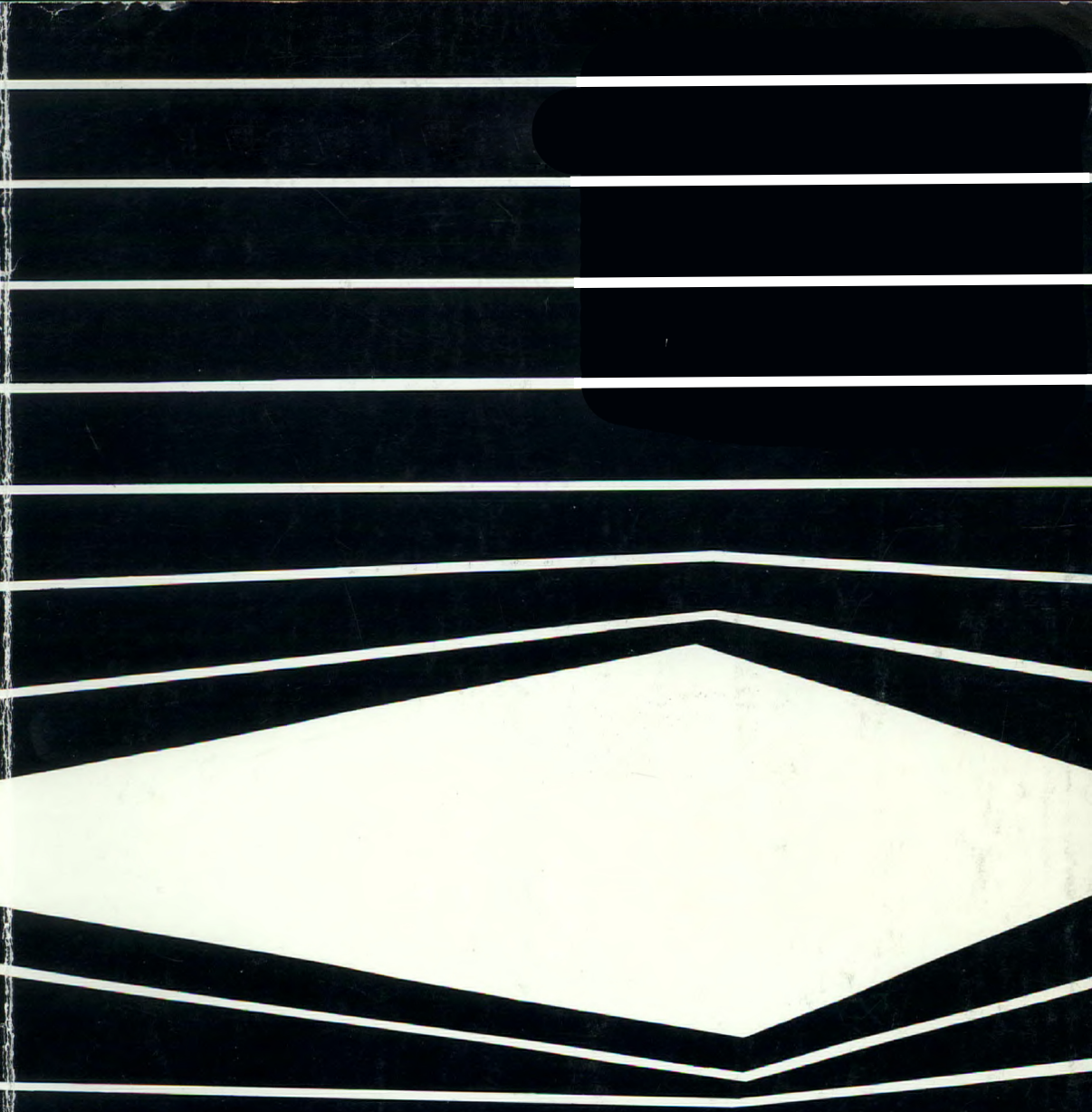

Annual Report
Information Commissioner
1986-87

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Information Commissioner
1986-87

The Information Commissioner of Canada
112 Kent Street, 14th Floor
Ottawa, Ontario
K1A 1H3

(613) 995-2410
1-800-267-0441 — 7:30 a.m. to 6:00 p.m., Ottawa time.

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"The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government."

Section 2(1)
Access to Information Act

The Honourable Guy Charbonneau
The Speaker
The Senate
Ottawa

June 1987

Dear Mr. Charbonneau:

I have the honour to submit to Parliament my annual report.

This report covers the period from April 1, 1986, until March 31, 1987.

Yours sincerely,

Inger Hansen, Q.C.

The Honourable John A. Fraser, P.C., Q.C., M.P.
The Speaker
The House of Commons
Ottawa, Ontario

June 1987

Dear Mr. Fraser:

I have the honour to submit to Parliament my annual report.

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Yours sincerely,

Inger Hansen, Q.C.

Contents

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The Fourth Annual Report

This fourth annual report of the Information Commissioner under the *Access to Information Act* covers the period from April 1, 1986, to March 31, 1987.

Mandate

The Office of the Information Commissioner has a mandate to ensure that the federal institutions subject to the *Access to Information Act* comply with the Act. This is done primarily by investigating and mediating complaints received under such categories as: refusal of access, fees, delays, official language, the register, the bulletins or other matters relating to access. The Commissioner also uses the authority to initiate complaints. If a mediated resolution is not possible, reports and appropriate recommendations are made to ministers or other heads of government institutions. In this report, the term "minister" is used for both. The Commissioner, on behalf of complainants and as an intervenant, also undertakes litigation before the Federal Court on issues relative to complaints under the Act.

The Commissioner must provide all complainants with a report. These reports are based on complaint investigations and representations from those affected. The investigations are conducted by investigators employed by the Office of the Commissioner and the investigatory powers of the Commissioner are delegated to them as permitted under the Act.

The Appointments

The Information Commissioner is appointed for a seven-year term by the Governor in Council after approval by resolution of both the Senate and the House of Commons. The two Assistant Commissioners are appointed by the Governor in Council for up to five years. References to the Commissioner in this report include the Assistant Commissioners, unless otherwise stated.

The Commissioners all hold office "during good behaviour", but the Information Commissioner may be removed only by the Governor in Council on address of the Senate and the House of Commons.

Authority

The Commissioner has the same power to obtain evidence as does a Superior Court of Justice. This enables the Office to review and obtain copies of all relevant records except records excluded as confidences of the Queen's Privy Council. When there is doubt that withheld records constitute such confidences, a certificate is obtained from the minister concerned or the Clerk of the Privy Council.

The Commissioner may summon witnesses and conduct investigations on government premises. However, the Act provides that the Office may not disclose exempted information, or confirm the existence of a record, where the head of an institution has not done so unless such action is necessary to conduct the investigation and report as required under the Act.

The Commissioner does not make binding decisions. Modelled on a parliamentary ombudsman, the Commissioner can neither order action nor impose sanctions. As described later in this report, the Commissioner seeks to resolve complaints through mediation.

Case Summaries

This annual report, as the reports before it, describes complaints the Office has dealt with during the reporting year. This year, investigation was completed on 309 complaints and 111 case summaries were selected for inclusion in the report to illustrate new problems and new developments. However, case summaries of all completed complaints are prepared and interested persons can review them on application to the Office.

Statistics

The statistical tables in this report are in the same form as those in previous years. Appendix II of the 1985-86 report was an index of completed complaints by department, categories of complaints, and exemptive sections. Such an index is not included here but will be made available later in 1987, on request.

Parliamentary Review

In addition to the ongoing responsibility of complaint-handling, we continued to be involved in the Standing Committee on Justice and Solicitor General review and hearings of the *Access to Information Act* and the *Privacy Act.*

The Information Commissioner and staff gave evidence before the Committee on May 14, 1986. The 1985-86 report contains our written brief to the Committee. The Committee's report, "Open and Shut", was tabled in Parliament just before the end of this reporting year. We were greatly encouraged by the support that the Committee has given to the principles of access to information and to our efforts.

The Committee's work will ensure that the principles of the *Access to Information Act* will be better understood and implemented by government institutions in future.

The Office handles complaints and therefore deals primarily with dissatisfied users of the Act. Thus the Commissioner and her staff become acutely aware of practical, legal and philosophical issues under the Act. The numbers and complexities of those issues continue to increase. Furthermore, as the case summaries bear out, the complaints are becoming more difficult to resolve compared with those of the first two or three years of operation of the Office. In addition, those who use the Act, and those who complain, are becoming more and more experienced and knowledgeable.

Our experience and special mandate colour the comments of this report and what follows here is the reaction of this Office to most of the Committee's recommendations, interspersed with comments based on the Commissioner's unique role in the scheme of things. The headings have been borrowed from the Committee's report. The recommendations in relation to access to information appear as Appendix II.

THRESHOLD CONCERNS

Creating a Public Education Mandate

Recommendations:

2.1 "The Committee recommends that, for purposes of clarification, the *Access to Information Act* and the *Privacy Act* mandate that the Treasury Board, the Information Commissioner, and the Privacy Commissioner foster public understanding of the *Access to Information Act* and the *Privacy Act* and of the principles described in section 2 of each Act. Such education should be directed towards both the general public and the personnel of government institutions. The appropriate provision in the statutes should follow the model of section 22 of the *Canadian Human Rights Act.*

2.2. "The Committee further recommends that the Treasury Board undertake a public education campaign in conjunction with the proclamation of any amendments to the *Access to Information Act* and the *Privacy Act* and also consider printing notices about individual rights under both the *Access to Information Act* and the *Privacy Act* to be included in standard government mailings."

Implementation of these recommendations will vastly improve the level of understanding and knowledge the Canadian public has of the *Access to Information Act*. In addition, a mandate for the Information Commissioner to take part in this educational program will eliminate any doubt as to the Commissioner's role and enable the Office to seek the necessary resources to conduct such a program.

During the reporting year, Treasury Board recognized the need for public education by providing $72,000 to carry out a public educational program. The Office pursued this in cooperation with public libraries across the country.

Why did we choose this route?

Librarians are in the information dissemination business and documents describing the access to information process (the access register, access bulletins and application forms) are available at public libraries. Thus librarians were an ideal target group.

Coincidentally, in response to the Information Commissioner's call for help, the Canadian Library Association (CLA), at its annual meeting in June 1986, passed this resolution:

> "...to contact the Information Commissioner to determine ways in which libraries could cooperate in publicizing the *Access to Information Act* for the benefit of Canadians".

The Convenor of the Access to Information Coordinating Group of the CLA met with the Information Commissioner and worked out a cooperative arrangement. The CLA invited its member libraries across Canada to hold workshops conducted by the Information Commissioner's Office.

By the end of March 1987, Assistant Information Commissioner Bruce Mann and Director, Information Complaints Célyne Riopel were more than half way through a series of 40 workshops, reaching all the provinces and territories of Canada.

The individual libraries arrange all the details and decide whether to hold the workshops for their professional staffs only or to invite the public and other interested groups.

Attendance has ranged from a dozen participants at Yellowknife to more than 125 research librarians from the Metropolitan Toronto Library.

The workshops focus directly on what library staff need to know to advise library patrons about the Act: What kinds of records can be obtained? Will I have to wait a long time? Will the government officials make it difficult for me? Where can I get help?

Feedback has been entirely positive and has generated changes in the workshop formats and ideas for creating greater public awareness of rights under the Act. The most frequent comment from workshop participants was that the *Access to Information Act* is much easier to use than they had imagined.

The most frequent suggestions for increasing public awareness about the Act were:

1. More eye-catching display material (e.g. posters) for use in libraries.

2. A short video clip about the Act which could be carried on local cable television channels.

3. Titles, addresses and telephone numbers (in particular toll-free or collect-call numbers) of federal government Access to Information Coordinators or other information officers who could be contacted about departmental record-holdings.

4. Written announcements or articles about the *Access to Information Act* which libraries could have reprinted in their own bulletins or community newspapers.

5. Continuation of the librarians' workshops.

Other initiatives have also helped to disperse knowledge about the Act. An Assistant Information Commissioner and the Director, Information Complaints, spoke to students at the University of Prince Edward Island, Queen's University in Kingston and the University of Victoria, and participants of the Western Canada Career Assignment Program (CAP) in Red Deer, Alberta.

The same Assistant Information Commissioner addressed the National Conference on Management in the Private Sector at Victoria and the Crown Corporations Conference on Employment Equity at Montreal.

The Director, Information Complaints addressed the Toronto Area Archivist Group, participated in a Colloque - Le Journalisme et le droit at le Centre d'information juridique du Nouveau Brunswick and lectured at the course for senior managers at the Federal Government Training Centre at Touraine, Quebec.

Throughout the year, the Information Commissioner lectured senior managers' courses at the Federal Government Training Centre in Touraine as well as at the Career Assignment Program courses. In addition, the Information Commissioner gave 17 speeches to various audiences on the subject of access to information.

Coverage Of Federal Government Institutions, Administrative Tribunals and Parliament

This Office generally agrees with the recommendations for extension of access rights to records held by institutions mentioned in recommendations numbered, 2.3, 2.4, 2.6, 2.7 and 2.8.

The Status of Applicants

The Office welcomes the recommendation that "any natural or legal person be eligible to apply for access to records under the *Access to Information Act*".

The Commissioner agrees that any limitation on the status of applicants is largely illusory and an amendment to allow applications by everyone, whether an individual or a legal entity, would be sensible and cause no significant change in the number of applicants and their actual status. Experience has shown that users and complainants frequently act as agents for each other and for persons unknown.

Access Tools

The Commissioner considers realistic the comment that "the description of records in the register reveals little information" and agrees with the opinion of many users that a good relationship with an understanding and knowledgeable access coordinator is much more useful.

The recommendations to combine the Access Register with other government publications, and to make segments of the register available on a customized basis, make a lot of sense. The recommendation that the Access Register be available on an on-line basis and/or through its sale in digital form for use on computers recognizes that most users of the *Access to Information Act* are well acquainted with electronically-processed information systems and tools.

Shortcomings of the register and bulletins can be overcome by cooperation between users and coordinators. For example, access requests may be too specific, causing departments to be very restrictive when providing records. Conversely, the wording may be very broad, making it difficult for institutions to determine what the requestor really needs. Broadly-worded requests, or "fishing trips" as they are called in some departments, may cause time-consuming and costly records' searches that the applicant does not want and in the end will not want to pay for.

The Commissioner's investigators have many times found that departments have conscientiously laboured over access requests to interpret what the requestor really wanted. How much simpler and more productive it would have been if officials had telephoned applicants and discussed the request.

Similarly, those seeking access often fail to contact institutions before submitting access requests. While an individual's reasons for seeking information are not relevant under the Act, experience shows that explanations may help identify just what is wanted. With more information, access staff might easily retrieve the exact material sought or suggest where the record might be found.

In many cases of successful mediation, the investigator simply brought the two parties together by telephone to clarify what was wanted and what was available.

Many departments list in the register the telephone numbers of their access coordinators under the heading "Access Procedures". This is a good idea which could be improved if departments that handle a large volume of access requests established a toll-free number for their access office to facilitate the exchange of information. Similarly access requestors should include their phone numbers on their requests.

While access requestors should express the type of record they are looking for, as narrowly as they can, they should also avoid choosing words that the receiving department could misinterpret. For example, a request for information mentioned the "effectiveness" of a program and caused a department to look only for audits and evaluations rather than the much broader range of information actually desired. In another instance, a request for records that would indicate any "criticisms" of a government publication caused the department to release only negative reactions omitting the general or favourable comments. By contrast, a request to a department for all documents, letters, records, plans, submissions and so on relative to a given subject leaves departmental personnel not knowing where to even start or stop a search.

The Responsibilities of Access Coordinators

The Committee recognized that no single person plays a more crucial role in the access to information than does the departmental Access to Information Coordinator. The coordinators operate under considerable pressure from applicants and the Information Commissioner's Office, as well as from their co-workers and senior officials. Many of them face increasingly heavy workloads and expert and persistent applicants. Often coordinators lack the resources to do their work and they have neither moral nor legal support in their efforts to have their departments comply with the *Access to Information Act.*

When government legislates a right to access, some disclosures are bound to make uncomfortable the writer of a record, the collector of information or the subject of a file. But, that discomfort alone does not give rise to a right to withhold.

Making coordinators scapegoats leaves them torn between what they perceive to be their public, professional duty and what might be better for their department, their colleagues and their careers.

In order for freedom of information principles to prevail, it is crucial that coordinators not be barred from any of the steps necessary to process a request to final release or exemption, and senior managers must be able to rely on their coordinators as *Access to Information Act* experts. It is equally important that senior management not impose on coordinators subjective reasons for withholding records such as resulting "embarrassment" or the need for "damage assessment". Holding coordinators responsible for the disclosure of "embarrassing" information is akin to "shooting the messenger". Coordinators should not have to feel threatened by their employers.

Furthermore, coordinators are put in the difficult position of having to deal with members of the media as clients of a service. Some of them feel completely defenseless and in doubt as to whether they are being interviewed or delivering an access service.

There is more. Differences of opinion appear to be growing between coordinators and departmental legal advisors. Initially, coordinators were instructed that release should take place if there was no sensible reason for withholding something that may be exempted under a discretionary exemption. However, some lawyers have a tendency to advise against release whenever it cannot be compelled. This is a normal reaction from lawyers but their advice fails to take account of the purpose and spirit of the Act.

The Committee's recommendations and comments on the access coordinators are timely and appropriate and the Commissioner not only fully supports the recommendations of the Committee dealing with the coordinators, but urges that they be given a high priority.

EXEMPTIONS AND CABINET CONFIDENCES: SAYING NO

The Office shares the Committee's concerns that records which could be disclosed without any injury may be, and we believe are, withheld because they belong to a category of documents that

may be withheld. Thus, the Commissioner welcomes the proposal that all exemptions should be discretionary in nature and that they should generally contain an "injury test".

We are concerned about drafting of provisions containing both an injury and a class test. Some departments will support the injury test but then submit that the classes of documents which are set out in the statute are merely examples of those that may cause the injury. This will be discussed later in the report under International Affairs and Defence.

SPECIFIC EXEMPTIONS

Information Obtained in Confidence From Other Governments

We also agree that section 13 of the *Access to Information Act* could be redrafted to be discretionary in nature and contain an injury test and that the burden of proof should be on other governments to establish the authority to exempt. Three months appears to be a reasonable period for the response, but in some cases this deadline may be difficult to meet. Perhaps a mechanism for an extension is necessary.

The suggestion is reasonable that institutions or governments of component elements of foreign states should also benefit from the exemption in section 13. The Commissioner welcomes the possibility that institutions of native self-government be accorded the same protection as other governments for purposes of the exemption.

Federal-Provincial Affairs

The Office has not had much experience with section 14 of the *Access to Information Act* but has no objection to the term "affairs" being deleted and replaced by the term "negotiations". We recognize that this change will narrow the scope of this exemption.

International Affairs And National Defence

The Committee refers to a drafting difficulty that has emerged concerning the exemption covering international affairs and national defence. The Committee correctly points to the differences of interpretation between the Department of Justice and the Information Commissioner.

Section 15 deals with records that contain "information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities". This is followed by paragraphs (a) to (i), which set out information that is included "without restricting the generality of the foregoing".

Some departments argue that once it is established that injury from release could reasonably be expected to occur there is no onus on the department to show that the records fall within one of the paragraphs. Such an interpretation lets a department use the section to cover more records than would be the case if the department had to establish that the records were of the kind listed in the paragraphs (or were similar in kind) and then address the possible injury test.

The Committee suggested that the injury must be analogous to the illustrations within the nine classes listed in the exemption. We believe that there should be clear requirements that there be both a reasonable expectation of injury and that the record be within one of the classes set out in paragraphs (a) to (i), or of an analogous class. Failure to meet either of these requirements would make the exemption illegal.

