Information Commissioner of Canada

Commissaire à l'information du Canada

Annual report 2009–2010

Achieving results. Building for success.

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Information Commissioner of Canada

Commissaire à l'information du Canada

June 2010

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 Interim Information Commissioner, covering the period from April 1, 2009, to March 31, 2010.

This report highlights the many achievements of my office last year in the name of more efficient and effective service to Canadians who complain to us about how federal institutions have handled their access to information requests. I introduced measures to bring much-needed improvement to the complaint investigation process and hired a full complement of program staff to carry out this work. Consequently, my office responded to more complaints than in any year in the last two decades. One third of these cases were ones we had had on our books for more than two years.

I also used the full range of my powers under the *Access to Information Act* to respond to instances of non-compliance with the Act. This included, for the first time, referring a matter to the Attorney General of Canada for review and possible prosecution.

All this work complements our important efforts to promote requesters' rights—in the courts, to the public and to Parliament.

Yours sincerely,

Suzanne Legault
Interim Information Commissioner of Canada

Information Commissioner of Canada

Commissaire à l'information du Canada

June 2010

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

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Interim Information Commissioner of Canada

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MESSAGE FROM THE INTERIM INFORMATION COMMISSIONER

I am pleased to present the results of my office's sustained and ongoing efforts to ensure that federal institutions meet their obligations under the *Access to Information Act* and are accountable for their actions and decisions to the Canadian public.

In June 2009, this office saw former Commissioner Robert Marleau depart after dedicating two years to complete an important change management exercise. This exercise was crucial to enable the organization to successfully respond to the various challenges facing it.

On June 30, I accepted with great honour the privilege—and all the inherent responsibilities—of leading this organization until the appointment of a new Commissioner. From the onset, I made a clear commitment to maximize the effectiveness and timeliness of our investigative function to fully meet the current needs and expectations of our clients and the Canadian public in general.

Public sector information is a public resource. Subject to limited restrictions, it belongs to Canadians. The right to access government information is the necessary prerequisite to transparency, accountability and public engagement. In a knowledge-based economy, public sector information is essential to foster collaboration and innovation among public sector organizations, individuals and businesses.

When citizens believe that they have been deprived of the information they are entitled to, they have the right to complain to my office. It is then our duty to investigate quickly, fairly and comprehensively.

With this imperative in mind, I reviewed and optimized our operations. I recruited and provided investigators with the tools and training tailored to today's requirements. My staff and I also thoroughly analyzed our caseload and how we approach it. Armed with this intelligence and the expertise gained by implementing new business processes, we became more strategic and proactive.

I also set out at the start of my term to make full use of all the powers and tools I have to maximize adherence to legislative requirements, as set out in our compliance continuum. My office collaborated with all stakeholders during investigations in the search for the best resolution to complaints. However, I took a firm hand when required, issuing clear practice directions, subpoenaing records, conducting examinations under oath, sending heads of institutions final recommendations under the Act to resolve complaints, and even referring a matter to the Attorney General of Canada for review and possible prosecution.

While strengthening our investigative function, I have ensured that our resources are managed in accordance with sound stewardship. My office's efforts at improving our financial management practices and governance were recognized last year by the Office of the Auditor General. I have reinforced our internal audit function to ensure that we gain maximum efficiencies from our internal processes and that needed adjustments are made in a timely fashion.

Despite these early successes, more work remains to be done. Backlog issues and calls for legislative reform are just as old as the access law itself. To address the former, I have instilled within the office a solution-oriented culture that relies on evidence-based analysis to develop the most effective remedies to well-defined issues. Our latest report cards process is a testimony to this approach.

In recent years our world has experienced exponential advances in information technology and social networking. We need to modernize the access legislation to reflect these changes. Until government decides to move forward, I will continue to collaborate with Parliament, central agencies and federal institutions to improve the manner in which the legislation is administered. To enhance our own transparency regarding how we conduct business, my office has revamped our public website to include internal policy documents, research and statistical reports, and access disclosure logs.

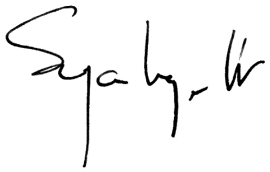
In my role as an officer of Parliament, I actively participated in efforts throughout the year to promote greater proactive disclosure and open government. In January 2010, the Canada School of Public Service offered me the opportunity to present my views on these issues. I recently had the privilege of sharing information on open government with members of the House of Commons Standing Committee on Access, Privacy and Ethics.

In addition, the 2009 Right to Know week proved an unprecedented success, shared by all our counterparts across the country. It brought together—and on the Web—renowned journalists, advocates and experts to discuss the state of access to information in the digital age.

A broader and more profound transformation is now required to bring about a true culture of transparency and openness. We can find inspiration in UNESCO Director-General Irina Bokova's call on the occasion of the 2010 World Press Freedom Day:

> Meanwhile faster and cheaper technology means that more people in the world have ready access to information from outside their immediate environment than ever before. Now is the time for us to capitalize on these advances, by strengthening institutions, by providing the necessary training for information professionals, by fostering greater open-ness within our public sectors and greater awareness among the public.

In closing, I must commend everyone at the Office of the Information Commissioner for their commitment to the ideals of transparency, and for their dedication, cooperation and flexibility through the years of transition and as we worked together to achieve our goals this year.



Suzanne Legault
Interim Information Commissioner of Canada

WHO WE ARE AND WHAT WE DO

The Information Commissioner is an officer of Parliament appointed by Parliament under the *Access to 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. As an ombudsman, the Commissioner also promotes access to information in Canada.

Canada's current Interim Information Commissioner, Suzanne Legault, began her term on June 30, 2009. Prior to this, she was Assistant Commissioner, Policy, Communications and Operations. Earlier in her career, Ms. Legault was Deputy Commissioner, Legislative and Parliamentary Affairs, at the Competition Bureau, Legal Counsel with the Department of Justice Canada, as well as a criminal lawyer in private practice and a Crown prosecutor.

The Interim Commissioner is supported in her 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.

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.

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.

We have 106 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 limited 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.
  - Information related to the Canadian Broadcasting Corporation's (CBC) journalistic, creative or programming activities is also excluded.[1] Information held by Atomic Energy of Canada Limited is excluded, except for information about its general administration and the operation of any nuclear facility.

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 may not 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, there are few incentives for institutions to comply with the Act, and only limited consequences for their not doing so. The Commissioner may not order a complaint to be resolved in a particular way, relying instead on persuasion to settle disputes or asking the Federal Court of Canada to review the case, when an institution does not follow a recommendation on disclosure of information.

1. At the time of writing this report, the CBC was of the view that the Information Commissioner does not have the right to review such records in the course of complaints investigations, and the matter was before the Federal Court of Canada. (See page 40 for more information on this case.)

HIGHLIGHTS

Our sustained and ongoing efforts to ensure that federal institutions meet their obligations under the *Access to Information Act* and are accountable for their actions and decisions to the Canadian public bore fruit this year. We instilled a solution-oriented culture that relies on evidence-based analysis to develop the most effective remedies to well-defined issues.

TAKING CRITICAL ACTION ON INVESTIGATIONS

Through concerted effort to significantly improve our investigative function (see **Chapter 1**), we closed more complaints than we have in any year in the past two decades, and we made the largest dent ever in our existing caseload. The number of cases we have had on file for more than two years continued to fall. We also reduced by nearly one third the average time it took us to conclude investigations into our more recent complaints.

KEYS TO OUR SUCCESS

In September 2009, we drew up a comprehensive action plan to maximize our efficiency gains and provide more timely and effective response to complaints.*

Building our capacity

- We implemented an integrated human resources strategy.
- We staffed our investigative teams to full capacity.
- We hired experienced investigators on contract to work on our oldest and most complex cases.
- We developed an in-house program of targeted training.
- We placed renewed emphasis on our career development program.
- We developed, monitored and adjusted targets for investigators.

Enhancing case management

- We adopted a portfolio approach to investigations.
- We collaborated with complainants and institutions to resolve complaints and sought feedback on how best we could assist them.
- We dedicated a team to our longstanding cases.
- We closely monitored our progress on files and promptly raised issues of concern with senior institutional officials, when required.

Auditing and adjusting our processes

- We improved our intake processes.
- We simplified how we prioritize complaints.
- We streamlined our approach to the early resolution of straightforward complaints.
- We published practice directions that set out clear guidelines on aspects of our processes.

*http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor_int-aud-ver-int.aspx

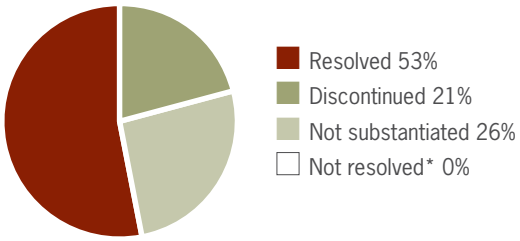
SUMMARY OF CASELOAD, 2008–2009 AND 2009–2010

	Requester-initiated complaints		Commissioner-initiated complaints		Total	
	2008–2009	2009–2010	2008–2009	2009–2010	2008–2009	2009–2010
Complaints carried over from the previous year	2,293	2,513	0	1	2,293	2,514
New complaints	2,018	1,653	1	36	2,019	1,689
Complaints cancelled*	28	n/a	0	n/a	28	n/a
Total complaints to investigate	**4,283**	**4,166**	**1**	**37**	**4,284**	**4,203**
Complaints completed with findings	1,118	1,516	0	34	1,118	1,550
Complaints discontinued	652	575	0	0	652	575
Total complaints closed	**1,770**	**2,091**	**0**	**34**	**1,770**	**2,125**
Complaints pending at year-end	2,513	2,075**	1	3	2,514	2,078
Report cards completed			10	24		

* We stopped using this category in June 2008; these 28 complaints were cancelled before that change was made.
**127 of these complaints are on hold awaiting the outcome of litigation.

OUTCOME OF COMPLAINTS CLOSED IN 2009–2010, BY TYPE

ADMINISTRATIVE COMPLAINTS (1,052)



Delays
Resolved: 71%; not substantiated: 5%; discontinued: 24%

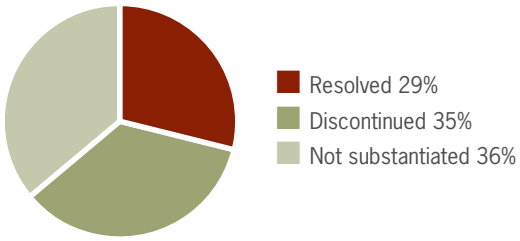
Time extensions
Resolved: 42%; not substantiated: 33%; discontinued: 25%

Fees
Resolved: 61%; not substantiated: 25%; discontinued: 14%

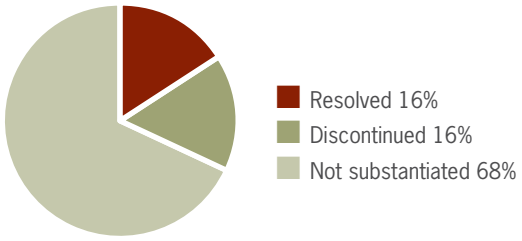
Miscellaneous
Resolved: 40%; not substantiated: 53%; discontinued: 7%

*One delay complaint was closed with a finding of well founded/not resolved

REFUSAL COMPLAINTS (970)



CABINET CONFIDENCE EXCLUSION COMPLAINTS (103)



EFFECTIVELY INVESTIGATING TO ENSURE REQUESTERS' RIGHTS ARE RESPECTED

This year, we made full use of the investigative powers available to us under the *Access to Information Act*, and we did not hesitate to take strong action when required. We expressed our willingness to compel institutions to provide records required for our investigations. On a number of occasions, the Interim Information Commissioner sent formal recommendations to heads of institutions under section 37 of the Act. For the first time ever, she also referred a case to the Attorney General of Canada for review and possible prosecution. **Chapter 2** provides examples to illustrate these strategies in action.

TAKING STOCK OF INSTITUTIONS NEW TO THE *ACCESS TO INFORMATION ACT*

We reviewed the experience of institutions that became subject to the Act in 2006 and 2007, under the *Federal Accountability Act* (see **Chapter 3**). The distinctive features of these organizations (which include Crown corporations and officers of Parliament), as well as their newness, brought challenges as they developed access to information expertise and implemented significant administrative and cultural changes to achieve compliance. This resulted in an 80 percent increase in complaints in 2007–2008. Our subsequent investigations have shown the impact of setting up an access to information function and gaining experience working with the Act, since 85 percent of the complaints completed with a finding were found to have merit.

SHINING A LIGHT ON COMPLIANCE

The most recent edition of our report cards, which we have been producing since 1999, evaluated the performance of 24 institutions in their compliance with the *Access to Information Act* (see **Chapter 4**). Eleven institutions performed reasonably well, while 13 performed below average or worse. Our report also shed light on the widespread problem of delays and their negative impact on Canada's access to information regime. The report card process revealed two issues that directly contribute to such delays: consultations and the delegation of decision-making powers related to access.

EXPLORING FUNDAMENTAL POINTS OF CANADIAN ACCESS LAW

This year, our work in the courts led to progress on several ongoing cases that have an impact on our access to information regime. As described in **Chapter 5**, we continue to seek access to records held within ministers' offices and the Privy Council Office, and we have begun a new case against the CBC to protect the reach of our investigative powers under the *Access to Information Act*. As always, we closely follow judicial reviews initiated by complainants, and we do not hesitate to become involved as needed.

GETTING THE MESSAGE OUT ABOUT TRANSPARENCY AND OPEN GOVERNMENT

This year, we spread the message of the importance of access to information, proactive disclosure and open government through numerous activities (see **Chapter 6**):

- The Information Commissioner (in the persons of both the former Commissioner and the current Interim Commissioner) appeared five times before the House of Commons Standing Committee on Access to Information, Privacy and Ethics.
- We launched a new website that provides a broader range of functions to Canadians.
- Canada's 2009 Right to Know week celebrated the fundamental principles of freedom of information and featured prominent experts in the field.

SETTING A GOOD EXAMPLE

As demonstrated in **Chapter 7**, we received considerably fewer access requests (34) this year than previously and the Information Commissioner ad hoc completed all the investigations into complaints against us. We accomplished all our IM/IT goals for this year, and we added and completed some new projects and advanced the start of others that still have to come to fruition. Of particular note was our success identifying and re-purposing existing tools from elsewhere within the government. Our efforts to improve our financial management practices and governance were recognized in 2009–2010. We received a clean audit from the Office of the Auditor General.

1. TAKING CRITICAL ACTION ON INVESTIGATIONS

Having already built a firm organizational foundation, we focused our energy, time and attention this year on our investigative function. We fully staffed our teams. We took significant corrective action to meet our targets for completing both recent and longstanding cases. Our success is evident in the decreasing size of our caseload and our more timely service to Canadians. And we have clear goals for continuing improvement.

This was a year of noteworthy achievements for the Office of the Information Commissioner in the area of investigations. We closed more complaints than we have in any year in the past two decades, and we made the largest dent ever in our caseload. The number of cases we have had on file for more than two years continued to fall. We also reduced by nearly one third the average time it took us to conclude investigations into our more recent complaints.

These successes were the direct results of our concerted effort to significantly improve our investigative function, based on detailed assessment of our caseload and the effectiveness of the processes we had introduced last year as part of our new business model.[1]

With more useful and accurate statistics and analysis in hand than ever before—the fruits of our plan to enhance our statistical reporting—we clearly saw that we needed to take focused measures to maximize our efficiency gains (see "Keys to our success," opposite and starting on page 13 for details). Our first priority was to hire and train new staff to bring our workforce up to full strength. We also honed our approach to managing cases and made crucial adjustments to our processes.

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1. http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2008-2009_6.aspx

BY THE NUMBERS

We closed 2,125 complaints this year (see Table 1). This is a 20 percent increase in completed cases from 2008–2009. With the exception of 1989–1990 (when we closed 3,011 files, three quarters of which were against one institution), this is the **highest number of cases we have closed in our 27-year history.**

We had 1,689 new complaints this year, including 36 that the Interim Commissioner initiated herself. Overall, this equals 330 fewer complaints than last year. This is the second year in a row that the number of new complaints has dropped since the spike in 2007–2008, which saw us receive 2,387 complaints. This jump was largely due to the 536 complaints we received about the Canadian Broadcasting Corporation.

The number of cases we had open decreased nearly every month (see Figure 1), continuing the downward trend that began in the summer of 2008. Overall for the year, our caseload decreased 17 percent (436 files), which is the **largest drop in our history.**

The drop in caseload includes a steady decrease in the number of longstanding complaints (dating from before April 1, 2008). As Figure 2 shows, we started the year with 1,105 of these files. By year-end, that number had shrunk to 387, a decrease of 65 percent. Overall, **since mid-November 2008, we have closed 76 percent of these cases.**

CONTINUING IMPROVEMENT

In 2009–2010, we closed 21 percent of our most straightforward complaints within three months. With continuing improvement to the front end of our investigation process, our goal is to complete 85 percent of these complaints within that timeframe next year. To do so, we will solicit the cooperation of institutions, in particular Foreign Affairs and International Trade Canada, National Defence, Privy Council Office, the Canadian Broadcasting Corporation and Parks Canada. These institutions were responsible for 73 percent of the straightforward complaints that took longer than three months to wrap up this year.

