Information Commissioner of Canada
Commissaire à l'information du Canada

Annual Report 2008–2009

Maximizing Compliance for **Greater Transparency**

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Commissaire à l'information du Canada

June 2009

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, 2008, to March 31, 2009.

Yours sincerely,

Robert Marleau

Information Commissioner of Canada
Commissaire à l'information du Canada

June 2009

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

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Yours sincerely,

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MESSAGE FROM THE COMMISSIONER

When I was appointed Information Commissioner two years ago, the Office of the Information Commissioner faced a similar problem to that affecting the entire access to information system: an ever-increasing inventory of files carried over from year to year.

I immediately initiated major structural and operational changes to better address the challenges that were limiting our work and to eradicate once and for all the inventory built up over the years. In 2008–2009, we formalized and fine-tuned our new way of doing business and, as the year ended, our new investigative process was starting to show results. We also developed and refined other management strategies to ensure we have the proper skills and resources to effectively carry out our mandate over the next five years.

More importantly, we looked closely at how we could best improve the performance of the access to information system. I have said repeatedly that the compliance model inherent in the Act is weak. Currently, there are few incentives to comply with the Act's requirements, and even fewer consequences for not doing so. Our new business model will allow us to effectively use the various tools at our disposal to maximize our influence on institutional compliance with the law.

Still, much more is needed to bring about a true culture of openness and transparency, and allow Canada to regain its status as a leader in the area of access to information.

July 2008 marked the 25th anniversary of the *Access to Information Act* on a rather bittersweet note. It was a moment to celebrate the important democratic leap Canada took in 1983 when it gave citizens the right of access to information held by federal institutions. At the same time, the occasion highlighted just how much the legislation lags behind standards established by other countries and other Canadian jurisdictions. The Act is still framed within the reality that prevailed a quarter of a century ago. It does not take into account the massive technological changes that have completely reconfigured the information landscape.

In March 2009, I presented a series of legislative recommendations to the House of Commons Standing Committee on Access to Information, Privacy and Ethics. These recommendations are meant as an initial effort to meet, without delay, the urgent challenges of modernizing the Act and strengthening the compliance model.

To move forward, strong, concerted leadership is required, now more than ever, from all quarters and all levels. Parliamentarians remain critical players, as they continue to press the government for legislative reform. The President of the Treasury Board, as the designated minister under the Act, must provide the political leadership to change a transparency adverse culture.

The Treasury Board Secretariat—as the organization responsible for ensuring that federal institutions fulfill their responsibilities under the Act—needs to provide institutional leadership guidance with clear performance objectives, explicit directives and adequate financial support and resources.

Within institutions, executive leadership is crucial to how well institutions fulfill their obligations under the Act. All ministers, deputy ministers and heads of agencies throughout the system must commit to the required cultural change. Through appropriate delegation of authority, access to information directors must be empowered to act in the true spirit of the legislation.

A rejuvenated, reorganized and better funded Office of the Information Commissioner also stands ready to fulfill the vision the Honourable Francis Fox set out in the parliamentary debates leading up to the adoption of the *Access to Information Act*. During the second reading debate in the House of Commons in 1981, he said: "I expect the office of the information commissioner to become over time more than an information ombudsman, more than an access advocate. I expect it to be the heart of the system." This can only fully happen with legislative reform.

In closing, I wish to acknowledge the professionalism and dedication my staff has demonstrated through a period of radical change and scarcity. I also want to pay tribute to the memory of former Information Commissioner Dr. John Grace whose impassioned pleas for reform, 15 years ago, still resonate today. Dr. Grace set the bar high in the defence of the citizen's right to know. Unfortunately, successive governments have chosen to ignore his recommendations and those of the commissioners who followed him. How much longer will Parliament stand by and tolerate this pervasive neglect and the attrition of a fundamental democratic right?

Robert Marleau
Information Commissioner of Canada

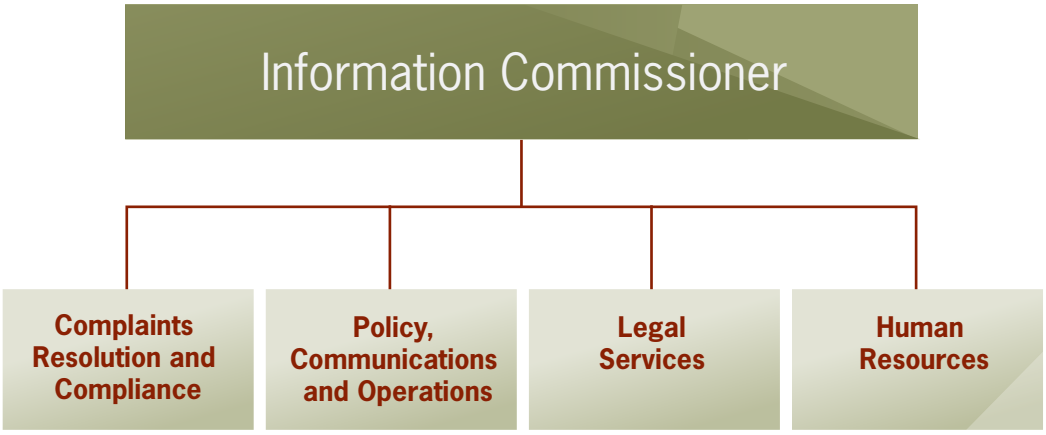
ABOUT THE OFFICE

WHO WE ARE

The **Information Commissioner** is an officer of Parliament and ombudsman, appointed by Parliament under the *Access of Information Act*, Canada's freedom of information legislation. The Commissioner reviews the complaints of individuals and organizations who believe that federal institutions have not respected their rights under the Act. The Commissioner also promotes access to information in Canada.

Canada's fourth and current Information Commissioner, Robert Marleau, began his term on February 1, 2007. Before taking up the position, Mr. Marleau served Parliament for 31 years, 13 of them as Clerk of the House of Commons. He was interim Privacy Commissioner in 2003.

The Commissioner is supported in his work by the **Office of the Information Commissioner**, 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.



WHAT WE DO

Investigating complaints	We thoroughly and fairly investigate complaints about federal institutions' handling of access to information requests. We use mediation and persuasion to resolve them. We bring cases to the Federal Court of Canada when they involve important principles of law or legal interpretation.
Promoting access to information and transparent and open government	We encourage federal institutions to disclose information as a matter of course and to respect Canadians' rights to request and receive information, in the name of transparency and accountability. We actively make the case for greater freedom of information in Canada through targeted initiatives such as Right to Know Week, and ongoing dialogue with Canadians, Parliament and federal institutions.

The Office has 82 full-time employees. It is divided into four main branches.

- The Complaints Resolution and Compliance Branch carries out investigations and dispute resolution efforts to resolve complaints.
- The Policy, Communications and Operations Branch assesses federal institutions' performance under the Act, conducts systemic investigations and analyses, provides strategic policy direction for the Office, leads the Office's external relations with the public, the government and Parliament, and provides strategic and corporate leadership in the areas of financial management, internal audit and information management.
- The Legal Services Branch represents the Commissioner in court cases and provides legal advice on investigations, and legislative and administrative matters.
- The Human Resources Branch oversees all aspects of human resources management and provides advice to managers and employees on human resources issues.

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.

One common reason for complaints is the time it takes an institution to respond to a request. Federal institutions have 30 days to do so but they may extend that time for a number of reasons—for example, when they have to search a large number of records, consult other federal institutions or notify third parties—and they must notify requesters of these extensions within the initial 30 days. Requesters may file complaints about this notice, about the length of extensions or because they feel, generally, that the process is taking too long.

We receive complaints that fall into 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, including the following:
  - Access to records: The institution did not give the requester an opportunity to examine the information.
  - Official language of choice: The institution did not provide the information in the requester's official language of choice.
  - Alternative format: The institution did not provide the information in an alternative format that a person with a sensory disability could use.
  - Other matters: This includes complaints about any other matter relating to requesting or obtaining access to records under the Act.

Refusal complaints

- Exemptions: The institution withheld the records under specific provisions of the Act, for instance: the information was obtained in confidence from foreign governments; the information relates to the safety of individuals, national security or commercial interests; the records contain personal information; or the information will be published within the next 90 days.
- No records: The institution found no documents relevant to the request.
- Incomplete response: The institution did not provide all the information it was required to release that matched the request.
- Excluded information: The institution did not disclose information that is excluded from the Act, such as publications, 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 Commissioner cannot review such records.

The Act requires that we investigate all the complaints we receive and that those investigations 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.

The Commissioner has strong investigative powers. However, the Commissioner may not order a complaint to be resolved in a particular way, relying instead on persuasion to settle disputes. When an institution does not follow a recommendation on disclosure of information, the Information Commissioner can, with the consent of the complainant, ask for a review by the Federal Court of Canada.

INTRODUCTION

After a year of regrouping and redefining the direction we needed to take to respond to the challenges brought on by our changing business environment, we in the Office of the Information Commissioner streamlined and fine-tuned our investigative process in 2008–2009 to maximize efficiency. We then turned our gaze outward to see how, given our resources, we could best encourage federal institutions to comply with the *Access to Information Act* and be increasingly accountable and transparent.

Chapter 1 of this annual report offers highlights of our work in 2008–2009.

Chapter 2 presents our new business model. It explains how we have adjusted our investigative process to maximize efficiency and timeliness and to resolve all ongoing cases carried over from previous years. It also explains the course of action that we have taken, and the tools we are using, to widen the influence of our findings, actions and expertise.

Chapter 3 provides a detailed account of our investigative performance in 2008–2009, including basic facts, figures and graphs, with a sample of noteworthy investigations.

Chapter 4 focuses on how we address performance and systemic issues. It briefly reviews the results of our latest report cards process and provides an account of two recent systemic investigations.

Chapter 5 presents important court cases in which the Information Commissioner intervened or that raised interesting legal and constitutional issues related to access to information. These cases serve to highlight the Information Commissioner's position on various issues in an effort to be as transparent and to provide as much guidance as possible to all stakeholders.

Our recommendations to modernize and strengthen the *Access to Information Act* form the basis of ***Chapter 6***.

The Information Commissioner presented these recommendations to the House of Commons Standing Committee on Access to Information, Privacy and Ethics in March 2009 as part of our efforts to impress upon the government the urgent need for change.

Chapters 7 to 9 explain our internal strategies with respect to information management and technology, communications, and financial and human resources. These strategies share the goal of ensuring that we have the proper resources, skills and tools to carry out our mandate in the most efficient manner, while providing excellent client service. Chapter 7 also included our own report card on how well we handled the access to information requests we received in 2008–2009.

Finally, ***Chapter 10*** looks to the future—how we will follow up on commitments from institutions and on our own, and how we will further strengthen our organizational capacity as well as our relations with partners and stakeholders.

1. HIGHLIGHTS 2008–2009

This year, we in the Office of the Information Commissioner focused on further streamlining and fine-tuning our investigative process while promoting greater institutional compliance with the *Access to Information Act* and addressing the need for legislative reform.

BUSINESS MODEL

In 2008–2009, we developed a new business model with the following goals:

- to streamline our investigative process to increase efficiency and timeliness, which will also help us to eliminate the inventory of cases accumulated over time and prevent its recurrence;
- to adopt a strategic and proactive approach to addressing systemic non-compliance; and
- to use a spectrum of tools that support our investigative and systemic actions to maximize compliance.

Summary of caseload

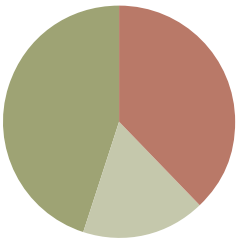
	2006–2007	2007–2008	2008–2009
Complaints received			
Complaints carried over from the previous year	1,453	1,420	2,293*
New complaints	1,317	2,387	2,018
Complaints cancelled during the year	82	108	28**
Complaints pending at year-end	1,420	2,318*	2,513
Outcome of complaints			
Complaints discontinued during the year	449	108	652
Complaints completed during the year with findings	819	1,273	1,118
Total of complaints closed during the year	1, 268	1,381	1,770
Commissioner-initiated complaints			
Complaints carried over from the previous year	423	237	0
New complaints	393	0	1
Complaints closed during the year	579	237	0
Complaints pending at year-end	237	0	1
Report cards initiated during the year	17	10	***

* Figure adjusted after year-end to avoid duplication – 25 complaints received at the end of March 2008 were registered at the beginning of April 2008.

** We stopped using the "cancelled" category in June 2008 when we set up our new intake process. These 28 complaints were cancelled before this change was made. In the past, a complaint was registered upon receipt and then cancelled after we determined that it was not valid under the Act (for example, when it was made beyond the time allowed, or the complainant withdrew or abandoned it before the investigation began). As of June 2008, we register a complaint once we review it and obtain, where necessary, sufficient information to determine that it is a valid complaint. A complaint that is found not to be valid is now treated as a general enquiry.

*** The 2007–2008 report cards were completed during the following fiscal year and published in February 2009.

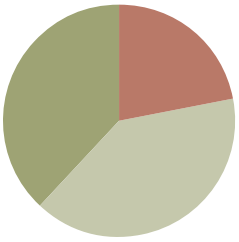
Outcome by type of complaint, 2008–2009



Outcome of administrative complaints (1303 complaints)

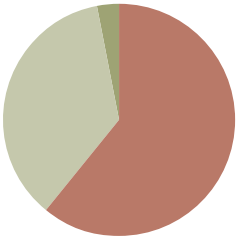
- Discontinued* 38%
- Not Substantiated 17%
- Resolved 45%

**290 complaints discountinued by a single complainant*



Outcome of refusal complaints (317 complaints)

- Discontinued 22%
- Not Substantiated 40%
- Resolved 38%



Outcome of Cabinet confidence exclusion complaints (150 complaints)

- Discontinued* 61%
- Not Substantiated 36%
- Resolved 3%

**Change in policy for registering Cabinet confidence complaints resulted in 82 discontinued complaints*

NOTEWORTHY INVESTIGATIONS

In addition to responding to access to information requests in a timely manner, institutions have an obligation to make every reasonable effort to help requesters get the information they seek. A number of our investigations in 2008–2009 uncovered instances of institutions not fully living up to their duty to assist requesters.

COURT CASES

The year 2008–2009 saw progress on several important court cases, including three cases pertaining to records held within ministers' offices or the Prime Minister's office; the Information Commissioner has appealed the Federal Court's decisions in these cases. The Commissioner has also become a party to a Federal Court review of the Canadian Broadcasting Corporation's failure to respond to a large number of access requests submitted in the fall of 2007. In addition, the Commissioner has asked permission to intervene in a case before the Supreme Court of Canada involving the constitutionality of a section of Ontario's freedom of information legislation.

PERFORMANCE AND SYSTEMIC ISSUES

In 2008–2009 we introduced our new methodology for the report cards process, through which we assess the performance of selected institutions in responding to access requests. The process conducted in 2008–2009 painted a poor picture of institutional performance, particularly in terms of delays and extensions.

The process also proved effective in identifying systemic issues that adversely affect the access to information system, including: widespread deficiencies in information

management, the prevalence of extensions, the negative impact of the consultation process, chronic gaps in human resources capacity and training, and a lack of effective executive leadership. We made a number of recommendations to the institutions surveyed and to the Treasury Board Secretariat to address these issues and help the institutions improve their performance.

We also did considerable work on two other systemic investigations—one resulting from a complaint by the Canadian Newspaper Association about delays and another about the discontinuance of the Coordinated Access to Information Request System.

LEGISLATIVE REFORM

Based on ongoing consultations with a wide range of stakeholders and experts in the field, the Information Commissioner presented 12 recommendations to the House of Commons Standing Committee on Access to Information, Privacy and Ethics in March 2009 to meet the urgent need to modernize the Act. These recommendations fall under the following themes: parliamentary review, providing a right of access to all, strengthening the compliance model, public education, research and advice, coverage and timeliness.