These comments apply to all exemptive sections that are, or will be, structured to include both a class test and an injury test.

Personal Information

We agree with the Committee's recommendation that the substance of relevant portions of sections 3 and 8 of the *Privacy Act* should be incorporated in the body of the *Access to Information Act.* We have experienced a number of difficulties with both the definition of "personal information" and the circumstances where personal information may be disclosed under the *Access to Information Act.* Some of these are before the Federal Court and may be clarified judicially but we agree with the Committee's recommendation that statutory amendments should be considered.

Confidential Business Information And Related Procedures

We agree with the proposal to narrowly define trade secrets for purposes of the Act. Since the Office has had little experience with this exemption it has no other comment on the proposed definition.

Product or Environmental Testing (Section 20(2) and Section 18 of the *Access to Information Act*)

The Office has no experience upon which it can assess the impact of the recommendation that would require the Canadian government to disclose the results of product or environmental testing. However, we see no particular problems should the recommendation be implemented.

Public Interest Override

The Commissioner agrees with the Committee that the public interest override does not apply to trade secrets. The complaint the Office investigated concerning tobacco additives, in which the tobacco manufacturers submitted that the records requested constituted trade secrets, helps illustrate the trade secret issue. (Files 006 and 241 - 1985-86 Annual Report). This complaint was settled when a limited disclosure was made through a mediated resolution. The tobacco manufacturers suggested that information about additives constituted trade secrets; the department had not exempted the records on that basis but had nevertheless exempted them as confidential business information. The Commissioner believed that there should be some disclosure in the public interest, as was possible under the section in question. However, she also accepted that disclosure in the form of the existing records would prejudice the competitive position of the manufacturers. Based on the Commissioner's view, the manufacturers agreed to release a composite list and not seek a court review on the trade secret issue.

Third-Party Intervention Under Section 28 of the *Access to Information Act*

The Office found it necessary once to use local newspaper advertising to reach third parties, and the Commissioner welcomes the possibility that the Act will provide for substitutional service of notification to third parties. In fairness, the fact that substitutional service may be employed should be widely publicized to alert the public to the possibility that their confidential business information might be released under the Act without direct notification. It should be noted, however, that notification by advertising in trade journals or periodicals would cause lengthy delays because most such publications are printed long in advance of publication.

The Commissioner also welcomes the recommendation for clarification regarding the onus of proof where third party information is concerned.

Finally, a comment on the Committee's point that the "third party" should include native band councils. The Commissioner has operated on the basis that native band councils, established pursuant to the *Indian Act,* have third party status. In instances where business information of native bands is involved, the Information Commissioner issues a third party notice prior to making any recommendation for disclosure.

Government Operations

The Commissioner agrees that an injury test should be included in section 21 and that the section should be limited so that only policy advice and minutes at the political level of decision-making be covered. The suggested ten-year limit on this exemption is reasonable as other exemptions are available if records are sensitive for specific reasons.

This Office has dealt with 25 section 21 complaints and confirms, as has the Committee, that this section has "the greatest potential for routine misuse".

Where appropriate, the Commissioner continues to attempt to persuade institutions to release records withheld under section 21. Sometimes we are successful; sometimes departments decline to reconsider.

When the Canadian Radio-Television and Telecommunications Commission (CRTC) rejected our recommendation for release, the Commissioner sought a judicial interpretation of section 21 and Mr. Justice Jerome ruled in favour of the CRTC. Subsequent to this decision, (*The Information Commissioner v. the Chairman of the CRTC*), the Office has not brought any applications for review where the issues were similar to those in the CRTC case.

This Office totally agrees with the recommendation to limit the scope of this particular section. This position is taken because in many instances it appears that exemption has been used where disclosure would have caused no damage to government interests or where the severability principle, and the use of other more clearly-defined exemptions, could have been applied to portions of the record.

Solicitor-Client Privilege

The Office of the Information Commissioner has had difficulty persuading departments to employ the severability principle to documents exempted under section 23.

We will continue to press for the release of any advice given by a solicitor where that advice is not clearly within the exemption regarding solicitor-client privilege. We will also continue to recommend the release of those portions of documents exempted under section 23 that do not qualify for the exemption. However, we recognize that legal advice given to a government can differ to some extent from legal advice given by a lawyer in general practice. One example would be legal advice given for the purpose of proposed legislation. The difference might be considered when the section is amended.

The Existence of a Record

The Office agrees that the right to neither confirm nor deny the existence of a record might usefully be limited to certain sections.

CABINET CONFIDENCES

We believe that Parliament intended individuals to have a right of access to the factual background documents upon which Cabinet makes decisions. But we have encountered difficulties answering complaints that records which were once called Cabinet discussion papers, or looked like them, have not been disclosed on the grounds that they are really memoranda to Cabinet.

Also, we have been informed by the Privy Council Office that the Cabinet decision-making process is continuously evolving, and since the *Access to Information Act* was passed, no Cabinet discussion papers as described in the Act appear to have been produced.

In the past, departmental officials prepared voluminous discussion papers to inform Cabinet ministers of every aspect of a matter before them. Apparently some ministers read only the short executive summary. We are informed that, as a result, the procedure changed and now only a Memorandum to Cabinet, containing the proposal in its barest form, is submitted to Cabinet. The background information is reportedly available in the files of government departments and is accessible under the Act.

Complainants find it hard to believe that no information now goes to Cabinet ministers in the nature of the old discussion papers. The Office is currently investigating a complaint on this issue.

The Office agrees with the recommendations the Committee made regarding confidences of the Queen's Privy Council

THE COMMISSIONERS AND THE COURT

The Commissioner

The recommendation that the Information Commissioner be granted authority to make binding orders for "certain subsidiary issues (relating specifically to delays, fees, fee waivers, and extensions of time)" may give rise to difficulties.

The intention appears to be to enhance the Commissioner's powers but any such amendment might well diminish the effectiveness of the Office.

The two-tier review process is an aspect of the Canadian *Access to Information Act* that is admired abroad. Other countries consider ingenious the idea of an Information Commissioner with no decision-making power as the first level. This is particularly so because the Commissioner's lack of decision-making power is coupled with the complainant's right to seek a judicial review if the Information Commissioner does not find in the complainant's favour.

The current role of the Commissioner is modelled on that of an ombudsman—that is, an official who is expected to achieve results by means of persuasion. Experience shows that, based on informal procedures, ombudsmen can be effective and influential in pressuring administrators to act fairly. An ombudsman is expected to try to persuade administrators to do what is equitable, even if not absolutely necessary in law. His or her success depends largely on the ability to earn and maintain credibility and flexibility.

Having only the power to persuade, the Information Commissioner can also go further than a court in attempting to have government institutions adhere to the spirit of the *Access to Information Act.*

The success of any new regulatory scheme depends, at least initially, on voluntary compliance. As a decision-maker with enforcement power, the Information Commissioner would have to maintain a certain distance and comply with a system of procedural rules. A decision-maker seldom gives informal, tentative advice and cannot easily encourage attitudinal change, something the Information Commissioner's Office now does.

We believe that, if the Commissioner is given authority to make binding decisions, additional formality will be injected into complaint resolution procedures. At this stage of the Act's development, that would tie the hands of the mediators and delay the proceedings more than is the case now.

The Office has statistics which bear out the argument in favour of maintaining the mediating procedures. From July 1, 1983, to March 31, 1987, 26.2 per cent of the complaints were well-founded, 23 per cent were supportable but resolved during the investigating process and 50.8 per cent were not supportable. Only the well-founded complaints (of which two-thirds are delays) ever reach the ministerial level. Thus, complaints that are supportable but are resolved by mediation, and those that are not supportable and are dismissed, are dealt with by a fairly informal process.

While the savings in time and effort cannot be quantified as there is no basis for comparison, it appears reasonable to assume that, if the Commissioner were required to make binding decisions concerning delays, fees, fee waivers and extension of time, the most senior officials and ministers would probably want to become involved.

This Office is also concerned by the suggestion that these binding decisions are to be final. If made the only decision-maker, the Commissioner would have to respect, and appear to respect, all of the rules of natural justice and fair procedures. But even if the rules were all obeyed, this Information Commissioner

would be uncomfortable with the power to make decisions in the important field of access to information if those decisions were not subject to appeal.

No doubt the Information Commissioner could work effectively if given authority to make binding decisions. In Canada, the Province of Quebec's Commission d'accès à l'information has decision-making power. Clothed with such decision-making power, the Commission's role resembles that of an administrative tribunal; it may be perceived as a lower court, be required to follow fairly precise rules of procedure and observe many of the rules of evidence.

But since the recommendation in this instance is to give the Information Commissioner authority to make decisions on "subsidiary" matters only, the Information Commissioner would become half ombudsman and half administrative tribunal.

There is the danger that this will cause confusion among complainants, administrators and the public. The mixing of roles will create problems because procedures relating to binding decisions will have to vary from those where recommendations are made. Worst of all, if the Committee's recommendation is implemented, there is the strong possibility that the public may draw unfavourable conclusions as to the reasons why the Commissioner is only given authority to make decisions on subsidiary issues and not on matters involving exemptions.

The incumbent Commissioner is satisfied that in the long run the Office is most effective by the Commissioner having no decision-making power and the Court conducting *de novo* reviews of government decisions to withhold. Examples of Australia, New Zealand, European countries and the Canadian provinces support the proposition that an ombudsman's office given only the power to recommend is by no means a toothless tiger.

The Committee also recommended "that the Information Commissioner be statutorily authorized to conduct audits of government institutions, *inter alia,* to assess the degree to which the policy of open government contained in the *Access to Information Act* has been implemented".

Under the existing authority to conduct investigations on her own initiative, the Information Commissioner has already launched complaints dealing with such problems as reading rooms, fees for photocopies, causes for unusually large numbers of delay complaints in specific departments, and attitudes to fee waivers by the media. The Commissioner agrees that the Office should conduct general investigations to assess "the degree to which the policy of open government contained in the *Access to Information Act* has been implemented", but is concerned that the recommendation might produce a broader mandate that might lead to duplication of the efforts of the Dominion Archivist and may have cost implications that would not be commensurate with the results.

The Commissioner agrees with the Committee's recommendation that the Office of the Information Commissioner and Privacy Commissioner be separated to avoid "any real or perceived conflict of interest in the discharge of the Commissioners' two mandates". There is no doubt that the situation of the shared offices and budgets causes confusion and concern.

Judicial Review

The Committee commented that "matters such as fees, unreasonable extension of time to give access and the language of records are not subject to judicial review under the Act". The Commissioner believes that unwarrantedly high fees could amount to constructive refusal and unreasonable extensions of time could eventually amount to deemed or constructive refusal to grant access, and complaints are reviewed by us with this in mind. The Commissioner is currently seeking a court review of a lengthy and unexplained extension of time. While the records in the case were eventually released, the Commissioner has asked the Federal Court to rule on the legality and reasonableness of the time extension.

Finally, the Commissioner fully supports the proposed amendments to sections 49 and 50 of the *Access to Information Act* so as to provide for a *de novo* standard of judicial review without exception. The Commissioner also supports the proposal that the Act should clarify the Federal Court's general jurisdiction to substitute its judgment for that of the government institution in interpreting the scope of all exemptions.

PARTICULAR ISSUES UNDER THE *ACCESS TO INFORMATION ACT*

A Matter of Form

While many government departments appear to accept access requests not written on the forms provided, it is important that the Act specifically state that no mandatory form be required. The Commissioner agrees with the recommendation of the Committee to that effect.

The Office also agrees that, for statistical and administrative purposes, an access request which refers to the *Access to Information Act* should suffice, particularly if the need is abolished for requestors to have Canadian citizenship or landed immigrant status. (At the present time some applicants forget to mention their status.)

Fees

We also understand and fully support the recommendations made for the abolition of the application fee, but the Commissioner takes issue with the recommendation—which appears to be included as a balancing factor—to authorize the Commissioner to make a binding order enabling a government institution to disregard frivolous or vexatious requests made under the Act.

The authority to make such an order, and the order itself, are incompatible with the Commissioner's role to examine the validity of complaints about failure of government institutions to adhere to the Act. The Commissioner should not be required to determine whether applicants submitted access requests that were frivolous or vexatious. Further, any finding that a request was frivolous or vexatious would have a damaging effect on this Office's ability

to mediate. The Commission d'accès à l'information in Quebec may have authority to investigate whether access requests under the Quebec act are frivolous or vexatious but that Commission functions as an administrative tribunal.

Similarly, courts are able to make findings that applications to them are frivolous or vexatious. The Information Commissioner's mandate is currently constituted so that the Commissioner has no decision-making power and, as stated, we believe the Office to be more effective without authority to make binding decisions.

The Information Commissioner is convinced that there is little or no misuse of the *Access to Information Act* at the present time.

Search Fees

We agree that there should be no fees levied for the first five hours of search and preparation.

The Information Commissioner supports the suggestion that fees not be levied where a search does not reveal any records. The Commissioner also believes consideration should be given to fee waivers where an access request results in a refusal of the whole of the requested record because of exclusions or exemptions.

The Information Commissioner also supports the recommendation:

> "...that once a document has been released to a particular applicant, subsequent applicants should be able to review this record in the reading room of the government institution. A list of records released under the *Access to Information Act* should be available in the reading room and in the Annual Report of the government institution. Should a copy be desired by subsequent applicants, they should be required at most to pay reasonable photocopying expenses without any additional expense for search and preparation."

Some arrangement for a pro-rated refund scheme from fees paid by subsequent access requestors might also be possible, if fees are high enough to warrant it.

Photocopying Fees

The Information Commissioner earlier made a recommendation to Treasury Board, similar to the Committee's recommendation, that rates of photocopying should generally be consistent with those charged by Public Archives of Canada so long as such rate reflects prevailing market conditions in the National Capital Region.

Fee Waivers

We believe that consistency in the policy for fee waivers would be beneficial and that the Commissioner should be able to deal with complaints of denials of fee waivers. For reasons already given, the Commissioner should not be able to make binding decisions.

A Matter of Time

The Committee reports that one complaint in five to the Information Commissioner involves delay. The Commissioner's statistics show that 25.9 per cent of the complaints experienced in this reporting year dealt with delays.

The Information Commissioner welcomes the intent of the recommendations to counter the problem of delays but points out that an investigation for the purpose of granting a certificate of reasonableness on an extension beyond 40 days will place a high demand on the resources in our Office.

Delays are experienced in this Office and in departments. They occur in departments both in the initial response and in response to our queries relative to complaints. This Office is acutely aware that it is extremely difficult for departments to obtain additional access to information resources. Nevertheless, investigators find that delays frequently arise at the senior officials' level, and access coordinators report to our investigators that records prepared for release are held up "on someone's desk" and that the coordinators cannot do anything to speed the release.

The Commissioner gives priority to delay complaints and complaints about extensions, but this has been at the expense of complaints about denial of access, which are further delayed.

We have also encountered extensive delays concerning records that are of current public concern. It is such a delay that is the subject of the application to Court, already mentioned, to determine whether a department can refuse to provide evidence to support the right to claim an extension within the provisions of section 9 of the Act.

Delays at the Office of the Information Commissioner

At March 31, 1987, 312 files were under investigation. The present backlog alone would take more than a year to complete given our current resources. The Office has ten investigators, which clearly is insufficient to cope with the increasing flow of complaints.

We share the frustrations of complainants about delays and support the recommendation that those who have not received an investigation report from our Office within 60 days should then have the choice of seeking an immediate review in the Federal Court or waiting until the investigation is completed. This Office is concerned, however, that practical difficulties may arise for a complainant arguing a case before a court as if blind-folded because the investigation is incomplete.

Finally, we agree with the recommendations "that the Access Act be amended to repeal section 24/Schedule II and replace it with new mandatory exemptions which are drafted so as to incorporate explicitly the interests reflected in the three provisions found in these three other Acts of Parliament, that is the *Income Tax Act,* the *Statistics Act,* and the *Corporations and Labour Unions Returns Act"* and "that the Department of Justice undertake an

extensive review of these other statutory restrictions and amend their parent acts in a manner consistent with the *Access to Information Act"* and "that any legislation that would seek to provide a confidentiality clause which is not to be made subject to the Access Act should commence as follows: 'Notwithstanding the *Access to Information Act,...'."*

The Office has no experience that would enable it to comment on the recommendation that a government institution "reveal information as soon as practicable where there are reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard".

The Commissioner believes that, if such a clause is included in the Act, provision should be made for specific complaint procedures to be activated on a priority basis if there is evidence of a crisis that ought to be revealed immediately, in the public interest.

Inquiries

The Commissioner's Office responds to a number of public inquiries primarily concerning procedures and problems under the Act. Some inquiries relate to the Act but others deal with issues that fall within the mandate of human rights commissions, provincial ombudsmen or other complaint-handling agencies.

Between April 1, 1986, and March 31, 1987, the Office handled 1,279 inquiries consuming 816 hours. The combined Offices of the Information and Privacy Commissioners handled 185 inquiries that concerned both the *Information* and *Privacy Acts*.

The inquiries are usually handled by the investigators. Records are kept of the nature of the inquiries and the subsequent responses. A large number of general government information questions reach the switchboard of our Office presumably because of the name of the Office.

Complaints by Number

Since the *Access to Information Act* came into effect July 1, 1983, 1,016 complaint files have been opened. Table 1 shows the status of files while the other tables refer to the number of complaints.

There are more completed complaints than closed files because a file, opened on receipt of a complaint letter, may eventually produce more than one complaint.

The 260 files dealt with during this reporting period gave rise to 309 complaints, 111 of which are described in case summaries.

A two-stage system traces the progress of complaints. The first stage records incoming complaints and the second stage records and reports results and other such pertinent particulars as category of complaint, department involved and geographical origin of complaint.

TABLE 1
STATUS OF INVESTIGATION FILES

April 1, 1985 to March 31, 1986	
Files pending from previous year	115
Files opened	321
Total	436
Files closed (deducted)	235
Files pending at March 31, 1986	201
April 1, 1986 to March 31, 1987	
Files pending from previous year	201
Files opened	371
Total	572
Files closed (deducted)	260
Files pending at March 31, 1987	312

THE TERMINOLOGY

Unlike civil court proceedings, where a plaintiff's case is either allowed or dismissed, complaints before the Information Commissioner are dealt with by mediation and lead to a variety of findings and dispositions. The terms *"Well-founded"* and *"Supportable"* are used to describe cases where the complaint was justified under the Act, with the term supportable used to indicate those that were resolved informally. Complaints found to be *"Not Supportable"*, in the Information Commissioner's opinion, had no merit or were outside the mandate of the Commissioner under the Act. The disposition of the case indicates how the investigation was concluded by the Information Commissioner.

A *"Government Institution"* is a department or agency listed in Schedule I of the *Access to Information Act* and is there-

fore subject to the Act. A reference to *"The Minister"* usually means the member of Cabinet responsible to Parliament for the particular government institution but in some cases means the person designated by Regulation under the Act as responsible for compliance with the *Access to Information Act* by the government institution. The President of the Atomic Energy Control Board is an example. The following are specific meanings ascribed for the terms used in the statistical tables.

Well-founded — Report to Minister

This means that the Information Commissioner concluded that the complaint was justified but it was not possible to achieve a satisfactory resolution through mediation. A report of the findings of the investigation was made to the Minister, along with any recommendations for remedial action which the Commissioner considered appropriate. The government either disputed the finding or took some action to resolve the complaint fully or in part. The Information Commissioner also reported the results of the investigation to the complainant.

Supportable — Resolution Negotiated

During the course of the investigation the complaint was found to be justifiable in whole or in part and was resolved through mediation. The government was persuaded to take some remedial action which the Information Commissioner considered to be an acceptable solution to the complaint. A report was made to the complainant and to the government institution. It was not necessary to make a report or recommendation to the Minister.

