Information Commissioner of Canada
Commissaire à l'information du Canada

ANNUAL REPORT
2012–2013
Information Commissioner of Canada

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October 2013

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

Dear Mr. Speaker:

I have the honour to submit to Parliament, pursuant to section 38 of the *Access to Information Act*, the annual report of the Information Commissioner of Canada, covering the period from April 1, 2012, to March 31, 2013.

Yours sincerely,

Suzanne Legault
Information Commissioner of Canada

October 2013

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

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MESSAGE FROM THE COMMISSIONER

This time last year, I sounded a note of mild optimism in my annual report. For the first time in a decade, federal institutions were providing more timely responses to access to information requests—a slight but perceptible improvement.

That progress was short-lived, however. As I release my latest annual report, there are unmistakable signs of significant deterioration in the federal access system. In fact, I saw numerous instances over the year of institutions' failing to meet their most basic obligations under the *Access to Information Act*.

One organization was so understaffed it could not acknowledge access requests until months after receiving them, and even then could not say when it would be able to provide a response. Another took an extension of more than three years for responding to an access request. Others failed to live up to commitment dates my office had negotiated for providing records to requesters on files that were already considerably overdue. Still others did not retrieve and analyze records before telling requesters they could not have access to them.

A common refrain was that budgetary restraint is having a direct and adverse impact on the service institutions provide requesters.

Developments such as these have led to a significant increase in the number of complaints to my office. Complaints were up by nine percent in 2012–2013 and jumped by a staggering 50 percent in the first quarter of the new year alone. More troublesome, administrative complaints—clear indicators of basic failings on the part of institutions—are climbing, reversing a three-year downward trend.

My office also continues to deal with the ramifications of new institution-specific exemptions that became part of access law under the *Federal Accountability Act*. In addition, investigations were hampered by the disappearance or amalgamation of institutions, without there being any clear guidance on how or where their records were to be dispersed or preserved.

All together, these circumstances tell me in no uncertain terms that the integrity of the federal access to information program is at serious risk.

Statistics show that Canadians are increasingly demanding accountability from their government by filing more and more access requests each year. Consequently, it is imperative that the problems in the system be fixed, and fixed promptly and substantively. "It is not enough that we do our best," as Winston Churchill noted. "Sometimes we have to do what is required."

What is required is leadership, most notably on the part of the government and the individual institutions that respond to access requests.

Ministers and officials at the highest levels must regularly and vigorously promote the intent and spirit of the *Access to Information Act*, to foster a culture of openness in their organizations and to communicate the importance of meeting their obligations under the law.

To be truly effective, however, leadership must translate into concrete action.

The present circumstances demand the allocation of sufficient resources for the access function at institutions and adequate parliamentary appropriations for my office to carry out its investigative work.

The legislation that guides access to information at the federal level must be modernized to reflect technological and legislative advances that have taken place since the Act was drafted 30 years ago. Administrative fixes, while suitable for addressing some concerns, are insufficient to effectively deal with the pressing problems in the legislation. Countless calls for reform have gone unheeded by successive governments. That track record of inaction must cease, given the perilous state of the access system.

There is also a role for Canadians to play. They must speak out about the need for a properly functioning access system and their quasi-constitutional right to information about the decisions the government is making on their behalf.

At this juncture, it is my view that the government has no choice but to listen to those demands. The *Access to Information Act* is the law of the land. Respecting it is the government's legal obligation.

Moreover, access to information is fundamental to Canada's system of government, a key tool that facilitates citizen engagement with the public policy process. When the access system falters, not only is Canadians' participation in government thwarted but ultimately, the health of Canadian democracy is at stake.

WHO WE ARE AND WHAT WE DO

The Information Commissioner of Canada is appointed under the *Access to Information Act*, Canada's freedom of information legislation. Canada's current Commissioner, Suzanne Legault, began her seven-year term on June 30, 2010, after serving one year as Interim Commissioner.

The Commissioner reviews complaints made by requesters who believe that federal institutions have not respected their rights under the Act. The Commissioner is supported in her work by the Office of the Information Commissioner (OIC), an independent public body set up in 1983 under the *Access to Information Act*.

The OIC conducts efficient, fair and confidential investigations into complaints about federal institutions' handling of access to information requests. We also bring cases to the Federal Court to clarify the law.

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

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

- Provide leadership and expertise to reverse the declining trends in timeliness and disclosure of public sector information, in order to develop a leading access to information regime.
- Deliver exemplary service to Canadians by conducting efficient, fair and confidential investigations, and effectively address issues of non-compliance with the legislation.
- Create an exceptional workplace.

OUR MISSION

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

OUR VISION

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

OUR VALUES

Excellence: Serve with competence, efficiency and diligence

Leadership: Champion efforts to modernize access to information

Integrity: Act with reliability, impartiality and honesty

Respect: Demonstrate courtesy, fairness and collaboration

OUR ORGANIZATION

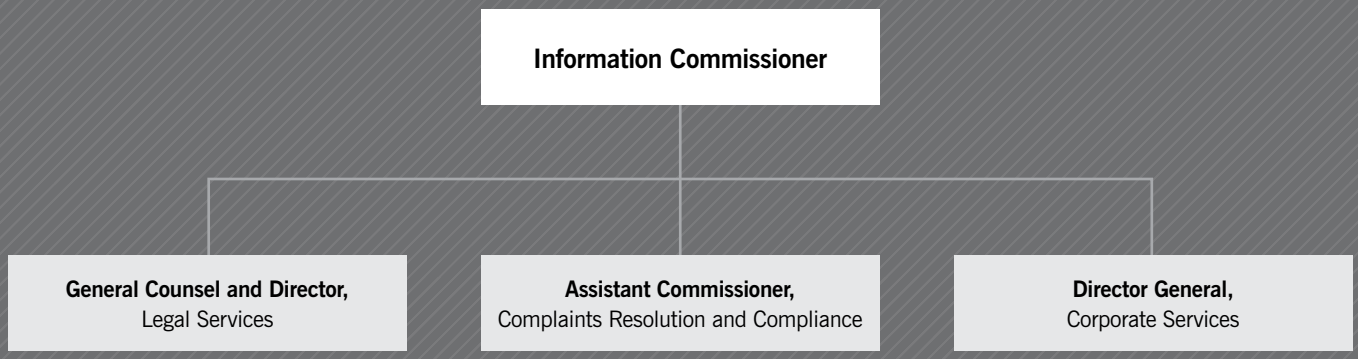
The OIC is funded through annual appropriations from Parliament. Three quarters of our budget is allocated to salaries. As of March 31, 2013, we counted a workforce of 89 full-time equivalents.

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

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

The **Complaints Resolution and Compliance Branch** investigates complaints about the processing of access requests, conducts dispute resolution activities and makes formal recommendations to institutions, as required.

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



COMPLAINTS AND INVESTIGATIONS

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

We receive complaints in three broad categories.

ADMINISTRATIVE COMPLAINTS

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

REFUSAL COMPLAINTS

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

CABINET CONFIDENCE EXCLUSION COMPLAINTS

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

The Act requires that we investigate all the complaints we receive. Consequently, we have little control of our workload. Nonetheless, our investigations must be thorough, unbiased and conducted in private. Although there is no deadline in the law for when we must complete our investigations, we strive to carry them out as quickly as possible to help ensure requesters' fundamental right to access to government information and to help ensure the overall health of the access to information system. This includes reviewing the records at issue, providing institutions the opportunity to make representations, seeking representations from the complainant and, when necessary, making formal recommendations to the heads of institutions before reporting the results of our investigations.

The Commissioner has broad investigative powers and a wide range of tools at her disposal to successfully resolve complaints, including mediation. In fact, it is through mediation that we successfully conclude 99 percent of our investigations. When informal methods of resolving a complaint fail and an institution does not follow our recommendations on disclosure of information, the Commissioner or the complainant may ask the Federal Court to review an institution's decision to withhold information.

HIGHLIGHTS

Our work during 2012–2013 investigating complaints from Canadians about institutions' handling of their access to information requests was shaped by a 9-percent increase in the number of complaints we received compared to the year before. We also saw the number of new administrative complaints increase by 42 percent from 2011–2012.

This development is a sign of clear deterioration in the access to information system and indicates that institutions are having difficulty meeting even their basic obligations under the *Access to Information Act*, such as adhering to the legislative deadlines for responding to requests or following proper procedures for taking time extensions.

Overall, we closed 1,622 files in 2012–2013, slightly more than we received and 8-percent more than we completed in 2011–2012. For the fourth year in a row we were able to make a dent in our inventory, which we have reduced by 28.6 percent since April 1, 2009. We have closed an average of 1,824 files annually from 2009–2010 to 2012–2013.

We were also able to achieve significant improvement in our turnaround times for the complaints we closed in 2012–2013. We reduced the overall average turnaround time from 432 days to 380, while the median turnaround time (representing the typical service complainants can expect) dropped to 215 days, down from 276 in 2011–2012. From the date we assign files to investigators, the median turnaround time was 86 days, a decrease from 91 in 2011–2012.

A seven-month gap between the median turnaround for our most complex cases (refusal complaints) measuring from when we register complaints and from when we can assign them to investigators reflects the fact that we are unable to assign these files immediately upon receiving them. We simply do not have the staff to do so. Consequently, the only way we will be able to continue to make any significant gains in productivity is by receiving more resources to allow us to augment our investigative team.

Beyond our resource restraints, changes in the overall environment in which we work, such as how government business is carried out, including through shared service initiatives, and the advent of open government, present new challenges for us as we help ensure the rights conferred by the *Access to Information Act* are respected. Compounding these challenges, however, is the fact that Canada's access law is becoming increasingly outmoded. This once state-of-the-art law has fallen behind legislative innovations at the provincial and international levels.

To provide Parliament with recommendations for modernizing the Act, the Commissioner began seeking feedback in September 2012 on long-time concerns about the Act, such as its scope and coverage, and the potential role of penalties to respond to instances of non-compliance. The consultation yielded wide-ranging submissions from 44 groups. We are analyzing this feedback, along with previous studies and recommendations for reform. This input, together with the in-depth knowledge gained from our investigations, will allow us to provide our unique and fully formed view on how the Act should be amended at this juncture and the benefits such changes would bring to transparency and accountability in the federal sphere. We will issue our reform proposals to Parliament in the fall of 2013.

1. IMPROVING SERVICE DELIVERY

Providing exemplary service to Canadians who complain to us about how institutions have handled their access to information requests is our overarching goal. With a legislative mandate to investigate all complaints that come to us, we strive each year to respond effectively and efficiently to changes in our workload.

We received 9-percent more complaints in 2012–2013 (1,596) than we did the year before (Figure 1). We also saw the number of new administrative complaints increase by 42 percent from 2011–2012 (Figure 2). This was a reversal of the trend we had observed in the three previous fiscal years, when administrative complaints had been in decline. Administrative complaints involve delays, time extensions, fees and miscellaneous matters.

Moreover, out of the top 15 institutions about which we received administrative complaints, only one was the subject of fewer administrative complaints in 2012–2013 than in the year before (Figure 3). In fact, the number of administrative complaints against six institutions more than doubled, with one being the focus of six times as many complaints. This is a sign of clear deterioration in the access to information system and indicates that institutions are having difficulty meeting even their basic obligations under the *Access to Information Act*, such as adhering to the legislative deadlines for responding to requests or following proper procedures for taking time extensions.

FACTS AND FIGURES OF INTEREST

We received 1,596 complaints in 2012–2013, a 9-percent increase from the year before.

We received 42-percent more administrative complaints in 2012–2013, compared to 2011–2012.

We closed 1,622 complaints, an 8-percent increase from 2011–2012.

We have reduced our inventory of complaints by 28.6 percent since April 1, 2009, and closed an average of 1,824 files annually from 2009–2010 to 2012–2013.