INFORMATION MANAGEMENT

We conducted a thorough assessment of our information management capacity and developed a comprehensive long-term information management and information technology (IM/IT) strategy designed to provide us with better tools and processes to carry out our investigations, handle access requests, and improve productivity and service delivery. As part of this initiative, we have developed procedures on how to manage and dispose of the huge volume of files associated with the thousands of investigations which we have carried out since 1983. IM/IT renewal efforts have also contributed to improving overall IT security, stability and management.

ACCESS TO INFORMATION AND PRIVACY REQUESTS

In 2008–2009, we received 113 requests under the *Access to Information Act*, and completed 109 of them within the year. We also received two requests under the *Privacy Act*, one of which we completed during the year. These figures represent an increase both in the number of requests received (20 percent) and in the resulting workload (414 percent). Despite this surge, we were able to maintain our record of responding fully within statutory timelines, while doing our best to assist requesters.

We were notified of 13 complaints about how we handled access requests. The Commissioner ad hoc, the Honourable W. Andrew MacKay, who independently investigates these cases, closed seven requests in 2008–2009, declaring six of them to be not substantiated. His annual report is annexed to our report.

PROMOTING THE RIGHT OF ACCESS TO INFORMATION

We use different means to maximize our influence on institutional compliance and promote requesters' right of access to information. The 25th anniversary of the Act in 2008 and Canada's Right to Know Week provided us with opportunities to enhance our communications, and to organize or take part in a number of special events. We provided advice and worked in collaboration with various access to information players, both at home and abroad, to share our unique perspective and further the cause of freedom of information.

2. THE NEW BUSINESS MODEL

Our 2007–2008 annual report set a bold new direction for the Office of the Information Commissioner.[1] This new direction involved making profound institutional changes to address inherent weaknesses that were significantly limiting our ability to do our job and to provide top-notch client service. We followed up in 2008–2009 with the introduction of a new business model tailored to meet our unique needs and challenges.

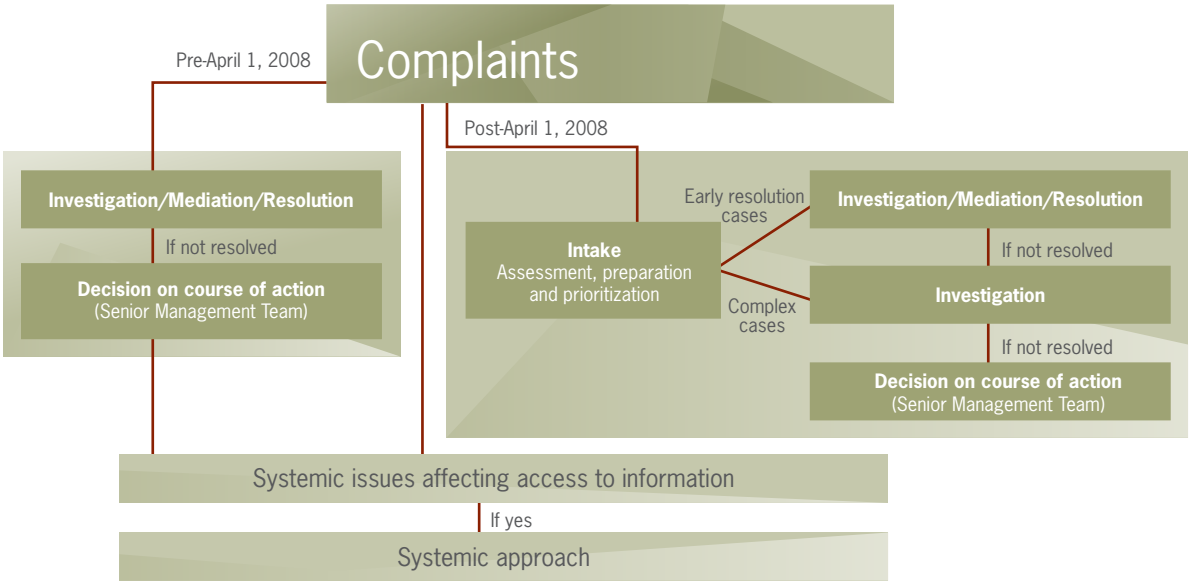
One of the major challenges we faced was a large and long-standing backlog of complaints. Despite considerable efforts over the years to reduce this inventory, the situation reached a critical point by the end of 2007–2008, due to the unprecedented number of complaints we received that year. This sudden increase put unmanageable pressures on operations, and it became evident that we had to change the way we worked or we would be unable to deliver on our mandate.

In 2008–2009, we developed a new business model to meet these challenges, and with the following goals:

- to streamline our investigative process to increase efficiency and timeliness so we can eliminate the inventory and prevent it from recurring;
- to adopt a strategic and proactive approach to addressing systemic issues and non-compliance; and
- to use a spectrum of tools that support our investigative and systemic actions to maximize compliance.

An improved investigative process

We undertook a critical exam of our key business processes and productivity levels based on case type and complexity, and did significant business re-engineering, to address case management issues that have contributed to the growing inventory. We introduced the resulting streamlined investigative process in the fall of 2008–2009 (see diagram below).



[1] *For more information, go to www.oic-ci.gc.ca/reports/2007-2008-e.asp*

PRE-APRIL 1, 2008 CASES

Our goal is to eliminate the older inventory of 1,594 cases by March 31, 2010. A multi-disciplinary team of experienced employees reviewed these cases and recommended the best strategies for completing them expeditiously. We then established a dedicated team, the Strategic Case Management Team, to implement these strategies, working closely with complainants and institutions. The team first worked on administrative complaints that it could complete quickly. This brought immediate and substantial results: in only four months, the team completed 489 cases, representing a 31 percent decrease in the inventory (see Chapter 3).

POST-APRIL 1, 2008 CASES

For post-April 1, 2008 cases, we now take a three-step approach.

First, to ensure that investigators do not spend time on administrative tasks—such as setting up files, delivering the notice of intent to investigate to the institution, and gathering initial information—, we process complaints through the **Intake Unit**. This unit does the initial assessment and preparation of complaints to be investigated. It reviews documentation related to the original access request and gathers information from the complainant and the institution to undertake the initial assessment. It also ensures that the complaint is made in accordance with the Act before it is processed any further.

MOVING QUICKLY ON PRIORITIES

One group of complaints involved access requests submitted to various institutions where extensions were taken. Using our new procedures, the Intake Unit determined that there was the possibility of significant loss of rights which could result from delays. The cases were immediately assigned on a priority basis.

The Intake Unit prioritizes cases that can be resolved quickly and easily, according to a set of criteria (see checklist on next page). It also identifies administrative efficiencies in the processing of complaints both for ourselves and for institutions with which we interact.

CANDIDATES FOR EARLY RESOLUTION?	WHAT'S THE PRIORITY?
Administrative complaints	Urgency
These complaints involve, for example, extensions, fees (particularly for photocopies), deemed refusals (delays beyond the times set out in the Act), and misdirected requests.	Are there crucial deadlines to meet, such as those for court cases? Is there a risk of loss of rights, or are broader human rights at stake? Are there concerns for public safety?
Exclusions	Impact
These complaints involve records to which the Act does not apply, such as those placed in library and archives for public use.	Does the case affect the public interest? Are there systemic issues involved? Does the file centre on national security or government accountability? Is there judicial interest?
Mandatory exemptions	Nature of the complaint
All complaints involving mandatory exemptions and those involving discretionary exemptions, when the file involves a low number of records, all of which are readily available. (Information may be exempted when, for example, it may compromise the safety of an individual. Personal information is also exempted.)	Is it an administrative complaint or one about a refusal due to an exemption or exclusion? How complex is the case? What volume of records is involved? What is the subject matter?
Other considerations	Other considerations
These include the probability of resolution and the location of the institution.	Is the statutory duty to assist at issue? How long has the file been registered? What are the complainant's priorities? Is there parliamentary interest?

Second, the **Early Resolution Unit** investigates cases that have been earmarked for early resolution by the Intake Unit. Through mediation and negotiation, it attempts to reach an early resolution of complaints to the satisfaction of the complainant and the institution.

EARLY RESOLUTION THROUGH NEGOTIATION

A case of multiple complaints from a single requester about time extensions emphasizes the benefits of an early resolution mechanism involving flexible approaches and alternative dispute resolution methods.

A complainant alleged that time extensions ranging from 240 to 365 days that the Canada Revenue Agency (CRA) invoked in 54 cases were excessive.

The extensions were invoked under paragraph 9(1)(a) of the Act, which means they must meet two criteria: that the request is for a large volume of records, or requires a search through a large volume of records, and that, consequently, meeting the original time limit would unreasonably interfere with operations.

In this case, CRA took the view that, because the complainant submitted multiple requests and was therefore responsible for a large percentage of the access to information office's workload, it had little option but to claim extensions in order to be able to process all of the requests.

All 54 complaints were assigned to one investigator, with the Early Resolution Unit, who met with CRA officials on a number of occasions to discuss their rationale for invoking these extensions. Through concerted efforts and negotiations with both the institution and the complainant, we were able to conclude our investigation within one week after receiving all pertinent documents from the institution. The complaints were resolved to everyone's satisfaction.

Third, we assign cases that do not qualify for early resolution, or those for which early resolution was not successful, to the **Complaints Resolution and Compliance team**. These more complex cases are advanced based on the priority established by the Intake Unit.

Our approach aims at achieving satisfactory results through mediated or negotiated outcomes, as early as possible in the review, and avoiding the need for more drastic, adversarial proceedings, which are both costly and time-consuming. However, for institutions that disregard the law or fail to take advantage of alternative case resolution, we will take the necessary action to respond to non-compliance.

NEW STREAMLINED APPROACHES FOR CABINET CONFIDENCES

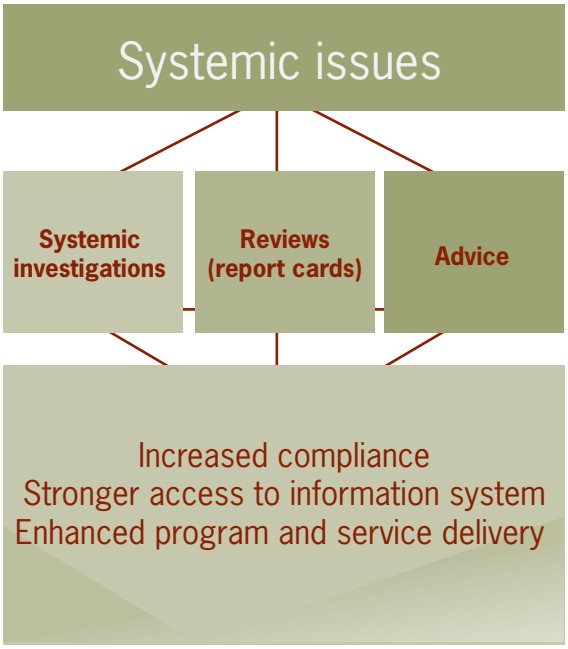
The Intake Unit reviewed processes in relation to complaints involving Cabinet confidences. Previously, we would open separate investigative files with the originating institution and the Privy Council Office's (PCO) access to information office, which would in turn notify Cabinet Confidences Counsel. The Counsel, which is responsible for verifying that records qualify as Cabinet confidences, would then contact the originating institution to initiate a second review of the records at issue.

Under a new, streamlined approach, we forward a copy of the notice of intent to investigate to the Counsel, with which we then work directly. We no longer initiate a separate complaint against PCO. This means that PCO's access to information office is no longer automatically involved and no longer needs to report the fact that it received complaints with respect to Cabinet confidences emanating from other institutions. This approach eliminates duplication of files among offices within PCO and the institution.

We decided to discontinue such duplicate complaints against PCO (82) and simply investigate the Cabinet confidence complaints made against the originating institutions. As a result, we have eliminated duplication and unnecessary administrative actions in our own office.

Strategic use of systemic actions

Many compliance problems cannot be solved adequately when treated in isolation, independent of the larger issues affecting the access to information system. To effect greater compliance across federal institutions and to reduce the number of complaints we receive, we approach certain problems with a more strategic and proactive approach. By integrating key information, observations and conclusions drawn from our own experience and that of our stakeholders, we can suggest more effective solutions and achieve better results.



As preventative or proactive actions, we review complaints and extension notices (for time extensions taken beyond 30 days) to identify systemic issues, or undertake a systemic investigation to formally address a problem hindering access to records of federal institutions. We also review and grade the performance of federal institutions in complying with the *Access to Information Act*. These assessments are called "report cards." These reviews provide information about the challenges, weaknesses, strengths of the federal institutions, and assesses what progress has been achieved. (More information on report cards and systemic issues is provided in Chapter 4.)

These actions enable us to develop expert and independent advice about the access to information implications of legislation, jurisprudence, regulations and policies. The Commissioner can then bring this unique perspective regarding access to information to parliamentarians, public servants, federal government institutions and the Canadian public.

Maximizing compliance

In a context of limited resources, maximizing compliance is sometimes best achieved through the use of a variety of tools that are interdependent and that also complement investigations and systemic actions. General application tools involve ongoing proactive efforts, directed at a broad range of stakeholders, to promote requesters' rights and develop partnerships. The aim is clearly to prevent non-compliance and to facilitate compliance. In contrast, specific application tools are directed toward individual parties in specific circumstances that result in or could lead to non-compliance.

To promote compliance, it is important that officials who are involved in the access to information process understand the basic principles and requirements of the legislation and related policies. They must also be aware of citizens' expectations regarding what government information should be available to them and how it should be disseminated in an increasingly sophisticated electronic environment. It is equally important that requesters be aware of and understand their rights and how to exercise them. Collaboration with important stakeholders at all levels is key for achieving these objectives. The Information Commissioner is the critical link between all players and can promote compliance through information and strategic partnerships.

In cases of potential or alleged situations of non-compliance, conducting investigations into matters affecting access rights often reaps the benefit of encouraging parties to comply without resorting to more drastic actions. Mediation and negotiation generally produce mutually satisfactory results that are less costly and less time-consuming than adversarial measures. However, it is important to note that means of suasion and resolution are balanced with the full range of adversarial tools at the disposal of the Commissioner in cases where vigorous enforcement is necessary to ensure compliance with the legislation.

The table below shows how our activities work together to achieve the greatest impact to maximize compliance.

Compliance continuum

Compliance through information and partnerships	Facilitating compliance	Responses to non-compliance	
		Suasion and resolution	Adversarial
• Annual and special reports to Parliament • Advice and representations to Parliament • News releases and media interviews • Speeches, presentations, information sessions and seminars • Input and representations to Central Agencies (e.g. the Treasury Board Secretariat) • Participation at access to information community events • Liaison with federal, provincial, territorial and international information and privacy commissioners • Liaison with national and international freedom of information communities and civil society groups • International parliamentary assistance • Website, blogs and podcasts • Right to Know Week	• Review of complaints to identify systemic issues • Systemic investigations (proactive) • Report cards • Review of extension notices • Consultations with access to information stakeholders, including institutions and users • Compliance programs • Case summaries and Commissioner's findings • Reference guides, information notices and best practices • Investigation guidelines (GRIDS) • Training	• Investigations and systemic investigations (reactive) • Early resolution • Well-founded complaints accepted • Commissioner-initiated complaints • Mediation and negotiation • Informal representations to senior officials • Commissioner's interpretations of policy positions • Reports of findings and recommendations • Special reports to Parliament	• Exercise of formal powers (e.g. subpoenas and hearings) • Non-resolved complaints • Federal Court actions • Interventions in court • Referrals for prosecutions
GENERAL APPLICATION		SPECIFIC APPLICATION	

3. INVESTIGATING COMPLAINTS

A core activity of our mandate is to review the complaints of individuals and organizations who believe that federal institutions have not complied with their access to information obligations. As explained in the previous chapter, we streamlined our investigative process in 2008–2009 to increase efficiency and timeliness. A key priority was to reduce cases accumulated prior to April 1, 2008 and to prevent the recurrence of large inventories in the future.