KEYS TO OUR SUCCESS

In September 2009, we drew up a comprehensive action plan to maximize our efficiency gains and provide more timely and effective response to complaints.*

Building our capacity

- We implemented an integrated human resources strategy.
- We staffed our investigative teams to full capacity.
- We hired experienced investigators on contract to work on our oldest and most complex cases.
- We developed an in-house program of targeted training.
- We placed renewed emphasis on our career development program.
- We developed, monitored and adjusted targets for investigators.

Enhancing case management

- We adopted a portfolio approach to investigations.
- We collaborated with complainants and institutions to resolve complaints and sought feedback on how best we could assist them.
- We dedicated a team to our longstanding cases.
- We closely monitored our progress on files and promptly raised issues of concern with senior institutional officials, when required.

Auditing and adjusting our processes

- We improved our intake processes.
- We simplified how we prioritize complaints.
- We streamlined our approach to the early resolution of straightforward complaints.
- We published practice directions that set out clear guidelines on aspects of our processes.

*http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor_int-aud-ver-int.aspx

FIGURE 1. NUMBER OF OPEN COMPLAINTS, 2009–2010

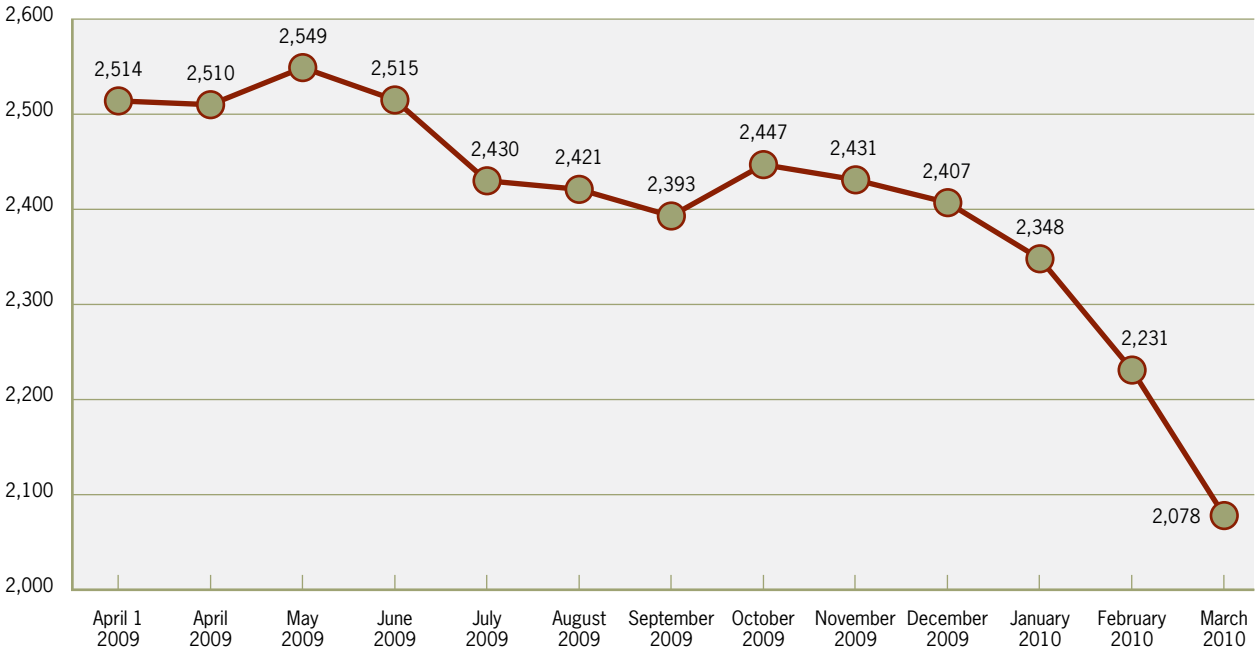
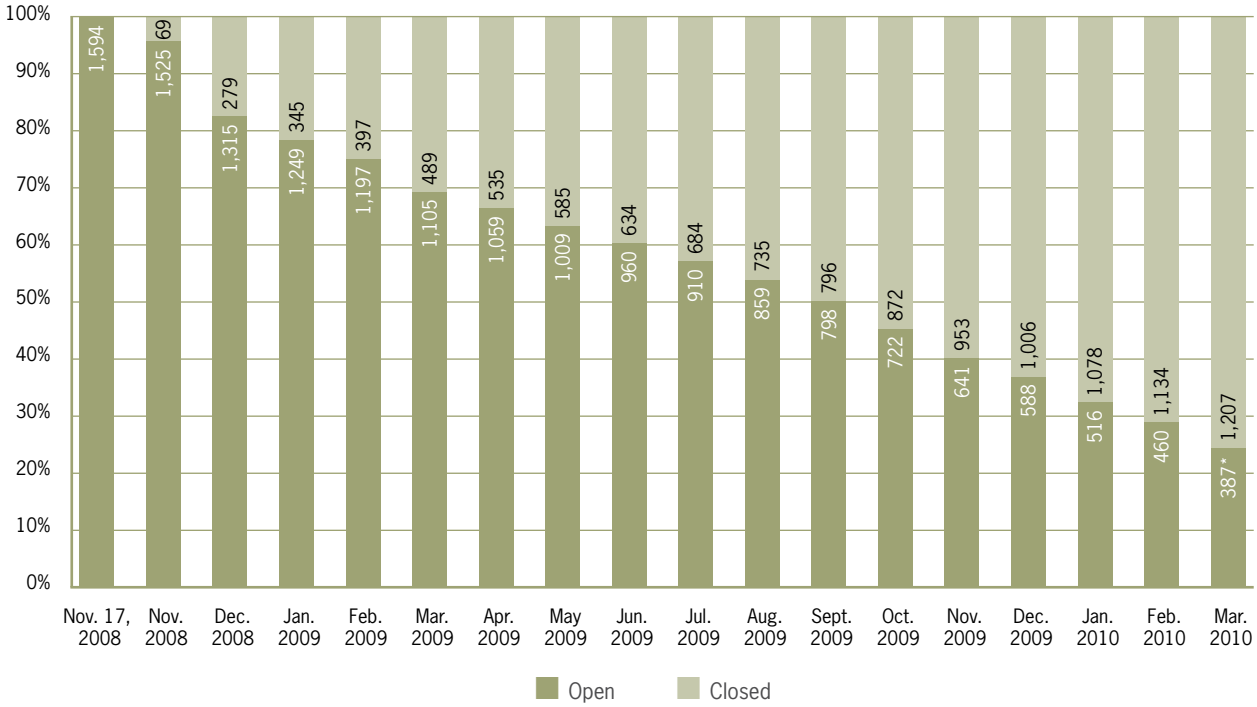


FIGURE 2. STATUS OF LONGSTANDING COMPLAINTS, NOVEMBER 2008 TO MARCH 2010



**21 of the cases remaining to be closed at March 31, 2010, are on hold awaiting the outcome of litigation.*

Finally, **we reduced the overall average time it took to conclude investigations on our more recent complaints** (those dating from after April 1, 2008) from 343 days in 2008–2009 to 245 in 2009–2010 (a 29 percent decrease). We also concluded more investigations more quickly than the year before. For example, the number of complaints we closed in fewer than three months grew by 68 percent, while the number we concluded in three to six months increased by 44 percent (see Figure 3).

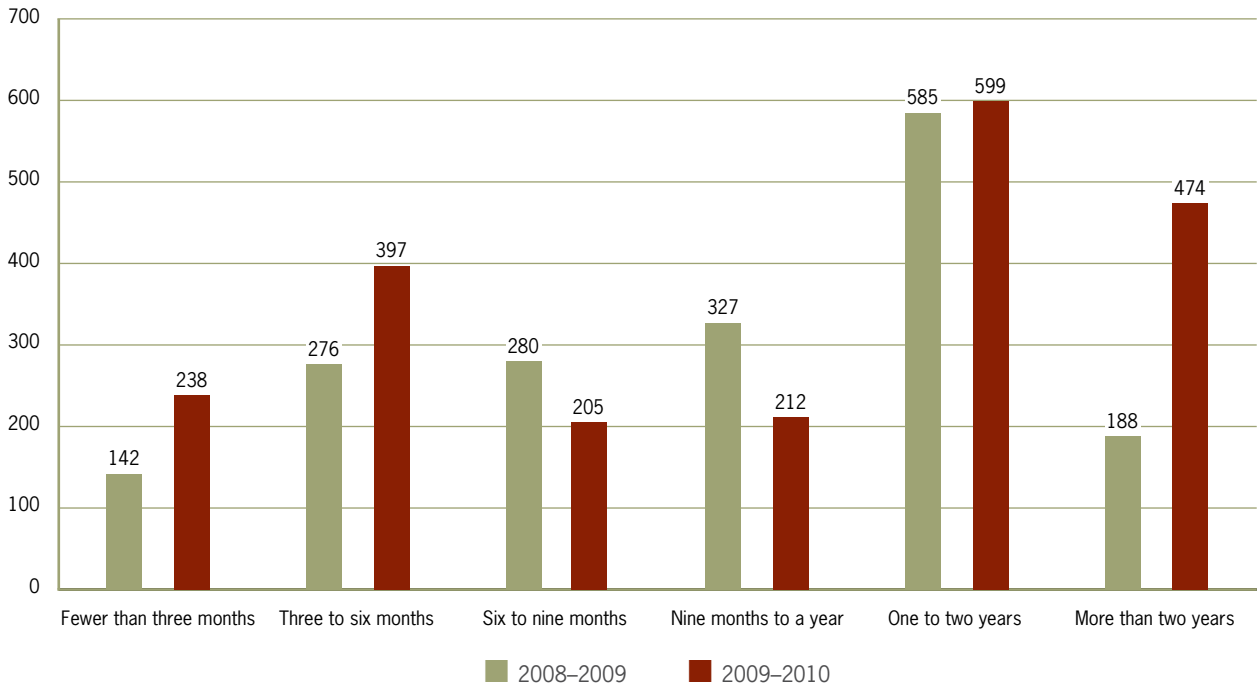
The average time it took to complete all complaints jumped from 401 days in 2008–2009 to 450 days in 2009–2010. The age of some of our longstanding complaints contributed to this increase. Since we are still carrying more than 100 cases that date from prior to 2007–2008 (see Table 2), our average turnaround time will continue to grow until we fully achieve the efficiencies possible with our process improvements. These include closing all the longstanding complaints and carrying over only 300 to 500 cases each year. We are committed to continuing to improve our methods and take other necessary measures to clear these older cases as soon as possible.

KEYS TO OUR SUCCESS

Building our capacity

A crucial prerequisite for success was having enough qualified employees to handle our caseload. Under our integrated human resources plan (see page 51), we had already begun to recruit and train new investigators. However, it became apparent this year that even with that increased capacity we were not going to meet our targets. Consequently, we directed more resources to our investigative teams, particularly the group working on our

FIGURE 3. TURNAROUND TIMES FOR COMPLAINTS CLOSED, 2008–2009 AND 2009–2010

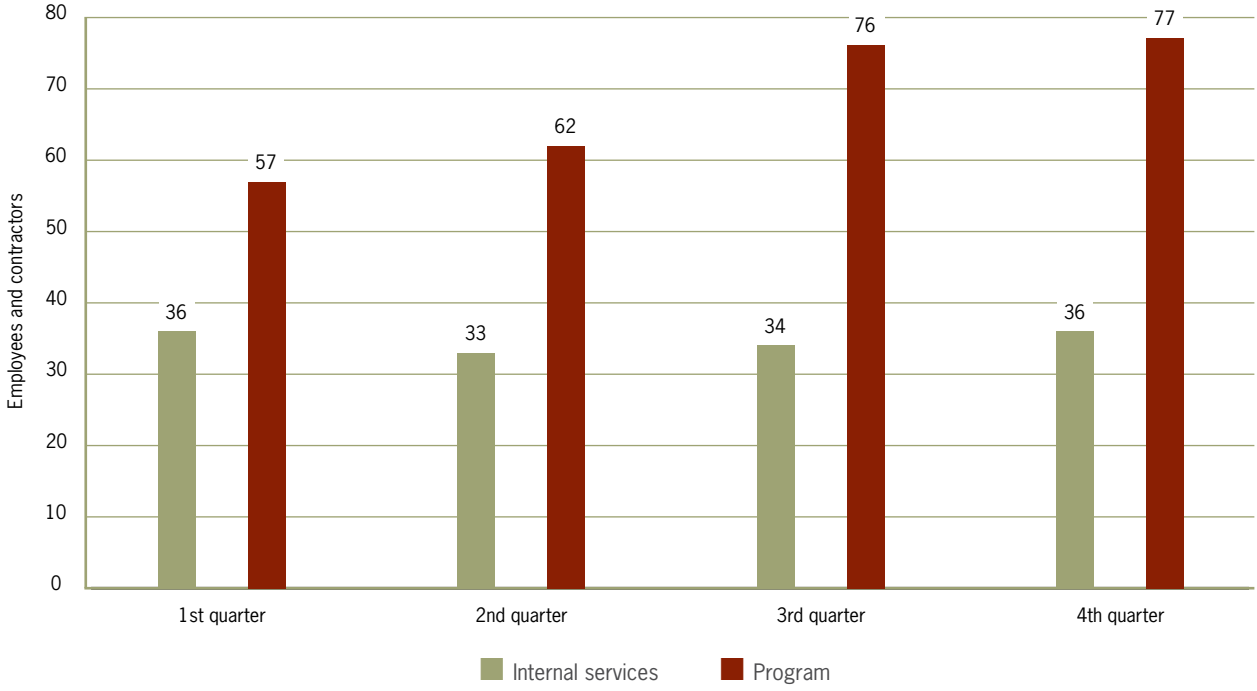


Note: While the total number of complaints closed in 2009–2010 shown in Figure 3 (2,125: the sum of the figures above each bar) equals the total in Table 2, below, for 2009–2010, the categories in the figure and the table do not align. For example, a complaint that was registered in December 2007 and closed in April 2009 would appear in the "2007–2008" category in Table 2, but in the "One to two years" category in Figure 3, since it took 16 months to complete.

TABLE 2. AGE OF COMPLAINTS CLOSED IN 2009–2010 AND THE NUMBER THAT REMAIN TO BE CLOSED

Year we registered the complaint	Number we closed in 2009–2010	How many we have left to close
2002–2003	1	1
2003–2004	4	3
2004–2005	17	10
2005–2006	33	23
2006–2007	151	66
2007–2008	512	284
2008–2009	796	613
2009–2010	611	1,078
Total	**2,125**	**2,078**

FIGURE 4. RESOURCES 2009–2010



longstanding cases. Overall, we hired 20 new people to work in the investigations area, and brought in 10 experienced investigators on contract to help complete our most complex cases. (See Figure 4.)

CONTINUING IMPROVEMENT

We will continue to add to our in-house learning program for investigators. In particular, we will be enhancing the legal component of this training to ensure investigators are aware of the latest jurisprudence related to the *Access to Information Act* and how to work with some of the complex exemptions and exclusions in the legislation.

Beyond securing more investigative staff, we focused on providing our investigators with the support they needed to perform effectively. We placed experienced leaders at the head of each investigation team to mentor our many new employees. We introduced an in-house continuous learning program. In particular, we provided targeted training to help investigators stay current with developments in the field of access to information, recent court proceedings and best practices in carrying out investigations. These efforts to develop the skills and expertise of our workforce will help us retain staff, maintain our productivity and provide quality services.

We are also looking to the future to plan for changes in workload and circumstances by creating pools of qualified investigators to draw from when needed. We also placed renewed emphasis on our career development program for investigative staff to facilitate internal promotion. We also examined how to create mobility within the organization among existing resources. Moreover, we discussed with the Canada School of Public Service how to address the chronic shortage of qualified staff in the access to information field across government, in the context of public service renewal.

We introduced and clearly communicated targets for each of our investigation teams and for individual investigators. We ensured teams and individuals were meeting their assigned targets through weekly monitoring of both achievements and obstacles. This helped motivate our workforce, as we strove each month to wind up as many investigations as possible.

All employees received monthly statistical reports on our caseload. This facilitated collaboration and mutual support across the organization and, consequently, aided our efficiency. We also improved these reports to allow us to better forecast when and how to apply our investigative resources.

Enhancing how we manage our cases

We separated our caseload into recent and longstanding complaints and analyzed it accordingly to determine the best way to handle the various types of complaints we receive. Among other things, this allowed us to implement a portfolio approach to investigations. Our investigators now specialize in terms of types and topics of complaint, particular complainants and specific institutions. Using this approach, our investigators build working relationships with stakeholders, become well versed in the subject matter that complaints frequently address, and develop a better understanding of the specific circumstances leading up to complaints. This expertise contributes to our efficiency and helps us formulate better ways to respond to complaints and maximize compliance.