In 2012–2013, we closed 57 percent of complaints within nine months from the date we registered them, compared to 49 percent the year before.

We closed 70 percent of administrative complaints within 90 days from date of assignment in 2012–2013, up from 48 percent in 2011–2012.

We reduced the average turnaround time for investigations (from date registered) by 52 days, from 432 days in 2011–2012 to 380. The median time was 215 days, two months less than in 2011–2012. The median overall turnaround time from the date we assigned a complaint to an investigator was 86 days.

Overall, we closed 1,622 files in 2012–2013, slightly more than we received and 8-percent more than we completed in 2011–2012. This means that for the fourth year in a row we were able to make a dent in our inventory, which we have reduced by 28.6 percent since April 1, 2009. As was true last year, our inventory at year-end (Figure 4) was largely composed of complex refusal files (involving the application of exemptions, for example), since we were able to absorb the increase in administrative complaints nearly completely, due to our having a fully staffed unit to investigate them.

We closed an average of 1,824 files annually from 2009–2010 to 2012–2013.

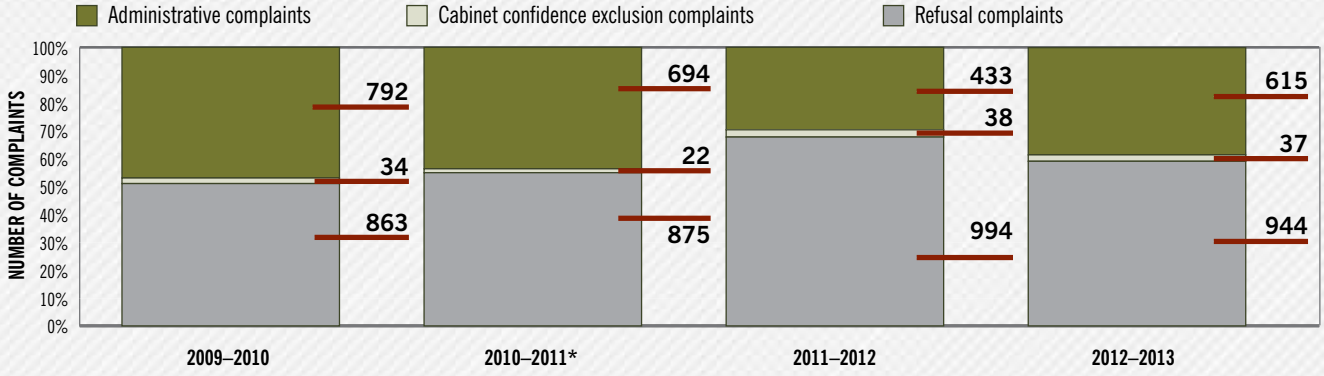
FIGURE 1. SUMMARY OF CASELOAD, 2009–2010 TO 2012–2013

	2009–2010	2010–2011	2011–2012	2012–2013
Complaints carried over from the previous year	**2,514**	**2,086**	**1,853**	**1,822**
New complaints received	1,653	1,810	1,460	1,579
New Commissioner-initiated complaints	36	18	5	17
Total new complaints	**1,689**	**1,828**	**1,465**	**1,596**
Complaints discontinued during the year	575	692	642	400
Complaints settled during the year	n/a	18	34	171
Complaints completed during the year with findings	1,542	1,351	820	1,051
Total complaints closed during the year	**2,117**	**2,061**	**1,496**	**1,622**
Total inventory at year-end	**2,086***	**1,853****	**1,822**	**1,796**

*Includes 127 complaints on hold pending ongoing litigation

**Includes 190 complaints on hold pending ongoing litigation

FIGURE 2. TREND IN COMPLAINTS REGISTERED, 2009–2010 TO 2012–2013

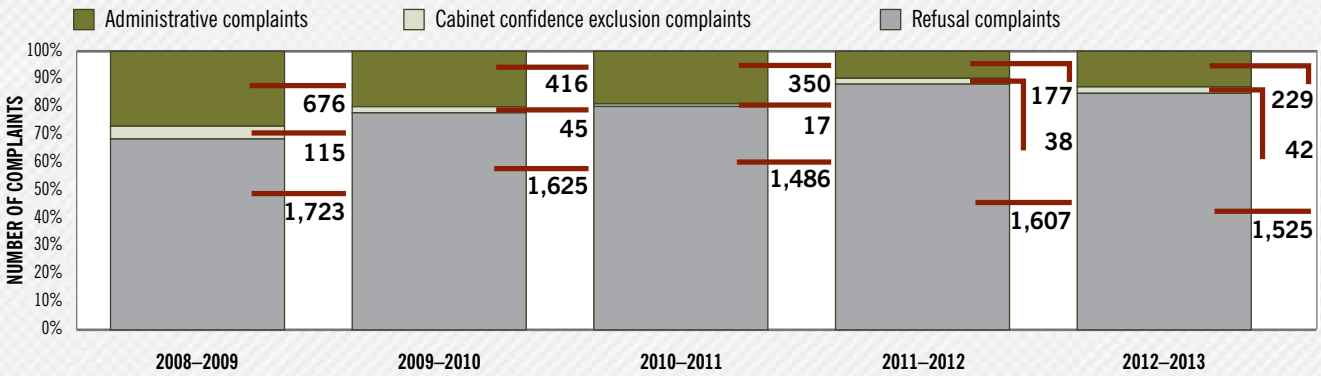


*The 237 delay complaints we received all at once in July 2010 have been removed for comparison purposes.

FIGURE 3. TOP 15 INSTITUTIONS WITH ADMINISTRATIVE COMPLAINTS, 2010–2011 TO 2012–2013

	2010–2011	2011–2012	2012–2013
Canada Revenue Agency	295	49	109
Royal Canadian Mounted Police	28	24	76
Foreign Affairs and International Trade Canada	14	21	35
Transport Canada	54	14	34
Citizenship and Immigration Canada	43	35	33
National Defence	30	22	31
Privy Council Office	17	5	31
Health Canada	62	18	25
Canada Border Services Agency	9	12	23
Correctional Service of Canada	47	20	21
Public Works and Government Services Canada	60	20	21
Canadian Food Inspection Agency	6	7	19
Environment Canada	12	8	14
Department of Justice Canada	11	10	11
Treasury Board Secretariat	6	4	11

FIGURE 4. TREND IN YEAR-END INVENTORY, 2008–2009 TO 2012–2013



MAKING SIGNIFICANT IMPROVEMENTS IN TURNAROUND TIME

In addition to the continued decrease in our inventory, we were able to achieve significant improvement in our turnaround times for the complaints we closed in 2012–2013.

The first indicator of this is the **proportion of all complaints we closed within nine months**. In 2012–2013, we closed more complaints within that time frame than we did the year before (57 percent versus 49 percent), measuring from the date we registered the complaints (Figure 5). This improvement held true in terms of both the number of files we closed and the percentage of the total volume of cases we completed.

We also have a goal to **close 85 percent of administrative complaints within 90 days**. In 2012–2013, we made progress toward this target, closing 70 percent of administrative files in 90 days, compared to 48 percent in 2011–2012 (from date of assignment).

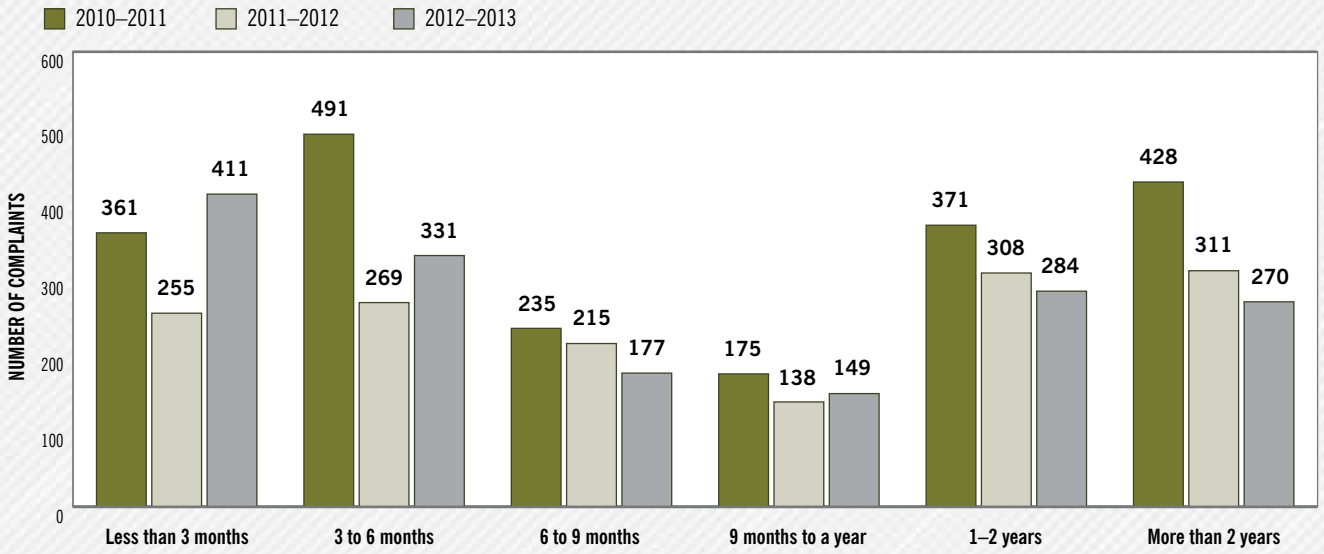
Calculating the **average turnaround time for a complaint** is another way we measure our performance. This was down in 2012–2013, both overall and within the administrative and refusal complaint categories (from date of registration). We shaved 52 days off the average turnaround time, reducing it from 432 days to 380. Over the same period, the average for administrative complaints was 138 days (compared to 236 the year before; a decrease of nearly 100 days) and 509 days for refusals (down from 565).

Looking at the **median turnaround time** gives us a good sense of how we are improving the typical service complainants can expect. The median for all files was 215 days, down from 276 in 2011–2012 (from date registered). It was 94 days for administrative files (a drop of roughly two months from the year before) and 350 days for refusals (down from 419 days).

Finally, we calculate how quickly we are **completing files from date of assignment**. In 2012–2013, the median turnaround time was 86 days, down from 91 in 2011–2012. For administrative files, the time was 52 days, a significant drop from 96 the year before. The median time for refusal files increased, however (140 days versus 89 in 2011–2012), reflecting the complexity and age of some of the cases we closed in 2012–2013.

Comparing the turnaround time from date registered and date assigned serves to emphasize a serious challenge we face, one that is already testing our ability to deliver on our mandate—the challenge of resources. For example, the median for refusal complaints from the date of registration

FIGURE 5: TURNAROUND TIMES FOR COMPLAINTS CLOSED, 2010–2011 TO 2012–2013



was 350 days in 2012–2013, compared to 140 days from date assigned. The gap of 210 days (about seven months) between the two time periods is largely accounted for by the fact that we are unable to assign refusal complaints (the most complex of our files) to investigators immediately upon receiving them. We simply do not have the staff to do so.

While we continue to strive to maximize our complement of investigators, there is very little more we can do through internal resource reallocation. The only way we can make ongoing gains in productivity of any significance is by receiving more resources to allow us to augment our investigative team.

TARGETED STRATEGIES TO HANDLE OUR CASELOAD

We began 2012–2013 with an inventory of complaints comprising nearly 90 percent refusal cases. More than half of these refusals (52 percent) were in three categories: files involving sensitive matters of national security, international affairs and defence, and complaints against the Canada Revenue Agency (CRA) and against the Canadian Broadcasting Corporation (CBC). As we did in 2011–2012, we continued to focus on these complaints, refining our approaches and developing new ones to suit the circumstances.