The charts and figures in this chapter set out our complaints caseload for 2008–2009 from three perspectives: the complaints we registered, the work we did to process them and the outcomes of our investigations. They also illustrate how our new investigative process, which was fully implemented in mid-November 2008, has contributed to substantially reducing our pre-April 1, 2008 inventory.

In addition, while working toward decreasing our turnaround times, we introduced changes in our intake procedures to reduce any unnecessary delays and allow our investigators to concentrate on investigations without being distracted by administrative functions. We also notify all parties earlier in the process, which gives institutions an opportunity to begin addressing the complainant's issues at an earlier stage.

Facts and figures

Table 1 summarizes our caseload for 2008–2009 and compares it to the two previous years. It shows the extent of the challenge we were facing at the beginning of the year with a total of 2,293 cases carried over from the previous year. This carry over partially resulted from the surge in the number of new complaints we experienced in 2007–2008—an increase of more than 80 percent over the previous year—which has since remained roughly at the same level.

We also registered 2,018 new cases in 2008–2009. Despite this substantial workload and limited investigative resources, we were able to close 1,770 complaints in 2008–2009, compared to 1,381 complaints in 2007–2008.

More importantly, as suggested by Figure 1, there are promising signs that, starting in August 2008, the implementation of our new investigative process has contributed to halting the growth of our inventory of ongoing cases.

Table 1. Summary of caseload, 2006–2007 to 2008–2009

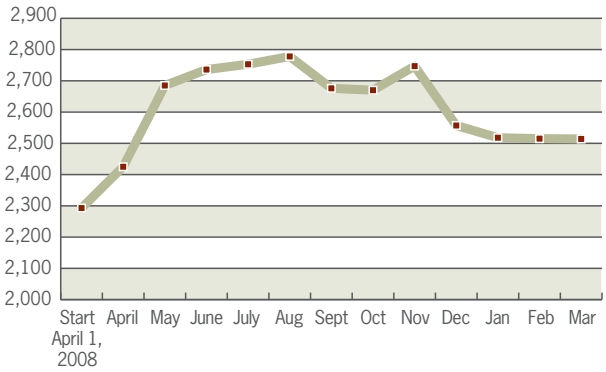
	2006–2007	2007–2008	2008–2009
Complaints received			
Complaints carried over from the previous year	1,453	1,420	2,293*
New complaints	1,317	2,387	2,018
Complaints cancelled during the year	82	108	28**
Complaints pending at year-end	1,420	2,318*	2,513
Outcome of complaints			
Complaints discontinued during the year	449	108	652
Complaints completed during the year with findings	819	1,273	1,118
Total of complaints closed during the year	1, 268	1,381	1,770
Commissioner-initiated complaints			
Complaints carried over from the previous year	423	237	0
New complaints	393	0	1
Complaints closed during the year	579	237	0
Complaints pending at year-end	237	0	1
Report cards initiated during the year	17	10	***

* Figure adjusted after year-end to avoid duplication—25 complaints received at the end of March 2008 were registered at the beginning of April 2008.

** We stopped using the "cancelled" category in June 2008 when we set up our new intake process. These 28 complaints were cancelled before this change was made. In the past, a complaint was registered upon receipt and then cancelled after we determined that it was not valid under the Act (for example, it was made beyond the time allowed or the complainant withdrew or abandoned it before the investigation began). As of June 2008, we register a complaint once we review it and obtain, where necessary, sufficient information to determine that it is a valid complaint. A complaint that is found not to be valid is now treated as a general enquiry.

*** The 2007–2008 report cards were completed during the following fiscal year and published in February 2009.

Figure 1. Trends in the status at month end of the inventory of all active complaints, 2008–2009*



** The inventory includes one Commissioner-initiated complaint*

NEW COMPLAINTS IN 2008–2009

As in previous years, the complaints we received in 2008–2009 fell into three broad categories: administrative complaints, refusal complaints and complaints related to exclusions for Cabinet confidences.

- Administrative complaints generally pertain to time extensions or delays from institutions in responding to access requests, or to the fees they propose to charge.
- Refusal complaints include cases of exemptions—where an institution withheld information under specific provisions of the Act—, incomplete responses or requests for which no relevant documentation was found.
- Cabinet confidence exclusion complaints relate to situations where access to records was refused because they contain Cabinet confidences, which are excluded from the Act and which, consequently, institutions may not release.

Figure 2 sets out the complaints we registered in 2008–2009 according to these three categories. Of the 2,019 new complaints (2,018 complaints registered and one Commissioner-initiated complaint), 52 percent were administrative complaints—a relatively high percentage which demonstrates the persistence of system-wide or recurrent issues.

Figure 2. Types of complaints registered, 2008–2009

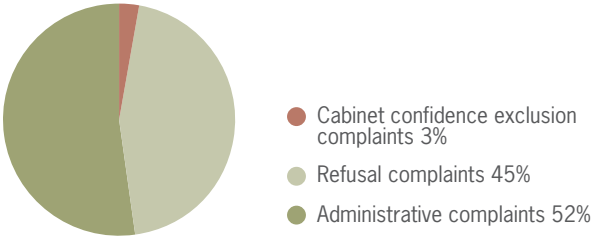


Table 2. New complaints in 2008–2009, by institution*

Canada Revenue Agency	302
National Defence	226
Canadian Broadcasting Corporation	221
Privy Council Office	198
Royal Canadian Mounted Police	106
Department of Foreign Affairs and International Trade	94
Industry Canada	79
Correctional Service Canada	60
Environment Canada	54
Transport Canada	52
Public Works and Government Services Canada	52
Citizenship and Immigration Canada	51
Canada Post Corporation	51
Health Canada	44
Telefilm Canada	39
Others (66 institutions)	390
Total	2,019

** Includes one Commissioner-initiated complaint*

PROCESSING AND DISPOSITION OF COMPLAINTS

Figure 3 shows the turnaround times for the 1,770 complaints we closed in 2008–2009. The average for the year was 13 months. This is mainly due to the fact that the huge inventory contained a high number of files that were already several years old, which skewed the calculation of the turnaround times.

As we work to eradicate the old inventory and the new investigative process in place allows us to gain in efficiency, we expect to substantially shorten our average turnaround times next year. To this end, the upcoming results of an internal audit which the Information Commissioner has requested on our new intake and early resolution methods, will guide us in making further adjustments. Moreover, as pre-April 1, 2008 files are now dealt separately from the new caseload, our statistics next year will shed more light on the effectiveness of the investigative process on improving timeliness.

Figure 3. Turnaround times for complaints closed, 2008–2009

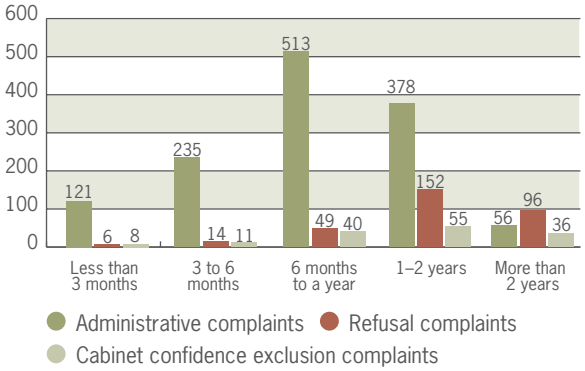
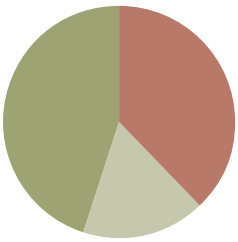


Figure 4 breaks down the outcomes of complaints closed in 2008–2009 by type of complaint. As in previous years, we found refusal complaints and Cabinet confidence exclusion complaints to be not substantiated more often than we did administrative complaints.

We also note a much higher proportion of discontinued complaints than in previous years. This can be explained largely by the fact that our inventory reduction strategy focused on quickly following up on the high number of time-related complaints (delays and time extensions) that had piled up in the inventory. In many instances, we received confirmation that the institutions had responded to the requesters some time after the complaints were filed, and the complaints therefore were discontinued. In another case, we were able to successfully mediate an issue which resulted in the withdrawal of 290 administrative complaints at once.

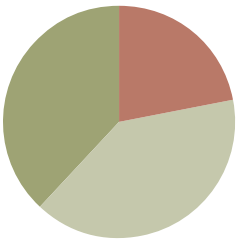
Figure 4. Outcome by type of complaint, 2008–2009



Outcome of administrative complaints (1303 complaints)

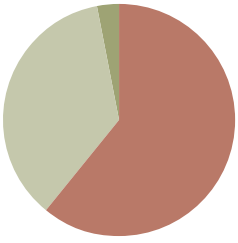
- Discontinued* 38%
- Not Substantiated 17%
- Resolved 45%

**290 complaints discountinued by a single complainant*



Outcome of refusal complaints (317 complaints)

- Discontinued 22%
- Not Substantiated 40%
- Resolved 38%



Outcome of Cabinet confidence exclusion complaints (150 complaints)

- Discontinued* 61%
- Not Substantiated 36%
- Resolved 3%

**Change in policy for registering Cabinet confidence complaints resulted in 82 discontinued complaints*

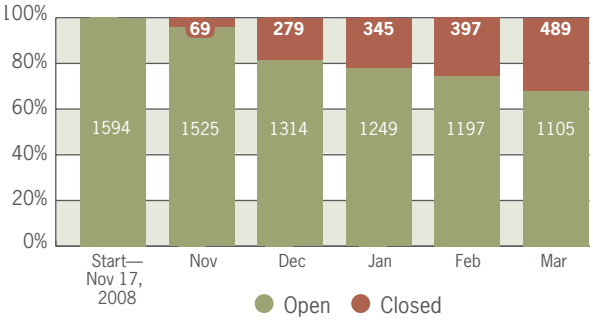
Table 3. Complaints completed with findings in 2008–2009, by institution

Institution	Complaints Overall	With Merit
National Defence	218	150
Canada Revenue Agency	149	125
Privy Council Office	75	28
Royal Canadian Mounted Police	62	24
Environment Canada	44	24
Department of Foreign Affairs and International Trade	41	34
Canada Post Corporation	32	28
Health Canada	30	27
Public Safety Canada	29	18
Public Works and Government Services Canada	27	19
Department of Justice Canada	27	7
Industry Canada	26	4
Atomic Energy of Canada Limited	26	24
Canada Border Services Agency	24	15
Correctional Service Canada	22	15
Transport Canada	22	20
Canadian Heritage	22	13
Others (46 institutions)	242	150
Total	1,118	725

PRE-APRIL 1, 2008 INVENTORY

As previously mentioned, we have committed to eliminating our pre-April 1, 2008 inventory of complaints by March 31, 2010. To this end, we were able to close half of it this year – 1,167 complaints. We started the year with 2,293 complaints that predated April 1, 2008, cancelled 21 of them and closed 678 cases between April and mid-November 2008. In mid-November, the remaining 1,594 cases from this inventory were moved to a dedicated team, which was successful in closing 489 more cases (or 31 percent) in about four months. Figure 5 illustrates the steady decrease of the pre-April 1, 2008 inventory, starting in December 2008.

Figure 5. Status at month end of the pre-April 1, 2008 inventory, November 2008–March 2009



Noteworthy investigations

Each year, a number of our investigations stand out from the others for one reason or another. Often it is their complexity or the light they shed on the access to information system that makes them noteworthy.

In addition to responding to access to information requests in a timely manner, institutions have an obligation to make every reasonable effort to help requesters get the information they seek. This "duty to assist" became an obligation under the *Access to Information Act* in 2007. A number of investigations in 2008–2009 uncovered instances of institutions not fully living up to that obligation.

"DOUBLE DOUBLE"

This investigation showed what some institutions are doing, against the spirit of the Act, to buy time to respond to requests.

Background

Subsection 9(1) of the Act allows institutions to extend the time limit to respond to a request for three reasons: the request is for a large volume of records, or requires a search through a large volume of records, and, as a result, meeting the 30-day deadline would interfere with operations; the institution needs to conduct consultations that cannot be completed within the original time limit; or the institution needs to consult a third party, which requires the institution to follow a formal notification process.

A requester asked Health Canada for drug submissions information. He subsequently complained to us about the length of a time extension Health Canada took to conduct consultations on his request. We discovered during our investigation that Health Canada had implemented a practice of claiming an extension to consult third parties (which is required to find out whether they consent to the disclosure of their information as described in subsection 20(1) of the Act) informally (citing the second reason, above) to give itself more time to complete the review of the technical records, and then take a second extension to consult the same third parties under the formal notification process.

Resolving the complaint

To evaluate whether institutions claimed the proper paragraph of section 9 for the extension, investigators usually verify the status of the organizations or individuals the institutions consulted. In this case, we also had to review the records to satisfy ourselves that the institution used the proper provision of the Act. Our review confirmed that consultations with third parties were required. However, the institution did not follow the proper process. This rendered the extension invalid, and the initial 30-day deadline remained unchanged.

Lessons learned

Although institutions need to consult third parties, it was never intended under the Act that institutions could use double extensions to give third parties more time to review records. Institutions must follow the specific process to notify third parties described in subsection 27(1), which includes claiming the extension under paragraph 9(1)(c) to consult third parties when the records pertain to section 20.

PLEASE HOLD!

This investigation also uncovered innovative, but not advisable, action on the part of an institution to gain time to respond to a request.

Background

A requester complained about a 300-day time extension that Industry Canada claimed. In investigating this complaint, we discovered that the institution used "holds" during the processing of the request in order to extend the due date. The "hold" at issue was taken during the Christmas holidays and resulted in the due date being extended by two days. Industry Canada maintained that the requester had agreed to this. We could find no written confirmation of this on the file, although, when we contacted the requester, he confirmed that he had agreed to the delay.

Resolving the complaint

Our position is that an institution cannot put a request on hold for this reason. It may do so, for example, to clarify the request with the requester or when issuing a fee estimate. We informed the complainant that although we did not object to such arrangements being made with his consent, Industry Canada could not alter or modify the legal due date.

Lessons learned

While we recognize the resource shortages that lead institutions to search for creative ways to buy time in processing access requests, institutions have a legal obligation to respect the timeframes set out in the Act.

WHERE'S THE RECORD?

This investigation highlights the importance of regular communications between institutions and requesters—particularly when requested information is about to be published on the Web.

Background

Under section 26 of the Act, institutions may refuse to release records that they are intending to publish within 90 days of the request being made.

The requester asked Human Resources and Skills Development Canada (HRSDC) for copies of the deliverables resulting from various contracts. HRSDC refused to disclose all the requested records, since it was going to be publishing all of them within 90 days. The requester complained to us about this complete refusal.

Resolving the complaint

During our investigation, we learned that HRSDC did, in fact, publish the information requested online within 90 days of the request, which was before we received the complaint. However, HRSDC did not inform the requester of this, nor that some of the information was going to be posted on the Library and Archives Canada website.

HRSDC was of the view that it had properly applied the publication exemption and left it to us to tell the requester where he could obtain the requested information. We, in turn, informed HRSDC that it was its responsibility to inform the requester, which it did and also provided the information he had requested.

Lessons learned

We were left to wonder about the understanding institutions have of their duty to assist requesters. We believe that in circumstances such as those described here, the obligation includes the duty to inform requesters of when and how the information will be published if they know this when they refuse to disclose the information.