Supportable — Discontinued by Complainant

Although the Information Commissioner found merit in the complaint, the investigation was discontinued before a resolution could be negotiated on a report made to the Minister. The investigation was terminated at the express request of the complainant or was abandoned by the complainant. A report was made to the government institution and to the complainant, where feasible.

Not Supportable — Dismissed

This term means that the Information Commissioner was unable to find any denial of the complainant's rights under the *Access to Information Act* by the government institution. In some instances, the complaint was outside the Commissioner's mandate. No action was taken by the government institution. A report was made to the complainant and to the government institution.

Not Supportable — Discontinued by Complainant

In this situation the complainant abandoned the complaint or asked that the investigation be terminated before the merits of the complaint could be fully determined. The Information Commissioner had found no basis to support the complaint. No action was taken by the government institution.

Stage One — Tracking Investigations

The Office of the Information Commissioner maintains a computerized data base for retrieval of records by name of complainant, date of complaint, department cited, investigator assigned to the file, and so forth.

Investigations are conducted in the order in which they are received but are not always completed in that order. The time required depends on the volume of records involved, how many third parties have to be consulted or given notice of the Commissioner's intention to recommend release of information, how many of those make representations and, generally speaking, the complexity of the issue.

To ensure that complaints are investigated without undue delay, the director of investigations reviews a list of outstanding files each month and each investigator receives his or her list of outstanding files. The list helps the investigator make certain that a complainant is kept informed of progress on a regular basis.

Stage Two — The Product

The annual report of the Information Commissioner contains case summaries that were generated after the Commissioner's findings were communicated. The information at the top of the various case summaries are the data that are compiled in the tables which follow.

Close to 50 per cent of the complaints fell into the well-founded and supportable categories but in only 26.2 per cent of the total complaints was it necessary to proceed formally with a report to the Minister. A total of 23 per cent were resolved during the course of the investigation and 50.8 per cent were dismissed.

Table 2 shows the findings and dispositions of the complaints.

An analysis of Table 2 into categories of complaints is found in Tables 3A and 3B. This shows that the largest number of complaints concerned exemptions and delays.

Table 4 identifies which departments and agencies were named in complaints, including numbers and resolutions. Information about the number of access requests which did not produce complaints can be found in the special annual reports individual departments and agencies are required to submit to Parliament under the *Access to Information Act.*

Table 5 covers the geographic origin of completed complaints.

Table 6 shows the *Access to Information Act* cases launched in the Federal Court.

TABLE 2
FINDINGS AND DISPOSITION OF COMPLAINTS
APRIL 1, 1986 - MARCH 31, 1987

Finding	Well-Founded	Supportable		Not Supportable		Total
Disposition	Report to Minister	Resolution Negotiated	Discontinued by Complainant	Dismissed	Discontinued by Complainant	
Total	81	66	5	149	8	**309**
Percentage	26.2%	23%		50.8%		**100%**

TABLE 3A
RESULT OF ACCESS AND DELAY COMPLAINTS
APRIL 1, 1986 - MARCH 31, 1987

Finding	Well-Founded			Supportable		Not Supportable		Total
Disposition	Report to Minister			Resolution Negotiated	Discontinued by Complainant	Dismissed	Discontinued by Complainant	
	Government Action Taken							
	Resolved in full	Resolved in part	Disputed	Resolved in full	Resolved in part	No Action	No Action	
Category								
Refusal								
- Exemption	6	5	11	8	36	2	63	2	**133**
- Exclusion	—	—	—	3	2	—	2	1	**8**
- General	1	2	1	4	1	1	23	3	**36**
Delay	Not Disputed		Disputed	Late Disclosure		No Action	No Action		
	47		3	—		2	27	1	**80**
									257

TABLE 3B
RESULT OF FEES, LANGUAGE, REGISTER AND OTHER COMPLAINTS
APRIL 1, 1986 - MARCH 31, 1987

Finding	Well-Founded			Supportable		Not Supportable		Total
Disposition	Report to Minister			Resolution Negotiated	Discontinued by Complainant	Dismissed	Discontinued by Complainant	
	Government Action Taken							
	Waived or Reduced		No Action	Waived or Reduced	No Action	No Action		
	in full	in part		in full	in part			
Category Fees	—	—	2	2	4	—	12	—	20
	Corrective Action		No Action	Corrective Action	No Action	No Action		
Language	—		—	—	—	—	—	—	
Register	—		—	—	—	—	—	—	
Miscellaneous	—		3	6	—	22	1	32
								52

TABLE 4
DISTRIBUTION BY FINDING OF COMPLAINTS AMONG GOVERNMENT INSTITUTIONS APRIL 1, 1986 - MARCH 31, 1987

Government Institution	Total	Well-Founded	Supportable	Not Supportable
Agriculture Canada	8	2	2	4
Bank of Canada	1	0	0	1
Canada Mortgage and Housing	6	2	0	4
Cdn. Aviation Safety Board	3	1	2	0
Cdn. Commercial Corporation	1	0	1	0
Cdn. Radio-Television and Telecommunications Commission	1	0	1	0
Cdn. Security Intelligence Service	21	8	1	12
Cdn. Transport Commission	1	1	0	0
Cdn. Wheat Board	2	0	0	2
Consumer & Corporate Affairs	7	1	1	5
Correctional Service Canada	5	1	3	1
Department of Communications	2	0	0	2
Department of Finance	14	2	7	5
Department of Insurance Canada	1	0	0	1
Department of Justice	6	1	1	4
Employment and Immigration Canada	18	7	5	6
Energy, Mines & Resources	9	2	5	2
Environment Canada	4	1	2	1
External Affairs Canada	25	8	7	10
Farm Credit Corporation	1	0	0	1
Great Lakes Pilotage Authority	1	0	0	1
Health and Welfare Canada	19	9	3	7
Immigration Appeal Board	5	5	0	0
Indian Affairs and Northern Development	23	10	3	10
Labour Canada	1	0	0	1
National Capital Commission	3	2	0	1
National Defence	12	2	3	7
National Museums of Canada	1	0	0	1
National Parole Board	1	0	0	1
National Research Council	1	0	0	1
Privy Council Office	15	5	5	5
Public Archives Canada	5	1	2	2
Public Works Canada	2	0	1	1
Regional Industrial Expansion	5	0	0	5
Revenue Canada, Customs & Excise	13	1	1	11
Revenue Canada, Taxation	8	3	1	4
Royal Canadian Mounted Police	7	1	1	5
Social Sciences and Humanities R.C.	1	0	1	0
Solicitor General	5	1	2	2
Statistics Canada	1	0	0	1
Supply and Services Canada	25	0	1	24
Transport Canada	12	2	4	6
Treasury Board of Canada	6	2	4	0
Veterans Affairs Canada	1	0	1	0
Total	**309**	**81**	**71**	**157**

TABLE 5
GEOGRAPHIC DISTRIBUTION OF THE ORIGIN OF COMPLAINTS
APRIL 1, 1986 - MARCH 31, 1987

ORIGIN	Total
Yukon Territory	0
Northwest Territories	2
British Columbia	16
Alberta	13
Saskatchewan	8
Manitoba	11
Ontario (excluding National Capital Region)	79
Quebec (excluding National Capital Region)	53
National Capital Region	104
New Brunswick	6
Nova Scotia	5
Prince Edward Island	0
Newfoundland	13
Outside Canada	0
Total	**309**

TABLE 6
ACCESS ACT CASES
LAUNCHED IN FEDERAL COURT OF CANADA - TRIAL DIVISION
JULY 1, 1983 - MARCH 31, 1987

Fiscal Year	Section 44 Cases (Third Party)	Section 41 Cases		TOTAL
		Initiated by Complainant	Initiated by Commisioner	
1983-84	2	0	0	2
1984-85	4	4	3	11 a)
1985-86	25 b)	5	3	33 b)
1986-87	39 c)	6 d)	9	54
TOTAL	**70**	**15**	**15**	**100 a)**

a) Does not include mandamus application brought against the Information Commissioner
b) Includes 3 Section 44 cases in which the Information Commissioner obtained leave from the Federal Court to intervene
c) Includes 2 cases in which the Information Commissioner obtained leave from the Federal Court to intervene
d) Includes a case in which the Information Commissioner, at the request of the complainant, consented to be added to the case as an Intervenant.

NOTE: *One Section 41 case has been appealed by the complainant to the Federal Court of Appeal*

Case Summaries

This report summarizes 111 cases dealt with by the Information Commissioner between April 1, 1986, and March 31, 1987. Each case has a heading to help readers identify particular interests. Also shown at the beginning of each case are such particulars as the department involved, the nature of the complaint and the outcome. These items form the basis for the annual statistical tables produced in the Complaints by Number section.

EXEMPTIONS

Third Party Agrees to Release

Files: 007(1/3)
032(1/2)

Institution: *Energy, Mines and Resources*
Complaint: *Refusal - exemption [14, 15, 19(1), 20(1)(a), (b), (c) and (d), 21(1)(a), (b) and (c), 23, 24(1)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

Two individuals complained that certain documents concerning the Synfuels Project (007, 032) and the National Energy Program (032) were withheld by the department, under sections 14 and 15, subsection 19(1), paragraphs 20(1)(a), (b), (c), and (d), paragraphs 21(1)(a), (b) and (c), section 23, subsection 24(1), subsection 28(1), and paragraph 68(1)(a).

The records were first reviewed in the fall 1983, but due to a misunderstanding, the department returned the records to its source files before the investigation was completed. Further, the department stated that it had to review 125 feet of files to yield the eight linear feet that had to be reviewed to respond to the requests.

In the spring 1984, the Commissioner's Office asked the department to retrieve the records again and justify each exemption separately. After several meetings with officials of the department, the Commissioner challenged numerous exemptions. In November 1984, the department agreed that it had to review the challenged exemptions, but on January 24, 1985, the Commissioner wrote to the Deputy Minister because the promised review had not occurred.

The Deputy Minister, responding on February 6, 1985, stated that the review should be completed by February 15, 1985. He also pointed out that some records would require consultations with other departments and third parties. Eventually, after an exchange of correspondence, the department indicated its intention to withdraw many of the exemptions.

In spite of this, none of the records were released to the complainants. The Commissioner's Office wrote to the Deputy Minister on April 30, 1985, suggesting disclosure of the records where exemptions had been revoked, setting a deadline of May 17, 1985, for action on the third party representations. The department replied on May 8 and 10, 1985, enclosing letters to the complainants with a list of previously exempted records now disclosed. On May 29, 1985, the Commissioner received a list of 20 additional records disclosed in whole or part to the complainants.

The Commissioner's Office was still not satisfied that the exemptions claimed on certain records were justified. On June 19, 1986, the complainants received additional releases.

The department had outlined to counsel for the third party the Commissioner's argument for recommending disclosure of exempted portions of certain records. However, counsel for the third party continued to object to disclosure and, as a result, the Commissioner called for representations from the third party. The reasons for suggesting release were placed before the third party, represented by counsel, and on May 30, 1986, the Office was informed that the third party had agreed to the full disclosure of specific records.

The Commissioner informed the complainants that she was satisfied that the remaining exemptions were valid and proper.

Third Party Support

File: 132

Institution: *Public Works Canada*
Complaint: *Refusal - exemption [20(1)(c) and (d)]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual sought access to "A document which contains the lease expiry dates of all office accommodation in the National Capital Region as described in the Public Works Accommodation Utilization Report (1983) for the NCR". The department refused to disclose the records under paragraphs 20(1)(c) and (d) of the Act. The individual objected.

During the investigation, the complainant asked that the scope of his complaint be narrowed to a list of ten National Capital Region properties and that disclosure of lease details of these properties be pursued. It was found that, of the ten properties selected, two cases had certain terms in the leases that were already publicly available. The department provided the complainant with the requested lease expiry dates. In two other instances, the properties were owned by the government and thus were not within the terms of the access request for accommodation leased by the government. Another property was privately owned and not leased to the government and was also outside the scope of the access request. This left five properties.

In his letter, the complainant stated that:

> "It is usual and prudent practice within the real estate industry in Ontario to register copies of leases or notices of leases in the local registry office if the lease term is for more than 7 years. I also understand that in Ontario that if only a notice of lease is registered the document must contain a clause that any interested party may have access to the lease itself. Thus lease information is generally within the public domain."

During the investigation, it was learned that, while in some cases the Crown, or a party contracting with the Crown, will register a notice of lease in the local Land Registry Office, the practice is by no means universal, nor is there any general government policy in favour of registration.

If a notice is registered, it states the names of the parties, describes the property in question and may also indicate the expiry date, renewal terms, rental amount and so forth. There is, however, no obligation on a party registering the lease to provide any or all of these details. The federal government's position, as set out in its contract regulations, appears to protect the

right of private contractors to their privacy. The Commissioner is not aware of any information to indicate that it is the practice in the industry to make available to the public (either through registering leases or providing the information on request) details of lease agreements.

The Commissioner was satisfied that the Department of Public Works was not using the *Access to Information Act* to withhold records which it would otherwise routinely have disclosed.

The complainant argued that the reasons for the exemptions were vaguely stated and did not provide any real justification for their application. The Commissioner agreed and intended to recommend to the department that the requested records be disclosed.

Under paragraph 35(2)(c) of the Act, if the Information Commissioner intends to recommend that a record be disclosed containing

> "(i) trade secrets of a third party;
>
> (ii) information described in paragraph 20(1)(b) that was supplied by a third party, or
>
> (iii) information the disclosure of which the Information Commissioner could reasonably foresee might effect a result described in paragraphs 20(1)(c) or (d) in respect of a third party"

she must give the third party a reasonable opportunity to make representations. The Commissioner therefore contacted all of the third parties involved in the leases of the five properties indicating that she proposed to recommend disclosure of the requested lease details.

None of the third parties consented to disclosure and one in particular satisfied the Commissioner that, while disclosure of details of leases about to expire immediately posed no particular threat, the disclosure of future lease expiry dates could enable others to build, acquire or otherwise make available competitive accommodation at a critical time.

Based on the investigation, the Commissioner informed the complainant that, while it is by no means a rule that the likelihood, nature and extent of possible injury be the same for all third parties involved, it appeared that the likelihood and extent of injury would be great enough in all the cases to deny disclosure of requested records in respect of any of the third parties.

Tenants Privacy

File: 171(1/3)

Institution: *National Capital Commission*
Complaint: *Refusal - exemption [19(1)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Disputed*

A May 10, 1984, request sought access to National Capital Commission (NCC) records covering:

a) A list of all rental properties then owned and administered by the NCC, except garden plots, and;

b) the names of all tenants and the rent charged to each.

The NCC provided the list of rental properties but withheld the names of tenants and the amounts of rent paid by each, citing subsection 19(1) of the *Access to Information Act.*

This particular subsection prohibits disclosure of "personal information" as defined in section 3 of the *Privacy Act:*

> "...information about an identifiable individual that is recorded in any form including,
>
> "...information relating to financial transactions in which the individual has been involved, ...the address... and...the name of the individual where it appears with other personal information relating to the individual...".

As a result, a complaint was made to the Information Commissioner May 22, 1984, objecting to NCC considering "commercial transactions between a body financed by taxes and an individual or a corporation as 'personal'" and therefore exempt from disclosure.

This Office began an investigation June 11, 1984.

The complainant told the investigator that access was sought to test persistent rumours that friends of the government received preferred treatment by being chosen as NCC tenants and by paying rents below market value.

Another part of section 3 of the *Privacy Act* is relevant in light of this allegation. It provides at paragraph (*l*) that for the purposes of...section 19 of the *Access to Information Act,* personal information does not include...

> "(*l*) information relating to any discretionary benefit of a financial nature...conferred on an individual, including the name of the individual and the exact nature of the benefit...".

Subsection 19(2) of the *Access to Information Act* must also be considered. This subsection provides that records containing personal information may be disclosed in accordance with section 8 of the *Privacy Act.* Paragraph 8(2)(m) of the *Privacy Act* provides that personal information may be disclosed for any purpose where:

> "(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure...".

The investigator's preliminary examination of records covering farm properties, market garden properties, vacant land, land unsuitable for leasing, commercial properties, houses and multiple residences, identified three categories of tenants:

- Non-profit organizations such as federal, provincial, regional and municipal governments, churches, schools and voluntary organizations. (case report 171(2/3))
- Businesses. (case report 171(3/3))
- Individual residential tenants. (case report 171(1/3))

The request for disclosure of the names and rents of residential tenants raised a number of contentious issues. There was disagreement over the legal interpretation of the relevant provisions of the *Access to Information Act,* the *Privacy Act* and the facts.

The legal issues may be summarized as follows:

a) Is the information withheld by the NCC under subsection 19(1) of the *Access to Information Act* "personal information" as defined in section 3 of the *Privacy Act,*

b) Are the names and the amounts of rent information about a "discretionary benefit of a financial nature" and therefore specifically excluded from the definition of "personal information" in the *Privacy Act* by virtue of paragraph 3 (*l*), and

c) Does the public interest in disclosure clearly outweigh any invasion of privacy that could result from disclosure of the requested information so that it could be made available as permitted under subparagraph (8)(2)(m)(i) of the *Privacy Act*?

The tenancy records examined by the investigator contained annual rents payable according to each individual lease but not the amount actually collected during 1984. The NCC indicated that rents are negotiated individually, taking many factors into consideration. NCC pointed out that some rents fell behind market value during the government-wide anti-inflation "Six and Five" program, which limited increases but it maintained that no individual tenant received a discretionary benefit of a financial nature.

Because of the preferential treatment allegation and the NCC's denial, it was necessary to determine whether some tenants were paying rent not within a reasonable market value range.

Based on professional advice about a statistically valid number of selected properties that would have to be examined to see how rents charged by the NCC compared with market value, 30 properties were selected at random according to a formula provided by a professional advisor. An independent, accredited real estate appraiser assessed the selected properties.

The NCC opposed these steps, charging:

> "...the proposed analysis of rents paid, in the absence of flagrant cases of preferred treatments, (discretionary benefits) amounts to a fishing expedition which should not take place, with respect to information already privileged under section 19(1) of the *Access to Information Act.*"

The Information Commissioner disagreed and the appraisals proceeded. The privacy of the tenants was respected throughout the investigation process. The appraiser was provided with a list of the addresses of the 30 properties but at no time was he informed by anyone in the Office of the Information Commissioner of the rents charged for the properties selected or for any other properties.

The appraiser proceeded according to the standards of his profession. He compared the NCC properties with other real estate in the neighbourhood and with similar real estate elsewhere to determine a range of market values, from the least a landlord could get, to the most he thought a tenant would pay on the open market.

In 26 of the 30 properties sampled, the market value in August 1985, appeared to be higher than the rent the NCC charged in June 1984. In three cases it was the same and in one instance the market rate was less than the NCC rent. On average, the market value was 65 per cent higher than the rent charged by the NCC.

There may be many valid reasons why NCC rents appeared to be lower than the market rate. However, public statements by NCC officials in 1986 that NCC rents were being "brought up to market value" strongly support the conclusion that rents have been below market value. Indeed, the appraisals of August 1985, provided *prima facie* evidence that NCC tenants generally paid less than market value for their tenancies at the time the appraisals were made.

Many discussions with NCC officials to find a fair balance across the competing interests of the complainant, the tenants, the NCC and the public were unsuccessful. In the end, the NCC disputed the accuracy of the appraisal and apparently is doing its own of the same 30 properties.

In May 1986, 352 current residential tenants were invited to show why the information sought should not be disclosed. Former tenants were also invited through newspaper advertising.

More than 100 written replies and over 50 telephone calls were received, mostly from tenants. Almost all of these responses opposed disclosure. However, a few confirmed that they too had heard rumours that some tenants receive favours by way of low rents.

With this background, the following legal issues can be considered.