Our approach to the **national security, international affairs and defence** files was to focus on our backlog of oldest files—58 dating from before April 1, 2009—and other groups of files with common features. Our concerted efforts to mediate between institutions and complainants was key to our closing 163 of these files in 2012–2013, up from 109 the year before. We received good cooperation from institutions, particularly when it came to meeting in person on difficult files to determine what points were still at issue and how to resolve them.

To tackle the volume of **complaints against CRA and the CBC**, we assigned expert resources to these files to capitalize on their experience and growing familiarity with the people and issues involved. We closed 442 files against these institutions in 2012–2013.

ONGOING DIALOGUE WITH THE COMMUNITY

In recent years, we have sought to improve our communication with institutions. Efforts in this regard have taken place not only in the context of individual files but also between our managers and institutional officials, from the deputy minister to the access to information coordinator. In all instances, our goal has been to facilitate the investigation process by making it clearer and more predictable. This ongoing dialogue has also been helpful when managers have had to step in to resolve particular problems in an investigation.

In January 2013, we took this communication one step further by launching a series of semi-annual meetings with coordinators. With the Commissioner and Assistant Commissioner, Complaints Resolution and Compliance, on hand, as well as other senior officials, these meetings are an excellent opportunity to share information about our investigation process and expectations, and to get feedback from institutions on ways we could improve. In 2013–2014, we will initiate discussions with complainants on similar issues.

Despite these efforts, these three categories of complaint accounted for 46.2 percent of our inventory as of March 31, 2013 (Figure 6), a 6.4 percent decrease over the year. We will continue to target these complaints in 2013–2014.

We also worked closely with the Cabinet confidences group at the Privy Council Office (PCO) to speed up the course of **delay complaints that also involved records that may have contained Cabinet confidences**. We acted as an intermediary with that group to determine when institutions would get a response to consultations about these requests, since institutions could not at the time directly seek this information, except through their legal counsel, which could be time-consuming.

FIGURE 6: COMPLAINTS IN THREE CATEGORIES IN OUR INVENTORY, AS OF MARCH 31, 2013

Overall inventory	Number (percentage of total complaint inventory)		
	National security, international affairs and defence	Canada Revenue Agency	Canadian Broadcasting Corporation
1,796	**335 (18.7%)**	**281 (15.6%)**	**213 (11.9%)**

OUR OLDEST FILES

The number of years that have passed since we received some files presents considerable challenges to us as we try to investigate them. The most significant is that very often the players involved—not only our investigators but also the analysts and subject-matter experts at the institutions—have changed, sometimes more than once, over the course of the investigation. This means that we have had to essentially start our work over from scratch in some instances. Another factor is the loss of memory about the details and circumstances of the original request, the issue in question (including the environment in which it was playing out) and the ins and outs of the work done to try to resolve the complaint.

Nonetheless, we have closed just about all our pre-2008 files, including, in early April 2013, the oldest one on our books. We are now concentrating on wrapping up files we received between April 1, 2008, and April 1, 2010.

SETTLING MATTERS THROUGH MEDIATION

In 2012–2013, we made extensive use of mediation to resolve issues that arose during complaint investigations. This is shown clearly in our growing use of the "settled" category for complaints. A settled complaint is one concluded to the satisfaction of all parties involved without the need for us to make a finding (i.e. well founded). Complaints closed as settled increased from 2 percent overall in 2011–2012 to 11 percent in 2012–2013, with a corresponding decrease in discontinued complaints.

See page 14 for more information on the various outcomes of our complaints.

TAKING A MORE FORMAL APPROACH, WHEN NECESSARY

Although we close 99 percent of complaints each year through mediation, we do invoke the Commissioner's broad investigative powers on occasion, when we are of the view that continued discussion with access to information officials may not produce any results.

In these instances, we involve increasingly senior officials, including the Assistant Commissioner, in discussions with their counterparts at institutions to resolve outstanding matters. When we continue to be at an impasse, or the Commissioner chooses for another reason to make formal recommendations to address the issue, she may write to the head of the institution (a subsection 37(1) report). These reports serve to raise issues at the highest levels in the organization and give the institution a final opportunity to respond (and, we hope, resolve the matter) before reporting to the complainant. In 2012–2013, the Commissioner issued such a report for 12 complaints.

USING FORMAL MECHANISMS TO ADVANCE ADMINISTRATIVE COMPLAINTS

We have taken a stricter approach to receiving work plans and proposed release dates from institutions. For example, we give institutions five days to provide us with a work plan for any complaint about a request that is in deemed refusal (that is, overdue according to the legislative deadline). Otherwise, we issue a letter to senior institutional officials formally re-iterating the request.

Similarly, for complaints about lengthy time extensions, we issue a formal letter asking for an earlier date than the extended one on which the institution will provide a response to the requester. Both these approaches have proven effective in speeding up the investigation process and getting requesters an answer more quickly, including more records in some instances.

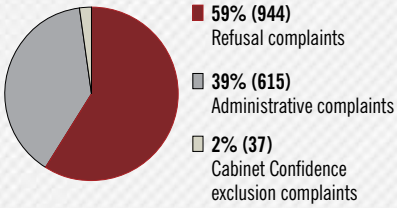
Other examples of the Commissioner's formal powers are compelling institutions to produce records and seeking affidavit evidence to forward an investigation. In some cases, we hold formal inquiries to gather evidence, subpoenaing witnesses and documents, as required. If we find evidence of the possible commission of an offence, we may disclose information to the Attorney General of Canada.

When an institution declines to follow our recommendations with regard to a complaint, we may, with the consent of the complainant, choose to seek a judicial review of the matter before the Federal Court. We initiated five such cases in 2012–2013 and intervened in several other matters before the courts.

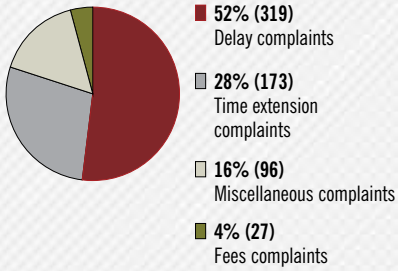
OTHER NOTABLE STATISTICS

COMPLAINTS REGISTERED, APRIL 1, 2012, TO MARCH 31, 2013

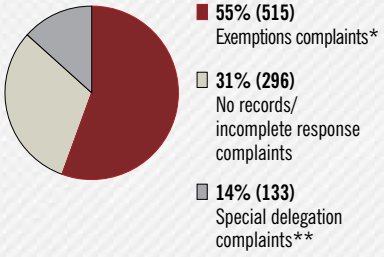
By type of complaint



Breakdown of administrative complaints



Breakdown of refusal complaints

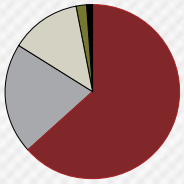


*Includes section 68, 68.1 and 68.2 exclusions.

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

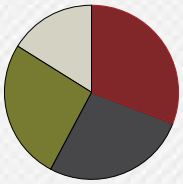
Of the 1,596 complaints we received in 2012–2013, 39 percent were about administrative matters, while 59 percent were refusal files (with the standard 2 percent of complaints about Cabinet confidence exclusions). The proportion of administrative to refusal complaints has changed somewhat from 2011–2012, when it was 30:68.

OUTCOME BY TYPE OF COMPLAINT, FOR COMPLAINTS CLOSED BETWEEN APRIL 1, 2012, AND MARCH 31, 2013



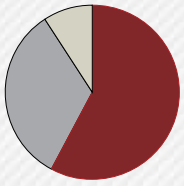
Outcome of administrative complaints
563 complaints

- **64% (359)** Well founded, resolved without recommendations
- **21% (118)** Discontinued
- **13% (71)** Not well founded
- **2% (9)** Settled
- **1% (4)** Well founded with recommendations–resolved
- **0%* (2)** Well founded with recommendations–not resolved



Outcome of refusal complaints
1,026 complaints

- **31% (314)** Well founded, resolved without recommendations
- **27% (274)** Not well founded
- **26% (271)** Discontinued
- **16% (162)** Settled
- **0%* (3)** Well founded with recommendations–not resolved
- **0%* (2)** Well founded with recommendations–resolved



Outcome of Cabinet confidences exclusion complaints
33 complaints

- **58% (19)** Not well founded
- **33% (11)** Discontinued
- **9% (3)** Well founded, resolved without recommendations

*Percentages are rounded to the nearest whole number.

Overall, there was a shift in the ratio of complaints with findings to complaints discontinued: 75:25 in 2012–2013 compared to 45:55 in 2011–2012 and very similar to the more traditional 70:30 ratio seen in previous years. This is due to our increased use of the settled category for complaints, particularly for refusals (16 percent of outcomes versus 2 percent in 2011–2012). Another notable change was in the percentage of administrative complaints that were well founded and resolved without recommendations (64 percent in 2012–2013 compared to 55 percent the year before). The outcome of Cabinet confidence exclusion complaints was also different this year compared to last: 58 percent were not well founded (38 percent in 2011–2012) and 9 percent were well founded and resolved without recommendations (19 percent in 2011–2012).

NEW COMPLAINTS IN 2012–2013, TOP 15 INSTITUTIONS*

Canada Revenue Agency	336
Royal Canadian Mounted Police	125
Citizenship and Immigration Canada	109
Foreign Affairs and International Trade Canada	83
National Defence	72
Transport Canada	72
Canada Border Services Agency	63
Correctional Service of Canada	57
Privy Council Office	52
Aboriginal Affairs and Northern Development Canada	45
Canadian Broadcasting Corporation	45
Health Canada	37
Industry Canada	36
Public Works and Government Services Canada	35
Canadian Food Inspection Agency	26
Others (74 institutions)	403
Total	**1,596**

*Includes 17 Commissioner-initiated complaints

The number of institutions about which we received complaints in 2012–2013 increased to 89, from 88 the year before. Notable changes among the top 15 institutions involve the RCMP, which jumped from fourth to second place, and the CBC, which dropped from third place to tied for tenth. Canada Post and the Department of Justice Canada are no longer among the top 15 while Transport Canada and the Canadian Food Inspection Agency joined the list. The Canada Revenue Agency remains far and away the most complained about institution, while the RCMP's complaints grew by 84 percent.

COMPLAINTS COMPLETED WITH FINDINGS IN 2012–2013, BY INSTITUTION*

	Overall	With merit	Not well founded
Canada Revenue Agency	179	146	33
Citizenship and Immigration Canada	96	50	46
Royal Canadian Mounted Police	69	57	12
Correctional Service of Canada	65	41	24
Foreign Affairs and International Trade Canada	59	34	25
Canadian Broadcasting Corporation	56	40	16
National Defence	47	21	26
Health Canada	38	31	7
Public Works and Government Services Canada	32	16	16
Transport Canada	27	22	5
Aboriginal Affairs and Northern Development Canada	26	16	10
Privy Council Office	23	14	9
Department of Justice Canada	21	13	8
Environment Canada	21	13	8
Canada Border Services Agency	20	14	6
Others (57 institutions)	272	159	113
Total	**1,051**	**687**	**364**

*Includes five Commissioner-initiated complaints

This chart lists the outcomes of complaints for the 15 institutions for which we issued the most findings in 2012–2013. With the exception of National Defence, all institutions had more complaints closed with merit than they did complaints that were not well founded.

2. ENSURING COMPLIANCE WITH THE ACT

Our core business is investigating complaints, in support of our mission to defend and protect Canadians' right of access to public sector information. During the course of our investigations we encountered a number of novel and complex issues—some of which are found in the summaries below.

We also uncovered a number of causes for concern about the health of the access to information regime at the federal level, particularly associated with complaints about basic administrative matters. Among those were a number of complaints about extremely lengthy extensions of time. In one mildly worded letter we received this year about a lengthy response time for a request, a complainant wondered whether the "[access to information] process that I'm experiencing really meets the intent of the program" (see box, right).

OUR INVESTIGATIVE CONTEXT

We received 9-percent more complaints in 2012–2013 than we did the year before. We also saw the number of new administrative complaints increase by 42 percent from 2011–2012.