IT'S GOING TO COST ME HOW MUCH?!

We receive many complaints about fees. This investigation underlines how important it is for institutions to carefully estimate the time required to prepare records for release to ensure fees are not a barrier to access.

Background

Preparation involves severing from records information that needs to be protected when the records are released. The Act and the regulations allow institutions to charge for preparation, but do not specify what constitutes preparation time. Guidelines exist to assist institutions in making this determination.

In response to a request, the Department of National Defence (DND) asked the requester for $2,650 in preparation fees. The requester complained to us, since he felt strongly that the institution had essentially refused him access to the information he sought by charging such high fees. He also took issue with the fact that the Department did not contact him to ascertain whether he would be willing to reduce the scope of the request to reduce or eliminate the fees.

Resolving the complaint

The Department was using a benchmark of two minutes per page to prepare the requested records, while recognizing that processing varies by file. However, according to DND,

the benchmark is only an estimate and so it would reimburse the requester if the processing took less time or absorb the extra costs if it was longer.

We asked DND to demonstrate the preparation process using the ATIPIMAGE software. The demonstration showed that the request could be prepared more quickly than two minutes a page. Consequently, DND reduced the fee estimate by half.

Lessons learned

Institutions have a legislated obligation to assist requesters at all stages of the access to information process. The possibility of a large fee presents the perfect opportunity for an institution to work with a requester to ensure his or her access rights are respected.

Other institutions, including the Department of Foreign Affairs and International Trade Canada (DFAIT), are closing or abandoning requests when they do not hear back from requesters within a certain timeframe after issuing fee estimates. In some instances, however, the institutions waited months or years before sending the estimates, while having little or no contact with the requesters in the meantime.

We are currently investigating complaints against DFAIT dealing with preparation fees and are monitoring practices in other institutions.

DUE DILIGENCE IN THE DIGITAL WORLD

The investigation highlights the need for institutions to take considerable care when introducing new technology or processes for responding to requests.

Background

Along with several government institutions, Public Works and Government Services Canada (PWGSC) frequently discloses information electronically. In August 2007, PWGSC became aware that information it redacted from documents and provided in electronic format to requesters might have been at risk of being recovered by individuals with technical expertise. We were asked to investigate when the legal representative of a company complained that its client might have incurred serious commercial damages as a result of the possible breach.

Resolving the complaint

With PWGSC's cooperation, we confirmed that a problem had, indeed, occurred with the transfer of information onto CD-ROM. As soon as PWGSC had become aware of the problem, it had stopped the practice of transferring information onto CD-ROM and had undertaken a full review of its processes. It had also identified 138 files that might have been at risk and reviewed all of the documents to assess the level of risk for each one. It had then notified all of the affected parties and, whenever possible, retrieved the CD-ROMs, and provided the requested records again.

We reported to the complainant that, although an error had occurred in the exporting of information onto CD-ROM, PWGSC had since changed its practice of burning CD-ROMs and was now using an appropriate format. We also reported that the potential disclosure of the client's information by PWGSC in the three access requests concerned was due to a technical error and, as such, was inadvertent and unintentional. In summary, our investigation satisfied us that PWGSC had provided timely notice of the potential disclosure, that it had properly and fully investigated the matter, and that it had taken the necessary steps to correct the problem.

Lessons learned

Government institutions continuously search for ways to process access requests in the most efficient and timely manner. Burgeoning technology in the area of electronic document redaction has provided institutions with a faster, more efficient way to remove sensitive information from documents. However, the complexity of electronic document formats increases the possibility that information exported to CD-ROM may retain sensitive information. The incident at PWGSC indicates that the potential for inadvertent disclosure of sensitive information is real.

While advancements in technology can prove useful, institutions must carefully assess and mitigate risks before introducing new software and procedures. To underline the importance of this, the Treasury Board Secretariat sent an information notice to all access to information and privacy directors on October 12, 2007. The notice alerts institutions to the potential risks of using electronic document redaction and urges institutions to ensure that they carefully test software and follow procedures governing its use to prevent the inadvertent disclosure of sensitive information.

COMMUNICATION IS KEY

This investigation highlights most clearly the potential consequences of poor communications between institutions and requesters.

Background

This investigation concerned a request that the Department of National Defence (DND) received for a large number of records which resulted in a $500 preparation fee. The requester refused to pay the fee and abandoned the request, but only after the access to information office had sought and received the records from departmental officials.

The requester then made 37 new requests for the same or similar information. Upon receipt of these requests, DND claimed an extension under paragraph 9(1) (a) of the Act on the grounds that it had already sent the records back to the originating office and implying that meeting the original deadline, given the large number of records involved, would interfere with its operations.

A few days later, the requester submitted 13 more requests for the records that were the subject of the first request. In response, DND advised the requester that it considered these records to be duplicates of those subject to the 37 requests. Therefore, it would respond to the most recent requests based on responses to the previous ones, and would abandon the last 13 requests submitted. The requester complained to the Information Commissioner about the processing of his requests.

The institution admitted during the course of the investigation that if it had had a better relationship with the requester, it would have been able to resolve some of the issues before he complained.

Resolving the complaint

The requester admitted that his motivation for abandoning his initial request was to be able to take advantage of the five free hours the Act allows per request by separating the requests. We dealt with whether this is allowed in our 1994–1995 annual report, concluding that as long as all of the requirements for a valid request exist, the institution must accept the individual requests. In the current case, then, the requester was within his rights to make other requests in place of his initial request.

The larger question is whether the institution had the right to abandon the subsequent 13 requests, claiming that they were duplicates. However, since the investigator was able to negotiate an agreement between the complainant and the institution, this question was never answered. The complainant agreed to discontinue his complaints and the institution agreed to provide a refund of $65 in the form of a "credit" towards the complainant's next 13 requests.

Lessons learned

Although the complaints in this case were discontinued following a negotiated agreement between the parties, the investigation showed that when requesters and institutions refuse to communicate, the situation can escalate. Had the institution communicated with the requester in an attempt to help to reduce the $500 fee, the subsequent requests would not have been necessary. At the same time, the requester—in submitting 50 requests within a few days—stretched the limited resources of the institution, which was unable to deal with the extra workload. An efficient and workable access to

information system requires both the assistance of institutions and the reasonableness of the requesters.

THE GASPARD CASE

This investigation shows how important it is for institutions to look at the specifics of each request before deciding on a course of action.

Background

This investigation involved a request for access to all the Supreme Court of Canada and Federal Court of Canada decisions in the Department of Justice Canada's GASPARD database—an electronic management information system that the Department uses for research in support of litigation activities. The requester asked that the 30,000-plus decisions be provided on CD-ROM.

The records the requester was seeking are available free of charge on the two courts' websites. In light of this, the institution advised the requester that it would not be providing the records under paragraph 68(a) of the *Access to Information Act*, which refers to published material or material available for purchase by the public. The requester complained to the Information Commissioner about this response.

Resolving the complaint

The institution claimed that the information was free online to the public and that to produce it, it would have had to hire a consultant at a cost of approximately $10,000—a cost it was not willing to incur.

The mitigating factor in this investigation, however, was that the requester was an inmate and did not have access to the Internet. He did have access to a stand-alone computer and could therefore access information on CD-ROM. The issue that stands out, of course, is whether it could be argued that the requested information was not, in fact, available to an interested member of the public, of which the inmate was one. In the course of our investigation, the Department conceded that the information was not readily available to the requester and agreed to recalculate the cost to produce it. The investigator reviewed the new calculations, agreed they were reasonable and informed the requester.

Lessons learned

This investigation showed that institutions must be careful not to invoke an exclusion simply as a barrier to access. In this case, the information excluded was not available to the requester, although it would have been under normal circumstances. On occasion, institutions must consider the special circumstances of a request or a requester before refusing access, in order to ensure that they are truly respecting requesters' access rights.

4. ADDRESSING PERFORMANCE AND SYSTEMIC ISSUES

We have various tools at our disposal to effect greater compliance among institutions with their obligations under the Act. In most cases, we use traditional enforcement actions, such as investigating individual complaints. However, other situations may warrant looking at the root causes of a larger problem, as is shown below.

Reviews (report cards)

This year marked the introduction of a new methodology for the report cards process. In the mid-1990s, when we introduced the report cards as a way to measure institutional performance, we tended to focus on one performance indicator: an institution's rate of deemed refusals (requests not responded to within 30 days of receipt or within the extended timelines provided for in the Act). This approach had the advantage of being simple and objective. It boiled the question of institutional performance down to one measure that was easy to explain, understand and calculate. The rate of deemed refusals remains a very important measure, especially in today's fast-paced digital environment. However, the concept of good performance under the Act is multi-faceted.

Over the years, the annual publication of the report cards has had a positive impact. We initially observed a dramatic reduction in the number of delay complaints. We also know of many cases of institutions that had received low grades making extraordinary efforts to achieve higher scores in subsequent years. The effectiveness of the report cards also caught the interest of one of our provincial counterparts. In February 2009, the Information and Privacy Commissioner of British Columbia published his first report on the performance of provincial institutions under that province's access to information legislation.

Although there is no doubt that our reviews have been effective in the past, their effectiveness has waned of late. One reason may be that they did not provide the whole picture of how the institutions performed. Consequently, we redesigned the process to gather information that would help us shed light on contextual factors, while keeping a strong focus on whether institutions are responding to requests within the statutory timelines. We paid particular attention to data on the use and duration of time extensions, the rising number of consultations and layers of approval, and their impact on delays. We also identified best practices for institutions to emulate.

In keeping with our new business model (see Chapter 2), we reported on system-wide trends affecting the capacity of institutions to fulfill their obligations under the Act but that are often beyond their control. We also identified areas to improve our work in relation to the report cards process.

On February 26, 2009, we tabled a special report to Parliament including a comprehensive report card for each of the 10 institutions we reviewed this year (see chart).[2]

[2] *For more information, go to www.oic-ci.gc.ca/specialreports/2007-2008_special_report_INSTITUTIONAL_REPORT_CARDS-e.asp*

Institution	Overall performance rating	
Canada Border Services Agency	★★½	Below average
Department of Justice Canada	★★★★★	Outstanding
Department of National Defence	★★½	Below average
Foreign Affairs and International Trade Canada	★★	Below average
Health Canada	★★	Below average
Library and Archives Canada	★★★★½	Above average
Natural Resources Canada	★★★½	Average
Privy Council Office	★★★	Average
Public Works and Government Services Canada	★★	Below average
Royal Canadian Mounted Police	★★	Below average

As the chart shows, 6 out of the 10 institutions we assessed performed below average. Reasons varied but generally included excessive workload, accumulated backlogs, lack of resources and inefficient processes. Our most significant finding was that the 30-day timeline intended by Parliament for institutions to respond to requests is becoming the exception instead of the norm. Our analysis confirms what Canadians have been experiencing: it takes a long time to obtain information from institutions. Only 48 percent of the requests are being answered within 30 days and 66 percent within the extended times allowed under the Act. Given the requirements of the Act, we should have found that a large number of requests are answered within 30 days and, where time extensions are needed to complete the processing of requests, 100 percent are answered within statutory timelines.

Based on our findings, we outlined a number of changes that need to be made to ensure that institutions live up to their access to information obligations, including the following:

- allocate adequate and permanent resources to access to information units;
- abide by the obligation to notify the Information Commissioner of every time extension taken beyond 30 days;
- review processing methods for information requests (including approvals) to improve efficiency and timeliness;
- improve tracking and reporting mechanisms, particularly with respect to processing time, extensions and consultations; and
- ensure that requesters are well informed of their rights to complain to us.

Institutions have provided their action plan to address these recommendations and we will monitor their progress in 2009–2010.

Through the report cards process, we also identified a number of system-wide issues that significantly affect access in general and that require urgent change. These issues, which are discussed in detail in our special report, include widespread deficiencies in information management, the prevalence of extensions, the negative impact of the consultation process, chronic gaps in human resources capacity and training, and a lack of effective executive leadership in the area of access to information.

The strongest administrative recommendations in the special report call on the Treasury Board Secretariat to do the following:

- properly assess, resource and improve information management practices throughout government;
- improve the statistical data collected to provide a more accurate picture of institutional performance;
- develop an integrated human resources action plan that will address current gaps in access to information resources; part of the solution requires professionalizing access personnel by establishing a formal training program and certification standards; and
- review and improve the criteria under the Management Accountability Framework for measuring the overall performance of institutions in meeting their obligations under the Act.

Finally, we will publish a three-year plan for our performance reviews, starting in 2009–2010. The report cards process is about providing constructive criticism in order to encourage compliance with the Act. We believe that a three-year plan will assist federal institutions in conducting their operations in accordance with the Act and, hopefully, will instill self-discipline across the system. The plan will provide advance notice to institutions, allowing them sufficient time to adequately prepare for a review.

Identification of issues

Identifying systemic issues requires us to be aware of trends and recurring patterns in the access to information system. To gather information on these, we scan various sources, such as the complaints we receive, extension notices and written responses to our report cards. We combine that information with observations and conclusions drawn from our own experience and that of our stakeholders to look beyond the symptoms and understand the underlying problem.

AN EXAMPLE: TIME EXTENSIONS

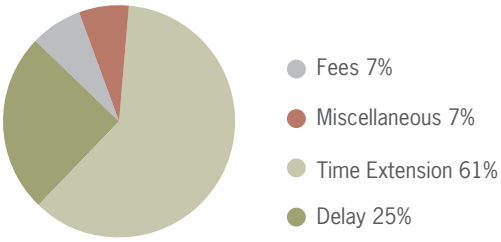
Federal institutions must complete access to information requests within 30 days of receiving them or take a time extension. Institutions may only take extensions under the specific conditions described in section 9 of the Act. In addition, extensions must be for a *reasonable* period of time. The use and length of these extensions are not otherwise constrained.

Statistics prepared by the Treasury Board Secretariat for 2007–2008 give a sobering but not alarming picture of the use of extensions: overall, institutions extend 27 percent of requests.[3] This fact runs counter to the evidence we found in our report cards process, analysis of the complaints we receive and feedback from stakeholders. We found that time extensions are becoming the norm rather than the exception.

Our data show that of all the complaints we received in 2008–2009, 52 percent were administrative ones, about time extensions, deemed refusals, fees and others. As the figure below illustrates, complaints about time extensions represent the largest proportion of administrative complaints. Moreover, a high ratio of administrative complaints is resolved with merit (see Figure 4 in Chapter 3).

[3] *For more information, go to www.infosource.gc.ca/bulletin/2009/b/bulletin-b03-eng.asp*

Figure 1. Breakdown of administrative complaints, 2008–2009



The report cards process brought to light a disturbing trend toward the greater use of extensions and for longer periods of time. This increase could be the result of chronic understaffing of access to information units, deficiencies in records management, tactics to prevent deemed refusals or simply a weak compliance model with limited checks and balances.

Given the inconsistencies in the data available on extensions, we looked more closely at the Treasury Board Secretariat statistics and found, controlling for extreme values, that around 40 percent of the remaining requests were extended.[4] These statistics confirm what we have observed thus far: it takes longer to process access requests today than in previous years, in part because most extensions are for periods beyond 30 days.

As a result, we will closely monitor the notices that institutions have to submit to us about the time extensions they take over 30 days, and we will investigate the use and duration of time extensions.

Systemic investigations

In 2008–2009, we did considerable work on two other systemic investigations. One resulted from a complaint from the Canadian Newspaper Association and the other focused on the Coordination of Access to Information Requests System.

DO SECRET RULES LEAD TO DELAYS?

In September 2008, we published the findings of an investigation into allegations by the Canadian Newspaper Association (CNA) that federal institutions were applying secret rules for processing media requests for records under the *Access to Information Act*.[5] The CNA suggested that these rules resulted in systematic discrimination and unjustifiable delays in the processing of media requests.