We stepped up our efforts to collaborate with institutions and encourage their cooperation during investigations. For example, we met with several deputy ministers and senior access officials during the report card process (see page 34) to better understand institutions' working environment and mandate, and to determine how best to collaborate to resolve complaints. We also discussed the number and type of administrative complaints they receive. Through these conversations, it became apparent that these complaints—about delays, fees and other administrative matters—are a drain on both our resources and theirs. (They account for

nearly half our caseload each year.) These meetings were a first step in working with institutions to significantly reduce the number of administrative complaints in the coming years. In fact, by understanding these complaints and the situations from which they arise, we can shed light on practices that can be improved in all institutions. We can also identify systemic problems that would benefit from broad-based solutions, involving central agencies and lawmakers (see page 34).

CONTINUING IMPROVEMENT

We have begun a project to replace our case management software. This is a key tool our investigators use as they pursue their enquiries. A modern and efficient system will put more and better information at investigators' fingertips and allow them to manage their time and monitor the progress of their files.

We took a strategic approach to closing longstanding cases. We dedicated a team to completing these files. We fully staffed the team with experienced investigators to handle the remaining cases, which are complex, and gave them each a diverse selection of files to work on to keep their interest. We worked with complainants to prioritize their longstanding complaints. This allowed us to discontinue some files and complete those of most importance to complainants. We also collaborated with institutions that were the subject of these complaints to develop strategies for dealing with groups of files and to identify priorities.

Auditing and adjusting our processes

Of critical importance to our success was the audit we commissioned in the winter of 2009 of our Intake and Early Resolution Unit. This unit carries out key tasks at the front end of our investigative process. The audit shed light on the performance of the unit while it was still a pilot project, giving us a chance to immediately adjust our approach.[2]

- We created a dedicated group to handle all incoming correspondence when it became apparent that this task was diverting Intake group staff from their investigation-related responsibilities.
- By clarifying the duties of the members of the Intake group, we reduced by half the number of times a file has to change hands during the intake process.
- We issued a practice direction that confirms the 60-day deadline requesters have to file complaints, and sets out institutions' responsibilities for informing requesters of that timeframe. This has reduced the number of complaints we find to be invalid because they were filed late. The practice direction is available on our website.[3]
- We redesigned the complaint form to make it easier for complainants to send us, from the outset, all the information we need to validate complaints. This will help decrease the time it takes us to complete this step of the intake process. We posted the new form on our website.[4]
- We eliminated the point-rating system we used during our complaint triage process, since it proved to be too complex and cumbersome. We issued a practice direction that sets out the new approach; it is available on our website.[5]

2. http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor_int-aud-ver-int_del-rep-rap-del.aspx#5
3. http://www.oic-ci.gc.ca/eng/inv-inv_pd-dp_timeframe-complaint-atia-temps-plaintes-atia.aspx
4. http://www.oic-ci.gc.ca/eng/lc-cj-logde-complaint-deposer-plainte.aspx
5. http://www.oic-ci.gc.ca/eng/inv-inv_pd-dp_triage-complaints-plaintes.aspx

Our most significant time savings came from reducing how long it took to receive from institutions the records we need to carry out our investigations and to prepare files for investigators. This step now takes 42 days on average instead of 90. To achieve this, we developed and published on our website a practice direction containing clear expectations that institutions must submit the records to us within 10 days of our request.[6] Since then, there has been considerable improvement in the turnaround from institutions, although we expect even faster responses in the future.

CONTINUING IMPROVEMENT

Through more process improvements and other strategies, we plan to continue to reduce our caseload next year and close our oldest files. Ultimately, our goal is to have a manageable carry over of 300 to 500 cases each year by 2014–2015.

We also committed to taking immediate action when we encounter delay in receiving requested records. We have made it clear that we will not hesitate to use our formal powers under the *Access to Information Act* to collect records from an institution's premises, or to issue an order compelling the institution to produce the records. We have also begun meeting with access staff and senior officials of institutions about which we receive a large number of complaints to explain our investigation process and emphasize the importance of receiving records quickly.

LOOKING AHEAD

Continuity in both action and purpose characterizes our priorities for 2010–2011. We will continue to monitor and adjust our investigation process to reap further benefits in efficiency and timeliness—particularly in light of the tight fiscal situation in our organization and across the government. In particular, we will monitor and evaluate the overall success of improvements related to staffing, timelines, productivity, monitoring and reporting. We will conduct performance assessments and reviews through internal audits.

In consultation with institutions and complainants, we will assess the effectiveness of our new online complaint form and our new intake procedures.

As our enhanced investigation process gains in experience and maturity, we will turn our attention to developing new strategies to deal with our most challenging cases, building on our in-depth knowledge of our caseload. We will also be in a good position to determine where next we need to focus our investigative and training efforts.

CONTINUING IMPROVEMENT

We intend to publish new practice directions on various topics related to our investigation process and other aspects of how we deal with complaints. These will clearly communicate our expectations to complainants and institutions and also provide insight into how we do our work.

6. http://www.oic-ci.gc.ca/eng/inv-inv_pd-dp_req-rec-inst-dem-doc-inst.aspx

NEW COMPLAINTS IN 2009–2010, BY INSTITUTION

Institution	Number of complaints
1. Canada Revenue Agency	261
2. Foreign Affairs and International Trade Canada	136
3. Canadian Broadcasting Corporation	134
4. Transport Canada	112
5. National Defence	100
6. Privy Council Office	84
7. Citizenship and Immigration Canada	72
8. Royal Canadian Mounted Police	68
9. Correctional Service of Canada	53
10. Canada Border Services Agency	43
11. Industry Canada	43
12. Public Works and Government Services Canada	43
13. Canadian Air Transport Security Authority	41
14. Health Canada	37
15. Canada Post Corporation	35
Other (66 institutions)	427
Total	**1,689**

Of the nearly 1,700 complaints we received in 2009–2010, 75 percent were against 15 institutions. (More than 250 are subject to the *Access to Information Act*.) Eleven institutions, including the first nine above, have been among the top 15 for at least the last three years.

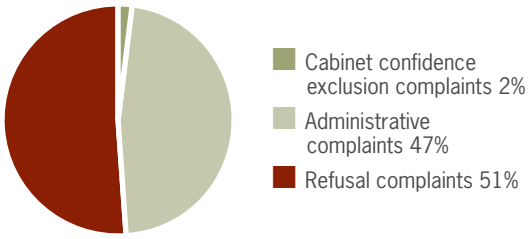
OUTCOME OF COMPLAINTS COMPLETED WITH FINDINGS IN 2009–2010, BY INSTITUTION

Institution	Overall	With merit	Not substantiated
National Defence	159	97	62
Canadian Broadcasting Corporation	158	126	32
Royal Canadian Mounted Police	127	50	77
Privy Council Office	115	47	68
Foreign Affairs and International Trade Canada	94	68	26
Transport Canada	92	41	51
Canada Revenue Agency	68	58	10
Citizenship and Immigration Canada	61	20	41
Public Works and Government Services Canada	45	20	25
Fisheries and Oceans Canada	45	18	27
Correctional Service of Canada	44	28	16
Canada Border Services Agency	43	25	18
Health Canada	42	37	5
Canada Post Corporation	37	21	16
Department of Justice Canada	34	9	25
Other (66 institutions)	386	193	193
Total	**1,550**	**858**	**692**

Overall, we found 55 percent of the complaints we completed in 2009–2010 to have merit and 45 percent to be not substantiated. This split is generally true each year. In contrast, the record for each institution varies. This reflects a variety of factors, such as the characteristics of each complaint, along with the proportions of administrative complaints and refusal complaints.

TYPES OF NEW COMPLAINT, 2009–2010

TYPES OF NEW COMPLAINT, 2009–2010

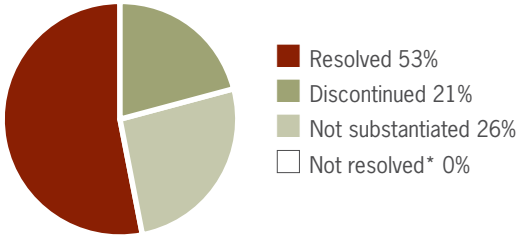


Our caseload was nearly evenly divided between administrative and refusal complaints (see page 5 for a description of these categories). The administrative category has recently gotten to be a smaller proportion of new complaints, decreasing from 58 percent in 2007–2008 to 47 percent this year.

Delay complaints and complaints about the time extensions institutions take to process requests account for more than three quarters of the administrative complaints. These complaints are of particular concern to us, since they represent instances of institutions essentially denying information to requesters by not responding to requests on time or by improperly applying the rules set out in the Act. (See also Chapter 4 and our special report, *Out of Time*, both of which focus on these types of complaint.)

OUTCOME OF COMPLAINTS CLOSED IN 2009–2010, BY TYPE

ADMINISTRATIVE COMPLAINTS (1,052)



Delays
Resolved: 71%; not substantiated: 5%; discontinued: 24%

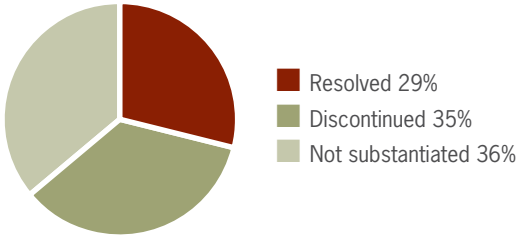
Time extensions
Resolved: 42%; not substantiated: 33%; discontinued: 25%

Fees
Resolved: 61%; not substantiated: 25%; discontinued: 14%

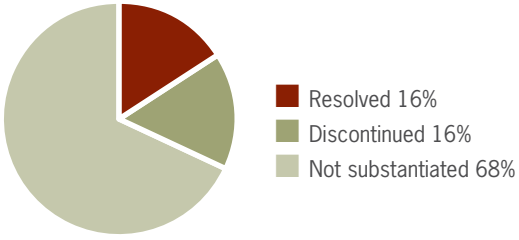
Miscellaneous
Resolved: 40%; not substantiated: 53%; discontinued: 7%

*One delay complaint was closed with a finding of well founded/not resolved

REFUSAL COMPLAINTS (970)



CABINET CONFIDENCE EXCLUSION COMPLAINTS (103)



We found a larger proportion of administrative complaints than any other type of complaint to have merit in 2009–2010. Within the administrative category, we resolved 71 percent of delay complaints and 42 percent of time extension complaints.

2. EFFECTIVELY INVESTIGATING TO ENSURE REQUESTERS' RIGHTS ARE RESPECTED

Access to information is essential to government transparency and accountability. It informs citizen participation and contributes to a healthy democracy. Through our developing expertise and streamlined approach, and by using the full range of tools we have available to us, we made effective interventions on behalf of citizens seeking information from the federal government. As a result, Canadians gained access to more—and more complete—information.

Our focus on investigations brought clarity to our approach. The analysis we performed of our caseload allowed us to develop administrative strategies to complete more investigations efficiently and effectively. Beyond this, however, we acknowledged that we had to make the best possible use of all the tools we have at our disposal to encourage institutions to live up to their obligations under the *Access to Information Act* and to take strong action when required. To that end, we made it clear that we would, if necessary, compel institutions to provide records to us. The Information Commissioner initiated a number of complaints and made formal recommendations to the heads of institutions, all in an effort to produce maximum compliance. This year also marked the first time ever that the Commissioner referred a case to the Attorney General of Canada for review and possible prosecution (see "Without a trace," page 22). At the same time, we also dedicated ourselves to collaborating with all stakeholders—complainants and institutions alike—to resolve access issues.

Below are some examples of noteworthy investigations we completed in 2009–2010 that feature both of these approaches.

MAKING FULL USE OF OUR POWERS

We have strong investigative powers under the *Access to Information Act*, and we invoke them as needed when addressing complaints. For example, we may be required to compel an institution to provide the records we need to carry out a proper investigation—or at least remind it that we have the power to do so (see page 32 for an example of such a case). After arriving at a finding, we might be required to make a series of formal recommendations to the head of an institution regarding the complaint (see box, opposite). When we suspect serious legal wrongdoing, we also have the power to refer a case to the Attorney General of Canada for review and possible prosecution.

By using our full range of powers, we make effective interventions on behalf of requesters to ensure that institutions comply with the Act. For example, in four cases this year, the Commissioner had to issue a report of a well founded complaint with recommendations to the head of the institution concerned. As shown in the case summaries below, three of the four cases were ultimately resolved but one was not. (See also "Justification is required" and "Missed commitments" in Chapter 4.)

When a "hair scrunchie" is a state secret

Background

National Defence received a request in July 2007 for a list of personal grooming items found in the possession of Afghan detainees, "such as combs, razors, cosmetics, hair scrunchies, etc." National Defence refused to release any information on the grounds that doing so would threaten national security (section 15), and in order to protect personal information (section 19). The requester then complained to us about this denial of access.

During the investigation, National Defence claimed another exemption related to protecting individuals' safety (section 17) as justification for withholding some information.

Resolving the complaint

We did not agree with National Defence's assessment of the risk to national security should the list be released. However, we did support its decision to withhold the detainees' names and assigned numbers, as well as the names of the Canadian Forces members identified on the list to protect their safety and that of their families. We also agreed that the detainees' names and assigned numbers were personal information.

The institution stood firm in its position to not release the grooming items. This left the Commissioner no choice but to issue a report to the Minister informing him that she considered the complaint to be well founded and recommended that National Defence release the grooming items. The institution accepted our recommendation. It released not only the list of grooming items but also the information relating to the military personnel, since it no longer considered such information to be a threat for these individuals.

Lessons learned

Several institutions apply the national security exemption with a broad brush. This should not be an institution's default response to requests that touch on national security issues (or even those only tangentially related). Institutions have a responsibility to exercise their discretion carefully, and to sever and release information that cannot be legitimately withheld under the Act. We will continue to challenge institutions' blanket use of the national security exemption.

Without commitment, nothing gets done

This is the only complaint that we were not able to resolve this year.

Background

In February 2008, Industry Canada received a request for records related to a report posted on its website on the topic of music downloads and P2P file sharing on the purchase of music. Due to the scope of the request (it involved 1,300 pages), Industry Canada took a 150-day time extension to respond. However, Industry Canada missed the deadline for claiming this extension and, as a result, the extension was not valid. Moreover, even with the extra time, it failed to provide the requester with the records. Frustrated, the requester complained to us about the delay.

Resolving the complaint

By the time we got involved a year and a half later, we discovered that Industry Canada access officials had done very little to process the request. For example, they had not even begun the consultations that they had to carry out with other institutions and third parties.

Industry Canada also put the request on hold twice for short periods of time over holidays. The institution received permission from the requester to do this. Nonetheless, the Act does not recognize accommodating holidays as a valid reason to put requests on hold.

WHAT IS A SECTION 37 REPORT?

Although we successfully resolve most complaints by working with an institution's access to information coordinator and senior-level officials, there are situations when that is not possible. In such situations, the Commissioner may issue a report to the head of the institution under section 37 of the *Access to Information Act*, stating that the complaint is well founded. This report would contain the following information: the Commissioner's findings, specific recommendations to remedy the issue, and when appropriate, a specific timeframe within which she expects notice of any plan to implement her recommendations. The institution must then decide whether to accept her recommendations or not.

As part of our investigation, we asked Industry Canada to commit to a date when it could provide a response. Upon learning that this would be sometime in June 2010, we attempted to negotiate a more reasonable date, without success.

Finding this complaint to be well founded, the Commissioner issued a section 37 report to the Minister with three recommendations:

- that all the requested information not requiring consultation under the formal third-party notification process (sections 27 and 28) be disclosed by January 2010;
- that interim releases be made as soon as they were ready; and
- that the final response be provided to the requester by the end of February 2010.

Industry Canada replied that, if the consultation process went smoothly, it might be possible to complete the entire request by the end of February 2010. We were disappointed with this response. By not committing to a firm release date and indicating only the possibility of interim releases, we believed it to be inadequate and unreasonable under the circumstances. We found the complaint to be well founded and not resolved—an unfortunate outcome since, in the end, the institution did meet the final response deadline the Commissioner had recommended.

Lessons learned

Although the *Access to Information Act* allows institutions to claim time extensions under specific circumstances, they are of little value when the institution does not do the work required to respond to the request. In addition, these extensions must be claimed during the first 30 days after receiving the request. In failing on both counts, Industry Canada did not live up to its legislated duty to make every possible effort to provide timely access to requested information and, consequently, compromised the rights of the requester.

Without a trace

Background

Media reports appeared in the press in the summer of 2008 concerning litigation related to a wrongful dismissal action filed in court against the National Gallery of Canada (NGC). Those reports, based on documents filed with the court, suggested that records were destroyed and/or individuals were counselled to destroy records that may have been responsive to an *Access to Information Act* request.

Section 67.1 of the Act makes it an offence to destroy, mutilate or alter a record, or direct, propose, counsel or cause any person in any manner to do such things with the intent to deny a right of access under this Act. A person who contravenes this section of the Act is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years or a fine not exceeding $10,000 or both; or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding $5,000 or to both.

In light of the serious nature of these allegations, the Information Commissioner initiated a complaint against the National Gallery of Canada, and we launched an investigation into the matter.

Resolving the complaint

The NGC cooperated fully with our investigation. We examined two issues. First and foremost, we looked at whether, in fact, records had been destroyed that related to an access request and whether some individuals had been counselled to destroy those records. Second, we looked at all the possible factors giving rise to those events, including corporate leadership, e-mail and access to information policies in place at the time of these events, and the availability of training for employees and senior management at the time of this incident.