This is a sign of clear deterioration in the access to information system and indicates that institutions are having difficulty meeting even their basic obligations under the *Access to Information Act*, such as adhering to the legislative deadlines for responding to requests or following proper procedures for taking time extensions.

A COMPLAINANT ASKS: IS THIS WHAT CANADIANS SHOULD EXPECT FROM THE ACCESS TO INFORMATION SYSTEM?

I would like to report my concerns with [my access to information] request. […] I have still not received the requested information almost 18 months later. […]

I'm not sure how long "final approval" takes, but I've paid a substantial amount of money, and have no idea when the CD of requested documents will arrive—or how relevant they will be at that point.

I'm just not sure that the [access to information] process that I'm experiencing really meets the intent of the program.

The most obvious problem is the lengthy time period that I have been waiting. […]

I would […] appreciate hearing whether you feel that my experience (so far) meets the spirit and intention of the [access to information] process available to Canadians. If you have the ability to encourage completion of this request, I would appreciate that, too.

ADMINISTRATIVE INVESTIGATIONS DEMONSTRATE THAT INSTITUTIONS ARE FAILING TO MEET BASIC OBLIGATIONS UNDER THE ACT

INSUFFICIENT RESOURCES

Responding to access to information requests is institutions' legislative duty and, as such, the access function should be properly resourced. However, in many of our investigations this year, institutions told us they had insufficient staff, both in the access to information office and program areas (subject matter experts) to properly respond to the number of access to information requests they receive.

One particularly notable instance of this concerned the failure of **Parks Canada** to meet an extended deadline to respond to a request for documents related to the announcement that Sable Island would become a Canadian National Park Reserve. Our investigation revealed that access officials took no action on the request for 11 months, neither processing the records nor initiating the required consultations. Parks Canada informed us that the underlying cause of this delay was heavy workload and understaffing at the institution. Cutbacks were compounded by the disappearance of some regional offices, which led to confusion about where access officials should send the records during final approvals. As a result of cumbersome approval processes and the lack of internal resources, Parks Canada missed its legislative deadline by more than 11 months.

OTHER INSTANCES OF INSUFFICIENT RESOURCES

We found a number of other instances of the access office, program areas or both not having enough staff to respond to requests in a timely manner.

For example, in Transport Canada's case (under "Lengthy time extensions," below), one sector took roughly a year to provide records, due to a shortage of staff. In addition, the access office initially said it would only be able to respond to the request more than two months after the due date, again, due to a lack of resources. Similarly, Health Canada (under "Failure to meet commitment dates," below) cited a lack of resources as the primary reason why a request had been untouched for a number of months and that consultations had not been initiated in a timely manner.

In light of these circumstances, the Commissioner made recommendations to both Ministers, which they accepted, about the necessity for proper resourcing of the access function.

Another institution, the **Royal Canadian Mounted Police** (RCMP), was so understaffed that it was unable to even acknowledge receipt of access requests within the 30 days in which it should have, generally, responded (see box, below, for a sample response). This failure hampered our ability to investigate, since the complainant did not even have file numbers for the requests to provide to us. We note that the number of administrative complaints we have received about the RCMP more than tripled from 2011–2012 to 2012–2013. We have held a number of meetings with the RCMP, and it has put a plan into place to respond to our concerns. We will be monitoring the effectiveness of the plan and the RCMP's performance closely.

INSUFFICIENT RESPONSE

In an April 2013 response to a request submitted in September 2012, the RCMP responded to a complainant as follows:

"Unfortunately, we are experiencing a huge backlog due to the high volume and complexity of requests. We cannot give you a time frame for when your request will be completed at this time, but it is approximately half way thru [sic] the process."

LENGTHY TIME EXTENSIONS

The *Access to Information Act* allows institutions to extend the time they take to search for and process large volumes of records (paragraph 9(1)(a)) and to consult other institutions (paragraph 9(1)(b)) and third parties (paragraph 9(1)(c)). However, the Act does not state how long those extensions should be, except to say that they must be "for a reasonable period of time, having regard to the circumstances" (subsection 9(1)).

We investigated a complaint about a 540-day time extension **Transport Canada** took to respond to a request for records related to the development of a joint Canada–U.S. declaration on security and competitiveness.

Our investigation determined that Transport Canada's extension under paragraph 9(1)(a) was invalid, since Transport Canada did not demonstrate that there was a large volume of records or that searching for the records would unreasonably interfere with operations. We also determined that the extension under paragraph 9(1)(b) was unreasonable, since Transport Canada had taken no action to initiate consultations for almost one year after receiving the request. This was largely because of one sector's reluctance to provide records they deemed to be sensitive. There was also no effective follow-up mechanism for taskings within the access to information office.

When we asked Transport Canada to provide us with a commitment date, officials told us that they would be able to respond more than two months after the expiry of the extended legislated due date. Given our findings about the extension, we were unwilling to accept a date after the time the institution was required to respond. Accordingly, the Commissioner wrote to the Minister, who committed to responding one month before the extended due date.

We also investigated an instance of an extension that was more than twice as long as Transport Canada's. **National Defence** took a 1,100-day extension to respond to a request for information about the sale of surplus military assets to Uruguay. At slightly more than three years, this extension was one of the longest we had seen in recent memory. The extension comprised 230 days to process the approximately 3,000 pages responsive to the request, and 880 days to consult other government institutions.

During the course of our investigation into the subsequent complaint, National Defence did not justify the 230 days claimed for the purpose of processing the responsive records. We were also informed that National Defence's consultations would, in fact, take approximately 160 days, falling well short of the 880 days claimed for the time extension taken for this purpose. As a result, we agreed with the complainant that the extension was wholly unreasonable and was therefore invalid, since subsection 9(1) requires extensions to be "for a reasonable period of time." We recommended to the Minister that he respond within 90 days of the expected completion of the outstanding consultation. Our recommendation was not accepted and, having obtained the consent of the requester, we commenced judicial review proceedings in the Federal Court (see page 30).

FAILURE TO MEET COMMITMENT DATES

One way we seek to resolve complaints about lengthy time extensions is to obtain a work plan and a date by which an institution formally commits to respond to a request. Once an institution commits to responding by a certain date we generally close our investigative file as resolved. This year, we investigated several complaints in which institutions failed to meet or refused to agree to commitment dates.

For example, **Health Canada** received a request in November 2010 for records relating to a television advertisement about childhood obesity and sugar-sweetened drinks. The institution did not take an extension of time. As a result, the request became overdue in January 2011. In March 2011, our office received a complaint.

During our investigation, we noted that the request had lain dormant for significant periods of time and that consultations, although required, had not been started in a timely way. On numerous occasions we asked Health Canada to provide us with a work plan and a commitment date. In the end, the Commissioner found it necessary to write to the Minister to seek her commitment to respond to the requester by the end of June 2012. The Commissioner also made a number of recommendations, including that consultations be undertaken in a timely manner and that Health Canada ensure that access requests are processed expeditiously. In response, the Minister agreed to respond by the recommended date and to take measures to improve the processing of access requests.

Unfortunately, it became apparent after we had reported the result of our investigation to the complainant that the institution was not going to meet its commitment date. In subsequent discussions with Health Canada senior management, the Commissioner emphasized the importance of complying with a commitment date, particularly once a Minister has agreed to meet it, since respecting such agreements is essential to the proper functioning of the Commissioner's ombudsman's role, as set out in the Act. In the end, Health Canada responded to the request approximately one month after the commitment date.

FAILURE TO RESPOND ACCURATELY TO REQUESTS BY NOT RETRIEVING RECORDS

Investigations in 2012–2013 revealed that access to information officials were not retrieving records when they were of the view that the records would be exempted or excluded under various provisions of the Act. Failing to retrieve the records led to incorrect and incomplete responses to requesters.

For example, we investigated more than a dozen complaints about the **Canadian Broadcasting Corporation**'s (CBC) use of its unique exclusion in section 68.1. At the time of the requests, the CBC had a guideline in place that allowed it to claim section 68.1 without gathering or reviewing any responsive records if officials decided that a request, on its face, was for information related to the CBC's journalistic, creative or programming activities. Instead of retrieving these records, officials simply responded to the requester that the records were excluded. The requesters then complained to our office.

The CBC made changes to this guideline in the fall of 2011. Moreover, in November 2011 the Federal Court of Appeal confirmed that the CBC (and by extension all institutions) must retrieve all records responsive to access requests before determining whether exemptions or exclusions apply and must also consider whether severance is required.

Following our intervention, the CBC withdrew its reliance on section 68.1 and conducted supplementary searches for responsive records. We concluded that in many instances the CBC had responded that the "record" was excluded when it did not in fact even exist. This practice resulted in inaccurate responses to requesters, unnecessary complaints to our office and a waste of public resources.

We can now report, however, that officials at the CBC retrieve and process all records responsive to requests made under the Act. They also consider whether it is possible to sever and release information, as is required by the Act.

In a second case, a requester sought access to all staff disciplinary investigation reports produced by the **Correctional Service of Canada** (CSC) in the Pacific Region in 2006 and 2007. CSC withheld the records in their entirety under subsection 19(1), the mandatory exemption for personal information. The requester complained to our office about this refusal, stating that redacted versions of similar records had been provided by CSC in the past.

During the course of our investigation, we requested a complete copy of the records on numerous occasions. CSC stated that the records were held in individual paper files and that retrieving them would require a search through hundreds of such files. When we reviewed the institution's records associated with processing the request, it became clear that the access to information office had never retrieved the records but had simply reviewed samples of similar records. We reviewed these samples and determined that CSC could have removed certain information that would have identified individuals and released the remaining information.

In the end, CSC informed us that the actual records, which would have now been more than two years old, had been disposed of even though our investigation was ongoing.

Our report to the complainant concluded that CSC had failed to properly respond to the request since it did not retrieve the records, had not properly responded to our investigative queries, had disposed of records responsive to an access request despite being aware of our ongoing investigation and of our requests to be provided with copies of the records, and had wholly failed in its duty to assist the requester. Indeed, CSC's failure to retrieve and preserve records resulted in irremediable harm to the requester's rights under the Act.

CSC has assured us that it now retrieves and processes all records that may be responsive to a request even when those records may be exempted as personal information.

ALL-ROUND FAILURE TO MEET THE DUTY TO ASSIST

Instances of a lack of compliance with the basic obligations of the Act, including those described above, demonstrate a failure on behalf of government institutions to abide by the duty to assist, as found in subsection 4(2.1) of the Act. Among other things, this legislated duty requires institutions to make every reasonable effort to assist a requester, and to respond accurately and in a timely manner to a request.

One of our investigations uncovered a particularly notable failure by an institution to meet its duty to assist. **Aboriginal Affairs and Northern Development Canada** (AANDC) provided a requester with an incomplete response to a request for information about the Food Mail Program. When the requester identified specific documents that had not been retrieved, AANDC insisted that he submit a new request, saying, "Due to the volume of information, we feel this goes beyond the duty to assist." Despite our showing AANDC access officials the complainant's detailed list of records, they continued to refuse to conduct a further search for the records. A subsequent formal letter produced no results. In the end, the complainant received the additional documents in response to a second request. When we reviewed the documents, we found that they were responsive to the first request and that the requester should not have been forced to make a subsequent request.

We concluded that AANDC's obstinate refusal to retrieve all responsive records, even in the face of evidence of their existence, as well as its insistence that the complainant make a second request, was a complete failure to abide by the legislated duty to assist.

EXEMPTIONS AND DISCRETIONARY DECISIONS

IMPACT OF THE *FEDERAL ACCOUNTABILITY ACT*

A number of changes were made to the *Access to Information Act* by the coming into force of the *Federal Accountability Act* (FedAA) in 2006. The amendments added institutions and institution-specific exemptions to the Act.