Legal issue

a) Is the information withheld by the NCC under subsection 19(1) of the *Access to Information Act* "personal information" as defined in section 3 of the *Privacy Act*?

The information clearly involves financial transactions and the name and address of individuals—all examples of "personal information" described in section 3 of the *Privacy Act.* Further, the information is "about...identifiable individual[s]" and is, therefore, within the same section's general definition of "personal information". Subject to any exceptions to that definition, the NCC would be forbidden to disclose this information, except as provided in section 8 of the *Privacy Act.*

Legal issue

b) Are the names and the amounts of rent information about a "discretionary benefit of a financial nature" and therefore specifically excluded from the definition of "personal information" in the *Privacy Act* by virtue of paragraph 3 (*l*)?

Benefits accorded individuals who meet certain criteria established in advance may not constitute such discretionary benefits. However, a benefit based on few or no predetermined criteria, such as a government award to a researcher or an artist, might be a discretionary benefit. While the awarding process might be legal and the objectives laudable, the personal information falls within the description in paragraph 3(*l*) of the *Privacy Act,* it is outside the definition of "personal information" in that Act and it is liable to be disclosed under section 19 of the *Access to Information Act.*

Finally, benefits, whether discretionary or not, might be extended in circumstances that warrant disclosure of the relevant personal information in the public interest in accordance with subparagraph 8(2)(m) (i) of the *Privacy Act*.

The NCC's standard rent application notes:

> "It is understood that this is an application to rent and is subject to official approval and/or acceptance. The Commission may, at its sole discretion, accept or reject any application received regardless of the order in which it is made."

The investigation disclosed that the NCC generally acted like any prudent property manager, examining potential tenants' creditworthiness, previous tenancies, family size and so on. But it also applied criteria that other landlords did not apply. These included government or NCC policies, compassion, and community problems. The criteria also specifically excluded incumbent politicians, their spouses and political parties from becoming tenants, unless provided for by an Act of Parliament or a Cabinet directive.

The NCC argued that the discretionary benefit exception contained in paragraph 3(*l*) of the *Privacy Act* must be construed strictly. That is, there must be clear evidence than an individual obtained a direct financial benefit before relevant personal information can be disclosed. The NCC submitted factors to explain why its rents appeared to be less than market value. The list included:

(1) the length of time the property has been in Commission ownership and leased to third parties;

(2) the effect of such programs as the Anti-Inflation Board, federal restraint guidelines and provincial rent controls applicable;

(3) no evident reason for rent increases other than incremental increases (i.e., no sale and subsequent refinancing);

(4) other physical factors, such as:

(a) general lack of finished basements or usable basement space finished or unfinished;

(b) age and condition of heating equipment;

(c) age and condition of windows (i.e. contributing cause of high heating bills);

(d) adequacy of insulation;

(e) seepage and/or drainage problems in basements;

(f) number, age and condition of bathrooms;

(g) condition and availability of water supply;

(h) septic system;

(i) proximity to public transportation (isolation of leased premises).

(j) vandalism and theft potential;

(k) interior layout;

(l) landlord services level (i.e. NCC does not normally do interior decoration of residential units but may supply paint), tenant responsible for lawn, garden maintenance, etc.);

(m) proximity to schools and other services;

(n) the lack of certainty of tenure that the tenant has as the properties were not acquired as investment properties and may be used for non-residential use or demolished on short notice for other NCC projects;

(5) government policy imposed on the NCC as a Crown corporation and owner of Crown land.

In short, said the NCC:

> "The amount of rent paid by a tenant may not reflect other responsibilities passed on to the tenant through negotiations that have taken place between the NCC and that tenant. It follows that the tenant may have to disburse amounts in addition to the rent to maintain the leased property. The rent may not also reflect government policy affecting the setting of rent on Crown land which the NCC as a Crown corporation must abide by."

Many of the tenants who made representations believed they were paying market value for what they considered substandard accommodation.

Granting a lease does not constitute a discretionary benefit of a financial nature. However, *prima facie* evidence of preferential treatment might convert it into one. In this context it must be noted that, while rumours of preferential treatment exist, no specific instances have been identified.

The Commissioner acknowledged that some of the factors submitted by the NCC and the tenants were not considered by the appraiser and there is insufficient evidence to determine whether rents below market value constitute a discretionary benefit in individual instances—either for valid reasons, or because of "sweetheart deals" as suggested by the complainant.

There is *prima facie* evidence that at the time of the access request NCC rents for residential tenancies were generally speaking below market value, leaving the question whether there is an overriding public interest in disclosure.

Legal issue

c) Does the public interest in disclosure, in any event, clearly outweigh any invasion of privacy that could result from disclosure of the requested information so that it could be made available as permitted under subparagraph (8)(2)(m)(i) of the *Privacy Act*?

The public interest provision in subparagraph 8(2)(m)(i) of the *Privacy Act* authorizes a government institution, subject to notification to the Privacy Commissioner, to disclose personal information without the consent of the individual concerned when:

> "the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure...".

The National Capital Commission representations on the subject were:

> "The public interest in disclosure is less than apparent in this situation as there would be no general benefit for, or advantage to, the public to be provided with that information. Furthermore, since some of the conditions forming an integral part of a lease would not be disclosed in this process, it would be misleading to the public and unfair to the tenants.
>
> "A high standard both in terms of weight and nature of the public interest is requested to demonstrate that the invasion of privacy is clearly outweighed by the public interest. The mere fact that public lands are being leased certainly does not imply under the legislation that the public has a right to know.
>
> "The head of this institution has determined in accordance with subparagraph 8(2)(m)(i) of the *Privacy Act* that there is no public interest in this case, or if any, would not be persuasive or of such significance to outweigh any invasion of privacy."

The complainant's representations on the public interest subject held that she was seeking to confirm or refute rumours that certain tenants received "sweetheart deals" and that friends and relatives of politicians have easy access to NCC leases.

A number of questions must be answered. For example:

a) What is the "public interest" in terms of the purposes of the *Access to Information Act* and the *Privacy Act*?

b) What is the potential invasion of privacy in the context of this complaint?

c) What is meant by "clearly outweighs" in the circumstances of this complaint?

The public interest concept has no single, abstract definition. It may vary depending on the facts, on any express statutory purpose and on public or private attitudes.

Section 19 must be interpreted as a limited and specific exception to the general right of access. But it is different because it incorporates by reference provisions from the *Privacy Act*. The general right of access to government records must be balanced against the purpose and any specific provisions of the *Privacy Act*.

The *Privacy Act* tips the balance in favour of privacy with the words "clearly outweighs" in subparagraph 8(2)(m)(i). Evidently, Parliament intended that, if having regard to all relevant circumstances, the public interest in disclosure evenly matches the resulting invasion of privacy, the information should not be disclosed. Therefore, the public interest in disclosure must be demonstrably greater to prevail over the privacy interest.

Whether it is demonstrably greater depends on various factors. One is the degree to which the information is regarded as private by the community generally and by the persons concerned —whether it is treated as sensitive and highly private (like an invisible disability) or as a matter of general knowledge (like approximate weight and height).

Section 3 of the *Privacy Act* explicitly requires some privacy control over one's name, address and financial information—the very matters covered by the complainant's access request.

However, the situation with regard to rent is ambiguous. Typically rent figures prominently in the financial affairs of tenants—a matter specified in section 3 of the *Privacy Act* among elements of "personal information" not ordinarily subject to disclosure. But rent charged for a particular property is commonly advertised by landlords seeking tenants. Further, the amounts are routinely disclosed by landlords, without the tenant's consent, in such circumstances as real estate transactions and through co-operation among creditors. At the time of this access request, it was NCC policy to routinely disclose to creditors who asked the amount of rent paid as well as whether and to what degree a particular tenant was in arrears.

Further, the privacy interest in rent amounts is similar in character to the privacy interest in the property value of an individual's home which is routinely available in tax assessment rolls, real estate transactions and expropriations.

Any harm that invasion of privacy may cause the individuals concerned is also a consideration. It is not necessary to show that specific harm will—or even may—be caused, but an invasion of privacy is obviously more serious if it does harm the one whose privacy has been invaded. Harm could be in the form of stigma, disgrace, harassment, loss of money, employment or friends, or adverse publicity. Such harm is difficult to predict, requiring examination of both the potential harm and the likelihood of harm.

Harm might befall some NCC residential tenants if their names, addresses and rents were published. They may also be embarrassed to being identified as NCC tenants because of the rumours of preferential treatment.

One tenant expressed it this way:

> "I fail to see how the disclosure of this personal information could be in the interests of the public. However, unless accompanied by the entire financial history of each property, such disclosure could have a considerable negative effect for tenants.
>
> "We already have a 'nuisance factor' to contend with vis-à-vis the public, which continuance of this entire issue will only exacerbate, e.g. on many occasions we have had people trespassing to gain access to a creek bordering our property, even though there is obvious access from an empty field on the other side of the water; their invariable excuse is that it is NCC property so it belongs to the public, and the most recent visitor wanted to know, 'what rent do you pay anyway!?'
>
> "Some of these encounters have become unnecessarily difficult because of 'visitor' false knowledge, promoted by media speculation that anyone has access to 'government' land, and that tenants do not pay enough rent anyway.
>
> "I would expect that these individual privacy problems would only increase if name, rent and location disclosure were to occur."

Disclosure might demonstrate that no NCC tenants benefit from "sweetheart deals", or it could pinpoint those who do. On the other hand, non-disclosure makes every residential tenant suspect and there may well be a public interest in clearing the air.

Section 10 of the *National Capital Act*, R.S.C. 1970 C. N-3, sets out the objects, purposes and powers of the NCC. Here follows the relevant portions:

"10. (1) The objects and purposes of the Commission are to prepare plans for and assist in the development, conservation and improvement of the National Capital Region in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance.

"(2) The Commission may for the purposes of this Act
...

"(*b*) sell, grant, convey, lease or otherwise dispose of or make available to any person any property, subject to such conditions and limitations as it considers necessary or desirable...".

In its Corporate Administration Manual the NCC has established a set of guidelines "to ensure the effective and efficient leasing of NCC real property".

This involves public money and public property and the public has a powerful interest in knowing how effectively and fairly the NCC deals with those who have financial dealings with the agency.

In its representations, the NCC suggested that harm might arise from disclosure of inaccurate or misleading information. It cited the many factors already listed, claiming they had to be taken into consideration to determine whether the rents paid were at fair market value. Obviously, such factors are relevant, and were mentioned in many of the tenants' representations.

However, the following factors strengthen the public interest in disclosure:

a) The appraisal carried out for the Commissioner, which, at the very least, provides *prima facie* evidence that NCC rents are generally below market value.

b) The recent public acknowledgment by representatives of the NCC that some NCC rents are or were below market value.

c) The rumours, which pre-date the access request, that certain individuals may have received special favours from the NCC.

d) The impact that the government-imposed "Six and Five" restraint program may have had on the ability of the NCC to establish rents at fair market value.

This case is not an instance in which an applicant fishes for information based on totally unsubstantiated allegations. There is clear *prima facie* evidence that some—perhaps most—NCC rents are, or were, below market value.

Even if only some tenants were paying less than market value, it might be in the public interest to disclose all the records, particularly if it were impossible to determine whether in any particular case a person was in receipt of a discretionary benefit.

It would be extremely hard to establish every discretionary benefit of a financial nature extended for whatever reason, from time to time. If users of the *Access to Information Act* were to repeat access requests at different times, the NCC and the Information Commissioner could become locked in a never-ending contest of who has the most accurate appraisal at the time of each new request. The public interest in this case is based on the public's right to have its concerns about the NCC leasing arrangements laid to rest—not in chasing a moving target.

This investigation identified a legitimate, overriding public interest in determining whether subsidized rents have been established and subsidized rental properties allocated in an open and equitable manner by the NCC. That public interest arises whether or not the rents below market value constitute a "discretionary benefit of a financial nature". Also the public interest can be served without providing access to the tenants' names. If the rents are released, with reference to the already publicly available addresses, the public can determine itself whether NCC rents are fair.

Any user of the *Access to Information Act* may allege that the NCC has conferred a discretionary benefit of a financial nature on an individual tenant and that there should be disclosure of the tenant's name. Further, anyone may suggest in an access request that it is in the public interest that the name of a given tenant be disclosed for any specific reason.

The Information Commissioner concluded that, because of rumours existing prior to the complaint that at least some individuals renting accommodation from the NCC benefitted from favoritism, and because some NCC rents were below market value at the time of the access request, the public interest must be given preference in this case.

Consequently, the Information Commissioner recommended that the requested list containing the addresses of the residential tenants and the rents to be charged in 1984 be disclosed to the complainant, subject to the severability principle being applied to exempt the names of the residential tenants under subsection 19(1) of the *Access to Information Act.*

The recommendation was rejected by the NCC and the complainant commenced legal action for access to the whole of the record concerning the residential tenants.

Non-Profit Leases

File: 171(2/3)

Institution: *National Capital Commission*
Complaint: *Refusal - exemption [19(1)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in full*

On May 10, 1984, access was sought to the National Capital Commission (NCC) records as follows:

a) A list of all rental properties then owned and administered by the NCC, except garden plots, and;

b) the names of all tenants and the rent charged to each.

The NCC disclosed its list of rental properties but refused to reveal the names of tenants or the amount of rent they each paid. Explaining its refusal in a May 15, 1984, letter to the applicant, the NCC cited subsection 19(1) of the *Access to Information Act*, which prohibits disclosure of "personal information" as defined in section 3 of the *Privacy Act:*

> "...information about an identifiable individual that is recorded in any form including,
>
> "...information relating to financial transactions in which the individual has been involved,...the address... and...the name of the individual where it appears with other personal information relating to the individual...".

The complaint, made to the Information Commissioner May 22, 1984, objected to the NCC considering "commercial transactions between a body financed by taxes and an individual or a corporation as 'personal'" and therefore exempt from disclosure.

An investigation began June 11, 1984. The investigator's preliminary examination, covering farm properties, market garden properties, vacant land, land unsuitable for leasing, commercial properties, houses and multiple residences, identified three categories of tenants:

- Non-profit organizations such as federal, provincial, regional and municipal governments, churches, schools and voluntary organizations. (case report 171(2/3))
- Businesses. (case report 171(3/3))
- Individual residential tenants. (case report 171(1/3))

The investigator challenged NCC's use of subsection 19(1) to withhold information concerning the non-profit organizations. Section 19(1) refers to "personal information" as defined in section 3 of the *Privacy Act* which, in turn, refers solely to information about individuals, not other legal entities.

The NCC then invoked paragraph 18(b) as well as paragraphs 20(1)(c) and (d) of the *Access to Information Act.*

Paragraph 18(b) gives the head of a government institution discretionary power to withhold any record that contains "...information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution...".

Paragraphs 20(1)(c) and (d) forbid the head of a government institution from disclosing any record that contains

> "...(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
>
> "(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party".

When the Commissioner's Office suggested that none of these exemptions covered non-profit organizations, the NCC released the requested information where it related to federal, provincial, regional and municipal governments, churches, schools and non-profit organizations.

Mounted Police Records

File: 195

Institution: *Public Archives*
Complaint: *Refusal - exemption [15(1)(d)(ii), 16(1)(c)(ii) and 17]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Resolved in full*

The complaint concerned a request for access to RCMP documents held by Public Archives. The requested documents were released to the complainant, with exemptions claimed under the international affairs and defence [15(1)(d)(ii)], law enforcement and investigations [16(1)(c)(ii)] and safety of individuals [17] provisions of the Act.

The investigation involved reviewing the exempted information as well as numerous meetings and exchanges of correspondence with the Public Archives and the Canadian Security Intelligence Service (CSIS), the government institution now responsible for handling those records.

As a result of the investigation, Public Archives, on the advice of CSIS, disclosed the information exempted under subparagraph 15(1)(d)(ii) and withdrew the exemption under section 17 of the Act, but continued to exempt Royal Northwest Mounted Police (RNWMP) special agent names under subparagraph 16(1)(c)(ii).

Following representations by the complainant, Public Archives and CSIS, the Commissioner concluded that the complaint was well-founded and recommended disclosure of the information withheld under subparagraph 16(1)(c)(ii). As a result of this recommendation, Public Archives released all previously withheld information.

Employee Record

File: 319

Institution: *National Defence*
Complaint: *Refusal - exemption [19(1)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Resolved in part*

The complaint concerned the Department of National Defence's (DND) refusal to release certain information relating to the employment of a named person on the grounds that it was personal information under section 19 of the Act.

The investigation revealed that the information in the DND records ought to have been disclosed because it concerned the position or functions of the named individual while he was an employee of DND. As a result, the Commissioner recommended to the Minister of National Defence that the records be released to the complainant.

Subsequently, additional information was released to the complainant but a portion of the record was withheld as personal information under section 19. The Commissioner was satisfied that the exempted portion of the records was indeed personal information about the named individual and did not relate to his position or functions as an employee of DND.

Minutes Withheld

File: 320

Institution: *Canada Mortgage and Housing Corporation*
Complaint: *Refusal - exemption [21(1)(b)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Disputed*

An individual complained of Canada Mortgage and Housing Corporation's (CMHC) refusal to disclose the minutes of the board/executive meetings from 1970 to March 31, 1985. Disclosure was refused through paragraph 21(1)(b) of the Act which provides:

> "21.(1) The head of a government institution may refuse to disclose any record requested under this Act that contains
> ...
> (b) an account of consultations or deliberations involving officials or employees of a government institution, a Minister of the Crown or the staff of a Minister of the Crown,
> ...
> if the record came into existence less than twenty years prior to the request."

After the investigation, the Commissioner informed the CMHC President that, while there may be valid reasons for exempting certain portions of the requested records under paragraphs 21(1)(b), the remaining portions ought to be released in accordance with the principle of severability at section 25 of the Act. The department rejected the suggestion.

In explaining the position, the Commissioner stated to the complainant:

> "As we have maintained from the outset, CMHC may have good reasons for refusing to disclose all of their minutes—we just do not know what they are. It now appears that there is no prospect of finding out.
>
> "According to the judgment in the CRTC case, the Federal Court cannot assist you because in a case such as this any court-enforceable right to disclosure is subject to the discretion of the president of CMHC. CMHC's rejection of the proposal for mediation makes further involvement by our office useless, as well. Regrettably, we are closing our file on your complaint."

Severance Applied

File: 323

Institution: *External Affairs*
Complaint: *Refusal - exemption [15(1)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Resolved in part*

This access request asked for all records that analyzed the possible impact on Canada of U.S. President Ronald Reagan's re-election in 1984 and all communications related to such analysis.

The department refused to disclose any records relevant to the request, exempting them under the international affairs and defence provisions [15(1)] of the Act.

Following the investigation, the Commissioner wrote the Secretary of State for External Affairs, recommending disclosure of as much of the records as possible pursuant to section 25 of the Act as they contained many media quotations and other information which was well publicized in the months leading up to and immediately after the 1984 U.S. elections. The Secretary of State for External Affairs responded that five records, severed in accordance with section 25, would be made available.

The Commissioner was satisfied that the remaining information was correctly exempted under subsection 15(1).

Solicitor-Client Privilege Waived

File: 339(1/2)

Institution: *External Affairs*
Complaint: *Refusal - exemption* [23]
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

An individual complained when records requested from External Affairs were severed and portions withheld under section 23, solicitor-client privilege.

As a result of the investigation, the department waived the solicitor-client privilege in nine of the 13 instances in relation to a particular document.

Researcher's Problems

File: 341

Institution: *Employment and Immigration Canada*
Complaint: *Refusal - exemption [19(1)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Disputed*

This complaint concerns the denial of access to records relating to the "Canadian immigration policy and practice as it applied to the case of [name of person] in the years 1948-1951". The denial was made under subsection 19(1) covering personal information.