We first sought to find out whether institutions treated access requests from the media according to secret rules or subjected them to some other form of systematic discrimination. We also examined whether the media's requests were unfairly and unjustifiably delayed. Our investigation looked at the period from April 1, 2003, to March 31, 2005.

Although we were unable to conclude that secret rules existed or that systematic government-wide discrimination against the media took place, we found that institutions that label access requests as "sensitive," "of interest" or "amber light," or with some other marker indicating special handling, tend to delay requests for unacceptably long periods. We also found that the media are not the only ones to encounter such delays. Requests from parliamentarians, organizations, academics and lawyers are also delayed.

[4] *For example, Citizenship and Immigration Canada received 11,434 requests in 2007–2008, which represents 37 percent of all access to information requests received in Canada. It only extended 6 percent of these requests.*

[5] *For more information, go to www.oic-ci.gc.ca/findings/CNA2008-e.asp*

To resolve the CNA complaint, we made three recommendations (see box). The President of the Treasury Board and the heads of all 21 institutions investigated agreed to follow our recommendations.[6] We also followed up with the institutions in early 2009, which elicited various replies.

RECOMMENDATIONS

- Subject to section 9 of the Act, any government institution that categorizes or labels access requests in any way that may lead to any form of special handling shall undertake not to delay the processing of these requests.
- The President of the Treasury Board shall undertake a study of how the institutions that categorize or label access requests for special handling with no detriment to the timely processing of access requests, organize the process, with a view to issuing best practices to all government institutions.
- The Treasury Board Secretariat, as of 2009–2010, shall start to collect statistics from all government institutions to allow the monitoring of this system of categorization of access requests and how it affects response times.

Some institutions stated once again that they do not label requests for special handling. Others confirmed that although they do label requests, this does not delay the disclosure of information.

Two institutions clearly demonstrated their commitment to avoid delays. **Citizenship and Immigration Canada** reviewed their processes and eliminated several review and approval stages. Delegation of authority was assigned at various levels within the access to information unit to expedite decision making. The institution is also conducting audits and analyses of late files to develop strategies to identify any deficiencies and improve compliance. **Indian and Northern Affairs Canada** conducted an audit and was able to confirm that the "preparation of any communications package does not delay the release date to the applicant, the request is finalized whether Communications has completed its communications package or not." By contrast, **Health Canada** has implemented solutions that will only decrease or reduce delays. This means that the institution will continue to fail to meet legal deadlines for its "highly sensitive" files. We intend to follow up with Health Canada in 2009–2010.

The Treasury Board Secretariat is working on publishing a list of best practices and is reviewing its collection of government-wide statistics to incorporate data that will facilitate determining how the categorization of access requests affects response times.

[6] *See Appendix A of our findings, at www.oic-ci.gc.ca/findings/CNA2008-e.asp*

In our opinion, there is nothing inherently wrong with labelling access requests as "sensitive," "of interest" or "amber light," or with some other marker indicating special handling. However, if federal institutions choose to handle certain access requests in a special way, the following suggestions should prevent delays in releasing information.

- Special handling of access requests should not create additional layers of approval. Not only does this situation run the risk of causing delay, it may also impede on the authority delegated to the access to information director. There is evidence that, even though access to information directors have delegated authority, senior officials override it.
- Content of the request should be the only factor considered in labeling a request for special handling. Institutions should not discriminate according to the requester or source of the request.
- The institution should narrowly define categories of requests deemed of interest so that they represent the exception rather than the norm.
- The source of the access request should not be identified outside of the Access to Information Office unless the information is necessary to locate records.
- It should be clear that communications requirements such as the preparation of a communication plan or media lines must not delay the release of the records.
- It should also be clear that records should be forwarded to the requester as soon as processing has been completed since timely disclosure can result in releasing information prior to statutory deadlines.

We will continue to monitor the situation. We could decide to investigate the issue further if institutions do not improve their practices in this area.

BECAUSE CANADIANS CARE...

At year-end, we were in the final stages of completing our investigation into complaints filed as a result of the Treasury Board Secretariat's decision to no longer require institutions to update the Coordinated Access to Information Request System (CAIRS). The investigation will determine whether the public's right to know has been adversely affected by this decision.

The discontinuance of CAIRS elicited considerable negative response. The decision was cited in the media as another example of the government's lack of commitment to openness and transparency. Regular users of the system demanded that the system be restored. In its *Sixth Report to Parliament*, presented to the House on May 7, 2008, the House of Commons Standing Committee on Access to Information, Privacy and Ethics deplored the discontinuance of CAIRS, and demanded that it be reinstated and made widely accessible free of charge, as a tool to promote transparency and accountability.[7]

We will issue the findings of our investigation in 2009–2010.

[7] *For more information, go to www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3471409&Language=E&Mode=1&Parl=39&Ses=2*

5. ADVANCING THE CASE FOR TRANSPARENCY BEFORE THE COURTS

A fundamental principle of the *Access to Information Act* is that decisions on disclosure of government information may be reviewed independently of government: by us when we investigate complaints and by the Federal Court of Canada.

When the Information Commissioner concludes that a complaint against a federal institution is substantiated and makes a formal recommendation to disclose records that the institution does not follow, the Commissioner may, with the complainant's consent, seek an order from the Federal Court to compel the institution to comply.

The Information Commissioner may also seek the Federal Court's permission to intervene in cases that raise issues of significance to the interpretation of the Act or to freedom of information in general.

Progress on ongoing cases

This year saw progress on a number of important ongoing legal cases, as described below:

- three cases pertaining to records held within ministers' offices or the Prime Minister's Office, and a case, heard at the same time as these three, pertaining to the agendas of a former Prime Minister, which the Prime Minister's Office shared with a government institution;
- a case dealing with the Information Commissioner's powers to issue confidentiality orders during investigations; and
- a case in which the Information Commissioner intervened involving the Privacy Commissioner's investigative powers under private sector legislation.

CONTROL OF RECORDS

Canada (Information Commissioner) v. Canada (Minister of National Defence), (T-210-05); *Canada (Information Commissioner) v. Canada (Prime Minister)*, (T-1209-05); *Canada (Information Commissioner) v. Canada (Minister of Transport)*, (T-1211-05); *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP)*, (T-1210-05), 2008 FC 766, June 19, 2008 (Justice Kelen)

Summary

Four cases decided by the Federal Court in 2008 received considerable attention in the access to information community, legal circles and the media.

These cases were initiated by the Information Commissioner who challenged decisions not to disclose certain records requested under the Act, including the daily agenda books of a former Prime Minister, agendas and documents originating from meetings involving a former Minister of National Defence and officials of the Department of National Defence, and the itinerary and meeting schedules of a former Minister of Transport.

Three of these cases centered on whether records held in ministers' offices or in the Prime Minister's Office, and that relate to the ministers' or Prime Minister's functions as heads of government institutions, are "under the control of a government institution" within the meaning of the Act. The fourth case concerned whether the agendas of a former Prime Minister that the Prime Minister's Office had given to the Royal Canadian Mounted Police (RCMP) and that, therefore, were clearly under the RCMP's control, could be withheld in their entirety under the Act's exemption provisions.

Background

The case against the former Minister of Defence stemmed from a request for "the minutes or documents produced from the M5 management meetings for 1999." These

meetings involved the Minister, the Deputy Minister, the Chief of the Defence Staff and members of the Minister's staff, during which matters relating to the Department of National Defence were discussed. In response to the request, the Department located more than 600 pages of records about these meetings within the physical confines of the Minister's office.

In the case against the former Prime Minister, the Privy Council Office (PCO) had received requests for the daily agenda books of former Prime Minister Jean Chrétien for the period between January 1, 1994 and June 25, 1999. More than 2000 pages of daily agendas were located within the Prime Minister's Office. Four other pages were located in the office of the Executive Assistant to the Clerk of the Privy Council.

The third case involved an access request to Transport Canada for a copy of all of the Minister of Transport's itineraries and meeting schedules for the period from June 1, 1999, to November 5, 1999. An abridged version of these itineraries had been sent to the Deputy Minister to assist in administering the department, but had been destroyed before the access request had come in. Nonetheless, the Minister's office had archived in electronic form both a complete version of the itineraries and the abridged version.

In each case, the institution maintained that the records, having been found within the physical confines of the ministers' or Prime Minister's Office, were not subject to the right of access under the *Access to Information Act*. In addition, in the case involving the Prime Minister, PCO refused to disclose the agenda pages located in its offices, despite acknowledging that those pages were under the control of a government institution.

The fourth case came about as a result of an access request "for all copies of the Prime Minister's daily agendas that had been provided to the Royal Canadian Mounted Police by the Prime Minister's Office" from January 1997 to November 2000. The RCMP located nearly 400 pages of these agendas, but refused to disclose them in their entirety on three grounds: that disclosing the information in the records would reasonably be expected to threaten the safety of the former Prime Minister; that the records were the personal information of the former Prime Minister; and that some portions of the records were excluded because they contained Cabinet confidences. Following an investigation into the complaint linked to this refusal to disclose, the Information Commissioner disagreed with the RCMP Commissioner's application of the exemptions and exclusion claimed.

In all but the last case, the Information Commissioner asked the Federal Court to determine whether the records at issue were "under the control" of the government institution over which the ministers or Prime Minister presided and, therefore, were subject to the Act. In two of these cases, as well as in the RCMP case, the Commissioner also asked the court to determine whether the records could be withheld, either in whole or in part, based on one or more of the Act's exemption provisions, as well as the exclusion for Cabinet confidences.

Issues

The court addressed a number of issues in these four cases:

- whether the office of the Minister of Defence, the Prime Minister's Office and the office of the Minister of Transport are part of "government institutions" under subsection 4(1) and Schedule I of the Act;
- what constitutes a record "under the control of a government institution," as stated in subsection 4(1); and
- did the exclusion and exemptions claimed properly apply to the records at issue?

Reasons

The court concluded that the offices of ministers and the Prime Minister's Office are distinct entities from the departments over which ministers and the Prime Minister preside and, consequently, are not "government institutions" within the meaning of the Act.

In reaching this conclusion, the court noted that the Department of National Defence, Transport Canada and the Privy Council Office were among the "government institutions" expressly

listed in Schedule I but that, in contrast, the offices of the ministers of defence and transport and the Prime Minister's Office were not.

Although the court acknowledged that ministers and the Prime Minister are the heads of their respective departments, it concluded that neither they nor their offices were "part of" these institutions.

The court then considered what constitutes a record "under the control of a government institution," as stated in subsection 4(1) of the Act.

The court did not agree with the Commissioner's argument that all records generated or obtained by ministers, or on their behalf, that relate to the discharge of their duties and functions with respect to the administration of the departments they head, are records under the control of the department and subject to the Act.

The court took into account the jurisprudence regarding the meaning of *control* under the Act, setting out the following principles:

- *Control* is not a defined term.
- In reaching a finding of whether the records at issue are "under the control of a government institution," the court can consider ultimate control as well as immediate control, partial as well as full control, transient as well as lasting control, and *de jure* as well as de facto control.
- Parliament did not restrict the notion of control to the power to dispose of the documents in question.
- The contents of the records and the circumstances in which they came into being are relevant to whether they are under the control of a government institution for the purposes of disclosure under the Act.

Applying these principles, the court decided that the issue of whether records in a minister's possession (or the possession of the minister's staff) are under the control of the department hinges on the answers to the following two questions: Do the contents of the records relate to a departmental matter? Do the circumstances in which the documents came into being show that the deputy minister or other senior officials in the department could request and obtain copies to deal with that subject matter? In other words, does a senior official, other than the Minister, have some power of direction or command over the document?

The court gave examples of documents that would be under the control of a government institution, even when located in the Minister's office: documents created by a departmental official, who should then have a reasonable expectation of being able to obtain a copy of it upon request; and documents prepared in the Minister's office in consultation with a departmental official.

With regard to the records at issue, the court concluded that the following records were not under the control of a government institution:

- M5 meeting notes taken by the Minister's own staff;
- email correspondence within the Minister's office dealing with the Minister's scheduling; and
- records that had been sent to the department with the condition that they be read and immediately destroyed, including the Prime Minister's agendas that were sent to the Clerk of the Privy Council but no longer in the Clerk's possession and the Minister of Transport's agendas that were provided to the Deputy Minister.

Records that were under the control of a government institution included the agendas listing the items to be addressed at the M5 meetings, which had been provided to attendees, including the Deputy Minister and the Chief of the Defence Staff, as well as miscellaneous records, including memoranda and briefing notes for the attendees of the M5 meetings.

On the applicability of the exemptions and exclusions claimed by the departments to refuse to disclose the requested records, the court agreed with the Information Commissioner's submissions.

The term "personal information" is defined as not including "information about an individual who is or was an officer or

employee of a government institution that relates to the position or functions of the individual." In deciding whether the contents of the Prime Minister's agendas could be exempt as containing "personal information," the court found that ministers are "officers" of government institutions. Consequently, ministers may not rely on the personal information exemption for information relating to their duties and functions in the administration of their departments, which, with the exception of the names of private individuals, the information in question was.

The court agreed with the Information Commissioner's submissions that the meetings referred to in agendas did not constitute advice or recommendations or accounts of consultations or deliberations, so the departments could not properly refuse disclosure on those grounds.

The Clerk of the Privy Council had not only invoked section 69 of the *Access to Information Act* to state that the Prime Minister's daily agenda books were excluded from the Act as Cabinet confidences, he had also issued a certificate under section 39 of the *Canada Evidence Act* objecting to the disclosure of the Prime Minister's and Minister of Transport's agendas on the same grounds. However, the certificate relating to the Minister of Transport was later revoked. The court found that since the pages of the Prime Minister's agendas located in the Privy Council Office did not note the subject matter of meetings, they did not disclose any Cabinet confidences. Consequently, the court found the certificates issued by the Clerk of the Privy Council to be invalid.

There are several practical results of these cases:

- The Department of National Defence was required to disclose the records from the Minister's office that had been distributed to the Chief of the Defence Staff and Deputy Minister.
- The Privy Council Office was required to disclose the four pages of records the Clerk of the Privy Council had received from the Prime Minister's Office.
- Transport Canada was not required to disclose any records.
- The RCMP was required to disclose all the records it had received from the Prime Minister's Office.

Future action

The Information Commissioner has appealed the Federal Court's decisions in the cases involving the former Minister of National Defence, Prime Minister and Minister of Transport.

The Attorney General has cross-appealed the case involving the former Prime Minister and appealed the RCMP case, on the question of whether the Prime Minister is a "public officer" or "officer" of a government institution, and has appealed the RCMP case. The outcome of these appeals may have an impact on the applicability of the section 19 exemption for personal information.

In the interim, the records at issue in these cases may not to be disclosed pending the determination of the appeals and cross-appeal.

The Information Commissioner and the Attorney General have both submitted their respective written arguments in support of their positions in these cases. A hearing date for the appeals has yet to be set.

CONFIDENTIALITY ORDERS

Canada (Attorney General) v. Canada (Information Commissioner), 2008 FCA 321 (A-492-07; A-568-07), October 22, 2008 (Justices Sexton, Evans and Sharlow)

Summary

This was an appeal by the Attorney General of a Federal Court of Canada decision (detailed in last year's annual report) to dismiss a challenge to the Information Commissioner's authority to issue confidentiality orders during the course of investigations. The Federal Court of Appeal upheld the Information Commissioner's confidentiality orders.

Background

The case involved the Information Commissioner's authority under the *Access to Information Act* to impose confidentiality orders on witnesses who had been compelled to give evidence in private during an investigation, and on these witnesses' legal counsel. At the time of the Federal Court hearing, only the confidentiality orders imposed on counsel remained at issue.