Definition of "general administration"

Two of the institutions that became subject to the *Access to Information Act* as a result of the FedAA were the Canada Post Corporation and the CBC. A new exemption (section 18.1) was added to the Act for confidential commercial information "belonging to" specific institutions, including Canada Post. A new exclusion (section 68.1) was also added to the Act for information that relates to the journalistic, creative or programming activities of the CBC. Both of these provisions, however, are subject to an exception for information relating to these institutions' "general administration." Although section 3.1 of the Act provides some examples of what constitutes information that relates to an institution's "general administration," the list of examples is not exhaustive, and the absence of a definition of this term has resulted in a number of complaints to our office.

Section 18.1 of the Act

Canada Post received a request for records concerning its procurement rules. In response, the institution applied section 18.1 to exempt the majority of the responsive records, which consisted of two related guidelines for employees.

In the course of our investigation, we questioned whether guidelines issued to Canada Post employees in the context of the evaluation of responses to requests for proposals constituted "commercial" information. In the end, we came to the view that the guidelines were not commercial information. We also concluded that even if they were, they related to Canada Post's "general administration," since they served as a mechanism to ensure sound management practice. In coming to this conclusion, we referred to the dictionary definition of "administration," which included the "management of business," an extremely broad concept. In the end, Canada Post released the records without exemption.

Section 16.5

Another new exemption whose application has resulted in complaints to our office is section 16.5. This section exempts information created for the purpose of making a disclosure under the *Public Servants Disclosure Protection Act* or information created in the course of an investigation into a disclosure under that statute.

We investigated a complaint against **Public Works and Government Services Canada** (PWGSC) concerning its refusal to disclose reports involving cases of workplace wrongdoing. During our investigation, we determined that section 16.5 could apply not only to information created in the course of any investigation into a disclosure conducted under the *Public Servants Disclosure Protection Act*, but

also in the course of other types of investigations conducted under different statutes, provided that those investigations were into disclosures under the *Public Servants Disclosure Protection Act*.

After carefully considering the matter, we concluded that, as long as the investigation took place because of a disclosure under the *Public Servants Disclosure Protection Act*, section 16.5 could apply. We, therefore, found that PWGSC had properly applied section 16.5. However, it should be noted that we were only able to reach this conclusion after experiencing difficulty obtaining a copy of the responsive records from PWGSC.

Briefly, PWGSC's senior disclosure officer resisted providing the access office with a copy of the responsive records and, during the course of our investigation, also expressed reluctance to provide us with a copy of the records. Although we appreciate that, in some instances, information responsive to requests under the *Access to Information Act* may be perceived to be sensitive, an institution's access office still needs to have it on hand for the purpose of processing the request and ensuring that possible severances are done in accordance with section 25 of the Act. The information also needs to be provided to our office in order for us to complete our investigation independently and in private.

OTHER EXEMPTIONS OF NOTE: SECTION 19 (PERSONAL INFORMATION)

Each year, the most commonly applied exemption about which we receive complaints is section 19. This provision applies to personal information about individuals, other than the requester, that appears in records. To apply subsection 19(1) properly, institutions must show that the information falls under the definition of "personal information" in section 3 of the *Privacy Act*. Thus, the information must be about an identifiable individual. It must also not fall within the exceptions to the definition of "personal information" set out in paragraphs 3(j) to (m) of the *Privacy Act*. In addition, the institution must also consider whether any of the conditions that would permit disclosure of personal information apply. This would include, among other things, determining whether the information is publicly available, whether the person to whom the information relates might consent to the information's release or whether the information warrants being disclosed in the public interest.

Disclosure of the identity of a wrongdoer in a report made by the Public Sector Integrity Commissioner

The **Public Sector Integrity Commissioner** (PSIC) issued a report concerning allegations of wrongdoing at Human Resources and Skills Development Canada (HRSDC). The report did not name the recipient of the report nor did it identify the person whom was its subject. In response to a request for access to the identities of these individuals, PSIC exempted the information under subsection 19(1). In a complaint to our office, the requester argued that the information should be released under paragraph 19(2)(c), which encompasses disclosure pursuant to paragraph 8(2)(m) (public interest disclosure) of the *Privacy Act*.

We agreed that the identity of the report's recipient, HRSDC's chief executive officer, should be disclosed, since receiving such a report was related to his position or functions as a government employee, and consequently fell within the exception to the definition of personal information found at paragraph 3(j) of the *Privacy Act*.

We then examined whether the institution had properly exercised its discretion under subsection 19(2) and, more specifically, paragraph 19(2)(c), which encompasses paragraph 8(2)(m) of the *Privacy Act*. Paragraph 8(2)(m) permits the disclosure of personal information when "the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure." The discretion to disclose under paragraph 8(2)(m) is, however, subject to any other Act of Parliament. Since the *Public Servants Disclosure Protection Act* provides that the identity of the subject of a report may only be disclosed in accordance with the provisions of that Act, we concluded that paragraphs 19(2)(c) and 8(2)(m) were not applicable in the circumstances. Accordingly, the only public interest mechanism that allows PSIC to identify the subject of a report on wrongdoing is found in the *Public Servants Disclosure Protection Act*. In the end, PSIC released the identity of the recipient chief executive officer but not the subject of the report.

Signatures

One issue that frequently recurs in our investigations is whether the signature of a government employee, placed on documents created in the course of his or her official functions, is "personal information." While we are of the view that a signature is information about an identifiable person, it is also our opinion that the signature of a government employee, provided in the course of official functions, falls within the exception to the definition of personal information found in paragraph 3(j) of the *Privacy Act*.

In one instance this year, the **Privy Council Office** had exempted the signatures and initials of various senior public servants from a briefing note provided to the Prime Minister in 2008. Through our investigation, we concluded that these individuals had provided their signatures, which appeared on official correspondence and routing slips, to authenticate that they had viewed and approved the briefing note in a professional context. We also noted that the presence or absence of signatures or initials is an important piece of information in the context of government accountability. Not being persuaded that the signatures were properly withheld, the Commissioner recommended to the Clerk of the Privy Council Office that the information be released. Although the Clerk did not accept our recommendation, most of the signatures were later released with the consent of the individuals. The requester agreed to settle the complaint after receiving the supplementary information.

Basic business information of third parties

A further question investigated this year was the extent to which individuals' general professional information constitutes personal information. This question arose when investigating a complaint about **Natural Resources Canada**'s refusal to disclose the names, professional titles and basic professional contact information of individuals working for a non-government entity who may have received data from Natural Resources Canada.

When considering this question, we noted that the Federal Court of Appeal has held that "personal information" must be understood as equivalent to information falling within an individual's "right of privacy" and that this right, in turn, connotes "concepts of intimacy, identity, dignity and integrity of the individual."

In keeping with this jurisprudence, the mere fact that certain individuals may have received information in their professional capacity, coupled with these individuals' professional titles and basic business coordinates, led us to conclude that the information was of a professional and non-personal nature and did not fall within the right of privacy that subsection 19(1) is intended to protect.

We therefore recommended that the Minister release the information at issue. The Minister did not accept our recommendation. We received consent from the requester to seek judicial review of the Minister's decision. We will report on this proceeding in our 2013–2014 annual report.

EXERCISING DISCRETION

Over the past several years, the courts have elaborated on the requirements for the exercise of discretion in the context of the *Access to Information Act*. We have reviewed these decisions and are now requiring from institutions a more detailed accounting of how they exercise their discretion under the Act. More specifically, we now require that institutions tell us who exercised the discretion and what factors that person took into consideration. We review the factors considered and make a determination as to whether the discretion has, in our view, been exercised reasonably.

National security matters

The Federal Court rendered a key decision in 2011 about the exercise of discretion related to historical records involving national security issues. In that decision, subsequently affirmed on appeal, the Court enumerated a number of factors institutions must take into consideration in that context. This decision has had a very positive impact on the access Canadians have to their documentary history. In particular, we note one investigation into a refusal by the **Library and Archives Canada** (LAC) to disclose information gathered by the RCMP about literary critic, university professor and editor Northrop Frye, who died in 1991. As a result of the Court decision and our investigation, LAC, in consultation with the Canadian Security Intelligence Service, undertook a complete re-review of the subject files. Subsequent to this re-review and after further questioning by our office, LAC released significantly more information to the complainant based on the passage of time and based on its exercise of discretion. We have a number of files in which similar re-reviews have been completed and institutions have disclosed substantially more information.

Relevant factors to consider when exercising discretion

As noted by the courts, the exercise of discretion must be reasonable and based on relevant considerations only.

In the context of a request made to the **Privy Council Office** (PCO) for all information concerning the requester's application for a Governor-in-Council position, PCO refused to release information relating to the assessment of the requester. Although this information was the requester's own personal information, PCO applied a discretionary exemption, section 21 of the Act (advice or recommendation to the government), to withhold the information at issue. Although we were not persuaded that the information constituted advice or recommendations, we also questioned whether PCO had reasonably exercised its discretion.

In the course of our investigation, we noted that the *Privacy Act* does not contain a provision analogous to section 21. We, therefore, concluded that even had PCO properly applied section 21 (which, in our view, it did not) it was unreasonable for it to continue to withhold information to which the requester had a right of access under the *Privacy Act*. In the end, PCO released the information.

The discretionary public interest override in paragraph 8(2)(m) of the Privacy Act

This year we also investigated complaints that the **Correctional Service of Canada** and the **National Parole Board** had failed to consider the public interest override to the exemption for personal information in relation to requests for the full file about an offender who was convicted of killing a police officer. This override is set out in subparagraph 8(2)(m)(i) of the *Privacy Act* and incorporated by reference in paragraph 19(2)(c) of the Act. Our role, in this context, is to ensure that the question of public interest disclosure is considered by an individual with delegated authority and that the exercise of discretion is reasonable and is based solely on relevant considerations.

After seeking formal representations from the institutions, we were convinced that persons with properly delegated authority had each exercised their discretion reasonably, albeit to not disclose the information. We learned that in doing so, the institutions had considered, among other relevant factors, the nature and gravity of the offence, other mechanisms for the disclosure of information, as well as the interests of the victim's family and the public in the conditional release process and outcome.

Discretion to assess fees and the duty to consult First Nations

An interesting question concerning the exercise of discretion arose in the context of a request made on behalf of a First Nation for records relating to the design of the government's Aboriginal consultation process for the proposed Northern Gateway pipeline. The recipient institutions, the **Canadian Environmental Assessment Agency** and the **National Energy Board**, assessed substantial fees to search for and prepare the requested records.

The requester complained to our office about the fees, noting that the "honour of the Crown" imposes a constitutional obligation on the government to consult affected First Nations groups about the proposed pipeline. The requester argued that institutions would fail to meet that obligation were they to charge prohibitively large fees.

We agreed that the institutions ought to have considered the "honour of the Crown" when exercising their discretion to charge fees in response to a request under the Act for records relating to the consultation process. In our view, the institutions' exercise of this discretion must be based on all relevant considerations. In this instance, among those considerations ought to have been the Crown's obligation to consult the First Nation on the project.

As a result of the institutions' failure to consider this relevant factor, as well as the fact that most of the records were in electronic format (http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2011-2012_6.aspx), we formally requested the institutions to re-consider their fee assessments. In our view, the institutions did not exercise their discretion in this matter reasonably. In the end, both institutions waived the fees assessed and processed the requests.

SHARED SERVICES AND QUESTIONS OF CONTROL: WHOSE RECORD IS IT?

New challenges relating to who has control of records are arising from recent government-wide information technology and shared services initiatives. Based on the current jurisprudence, it is clear that both the institution with physical possession as well as the institution with the right to obtain a copy of the record have control for the purposes of the Act.

A complaint involving **Citizenship and Immigration Canada** (CIC) alleged that the institution had conducted an inadequate search for records about an individual's immigration history, dating to the 1970s.