The complainant wished to prepare an article for an historical journal and thought that the department's files may contain documents that he had not seen elsewhere and that would be useful to the accomplishment of his project. The department informed him that most of the information was personal and protected from disclosure. The balance of the records were press clippings which the complainant already had.

The complainant asked the department whether consideration to allow access to the record could be given under the discretionary disclosure provisions of section 8 of the *Privacy Act* subparagraph 2(j)(ii) which reads:

> "8(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed.

...

"(j) to any person or body for research or statistical purposes if the head of the government institution ...

"(ii) obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates; ..."

When he did not receive a response, he complained to this Office.

The investigator thoroughly reviewed the departmental records as well as records at Public Archives on persons which were similar, and in some cases the same, as those in the exempt record.

The complainant, who considers himself an historical researcher, was willing to sign an agreement, as stipulated in subparagraph 8(2)(j)(ii) of the *Privacy Act,* that he would not quote from the department's dossiers or mention their existence.

The Commissioner informed the Minister in January 1986, of the complainant's offer and recommended that the record be made available for review by the complainant.

On March 21, 1986, the Commissioner advised the Minister that, because it appeared that the department was still delaying release of the requested records, she had no alternative but to inform the complainant of his right to apply to the Federal Court for a review of the department's decision. (The review application was made on May 9, 1986.)

Question of Privacy

File: 371

Institution: *Privy Council Office*
Complaint: *Refusal - exemption [15(1), 16(1) and 19(1)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Resolved in part*

This complaint concerned information withheld in response to a request for access to records involving terrorist activities in Quebec between June 1, 1964, and February 1, 1965. The complainant argued that this event was at least 20 years old and that exemptions should be applied to as little material as possible.

An investigation was carried out which satisfied the Commissioner that the Privy Council Office conducted a thorough records search and that, with one exception, the record was correctly severed and the exemptions were supportable and correct in law.

The one exception dealt with a document exempted under subsection 19(1) of the Act, identified as "List of Persons Arrested and Convicted for Criminal Separatist Activity". With the exception of the cover page, this was totally exempted as personal information. The Commissioner wrote the Prime Minister, recommending release of the document, subject to some names not being disclosed as some of the persons named were not charged or had received pardons. The Commissioner also noted that the information in question was public and available through the courts of Quebec. The information had also been the subject of newspaper articles and was available in national and public libraries.

As a result, PCO released the questioned document, subject to exemptions.

Personal Information

File: 377

Institution: *Correctional Service Canada*
Complaint: *Refusal - exemption [16(1)(d), 19(1), 21(1)(a)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Disputed*

An individual complained because portions of a report he requested on food services at the Regional Psychiatric Centre (Penitentiary) in Saskatoon were exempted under paragraphs 16(1)(d) and 21(1)(a) and subsection 19(1) of the Act.

The Commissioner believed that some exemptions were not applicable under paragraphs 16(1)(d) and 21(1)(a) and subsection 19(1) and representations were made to the Correctional Service Canada (CSC). As a result, exemptions under paragraphs 16(1)(d) and 21(1)(a) were cancelled but exemptions were maintained under subsection 19(1) of the Act.

The Commissioner provided a report to the Solicitor General recommending disclosure to the complainant of the remaining exempted portions of the record. CSC then provided a severed record to the complainant, with certain portions still exempted under subsection 19(1).

This Office continued to view the complaint as well-founded and that the remaining portion of the record ought to be disclosed to the complainant. The Commissioner received the consent of the complainant to apply to the Federal Court of Canada for a review of the CSC refusal to disclose.

Partial Release

File: 392

Institution: *Environment Canada*
Complaint: *Refusal - exemption [14(a)]*
Finding: *Supportable*
Disposition: *Discontinued by complainant*
Result: *No action*

The complaint concerned Environment Canada's refusal to provide the minutes of meetings of the Federal-Provincial Committee on Air Pollution. The department's decision was based on paragraph 14(a) of the Act.

The department had exempted the whole requested record. However, as a result of discussions negotiated by this Office with the complainant and the department, the complainant could request specific minutes and the department would release them, subject to exemptions which, in the department's judgement, would prove injurious to the conduct of federal-provincial affairs if released. The complainant could then review the material and decide whether to pursue the request for all of the minutes.

The complainant did not act to secure a sample set of the minutes.

The Delicate Balance

File: 412

Institution: *Canada Mortgage and Housing Corporation*
Complaint: *Refusal - exemption [18(a) and (d), 19(1)]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

The complaint concerned a refusal by Canada Mortgage and Housing Corporation (CMHC) to disclose details of its undertakings to insure multiple unit residential building projects in metropolitan Toronto from 1978 through 1981.

CMHC refused to disclose the requested records on the grounds that portions contained personal information, the disclosure of which is prohibited under subsection 19(1), and that they contained financial, commercial or technical information that belonged to a government institution and had substantial value [18(a)], as well as information the disclosure of which could reasonably be expected to be materially injurious to the financial interests of the Canadian government or result in an undue benefit to any person [18(d)].

During negotiations with CHMC, it raised other grounds for exemption under the Act which could not be ignored:

1. Under paragraph 18(b), the institution is permitted to withhold a record where disclosure could reasonably be expected to prejudice its competitive position.
2. Under paragraphs 20(1)(b), (c) and (d), the institution is required to withhold any record that contains financial or commercial information that is supplied to CMHC in confidence by a third party and is treated consistently in a confidential manner by the third party or information where disclosure could reasonably be expected to prejudice the competitive position of the third party or interfere with its contractual or other negotiations.

It is not the Commissioner's normal practice to suggest alternate grounds for exemption under the Act or to condone additional grounds which have not been raised within the time frame prescribed in the Act. Where such does occur, an explanation to the complainant is warranted. In the present case, the exemption under paragraph 18(b) was closely related to the grounds of paragraphs 18(a) and (d); therefore the Commissioner accepted the claim under paragraph 18(b) more as a clarification of the initial grounds than as a completely new ground.

Exemptions under paragraphs 20(1)(b), (c) and (d) all relate to the rights of third parties which had not been privy to either the access application or the complaint. It would have been unfair to the third parties to fail to consider their interests under the Act simply because CMHC did not claim exemptions pertaining to them in the first place.

CMHC sets its premiums using a complex risk assessment procedure which considers the equity ratio, type of construction, number of units in a building, location, housing market, track record of the lender and builder. The Commissioner was satisfied that disclosure of

details of the undertakings to insure would likely be of substantial value to competitors in the field and therefore the exemption, under paragraph 18(a), was properly applied. Even information which is a number of years old would be useful in this respect.

CMHC argued that disclosure of details of undertakings to insure would give a competitor an advantage which would prejudice CMHC's competitive position in the mortgage insurance market. Lending institutions applying for mortgage insurance have always done so on the basis that information provided is in confidence. If it became apparent to lenders that under the *Access to Information Act* CMHC might disclose information, this could become a factor in their business decisions. The Commissioner was satisfied that the exemption claimed under paragraph 18(b) was correct as disclosure could prejudice CMHC's competitive position.

Under paragraph 18(d), CMHC argued that any such effect on its competitive position could lead to an absolute loss of business or a selective drawing away of the better risk business, which could reduce the mortgage insurance fund to the point where it would not be sufficient to meet anticipated liabilities.

The information on the undertakings to insure is provided by lending institutions in confidence. The Office is not aware, except where details of mortgages are registered on title, that lending institutions have failed to consistently treat this information as confidential. As a result, the Commissioner was satisfied that, pursuant to paragraph 20(1)(b), CMHC is required to withhold from disclosure details of the undertakings to insure.

Under paragraphs 20(1)(c) and (d), CMHC is required to refuse to disclose records where disclosure could have an adverse effect on the competitive position, or contractual negotiations, of third parties. Since the documents requested relate to the period 1978 to 1981, it is not likely that disclosure would have adverse effects where mortgages have been taken and the details are largely public. However, a significant proportion of the undertakings do not culminate in insured mortgage loans being advanced and consequently the undertakings contain a great deal of information about lender's business transactions which would not otherwise be available. The Commissioner agreed that certain aspects of the undertakings, such as the maximum equity ratio which CMHC is prepared to insure and the premium rates are information which, if disclosed, could prejudicially affect the lender operations.

The Commissioner concluded that the exemption of the requested records by CMHC was justified, if not required, under the Act.

CMHC advised the Commissioner that it was prepared to disclose limited portions of the undertakings where the same information is publicly available through the registry office.

In such cases, the applicant will be required to pay the cost of searching for such records and putting them in order. Record retrieval would be a manual operation.

Blanket Exemption

File: 424

Institution: *Health and Welfare Canada*
Complaint: *Refusal - exemption [13(1)(a) and (c), 14(a), 19(1), 21(1)(a) and (b)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Disputed*

A representative of an access applicant complained that Health and Welfare Canada had denied access to records of meetings of the National Advisory Committee on Immunization (NACI).

The department claimed the following exemptions:

- paragraph 13(1)(a) [confidential information from a foreign government or institution];
- paragraph 13(1)(c) [confidential information from a provincial government or institution];
- paragraph 14(a) [injury to federal-provincial affairs];
- subsection 19(1) [personal information];
- paragraph 21(1)(a) [advice or recommendations developed for the government];
- paragraph 21(1)(b) [consultations or deliberations involving government employees, etc.].

The department failed to indicate the extent to which each of the exemptions applied to the requested records.

In the course of the investigation, the Office learned that the department intended that paragraph 21(1)(b) apply to the records in their entirety. The Commissioner recommended to the Minister that the department withdraw its blanket exemption and disclose the records, subject to any other appropriate exemptions under the Act. This Office did not consider the accounts of the NACI to be consultations or deliberations involving federal government officials or employees because the NACI generally has only one federal government member.

The Minister rejected the recommendation for disclosure and has maintained a blanket exemption under paragraph 21(1)(b) as well as exemptions of portions of the records on the grounds described previously. The Minister stated that disclosure of the minutes would seriously affect the capability of the committee to deliberate and advise freely on health protection issues and to produce essential statements on immunization.

The Commissioner did not agree with the blanket exemption and, with the consent of the complainant, filed an application in Federal Court of Canada.

Why Investigations Take So Long

File: 439

Institution: *Energy, Mines and Resources*
Complaint: *Refusal - exemption [19(1), 20(1)(b) and (c), 23]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

An individual complained that the Department of Energy, Mines and Resources (EMR) had denied him access to Canadian Home Insulation Program administration records.

The department advised the complainant that notifications of intention to disclose were sent to third parties in accordance with subsection 28(1) of the Act and that information available for disclosure would subsequently be sent to him. They also provided him with some accessible records or portions of records but claimed exemptions under subsection 19(1) and section 23. The investigator disagreed with most of the exemptions.

During the investigation, the department contacted the third parties and advised them that a simple repetition of the words of the cited sections of the Act would not satisfy the Information Commissioner. The department made it absolutely clear to the third parties that it was their responsibility to demonstrate that release of each particular document, or part of a document, could reasonably be expected to result in injury to them.

Eventually, additional records were located and released and records were gradually released as third parties' responses slowly came in.

The investigation revealed that some of the records exempted under subsection 19(1) and section 23 had been withheld improperly. The department agreed to release some of the records but continued to exempt the remaining records under subsection 19(1) and section 23. It also exempted some of the records as third party information under paragraph 20(1)(b).

The investigator finally persuaded the department to apply severance where whole documents had been withheld and to cancel the section 23 exemptions. In all, the period of negotiating took 14 months.

CPIC Records

File: 450

Institution: *Royal Canadian Mounted Police*
Complaint: *Refusal - exemption [13(1)(c) and (d), 16(2)(c), 19(1)]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual sought copies of reports indicating possible violations of the Canadian Police Information Centre (CPIC) policy and copies of reports of any serious, flagrant or continuous breaches of CPIC policy. The Royal Canadian Mounted Police (RCMP) stated that the requested records would not be released based on paragraphs 13(1)(c) and (d), paragraph 16(2)(c) and subsection 19(1) of the Act.

Paragraph 16(2)(c) of the Act, provides that an institution may refuse to disclose a record that contains information the release of which could reasonably be expected to facilitate the commission of an offence. Based on the investigation, the Commissioner was satisfied that the disclosure of the documents requested could result in the injury described in paragraph 16(2)(c) and since that paragraph applied to all the exempted records, there was no need to consider whether the other exemptions were justified in whole or in part.

The complainant made representations which included the following:

> "It is not my intention to discover information that reasonably may be expected to facilitate the commission of an offence. On the contrary I want to find out whether there have been breaches of CPIC policy.
>
> "...If the RCMP is successful in invoking paragraph 16(2)(c) am I then justified in concluding that there indeed have been criminal violations involving CPIC use, but the RCMP refuses to reveal any and all information about those violations, including their number, which could range from one to one hundred to one thousand? I'm not sure that is the impression the force wishes to leave."

The Commissioner informed the complainant that whether he intended to discover information that could reasonably be expected to facilitate the commission of an offence was not relevant to the exemption. The test was whether the information, if made available to any member of the public through the Act, could have the described effect.

The Commissioner added that the successful use of paragraph 16(2)(c) did not necessarily mean that there had been criminal violations involving CPIC use. Such incidents may have been accidental or may not have led to criminal activity.

The complaint was dismissed because disclosure of details of CPIC policy breaches, not necessarily the technique of the violation but just dates, places and numbers of breaches, could identify potential weaknesses in the system. Disclosure could enable intrusion into the system and could reasonably be expected to facilitate the commission of an offence. For example, an intruder could learn whether he or she had been identified by the police as a suspect and which identifying features had been recorded. The person might even be able to delete information or suppress its retrieval.

On severance the RCMP stated that, "an attempt was made to sever the requested information under section 25 of the Act. However, the preponderance of material fell into the exempt category rendering the remaining material unintelligible."

The Commissioner explained that as a matter of policy government institutions are urged by her office to sever and release what portions of the record it can and let the complainant judge whether the disclosed material is useful or even intelligible. In this case the portion of the record that could be disclosed would contain virtually no information responsive to the request. The Commissioner thought it would be a waste of government and the complainant's time to go through the exercise. However, the complainant was informed that, if he wished to have the severance done, she would make such a recommendation to the RCMP.

Information Made Public Elsewhere

File: 451

Institution: *Treasury Board*
Complaint: *Refusal - exemption [19(1), 21(a), 23)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in full*

This complaint concerned the exemptions claimed by Treasury Board under subsection 19(1)—personal information, paragraph 21(1)(a)—advice or recommendations developed for a government institution or Minister of the Crown, and section 23—solicitor/client privilege, concerning his request for a report on a specific conflict of interest case.

The Commissioner's Office learned that portions of the material contained in the report had been disclosed at a hearing by the Public Service Commission. Members of the media were present at this hearing and the proceedings were thus reported. It was subsequently learned that appeals had been launched in the Supreme Court of Canada and the report had been filed with the Court, thereby placing it in the public domain. The Commissioner's representation that the report was releasable was accepted.

Exception Is Court Action

File: 493(2/2)

Institution: *Solicitor General*
Complaint: *Refusal - exemption [13(1)(a), 15(1)(e) and (g), 16(1)(a)(i) and (iii), 21(1)(a) and (b)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

An individual sought access to "records or any other material supplied by the Department of the Solicitor General and its employees to any agency of the United States concerning [a named Canadian author]".

The department released one letter and part of a telex, informing the applicant that the balance of the records were exempt under paragraphs 13(1)(a), 15(1)(e) and (g), 21(1)(a) and (b), and subparagraphs 16(1)(a)(i) and (iii) of the Act.

In each case only the exemption that appeared to be most readily sustainable was considered, even though more than one ground for exemption was claimed in all documents.

The Commissioner informed the complainant that, with one exception, the exemptions the department made were justified, based on the designated provisions of the Act.

The one exception was a document exempted under paragraph 21(1)(b) and subparagraphs 16(1)(a)(i) and (iii). The Commissioner wrote to the Solicitor General recommending that the questioned document be released. The Solicitor General refused to release the record and the Commissioner advised the complainant that, with his consent, she was prepared to take the exemption of that one document to the Federal Court of Canada. This was done on June 26, 1986.

Third Party Action

File: 497

Institution: *Environment Canada*
Complaint: *Refusal - exemption [20(1)(d)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

This complaint resulted from a request for access to a list of all hydro electric transformers and other equipment containing PCBs (Polychlorinated biphenyls)

in the City of Montreal. The department advised the applicant that the list was not available because it may infringe on the rights of those using PCBs and claimed an exemption pursuant to subsection 4(4) of the *Environmental Contaminants Act* and relying strictly on the provisions of the *Access to Information Act.*

The department, in accordance with the Act, had advised 271 firms of the department's intention to disclose the requested records, inviting representations from any of them if they objected to the disclosure.

The department concluded that only two firms gave reasons sufficient to warrant exemption under paragraph 20(1)(d) of the Act.

The Commissioner informed the complainant that she was satisfied that the records regarding the two firms were properly exempted.

The records of the remaining 269 firms were considered disclosable by the department and this Office. However, two additional firms which had objected to the disclosure of their records filed applications in Federal Court under section 44 to block the proposed disclosure. In the interest of pursuing the disclosure of the records of these two firms, the Information Commissioner was granted leave to intervene in the cases. The court held that a proper designation order had not been made as required under section 73.

The investigation has been closed pending further action by the department.

Prime Ministerial Discussions

File: 547

Institution: *Privy Council Office*
Complaint: *Refusal - exemption [14]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Resolved in full*

An individual complained when information was exempted under section 14 in response to his request for Cabinet minutes and records of discussions between Prime Minister Pearson and Premier Lesage on May 4 and 11, 1965. Privy Council Office (PCO) had provided seven pages of documents but eight portions of the records were exempted.

The Commissioner's investigator examined news articles and editorials which appeared in Ottawa and Montreal newspapers at the relevant time, as well as the Hansard record of the Commons debates. The Commissioner was satisfied that both the substance and tenor of the discussions between Mr. Pearson and Mr. Lesage were known to the public and that officials in the Privy Council Office had not demonstrated how disclosure of the exempted portions of the requested records could injure Canada's conduct of federal-provincial affairs.

As a result of the investigation and a report to the Prime Minister, PCO disclosed the previously-exempted records in their entirety.

Third Party Protected

File: 561

Institution: *Supply and Services Canada*
Complaint: *Refusal - exemption [20(1)(b), (c) and (d)]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual complained when he was provided with the names of the firms bidding on a specified contract but was denied the unit prices based on paragraphs 20(1)(b), (c) and (d) of the Act.

The investigation revealed that the department contacted the third parties who objected to the release of the unit prices.

The Information Commissioner examined the documents in question and found that they met the tests in paragraphs 20(1)(b), (c) and (d) as they contained financial and commercial information supplied to a government institution and had been treated consistently in a confidential manner by third parties. Further, the disclosure of the unit prices could reasonably be expected to prejudice the competitive position of third parties.

The complainant said that in the past he was always able to get such information. Prior to the Act coming into force in 1983, the department did on occasion release this information. However, the policy changed in anticipation of the new legislation and the information requested has consistently been exempted unless third parties agree to disclosure. There is no indication that this information has not been treated consistently in a confidential manner since the beginning of the *Access to Information Act.*

Solicitor-Client Privilege

File: 570

Institution: *Employment and Immigration Canada*
Complaint: *Refusal - exemption [23]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual complained when Employment and Immigration Canada (CEIC) refused to release a copy of a study pertaining to the compatibility of the *Unemployment Insurance Act* and the Charter of Rights and Freedom.

The investigation revealed that parts of the introduction to the study were released and the rest was exempted under section 23 of the Act. The documents in question were examined to determine whether the exemption was properly applied. The records comprised material prepared by CEIC specifically for review by lawyers with the Department of Justice, and sought the comments of legal counsel. Therefore the Commissioner was satisfied that the records constituted information subject to solicitor-client privilege, a concept developed under the common law.