The Attorney General argued that the orders improperly interfered with solicitor-client privilege and unreasonably infringed freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms*. The Federal Court did not accept these arguments and upheld the Information Commissioner's orders.

The Attorney General appealed the Federal Court decision.

Issues

The central issue was whether confidentiality orders imposed on witnesses' counsel, requiring counsel to obtain the consent of each witness before sharing his or her private evidence with others, interfered with solicitor-client privilege.

Reasons

The appeal court did not agree with the Attorney General that the confidentiality orders imposed on counsel unlawfully interfered with solicitor-client privilege. Nor was the appeal court persuaded that the Federal Court had erred when dismissing the Attorney General's challenge of the Information Commissioner's authority to issue confidentiality orders to witnesses' counsel.

The orders simply stated that counsel must not disclose without witnesses' consent questions asked, answers given and exhibits to which witnesses referred. The appeal court recognized that these orders were consistent with the objectives of the *Access to Information Act*, including that the Commissioner's investigations be conducted independently of government.

Future action

Neither the Commissioner nor the Attorney General sought leave to appeal the decision to the Supreme Court of Canada.

SOLICITOR-CLIENT PRIVILEGE

Canada (Privacy Commissioner) v. Blood Tribe Department of Health, 2008 SCC 44 (Court file No. 31755, July 17, 2008)

Summary

This was an appeal, in which the Information Commissioner intervened, by the Privacy Commissioner of Canada of a decision of the Federal Court of Appeal. The appeal court had decided that the Privacy Commissioner, in the context of investigating an alleged breach of obligations under the *Personal Information Protection and Electronic Documents Act* (PIPEDA), did not have the authority to compel organizations or individuals to produce documents for which they claimed solicitor-client privilege.

Background

PIPEDA is privacy legislation that applies to the private sector. In common with the Privacy Act, PIPEDA includes provisions allowing individuals to access personal information about themselves, subject to certain limited exemptions, which the Privacy Commissioner may review in response to a complaint.

The original case centred on a former employee of the Blood Tribe Department of Health, an organization subject to PIPEDA, who had requested her personal information and complained to the Privacy Commissioner when she did not receive all the records she requested. The Privacy Commissioner then requested the complainant's employment file from the organization to confirm that all the records to which she was entitled had been released. The organization refused to provide a portion of the file, claiming solicitor-client privilege.

The Privacy Commissioner sought to verify the organization's claim of privilege by ordering it to produce the missing documents, in accordance with the Commissioner's

investigative authority under PIPEDA. The organization refused to do so and initiated court proceedings challenging the Privacy Commissioner's authority under PIPEDA in this area.

The Federal Court and Federal Court of Appeal arrived at different decisions about whether the Privacy Commissioner had the power to compel these records.

The Privacy Commissioner appealed to the Supreme Court of Canada. The Information Commissioner was granted status to intervene in the proceedings.

Issues

The case dealt with the Privacy Commissioner's powers under PIPEDA, not the federal *Privacy Act* nor the Information Commissioner's powers under the *Access to Information Act*, since these laws apply to the public sector.

The Supreme Court of Canada described the issue before it as one that required it to resolve a conflict between, on the one hand, the Privacy Commissioner's statutory power to have access to personal information about a complainant for the purpose of ensuring compliance with [PIPEDA], and on the other hand, the right of the target of the complaint (in this case a former employer of the complainant) to keep solicitor-client confidences confidential.

Reasons

The Supreme Court ruled that the language giving the Privacy Commissioner powers under PIPEDA does not empower the Privacy Commissioner to compel production of documents for which solicitor-client privilege is claimed.

Applying the appropriate principles of statutory interpretation to the general language of PIPEDA, the court determined that the right of organizations to keep solicitor-client communications confidential prevailed over the Privacy Commissioner's statutory power to gain access to records containing personal information.

Though the court agreed that PIPEDA provides a mechanism for calling the private sector to account for decisions respecting the disclosure of documents containing personal information, it determined that the proper way to achieve such independent verification was to ask the courts not the Privacy Commissioner.

The court noted the differences in the wording of PIPEDA and of the *Privacy Act* and *Access to Information Act*: the second and third of these laws contain explicit language granting the Commissioners access to privileged confidences, while the first does not.

The Information Commissioner's intervention in this case was successful in ensuring that the court's decision applied only to PIPEDA and not to the *Access to Information Act*.

Future action

The decision, which applies to the Privacy Commissioner's powers under PIPEDA, stands. As a result, the Blood Tribe Department of Health did not have to produce to the Privacy Commissioner records which it claimed were subject to solicitor-client privilege.

New cases

Two of the cases we became involved in this year are:

- a case centering on a large number of requests that remained unanswered after the 30-day time limit; and
- a case before the Supreme Court of Canada involving the constitutionality of a section of Ontario's freedom of information legislation.

Other cases in which we were not involved, but which we consider noteworthy are:

- a case focusing on whether paragraph 2(b) of the *Canadian Charter of Rights and Freedoms* encompasses a general right of access; and

- a case in Ontario highlighting the fact that, in responding to access requests, institutions are expected to use technology as an enabler, not as an excuse to evade the public's right to know.

LARGE VOLUME OF REQUESTS

Statham v. The President of the Canadian Broadcasting Corporation and the Information Commissioner of Canada, T-782-08

Summary

David J. Statham, on behalf of Michel Drapeau Law Office, filed an application with the Federal Court for judicial review of the Canadian Broadcasting Corporation's (CBC) failure to provide access to records in response to approximately 284 requests submitted to the CBC in the fall of 2007. The Information Commissioner has become a party to this proceeding.

Background

The CBC became subject to the *Access to Information Act* on September 1, 2007. Between September 5, 2007, and December 12, 2007, Mr. Statham submitted approximately 400 access requests to the CBC. The CBC did not respond to the vast majority of the requests within 30 days of receiving them, as the Act requires. Nor did the CBC claim any time extensions for these requests within that time, although it was allowed to do so under the Act.

Mr. Statham subsequently submitted 389 complaints to the Information Commissioner about the CBC's alleged "deemed refusal" to disclose the requested records. (Requests are deemed to be refused when institutions do not respond to them within 30 days.)

The Information Commissioner investigated these complaints and concluded that the bulk of them were valid. The Commissioner went on to recommend that the CBC respond to all of the outstanding requests on or before April 1, 2009. The CBC committed to meeting that deadline and these complaints were found to be resolved.

Upon receiving the results of the investigation, Mr. Statham applied to the Federal Court for a judicial review of the CBC's actions. Mr. Statham is asking the court to order the CBC to, among other things, disclose any records covered by requests to which the CBC has yet to respond at the time of the hearing. The Information Commissioner sought leave to intervene in the case, noting that Mr. Statham had filed some erroneous evidence. The court granted the Commissioner party status and ordered that this evidence be corrected.

Issues

The court has made clear that the case is to be limited to information requests that remain outstanding at the time of the hearing.

Future action

As of April 1, 2009, the CBC had responded to all but 32 access requests. The court case is to be heard on June 3, 2009.

In the meantime, the Information Commissioner has self-initiated refusal complaints against the CBC for the remaining 32 requests.

FREEDOM OF EXPRESSION

The Criminal Lawyers' Association v. Ontario (Public Safety and Security), Docket 32172, Supreme Court of Canada, heard December 11, 2008, judgment reserved. On appeal from the Ontario Court of Appeal, 207 ONCA 392.

Summary

This case involves an appeal by the Ontario government of an Ontario Court of Appeal decision. The appeal court had held that a provision in Ontario's *Freedom of Information and Protection of Privacy Act* was unconstitutional for unjustifiably infringing upon the right to freedom of expression set out in paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*, because it did not extend a public interest override to certain types of information exempted under that Act.

Background

The Criminal Lawyers' Association had requested records from the Ontario Ministry of Public Safety and Security, including a police report on an investigation into the conduct of a police force and Crown attorneys in the prosecution of a murder case that had been stayed because the accused's Charter rights had been breached. The Ministry had refused to disclose the requested records, invoking the solicitor-client privilege and law enforcement exemptions the provincial Act contains.

The majority of the appeal court had decided that a section of the Act was unconstitutional because it unjustifiably infringed the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*. The Ontario Act includes a section providing that certain exemptions may not be applied to refuse disclosure of records when a compelling public interest in disclosure clearly outweighs the purpose of the exemption. However, this override does not include the solicitor-client privilege and law enforcement exemptions. The way the law is drafted means that once the Ontario Information and Privacy Commissioner or a court finds that the exemptions apply to records requested, they cannot order their disclosure, regardless of how compelling the public interest in disclosure might be.

The Supreme Court of Canada agreed to hear the appeal. The Information Commissioner successfully sought leave to intervene in the case.

Issues

There are two principal issues in this case: whether a provision in Ontario's freedom of information legislation infringes upon the right to freedom of expression as guaranteed by paragraph 2(b) of the Charter; and whether, because the public interest override does not extend to information exempted on the grounds of solicitor-client privilege or law enforcement, the provision offends the constitutional principle of democracy. If the court were to find such an infringement, it would then need to determine whether this infringement could be demonstrably justified in a free and democratic society, as section 1 of the Charter allows.

Both the solicitor-client privilege and law enforcement exemptions are discretionary. Consequently, the Information Commissioner also raised the issue of whether the Ministry had failed to properly exercise its discretion when invoking these exemptions without showing any evidence that it had considered whether factors such as the public interest and the guarantee of freedom of expression would favour disclosure of the records in this case.

Future action

The hearing took place on December 11, 2008. The Supreme Court of Canada has yet to issue its decision.

GENERAL RIGHT OF ACCESS

Attaran v. Minister of Foreign Affairs, 2009 FC 339 (T-2257-07), April 2, 2009 (Justice Kelen)

Summary

A requester challenged the Minister of Foreign Affairs and International Trade's decision to refuse access to requested records. The court largely upheld the Minister's decision not to disclose portions claimed to be exempted under the *Access to Information Act*.

Background

Mr. Attaran made a request to the Department of Foreign Affairs and International Trade (DFAIT) for copies of its annual reports on human rights in Afghanistan for the years 2002 to 2006.

DFAIT released portions of the reports but withheld other portions, invoking several of the Act's exemptions.

Mr. Attaran complained to the Information Commissioner, who then investigated. As a result of this investigation, DFAIT disclosed additional portions of the reports, withdrawing its claim of some exemptions. With this, the Information Commissioner was satisfied that Mr. Attaran had received all of the information to which he was entitled under the Act and reported this to him and to the Minister.

Upon receiving the Information Commissioner's report, Mr. Attaran brought a case before the Federal Court. The Canadian Journalists for Free Expression intervened in the case in support of Mr. Attaran's challenge.

Issues

The issue at the centre of the case was whether general information about torture could be withheld on the grounds that its release would reasonably be expected to injure international affairs or defence.

The court considered a number of other issues, the most notable of which were questions surrounding the application and impact of the guarantee of freedom of expression found in the *Canadian Charter of Rights and Freedoms* on the interpretation and application of the *Access to Information Act*.

Reasons

The court was satisfied that the Minister was justified when refusing to disclose all but two of the extracts of information at issue, although they were characterized as "general information about torture."

The court distinguished between general information about torture that had been publicly reported by other countries and comments set out in DFAIT reports about Canada's allies and Afghan officials, with an intended audience of Canadian officials.

Nonetheless, the court made an exception for two extracts that had in fact appeared in a front-page article in *The Globe and Mail* and been publicly disclosed in another court case. Noting that this public dissemination had occurred without evidence of repercussions or reaction against Canada, the court concluded that the disclosure of these two extracts could not reasonably be expected to cause probable harm of injury and so qualify to be withheld under subsection 15(1).

The court then considered the constitutional arguments raised in the case, holding that the freedom of expression enshrined in the Charter does not encompass a general right to access any information government institutions hold. There was therefore no need for the court to consider whether limits on the right of access are "demonstrably justified" under section 1 of the Charter.

As to whether the Minister was required to bear in mind values linked to the constitutional right of freedom of expression when deciding whether to exempt information under subsection 15(1), the court held that the Act had to be interpreted in accordance with the intent of Parliament; Charter values should be applied only when the statute is ambiguous. Since the court did not view subsection 15(1) to be ambiguous, it determined that Charter values did not need to be applied and that the Minister did not have to consider them when exercising his discretion under subsection 15(1).

The court ordered the Minister to disclose the two extracts that had been previously publicly disclosed.

Future action

To date, neither party has filed a notice of appeal of the Federal Court's ruling.

TECHNICAL EXPERTISE

Toronto Police Services Board v. Ontario (Information & Privacy Commissioner), 2009 ONCA 20 (Ont. C.A.), January 13, 2009 (Justices Moldaver, Sharpe and Blair)

Summary

The Ontario Court of Appeal decided that the definition of *record* under a provincial access to information law was to be read broadly to include a requirement that government institutions develop new algorithms to modify their existing computer software if doing so would involve technical expertise normally used by the institution.

Background

A journalist, James Rankin, from the *Toronto Star*, made two access requests under Ontario's *Municipal Freedom of Information and Protection of Privacy Act* to the Toronto Police Service Board. When making these requests, he asked to receive the records in a different format from that in which the information was stored. To respond to the requests, the organization would have had to design an algorithm capable of extracting and manipulating the information in two electronic databases and re-formatting it.

The organization had the technical expertise to do this; however, it refused the requests for various reasons, including that the information sought was not a "record" under the municipal law, since new software would be required to produce the information in the format requested.

The federal *Access to Information Act* includes a very similar provision to the one interpreted under the Ontario legislation in this case.

Issues

The issue in this case was the scope of the term record and, more particularly, the scope of the subsection stating that records include those capable of being produced from machine-readable records.

Reasons

Bearing in mind the purpose of the legislation, the appeal court adopted a liberal interpretation of the definition of *record*, stating that it was intended that in some circumstances "…new computer programs will have to be developed, using the institution's available technical expertise and existing software, to produce a record from a machine readable record… ."

The court rejected the interpretation proposed by the Toronto Police Services Board, which had been accepted by the Divisional Court, explaining that the interpretation

> …provides government institutions with the ability to evade the public's right of access to information by eliminating all access to electronic information where its production would require the development of software that is within the technical expertise normally used by the institution. On the Divisional Court's interpretation, access would be determined based upon the coincidence of whether the software was already in use, regardless of how easy or inexpensive it would be to develop.

A general principle that emerges from the court's decision is that access to information legislation must be interpreted in a manner that maximizes the public's right of access to electronically recorded information:

> A contextual and purposive analysis of s. 2(1)(b) must also take into account the prevalence of computers in our society and their use by government institutions as the primary means by which records are kept and information is stored. This technological reality tells against an interpretation of s. 2(1)(b) that would minimize rather than maximize the public's right of access to electronically recorded information (para. 48).

Future action

Neither the Toronto Police Services Board nor the Ontario Information and Privacy Commissioner has appealed this decision to the Supreme Court of Canada.

6. ADVOCATING FOR LEGISLATIVE REFORM

*Significant and thoughtful proposals for reform have been made almost continuously over the last two decades, but very few have attracted parliamentary attention. For legislation like the [*Access to Information Act*], which the courts have affirmed is quasi-constitutional in nature, its continuing vitality now hinges upon meaningful reform efforts.*

Murray Rankin[8]

This past year marked the 25th anniversary of the adoption of the *Access to Information Act*. Sadly, the occasion highlighted just how much the legislation lags behind provincial, territorial and international standards. It has remained static in a dynamic environment of massive technological changes, which have completely reconfigured the information landscape.

Yet, over the last two decades, much time has been spent on various studies of the legislation, and many proposals for reform have been presented. More than ever, the Act needs to be strengthened to reflect the realities that have taken shape since its adoption, and now is the time for action.