CIC stated that it was unable to process the request, since the records in question now belonged to the **Canada Border Services Agency** (CBSA). When the requester sought the information from CBSA, it replied that CIC would have originally generated the file and would likely hold the information. Through our investigation into the complaint against CIC and a subsequent one against CBSA, we learned that both institutions had access to microfiches containing the requested information. We also learned that these microfiches are located on CIC premises. Consequently, we concluded that both institutions had erred when they told the requester they did not have responsive records: CBSA had access to the records and the ability to request and obtain them from CIC; CIC had physical possession of the records. As pointed out by the courts, "control" of government information is not limited to physical possession but encompasses information that a government institution has a right to obtain. As the government increasingly turns to shared services, it will be essential for institutions to ensure that they properly task for records under their "control" even when they are not in their physical possession.

MOVING TOWARDS MORE OPEN GOVERNMENT

Canada has committed to open government initiatives, through the international Open Government Partnership, for example, and by developing its own Open Government Initiative. Open government principles require that governments publish data in a format that is useful to the public. The duty to assist in the *Access to Information Act* also requires institutions to provide information to requesters in the format in which they wish to receive it. To effectively move towards a more open government, institutions must consider how they make information available to the public and address issues of access and data re-use.

For example, **Industry Canada** initially refused to provide the requester with a copy of Corporations Canada's main database, citing subsection 68(a), which excludes from the Act information that is already published, on the grounds that it is publically available. In investigating the complaint, we determined that the search engine of the database was limited to a maximum of 200 results. We therefore concluded that this was inadequate to render the information publicly available. Industry Canada subsequently increased the number of search results from 200 to 500 but nevertheless maintained that the information was publicly available.

In the end, after discussions with Industry Canada senior management about the principles of the Open Government Initiative—namely, the importance of providing data in a format that is useful to requesters—Industry Canada released the full database to the requester in electronic format.

WHEN INSTITUTIONS CEASE TO EXIST, WHERE DO THE RECORDS GO?

It came to our attention in 2012–2013 that a number of federal institutions had either been wound down or amalgamated with other institutions or were the subject of plans to do so in the near future (see box, right). Unfortunately, it does not appear that sufficient safeguards have been put in place to ensure the integrity of the public's right of access to information held by the institutions that have been affected.

In one instance, the **International Centre for Human Rights and Democratic Development** was closed down while we were conducting an investigation. However, no measures had been taken to ensure the orderly transition of the centre's records. During our investigation, we eventually learned that some were sent to Library and Archives Canada and others to Foreign Affairs and International Trade Canada (DFAIT). In the end, we closed our file and recommended that the requester make a new request to DFAIT, which, according to our investigation, should have received the responsive records.

EXAMPLES OF INSTITUTIONS AFFECTED BY RECENT LEGISLATION

- Canadian International Development Agency: amalgamated with the new Department of Foreign Affairs, Trade and Development
- Assisted Human Reproduction Agency of Canada: abolished
- Pensions Appeal Board: abolished; a new institution to be established
- Canadian Wheat Board: structure to be modified; no longer to be subject to the *Access to Information Act*
- Hazardous Materials Information Review Commission: abolished

Our website (http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx) contains a complete list of affected institutions.

In April 2013, the Commissioner wrote to the President of the Treasury Board in his capacity as the Minister responsible for "causing to be kept under review the manner in which records under the control of government institutions are maintained and managed to ensure compliance with the Act" (section 70 of the Act). In her letter (http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx), the Commissioner stated that "it is imperative that measures are put into place to protect the rights of requesters under the Act and to preserve the integrity of the access to information system when federal institutions that are subject to the Act are eliminated or amalgamated with other institutions." The President of the Treasury Board responded (http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx) to the letter on June 4, 2013.

MULTI-INSTITUTION INVESTIGATIONS

We issued two sets of comprehensive reports on the timeliness of institutions' responses to access to information requests in 2012–2013. These reports were the third and fourth in a series looking into delays in the federal access system and assessing institutions' overall compliance with the *Access to Information Act*.

To assess the subject institutions, we used three indicators of delay and then collected statistical and contextual information to form a complete picture of institutions' operations. For the report we released in May 2012 (http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_measuring-up-etre-a-la-hauteur.aspx), we investigated 18 at-risk and below-average performers we had previously rated for 2008–2009. Out of these, 13 improved their performance in 2010–2011 (the subject year of our assessment), two received the same grade and three performed worse.

Canada Post and the CBC were the subject of the report we issued in December 2012 (http://www.oic-ci.gc.ca/eng/special-report-report-cards-2011-2012_rapport-special-fiches-de-rendements.aspx#2). It focused on these institutions' performance during 2011–2012. The organizations had become subject to the Act with the coming into force of the *Federal Accountability Act* in 2006. Both received failing grades on our 2009–2010 assessments. Our re-assessment revealed, in stark terms, the difference that leadership and engagement can make in addressing issues of delay in the system. In just two years, senior management at the CBC had transformed that organization into one committed to meeting its obligations under the *Access to Information Act*. The same cannot, unfortunately, be said of Canada Post, which continued to struggle with poor performance.

Given the overall improved performance we had seen, we announced in the May 2012 report that we would suspend this type of multi-institution investigation until at least 2014 in order to dedicate all of our investigative resources to pursuing individual complaints, unless circumstances changed. As this annual report demonstrates, the situation has changed dramatically and investigations into the overall performance of institutions will have to be reconsidered.

We also recommended that institutions report to Parliament in their annual report on access to information operations on their progress implementing our recommendations. This would help ensure federal institutions could be held to account for their access to information activities. The Treasury Board Secretariat has agreed to make this a mandatory requirement for institutions' annual report to Parliament.

In 2012–2013, we completed the final stages of two other multi-institution investigations: one into delays caused by inter-institution consultations and the time extensions associated with them, and the other involving possible interference with the access to information process. Early in the new fiscal year, we began gathering final representations from the institutions involved and reporting back to them. We expect to report to Parliament on these investigations in the fall of 2013.

We launched an investigation into institutions' use of PIN-to-PIN communications, as they impact access to information. Our plan is to also report on this investigation in the fall of 2013. Finally, at the very end of the fiscal year, we began investigating a complaint into whether government policies that restrict or prohibit government scientists from speaking to or sharing research with the media and the public are impeding the right of access to information under the Act.

3. PURSUING IMPORTANT PRINCIPLES OF 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 (OIC) through our investigation process. Once an investigation is completed and the findings are reported, there is a second level of review of refusals to grant access to records before the Federal Court. Court proceedings under the Act may be commenced in a number of instances:

- When we conclude that a complaint is well founded and the institution does not act upon our formal recommendation to disclose records, we may, with the complainant's consent, seek judicial review by the Federal Court of the institution's refusal.
- When the complainant, upon receiving our investigation report, is not satisfied with the Commissioner's findings, the complainant may seek a judicial review of the institution's refusal.
- The Act also provides a mechanism by which a third party may apply for judicial review of an institution's decision to disclose information that the third party believes should be withheld.

We may also be involved in other types of proceedings:

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

We also closely monitor other cases with potential ramifications for the OIC or for access to information in general, including cases started under section 44 of the Act in which third parties have challenged institutions' decision to disclose requested information.

The following summaries review court decisions and ongoing cases in 2012–2013.

DECISIONS

AN ISSUE OF PROTOCOL

Canada (Information Commissioner of Canada) v. Canada (Minister of Public Safety and Emergency Preparedness) et al., 2012 FC 877 (Federal Court) (T-146-11 and T-147-11) and A-375-12 (Federal Court of Appeal). See also, "Issue of Protocol" in our 2010–2011 annual report (http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2010-2011_9.aspx).

A requester sought access to a copy of the protocol between the Royal Canadian Mounted Police (RCMP) and the Department of Justice Canada regarding the principles governing the listing and inspection of RCMP documents in civil litigation.

The requester made two requests to obtain the protocol. One was sent to the RCMP, and the other to the Department of Justice Canada. In both cases, the institutions refused to disclose the protocol, invoking the exemptions under sections 21 (advice developed for government) and 23 (solicitor-client privilege) of the *Access to Information Act*.

The requester filed a complaint with us in relation to both refusals. The Commissioner conducted investigations and rejected the application of the exemptions. Once the investigations were completed, the Commissioner presented her findings to the institutions, which declined to implement her recommendations. The Commissioner then filed applications for judicial review, with the requester's consent, under section 42 of the Act.

This case involved the following legal issues: Does the protocol contain information subject to solicitor-client privilege? If applicable, was discretion appropriately exercised? Does the protocol contain advice or recommendations developed by or for a government institution? If applicable, was discretion appropriately exercised?

Federal Court decision

According to the Federal Court, the protocol is not a communication designed to seek or provide a legal opinion; it therefore does not satisfy the second branch of the test developed to determine whether it is subject to solicitor-client privilege. The protocol is an agreement that imposes obligations on both parties. It was negotiated and signed by both parties and does not contain any advice. Therefore, the exemption under section 23 does not apply.

In addition, in the opinion of the Court, the protocol does not contain any advice, within the meaning of section 21, because it is an agreement concluded by the parties. Therefore, the exemption under section 21 does not apply.

Given that the Court concluded that the documents were not covered by the exemptions, it was not necessary to rule on the exercise of discretion, because the respondents (the RCMP and Department of Justice Canada) did not have that discretion. Consequently, the protocol had to be disclosed.

The ministers of both institutions appealed the decision.

Federal Court of Appeal decision

The Court agreed that 14 of the 17 paragraphs of the document are not protected by solicitor-client privilege, because these paragraphs are "a negotiated and agreed-upon operational policy formulated after any legal advice has been given and after any continuum that is necessary to be protected in light of the purposes behind the privilege." It is impossible to tell whether this document is based on earlier legal advice. Thus, disclosing the document does not disclose the content of any earlier legal advice.

The Court found, however, that the first three paragraphs of the document do reveal legal advice, since they set out by way of background the content of certain legal obligations of the federal Crown.

The Court ordered that the last 14 paragraphs be disclosed, and that the remaining three paragraphs be remitted to the two institutions to exercise their discretion, in light of the Court's reasons.

The parties have until June 17, 2013, to seek leave to appeal to the Supreme Court of Canada.

EXERCISE OF DISCRETION

Minister of Canadian Heritage v. Jim Bronskill and Information Commissioner of Canada (intervener), 2012 FCA 250, and A-364-11, Federal Court of Appeal. See also "Expiration dates" in our 2010–2011 annual report (http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2010-2011_9.aspx) and "Discretion and subsection 15(1)" in our 2011–2012 annual report (http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2011-2012_7.aspx).

Journalist Jim Bronskill made a request to Library and Archives Canada (LAC) to access the security files collected by the RCMP on Tommy Douglas, who died more than 20 years ago.

LAC provided the requester with information that was heavily redacted under section 15 (international affairs and defence) and section 19 (personal information) of the *Access to Information Act*. The requester complained about the redactions.

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

Federal Court decision

The Court found that LAC failed to show that disclosure of the information would lead to an "expectation of probable harm." The Court held that LAC's redactions were inconsistent and provided a table (appendix) listing the documents that were wrongly withheld that LAC must take into account when reviewing the files.

The Court provided a non-exhaustive list of factors to take into consideration when exercising discretion under section 15, notably the passage of time between the creation of the record and the request, prior public disclosure of the information and the historic value of the record.

The Court also found that LAC failed to show reasonable discretion.

The Federal Court ordered the matter be sent back to LAC so that it could review the outstanding records in light of the appendix and according to the guidance set out in the decision, including the list of factors to be taken into consideration when exercising discretion under section 15. The Court also ordered LAC to inform Mr. Bronskill in writing whether it had any additional information on Tommy Douglas in its holdings.

Federal Court of Appeal decision

As the intervener, the Information Commissioner set out in her factum the various factors a government institution must consider when exercising discretion, when applicable.