Section 23 of the *Access to Information Act* does not mandatorily prohibit government institutions from disclosing material subject to privilege, but rather permits the head of a government institution to refuse disclosure. A Commissioner's review of news stories and other public documents determined that the claimed privilege had not been compromised by the government.

The Commissioner also considered whether CEIC might disclose, or ought to have disclosed, the requested records notwithstanding its discretion to exempt them. This took into account comments from the complainant about the cost to taxpayers of the study of the Unemployment Insurance program. However, the Commissioner accepted that it is within CEIC's rights not to disclose details of legal opinions sought and received.

The Commissioner pointed out that as a result of the Federal Court ruling in the case of Information Commissioner v. Chairman of Canadian Radio-Television and Telecommunications Commission (Federal Court, Trial Division, No. T-707-85, February 28, 1986) the final word in the exercise of discretion rests with the Minister of Employment and Immigration, so long as the record is properly characterized as subject to solicitor-client privilege.

Job Descriptions

File: 578(1/2)

Institution: *External Affairs*
Complaint: *Refusal - exemption [15(1)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

This complaint involved a complete exemption under subsection 15(1) of documents requested for the job description and classification evaluation rationales for five specific positions.

The investigation revealed that the requested five job descriptions were drawn in part from classified information that was supplied to, and held by, the department in confidence. Through negotiations with officials of the department, they agreed to release portions of the record, with the remainder exempted under subsection 15(1) of the Act.

The Commissioner informed the complainant that the exempted portions were examined and she was satisfied that they contained information the disclosure of which could reasonably be expected to be injurious to the detection, prevention or suppression of subversive or hostile activities and that the exemptions were correctly applied by the department.

Penitentiary Sites

File: 581(1/2)

Institution: *Correctional Service Canada*
Complaint: *Refusal - exemption [21(1)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in full*

An individual requested "all information related to and including recommendations made or received by the government on the best and most cost effective locations to build federal prisons in Canada in the 1980's (beginning in 1980)". The department provided some records but exempted most of them under subsections 21(1) and 69(1) of the Act.

As a result of the Commissioner's investigation, Correctional Service Canada released all the records that were originally exempted under subsection 21(1). Exclusions under subsection 69(1) are dealt with separately.

Aircraft Accident Report

File: 594

Institution: *Canadian Aviation Safety Board*
Complaint: *Refusal - exemption [16(1)(c)(iii)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in full*

An individual requested copies of documents on Aircraft Accident C-GPAM, February 15, 1985, at Pembroke Airport. The Canadian Aviation Safety Board forwarded a quantity of material to the requestor but exempted page 4 of the report "Elevation View of Locale" under subparagraph 16(1)(c)(iii) of the Act.

An investigator discussed the complaint with an official of the Canadian Aviation Safety Board and arranged to examine the document. However, before the meeting took place, the Board released the exempted document.

Public Interest

File: 601

Institution: *External Affairs*
Complaint: *Refusal - exemption [20(1)(b) and (c)]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual objected to the exemptions under paragraphs 20(1)(b) and (c) claimed by External Affairs in response to his request for records showing the volume of cheese imported by individual importers in 1983, 1984 and 1985. He contended that the decision to grant an import quota rested entirely with the federal government, that the decision presumably is made in the public interest and therefore the public has a right to know. He also contended that there is a clear economic advantage and benefit conferred with the right to import and that the public has a right to know the nature and extent of these benefits.

While accepting the argument and the amount of the quotas that there may be a public interest in disclosure, the Commissioner was satisfied that the information, if released, "could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party". In such circumstances, the exemption paragraph 20(1)(c) is mandatory.

The complainant made representations favoring release of cheese import quotas. He concluded that "...the pro-confidentiality argument rests on two false assumptions - 1. That the permit system exists to provide a profit for every importer and 2. That confidentiality is crucial to preserving that profitability." He also contended that the profits work against the public interest and this public interest overrides the "commercial confidential" argument.

The Commissioner replied:

> "Having been persuaded that the information that was withheld from you in this case was confidential business information and that release might cause material financial loss or gain to a third party, I have no choice in terms of the *Access to Information Act* but to support the exemptions. The morality of the quota system is, rightly or wrongly, not part of the Information Commissioner's consideration.

In other words, I cannot use any public interest arguments to persuade the government to change its mind.

"...I remain convinced that refusal to disclose must be supported if the record has been legitimately exempted under subsection 20(1)(b) and (c), even if it might be in the public interest that the information be disclosed."

Loss of Land Use Studies

File: 602

Institution: *Indian Affairs and Northern Development*
Complaint: *Refusal - exemption [20(1)(b) and (d)]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

The complaint involved access to copies of loss of use studies by Indian Bands seeking compensation from the Government of Canada in connection with loss of land. The department exempted the studies under paragraphs 20(1)(b) and (d) of the Act.

According to the complainant, these studies could have been released to him under paragraph 8(2)(k) of the *Privacy Act* as he was researching and validating the claims, disputes and grievances of and for a specific Indian Band.

The investigation confirmed that, in addition to one particular study that could not be supported under paragraphs 20(1)(b) and (d), segments of other studies did not qualify for exemption under section 20 because settlement had been achieved and negotiating positions could not be jeopardized.

The department reviewed the exemption and agreed it should have invoked paragraph 21(1)(c) concerning the specific study. The department informed the complainant of the error. It also agreed that it could release the settled studies but that it would have to ask the Indian Bands whose claims had been settled if they objected to the release of the studies they submitted in support of claims. All of the Indian Bands contacted objected to disclosure of the requested records because either the information was supplied in confidence or the study was still in use as negotiations on a claim and therefore exempt under paragraph 20(1)(d).

The Commissioner was satisfied that the remaining exemptions claimed under paragraph 20(1)(b) were justified. Loss of land use studies involving trees, wild animals, fishing and natural resources, deal with food to Indians and have monetary value. Further, the studies are technical because the information stresses boundaries and land sites. The other exemption claimed under paragraph 20(1)(d) was also proper in that disclosure could reasonably be expected to interfere with contractual or other negotiations of a third party. If the loss of use studies were supplied the opposition, it could interfere with negotiations and cause material, financial loss or gain to a third party Band. The Bands pay considerable amounts for the land use studies and, once produced, they could be obtained and adapted for re-use by other Bands or their agents at considerably reduced sums.

The Commissioner was satisfied that the department had correctly applied the exemption under paragraph 21(1)(c) as the study was done on behalf of the department for its information and as such contained "positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada".

Could Cause Injury

File: 611

Institution: *Health and Welfare Canada*
Complaint: *Refusal - exemption [19(1), 20(1)(a), (b) and (c)] - [10]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual requested access to the Notice of Compliance of a particular drug. The department advised him that it could not comply with his request and that, if such information did exist, it would be exempted under subsection 19(1) and paragraphs 20(1)(a), (b) and (c) of the Act. The individual objected to the response, contending that the sections cited by the department were not applicable.

As a result of the investigation, the Commissioner was satisfied that disclosure of the existence, or non-existence, of the type of record requested could be expected to cause the injury contemplated in paragraph 20(1)(c). Paragraphs 20(1)(a), (b) and subsection 19(1) may have also been applicable, but were not addressed. Confirmation that a prescription drug has, or has not, reached the Notice of Compliance stage before approval is made public could seriously prejudice the manufacturer's competitive position in the process of developing and acquiring approval to market the new product.

The Commissioner also informed the complainant that, under section 10 of the Act, the head of a government institution is not required to indicate whether a record actually exists. However, the provisions on which refusal could reasonably be expected to be based must be provided.

War Death

File: 617

Institution: *Public Archives*
Complaint: *Refusal - exemption [19(1)]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual complained that she had been denied access to minutes of the 1945 2nd Naval Enquiry into her brother's death as well as the war record of an associate of her brother.

The investigation showed that copies of the brother's service file and board of enquiry file had been sent to the complainant. A small amount of personal information on other individuals was exempted. A review of these exemptions confirmed that they were lawfully applied as provided under subsection 19(1) of the Act.

The Commissioner informed the complainant that the investigation showed that she had received all the information to which she was entitled and that there was no indication in Public Archives that a second board of enquiry was ever held.

Further, Public Archives never received the war record of her brother's associate and could, therefore, not respond to this request.

Minutes Released

File: 622

Institution: *Canadian Commercial Corporation*
Complaint: *Refusal - exemption [21(1)(a)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

An applicant complained when the Canadian Commercial Corporation (CCC) denied him access to minutes of the Industrial Advisory Committee. The CCC denial of access to the documents was under paragraph 21(1)(a) and based on the grounds that the information therein contained advice or recommendations developed by, or for, a government institution or a Minister of the Crown.

In light of a Federal Court decision in the case of the Information Commissioner v. CRTC, the Corporation could simply have maintained its position, knowing that its decision to exempt could not effectively be challenged in Court. Corporation officials decided, however, to apply the principle of severability and it released almost all of the minutes, exempting only certain segments under paragraph 21(1)(a).

The Commissioner informed the complainant that she was satisfied that the exemptions had been legitimately claimed by CCC as such exemptions constituted advice or recommendations within the meaning of that paragraph.

CSIS Manual

File: 625

Institution: *Canadian Security Intelligence Service*
Complaint: *Refusal - exemption [15(1)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Resolved in part*

The complaint concerned the refusal by the Canadian Security Intelligence Service (CSIS) to release under subsection 15(1) of the Act its Operational Manual and Technical Aids, Policy and Procedures Manual.

The investigation revealed that the manuals could not be exempted in their entirety under subsection 15(1). As a result, the Commissioner recommended to the Minister that the records be released subject to severance under section 25 of the Act.

CSIS complied with the recommendation and released to the complainant the severed records, with exemptions claimed.

Information/Public Figure

File: 626

Institution: *Employment and Immigration Canada*
Complaint: *Refusal - exemption [19(1)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Disputed*

The complainant had requested records concerning a well-known public figure. When Employment and Immigration Canada refused to disclose any

documents on the file, except press clippings, on the ground that they were considered to be personal information under subsection 19(1) of the Act, the requestor complained, noting that "documents released by the Public Archives of Canada have resulted in a great many details of [the named person's] past being made public".

The investigation revealed that the department said most of the material on file was personal information, but did not identify what was not personal. The department agreed that some of the records may have become public knowledge and that it would do a review, as resources permitted, to see if release of some of the material was possible.

The investigator's review of records at Public Archives Canada found documents among some of the publicly available historical records which appeared to be similar, and in some cases the same, as the records which Employment and Immigration Canada had refused to disclose.

On May 8, 1986, the Commissioner reported her findings to the Minister of Employment and Immigration, recommending that the requested records be made available to the complainant by June 6, 1986. When the complainant had not received anything by June 11, 1986, he authorized the Information Commissioner to apply to the Federal Court for a review of the department's refusal.

Native Claims Policy

File: 631

Institution: *Indian Affairs and Northern Development*
Complaint: *Refusal - exemption [21(1)(a)]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual objected to exemptions claimed under paragraph 21(1)(a) by the Department of Indian Affairs and Northern Development regarding a request for access to paragraphs 15 to 27 inclusive and Annex B of the discussion paper on Native Claims Policy.

The investigation revealed that the discussion paper was prepared by the department to inform federal Cabinet members of the various land entitlement issues and options the government might consider when developing negotiating positions.

When submitting the paper to Cabinet, the department recommended that the paragraphs dealing with compensation (paragraphs 15 to 24 inclusive), financial considerations (paragraphs 25 to 27 inclusive), and specific claim settlement - estimated expenditures (Annex B), not be released to the public. Cabinet subsequently confirmed that, while the other portions of the discussion paper could be released, these particular sections should be exempted under paragraph 21(1)(a) of the *Access to Information Act.*

The Commissioner found that the discussion paper, and more particularly those portions that were exempted, represented positions or plans developed

specifically for the purpose of negotiations carried on by, or on behalf of, the Government of Canada. The exempted portions contained suggestions or options for consideration by federal negotiators and the release of this information could unfairly compromise the federal government's ability to negotiate. Consequently, the Commissioner was satisfied that the exemptions were properly applied.

Public Opinion Survey

Files: 638, 643(1/2)
663(1/2), 677(1/2)

Institution: *Finance*
Complaint: *Refusal - exemption [18(d)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

Four individuals lodged separate complaints against the Department of Finance because of its refusal to apply the severance principle under section 25 of the Act to release a public opinion survey conducted for the department. Finance denied access to the records on the basis of paragraph 18(d) of the Act because it held that the document was background information for the Minister to develop economic policies and make decisions on the direction and management of the economy.

As a result of the investigation, the department severed the requested survey and released 55 of the 107 pages of the report. It exempted the remaining pages under paragraph 18(d).

Public Opinion Survey

Files: 643(2/2),
663(2/2), 677(2/2)

Institution: *Finance*
Complaint: *Refusal - exemption [18(d)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in full*

Three individuals lodged similar complaints against the Department of Finance because of its refusal to release a public opinion survey conducted for the department.

Originally the department denied access to the entire survey under paragraph 18(d) of the Act because "it served as background for the Minister in the ongoing development of economic policies and in the making of certain decisions on the direction and management of the economy". As a result of the investigation, the department severed the record and released portions to the complainants. They objected to this partial release and acted to have the entire survey made public.

The Commissioner's investigator made representations for the release of the whole survey, pointing out various reasons why continued denial could not be supported. As a result, the department released the entire report.

Public Interest

File: 652

Institution: *Canadian Security Intelligence Service*
Complaint: *Refusal - exemption [19(1)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Resolved in part*

An individual objected when he was denied access to records on a named person under subsection 19(1).

The investigation showed that the information contained in the Canadian Security Intelligence Service (CSIS) file on the named person was personal information as defined by section 3 of the *Privacy Act.* However, major details of the case had been public since 1945, and most of the erroneous information contained in the public information had been corrected by the Royal Canadian Mounted Police summary of the case released in 1983. In addition, attempts had been made over the years to gain access to the file, indicating a public interest in its disclosure.

Accordingly, the Commissioner reported to the Solicitor General of Canada that, in her view, exemptions 19(2)(b) and (c) to paragraph 19(1) of the *Access to Information Act* should apply. The Commissioner held that paragraph 19(2)(b) covered the information contained in the records that was publicly available, though not in the detail contained in the person's file. With reference to paragraph 19(2)(c), it was the Commissioner's opinion that release was authorized by subparagraph 8(2)(m) of the *Privacy Act* in that public interest in disclosure clearly outweighed any real invasion of the person's privacy.

As a result, CSIS informed the complainant that access would be granted.

Seeks Clarification

Files: 657, 698, 708, 830

Institution: *Immigration Appeal Board*
Complaint: *Refusal - exemption [17]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Disputed*

Four individuals complained of the refusal by the Immigration Appeal Board (IAB) to disclose entire records about the Board's decision to grant refugee status to a named person under section 17 of the Act, which provides:

> "The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to threaten the safety of individuals."

Based on a review of the records, the Commissioner advised the Chairman of the Immigration Appeal Board that the investigation did not identify sufficient justification to support the Board's contention that the total exemption of the records was necessary to protect an individual's safety.

The Board responded that a quorum of the Board, designated to hear the named case, delivered a decision from the bench allowing a motion for an *in camera* hearing.

Section 82 of the *Immigration Appeal Act 1976* reads:

> "An appeal to the Board should be heard in public but if any party thereto so requests the Board may in its discretion direct that the appeal be heard *in camera*".

The Chairman of the Board found no authority to vary that decision.

The issue now is whether the Immigration Appeal Board, as a Superior Court of record, is permitted or required to maintain the secrecy of *in camera* proceedings where a request for those records has been made under the *Access to Information Act*.

There was no dispute that the IAB is subject to the Act, but the Chairman of the Board doubted that the rights of a requestor to receive records under the Act override the decision lawfully taken by three Immigration Appeal Board members, acting independently of the Chairman, to conduct a hearing *in camera* and to maintain the secrecy of the proceedings.

This Office believed that when Parliament passed the *Access to Information Act* and included the Immigration Appeal Board in Schedule I as a government institution subject to the Act, it intended that the provisions of other statutes, including the provisions in the *Immigration Act 1976* authorizing the Board to conduct *in camera* hearings, are to yield in favour of the right to disclosure under section 4 of the *Access to Information Act*, which reads, in part:

> "Subject to this Act, but notwithstanding any other Act of Parliament, every person...has a right to and shall, on request, be given access to any record under the control of a government institution."

In some instances, provisions in other statutes prohibiting the disclosure of information have been effectively incorporated by reference into the *Access to Information Act* through subsection 24(1) which reads:

> "The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II."

The provisions in the *Immigration Act 1976* authorizing *in camera* hearings are not listed in Schedule II of the *Access to Information Act*.

Based on the foregoing, the Commissioner maintained in all four cases that the requested records be disclosed, subject to any particular exemptions which might be appropriate under the Act.

The complainants' consent is being sought to make an application to the Federal Court to clarify the applicability of the *Access to Information Act* to *in camera* hearings of the Immigration Appeal Board.

MP's and GG's Pensions

File: 676

Institution: *Supply and Services Canada*
Complaint: *Refusal - exemption [19(1)]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

When Supply and Services Canada was asked for the names and pension amounts of retired Members of Parliament, Prime Ministers and Governors General, it refused to disclose the information on the ground that it was exempt pursuant to subsection 19(1) of the *Access to Information Act*, which prohibits the disclosure of personal information. The department did provide a copy of its "Report on the Administration of the Members of Parliament Retiring Allowances Act for the Fiscal Year ended March 31, 1985".

The Commissioner concluded that the department correctly exempted the pension records, since they relate to the employment history, financial transactions, and the marital status of the individuals, all of which constitute personal information.

In a letter to the Information Commissioner, the complainant said that the information requested was on individuals who received their pensions as a result of having held public office and since the pensions are paid from public funds the expenditures ought to be public.

The Information Commissioner replied that although the *Access to Information Act* provides for disclosure of personal information in the case of individuals who are, or were, officers or employees of government institutions, only salary ranges and not exact amounts (or pensions), are disclosable. Familiarity with the government's pension scheme might enable determination of the range within which an individual's pension would lie upon retirement, but the Information Commissioner warned that other factors may affect the range.

> "For example, if an individual has elected to "buy back" pensionable service for previous years of employment with the federal government for which contributions were not made, the pension will be higher... In respect of a deceased public servant, the pension payable to a widow, widower *or other dependent will depend on the number and relationship of such* or other dependent will depend on the number and relationship of such survivors."

Under the *Access to Information Act* a government institution is not permitted to disclose elective choices to buy back years of service, to combine different types of pensions and so forth since such information does not fall within the exception to the non-disclosure rule. Similarly, information about a deceased public servant's survivors and their relationship to him or her is not disclosable because this is information personal to the deceased individual and to the survivors. The Commissioner pointed out that Parliament has struck a balance between the public's right to know how its tax dollars are being spent and the privacy of individuals by permitting the disclosure of salary ranges and the employment history of public servants so that the public can determine an individual's government pension within a certain latitude.

Pension information about former Members of Parliament and former Governors General is already publicly available to a large extent. By using the rules governing pension entitlements for such individuals the complainant could approximate their pension entitlements, just as could be done in the case of "ordinary" public servants whose salary ranges, and years of service, are accessible under the *Access to Information Act.*

The Commissioner cautioned the complainant against using this information to determine pensions precisely:

> "The pension determinations will only be approximate because, once again, there may be variable factors at work which are based on information to which you do not have access. For example, I understand that Members of Parliament are entitled to a supplemental amount for acting on various committees and this may count as pensionable income.
>
> "Also, there are myriad of elective choices which Members of Parliament who have been out of office, and then returned to office at a later time, and so forth, may have made concerning their pension entitlements."

The House of Commons and the Office of the Governor General are not listed in Schedule I of the *Access to Information Act* but salaries of Members of Parliament and the Governors General are normally a matter of public record.