It should be noted that upon learning of the incident involving the destruction of records, the NGC immediately took remedial action. In recognizing the seriousness of the incident, it adopted a number of measures to address deficiencies to ensure that similar incidents do not take place in the future. Since it adopted these measures before our investigation got underway, we did not make any specific recommendations. We did, however, make a number of observations in arriving at our findings.

Our investigation found as a fact that records responsive to the access to information request were destroyed and individuals were counselled to destroy records during the course of the processing of the request. While we found these to be the facts of the matter, we did not investigate nor did we make any findings regarding whether these actions were done "with intent to deny a right of access under [the] Act" as set out in section 67.1.

Our mandate is to conduct administrative investigations into federal institutions' compliance with the Act and to make findings of fact. We cannot conduct criminal investigations nor can we assign civil or criminal liability. That said, in conducting an investigation, we may uncover evidence of a possible commission of an offence which may lead us to refer the matter to the Attorney General of Canada as provided under the Act.

In this case, we did find evidence of an offence having been committed under section 67.1. As a result, the Information Commissioner has referred this matter to the Attorney General of Canada.

In finding this complaint to be well founded and resolved, we made the following observations to the NGC.

First, despite the existence of policies such as the "Computer equipment – E-mail – Internet Access – Electronic documents (2005)", we found that there was a general lack of computer use and e-mail training for the majority of non-information technology staff. This contributed to employees being unaware of both the proper use of e-mail, as well as their retention and disposal policies.

Second, we observed that at the time of the incident, employees had the ability to erase all traces of e-mails thereby enabling employees to permanently delete these records. Following the incident in question, the NGC disabled this function so that henceforth only certain employees in the Information Technology Branch would be able to perform this function.

Third, after the incident, the NGC amended its "Policies and Procedures: Computer equipment – E-mail – Internet Access – Electronic documents (Nov. 2008)", the "ATIP Policy (Nov. 2008)", and "E-mail Etiquette (Nov. 2008)" and made all such policies available on the Intranet. It also directed management to familiarize themselves with the policies, and directed management to educate employees of such policies. Furthermore these policies are now part of the orientation training presented to all new employees.

Finally, although some training was given to employees, we found that at the time of the incident, leadership and guidance from the corporate sector was lacking with regards to access to information and privacy (ATIP) training. Such training was not provided on a consistent basis to existing employees, nor was it offered in sufficient detail to new employees as part of their orientation. Also, the training for employees (particularly senior management) on such ATIP policies, and on the duties and responsibilities therein was lacking. There should have been continuous training on the subject, and mandatory training for any new employee. The policies and procedures in place concerning access to information and privacy were, likewise, deficient.

The NGC asked us to review its ATIP and e-mail usage policies. We will work with the NGC to clarify those policies outside the ambit of this investigation.

Lessons learned

It is the responsibility of institutions to fully train employees on its ATIP and information management policies and practices so that they know and understand their legal obligations under the Act. By not providing the knowledge and support, institutions run the risk of their staff making decisions that may lead to serious consequences when handling access to information requests.

Preventing fraud?

Background

In 2004, Public Works and Government Services Canada (PWGSC) received a request for a list of all uncashed cheques of more than $2,000 it had issued to corporations from 1996 to 2003. PWGSC responded that the information did not exist. It also claimed that the records did not need to be produced because their creation would unreasonably interfere with the operations of the institution. The requester complained about this response.

Resolving the complaint

When we asked how the production of the information would interfere with its operations, PWGSC decided that it would no longer rely on the argument of interference, and agreed to come up with an arrangement to extract the available data for a fee. In addition, the requester agreed to modify the original request for the information, starting in 1999.

An initial fee estimate of $12,480 ($6,930 to cover the time to access the institution's mainframe and $5,550 to cover the time to develop a program to retrieve the requested information) was sent to the requester, for which he paid a deposit of $6,240 in 2005. At that time, we found the estimate to be excessive and intervened. In response, PWGSC provided a revised estimate of $4,050 to the requester. More discussions were held regarding the amount of mainframe time being charged, resulting in a second revised estimate ($1,485 instead of $6,930).

After several consultations with other federal institutions, PWGSC disclosed some information to the requester on five different dates between December 2005 and July 2006. However, PWGSC exempted other information under the *Access to Information Act* for several reasons: international affairs (section 15), commission of an offence (subsection 16(2)), personal information (section 19), confidential third party information (section 20) and section 24, which references other laws that restrict disclosure.

We then began our investigation into whether PWGSC properly claimed these exemptions. While we agreed with PWGSC about some of the exemptions (personal information, third-party information, other restrictive disclosure provisions), the investigation turned out to be a lengthy one. We went back and forth several times with PWGSC as officials tried to demonstrate the harm that would probably result if the names and addresses of the corporate cheque recipients were disclosed. PWGSC maintained that release of the names and addresses, in combination with the information already disclosed to the requester (such as the amount of the cheques), would facilitate the commission of fraud against the Crown.

From the start, we accepted that, by having access to the payment reference numbers (PRN or cheque number), a fraudster could forge a cheque, cash it and never get caught. However, we were not convinced that this scenario would occur if the names of the payees and addresses were released. We asked PWGSC to provide real examples of fraud cases so that we might understand the process allegedly used by fraudsters. Unfortunately, the examples we received did not explain how those same fraudsters could bypass the security measures put in place by financial institutions.

Coincidentally, we found out that at least one provincial government was already releasing the same type of information, including the names of payees and the amounts of the cheques.

In assessing all the evidence, we concluded that PWGSC did not satisfy the "reasonable expectation of possible harm" test required to justify the commission of an offence exemption. The Commissioner issued a report to the Minister under section 37 of the Act that the complaint was well founded and recommended that the corporate names and addresses be released. She also recommended that, as a public interest issue, PWGSC contact the individual government institutions on whose behalf it issued cheques so that they make efforts at getting in touch with the payees of uncashed cheques.

The Minister accepted the Commissioner's recommendations and released the names and addresses of the recipients. The Minister also informed the Commissioner that PWGSC had taken action to reduce the number of uncashed cheques issued to individuals and corporations by advising the chief financial officers of all departments to address the situation.

Lessons learned

At first glance, it may seem logical that the disclosure of such information would create vulnerabilities for the Government of Canada. There is no doubt that there are real fraud cases involving government cheques that have been discovered by PWGSC. However, when an institution is unable to properly demonstrate how disclosure of information will result in probable harm to a particular interest, it must disclose the information.

Whose call is it?

Background

Library and Archives Canada received a request for all records in a file concerning an individual involved in an important event in the early 20th century (the Halifax Explosion disaster in 1917). The institution refused to disclose certain records in this file, stating that it was still subject to solicitor-client privilege, as per section 23 of the *Access to Information Act*.

The requester complained to us about the denial of access.

Resolving the complaint

The requester is a professional historian and author in need of the requested information for an upcoming publication. As such we asked the institution if it would exercise its prerogative as client to waive solicitor-client privilege and release the records to the requester in the public interest.

We learned during the investigation that Library and Archives Canada consulted with the Department of Justice Canada, who confirmed that the requested information was still covered by solicitor-client privilege and recommended that it be withheld.

Based on that recommendation, Library and Archives Canada withheld the records. However, it did not consider disclosing the records in the public interest, as we had requested. We asked Library and Archives Canada again to carry out this assessment.

During a second consultation with the Department of Justice, Library and Archives Canada was advised that the documents in question were actually under the control of either Transport Canada or Fisheries and Oceans Canada, even years after the event to which they refer occurred. This effectively made one of these two institutions the actual "client" and, as such, responsible for exercising the required discretion.

Fisheries and Oceans Canada replied that the records were not under its control. Transport Canada reviewed the information and, after careful consideration, determined that it held no litigation value and waived the solicitor-client privilege. Library and Archives Canada subsequently released all records to the requester.

Lessons learned

Even though information may fall under the solicitor-client privilege, an institution still has the discretion to disclose it. Since the privilege belongs to the client and not the lawyer, the institution can decide to waive the privilege, particularly where there are no consequences or effect to be expected in disclosing the information.

COLLABORATING FOR RESULTS

This year, we have committed to working *with* institutions to resolve complaints, and to provide them support and guidance when needed. In addition, our investigators have been routinely working with requesters to clarify and refine their complaints. They have also been negotiating with access to information staff on the best way to resolve issues in a timely manner.

The case summaries below highlight instances of such collaboration. (See also, "Proper assessment for proper fees," page 32.)

Learning the ropes (number 1)

Background

The Saguenay Port Authority is a very small and geographically isolated institution that normally receives only a very few requests in a given year. Two years ago, it received ten requests within a very short period of time. Although the institution was able to respond in a timely fashion to the first four requests, it could not cope with six additional requests and four complaints resulting from its initial four responses. The requester then made several additional complaints to us.

Resolving the complaint

This investigation presented a number of issues that no amount of phoning and letter writing could resolve, including incomplete searches, improper fee estimates and the inappropriate application of exemptions. Moreover, the institution refused to give us access to the records we needed to investigate the complaints, saying that since they were held by its external legal counsel, the records were not under its control.

In an attempt to work with the institution to resolve the complaints, the investigator travelled to the institution's offices. During the course of the visit, the investigator successfully worked through the various outstanding issues with the institution's staff and the lawyer. By investing some time onsite to give their officials a crash course on the *Access to Information Act*, the institution's legal obligations

and our role in the process, we obtained the records that we needed to complete our investigation. In addition, the institution was left with a better understanding of what was required to comply with the Act. As a result, they responded to the requester (albeit two years after the first requests were made).

Lessons learned

This investigation highlights some of the challenges for small institutions in meeting their obligations under the *Access to Information Act*, while having to comply with other legal obligations and respond to competing interests. These institutions may lack knowledge of the Act and have little experience and limited resources for handling access requests, since this is usually an add-on to their other responsibilities. They should be aware of and rely on the resources that are available to them. For example, they can turn to the Treasury Board of Canada Secretariat for guidance on access policies and guidelines, network with other small institutions in similar circumstances (such as other port authorities), or engage the services of access to information experts for advice and assistance on processing requests. When complaints are involved, we stand ready to assist small institutions in gaining more knowledge of their legal obligations so that they are better prepared to respond to future requests. The bottom line, though, is that they must accept and meet their responsibilities under the Act. To do otherwise has a serious and negative impact on the public's right of access.

Learning the ropes (number 2)

Background

The Toronto Port Authority (TPA) received a request for detailed records related to employee expenditures. The TPA provided the requester with a fee assessment of $750 and asked for 75 percent of it to be paid up front. The institution also offered to send the requester summary documents related to the request for only $10. The requester persisted in the original request, however, and promptly paid the fees. He nevertheless complained to us because he believed the fees to be excessive.

Resolving the complaint

During the course of our investigation, we discovered that there were other significant problems with how the TPA processed the request, beyond the fee assessment.

First, the institution was late in advising the requester that it would need a 30-day time extension to process the request. Second, it seriously miscalculated the amount of time it would actually take to process the request. In the end, it was nearly a year after the extended due date that the institution was able to provide the requested records.

Our investigator, through discussions with both the TPA and the complainant, was able to broker an arrangement whereby the institution agreed to refund the fees paid and waive the remaining fees owed. In addition, both the CEO and legal counsel apologized to the requester for their processing errors and promised an immediate release of certain documents. The institution committed to a final release date, and promised regular interim releases as information was processed.

Lessons learned

The TPA is another example of a small organization facing challenges in responding to access requests. As in the case of the Saguenay Port Authority, this institution does not receive many requests in any given year and has limited experience and resources for handling them. The TPA's decisions in this case were a consequence of that inexperience and had a negative impact on the requester's right of access. However, the TPA's willingness to work with us and take corrective action puts it in good stead for the future and sets a good example for other institutions to follow.

DUTY TO ASSIST

Institutions have a legislated duty to make every effort to help requesters with their access to information requests. We work with institutions to ensure they are living up to that commitment, and provide guidance when such efforts fall short.

Application fee times three

Background

The Correctional Service of Canada (CSC) received a request that listed three distinct items. Since they were part of one request, the requester paid a single $5 application fee.

After splitting the request into three separate requests, however, CSC asked the requester to pay two more application fees. He strongly disagreed, stating that he had submitted a single request and should pay only one fee.

In response, the institution processed one item on the request and placed the other two on hold until the requester paid the two additional charges. The requester complained to us.

Resolving the complaint

Our investigation revealed that CSC does indeed have an internal policy regarding splitting multiple items on a single request. The intent of the policy is to ensure that requesters can take full advantage of the five non-chargeable processing hours allowed for each request, as set out in the *Access to Information Act*.

In this case, by splitting the request into three, CSC was attempting to provide the requester with 15 free processing hours (five per item), which would significantly reduce the total fees the requester would have to pay.

Unfortunately, CSC access staff failed to explain any of this to the requester or to get his agreement to proceed as they did. Although the institution's intentions were good, we believe that by not informing the requester, it failed to fulfill its obligation to provide the best service possible.

As a result of our intervention, CSC revised its position and processed the remaining two items under the original request.

Lessons learned

Apart from the $5 application fee per request, the *Access to Information Act* is silent as to how many items can be included in one request. Administratively, institutions may deal with requests in the manner they see fit. However, they cannot charge a requester additional fees without the requester's consent. To fulfill their duty to assist obligations, institutions should make every reasonable effort to assist a requester to ensure access rights are respected.

No need to reinvent the wheel

Background

Foreign Affairs and International Trade Canada (DFAIT) received a request for a list of the occupants of the Government of Canada Official Guest House over two years.

DFAIT refused to provide this information, contending that the only way to do so would be to create a record from various sources of information, since the list didn't exist. DFAIT also claimed that there was no system that could perform such a task. The requester complained to us about DFAIT's refusal.

Resolving the complaint

We pointed out to DFAIT officials that if various sources contained information that was responsive to the request, and if those sources could produce machine-readable records, then under subsection 4(3) of the *Access to Information Act*, DFAIT was legally obliged to produce the information.

To address DFAIT's alleged difficulty in producing a single record from various sources, we advised that it simply print the related records and then disclose only what the requester wanted. Following our advice, DFAIT was able to collect the required information and provide it to the requester. This is a vast improvement over their original response, in which officials claimed such efforts were simply not possible.

Lessons learned

Information pertaining to a request may not necessarily exist in a single record, yet may still be accessible via other sources under the control of the institution. It is the institution's obligation under the Act—and, indeed, under the legislated duty to assist—to take the necessary steps to provide access to that information.

Decide now or pay later

Background

A requester submitted two requests to Foreign Affairs and International Trade Canada (DFAIT) that officials deemed to be "larger than normal." As a result, they asked the requester to narrow the scope of both requests. However, they failed to inform the requester of the amount of fees that would be required to process such large requests.

The requester declined the offer to re-scope the request, and DFAIT subsequently provided the requester with fee estimates totalling more than $16,600, half of which was payable in advance. In response to such large fee assessments, the requester asked the institution to re-scope his requests, as originally suggested. DFAIT refused, stating that its policy is that, after a requester declines to re-scope a request, it will not accept any changes to the request once it has issued the fee assessment. The requester complained to us about DFAIT's handling of his request.

Resolving the complaint
DFAIT maintained throughout the investigation that its policy met its duty to assist obligations. We did not agree. In our view, DFAIT was deliberately flouting its responsibilities, since its policy did not allow "every reasonable effort to assist the person in connection with the request" (subsection 4(2.1)). Consequently, we suggested that DFAIT revise its position, which it did and allowed the requester to re-scope his requests.

Lessons learned
Institutions can process a request in any manner they see fit, under the rubric of the legislation. They do not, however, have the right to implement policies that contravene provisions of the legislation. Institutions have an obligation to assist requesters throughout the processing of the request, including informing them of any amount required to be paid before access is given (which DFAIT failed to do in this case).

PROACTIVE DISCLOSURE

Under proactive disclosure policies, institutions make information available to the public as a matter of course, without the public having to resort to the *Access to Information Act* to get it. Indeed, a fundamental principle of the Act is that it complements and does not replace existing means to obtain federal government information. Proactive disclosure is a fundamental aspect of freedom of information and open government, and we strongly encourage institutions to consider its value.

Keep it accessible

Background
Industry Canada received a request from a journalist, seeking an electronic copy of the most recent version of the online database maintained by the Lobbyist Registration Branch. He would use this data in the context of Computer Assisted Reporting (CAR), a form of journalism whereby reporters sift through spreadsheets and databases looking for newsworthy stories.

Industry Canada responded it did not have to release the requested information, since it was already contained in the database and available to anyone with Internet access (paragraph 68(a)).

The requester complained to us, pointing out that the database's search function limited his ability to obtain this information in a format useful for CAR. As such, he was unable to truly access the information.

Resolving the complaint
In an early attempt to resolve the complaint, we suggested that Industry Canada try to provide the requested information in the format required. Instead, officials offered to train the requester on the use of the database, but this never happened. In addition, although the institution updated and modernized the database during the course of our investigation, the required information remained difficult to retrieve online.

At this point, we intervened and organized a meeting with the requester and the Office of the Commissioner of Lobbying of Canada, who had become the new custodian of this complaint. In this meeting, the requester clearly indicated what information he wished to obtain. The institution agreed to extract the raw data and provided it to the requester at significant cost.