At the hearing—at which this matter was not addressed due to concessions made by the appellant's lawyers, and more specifically due to the concession that the historical significance of the documents in question constitutes a valid consideration when exercising discretion—the Court saw no reason to modify the judgment, except for the following elements.

The Court removed the table appended to the judgment. Moreover, one of the findings in the ruling that ordered LAC to indicate whether it had additional information in its holdings was modified to specify the scope.

Finally, the Court also mentioned that "in light of these conclusions, it is not necessary for us to embark upon a review of the application judge's reasons. Accordingly, we do not wish to be taken as to having endorsed him."

The appeal was allowed.

Mr. Bronskill sought leave to appeal this decision to the Supreme Court of Canada (35118). This leave was dismissed on March 28, 2013.

ROLE OF THE INFORMATION COMMISSIONER AD HOC

West v. Her Majesty the Queen, 2012 NSCA 112 (Nova Scotia Court of Appeal, Docket 264962). See also "Ad hoc Commissioner" in our 2010–2011 annual report (http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2010-2011_9.aspx) and "Motion under section 683 of the Criminal Code" in our 2011–2012 annual report (http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2011-2012_7.aspx).

In criminal proceedings against him, Mr. West submitted two access to information requests to the RCMP. Following responses from the RCMP, he filed complaints with the Commissioner. During the first investigation, we found some documents relevant to his request, which were then sent to Mr. West. We found his second complaint to be unsubstantiated.

Following our investigations, Mr. West made two access requests for a copy of the investigation files related to his complaints. We released the information, but exempted some records under section 16.1 of the Act, which protects information and records obtained in the course of investigations conducted by the Commissioner.

Mr. West then filed a complaint with the Information Commissioner ad hoc about the two requests he had filed. The Commissioner ad hoc conducted an investigation and found that the complaints were unsubstantiated. Mr. West did not request a judicial review of these decisions.

In his case before the Nova Scotia Court of Appeal, Mr. West brought a motion seeking to obtain the disclosure of information contained in our investigation files. In the motion, he named the Commissioner ad hoc and the Commissioner as respondents.

We argued that the Nova Scotia Court of Appeal does not have the jurisdiction to order disclosure of information requested pursuant to an access request. The Federal Court has exclusive jurisdiction in that regard.

The motion for disclosure was rejected. According to the Court, Mr. West should have requested a judicial review of our decisions on his access requests under section 41 of the Act, which he failed to do. The Nova Scotia Court of Appeal does not have the jurisdiction to order that the information be disclosed. The parties did not appeal the decision.

ONGOING CASES

FEES AND ELECTRONIC RECORDS

Information Commissioner of Canada v. Attorney General of Canada (T-367-13)

The Information Commissioner filed an application for a reference with the Federal Court seeking a determination on whether an institution can charge search and preparation fees for electronic documents that are responsive to an access request.

This procedure, under section 18.3 of the *Federal Courts Act*, allows a federal office, such as the Commissioner, to refer, as part of an investigation, a question of law to the Federal Court for hearing and judgment.

Following a complaint about the fees required by Human Resources and Skills Development Canada to search for and prepare electronic documents, we conducted an investigation and recommended that the institution cease requesting payment of such fees. The recommendation was rejected by the Minister.

The same question has been raised in a number of our other investigations. See, for example, "Fees" in our 2011–2012 annual report (http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2011-2012_6.aspx).

In this case, the Commissioner maintains that federal institutions do not have statutory support for requiring that such fees be paid when requests are submitted for electronic documents. The Federal Court is therefore being asked to provide a legislative interpretation of section 11 of the *Access to Information Act* and subsection 7(2) of the *Access to Information Regulations*.

On March 12, 2013, the Attorney General filed a notice of motion to strike out the application.

A VERY LENGTHY TIME EXTENSION

Information Commissioner of Canada v. Minister of National Defence (T-92-13). See page 18 for a summary of the investigation leading up to this court action.

On December 9, 2010, National Defence received a request for access to all documents relative to a specific contract, and all communications between certain employees and with Public Works and Government Services Canada in relation to the contract. The requester also sought the communications between certain individuals about a company, an individual and the sale of military surplus in Uruguay.

National Defence advised the requester that it would extend the time limit and would respond to the request in 1,110 days.

As a result of a complaint from the requester indicating that the time limit was unreasonable, the Commissioner conducted an investigation and determined that the requirements of section 9 for the time extension had not been met. The Commissioner then recommended that the Minister make a commitment to respond to the request by February 28, 2013, at the latest. On November 6, 2012, the Minister informed the Commissioner that he would be unable to commit to responding to the request by the recommended date.

In December 2012, the Commissioner informed the requester that she considered the 1,100-day extension to be invalid and constituted deemed refusal on the part of the Minister to disclose the requested documents.

The Commissioner then filed an application for judicial review, with the requester's consent, under section 42 of the Act.

In the application, the Commissioner maintains that the extension of time is unreasonable and therefore invalid. The Commissioner also maintains that the extension does not comply with the Minister's duty to assist requesters and is inconsistent with requesters' quasi-constitutional right of access to records under the control of government institutions.

The Commissioner requests that the Court issue a declaration that the Minister of National Defence has failed to give access to records requested under the Act within the time limits set out in the Act and is therefore deemed to have refused to give access to the requested information. She also asks that the Court order the Minister to respond to the request within 30 days of the judgment.

The particular issue before the Court is whether the 1,110-day extension is valid or whether it constitutes a refusal that enables the Federal Court to order the disclosure.

The Commissioner filed her application record on May 15, 2013.

APPLICATION OF EXEMPTIONS

Information Commissioner of Canada v. Minister of Fisheries and Oceans (T-2061-12)

On July 24, 2007, Fisheries and Oceans Canada received a request for documents and reports on the evaluation of a bid for mid-shore patrol vessels.

The Minister invoked the exemptions under paragraph 18(d) (economic interests of Canada) and section 21 (advice developed for government) of the Act.

As a result of a complaint by the requester, the Commissioner conducted an investigation and rejected the application of the exemptions. Once the investigation was complete, the Commissioner presented her findings to the Minister, who rejected her recommendations. The Commissioner then filed an application for judicial review, with the requester's consent, under section 42 of the Act.

The issue before the Court is whether the Minister can invoke the exemptions under paragraph 18(d) and section 21.

The Commissioner filed a motion for an order of confidentiality on March 19, 2013.

The Minister subsequently disclosed the information in accordance with the Commissioner's recommendations. The Commissioner discontinued the case on May 8, 2013.

THIRD-PARTY INFORMATION (1)

Nuisance Wildlife Control Inc. v. Minister of Foreign Affairs, Attorney General and Information Commissioner of Canada (T-2030-12)

In this case, Nuisance Wildlife Control Inc. filed an application for judicial review under section 44 of the Act in order to prevent the National Capital Commission from disclosing some documents.

Nuisance Wildlife claim that the documents should not be disclosed under sections 17 (safety of individuals), 19 (personal information) and 20 (third-party information). In its application, Nuisance Wildlife filed a confidential motion to have any documents filed as part of the litigation excluded from the public Court file.

The Commissioner was of the opinion that the confidentiality was appropriate only for those documents subject to an exemption or likely to be. Following the parties' representations, on January 11, 2013, the Court accepted the Commissioner's position and issued a limited confidentiality order.

Nuisance Wildlife discontinued its application on January 17, 2013, and all the documents subject to the access request were disclosed.

THIRD-PARTY INFORMATION (2)

Porter Airlines Inc. v. Attorney General and Information Commissioner of Canada (T-1768-11). See also "New cases" in our 2011–2012 annual report (http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2011-2012_7.aspx).

This application from Porter Airlines, based on section 44 of the Act, challenges Transport Canada's decision to disclose certain documents. Porter Airlines claims that the documents should not be disclosed under section 20 (third-party information) of the Act. Porter Airlines is also questioning the legality of the decisions made by Transport Canada on this request.

The Commissioner became involved as a result of a complaint from the requester that Transport Canada had failed to respond to the request within the prescribed time period. The Commissioner found that the complaint was well founded because Transport Canada had failed to comply with the time limits prescribed by the Act and had failed to fulfill its duty to assist.

In this case, the Information Commissioner filed a factum focusing on institutions' obligation to respond to requests for access in a timely fashion. Given that the requester had still not received a response to its request, which was filed in September 2010, the Commissioner asked that the Court rule on the application of the exemption and order the disclosure of documents not falling under an exemption.

The hearing is scheduled for May 30, 2013.

SOLICITOR-CLIENT PRIVILEGE

Louis Dufour v. Attorney General for Canada and Information Commissioner of Canada (T-1298-10)

On November 28, 2008, a request was filed with the Department of Justice Canada to obtain the costs involved in various court cases.

The Minister refused to provide the majority of the documents, invoking section 23 (solicitor-client privilege).

As a result of a complaint, the Commissioner conducted an investigation and found that the Minister's refusal was justified. The requester filed an application for judicial review under section 41 of the Act.

The issue before the Court is whether the Minister can invoke the section 23 exemption.

The cross-examinations were completed in March 2013.

4. ENGAGING WITH STAKEHOLDERS

The Commissioner uses a variety of venues to work with partners and interested parties to help bolster the case for freedom of information in Canada and to promote the development of a leading access system. During 2012–2013, we made considerable use of our website and social media platforms such as Twitter to provide information to interested stakeholders and also to gather their views on access to information in Canada. With the benefit of this input, the Commissioner can offer to Parliament her unique and comprehensive perspective on national and international developments in the world of access to information. This, in turn, allows Parliament to carry out useful oversight of the access to information system in Canada.

OPEN DIALOGUE ON ACCESS TO INFORMATION

On Right to Know Day, September 28, 2012, the Commissioner launched a dialogue with Canadians about modernizing the federal access to information system—following in the footsteps of her predecessors and on the occasion of the 30th anniversary of the *Access to Information Act*.

The once state-of-the art legislation has fallen behind legislative innovations at the provincial and international levels. In the absence of any legislatively mandated review, the law has remained static; most calls for reform have not borne fruit. The Act is a quasi-constitutional piece of legislation that confers duties on government and ascribes rights to citizens. Legislation of this nature must continue to evolve.

In initiating the dialogue, we sought feedback on a variety of issues, including limits to the right of access and a possible awareness and education mandate for the Commissioner. We also asked specific questions about long-time concerns about the Act, such as the scope and coverage of the legislation and the potential role of penalties to respond to instances of non-compliance.

The consultation, which ran until January 31, 2013, yielded submissions from 44 groups and individuals—including two petitions with nearly 1,500 signatures—representing a broad spectrum of opinion and interest in access to information, both in Canada and internationally. We are analyzing the feedback, along with previous studies and recommendations for reform. This input, together with the in-depth knowledge gained from our investigations, will allow us to provide our unique and fully formed view on how the Act should be amended at this juncture and the benefits such changes would bring to transparency and accountability in the federal sphere. We will issue our reform proposals to Parliament in the fall of 2013.

RIGHT TO KNOW

To mark Right to Know Week, the Commissioner participated in a Twitter Chat on access to information issues and was a guest on CBC journalist Kady O'Malley's weekly hour-long Web-based discussion with Canadians about the political issues of the day.

We also announced the winner of the second annual Grace-Pépin Access to Information Award (http://www.oic-ci.gc.ca/rtk-dai-eng/grace-pepin-award-prix-grace-pepin.aspx). Darrell Evans (http://www.oic-ci.gc.ca/eng/media-room-salle-media_news-releases-communiques-de-presse_2012_5.aspx) of Vancouver was recognized for his many years of dedication and hard work to advancing the principles of access to information both in his home province and across Canada. The award is named in recognition of the contributions of John Grace, former Information Commissioner of Canada, and Marcel Pépin, President and founder of the Commission d'accès à l'information du Québec. The award will next be presented during Right to Know Week in September 2013.