The Information Commissioner concluded:

> "The reason that I have gone into this amount of detail is because your access to information request dealt with specific categories of publicly-paid (and pensioned) individuals and the point which I want to make is that the imprecision in estimating their pensions does *not* derive just from their special status. The imprecision is more or less the same as it would be for public servants whose salary ranges are accessible under the Act... I think that the Department of Supply and Services was correct in refusing to disclose the names and pension amounts of the individuals in question."

The complaint was dismissed as not supportable.

Severance Required

File: 715(1/2)

Institution: *Indian Affairs and Northern Development*
Complaint: *Refusal - exemption [18(d), 21(1)(a) and (d)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

An individual objected when the department totally exempted a report entitled "Indian Oil and Gas" under paragraphs 18(d) and 21(1)(a) and (d).

The department reconsidered its position following discussions with an investigator and agreed to sever and release the document to the complainant, claiming exemptions under paragraphs 20(1)(b) and (c) and 21(1)(d).

The Commissioner reviewed the exempted portions of the report and found that they were justified and in accordance with the Act.

Lack of Communication

File: 715(2/2)

Institution: *Indian Affairs and Northern Development*
Complaint: *Refusal - exemption [20(1)(d)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Resolved in full*

A reporter complained when the department exempted a copy of a letter from a consultant to the Minister of Indian Affairs and Northern Development in response to a request for records concerning a named Indian Band. The exemption was under paragraph 20(1)(d).

As a result of the investigation, the department informed the Commissioner on August 14, 1986, that it would release the letter in its entirety. On September 29, the Commissioner learned that the letter had not been forwarded and recommended that it be released. On October 27, 1986, the department forwarded a copy of the letter, without exemptions, to the complainant.

After receiving the letter, the complainant alleged that the department had previously released the same letter to another reporter.

The investigator's further enquiries revealed that a recommendation to release was made to the Deputy Minister on August 11, and the authorization to release was made on August 13. This led to the phone call from the department on August 14 advising of the expected release to the complainant. Officials in another area of the department, knowing of the decision to release and without the direction or knowledge of the department's Access to Information Unit, sent the letter to the second reporter. These officials were unaware of the delay that was occurring to the complainant's official access request, which was being questioned in another area of the department. Similarly, personnel in the Access Unit were unaware that the letter had been informally released to other persons.

The Commissioner found no specific intent on the department's behalf to discriminate against the complainant.

Exemption Cancelled

File: 735

Institution: *External Affairs*
Complaint: *Refusal - exemption [15(1)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in full*

An individual complained that the exemption imposed on the record of the Canadian Conservative Centre was not justified under subsection 15(1) of the *Access to Information Act.*

As a result of the investigation, the department re-examined the exemption and released the entire record.

Information About a Soldier

File: 738

Institution: *Public Archives*
Complaint: *Refusal - exemption [19(1)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

An individual objected to the personal information exemption claimed by Public Archives under subsection 19(1) in response to his request for military records of a named person.

Public Archives released the date that the named person enrolled in the Canadian Expeditionary Force, the countries in which he served and the date of his discharge. Other information was withheld because there was no proof that the person had been dead for more than 20 years and to release personal information about him would violate subsection 19(1) of the Act.

The Commissioner's review of the records confirmed that portions were clearly personal information correctly exempted under subsection 19(1) of the *Access to Information Act.* However, other information could have been released to the complainant based on the exceptions allowed under paragraph 3(j) of the *Privacy Act* (information relating to the position or functions of an officer or employee of a government institution).

Consultations with the department led to reconsideration of the request and release of additional information which revealed the places of the person's enlistment and discharge, the names of the units in which he served and the dates of his overseas service.

Names of Band Members

File: 740

Institution: *Indian Affairs and Northern Development*
Complaint: *Refusal - exemption [19(1)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

A member of an Indian Band requested access to "...membership lists for five years—from 1981 to present" and "voting lists for the same five-year period of time" of his Band. The department exempted the records as personal information under subsection 19(1) of the Act.

The investigator made representations for release because the information would be publicly available based upon the provisions of subsection 14(3) of the *Indian Act* which reads:

> "The Counsel of each band shall, forthwith on receiving a copy of the Band List...post the copy of the list as the case may be, in a conspicuous place on the reserve of the band."

Upon reconsideration the department offered to release to the complainant the lists of Registered Indians for the requested named Indian Band for the years 1981-1985 inclusive. The department informed the complainant that the 1986 Band List would not be made up until December 31, 1986, and therefore was unavailable.

The department informed this Office that no copies of the voters list could be found. It stated that "...the department has no involvement in the electoral process since this band conducts its selection of Chief and Council in accordance with band custom". The Commissioner was satisfied that the department did not have the lists.

Research Information

File: 749

Institution: *National Research Council*
Complaint: *Refusal - exemption [20(1)(a), (b), (c) and (d)]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

The complaint involved a request for access to records concerning research projects carried out by two [named] companies, which were funded under the Industrial Research Assistance Program (IRAP) or Programs for Industry/ Laboratory Projects (PILP). The complainant contended that paragraph 20(1)(b) did not apply because the technical information would have had to be treated consistently in a confidential manner by the third party. The complainant stated that in this case the information was contained in an issued Canadian Patent or in a patent application still pending.

Further, the complainant stated that specific IRAP program contracts, or agreements between parties and the federal government, could not be exempted from access under the *Access to Information Act* or the *Privacy Act.*

The investigation confirmed that the records in question contained scientific and technical information supplied to a government institution by a third party and was treated consistently in a confidential manner by the third party. The investigator found no indication that the third party released the information in a Canadian Patent application.

The investigation also demonstrated that no specific contract or agreement exists between a third party and IRAP through administration by the National Research Council (NRC). All recipients of IRAP assistance are governed by the IRAP Information for Applicants, which is available on request from the NRC. This booklet is publicly available and contains an outline of the intent and nature of the program and describes the parameters within which the recipients must perform. The agreement, as it might be referred to, is in effect once the research application is accepted by IRAP.

When contacted, the third party declined to agree to release of the information requested. As a result, the Commissioner was satisfied that the department had properly exempted the records under paragraph 20(1)(b).

The Commissioner also informed the complainant that, where more than one paragraph of a section is cited to exempt a record, it is not necessary to inquire into the propriety of using all as long as there is clear justification for the use of one.

Severance Leaves Nothing Much

File: 766

Institution: *Public Archives*
Complaint: *Refusal - exemption [15, 16(1)(c), 19(1)]*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

An individual objected to the exemptions Public Archives claimed under section 15, paragraph 16(1)(c) and subsection 19(1) in response to his request for file SF-J-3, Joint Intelligence Bureau.

The investigation determined that the file contained some material that could be severed and released. The department agreed to review the record and identify those portions for release to the complainant. A specific estimate of the costs for search and preparation was not prepared, but the department felt considerable time and effort would be required to do the severance.

The investigator found that the department was justified in exempting much of the record under section 15 and under paragraph 16(1)(c). Some records were also exempted under subsection 19(1). We did not inquire into the propriety of using the second section as long as there was clear justification for the use of one.

Normally, the Commissioner recommends, or suggests, release after severance even when the applicant receives very little, provided that the applicant gives informed consent and is willing to pay for virtually blank pages. This is based on the belief that only the applicant can decide whether the severed record is meaningful.

In this case the department was willing to sever and release but the Commissioner's Office was faced with a dilemma because we agreed that severance would be time-consuming and costly and that the material the applicant would receive would be of limited value and not commensurate with the potential fee. We made it clear that the choice was his not ours and he opted not to pursue the matter.

Sailor May Find His Mates

File: 788

Institution: *Transport Canada*
Complaint: *Refusal - exemption [19(1)]*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Disputed (but resolved)*

An individual complained that Transport Canada had exempted the age, rank and duties of fellow sailors in response to his request for the 'ships articles' needed to prove that he served in the Merchant Navy in war time.

During the investigation, the Office became aware of section 276 of the *Canada Shipping Act* which states that ships' documents, including 'ship articles' "...shall be open to the inspection of any person". However, officials in the department took the view that they had given the complainant everything required under the *Access to Information Act*. The Commissioner then brought the complaint before the Minister, as follows:

> "For a number of years, (the complainant) has been trying to verify, for pension purposes, that he served aboard the S.S. ...during World War II. He was only 16 years of age in 1944 and maintains he served longer than the Department of Transport indicates. To support this claim, he initially tried informally through the Department of Transport and later under the *Access to Information Act* to obtain information concerning all the seamen who served with him aboard the S.S. ...during the war years. The personal data is contained in what is referred to as the 'Ships Articles', and would include the positions held by seamen onboard the ship, dates of service, etc.
>
> "While Department of Transport officials have released to (the complainant) the names of the seamen concerned, they have not released the additional information to assist him in locating these seamen, who might support this claim to having served during 1944 to 1945.
>
> "Our investigation suggests that had it not been for the fact that these war time records are still in active use by the Department of Transport, they

would have been placed in the Public Archives. Public Archives' officials have advised us that in their opinion 'Ships Logs and Ships Articles' can be reviewed by any person on request by virtue of section 276 of the *Canada Shipping Act.* Your officials, on the other hand, hold the view that the information requested cannot be released.

"The complainant has received some of the information he has requested from the 'Ships Articles', but not the historical data he seeks. In this connection may I refer you to paragraph 19(2)(c) of the *Access to Information Act* which provides that the head of a government institution may disclose records that contain personal information if the disclosure is in accordance with section 8 of the *Privacy Act.* Paragraph 8(2)(b) of the *Privacy Act* in turn states that personal information may be disclosed in accordance with any Act of Parliament that authorizes its disclosure.

"Section 275 of the *Canada Shipping Act* provides that the Department of Transport 'shall' keep the records of service of seamen and provides for the possibility of charging for copies. Section 276 states that those records shall be open to 'the inspection of any person'. Bearing in mind this legal obligation and the fact that similar pre and past World War II records are accessible to the general public in the Public Archives, I have concluded that all the 'Ships Articles' including the historical personal data, should be released to (the complainant).

"The Commissioner therefore recommends that all of the 'Ships Articles' including the historical personal data, for the S.S. ...be released to the complainant, in accordance with the *Access to Information Act...".*

The Minister's response was, in part:

"Your findings and comments are indeed well taken. However, we wish to point out that we believe we have complied with (the complainant)'s request as originally formulated by providing him with a list of all sailors who served on the S.S. ...

"It is evident from your letter that (the complainant) is requesting more information than was originally asked for in his formal access request and accordingly we agree, pursuant to Section 276 of the *Canada Shipping Act,* to provide this information which will be forwarded to (the complainant) within the next few days."

A Very Technical Point

File: 850(1/2)(2/2)

Institution: *External Affairs*
Canadian Security Intelligence Service
Complaint: *Refusal - exemption [13(1), 15(1), 16(1), (19(1)]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

Both complaints concerned the manner in which the departments responded to two separate requests for access to records relating to a named person.

When the applicant objected to the exemptions, both departments contended that no requested information was withheld. In the case of External Affairs, the complainant referred to a topic and requested "...access to the documents recently released under Access to Information...". In the case of Canadian Security Intelligence Service she requested "...access to *all documents already released* under Access to Information...".

Based on the investigation at both institutions, the Commissioner was satisfied that the documents released to the complainant were identical to those previously released to other applicants.

The Commissioner informed the complainant that she had not been denied access to the requested records as the two departments released exactly what she requested. This put the complainant in a position of not being able to complain about exemptions.

No Confirmation, No Denial

File: 925

Institution: *National Defence*
Complaint: *Refusal - exemption [13(1), 15(1)]*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual requesting access complained about the exemptions National Defence made under subsections 13(1) and 15(1) of the Act.

In the first portion of the request, the complainant sought "a copy of the Canada-U.S. agreement on Control of Inbound Shipping in Canadian-U.S. Pacific Waters". Based on the investigation, the Commissioner was satisfied that the documents contained information that was provided in confidence by a foreign government. The complainant had referred to subsection 13(2), which allows for disclosure of a document of this nature with the consent of the government from which the information was obtained. The U.S. government has never released this document. However, the document was signed by both countries and the Canadian Department of National Defence objected to the release of the agreement on the basis that disclosure could reasonably be expected to be injurious to the defence of Canada or any state allied, or associated, with Canada. The department also claimed an exemption under subsection 15(2) and the Commissioner supported that exemption by itself.

In the second portion of the request, the complainant asked for "records pertaining to the establishment and operation of the United States Trident Submarine base at Bangor, Washington". Subsection 10(2) of the Act states that the head of an institution "is not required to indicate...whether a record exists" and, based on that provision, the Department of National Defence chose the words "if such records existed..." in its response to the complainant. Paragraph 10(1)(b) also required the department to specify "the provision on which a refusal could reasonably be expected to be based if the record existed" and the department advised the complainant that sections 13 and 15 of the Act would apply.

The Commissioner informed the complainant that this response was correct in law and that rights had not been denied under the Act.

In the circumstances, this is equivalent to neither confirming nor denying the existence of a document, which the Act permits.

Exclusion Cancelled

Files: 007(2/3)
032(2/2)

Institution: *Energy, Mines and Resources*
Complaint: *Refusal - exclusion* [69]
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in full*

Two individuals objected when the department excluded portions of records they requested as confidences of the Queen's Privy Council.

As a result of the investigation, the department reconsidered and withdrew the exclusion.

EXCLUSIONS

Some Exclusions Lifted

File: 581(2/2)

Institution: *Correctional Service Canada*
Complaint: *Refusal - exclusion* [69]
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in part*

An individual objected when Correctional Service Canada excluded records he had requested concerning penitentiary sites.

As a result of the Commissioner's investigation, the department provided a portion of the originally excluded records under subsection 69(1). This Office does not have a mandate to examine excluded records. However, a certificate was received from the Clerk of the Privy Council Office confirming that the withheld records were confidences of the Queen's Privy Council for Canada within the meaning of subsection 69(1) of the Act.

GENERAL

A Misunderstanding

File: 534

Institution: *National Defence*
Complaint: *Refusal - general*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual complained he had received incomplete records from National Defence. He suspected that the Minister, in order to prevent their release, had ordered the destruction of certain documents relating to women in the Armed Forces.

The investigator was unable to find any person who could identify the document allegedly removed nor anyone able to provide detail that would assist in identifying such material. The investigator discovered that, prior to release

of the records, the Minister had been consulted concerning possible exemptions and had instructed that additional material be removed by exemption. All of the exempted material was properly accounted for and on the file and the exemptions were in accordance with the Act.

The Commissioner was satisfied that the investigator carefully reviewed the files for any indication that material was missing or that instructions might have been given to alter or remove documents. Personnel involved with handling the access request were also interviewed and nothing was learned that would support the complainant's allegation. The Commissioner informed the complainant that the action by the Minister to have additional records exempted could have been misunderstood.

Ministerial or Departmental

File: 571

Institution: *Transport Canada*
Complaint: *Refusal - general*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in full*

The complaint concerned Transport Canada's denial of access to the "Report on the Availability and Accessibility of Transportation for the Disabled". The department informed the complainant that the report was specifically prepared for the Minister and consequently not a departmental record.

The Commissioner's suggestion that the report should be a departmental record and subject to the Act was accepted, and the entire report was released.

Complaint Out of Time

File: 630

Institution: *Justice*
Complaint: *Refusal - general*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

This complaint concerned the Department of Justice's failure to disclose records concerning the extradition of residents of Canada who are alleged to have committed war crimes.

The investigation revealed that the complainant's access request was received by the department February 21, 1985. The complaint to this Office was dated March 13, 1986.

The Commissioner informed the complainant that, because more than one year had elapsed since the access request was received by the department, the Office had no mandate to carry out an investigation. Section 31 of the Act reads:

> "A complaint under this Act shall be made to the Information Commissioner in writing unless the Commissioner authorizes otherwise and shall, where the complaint relates to a request for access to a record, be made within one year from the time when the request for the record in respect of which the complaint is made was received."

The Commissioner indicated that she would draw the problems of section 31 to the attention of the Parliamentary Committee conducting the three-year review of the Act.

Publicly Available

File: 673

Institution: *External Affairs*
Complaint: *Refusal - general*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual complained to the Commissioner when External Affairs took 29 days to release a copy of a contract entered into by the Government of Canada with a consulting firm from the United States. His complaint held that 29 days was too long to respond to a request for a record which was available for public scrutiny in the United States and the department was thus in violation of the spirit of the Act.

The investigation satisfied the Commissioner that the department had acted upon the request promptly and that there was no deliberate delay. Nothing was discovered which indicated that time was wasted in replying to the request or that it was dealt with differently than other similar requests.

The Commissioner replied to the complainant that the availability of the documents from the United States' Justice Department did not relieve External Affairs of the obligation to review the document in light of the Canadian law. Public availability in another country does not raise an automatic presumption that the record or document must be released in Canada.

In his letter of representations, the complainant stated:

"My point about the availability of the document in the U.S. was that such easy public access there would, in my view, pre-empt most of the potential exemptions under the [Canadian] AI Act.

"For example, release of the document here could hardly be damaging to international relations with the U.S. if the U.S. itself had already made the document available. Similarly, there could be no violation of privacy since the material was already available.

"I feel somewhat uneasy about your comments on this aspect. Am I to infer that the information commissioner might someday uphold as correct the exemption of a record in Canada under one of the above headings (international relations, personal information) even though the documents had already been made public by the other state involved? Which categories of exemption could still apply to a record which was made public by the government in another jurisdiction?"

The Commissioner replied:

"I do not ignore the fact that a record may have been published in another jurisdiction or may be available for purchase by members of the public in another jurisdiction. In fact, in other cases we have used the 'public availability' of records in another jurisdiction to contest exemptions on Canadian records released in Canada subject to severance.

"In the case of discretionary exemptions and 'injury test' exemptions the fact of 'public availability' becomes a powerful argument for release. In those cases where the exemption is mandatory and there is no discretion or injury test..., I can see no alternative for the department other than to impose the exemption. It is for this reason that I said in my report that I would not foreclose the possibility of such a case arising at some time in the future. You may be interested to know that we have never had such a case."

Although it did not bear directly on his access request, the complainant also asked the Commissioner whether section 68 of the Act, which states that the rights of access do not apply to "published material or material available for purchase by the public", applies only to material available in Canada.

The Commissioner pointed out that, if section 68 were not confined to Canada, a government department could refuse to disclose a record simply by pointing out that the requestor could get the same material in some foreign country. The requestor would not have the benefit of the time limits and controlled costs of the Canadian *Access to Information Act*. The Commissioner concluded:

"For all of the above reasons I am of the opinion that, in the absence of a ruling on a geographical restriction to section 68, it is very much in the applicant's interest to confine its application to Canadian records in Canada."

Indication of Authority for Exemption

File: 703

Institution: *Canadian Security Intelligence Service*
Complaint: *Refusal - general*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Disputed*

An individual complained that the Canadian Security Intelligence Service (CSIS) had not stated on a record the specific exemptive provision(s) of the *Access to Information Act* on which it had based a refusal.

The investigation confirmed that CSIS had advised the requestor by correspondence that "some of the documents provided to you have been exempted, in whole or in part, pursuant to..." and they quoted the sections involved. The deleted (exempted) portions of the records contained no indication of the authority upon which a specific exemption was based. The complainant suggested that he had no understanding of why a particular portion or document was not provided, nor did he have an informed basis upon which to draft a complaint.

Paragraph 10(1)(b) of the *Access to Information Act* requires that the head of a government institution shall state "the specific provision of this Act on which the refusal was based...". Most departments comply with this requirement by quoting the applicable section, subsection or paragraph on the document itself. Subsection 10(1) allows for an institution to "state in the notice given under paragraph 7(a)...the specific provisions...". However, the Commissioner

was of the view that if this option is followed, the notice must contain sufficient detail to enable the recipient to clearly link the applicable sections, subsections etc., being quoted, to the deleted portions of the record.