Throughout the year, we engaged in a dialogue with stakeholders, including access to information users and those who work in the field.[9] We wanted to learn more about what the priorities for the modernization of the Act should be. We presented 12 recommendations stemming from this dialogue to the House of Commons Standing Committee on Access to Information, Privacy and Ethics in March 2009 (see box).[10] Our recommendations fall under a number of general themes: parliamentary review, providing a right of access to all, strengthening the compliance model, public education, research and advice, coverage and timeliness. This list of recommendations is by no means comprehensive. It includes only the most pressing matters for reform, in an initial effort to meet the urgent challenge of modernizing the Act without further delay.

RECOMMENDATIONS

1. That Parliament review the *Access to Information Act* every five years
2. That all persons have a right to request access to records pursuant to the *Access to Information Act*
3. That the *Access to Information Act* provide the Information Commissioner with order-making power for administrative matters
4. That the *Access to Information Act* provide the Information Commissioner with discretion on whether to investigate complaints
5. That the *Access to Information Act* provide a public education and research mandate to the Information Commissioner

[8] The Access to Information Act 25 years later: Toward a New Generation of Access Rights in Canada, *commissioned by the Office of the Information Commissioner, June 10, 2008, www.oic-ci.gc.ca/publicComments/pdf_en/ATIA25y.pdf*

[9] *For more information, go to www.oic-ci.gc.ca/InfoNotice/infoNoticeJune18-e.asp*

[10] Strengthening the Access to Information Act to Meet Today's Imperatives, *www.oic-ci.gc.ca/publications/modernization_2009-e.asp*

6. That the *Access to Information Act* provide an advisory mandate to the Information Commissioner on proposed legislative initiatives
7. That the application of the *Access to Information Act* be extended to cover records related to the general administration of Parliament and the courts
8. That the *Access to Information Act* apply to Cabinet confidences
9. That the *Access to Information Act* require the approval of the Information Commissioner for all extensions beyond 60 days
10. That the *Access to Information Act* specify timeframes for the Information Commissioner to complete administrative investigations
11. That the *Access to Information Act* allow requesters the option of direct recourse to the Federal Court for access refusals
12. That the *Access to Information Act* allow time extensions for multiple and simultaneous requests from a single requester

At year-end, the Standing Committee began hearings on the reform of the Act. The Commissioner appeared before the committee to discuss the recommendations. We will continue our efforts in this regard to impress upon the government the imperative for change.

Other proposed changes to the Act

We monitor Parliament's activities for proposals to amend the *Access to Information Act* and advise on the implications of draft legislation on the right of access to information.

During 2008–2009, there were a number of bills at various stages that proposed amendments to the *Access to Information Act*. See Appendix 3.

7. ENHANCING OUR INFORMATION MANAGEMENT CAPACITY

Information management (IM) is critical to the success of our new business model. We produce a significant amount of documentation in the form of investigation files, legal opinions, memos, briefings, correspondence and other information. In turn, we receive a significant amount of information from external sources. To take best advantage of all this information, we must manage it in such a way that we can easily coordinate, re-use, re-purpose and distribute it in a useful, targeted and responsible manner.

In 2008–2009, we conducted a thorough assessment of our IM capacity. Consequently, we created a new IM division—regrouping the information technology (IT) function, the Records Centre, Library Services and the Access to Information and Privacy Secretariat—and developed a comprehensive long-term IM/IT strategy designed to make IM service delivery more proactive.

IM/IT renewal

In 2008–2009, we developed a five-year strategic plan aimed at positioning us as a leader in resolving access to information complaints and providing agile and enhanced service delivery. This plan identified a number of IM/IT renewal initiatives designed enable us to create, manage, access and share information and knowledge with a seamless technology infrastructure. We focused our efforts on the most critical issues that were having a direct impact on our productivity, left us vulnerable to security breaches, and caused instability in our infrastructure, including the following:

- We established a new unit with a director and five IT professionals, who are responsible for implementing our IM/IT vision.
- We created a proactive service delivery model that anticipates business needs and identifies strategic solutions.
- We consolidated our IT infrastructure, with appropriate and up-to-date software and processes, including tools for project and change management.
- We updated or developed and implemented all the required policies and procedures.
- We increased security measures to protect data, both at rest and in transit across our network, according to their security classification while minimizing the impact of existing and emerging threats to the integrity of the information.

The results of our IM/IT renewal initiatives have been immediate and significant. The successful consolidation of the network and desktop environment has had a positive impact on our productivity while improving overall IT security, stability and management.

Records management

Since the Office of the Information Commissioner was founded in 1983, we have conducted thousands of investigations. Over the years, the volume of files associated with closed investigations increased to the point that we had to take decisive action to manage the overwhelming quantity of paper records. In 2008–2009, we developed our first Records Disposition Authority to determine how long we should keep present and future paper and electronic records created by investigators.

We also increased the capacity of our records section, in anticipation of the work we will have to do to develop and implement an institutional information management framework. Specifically, we created the positions of Manager, Information Management, and Manager, Records, to develop and maintain critical elements of an IM framework, such as a universal classification system, business rules and a concept of operations, as well as additional disposition authorities to cover all institutional records.

Access to Information and Privacy Secretariat

Since our organization became subject to the *Access to Information Act* in 2007, we have proactively managed our access to information program with the goal of achieving perfect compliance with the law. We used new funding obtained in 2007 to staff analyst positions and to purchase electronic request processing software. Electronic processing allows us to manage records associated with access and privacy requests more efficiently, maximize compliance with deadlines, and deliver records on CD-ROM, which effectively eliminates photocopy fees—a potential barrier to access.

The resulting improvement in information management has had several benefits:

- reproduction fees have been eliminated;
- packages of records are easily re-created, when necessary;
- statistical reporting is more accurate; and
- the overall quality of the packages of records we release is generally improved, in terms of organization of the records, legibility, contextualization of information and completeness and accuracy.

The impact of better information management has also allowed us to build our access to information and privacy capacity. Given the widespread shortage in qualified personnel across federal institutions, and the need for more junior staff to come up to speed quickly, having reliable electronic records keeping and accompanying processes means that we can spend less time on training than previously and allows for greater ease of succession.

OUR PERFORMANCE FOR 2008–2009

In 2008–2009, we received 113 requests under the *Access to Information Act*, and completed 109 of them within the year. We also received two requests under the Privacy Act, one of which we completed during the year. These figures represent a 20 percent increase in the number of requests received compared to the Secretariat's first year of operation.

During the year, we also experienced a significant surge in volume, going from processing approximately 7,696 pages in our first year to processing 40,489 pages in our second, the vast majority of these needing to be dealt with in the third and fourth quarters. This represents a 414 percent increase in our workload. Our efforts to improve record-keeping practices will help us cope with this increased volume of pages. Despite this surge, we were able to maintain our record of responding fully within statutory timelines.

We have also made every effort to fulfill the duty to assist. Here are some examples of how we put this duty into action in the past year:

- We reviewed CD release packages to identify any information that could be misunderstood or unclear, and provided explanations to requesters.
- We discussed any potential time extensions with requesters prior to actually extending the timeline, and provided a clearly documented rationale for the additional time on the notice of extension, as well as the new due date.
- We negotiated the shortest possible turnaround time on consultations with federal institutions in order to provide the timeliest access possible, and released all records that did not require consultation within 30 days.

- We followed up on requests involving records not being disclosed under section 26 because of impending publication, and we responded to requesters once the records were published.
- We opened abandoned files as new requests, when necessary, and waived application fees, in order to preserve applicants' right to complain.

Complaints to the Information Commissioner ad hoc

The amendments to the *Access to Information Act* that made our organization subject to the Act, following the adoption of the 2007 *Federal Accountability Act*, did not set out how complaints against us were to be handled. To ensure requesters have the right to voice their concerns and to make complaints, the Information Commissioner appointed an independent Commissioner ad hoc to investigate these complaints independently of our office. The Honourable W. Andrew MacKay became the Information Commissioner ad hoc in May 2008, succeeding the Honourable Peter de C. Cory, who established the guiding principles and functioning of the Office of the Information Commissioner ad hoc.

This year, we were notified of 13 complaints about our handling of access requests. The reasons for those complaints were: withholding of information (11) and length of extensions (2).

Mr. MacKay is a former judge of the Federal Court of Canada and a distinguished jurist. He was admitted to the Bar of Nova Scotia in 1954 and appointed Queen's Counsel in 1972. He studied at Harvard University and at Dalhousie University, where from 1957 to 1988, he held various positions, including Professor and Dean of the Law School, Vice-President, President and Vice-Chancellor of the University. From 1967 to 1986, he was Chair of the Nova Scotia Human Rights Commission and was the Ombudsman for Nova Scotia from 1986 to 1988. He was appointed Judge of the Federal Court of Canada, Trial Division, ex-officio member of the Court of Appeal and Judge of the Court Martial Appeal Court of Canada in 1988. After retiring as a Judge in 2004, Mr. MacKay served as Deputy Judge of the Federal Court from 2004 to December 2007.

The Commissioner ad hoc closed seven complaints during 2008–2009, declaring six of them to be not substantiated. One was resolved by the release of further information and six were carried over to 2009–2010. Appendix 1 contains the report of the Information Commissioner ad hoc for 2008–2009.

8. PROMOTING REQUESTERS' RIGHTS

As the ombudsman responsible for investigating access complaints against federal institutions, the Information Commissioner represents an independent source of expert knowledge with a unique perspective on freedom of information. In order to maximize the Commissioner's and our influence and promote requesters' rights, we believe that we must complement our investigative work by sharing our expertise with all our stakeholders and by being as transparent as possible about our decisions and our way of doing business. This is why communications, advice and consultations, as well as partnerships, both domestically and internationally, are essential components of our compliance continuum (see Chapter 2).

Communications and special events

In 2008–2009, we continued to increase the quantity and quality of information about our work that we publish on our website.[11] We have also started to redesign our website, to ensure it better meets the needs of our users and the general public, and to accommodate greater proactive disclosure. We developed a new brochure on the Office of the Information Commissioner and made considerable efforts to raise awareness about our agenda and activities. The wide interest that our reports to Parliament and news releases generated this year demonstrates our success in this area.

Canada's Right to Know Week—which coincides with International Right to Know Day—celebrates the fundamental human right of access to information, and provides an opportunity for citizens to campaign for open, democratic government. In 2008–2009, we collaborated with the provinces and territories to create a dedicated website that features all the activities taking place across the country during the Right to Know Week.[12] This communication and learning tool also provides background information on freedom of information worldwide and in Canada.

As part of last year's celebrations, we organized a number of events, including a national seminar and a panel discussion on the various meanings of "right to know." The discussion served to remind participants that even today access to information is often a matter of life or death in many corners of the world. Our assistant commissioners visited various regions of the country to share perspectives and ideas about how to raise awareness of access to information.

In 2008–2009, Rick Snell a law professor from the University of Tasmania, gave an excellent presentation on Australia's and New Zealand's efforts to create a next-generation access to information law.

Advice and consultations

In 2008–2009, we took part in the development of the Treasury Board Secretariat's directive on access to information, with the aim of specifically addressing the duty to assist provision of the *Access to Information Act*. This provision explicitly requires all institutions to help requesters find the information they seek.

We also worked with other officers of Parliament to put forward our perspective on Treasury Board Secretariat policies. These policies were developed for federal departments and agencies and do not always accommodate the unique roles of independent officers of Parliament.

[11] *See www.oic-ci.gc.ca/menu-e.asp*

[12] *See www.righttoknow.ca/home/index_e.php*

Finally, we consulted a group of directors of access to information on how best to categorize the results of our investigations. Until now, we have simply categorized complaints as being resolved, not resolved, substantiated or not substantiated. We committed to reviewing this practice, after receiving feedback during the report cards process, in order to provide a more precise picture of institutional compliance.

Parliamentary relations

As an officer of Parliament, the Commissioner enjoys a special rapport with Parliament. Parliamentarians rely on the Commissioner for objective advice about the need for legislative reform and, more generally, about implications of legislation, jurisprudence, regulations and policies on Canadians' right to access government information. In addition, the Commissioner must account for the administration of his office on an annual basis. He made the following appearances before Parliament in 2008–2009:

- appearance before the House of Commons Standing Committee on Access to Information, Privacy and Ethics in April 2008 to discuss our spending estimates for the year;
- two appearances before the same committee in March 2009 to discuss our 2007–2008 annual report and future business, our most recent report cards process (see Chapter 4), as well as reform of the *Access to Information Act* (see Chapter 6); and
- appearance before the Advisory Panel on the Funding and Oversight of Officers of Parliament in March 2009 to present our review of resources and to seek the required funding for us to deliver on our mandate (see Chapter 9).

International activities

In support of our priorities, we participate in various international activities, with the following goals:

- to contribute to the development of access to information legislation and policy internationally;
- to learn from our counterparts on best practices and new developments; and
- to explain how we approach freedom of information in Canada.

Of note during 2008–2009, we sent a letter to the Chairman of the Council of Europe's Committee of Ministers to comment on the proposed Convention on Access to Official Documents.[13] Based on Canada's experience with access legislation, we recommended strengthening the Convention to foster a culture of openness in public institutions.

We participated in conferences and meetings in Mexico, England and Scotland. We also met with parliamentary and government officials of Barbados and Grenada to share information on Canada's experience and best practices in the area of access to information, and to offer advice on compliance models as they develop freedom of information legislation.

[13] *See www.oic-ci.gc.ca/oicinfo/Council_Europe_Treaty_letter-e.asp*

Partnerships

To maximize our influence on institutional compliance and on freedom of information in general, we need to foster good relations with all players in the access to information system—from requesters and complainants, to institutions (including Parliament), to other government jurisdictions and advocacy groups.

We established a discussion forum with the National Privacy and Access to Information Law Section of the Canadian Bar Association. The forum will not only foster the exchange of ideas on matters of mutual interest but also collaboration in promoting the right of access to information to Canadians.

We were pleased to be able to participate for the second year in the annual investigators conference hosted by the Office of the Privacy Commissioner of Canada in February 2009. The conference allowed investigators from the federal, provincial and territorial information and privacy commissioners' offices to share experiences and best practices, and to discuss common issues. We subsequently hosted a two-day negotiation skills course for investigators, including colleagues from the Office of the Privacy Commissioner, and from the privacy and access to information agencies in Manitoba, New Brunswick, Newfoundland and Labrador, and Nova Scotia.

9. RENEWING OUR OFFICE

Our 2007–2008 annual report clearly set out the new direction for our work. This year, we put the foundational elements of that new direction in place by reviewing our resource requirements, developing an integrated human resources plan and refining our internal audit function.

Review of resources

We undertook a comprehensive review of our resources to determine whether they were sufficient for us to be able to deliver on our mandate. In particular, we assessed our capacity to eliminate the inventory of complaints by the end of 2009–2010, to tackle the significant increase in the number of complaints we have been receiving since 2007–2008 and to respond to the need to strengthen accountability and compliance in accordance with the *Federal Accountability Act,* government-wide policy renewal and other initiatives. The results of the review clearly showed that we need to augment our resource base.

Based on the results of the review, we submitted our request to the Advisory Panel on the Funding and Oversight of Officers of Parliament and to the Treasury Board Secretariat. At year-end, a final decision on resource levels was awaiting Treasury Board's decision.

During the year, we also did an extensive re-allocation of our office space to accommodate current and future staff.

Human resources

Our organization faces significant human resources challenges. Access to information professionals are in high demand across federal institutions. The 70 new institutions' coming under the Act in 2007 has exacerbated this scarcity of resources.

Recruitment, retention and renewal of staff are our priorities. To that end, we developed an integrated business and human resources plan with key strategies to be more efficient and proactive in recruiting, retaining and training employees to meet our specific skills requirements and our growing caseload.

