPEN GOVERNMENT PARTNERSHIP

In 2011, the Speech from the Throne and several other developments gave impetus to open government at the federal level. On September 19, 2011, the government signalled Canada's intent to join the international Open Government Partnership. We will provide input into the government's open government initiatives both at home and as part of the international effort.

SHARED SERVICES DELIVERY

To achieve greater efficiencies and minimize risks, we will take advantage of shared services options, when feasible. In April 2012, we established a memorandum of understanding with the Shared Services Unit of Public Works and Government Services Canada for all human resources services.

Our planned relocation with other Agents of Parliament in 2013 presents additional opportunities to achieve efficiencies by sharing common administrative services. We will continue to implement standard business processes consistent with those of other federal institutions. This standardization will facilitate any transition to shared services arrangements we choose to make.

APPENDIX A. REPORT OF THE INFORMATION COMMISSIONER AD HOC

On April 1, 2007, the Office of the Information Commissioner (OIC) became subject to the *Access to Information Act* (the "ATI Act"). The law that brought this about did not create at the same time a separate mechanism to investigate any complaints that an access request to the OIC has been improperly handled.

Since it is a cardinal principle of access to information law that decisions on the disclosure of government information should be reviewed independently, the office of an independent Information Commissioner, *Ad Hoc* was created and given the authority to investigate any such complaints about the OIC.

More specifically, pursuant to subsection 59(1) of the ATI Act, the Information Commissioner has authorized me, as Commissioner, *Ad Hoc*:

> … to exercise or perform all of the powers, duties and functions of the Information Commissioner set out in the *Access to Information Act*, including sections 30 to 37 and section 42 inclusive of the *Access to Information Act*, for the purpose of receiving and independently investigating any complaint described in section 30 of the *Access to Information Act* arising in response to access requests made in accordance with the Act to the Office of the Information Commissioner of Canada.

I am the fourth person to hold this office since 2007. When I took office on May 6, 2011, there were no outstanding complaints against the OIC from previous years. There was one new complaint in 2011–2012. It was deemed to be Not Well-Founded.

One other matter also required my attention this past year. In the case of *William Fenwick West v. Her Majesty the Queen* (Docket 264962, Nova Scotia Court of Appeal), Mr. West brought an application against several parties seeking, among other things, the disclosure of information in the investigative files of one of my predecessors in the office of Information Commissioner, *Ad Hoc*. Counsel appeared on my behalf before the Court of Appeal in April 2012 to argue that the Court lacked jurisdiction to order the production of these documents. The Court dismissed Mr. West's motion for disclosure that same day, with reasons to follow later.

The existence of an independent Commissioner, *Ad Hoc* ensures the integrity of the complaints process, itself an essential element in any access to information regime. The fact that only one complaint was filed with me this year does not suggest either that the system is unnecessary or not working properly. Rather, it demonstrates that the OIC is processing requests for information under its control so successfully that very few complaints are being registered. Should any new complaints be made in the future my office is ready to investigate them thoroughly and independently.

It is a privilege to serve as Information Commissioner, *Ad Hoc*.

Respectfully submitted,
John H. Sims, Q.C.