Lessons learned
When government institutions make their databases available to the public, regular software updates become essential, so the published data remains truly accessible and retrievable, based on the public's needs. Moreover, institutions should not impose a method or format that may not be conducive to either regular or more computer savvy users. Open government principles include proactive disclosure and the practice of providing data to the public in reusable form based on open standards and formats.

3. TAKING STOCK OF INSTITUTIONS NEW TO THE *ACCESS TO INFORMATION ACT*

The challenges of institutions who became subject to the *Access to Information Act* in recent years—including our office—came to the fore this year, in both investigations and legal proceedings. Solutions for dealing with those challenges also became apparent, however, as we collaborated with institutions.

The 70 or so institutions that became subject to the *Access to Information Act* in 2006 and 2007 under the *Federal Accountability Act* have now had a few years of experience working with the legislation as they respond to access requests and complaints. These institutions include Crown corporations (such as the Canadian Broadcasting Corporation [CBC], Canada Post and Via Rail), various foundations and agencies, and officers of Parliament (such the Auditor General of Canada, the Privacy Commissioner of Canada, and our own office). The distinctive features of these organizations, as well as their newness, presented challenges as they developed access to information expertise and implemented significant administrative and cultural changes to achieve compliance.

As Table 1 indicates, we have received complaints against about one quarter of the new institutions since 2007. More than 80 percent of the complaints were against the CBC, largely involving one requester. Eighty-five percent of the

TABLE 1. COMPLAINTS RECEIVED AND COMPLETED, 2007–2010

Institution	New complaints	Closed	Discontinued	With merit	Not substantiated
Canadian Broadcasting Corporation	889	576	18*	498	60
Canada Post Corporation	116	75	6	49	20
Atomic Energy of Canada Limited	32	27	0	24	3
Office of the Information Commissioner (complaints investigated by the Information Commissioner ad hoc)	24	24	4**	6	14
National Arts Centre	10	9	1	3	5
Office of the Auditor General	10	3	2***	0	1
Office of the Privacy Commissioner	8	7	1	2	4
VIA Rail	6	3	2	0	4
Canada Eldor Inc.	4	4	4	0	0
Canadian Wheat Board	3	2	0	1	1
Elections Canada	3	0	0	0	0
Export Development Canada	3	1	0	0	1
Others (7 institutions)	11	9	3	3	3
Total	**1,095**	**716**	**37**	**580**	**99**

* Including one complaint that was cancelled before the investigation began.

** Including two complaints that were cancelled before the investigation began and two that the complainant withdrew after the investigation began.

*** Including one complaint that was cancelled before the investigation began.

complaints completed with a finding were found to have merit. For our part, requesters filed all but one of the 24 complaints against us in 2007–2008 and 2008–2009. We have not been subject to a complaint since August 2009.

COLLABORATIVE STRATEGIES

Throughout our investigations, we significantly stepped up our collaborative efforts to better understand the challenges that new institutions face when applying the *Access to Information Act*. Beyond our desire to resolve these complaints efficiently, we also wanted to help institutions prevent such issues from reoccurring. To this end, we regularly offered our expertise and advice when needed, and built strong working relationships between all stakeholders to help address their special circumstances.

For example, the former Information Commissioner met with senior officials of the larger of the new institutions during their first year of processing access requests to explain their duty to assist obligations and our role in investigating complaints, and to learn more about the obstacles that they were facing. This year, we also implemented a portfolio approach, grouping some complaints by institution and topic to give our investigators a clearer understanding of an institution's business.

We established links and relationships with new institutions, and adapted to their reality in recognizing that Crown corporations and officers of Parliament function differently than other institutions. For example, the Act provides that the Auditor General of Canada shall not disclose to a requester information that it gathers or creates in the course of conducting an audit or examination (section 16.1). This exemption applies to both ongoing and completed audits or examinations. In recognizing the volume and class nature of the information involved, and to gain efficiencies in our investigations, we established a protocol with the Auditor General of Canada whereby we may review the information on its site to satisfy ourselves that the exemption has been properly applied.

During our work with new institutions we also learned of some best practices. For example, Via Rail demonstrated that it sees complying with the Act as part of its everyday business practice. Upon becoming subject to the Act, Via Rail immediately posted on its website, as a service to the public, instructions on how to make an access to information request.

DEVELOPING EXPERIENCE WITH NEW AND EXISTING PROVISIONS

When the new institutions became subject to the Act, they were required to navigate new legislation and learn what information they must disclose as well as justify the reasons for applying exemptions and exclusions to withhold information. On top of this, additional exemptions were created to protect some of their specific interests, such as the economic interests of Canada Post and Via Rail, and audits conducted by the Auditor General of Canada.

When we became subject to the Act, section 16.1 became particularly relevant, due to the nature of our work and the kinds of records that are under our control. Section 16.1 is a mandatory exemption protecting the confidentiality of the investigative process. We cannot reasonably conduct an investigation into a complaint without full access to all pertinent information, even information that may be considered sensitive or private. By erecting a strong wall of confidentiality around our work that is bolstered by mandatory exemptions, the Act provides us access to vital material without compromising any of the stakeholders involved.

But what happens after the investigation has closed? What remains confidential and exempted from release, should a requester seek access to that investigation's records? As a new institution negotiating a new exemption without any jurisprudence to guide us, we experienced some challenges in answering such questions appropriately.

Our initial efforts to address the complexity of these issues resulted in several complaints made against our office. Learning from our decisions and the independent feedback we received from the Information Commissioner ad hoc, our office set out to develop a sound approach to meeting our

duty to assist obligations while maintaining the confidentiality of our investigations. We put a new policy in place that sets clear rules for working with section 16.1, and administrative practices that balance the needs of all stakeholders involved—requesters, institutions and ourselves.

Subsequently, we received only a small number of complaints about our application of section 16.1. Upon investigation, the Information Commissioner ad hoc found them to be not substantiated. It is worth noting that the process of receiving feedback from the Information Commissioner ad hoc and then subsequently improving our practices confirms the value of this independent oversight. We agree with the Information Commissioner ad hoc that it should be formalized in the legislation. (See page 52.)

Our experience mirrors challenges that other new institutions have faced. For example, section 68.1 is a new provision that specifically excludes CBC's journalistic, creative and programming information. As such, CBC began to regularly apply section 68.1 exclusions when responding to requests, resulting in a large number of complaints.

We have not been able to investigate these complaints because there is a difference of opinion between us and the CBC about the implications of this exclusion in our investigations. As reported in Chapter 5, we are currently before the courts because the CBC has refused to provide us with records that we subpoenaed related to complaints. Without the benefit of reviewing the information alleged to be excluded, we cannot assess whether the CBC was correct in its initial decision to withhold records respondent to the original requests. In light of this legal proceeding, we have had to place around 120 refusal complaints on hold.

Atomic Energy of Canada Limited (AECL) also has a provision particular to it. Section 68.2 excludes from the Act information that is not related to AECL's general administration or to the operation of a nuclear facility. AECL has been the subject of two complaints about how it has applied this exemption. During our investigations, AECL has cooperated fully in providing us information that it had excluded from an access request under section 68.2. This cooperation has allowed us to proceed with our investigation without unnecessary delays.

NOTEWORTHY INVESTIGATIONS

Our investigations into complaints against the CBC have been instructive in terms of the challenges new institutions have faced as well as breaking new ground on applying new provisions in the Act. The following summarize three such investigations.

Justification is required

Background

Overwhelmed by a large volume of requests, the CBC began to automatically exempt all records containing certain internal accounting codes and certain credit card numbers. To do so, it claimed the exemption that protects any information that might facilitate the commission of an offence (subsection 16(2)). The requester complained to us about the CBC's use of this provision in several requests.

Resolving the complaint

Since the onus falls on institutions to prove the applicability of an exemption, we requested a detailed rationale for each instance the CBC applied the exemption.

In the course of doing so, the CBC's access to information officials conceded that, in order to commit an offence using the internal codes, a breakdown of accounting controls would have to happen at several levels within the institution itself. After this re-evaluation, the CBC released the records, which were previously exempted, to the requester.

As for the corporate credit card numbers, we agreed with the institution that the release of information could facilitate the commission of an offence. As such, this information remained withheld.

Lessons learned

When deciding to withhold information under the Act, institutions must assess and demonstrate how disclosure of the requested information would result in probable harm to the particular interest it has identified. When it cannot demonstrate the harm, it must disclose the information.

Proper assessment for proper fees

Background

The *Access to Information Act* allows institutions to charge fees for every hour (after the first five hours) they reasonably need to search for records and prepare them for release.

The CBC received 68 requests and assessed that the resulting processing fees would total several thousand dollars. The requester complained to us, stating that he considered the fees to be excessive. The requester also suggested that the CBC might be using the large fees as a general deterrent to requesters.

Resolving the complaint

To evaluate whether the CBC properly estimated the fees, we asked them to provide a detailed justification for each request. The CBC did so and we worked closely with officials there to assess each one.

We found that most of the fees were, in fact, unjustifiably high, in some instances due to mistakes made by inexperienced access staff. However, we found no evidence that the CBC was using excessive fees as a way to deter requesters.

As a result of our investigation, the CBC re-assessed the excessive fees and ended up processing many requests for free.

Lessons learned

Institutions are responsible for providing their staff with appropriate advice and training on calculating processing fees, particularly if they are large and out of the ordinary. Institutions must also be able to adequately justify any fees that are out of the ordinary. In this case, a more diligent approach to the assessment of fees on the part of the CBC would have resulted in a better service to the public and fewer complaints to our office.

In addition, we recognize that the fee scheme in the Access to Information Regulations, which dates back to the 1980s, needs to be revisited to reflect the electronic-based environment in which all institutions work and to address the discrepancies in how the regulations are applied. This will likely reduce the number of fee complaints we receive each year. (They accounted for four percent of new complaints in 2009–2010.) We will pursue this issue with the Treasury Board of Canada Secretariat.

Missed commitments

Background

This is a follow-up to a case that we originally reported two years ago and again in last year's annual report.[1]

A person submitted hundreds of access requests to the CBC in the first few months that it became subject to the *Access to Information Act*. He then made hundreds of complaints to us when the institution failed to respond on time.

Although we found the bulk of these delay complaints to have merit, we agreed to the CBC's undertaking to respond to the remaining requests within one year. We understood that the institution was overwhelmed by requests and dealing with a heavy workload.

We monitored CBC's progress as it worked to meet the April 1, 2009, deadline for more than 260 outstanding requests. Unfortunately, the CBC failed to respond to 32 of these requests by that deadline. Consequently, the Commissioner initiated a complaint for each of the outstanding requests.

Resolving the complaint

In order to investigate these complaints, we had to ask the CBC for additional documentation. Given the delays in processing these requests up to that point, we also informed the CBC that we would exercise our formal powers to compel it to produce the responsive records, if required. In response, CBC sent us all of the information we requested (processing files) but not the responsive records at issue.

1. See 2007–2008 annual report: http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2007-2008_8.aspx; and 2008–2009 annual report: http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2008-2009_12.aspx

The CBC responded to all of the outstanding requests between April 3 and May 28, 2009, before it became necessary to issue the order for production of records. We found the complaints to be valid and resolved.

It is our view that the institution might not have responded to these requests as soon as it did, had it not been for strong action on our part—initiating our own complaints and then expressing our willingness to issue an order for the production of records—and the requester's—taking the CBC to court. (For a summary of that proceeding, see page 40.)

Lessons learned

While we acknowledge that the CBC has been working under difficult circumstances, we expected that the institution would fully meet its commitment to respond to all the requests in the year provided. In its breach of not only the provisions but also the spirit of the *Access to Information Act*, the CBC clearly did not respect the rights of the requester. This case also raises the broader question of whether the Act needs to be reformed to allow institutions to take time extensions for responding to multiple and simultaneous requests from a single requester. This was one of the amendments we proposed in our 2009 legislative reform package.[2]

LOOKING AHEAD

Working with these institutions to overcome their obstacles gave us invaluable insight into broad-based issues that may be affecting institutional performance across the entire access to information system. As such, our experience resolving these cases has directly informed our ongoing systemic investigations into compliance. For example, next year we will be producing report cards on new institutions. For more information, see Chapter 4.

2 See recommendation 12 here: http://www.oic-ci.gc.ca/eng/pa-ap-atia_reform_2009-march_2009-strengthening_the_access_to_information_act_to_meet_todays_imperatives.aspx

4. SHINING A LIGHT ON COMPLIANCE

Our report cards highlighted both success stories and compliance concerns at individual institutions, and shed light on system-wide problems, gaining attention in Parliament. Our systemic investigations complement this work by giving us greater in-depth knowledge of widespread problems that have wide-ranging effects.

REPORT CARDS: ASSESSING INSTITUTIONAL PERFORMANCE

The most recent edition of our report cards, which we have been producing since 1999, looked at compliance with the *Access to Information Act* by 24 institutions.[1] This is the most institutions we have ever looked at in one year.

This group, which includes nine institutions that we assessed last year, accounts for 88 percent of all the access requests submitted to the federal government in 2008–2009 (the year we were looking at). We produced a fact-based assessment of institutional compliance linked to a series of recommendations for improvement.

Eleven institutions performed reasonably well. Among this group, Citizenship and Immigration Canada, the Department of Justice Canada, Canada Border Services Agency and Public Works and Government Services Canada deserve special praise for their consistency in good performance or their significant improvement over last year. Thirteen institutions performed below average or worse (see Table 1). We found that the Foreign Affairs and International Trade Canada performed so poorly compared to last year that we assigned it a red alert rating.

The point of the report cards, however, is not to point fingers and ostracize institutions. Rather, we set out to shed light on issues that need to be addressed to ensure improvement across the entire access to information system.

Through the report card process, we confirmed the continued presence and detrimental impact of the system-wide issues identified in the 2007–2008 special report.[2] These include the inappropriate use of time extensions and the increase in time-consuming consultations among institutions—particularly consultations that are mandatory under Treasury Board of Canada policy. We also uncovered a significant obstacle to timely access to information: the flawed or ill-enforced delegation of authority for access to information decisions within institutions.

With these facts in hand, we framed recommendations for individual institutions, tailored to their circumstances, and for the system administrator—Treasury Board of Canada Secretariat. These recommendations set out specific measures these organizations must take to resolve the problem of delays and other issues of compliance with the *Access to Information Act*.

We tabled the report cards and our assessment of systemic issues in a special report to Parliament on April 13, 2010.[3]

1. http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2008-2009.aspx

2. http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2007-2008_5.aspx

3. http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2008-2009.aspx

OUR COMMITMENTS

In the special report to Parliament we released in February 2009, we committed to taking follow-up actions in three areas to ensure that we are doing our part to support the access to information system.[4] We met those commitments in 2009–2010, as follows.

New categories describe outcomes of complaints

The terms we have used to describe the outcomes of our investigations have varied over the years. The general principle behind them all, however, has been whether the complaints were well founded, as per section 37 of the *Access to Information Act*.

Feedback we received from complainants and institutions over the years led us to review and reconsider the disposition categories. Access officials said that the terminology we were using gave a misleading impression of institutions' conduct in some cases. For example, there was only one category—"resolved"—to cover a wide range of problems, from institutions missing just a few pages of records in a release to incorrectly denying access to records outright.

In light of this feedback, we committed to reviewing the current categories and proposing amendments as required. We consulted with access to information coordinators in March 2009 and with the public in March 2010, and sought the input of investigators. The four new categories we developed are simpler, more accurate and follow the terminology used in the law: well founded (with three-sub-categories), not well founded, discontinued and settled. More information about these categories is available on our website.[5]

Releasing information under the Act

A key principle of the *Access to Information Act* is that institutions should release as much information to requesters as possible. However, measuring whether this is happening is challenging. We committed to designing a method for doing so.

Starting in April 2010, we will routinely capture data in investigation files to track the overall degree of disclosure subsequent to complaints.

Three-year plan for report cards

In July 2009, we launched our three-year plan to bolster our report cards as part of our effort to get to the root causes of delays in the federal access to information system.[6]

The plan takes an integrated approach to compliance assessment, marrying institutional performance reviews with a systemic investigation into time extensions and whether interference with the access process—political or otherwise—causes delays or unduly restricts the release of information to requesters.

We carried out all the promised activities of year one of the plan in 2009–2010:

- We followed up on the action plans promised by the 10 institutions we surveyed last year.
- We increased our report card sample to include all institutions for which we received at least five delay-related complaints in 2008–2009.
- We added several new measurements to paint a better picture of each institution's performance.
- We gave institutions the opportunity to explain the underlying reasons for their performance results.
- We let institutions comment on a draft version of their report card, and we published these responses.
- We laid the groundwork for our systemic investigation.

Each year, we will review the plan and adjust it as required.

New commitments

In our most recent special report, we made four new commitments:

- to publish a practice direction on the time extensions institutions take to process access requests;
- to develop a template for institutions to use when notifying us of those extensions, possibly by electronic means;

4. http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2007-2008_10.aspx

5. http://www.oic-ci.gc.ca/eng/what-is-new-quoi-de-neuf_2010_3.aspx

6. http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_3_yrs_plan.aspx

- to publish a practice direction on the procedure for notifying us of these extensions; and
- to assign an official to review and assess the notices we receive, based on the information institutions provide about the use and length of extensions, and to carry out any follow-up actions.[7]

We will report on our work to meet these commitments in next year's annual report.