Internal audit

To comply with the Treasury Board Policy on Internal Audit, we created an audit function two years ago. In 2008–2009, we hired a firm to provide internal audit services and secured the services of two external members to sit on our audit committee, of which the Information Commissioner is a member. To date, three audit committee meetings have been held, and the committee has approved an audit committee charter, internal audit charter and risk-based audit plan.[14]

The following are the key risks identified:

- effectiveness of our new and existing investigative processes, particularly to address the inventory of older cases;
- ability to recruit and retain staff;
- effectiveness of our information management/information technology processes and tools;
- ability to respond to access requests; and
- ability to comply with federal regulations and policies.

The objective of our internal audits is to provide "just-in-time" feedback on new and maturing processes, thereby enabling corrective action. Accordingly, the audit committee recommended, based on the identified risks, that we undertake an internal audit of the intake and early resolution of new complaints during 2008–2009. The results of the audit will be available on our website as they become available.

[14] *Information about internal audit is available at http://www.oic-ci.gc.ca/expenses/audits/default-e.asp*

10. THE YEAR AHEAD

Our vision is for the Office of the Information Commissioner to become "best in class" as an investigative body resolving complaints, as an ombudsman for access to information, and as an employer. This vision will continue to guide all our decisions and initiatives in the year ahead.

Follow-ups and system monitoring

Next year will see us follow up on our report cards process in several ways.

First, we will monitor the progress of the 10 institutions surveyed this year. We will follow up with the Treasury Board Secretariat and the Canada School of Public Service as they implement the measures they committed to carrying out in response to the recommendations in our special report to Parliament.

We will also launch our first three-year plan for performance reviews. This plan will be widely advertised, giving selected institutions advance notice of the type and scope of information we will be seeking. By doing so, we hope to encourage proactive compliance.

Second, we will continue our consultations with stakeholders on proposed new categories for classifying the results of our investigations.

Third, we are planning to conduct a formal systemic investigation that will focus on time extensions. We want to further examine the use, root causes and impact of extensions, and work with institutions to propose solutions.

We will also be monitoring the access to information system to identify and examine emerging systemic issues. For example, we will be looking more closely at preparation fees, which federal institutions may charge for the time they take to prepare records for disclosure. Before the advent of electronic case management systems, access to information officers used to perform this task by blocking every occurrence of excluded or exempted information using "cut and paste" operations. Now, most institutions prepare records for disclosure while reviewing the record, a function for which fees cannot be charged. Therefore, the rationale for charging preparation fees is no longer so obvious and we are concerned that this practice could be a means to limit disclosure of information.

Strengthening capacity and accountability

The progress we made in 2008–2009 on enhancing internal operations has set the stage for the broader, more far-reaching work we will do in the year ahead. To achieve optimal efficiency and timeliness, we will monitor the performance of our new investigative process, taking into account, among other things, the results of an internal audit which is being conducted at the Commissioner's request.

We will continue to renew and upgrade our information management technology and practices. This will give investigators more effective tools to meet workload targets, deliver on our access to information and privacy responsibilities, and provide top-notch service to Canadians.

We will also focus on recruiting, training and retaining skilled and versatile employees to ensure we have the appropriate human resource capacity to effectively deliver on our mandate. In particular, we need to address the shortage of investigators to avoid this becoming an obstacle to meeting our performance targets over the next several years.

Finally, we will review the management controls that are in place throughout the organization and develop new ones to ensure sound governance and increased accountability in existing and new areas of responsibility.

Web-enhanced information and proactive disclosure

We are redesigning our website to ensure that it provides comprehensive, up-to-date and user-friendly information. We want to maximize the site's usefulness for employees, members of the access to information community, complainants and requesters.

To promote requesters' rights through greater transparency in the way we conduct our business, we will be posting much more than the usual proactive disclosure information. Our website will include, for example, summaries of access requests received, our latest statistics, audit reports, policy updates, materials summarizing the policies and practices considered optimal in the access field, as well as tools to help with the interpretation of the law involved in various types of investigations. We will publish extensive reports of completed investigations, court decisions and report cards on the redesigned site.

Consultations and partnerships

It is critical that the federal access to information system be modernized to align it with more progressive models. The Information Commissioner will continue to promote reform by identifying the gaps between the intent of the legislation and its deficiencies in ensuring that Canadians' right of access to information is respected. In his role as an Officer of Parliament, he will advise and make recommendations on how best to achieve the goals envisioned by the legislation, i.e. a more informed dialogue between political leaders and citizens, improved decision making, and greater transparency.

APPENDIX 1. REPORT OF THE INFORMATION COMMISSIONER AD HOC

The authority of the Information Commissioner ad hoc is the delegation by the Information Commissioner of Canada, pursuant to section 59 of the Access to Information Act (the ATI Act). The current delegation is effective May 1, 2008 for a one-year period, until such time as it is revoked, amended or renewed. It is the second similar delegation, the first having been issued in 2007 to the Honourable Peter Cory.

The delegation by the Commissioner provides authority for

> "...the Hon. W. Andrew MacKay, 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 investigate 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."

The delegation implements arrangements whereby the Office of the Information Commissioner is subject to the ATI Act. Thus, that Office's activity and decisions in relation to access requests made to it are subject to review, like other government institutions of Canada, in accord with the Federal Accountability Act, of 2007 and amendments then made to the ATI Act.

It is of fundamental importance as emphasized in the Report of the Ad Hoc Access to Information Commissioner by the Honourable Peter Cory in 2008 that the role of the Ad Hoc Commissioner be completely independent of the Information Commissioner, with a separate office, mailing address, telephone, investigating and secretarial assistance.

In my view the necessary independence of the Office of the Commissioner ad hoc has been maintained in the past year and its independence has been respected by the Information Commissioner, through whose good offices the needs of the work of the Commissioner ad hoc have been met. Expenses of the office, support for an experienced senior investigating officer, for secretarial assistance, and for legal advice have been provided as needed. In particular, I acknowledge the assistance of Ms. Julia O'Grady, whose work, investigating and resolving complaints for this office independent of but with cooperation of the Commissioner's staff, and whose advice to me, have been invaluable.

Since May 1, 2008 this office has been concerned with a dozen complaints. All have been investigated. A few of these were initiated before May 1, 2008. Three of those, which remain unresolved, concern the issue of control by a government institution, in this case the Office of the Information Commissioner, of certain computer-based information. The complaints raise issues of both fact of concern to the Commissioner, and law for which I have obtained independent legal advice. Those complaints will, I trust, soon be resolved.

Other complaints initiated in 2008 raise issues of the application of section 16.1 of the ATI Act in situations where the Office of the Information Commissioner has contended the information requested by a complainant is exempt from release as information obtained or created in the course of an investigation or examination conducted by that office. It is noted that if it is such information, it is exempt from release only pending conclusion of the investigation and related proceedings by that Office. A process for review by the Commissioner of any such request after conclusion of an investigation would be an appropriate routine.

Three complaints raised the issue of the jurisdiction of the Information Commissioner ad hoc in circumstances where the information was refused to be released by the government institution which was asked for it after the institution had consulted with the Office of the Information Commissioner. As I interpret jurisdiction of the Commissioner ad hoc, as set out in the delegation above, unless the Information Commissioner is requested information and refuses to release it there is no decision by his office that is to be reviewed.

I concur with the words of my predecessor, the Honourable Peter Cory, "In my view, it is necessary to maintain the Office of the Ad Hoc Commissioner. This is necessary in order to ensure that someone independent of the Commissioner has considered the complaints made against the Commissioner were properly considered and appropriately dealt with." That continues to be the goal of this office.

Respectfully submitted,

The Honourable W. Andrew MacKay

APPENDIX 2. ONGOING COURT CASES

These are pending cases before the Federal Court that involve the Information Commissioner

Case	Next Step	Issue
Control of records in a minister's office *Information Commissioner v. Minister of National Defence*, A-378-08	Hearing date to be set, followed by hearing	Appeal by the Information Commissioner of the decision in *Information Commissioner v. Minister of National Defence*, 2008 FC 766 Interpretation of "under the control of a government institution" and interplay between the concepts of minister (as head of a government institution) and department (government institution) For more information, see p. 32
Control of records in the Prime Minister's Office *Information Commissioner v. Prime Minister*, A-379-08 Cross-Appeal: *Prime Minister v. Information Commissioner*	Hearing date to be set, followed by hearing	Appeal by the Information Commissioner / Cross Appeal by the Prime Minister of the decision in *Information Commissioner v. Prime Minister*, 2008 FC 766 Interpretation of "under the control of a government institution" and interplay between the concepts of minister (as head of a government institution) and department (government institution) The cross-appeal involves the issue of whether the Prime Minister is an officer of a government institution. For more information, see p. 32
Control of records in a minister's office *Information Commissioner v. Minister of Transport*, A-380-08	Hearing date to be set, followed by hearing	Appeal by the Information Commissioner of the decision in *Information Commissioner v. Minister of Transport*, 2008 FC 766 Interpretation of "under the control of a government institution" and interplay between the concepts of minister (as head of a government institution) and department (government institution). For more information, see p. 32
Prime Minister's agendas under the control of the RCMP *Commissioner of the RCMP v. Information Commissioner*, A-413-08	Hearing date to be set, followed by hearing	Appeal by the Commissioner of the RCMP of the decision in *Information Commissioner v. Commissioner of the RCMP*, 2008 FC 766 Exemption: s.19 For more information, see p. 32
Statham v. President of the Canadian Broadcasting and Information Commissioner, T-782-08 (The Information Commissioner is an intervener)	Hearing on June 3, 2009	Application for judicial review under s.41 of the *Access to Information Act* against the CBC relating to numerous access requests. Involves issues relating to the Court's jurisdiction under s.41 and 49 of the *Access to Information Act*. For more information, see p. 38
Ontario (Ministry of Public Safety and Security) et al. v. Criminal Lawyers' Association, SCC, S-32171 (The Information Commissioner is an intervener)	Judgment reserved at the December 11, 2008 hearing	Appeal by Ontario's Ministry of Public Safety and Security of the decision in Criminal Lawyers' *Association v. Ontario (Ministry of Public Safety and Security)*, 2007 ONCA 392 Involves issue of whether an exemption provision in Ontario's *Freedom of Information and Privacy Act* infringes the *Canadian Charter of Rights and Freedoms* (s.2(b)—freedom of expression) as it does not extend a public interest override. For more information, see p. 38

APPENDIX 3. AMENDMENTS AND PROPOSED AMENDMENTS TO THE *ACCESS TO INFORMATION ACT*

Changes to the Schedules and Designation Order in 2008–2009

Statute or Order in council	Bill	Citation	Came into force	Change
An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures	C-10	S.C. 2009, c. 2	Royal Assent received on March 12, 2009. Coming into force will be determined by Order in Council.	Add *Canada Deposit Insurance Corporation Act* to Schedule II and add a reference to subsection 45.3(1)
An Act to give effect to the Tsawwassen First Nation Final Agreement and to make consequential amendments to other Acts	C-34	S.C. 2008, c. 32	April 3, 2009	Subsection 13(3) of the *Access to Information Act* is amended by adding the following after paragraph (e): (f) the Tsawwassen Government, as defined in subsection 2(2) of the *Tsawwassen First Nation Final Agreement Act*
An Act to establish the Specific Claims Tribunal and to make consequential amendments to other Acts	C-30	S.C. 2008, c. 22	November 18, 2008	Add the *Specific Claims Tribunal Act* to Schedule I Schedule II: adds a reference to subsections 27(2) and 38(2) of the *Specific Claims Tribunal Act*
An Act to amend the Museums Act and to make consequential amendments to other Acts	C-42	S.C. 2008, c. 9	August 10, 2008	Paragraph 68(c) of the *Access to Information Act* is replaced by the following: c) material placed in the Library and Archives of Canada, the National Gallery of Canada, the Canadian Museum of Civilization, the Canadian Museum of Nature, the National Museum of Science and Technology or the Canadian Museum for Human Rights by or on behalf of persons or organizations other than government institutions Schedule I to the Act is amended by adding the following: Canadian Museum for Human Rights
P.C. 2008-800			June 1, 2008	Adds the institution the Indian Residential Schools Truth and Reconciliation Commission Secretariat to Schedule I
P.C. 2008-802			June 1, 2008	Adds an institution to the Designation Order

Proposed changes to the Act

Second Session, Thirty-Ninth Parliament

Bill	Proposed legislation	Last stage	Changes
C-554	*An Act to amend the Access to Information Act (open government)*	First reading, May 29, 2008	The Bill implements the proposals contained in the *Open Government Act*, made by former Information Commissioner Reid in 2005.
C-556	*An Act to amend the Access to Information Act (improved access)*	First reading, June 2, 2008	The Bill implements the proposals contained in the *Open Government Act*, made by former Information Commissioner Reid in 2005.

First and Second Sessions, Fortieth Parliament

Bill	Proposed legislation	Last Stage	Changes
C-278	*An Act to amend the Access to Information Act (response times)*	First reading, February 2, 2009 (was referred as Bill C-470 in the 2007–2008 Annual Report)	The Bill provides for a report to be given to the requester and the Office of the Information Commissioner explaining the delay and the projected completion date when a request is still outstanding 100 days after it was received. It also requires the Information Commissioner to report annually the number of outstanding requests.
C-326	*An Act to amend the Access to Information Act (open government)*	First reading, February 25, 2009 (was referred as Bill C-554 in the 39th Parliament)	The Bill implements the proposals contained in the *Open Government Act*, made by former Information Commissioner Reid in 2005.
C-334	*An Act prohibiting the commission, abetting or exploitation of torture by Canadian officials and ensuring freedom from torture for all Canadians at home and abroad and making consequential amendments to other Acts*	First reading, March 5, 2009	The Bill amends section 15 of the *Access to Information Act* to ensure that it does not prevent the disclosure of records relating to torture.
S-203	*An Act to amend the Business Development Bank of Canada*	First reading, January 27, 2009	The Bill proposes an amendment to Schedule II of the *Access to Information Act*.
S-206	*An Act to create the Office of the Commissioner of the Environment and Sustainable Development*	First reading, January 27, 2009	The Bill proposes amendments to subsection 16.1 and Schedule I of the *Access to Information Act*.
S-214	*An Act to regulate securities and provide a single securities commission for Canada*	First reading, January 27, 2009	The Bill proposes to exempt some information from disclosure.

Report	
First Report of the Standing Committee on Access to Information, Privacy and Ethics	*Pursuant to Standing Order 108(2), and a motion adopted by the Committee on Wednesday, February 11, 2009, your Committee recommended:* *That the government introduce in the House, by May 31, 2009, a new, stronger and more modern Access to Information Act, drawing on the work of the Information Commissioner Mr. John Reid.*
Motions	
Opposition motion (Mr. McTeague) – March 6, 2009	*That, given the Information Commissioner's report on February 26, 2009, which condemns "a lack of leadership at the highest levels of government", this House calls upon the government to amend the* Access to Information Act *to include, as part of its purpose, that "every government institution shall make every reasonable effort to assist persons requesting access and to respond to each request openly, accurately and completely and without unreasonable delay", and further, to provide a general "public interest" override for all exemptions, so the public interest is put before government secrecy, as promised in the 2006 election platform of the Conservative Party of Canada.*
Opposition motion (Mr. Siksay) – March 3, 2009	*That this House calls on the government to recognize Canadians' right to know and the principle of open government, rather than placing further restrictions on the release of information and opting for increased secrecy, and therefore this House urges the government to introduce within 30 days legislation based on former Information Commissioner John Reid's draft bill to revise the* Access to Information Act, *in consultation with Information Commissioner Robert Marleau.*