PARLIAMENTARY ACTIVITIES

In 2012–2013, the Commissioner issued four reports to Parliament: her reports on access to information and privacy activities for 2011–2012 (http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx), her 2011–2012 annual report (http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2011-2012.aspx), and two reports on the results of multi-institution investigations into institutions' overall performance (see page 25 for more information). Each of these reports provides perspective to Parliament on our oversight role in the access to information system and our work to uphold the principles and right of access at the federal level. Our website contains a table of other Parliamentary activities—namely, bills, motions and other business—that has had or may have an impact on access to information in general and the *Access to Information Act* in particular (http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx).

FIVE ISSUES AT THE INTERSECTION OF ACCESS TO INFORMATION AND PARLIAMENTARY PRIVILEGE

1. In the absence of a specific statutory provision for parliamentary privilege under the Act, there is currently no obligation for government institutions to consult Parliament prior to making a disclosure decision. This means that there is no way for Parliament to know whether information that could be protected under parliamentary privilege is being identified as such or released.
2. There is no process for government institutions to determine who has the authority to invoke or waive parliamentary privilege.
3. In the face of an assertion of parliamentary privilege, government institutions are faced with a dilemma because there are no specific exemptions or exclusions dealing with parliamentary privilege under the Act.
4. If the assertion of parliamentary privilege is the basis for not releasing information to a requester, is the decision to refuse disclosure by a government institution a valid one under the Act?
5. If the assertion of parliamentary privilege is the basis for not releasing information to a requester but the government institution uses other exemptions or exclusions to withhold the information, what is the impact on the requester's rights? Would this information have been provided to the requester in the absence of the assertion? How does this impact on transparency and the ability of my office to effectively review government decisions to withhold information?

—Information Commissioner Suzanne Legault
before the House of Commons Standing Committee
on Procedure and House Affairs, November 22, 2012

Complementing these reports was an appearance by the Commissioner before the House of Commons Standing Committee on Procedure and House Affairs on November 22, 2012. This appearance was an opportunity for the Commissioner to contribute to the committee's study of access to information and parliamentary privilege. This work was prompted by an access request to the Office of the Auditor General for records about the appearance of the Auditor General before parliamentary committees in 2012 and a subsequent application by the House of Commons for the Federal Court to review the institution's proposed release of the records.

During her remarks to the Committee (http://www.oic-ci.gc.ca/eng/pa-ap-appearance-apparance-2012_3.aspx), the Commissioner noted that the *Access to Information Act* currently does not address the issue of parliamentary privilege, which raises a number of practical concerns (see box, page 34). In light of this gap, the Commissioner recommended that the best way to protect requesters' rights, and to ensure transparency, accountability and effective oversight, would be to amend the Act to cover the administrative records under the control of Parliament while adding a specific exemption to deal with parliamentary privilege.

In its report, released in March 2013, the committee noted that there was some validity to the suggestion of amending the Act for the sake of clarity. However, the committee did not ultimately recommend such a step. Instead, committee members suggested classifying parliamentary information into various categories (public and accessible records, *in camera* records, those neither public nor *in camera*, and those prepared for parliamentary proceedings but never submitted), depending on whether they could be released to the public. The government's response to this report is expected in 2013–2014.

5. ENSURING OPERATIONAL INTEGRITY AND CORPORATE SUPPORT FOR INVESTIGATIONS

Our ongoing efforts to ensure sound governance and stewardship of our limited resources have proven particularly valuable as we face a significant decrease in our budget. Nonetheless, we have maintained a solid foundation for our core business—investigating complaints and providing exemplary service to complainants.

RESOURCES

As with most other federal organizations, we are in the process of absorbing successive and significant budget reductions and pressures—in our case, equalling nearly 11 percent of our Main Estimates by 2014–2015. This is putting us at the limit of our financial and organizational flexibility, with our staff complement having been reduced from 106 to 93 full-time equivalents.

These reductions are significantly limiting our ability to deal with the demands of our current inventory of complaints and to meet various corporate obligations. Any unexpected event that would impact our workload (a large increase in complaints or litigation, for example) would create significant pressures on the organization and put our ability to uphold Canadians' democratic right of access to information at risk. Despite our ongoing improvement in turnaround times for complaint investigations and our closing slightly more complaints than we received, our pursuit of exemplary service to Canadians requires us to continue to perform at the highest levels. While we will continue to make process improvements and ensure our staff are as productive as possible, any significant advances we might achieve in the future, such as to be able to assign all complaints promptly and continue to reduce our turnaround times for investigations, would only be possible with an influx of resources, particularly funds to hire new investigators.

EXCEPTIONAL WORKPLACE

Under the auspices of a new integrated human resources plan, to be launched in 2013–2014, we continue to emphasize the importance of a strong and healthy workplace as key to our achieving excellence in our work. For example, we appointed champions for a wide range of issues in 2012–2013—managers who are the point people for employee concerns and input on workplace matters, such as values and ethics, official languages and diversity.

As part of our talent management program, we are vigorously pursuing performance management and evaluation to ensure all our staff can reach their full potential. At the same time, we are supporting their work with a variety of training programs—not only specific to our investigative mandate but also to underline our corporate mission and values, and promote leadership among employees.

Our move to Shared Services in April 2012 has resulted in significant improvement in the delivery of human resources services to the organization. We also worked with that group throughout the year to implement the follow-up actions we took as a result of a Public Service Commission audit of our staffing practices (http://www.psc-cfp.gc.ca/adt-vrf/rprt/2012/ar-rv/7-oic-ci/index-eng.htm).

Finally, we reviewed how we provide information to Shared Services and how we apply key provisions of the *Financial Administration Act*, to ensure our internal controls are consistent and effective.

INFORMATION MANAGEMENT/ INFORMATION TECHNOLOGY

In 2012–2013—year four of our five-year IM/IT strategy—we upgraded many infrastructure components and introduced a wide range of new information management tools.

For example, we launched the new mobile secure remote access system and the secure file transfer system. We also completed the prototype for the new legal case management system, which increases interoperability with our existing investigations case management system. New record-keeping tools, business rules and training are helping ensure our staff can provide exemplary service to Canadians, particularly answering access to information requests promptly, completely and accurately.

Finally, we continued to modernize our website to increase accessibility, usability and interoperability. In early 2013, we also launched a new accessible mobile version of the site.

ACCESS TO INFORMATION AND PRIVACY

For information on our access to information and privacy activities in 2012–2013, consult our annual reports to Parliament on these topics (access to information: http://www.oic-ci.gc.ca/eng/annual-report-administration-access-to-information-act-rapport-annuel-administration-loi-acces-a-information-2012-2013.aspx; and privacy: http://www.oic-ci.gc.ca/eng/annual-report-privacy-act-rapport-annuel-rapport_annuel-loi-protection-renseignements-personnels-2012-2013.aspx). Appendix A contains the annual report of the Information Commissioner ad hoc, who investigates complaints against us, since we may not investigate ourselves.

6. LOOKING AHEAD

The coming year will bring our 2011–2014 strategic plan (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor-stategic-planning-plan-strategique_2011-2014.aspx) to a close. An essential activity for 2013–2014, then, will be developing a new plan to guide our activities until 2017, the end of the current Commissioner's mandate.

The new plan will focus on how we will achieve the highest level of performance in investigating access to information complaints and become an effective catalyst for advancing access to information and fostering openness and transparency. Dialogue with employees and stakeholders will ensure the new plan is grounded in our current and anticipated challenges and opportunities.

Meanwhile, we will continue to work to meet our goals in the three key areas of the current plan: developing a leading access to information regime, providing exemplary service to Canadians, and creating an exceptional workplace.

LEADING ACCESS TO INFORMATION REGIME

Our focus in 2013–2014 will be on completing our multi-institution investigations into consultations, interference with the access to information process and text-based messaging. We also plan to complete our investigation into a complaint that government policies that restrict or prohibit government scientists from speaking with or sharing research with the media and the Canadian public are impeding the right of access to information under the Act.

30TH ANNIVERSARY OF THE *ACCESS TO INFORMATION ACT*

The *Access to Information Act* came into force on July 1, 1983. A world leader at the time, the legislation has subsequently been surpassed—in terms of technological advances as well as the continued relevance of certain exceptions and exemptions—by newer laws, not only across Canada, but also in dozens of countries around the world.

To coincide with the 30th anniversary of the Act, we will issue recommendations to Parliament in the fall of 2013 for modernizing the Act, based on wide-ranging stakeholder submissions, previous studies and previous Commissioners' recommendations for reform, the current Commissioner's experience with the Act and recent international developments (see page 33). These recommendations will attempt to place the Act in a 21st-century context, particularly in light of Canada's commitments under the international Open Government Partnership (http://data.gc.ca/eng/canadas-action-plan-open-government) and leading access systems in other jurisdictions.

EXEMPLARY SERVICE TO CANADIANS

We will continue to strive to provide exemplary service to Canadians by meeting demanding performance targets: to complete 85 percent of our administrative cases within 90 days and 75 percent of priority or early resolution cases within six months.

We will continue to target the files in our inventory that deal with national security, international affairs and defence, as well as complaints against the Canadian Broadcasting Corporation and the Canada Revenue Agency. We will also work to complete the oldest files in our inventory and carefully follow the progress of our investigations.

EXCEPTIONAL WORKPLACE

As part of our ongoing efforts to be an exceptional workplace, we will roll out a comprehensive talent management program, a new human resources plan as well as our code of values and ethics, with excellence in all aspects of our work as our goal.

Our Corporate Services group will finish implementing our information management/information technology strategy and manage the relocation of our offices in the late fall of 2013.

While giving us modern accommodations, the relocation will also afford us the opportunity to share services and facilities with fellow Agents of Parliament who will be in the same building. At the same time, we are taking the opportunity to examine government-wide common service initiatives to determine whether they could be of benefit to us. In both cases, we will weigh any advantages against the possibility of compromising our independence or ability to deliver our mandate.

UPDATE YOUR ADDRESS BOOK

In the late fall of 2013, the Office of the Information Commissioner will be moving to 30 Victoria Street in Gatineau, Quebec. Our website (http://www.oic-ci.gc.ca/eng/) will provide more information as the time approaches.

We are financing the move through an increase in our parliamentary appropriations in 2013–2014, in the form of a loan repayable over 15 years ($175,000 a year, starting in 2014–2015). In addition, the relocation will impose new ongoing incremental costs, which will add to the existing financial pressure we face.

APPENDIX A: REPORT OF THE INFORMATION COMMISSIONER AD HOC

This is the second year that it has been my pleasure to report on the activities of the Information Commissioner, *Ad Hoc*. On April 1, 2007, the Office of the Information Commissioner (OIC) became subject to the *Access to Information Act* (http://laws.justice.gc.ca/eng/A-1/index.html) (the "ATI Act"). The law that brought this about did not create at the same time a separate mechanism to investigate any complaints that an access request to the OIC has been improperly handled.

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

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

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

I am the fourth person to hold this office since 2007.

Two new complaints were received this past year. In the first, the complainant says that the OIC failed in its statutory duty to assist him by burdening him with too many documents when it responded to his request. This complaint was still pending at the end of the year.

The second complaint concerns the scope and meaning of section 16.1 of the ATI Act, a provision that exempts from production information obtained or created in the course of an investigation by the OIC. Once the investigation and all related proceedings are finally concluded, however, the exemption is partially lifted. At that point, the exemption no longer applies to documents created during the investigation. The issue in this complaint is whether the OIC applied this provision properly to the facts of this case. This complaint, too, was still pending at the end of the year.

The existence of an independent Commissioner, *Ad Hoc* ensures the integrity of the complaints process at the OIC. We remain ready to investigate any future complaints against the OIC thoroughly and independently.

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

Respectfully submitted,

John H. Sims, Q.C.