SYSTEMIC INVESTIGATIONS

Systemic investigations are a key component of our three-year plan, since they complement the report cards and allow us to look more deeply into the issues those institutional assessments reveal.

We laid the groundwork this year for our systemic investigation into time extensions that we had announced in last year's special report to Parliament.[8] We also expanded the scope of this self-initiated investigation to look at whether interference with the access process—political or otherwise—causes delays or unduly restricts the release of

TABLE 1. 2008–2009 REPORT CARD RATINGS

Institution	Rating	Letter grade	Overall performance rating
Department of Justice Canada	5	A	Outstanding
Citizenship and Immigration Canada	5	A	Outstanding
Public Works and Government Services Canada	4.5	B	Above average
Canada Border Services Agency	4.5	B	Above average
Industry Canada	4	B	Above average
Public Safety Canada	3.5	C	Average
Royal Canadian Mounted Police	3	C	Average
Fisheries and Oceans Canada	3	C	Average
Indian and Northern Affairs Canada	3	C	Average
Human Resources and Skills Development Canada	3	C	Average
Transport Canada	2.5	D	Below average
Canada Revenue Agency	2.5	D	Below average
Canadian Security Intelligence Service	2	D	Below average
National Defence	2.5	D	Below average
Health Canada	2	D	Below average
Canadian Food Inspection Agency	2	D	Below average
Privy Council Office	2	D	Below average
Canadian International Development Agency	1	F	Unsatisfactory
Correctional Service of Canada	1	F	Unsatisfactory
Canadian Heritage	1	F	Unsatisfactory
Natural Resources Canada	1	F	Unsatisfactory
Environment Canada	1	F	Unsatisfactory
Foreign Affairs and International Trade Canada	0	Off chart	Red alert
Telefilm Canada	n/a	n/a	n/a

7. http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2008-2009_6.aspx

8. http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2007-2008_6.aspx

information to requesters. This was a result of oral information given during the report card process and complaints we received.

The report card process also clearly showed that two issues should be of particular concern to us during this investigation. The first is how consultations that institutions must have on certain issues, among each other and with third parties (here and, particularly, abroad, including with foreign governments) contribute to delays. The second is institutions' delegation orders—that is, how decision making on access files is shared among senior officials and whether this slows down the processing of access requests or results in a reduction in disclosure that is contrary to the Act. With regard to consultations, we must find out the details of the process. We will look at practices in key institutions with whom other institutions must consult. Delays in these institutions result in a bottleneck across government.

LOOKING AHEAD

In 2010–2011, we will implement year two of the three-year plan.[9] We will apply our report card process to a sample of institutions that became subject to the *Access to Information Act* in 2006 and 2007. We will be among the institutions in this group, and we are designing a method to allow for an independent assessment of our own compliance with the *Access to Information Act*. (For information on our access to information and privacy activities in 2009–2010, see page 49.)

With regard to our systemic investigations, we are beginning to review the data we have in our possession; specifically, our extensive investigation files and the notices that institutions regularly send us about the extensions they take. We will further analyze the use and duration of time extensions, while looking into their root causes and impact.

In 2010–2011, we will also collect data from a select group of institutions and perform a comparative analysis of how other countries deal with the issue of international consultations.

9. http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_3_yrs_plan.aspx

5. EXPLORING FUNDAMENTAL POINTS OF CANADIAN ACCESS LAW

Our work in the courts led to progress on several ongoing and new cases that touch on important areas of access to information law. These proceedings and our participation in them highlight the importance we place on developing access to information jurisprudence and standing up for the sound application of the law.

A fundamental principle of the *Access to Information Act* is that decisions on disclosure should be reviewed independently of government. The first level of review is by the Office of the Information Commissioner through our investigation process; the second level of review is by the Federal Court, after we complete our investigation. The latter is only in relation to access refusals.

Court proceedings under the Act may be instigated in the following situations:

- When we conclude that a complaint is substantiated and we make a formal recommendation to disclose records that the institution does not follow, we may, with the complainant's consent, seek judicial review by the Federal Court of the institution's refusal.
- The complainant, upon receiving our report of the investigation, can apply for a judicial review of the institution's refusal.

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

We may also be involved in other types of proceedings:

- We may seek leave to intervene in matters that relate to access to information.
- We may defend the Commissioner's jurisdiction or powers.

This year, we participated in several court proceedings, summarized below.

CONTROL OF RECORDS

Canada (Information Commissioner) v. Canada (Minister of National Defence), (A-378-08); *Canada (Information Commissioner) v. Canada (Prime Minister)*, (A-379-08); *Canada (Information Commissioner) v. Canada (Commissioner of the RCMP)*, (A-413-08); *Canada (Information Commissioner) v. Canada (Minister of Transport)*, (A-380-08)

2009 FCA 175 (May 27, 2009), 2009 FCA 181 (May 29, 2009) (Justices Richard, Sexton, Sharlow)

After lengthy investigations into refusals to provide access by National Defence, Transport Canada, the Royal Canadian Mounted Police (RCMP) and the Privy Council Office of agendas of the Prime Minister, agendas of a Minister and minutes and documents about meetings, the Information Commissioner applied to the Federal Court for a review of the departments' decisions.

Following the Federal Court decision, there were several appeals. The Federal Court of Appeal dismissed the Information Commissioner's appeals but supported the Attorney General's. We subsequently sought and were granted leave to appeal the decisions to the Supreme Court of Canada.

Background

A detailed summary of these cases can be found in our 2008–2009 annual report.[1]

These cases revolved around the following questions:

1. **The control issue.** Are records in a Minister's office (including the Prime Minister's Office) "under the control" of a government institution?
2. **Are ministers considered "officers"?** Does the term "officers," as found in the exception to the definition of "personal information" set out in the *Privacy Act*, include ministers?

Summary of the Federal Court decision

1. The control issue.

The Federal Court decided that ministers' offices are distinct entities from the departments over which ministers preside and do not constitute "government institutions" within the meaning of the *Access to Information Act*. The court acknowledged that while ministers and the prime minister are the *head* of their respective departments, they are not *part* of them.

To establish whether records located in a minister's office were under the control of an institution, the Federal Court set out the following test:

1. Does the content of the records relate to a departmental matter?
2. 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 a copy of that document 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, even if it is only on a partial, transient or *de facto* basis?

Only if the answer to both these questions is "yes" would the court consider the records in question to be under the control of the institution.

2. Are ministers considered "officers"?

On the applicability of the exemption for personal information, the court found that ministers are public officers as defined in the *Interpretation Act* and the *Financial Administration Act*, and therefore "officers" for the purposes of the *Privacy Act*. As such, they could not rely on the "personal information" exemption for information relating to their duties and functions in the administration of their departments.

The Information Commissioner appealed the Federal Court's decision on the control issue. The Attorney General brought a cross-appeal, arguing that ministers were not "officers" and, as such, section 19(1) did apply.

Issues, findings and reasons

1. The control issue.

The Federal Court of Appeal dismissed the Information Commissioner's appeals. The judges upheld the conclusion that government institutions did not include the office of the minister who presides over them.

While acknowledging the force of the legal argument that the head of a government institution is, as a matter of common sense and in accordance with the ordinary meaning of the words, a part of that government institution, the court stated that "it appears to us that the *Access to Information Act* was drafted on the basis of a well understood convention that the Prime Minister's office is an institution of government that is separate from the Privy Council Office, and that the offices of Ministers are institutions of government that are separate from the departments over which the Ministers preside."

The Federal Court of Appeal agreed with the two questions that the Federal Court had proposed to determine which records in a minister's office were nonetheless under the control of a government institution. The Court acknowledged that the second question could invite speculation, but stated that it could also be answered by drawing reasonable inferences from the evidence, which the Federal Court did.

1. http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2008-2009_18.aspx

2. Are ministers considered "officers"?
The Federal Court of Appeal allowed the Attorney General's cross-appeal.

The appeal judges found that the Federal Court had erred in law in importing into the *Privacy Act* the definitions of "public officer" from statutes dealing with different subjects that use the term in a different context (i.e. the *Financial Administration Act* and the *Interpretation Act*).

The court found that since the *Privacy Act* and *Access to Information Act* were "drafted on the basis of a well understood convention that the Prime Minister's office is an institution of government that is separate from the PCO," then "if Parliament had intended the Prime Minister to be treated as an 'officer' of the PCO for the purposes of the *Privacy Act*, it would have said so expressly." The Federal Court of Appeal was also of the view that "it would be inconsistent with the intention of Parliament to interpret the *Privacy Act* in a way that would include the Prime Minister within the scope of the phrase 'officer of a government institution'."

Future actions

On December 17, 2009, the Information Commissioner was granted leave to appeal the Federal Court of Appeal's decisions to the Supreme Court of Canada. The tentative date for the hearing is October 7, 2010.

PRODUCTION OF RECORDS

The Canadian Broadcasting Corporation v. The Information Commissioner of Canada (T-1552-09)

Background

We launched investigations into numerous complaints regarding CBC's application of section 68.1 of the *Access to Information Act*. This section provides that the Act "does not apply to any information that is under the control of the Canadian Broadcasting Corporation that relates to its journalistic, creative or programming activities, other than information that relates to its general administration."

During the course of our investigations, we insisted that the CBC produce records related to these complaints. In response, the CBC re-iterated that section 68.1 excludes records from the operation of the Act and claimed that we did not have the legal authority to access these documents.

On September 16, 2009, we served Mr. Hubert T. Lacroix, the President of the CBC, with an Order of Production requiring that he produce, or cause to be produced, these specific records. On that same day, the CBC applied for a judicial review challenging our authority to compel the production of records.

Issues

Does the Information Commissioner have the authority to independently review records that are requested under the *Access to Information Act* but that the CBC claims are not subject to the right of access?

Future actions

The parties have filed their affidavit materials and completed their cross-examinations. The parties have filed their written arguments in this case. The CBC filed a request for a hearing date on April 23, 2010.

LARGE VOLUME OF REQUESTS

Statham v. Canadian Broadcasting Corporation (T-782-08), 2009 FC 1028, October 13, 2009 (Justice de Montigny)

Background

Within its first three months of being subject to the *Access to Information Act*, the CBC received approximately 400 requests from David Statham. Overwhelmed by a large volume of requests, the CBC was unable to respond to these requests on time. In addition, it did not claim time extensions within the 30-day deadline set out in the Act.

For a detailed description of the ensuing complaints and the result of our investigations, see page 32, "Missed Commitments."

The requester filed an application for judicial review and asked the Federal Court to do the following:

- order the President of the CBC to disclose documents requested under the Act that had not yet been disclosed at the time of the application for review;
- declare that the CBC had acted unreasonably in failing to respond to requests in accordance with the provisions of the Act; and
- award costs on a solicitor-client basis.

In order to strike out inaccurate statements of fact that the applicant had filed, the Information Commissioner was added as a respondent in the proceeding.

By the time the Federal Court heard the application for review, the CBC had responded to all of the outstanding access requests.

Issues, findings and reasons

The application was dismissed based on the following:

Is the application for review moot?
Because the CBC had responded to all of the outstanding requests by the time of the hearing, Justice de Montigny noted that the case had been rendered moot. Nonetheless, Justice de Montigny stated that he would hear the case on the grounds that the applicant had raised issues of interest to other potential litigation that the courts had never addressed before.

Can a deemed refusal be "cured" by a commitment date recommended by the Office of the Information Commissioner of Canada and agreed to by a government institution?
Justice de Montigny made it clear that a federal institution such as the CBC cannot cure or suspend a deemed refusal. However, he went on to find that a deemed refusal can effectively be "cured" when the Office of the Information Commissioner issues a recommendation setting a new time frame within which an institution is to respond to an access request:

> This is not to say, however, that the deemed refusal cannot be cured. It is then for the Information Commissioner, having received a complaint from the person who has been refused access, to investigate the matter and to make a report.

According to Justice de Montigny, when the Information Commissioner has issued a recommendation that an institution respond by a certain date, the fact that an institution has failed to abide by section 9 of the Act (and is therefore deemed to have refused access) is "no longer applicable."

Does the court have any jurisdiction to hear an application for review in relation to a deemed refusal under section 41 before the expiration of a time limit recommended by the Office of the Information Commissioner?
According to Justice de Montigny, a section 41 proceeding in relation to a deemed refusal cannot be brought until the expiration of a time limit set by the Information Commissioner in his or her recommendations.

Does the court have any jurisdiction under section 41 to entertain an application when there is no genuine and continued claim of refusal?
Justice de Montigny cited with approval a line of Federal Court cases in which the Court held that it did not have jurisdiction under the Act to entertain an application when, at the time of the hearing, there was no genuine and continuing access refusal. The judge went on to suggest that even while the CBC was in a deemed refusal position, there was no genuine and continuing claim of refusal (which would give rise to the Court's jurisdiction in the section 41 application) because of its undertaking to respond within the time frame endorsed by the Office of the Information Commissioner.

Does the court have jurisdiction in a proceeding initiated under section 41 to render declaratory judgment in the absence of a continued and genuine refusal?
Justice de Montigny cited with approval case law in which a refusal of access is a condition precedent for declaratory relief (or other relief) in a section 41 proceeding because the remedial powers under section 49 or section 50 of the Act only arise where the Court finds a refusal to disclose a record. On this basis, Justice de Montigny stated, "I am further of the opinion that this Court has no jurisdiction to make a declaratory judgment reprimanding the behaviour of an institution."

Future actions

On November 12, 2009, Mr. Statham appealed the Federal Court's decision. Both the CBC and the Information Commissioner are parties in this appeal (A-458-09).

FREEDOM OF EXPRESSION

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

This case involves an appeal of an Ontario Court of Appeal decision over the following issues:

- Does a provision in Ontario's freedom of information legislation infringe on the right to freedom of expression guaranteed by paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*?
- Because the public interest override does not extend to information exempted on the grounds of solicitor-client privilege or law enforcement, does this provision offend the constitutional principle of democracy?

The OIC was an intervener in the case.

The Supreme Court of Canada has not yet rendered its decision. See the 2008–2009 annual report for a summary of the case.[2]

NATIONAL SECURITY

Kitson v. Canada (Minister of National Defence) (T-680-08), 2009 FC 1000, October 2, 2009 (Chief Justice Lutfy)

Background

National Defence received a request for information contained in reports generated by the Canadian Forces deployed to Afghanistan during Operation Medusa. Specifically, the requester sought the disclosure of the following:

- the number of prisoners taken hostage by Canadian troops in Afghanistan;
- the prisoners' physical location after capture; and
- the prisoners' current location.

In response, National Defence disclosed some of the information requested, but only after redacting the records under section 15 of the *Access to Information Act*, which protects information related to international affairs and national defence.

The requester complained to us about these redactions. As a result of our investigation, we determined that National Defence had applied section 15 properly.

The requester applied to the Federal Court for a judicial review.

Issues, findings and reasons

Did National Defence properly invoke the section 15 exemption?

The Federal Court found that National Defence had correctly applied the section 15 exemption.

In this case, the redacted information comprised detailed information about significant incidents that was communicated through the Canadian Forces chain of command to the Chief of the Defence Staff and Deputy Minister of National Defence.

After reviewing the information in question, Chief Justice Lutfy concluded that "there is no doubt in my mind that the documents identified by National Defence come within the s. 15 exemption" and that "the disclosure of the requested information in 2007 could have been of assistance to the enemy of the [Canadian Forces] in Afghanistan, could have caused harm to members of the [Canadian Forces] and others in that country and could reasonably have been expected to be injurious to the defence of Canada or its allies within the meaning of s. 15 of the Act". According to the Chief Justice, the "determination made in 2007 by National Defence not to disclose this information was made on reasonable grounds" and "there is no further information in issue which could reasonably have been severed within the meaning of section 25 of the Act."

Do sections 52(2)(a), 52(2)(b) and 52(3) infringe or deny the applicant's rights or freedoms guaranteed by section 2(b) of the Charter?

When section 15 exemptions are the subject of a judicial review, paragraph 52(2)(a) of the *Access to Information Act* requires that any hearings be held *in camera* (in private). In addition, subsection 52(3) gives the institution the right to make representations *ex parte*—that is, with no other parties to the review present.

During the private hearing, the court examined National Defence's confidential material to determine what could be delivered to the applicant. As a result, the applicant received much of the material, with the exception of the redacted information in issue, and a few paragraphs.

2. http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2008-2009_19.aspx

In this case, one hearing was conducted publicly in order to receive oral submissions from both parties. National Defence did not request that the hearing be conducted *in camera*, nor did the court direct that the hearing take place in private. No specific mention was made of the redacted information during this public hearing.

Chief Justice Lutfy remarked that "the Court's encouragement of the openness principle was inconsistent with the mandatory provisions of s. 52(2)(a)."

To remedy this, Chief Justice Lutfy "read down" paragraph 52(2)(a) so that *in camera* hearings are only mandatory when *ex parte* submissions mandated by section 52(3) have been made. "Reading down" is the act of ignoring words in legislation so that it complies with the Charter.

In reading down paragraph 52(2)(a), Chief Justice Lutfy relied on the Supreme Court of Canada's decision in *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R 3. In that case, the Court found that it is not "open to a judge to conduct a hearing in open court in direct contravention to the requirements of the statute … . Unless the mandatory requirement is found to be unconstitutional and the section is 'read down' as a constitutional remedy, it cannot otherwise be interpreted to bypass its mandatory nature."

Expanding on the *Ruby* decision, Chief Justice Lutfy also decided that paragraph 52(2)(b) should be read down to apply only to *ex parte* submissions. He pointed out that this reading down "is not intended to affect in any manner the right of the government institution to request that the *ex parte* hearings be heard and determined in the National Capital Region."

The application for judicial review was dismissed.

DETERMINING PRIVILEGE

Blank v. Canada (Minister of Justice) (T-1577-08), 2009 FC 1221, November 30, 2009 (Justice de Montigny)

Background

Mr. Blank made a request to the Department of Justice Canada for access to all of its communications concerning offences with which he had been charged at one time. Even after he narrowed his request, the Department of Justice advised the requester that there were 20 boxes of records in the file, and that it would take 200 hours to search through them. The requester agreed to pay the resulting processing fees.

The Department of Justice failed to respond to the access request within the statutory time limit of 30 days. The requester filed a complaint with us about that delay.

After further consultations and a review of the records, the Department of Justice released 10 pages. For the information withheld from these pages, the institution claimed section 21(1) and section 23 exemptions. Section 23 protects information that is subject to solicitor-client privilege.

Upon the delivery of these pages, we considered the delay complaint resolved. However, we believed that the Department of Justice could have processed the request within the statutory time limit. We also expressed concern about the discrepancies between the number of boxes of records related to the request and the number of pages that were finally released.

Unsatisfied with the information he received, the requester made a second complaint alleging that the Department of Justice failed to identify *all* the documents pertinent to his request, and that it did not properly apply the claimed exemptions.

Our investigation into this second complaint resulted in the release of an additional 174 pages of information. However, some information remained withheld under section 19(1) and section 23 exemptions.

After additional reviews, consultations and taking into account the outcome of a related court case, the Department of Justice eventually provided approximately 800 pages. The institution continued to withhold certain information, claiming the solicitor-client privilege exemption.

We investigated the second complaint and found that these exemptions had been properly applied. The requester filed an application for judicial review.

Issues, findings and reasons

The application for judicial review was dismissed on the following grounds.

Did the Department of Justice properly apply the section 23 exemption to the records at issue? Did the Department of Justice waive its right to the privilege?

Relying on the Supreme Court of Canada decision in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, Justice de Montigny explained the difference between *legal advice privilege* and *litigation privilege:*

Legal advice privilege is absolute and indefinite in duration. It applies when the communication is between solicitor and client, and it entails the seeking or giving of legal advice that is intended to be confidential by the parties.

Litigation privilege expires with the litigation of which it was born. It applies when the communication in question was prepared or obtained for the "dominant purpose" of litigation or reasonably anticipated litigation.

Justice de Montigny also reiterated the Supreme Court's comment that there "is often a potential for overlap of legal advice privilege and litigation privilege in the litigation context," such that certain documents might remain protected by legal advice privilege even though the litigation privilege has expired.

Justice de Montigny determined that all the documents in question in this case are protected by legal advice privilege under section 23, since "they all pertain to the giving or seeking of legal advice that was intended to be confidential by both parties." Justice de Montigny also noted that the Information Commissioner had made similar findings regarding privilege.

The applicant argued that the Department of Justice had waived its right to claim solicitor-client privilege on the basis of representations made by counsel for the Crown at the criminal proceedings. After reviewing the transcripts, Justice de Montigny found that the "representations can in no way be assimilated to an explicit or even an implicit waiver of the documents" withheld by the Department of Justice.

Justice de Montigny also rejected the applicant's assertion that "once a document has been obtained in the context of another Access request, the privilege that may attach to it must be taken to have been waived for all intent and purposes." He found that "a document sometimes take its colour from the context in which it is found" and that "the wording of the Access request must also be taken into consideration." According to Justice de Montigny "it is at least conceivable that a specific document may be found to be releasable in one Access request and not releasable in another, without there being improper use of the discretion conferred by section 23 of the Act."

It was for these very reasons that Justice de Montigny stated that the Department of Justice "did not have the obligation to cross-reference all the documents released as a result of other Access requests filed by the applicant with the documents considered in the Access request underlying the case" before him. According to Justice de Montigny, "each Access request must be treated as a discrete and self-contained exercise, to be performed with due consideration of the language used in the request and its focus".

Did the Department of Justice comply with the order to provide particulars for the documents that are claimed to be exempted or irrelevant?
The Department of Justice was ordered by the court to provide the applicant with certain particulars regarding the documents that it claimed were exempt or irrelevant to his request. Justice de Montigny concluded that the Department of Justice complied with the order, since the particulars were provided. Justice de Montigny pointed out that this should have been dealt with by way of a motion before the hearing.

Did the Department of Justice fail to locate and process all of the pertinent records and was this deliberate?
The applicant argued that the Department of Justice deliberately failed to locate and process all of the records relevant to his request. Justice de Montigny disagreed and concluded that the Department of Justice "went to great lengths to locate and process all of the documents relevant to the request, albeit not as expeditiously as it should have done." Therefore, Justice de Montigny did not grant the applicant's request to order the Department of Justice to conduct a new search.

Did the Department of Justice act unlawfully, thereby nullifying the application of section 23?
The applicant argued that the Department of Justice not only failed to disclose all of the records to which he was entitled but that the decision to withhold some of them was made in bad faith. The applicant also argued that the records at issue should have been disclosed to him during his criminal trial.

In applying the standard of reasonableness to review the Department of Justice's decisions regarding disclosure, Justice de Montigny explained that he would consider the Act and the jurisprudence guiding its interpretation and application, as opposed to the laws requiring disclosure in the criminal law context. Justice de Montigny concluded that the applicant did not provide concrete evidence to support his allegations that the Department of Justice had conducted itself unlawfully.

EXPIRATION DATES

Bronskill v. Minister of Canadian Heritage (T-1680-09)

Background

Journalist Jim Bronskill made a request to Canadian Heritage for the RCMP security files collected on Tommy Douglas, a prominent historical figure who died more than 20 years ago.

Canadian Heritage provided the requester with information that was heavily redacted under section 15 and section 19 of the *Access to Information Act*. The requester complained about these redactions.

After conducting an investigation, we determined that the exemptions had been properly applied. The requester applied for judicial review, arguing that Canadian Heritage unlawfully exercised its discretion since the records were over 70 years old. He argues that any possible security risk they might still represent is far outweighed by the public's interest in their significant historical value.

Issues

In light of the passage of time and the public's interest in disclosure, was the Minister of Canadian Heritage's exercise of discretion to withhold information under section 15(1) and section 19(1) reasonable?

Future actions

The parties have filed their respective affidavits. They have yet to file their written representations.

NATIONAL DEFENCE

Attaran v. Minister of National Defence (T-1679-09)

Background

Mr. Attaran made a request to National Defence for documents concerning the transfer of detainees in Afghanistan. In response, National Defence disclosed some of the information but withheld other information based on sections 15, 16, 17 and 19 of the *Access to Information Act*.

The requester complained to our office. After an investigation, we determined that National Defence had properly applied the exemptions.

The requester applied for judicial review. The Information Commissioner is an intervener for the purpose of filing affidavit material.

Issues

1. During the course of our investigation, was National Defence entitled to raise additional exemptions for refusing access, beyond those that were initially claimed when responding to the request?
2. Did the Minister unreasonably exercise his discretion when refusing to disclose records, or portions thereof, based on sections 15 and 19 of the Act?
3. The applicant is arguing that the disclosure of the requested information in a timely manner is a matter of public concern and is necessary to his exercise of effective scholarly freedom of expression under subsection 2(b) of the Charter and, therefore, also necessary to the applicant's ability to engage in his livelihood.

Future actions

The parties have filed their written arguments. No court date has been set.

6. GETTING THE MESSAGE OUT ABOUT TRANSPARENCY AND OPEN GOVERNMENT

We took the message of the importance of access to information, proactive disclosure and open government to Parliament and to Canadians through numerous activities, including appearances before Parliamentary committees, our new website, and the annual Right to Know week. We also participated in international efforts to promote open government.

ASSISTING PARLIAMENT

The Information Commissioner (in the persons of both the former Commissioner and the current Interim Commissioner) appeared five times before the House of Commons Standing Committee on Access to Information, Privacy and Ethics in 2009–2010. Through these appearances, the commissioners carried out one of the key roles of the position—to support Parliamentarians in their work.

One of the appearances was about possible reforms to the *Access to Information Act*. We presented 12 recommendations for immediate actions that the government could take to strengthen the legislation. (For more information, see our 2008–2009 annual report.[1]) In its report on the need for legislative change, the committee accepted eight of our recommendations as we presented them. Of the remaining recommendations, they supported three with additional considerations and wished to review implications of the fourth.

The Interim Commissioner also spoke to the committee about our 2008–2009 annual report. The remainder of the appearances were about funding for 2009–2010 and 2010–2011. As a result of an appearance in March 2009 and a subsequent presentation to the Advisory Panel on the Funding and Oversight of Officers of Parliament and to the Treasury Board of Canada Secretariat, we received additional funding in May 2009 to continue the implementation of our new business model.

In April 2010, the Interim Commissioner appeared before the committee to discuss her special report, *Out of Time* (see page 34 for more information on the findings), and to brief committee members on developments in the area of open government.[2]

STRENGTHENING AWARENESS

Our new website

In response to the evolving online needs of Canadians, we created a new website that provides a broader range of functions in an attractive scheme. We launched the website in March 2010 and immediately received positive feedback from our users.

To help Canadians better understand their rights to access to information, our new website hosts a variety of articles, reports, publications and statistics. As an additional resource, users can view a variety of podcasts that discuss access to information topics. These podcasts feature speeches and seminars that provide invaluable insight into the world of access to information on both the national and international levels. We have also set up RSS feeds to disseminate updated website content and will be developing a blog and a Twitter feed as we have the capacity.

1. http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2008-2009_20.aspx

2. http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2008-2009.aspx

In the spirit of promoting both transparency and accountability, the new website provides a much more comprehensive view of the work we do. In the new Reading Room section, users can find information about our consultations and a full range of reports on our current progress and future plans. We are also posting the wording, in English and French, of all the access to information requests we receive. Interested readers may ask informally for the documents that we released in response to each request.

2009 Right to Know week

Canada's Right to Know week celebrates the fundamental principles of freedom of information. Every year, Canadians are provided with the chance to come together to discuss these principles and how they contribute to a successful democracy. These discussions help identify our current access to information issues from various perspectives; more importantly, together we can identify and develop ways to solve these issues.

In 2009, we worked with our provincial and territorial counterparts to make Canada's Right to Know week a truly national event. Together, we also made full use of technology to share the benefits of the week with Canadians across the country. For example, the official website (Righttoknow.ca) provided links, live podcasts, and transcripts of the presentations given at Right to Know week events.[3]

During the opening Town Hall, renowned advocates and journalists criticized the lengthy delays and the lack of transparency that information seekers often face. Examples in hand, they discussed the resulting implications for the social and economic well-being of Canadians.

During a conference for parliamentarians, participants talked about the efforts made by some Canadian cities to create portals to a vast array of reusable information. Other experts presented various projects and tools to improve the speed, quality and user-friendliness of such proactive disclosure. To this end, Senator Francis Fox recommended that deputy ministers and senior federal officials be assessed according to their institution's ability to rapidly process requests for access to information. Also in attendance was prominent access expert Stanley Tromp, who discussed how our federal legislation still does not capture the benefits of transparency.

During a panel discussion, legal experts put forth their own suggestions for improving our legislative framework. All kinds of approaches were raised, including direct court action, strengthening the Information Commissioner's powers, and entrenching the right to know in the Charter.

Lastly, the week also featured international representatives from several influential organizations, who presented their own recent efforts to promote access to information to various countries and international organizations to create favourable conditions for access without borders.

WORKING INTERNATIONALLY

Through our international work in 2009–2010, we sought to develop and share best practices in the area of access to information. These efforts were also an effective way to spread the word about the importance of transparency, and to produce tools for countries to use to implement access to information systems or enhance what they already have in place.

For example, we collaborated with representatives from other Organization of American States member countries to develop a model access to information law and implementation guide for the Western hemisphere.[4] These tools set out a clear and close-to-ideal approach to access to information as a benchmark for all countries to work toward.

In April 2009, we also looked at the right of access to information in the Americas by participating in a conference put on by the Carter Centre in Peru. The conference resulted in an action plan for the hemisphere, backed by broad agreement by participating countries, on how to uphold and, ideally, enhance citizens' right to information.

Finally, we hosted delegations from Burkina Faso, India and Russia, providing briefings on the access to information system in Canada and learning about the challenges officials in these countries face. This knowledge allows us to provide better support to Parliamentarians.

3. http://www.righttoknow.ca/en/Content/default.asp

4. http://www.oas.org/dil/access_to_information_model_law.htm

COLLABORATING WITH PARTNERS

Collaboration with all our partners in the access to information system—institutions, citizens, our international counterparts, and domestic and international interest groups—enhances our effectiveness. It is also crucial to our efforts to spread the word about the importance of access to information and transparency.

In 2009–2010, for example, we began working with the Canadian Bar Association to plan a seminar on access to be held in 2010. Representatives from this group also spoke to legislative reform in front of the House of Commons Standing Committee on Access to Information, Privacy and Ethics.

We started to plan the international conference of information commissioners, which we will host in Ottawa in 2011. We also met with our provincial and territorial colleagues in person and by teleconference to discuss issues of mutual interest. One concrete and noteworthy action that resulted from those exchanges was the drafting of a joint letter to the World Bank offering observations on its proposal to modernize its disclosure policy.

LOOKING AHEAD

Parliamentary relations

We will strive to support parliamentarians as they continue to discuss the *Access to Information Act* and study open government initiatives. To this end, we will continue to conduct national and international benchmarking and to document best practices worldwide through collaborative endeavours and partnerships with national, foreign and international experts and organizations.

Spreading the word

In 2010–2011, we will continue to publish various documents that explain our investigative process and disseminate our findings and recommendations. For example, we will post any new practice directions we develop on our website.

We will continue to develop our new website to give the public access to, among other things, findings of noteworthy investigations, major corporate documents and listings of access to information requests.

Championing the cause

There is a growing movement in favour of greater access to information through proactive disclosure. We will continue to promote our strong support of this practice, and work with other public and private agencies to bring proactive disclosure to a new level across the system.

We will continue to collaborate with partners and counterparts across Canada to promote compliance with legislative requirements, raise awareness of underlying causes of and solutions to systemic issues, and the need for greater proactive disclosure. In addition, we will continue to work with various stakeholders to share information on both the challenges and best practices in access to information, particularly in the context of today's open government initiatives.

7. SETTING A GOOD EXAMPLE

Part and parcel with our new business processes came a commitment to continuously strive to set a good example of service—particularly in how we responded to access to information requests. This year we showed that we are, in fact, meeting that goal in all aspects of our operations.

PROVIDING TIMELY ASSISTANCE TO REQUESTERS

Our exemplary performance in responding to access to information and privacy requests continued in 2009–2010. Since becoming subject to the *Access to Information Act* in 2007, we have sought to become an example to other federal institutions of how to effectively handle access and privacy requests.

We received considerably fewer access requests (34) this year than previously (see Table 1). However, these requests accounted for more than 56,000 pages to review. This is a 40 percent increase over the volume of pages in 2008–2009 and a 635 percent increase over 2007–2008.

To ensure that we are always providing the best service to requesters, we established a number of principles that guide our access work. Among them is that we take as few time extensions as possible, and for as short a time as possible. In line with this, we took only three time extensions in 2009–2010: one of 14 days, one of 15 days and one, for a particularly large file (more than 40,000 pages), of 180 days. In the last case, however, through teamwork and hard work, we were able to deliver the records to the requester a week early. Moreover, we completed all our requests on time.

We remain in constant contact with requesters and seek their collaboration at each step of the access process. We also prepare interim releases as a matter of course, to ensure requesters get documents as quickly as possible, particularly when time is of the essence.

In fact, we are making every effort to assist requesters. In one instance, we provided paper copies of requested records for free to a requester who had no access to a computer and could not afford the photocopying fees.

There was only one complaint in 2009–2010 about how we handled an access request. The Information Commissioner ad hoc, who investigates complaints about how we handle access requests, found the complaint to be unsubstantiated and it was closed in a week.

TABLE 1. ACCESS TO INFORMATION AND PRIVACY CASELOAD, 2007–2008 TO 2009–2010

	2007–2008	2008–2009	2009–2010
Access requests	93	114	27
Requests for consultations from federal institutions	23	23	4
Privacy requests	2	1	3
Total	118	138	34
Number of pages to review	7,696	40,500	56,589

In his annual report (see page 52), the Information Commissioner ad hoc, the Honourable W. Andrew Mackay, praised our work in responding to access requests, noting that we set "an example for other institutions in effectively processing requests…".

ENHANCING IM/IT TO SUPPORT OUR BUSINESS

This year was the first year of implementation of our five-year strategy to enhance our information management and information technology (IM/IT) capabilities in support of our operations and to allow us to work to our full potential. We received funding from Treasury Board to dedicate to this work in May 2009.

We accomplished all our goals for this year, added and completed some new projects and advanced the start of others that are still to come to fruition. Here are some examples:

- We developed and implemented a comprehensive information management program from the ground up.
- We accelerated project delivery and took innovative approaches to applying information technology in support of investigations.
- We formalized the help desk function and made flexibility and service our priorities.
- We assessed, and then improved and expanded our management reporting information.
- We brought IM and IT security policies into alignment with federal standards.
- We began to make significant investments in IT infrastructure.
- We contributed to a greener organization.

Of particular note this year was our success in identifying and re-purposing existing tools from elsewhere within the government. As a small agency with limited resources, this is essential to our being able to carry out the many initiatives of our IM/IT strategy. Among the many instances of this are our core IM training package, a user guide for the information management system and our case management software.

A large part of our work this year centred on developing and introducing IM processes and practices to the organization, focusing initially on records retention and disposition of paper files. We will now turn our attention to improving our electronic capabilities for producing, capturing and retaining official records.

IMPLEMENTING EXEMPLARY FINANCIAL GOVERNANCE

Prudent spending is always crucial in small organizations such as ours, and will continue to be so as we enter a period of fiscal restraint. The improvements we made in terms of financial reporting in 2009–2010 will serve us well as we monitor and adjust our spending to make optimal use of our limited resources. For example, we improved—in format and quality—the analysis and information we provide to management each month to help them make decisions and assist with due diligence. All directors and managers must now sign off on these monthly reports.

Our efforts to improve our financial management practices and governance were recognized in 2009–2010. We received a clean audit from the Office of the Auditor General. We also received an A grade from the Office of the Receiver General for providing more accurate and timely reporting of financial information to Parliament and Canadians. This grade is up from a D the year before.

MANAGING OUR PEOPLE

As noted in Chapter 1, recruiting and training investigators was the key human resources priority for 2009–2010, the first year of our integrated five-year human resources plan.

Developing this plan brought the importance of clearly linking business planning and human resources planning into focus. Integrated planning has enabled us to proactively respond to risks in terms of timely recruitment, retention and developing qualified staff to meet our ongoing and emerging workload and obligations.

We also developed a number of new tools to help employees and managers, including an orientation guide for new employees and a guide to human resources for managers, as well as various training and awareness sessions.

LOOKING AHEAD

Enhancing IM and IT infrastructure

We will continue to integrate and standardize IM/IT in accordance with the *IM/IT Strategic Plan 2009–2014*. Projects of particular focus next year will be the implementation of the new case management system for investigations and rolling out the information management system to all areas of our organization.

Sustaining our human resources capacity

The successful implementation of our new business model largely depends on its ability to attract, develop and retain a group of highly productive and technology-savvy investigators. As of April 2010, our full contingent of investigators was in place.

However, as this group is currently in high demand across the government, staffing will remain an ongoing activity within the office and will be completed in accordance with the organization's integrated human resources plan.

Reviewing governance tools

We will be updating our corporate risk assessment and performance measurement framework, and will be implementing our new internal control policy.

APPENDIX 1. REPORT OF THE INFORMATION COMMISSIONER AD HOC

By delegation of authority by the Information Commissioner pursuant to section 59 of the *Access to Information Act* ("the ATI Act") authority was first delegated to the Hon. Peter de C. Cory in 2007 and in the following year it was extended to me in these terms:

> … 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.

It is noteworthy that jurisdiction of this office extends only to a complaint arising with regard to a response by the [Office of the Information Commissioner (OIC)] to a request for information originally sent to it. Of course the primary function of the OIC is to deal with complaints made to it in regard to responses by other government institutions to persons seeking information. That primary function is not subject to consideration or review by the Information Commissioner ad hoc.

This office has now functioned under two successive ad hoc commissioners without a formal statutory or regulatory basis. It may be timely and appropriate for the Information Commissioner to consider and to consult whether a formal legal basis, e.g., by regulation, would ensure continuity of the office and a continuing basis for its independence. I continue to share the view recorded by the Hon. Peter de C. Cory in his 2008 report as Information Commissioner ad hoc, that is, that the independence of this office is essential to its successful operation. I again record appreciation for the co-operation by staff of the Information Commissioner's office and my own assessment that they have not in any way impeded the independence of my function. I record also my appreciation and my gratitude to Ms. Julia O'Grady, a senior and experienced investigator in relation to matters arising under the ATI Act, whose service as Investigating Officer to this office has been invaluable.

It seems appropriate to commend the Office of the Information Commissioner for its effective processing of requests for information access when you look at the number of complaints this office has received this past year. This office, the Information Commissioner ad hoc, received only one complaint in 2009–2010. That one, compared with those received in the two previous years, indicates substantial reliance by the OIC on subsection 4(2.1) of the ATI Act. That subsection sets out the duty to assist, introduced as part of the *Federal Accountability Act* of 2006.

That duty is expressed thus,

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

In following that duty the OIC works diligently to process requests, ensuring deadlines are met and requesters are ultimately provided with a compact disc of responsive records at no cost.

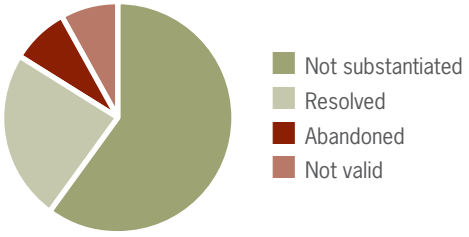
With a single complaint received this year my office had the opportunity to complete consideration of all outstanding complaints from previous years. There were 9 complaints carried over from 2008–2009. By the end of 2009 all outstanding complaints had been completed, including the one new complaint received in 2009.

SUMMARY OF INVESTIGATION CASELOAD, 2007–2010

	2007–2008	2008–2009	2009–2010
Complaints carried over	n/a	3	9
New complaints received	10	13	1
Complaints completed	7	7	10
Complaints still pending at end of year	3	9	0

Although the OIC had a higher number of complaints in the two previous years than in the current one, it seems evident that the OIC is managing in accord with the *Access to Information Act* in the manner required of all government institutions.

SUMMARY OF COMPLAINT RESOLUTIONS, 2007–2010



Almost half of the complaints received in the last three years have been dealt with in accord with section 16.1. Of those, 7 were found to be "not substantiated." That determination was made when it was concluded there was no factual basis for complaint or that section 16.1 precluded access in the circumstances. Section 16.1 is a relatively new exemption that was created for the OIC and other similar institutions in 2006. It was created along with the duty to assist by the *Federal Accountability Act*.

Section 16.1 states:

> (1) The following heads of government institutions shall refuse to disclose any record requested under this Act that contains information that was obtained or created by them or on their behalf in the course of an investigation, examination or audit conducted by them or under their authority:
>
> (a) the Auditor General of Canada;
>
> (b) the Commissioner of Official Languages for Canada;
>
> (c) the Information Commissioner; and
>
> (d) the Privacy Commissioner.
>
> (2) However, the head of a government institution referred to in paragraph (1)(c) or (d) shall not refuse under subsection (1) to disclose any record that contains information that was created by or on behalf of the head of the government institution in the course of an investigation or audit conducted by or under the authority of the head of the government institution once the investigation or audit and all related proceedings, if any, are finally concluded.

It is important to note that subsection 16.1(1) is a mandatory exemption, meaning that the OIC is correct when it denies access to information obtained or created for it or on its behalf in the course of an investigation. Requesters who complained they were denied access to information concerning OIC investigations were advised that if they requested the same information once the investigation had been completed and any other related proceedings were done, additional information would be released to them, specifically, any information that was created by the OIC during the investigation would be released. Thus, in circumstances where subsection 16.1(1) precludes access, that is only pending a continuing investigation and related proceedings.

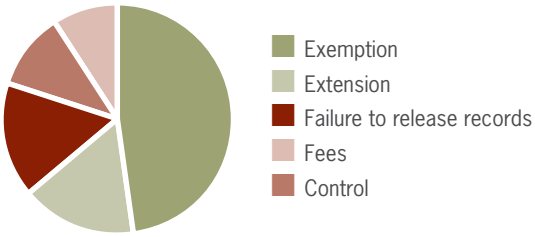
This past year was a successful one for both my office and that of the Information Commissioner of Canada. As noted, the latter's work has led to very few complaints to this office. I am pleased that we were able to complete all of the outstanding complaints before the end of the year. In my view the OIC sets an example for other government institutions in effectively processing requests made to them.

It has been a privilege to have served as Information Commissioner ad hoc.

Respectfully submitted,

The Honourable W. Andrew MacKay

SUMMARY OF COMPLAINT FINDINGS, 2007–2010



APPENDIX 2.
ONGOING COURT CASES

These are pending cases before the courts that involve the Information Commissioner.

Case	Next step	Issue
Control of records in a minister's office *Information Commissioner v. Minister of National Defence*, SCC, 33300	Tentative hearing date: October 7, 2010	Appeal by the Information Commissioner of the decision of the Federal Court of Appeal in *Information Commissioner v. Minister of National Defence*, 2009 FCA 175 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 page 38.
Control of records in the Prime Minister's Office *Information Commissioner v. Prime Minister*, SCC, 33299	Tentative hearing date: October 7, 2010	Appeal by the Information Commissioner of the decisions of the Federal Court of Appeal in *Information Commissioner v. Prime Minister*, 2009 FCA 175 and 2009 FCA 181 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) Also, involves the issue of whether the Prime Minister is an officer of a government institution. For more information, see page 38.
Control of records in a minister's office *Information Commissioner v. Minister of Transport*, SCC, 33296	Tentative hearing date: October 7, 2010	Appeal by the Information Commissioner of the decision of the Federal Court of Appeal in *Information Commissioner v. Minister of Transport*, 2009 FCA 175 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 page 38.
Prime Minister's agendas under the control of the RCMP *Information Commissioner v. Commissioner of the RCMP*, SCC, 33297	Tentative hearing date: October 7, 2010	Appeal by the Information Commissioner of the decision of the Federal Court of Appeal in *Commissioner of the RCMP v. Information Commissioner*, 2009 FCA 181 Involves the issue of whether the Prime Minister is an officer of a government institution. For more information, see page 38.

Case	Next step	Issue
Ontario (Ministry of Public Safety and Security) et al. v. Criminal Lawyers' Association, SCC, 32172 (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 page 42.
David J. Statham v. Canadian Broadcasting Corporation and the Information Commissioner of Canada, A-458-09	Hearing date to be set	Appeal of Justice De Montigny's decision in T-782-08 Involves issues relating to the Court's jurisdiction under s.41 and 49 of the *Access to Information Act*. For more information, see page 40.
Blank v. the Information Commissioner of Canada, T-1842-09	Hearing on May 12, 2010	Whether the Court should issue an order in the nature of mandamus, requiring the Information Commissioner to issue a report of findings, pursuant to s.37(2) of the ATIA.
Amir Attaran v. The Minister of National Defence, T-1679-09 (The Information Commissioner is an intervener.)	Hearing date to be set	Can the Minister of National Defence raise additional exemptions not initially claimed by the department? Involves exemptions in s.15, 16, 17 and 19 Is the requester's right to freedom of expression enshrined in s.2(b) of the Charter violated by the Minister's access refusal?
New Dawn Enterprises Ltd. v. The Attorney General of Canada and the Information Commissioner of Canada, T-1595-09 (The Information Commissioner is a respondent.)	Notice of status review	Can the Minister of National Defence disclose records that New Dawn Enterprises Ltd. claims must be withheld under s.20(1) of the ATIA? Can the Minister of National Defence disclose records that are subject to s.20(1), if the Minister determines that the information ought to be disclosed under s. 20(2) and/or 20(6) of the ATIA?
Canadian Broadcasting Corporation v. The Information Commissioner of Canada, T-1552-09	Hearing date to be set	Can the Information Commissioner compel the production of records that CBC claims to be excluded under s.68.1?

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

CHANGES TO THE ACT, THE SCHEDULES AND THE 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 Came into force on July 1, 2009	Add the *Canada Deposit Insurance Corporation Act* to Schedule II and add a reference to subsection 45.3(1)
An Act to give effect to the Maanulth First Nations Final Agreement and to make consequential amendments to other Act	C-41	S.C. 2009, c. 18	Royal Assent received on June 18, 2009 Will come into force on April 1, 2011	Subsection 13(3) of the *Access to Information Act* and subsection 8(7) of the *Privacy Act* is amended by adding the following paragraph: (f) a Maanulth Government, within the meaning of subsection 2(2) of the *Maanulth First Nations Final Agreement Act*.
SOR/2009-174			July 1, 2009	Adds the Indian Residential Schools Truth and Reconciliation Commission to Schedule I
SI/2009-11			March 2, 2009	Amends the Designation Order (repeals item 85.1: Public Service Human Resources Management Agency of Canada)
SI/2009-33			April 30, 2009	Amends the Designation Order (repeals item 75.21: Office of the Registrar of Lobbyist)
SI/2009-35			April 30, 2009	Amends the Designation Order (repeals item 87.2: Queens Way West Land Corporation)
SI/2009-47			July 1, 2009	Adds the Indian Residential Schools Truth and Reconciliation Commission to the Designation Order
SI/2009-77			August 13, 2009	Adds the Federal Economic Development Agency for Southern Ontario to the Designation Order
SI/2009-83			August 13, 2009	Adds the Canadian Northern Economic Development Agency to the Designation Order
SI/2009-96			September 23, 2009	Adds the Veterans Review and Appeal Board to the Designation Order

PROPOSED CHANGES TO THE ACT

Second and Third Sessions, Fortieth Parliament

Bills			
Bill	**Proposed legislation**	**Last stage**	**Changes**
C-9	*An Act to implement certain provisions of the budget tabled in Parliament on March 4, 2010 and other measures*	Committee meeting, May 4, 2010	This Bill deletes the Public Service Human Resources Management Agency of Canada from Schedule I of the Act
C-278	*An Act to amend the Access to Information Act (response time)*	First reading, March 3, 2010	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, March 3, 2010	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 3, 2010	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.
C-366	*An Act to establish and maintain a national Breast Implant Registry*	First reading, March 3, 2010	The Bill adds the Registrar of the Breast Implant Registry to Schedule I and adds the *Breast Implant Registry Act* to Schedule II.
C-415	*C-415 An Act to amend the Canada Marine Act (City of Toronto) and other Acts in consequence*	First reading, March 3, 2010	This Bill amends Schedule I of the ATIA by striking out the Toronto Port Authority
C-418	*C-418 An Act to establish a Children's Commissioner of Canada*	First reading, June 11, 2009	This Bill proposes amendments to subsection 16.1(1) and Schedule I of the *Access to Information Act*
S-203	*An Act to amend the Business Development Bank of Canada*	Committee meeting, November 5, 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*	Debates at second reading, November 24, 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*	Debates at second reading, October 28, 2009	The Bill proposes to exempt some information from disclosure.

Private member's motions			
Motion	**Proposed legislation**	**Last stage**	**Changes**
M-486	That, in the opinion of the House, the government should re-instate the Co-ordination of Access to Information Requests System, under the authority of Public Works and Government Services Canada, which was shutdown on April 1, 2008.	Tabled March 4, 2010 – Mrs. Jennings (Notre-Dame-de-Grâce – Lachine)	

Report	
Report 2 – *Access to Information Act* Reform (Adopted by the Committee on March 11, 2010; Presented to the House on March 18, 2010)	Pursuant to Standing Order 108(3)h)(vi), the Standing Committee on Access to Information, Privacy and Ethics has considered the 11th report, tabled in the House in the 2nd session of the 40th Parliament, entitled "The *Access to Information Act:* First Steps Towards Renewal". Pursuant to the motion adopted by the Committee on Thursday, March 11, 2010, the Committee adopted the report and is retabling it, a copy of which is appended.
Report 4 – Main Estimates 2010–2011: Vote 40 under JUSTICE (Adopted by the Committee on March 30, 2010; Presented to the House on March 31, 2010)	In accordance with its Order of Reference of Wednesday, March 3, 2010, your Committee has considered the Vote 40 under JUSTICE in the Main Estimates for the fiscal year ending March 31, 2011, and reports the same, less the amounts voted in Interim Supply.

Motions	
Opposition Motion (Mr. Siksay) – March 15, 2010	That the House call 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 the Information Commissioner.
Concurrence Motion No. 3	March 18, 2010 – Mr. Siksay (Burnaby-Douglas) – That the Second Report of the Standing Committee on Access to Information, Privacy and Ethics, presented on Thursday, March 18, 2010, be concurred in.
Concurrence Motion No. 5	March 18, 2010 – Mr. Easter (Malpeque) – That the Second Report of the Standing Committee on Access to Information, Privacy and Ethics, presented on Thursday, March 18, 2010, be concurred in.
Concurrence Motion No. 7	March 18, 2010 – Ms. Foote (Random-Burin-St. George's) – That the Second Report of the Standing Committee on Access to Information, Privacy and Ethics, presented on Thursday, March 18, 2010, be concurred in.
Concurrence Motion No. 13	March 31, 2010 – Mrs. Block (Saskatoon-Rosetown-Biggar) – That the Second Report of the Standing Committee on Access to Information, Privacy and Ethics, presented on Thursday, March 18, 2010, be concurred in.