The Commissioner considered the complaint well-founded and recommended the Solicitor General inform the complainant of the specific authorities on which exemptions were made on the relevant portions of the records released.

The Solicitor General supported the position of CSIS, that linking a specific section to the deleted portion of a record defeats the purpose of the exemption as it could provide an indication of the type of information that was being exempted. The Minister stated that "in certain circumstances the specifying of the exemptions used should not provide 'clues' as to what the nature of the information being exempted might be".

While the Commissioner accepts that in specific circumstances, subject to being established by the department, the position taken by the Solicitor General might be supportable, she maintained that as a general rule the institution must comply with the provisions of paragraph 10(1)(b). Most departments already follow such interpretation.

The matter may be referred to the Federal Court.

Question of Control

File: 714

Institution: *Social Sciences and Humanities Research Council*
Complaint: *Refusal - general*
Finding: *Supportable*
Disposition: *Discontinued by complainant*
Result: *No action*

This complaint concerns the denial in June 1986, of a request for access to a comprehensive audit of the Social Sciences and Humanities Research Council. The Council returned the $5 application fee to the complainant, informing him that the requested document would be tabled in the House of Commons in October 1986, and until then was "the property" of the Auditor General. The complainant argued that he should not have to wait until tabling in the House of Commons to see the document in question.

The complainant withdrew his complaint before the investigation was completed.

Although the investigation was not carried to its conclusion, the Commissioner considered the response of the department incorrect under the Act and recorded it as supportable.

Deemed Refusal

File: 744

Institution: *Health and Welfare Canada*
Complaint: *Refusal - general*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Resolved in full*

This complaint concerned the department's delay in responding to a request for access to records pertaining to alcohol, substances or drug abuse on all Alberta Indian Reserves and other native communities in the province.

The investigation showed that the request was initially dated March 25, 1986, but amended by the complainant to April 16, 1986. It was postmarked in Calgary April 17 and received at the department on April 21. On April 23 the department sent a letter acknowledging receipt of the request.

Apart from the department's two phone calls to the complainant to clarify some points, no further official communication occurred until May 21, 1986, when the department advised the complainant of an extension (no time mentioned) beyond the initial 30-day response period.

The investigation determined that on May 6, 1986, the department's Alberta Regional Office forwarded boxes of records to Ottawa containing many of the requested records. The department failed to arrange the release of the records to the complainant.

Although the department indicated in September 1986, that the requested records, subject to exemptions, would be made available, the complaint was found to be a deemed refusal under subsection 10(3) of the Act.

Service Bureaus' Budget Cuts

File: 769

Institution: *Supply and Services Canada*
Complaint: *Refusal - general*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

A complainant rejected Supply and Services Canada's claim that records concerning budgetary cuts affecting Canada Service Bureau walk-in bureaus and telephone referral services were not in its possession.

The investigation confirmed that the department had no records that would answer the complainant's questions as to why, in 1984, the budget of the Telephone Referral Service of the Canada Service Bureau was reduced or the walk-in centres were closed. The department did, however, attempt to answer some questions in a letter to the complainant. The letter noted that the decision to reduce the budget was announced by the Minister of Finance November 8, 1984, and was not an announcement originating from Supply and Services Canada. The Commissioner explained that, in such instances, decisions may have been based on factors not in the possession of the department which could explain why it was unable to answer all of the complainant's questions.

Missing Study

File: 771

Institution: *Transport Canada*
Complaint: *Refusal - general*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual had not been successful in obtaining from Transport Canada a study or assessment conducted by Canadian National Railways on the C.N. maintenance and repair facilities at named Canadian cities from the Department of Transport. He drew the Commissioner's attention to an undertaking by [name] to the Parliamentary Transport Committee that a copy of the study would be given to the Minister of Transport.

Based on the investigation, the Commissioner informed the complainant that she was satisfied that the department did not have a copy of the requested study in its files and furthermore that the Minister had not yet received a copy.

No Trace of Manual

File: 875

Institution: *National Defence*
Complaint: *Refusal - general*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual sought access to the Canadian Forces Nuclear Safety and Inspection Orders Manual. The department responded that it was unable to accede to his request because "...in 1984 the Canadian Forces ceased to have a need for a nuclear safety manual and as a consequence the publication was cancelled and removed from the departmental inventory".

The investigation showed that the department made every effort to find the manual by locating and speaking to people previously working in the responsible areas. This failed to produce a lead. The internal enquiries confirmed that there was no stipulation or regulation to maintain a copy of cancelled or rescinded publications in a Canadian Forces repository.

DELAYS

Free Trade Papers

Files: 567, 590, 595(2/2)

Institution: *External Affairs*
Complaint: *Delay*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Disputed*

Three complainants received notices of a 120-day extension invoked by External Affairs Canada following their requests for access to records on papers prepared in advance of the freer trade talks between Canada and the United States.

The department based the extension on paragraphs 9(1)(a) and/or (b) of the Act, but would give no other facts or explanations to justify the need for more time. Having received no evidence to justify the extension, the Commissioner tentatively concluded that none existed and, as provided for in subsection 37(1)

of the *Access to Information Act,* recommended that the records be disclosed and that notice be given of any action taken, or proposed to be taken, to implement the recommendation, or provide reasons why no such action was taken or proposed. The answer received was not satisfactory, nor was the answer to another letter and a telephone conversation.

The matter is before the Federal Court.

Extensions Not Unreasonable

File: 599(1/2)

Institution: *Consumer and Corporate Affairs*
Complaint: *Delay*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual complained of delays experienced in response to his access request for reports regarding the status of an oil refinery, as follows:

1) "The department did not inform me that they had received my request. When I called in mid-January to follow up my request I was told this is Departmental policy."

Section 7 of the *Access to Information Act* requires that a written response to a request must be made within 30 days of receipt of the request. The Department of Consumer and Corporate Affairs received the request on January 10, 1986, and responded on February 7, 1986. The department confirmed that it was not its policy to acknowledge requests prior to being in a position to inform the applicant of the status of the request nor is it the policy of any other government institution. The Commissioner indicated her willingness to consider as unreasonable any extension claimed where little or nothing is done during the first 30 days.

2) "On February 7, 1986, the Department informed me an extension of up to 60 days is required."

The investigation revealed that the department needed a legal opinion prior to responding to the request and efforts began January 14, 1986, to obtain that opinion. The department released the severed report to the complainant on February 28, 1986, which was 19 days into the 60-day period.

3) "The Department did not specify the reason for the delay, except to write the 'necessary consultations' were needed."

Paragraph 9(1)(b) of the Act provides for an extension of time if "consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit". The investigation found that consultation was required with the Department of Justice, Investment Canada and the Privy Council Office.

4) The complainant suggested that the department was using the *Access to Information Act* as a tool to delay the release of information even though the material was readily at hand.

The department agreed that the record requested was readily available. The extension was for consultations.

Invalid Ground for Extension

File: 603(2/2)

Institution: *Canadian Security Intelligence Service*
Complaint: *Delay*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Not disputed*

An individual objected to what he considered an unreasonable extension of time to respond to three access requests.

Canadian Security Intelligence Service (CSIS) received the access requests January 14, 1986, and informed the complainant February 12, 1986, that an extension of 120 days beyond the initial 30-day statutory time limit was necessary as "...meeting the original time limit would unreasonably interfere with the operations of the Canadian Security Intelligence Service".

The investigation revealed that CSIS had a large number of requests under the *Access to Information Act* and as a result had difficulty handling the requests in a timely fashion.

The Commissioner reported to the Solicitor General that the government may extend the 30-day time limit if

> "...the request is for a large number of records *or* necessitates a search through a large number of records *and* meeting the original time limit would unreasonably interfere with the operations of the government institution."

In this case, CSIS did not establish that the time extension was needed because each of the requests was for a large number of records or necessitated a search through a large number of records.

Unreasonable Delay

File: 609

Institution: *Employment and Immigration Canada*
Complaint: *Delay*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Not disputed*

The complaint involved a request for records to "a known Nazi war criminal...". Employment and Immigration Canada received the request November 19, 1985, and informed the complainant on December 13, 1985, of the need for a 45-day time extension for consultation. The complainant had received no further word from the department by February 21, 1986.

The Commissioner reported the delay to the Minister and, as well, noted the department's failure to notify the complainant of his rights to complain to the Commissioner's Office.

Search Justified - Delay Reasonable

File: 629

Institution: *Canadian Security Intelligence Service*
Complaint: *Delay*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual asked the Commissioner to review the need for a 90-day extension of time to process his request for a copy of the Royal Canadian Mounted Police "anti-subversive" policy by the Canadian Security Intelligence Service (CSIS).

The investigation determined that, during the initial 30 days, CSIS reviewed the request and decided that, since the applicant had made particular reference to a newspaper article about RCMP illegal acts policy, he was specifically interested in gaining access to that particular policy (as opposed to more general policy related to anti-subversion). CSIS eventually concluded that it had no such policy within its records, but decided that, since the McDonald Royal Commission had examined alleged illegal activities of the RCMP Security Service, some reference to the requested policy might be found within that commission's records. Because the records remained under the control of the RCMP, CSIS had to seek authority to review them and thus sought a 90-day extension of time beyond the 30-day statutory limit. CSIS reviewed the records but found no specific policy of the kind sought by the complainant. It advised the complainant of its findings 85 days after the initial receipt of the access request but 35 days before the expiration of the 90-day extension period.

The Commissioner informed the complainant that, while the time taken to conclude the request was lengthy, CSIS did take appropriate action both within the initial 30-day period and during the extension period.

Extension Excessive

File: 672

Institution: *Consumer and Corporate Affairs*
Complaint: *Delay*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Not disputed*

An individual requested access to various records on asbestos for the years 1975 to 1979 and complained when the department took a 90-day extension of time beyond the 30-day limit because "meeting the original time limit would unreasonably interfere with operations of this institution". The complainant stated that the records had originally been informally requested in September 1985, and that discussions were held with departmental officials during October 1985, and specific assurances to release the material were made on October 15, 1985, and January 7 and 13, 1986.

A formal request for access, dated February 24, 1986, was received by the department February 27, 1986, and, on March 19, 1986, the department advised the complainant of the 90-day time extension.

The investigator discovered that the department's access office was unaware of the informal dealings when it first received the formal request. The office determined that due to the nature of the request considerable search and consultation time would be necessary.

The investigation confirmed that the department did consult with several other government departments and private firms and searched through a number of files relating to asbestos listed in the registry.

The investigator learned that the department regarded the formal request as somewhat different than the informal one. Besides, departmental personnel admitted that once the formal request was received it had priority over the informal request.

The investigator persuaded the department to release several packages of documents to the complainant. However, the last package of records was not mailed until after the 90-day time extension had expired.

The Commissioner found that, while the department needed time to search and consult, the 90-day extension beyond the initial 30-day time limit was excessive.

Consultation Started Late

File: 709

Institution: *Agriculture Canada*
Complaint: *Delay*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Not disputed*

An individual complained that Agriculture Canada delayed its response to her access request.

The department received the request April 23, 1986. On May 22, 1986, it informed the applicant that it needed a 45-day time extension beyond the 30-day statutory limit to consult with the Department of Justice.

The investigation revealed that Agriculture Canada only sought consultation with the Department of Justice June 12, 1986, 50 days after it received the request. Records were released to the complainant July 14, 1986.

Second Extension Not Valid

File: 716

Institution: *Health and Welfare Canada*
Complaint: *Delay*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Not disputed*

An individual complained that the Health Protection Branch of Health and Welfare Canada took excessively long to respond to his February 18, 1986, access request for details on certain drug usage at the Ontario Penetanguishene Hospital in 1972-73.

The department had extended the time limit by 30 days on March 19, 1986, because of the complexity of the records to be searched. The records were not dispatched and on April 25, 1986, the department extended the time limit by a further 30 days.

The Commissioner notified the Minister that the second extension was not authorized under the *Access to Information Act*.

Interference with Government

File: 724

Institution: *Royal Canadian Mounted Police*
Complaint: *Delay*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Not disputed*

An individual complained when the Royal Canadian Mounted Police (RCMP) required a 30-day time extension to respond to his access request.

The RCMP requested the extension to reproduce audio tapes for release to the complainant. The technical unit able to do the work was involved with ongoing criminal investigations and could only assist the Access to Information Unit as time permitted.

The RCMP was not being unreasonable but was hampered by technical considerations not addressed in the *Access to Information Act*. Paragraph 9(1)(a) of the Act permits a time extension when compliance with the access request interferes unduly with the operations of the government institution but only where the access request is for a large number of records or necessitates a search through a large number of records. As the records requested were readily identified and not extensive, the complaint was considered well-founded because the reason for the extension of time was not authorized under the Act.

Extension Reasonable

File: 728 (1/2)

Institution: *Agriculture Canada*
Complaint: *Delay*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual complained that a 120-day extension beyond the 30-day statutory limit claimed by Agriculture Canada for consultation with a third party, federal and provincial institutions was "an unduly long and unnecessary delay". He also objected because the department indicated that "the notification process normally takes up to sixty days to complete...".

The investigation revealed that the 120-day extension required by Agriculture Canada was not only for consultations with a third party and with federal and provincial institutions but also to process the large volume of records involved in the request. The department had indicated to the complainant that a conservative estimate was that 416 hours would be required to compile and photocopy some 5,000 pages of documents. The 416 hours translated into approximately 83 days, based on a 7-hour working day.

The investigation disclosed that substantially more than 5,000 pages of records were involved and thus the estimated time required would be greater than the 416 hours.

The Commissioner advised the complainant that the 120-day extension was reasonable.

Extension Not Warranted

File: 733

Institution: *Immigration Appeal Board*
Complaint: *Delay*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Not disputed*

This complaint concerned a 30-day extension of time beyond the 30-day statutory limit to process two access requests.

The Immigration Appeal Board received the two requests on May 26 and June 6, 1986. On June 24, 1986, the Board notified the complainant that "...because of the large number of records requested, an extension of thirty (30) days beyond the thirty (30) day statutory limit is required for both in order for us to fully comply with your requests...".

Paragraph 9(1)(a) states:

(1) "The head of a government institution may extend the time limit... for a reasonable period of time, having regard to the circumstances, if

(a) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution".

The Commissioner's investigation revealed that the requests involved approximately five records of some 800 pages, some 300 of which were relevant to the complainant's requests.

The Commissioner was satisfied that the volume to be searched did not warrant a 30-day extension.

No Response for 51 Days

File: 837

Institution: *Indian Affairs and Northern Development*
Complaint: *Delay*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Not disputed*

An individual complained that Indian Affairs and Northern Development failed to acknowledge receipt of an access request dated September 2, 1986, nor did it take any other action on the matter within the time stipulated by the Act.

The request was received by the department September 4, 1986, and the 30-day period for response expired October 4. On November 24, 1986, more than a month after the individual had complained to the Information Commissioner and 51 days beyond the statutory 30-day time limit, the department sent notice that the records were forwarded to a district office for the complainant's review.

The Commissioner advised the Minister that failure to provide the records within the required time was deemed a refusal per subsection 10(3) of the Act.

Non-Compliance

File: 860(1/2)(2/2)

Institution: *Privy Council Office*
National Defence
Complaint: *Delay*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Not disputed*

An individual complained of the delays by Privy Council Office and the Department of National Defence in responding to his access requests.

The investigation confirmed that neither department supplied the requested records within the 30-day period prescribed by section 7 of the Act nor set a time frame for providing the records, pursuant to section 9 of the Act. Also they did not advise the applicant that an extension of time was necessary to respond to his request. Both neglected to advise the applicant that he had a right to complain to this office about the extension of time and the failure to receive the requested records.

Failure to take the steps constituted non-compliance with requirements of the Act and reports were made to the Ministers concerned.

Delay Not Justified

File: 863

Institution: *Health and Welfare Canada*
Complaint: *Delay*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Not disputed*

This case concerned the extension of time invoked by Health and Welfare Canada to respond to an access request for records on a named drug.

The department received this request September 29, 1986, and on October 29, 1986, it informed the complainant that the response time was extended to November 17, 1986, because "it was impossible for us to complete the review of your request within the prescribed time frame".

Although the nature of the request clearly suggested that consultations with a third party concerned were necessary prior to release, the department proceeded with such consultation only on November 20, 1986. The reasons given by the department to justify the time it took to commence consultations were not acceptable.

23 Days Beyond Extension

File: 915

Institution: *Privy Council Office*
Complaint: *Delay*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Not disputed*

An individual complained that the Privy Council Office (PCO) failed to meet its own 60-day time extension for supplying a record relating to a government decision to establish a commission of inquiry to investigate alleged war criminals in Canada.

The investigation showed that PCO received the request September 15, 1986, and on October 15 extended by 60 days the time for response for consultations.

The record was provided to the complainant on January 7, 1987, 23 days after the expiration of the extended time limit. As a result, the Commissioner advised the Prime Minister, as minister responsible for PCO, that an excessive time delay had occurred and that by exceeding the time limit PCO was deemed to have refused to provide the record.

FEES

Reasonable Copying Fees

File: 124

Institution: *Treasury Board*
Complaint: *Fees*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Reduced in part*

The Information Commissioner initiated a complaint in June 1984, concerning photocopying fees charged by federal institutions responding to access requests under the *Access to Information Act.*

A letter to the President of the Treasury Board stated:

> "Since the coming into force of the *Access to Information Act* on July 1, 1983, a number of complaints have been made to this office that the fees which may be charged for search time and copies of records under the Act are excessive and that the application of these fees is not consistent among government institutions.
>
> "In almost all such instances the Information Commissioner has dismissed these complaints because the fees for search and preparation were within the provisions of the Act and Regulations and appeared to be reasonable considering the amount of work required. However, research conducted by our office, at the Commissioner's initiative, has indicated that the prescribed copy fees may be excessive and it also appears that there is some disparity in the circumstances in which fees are waived or reduced...".

The investigation revealed that data published by the Department of Supply and Services for 1983-84 indicated that the cost for photocopying one page is between one and two cents per page on an average.

It was also ascertained that public libraries equipped with coin-operated photocopiers charge 15 cents per page and that photocopying costs in Ottawa at commercial establishments varied from seven to 15 cents per page, depending on the volume.

The investigation did not find that it is the "...government's policy of waiving fees under $25. which enables an applicant to receive (in addition to the five hours of free preparation and searching time), 100 pages of photocopies, free of charge" as stated in a letter from the Secretary of the Treasury Board to the Information Commissioner. The Treasury Board Interim Policy Guide stated only that "...government institutions *should consider* waiving the requirement to pay fees, other than the application fee, if the amount payable is less than $25.00".

Based on the investigation, the Commissioner concluded that the fee specified by subparagraph 7(1)(b)(i) of the Access to Information Regulations was unreasonably high. While she concluded that 10 cents per page would be reasonable, she was prepared to accept a proposal by Treasury Board officials that a charge of 15 cents per page would be appropriate.

Recognizing that 25 cents per page was high, the President of the Treasury Board informed the Commissioner that 20 cents per page constituted a fair rate under the Act. The Commissioner asked Treasury Board to reconsider its position and recommended that a charge of 15 cents per page be stipulated. Treasury Board responded that "Since the Parliamentary Committee will have the opportunity to discuss and make recommendations on all aspects of the *Access to Information Act,* I have no doubt that there will be an opportunity to consider any further action that may be required with respect to the fees".

Guidelines Not Followed

File: 402

Institution: *Treasury Board*
Complaint: *Fees*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *Disputed*

The complaint concerned a photocopying fee assessed by Treasury Board on a request concerning the expansion of the Access Register distribution network.

The request was received November 29, 1984, and on December 20, 1984, Treasury Board advised the complainant that a large number of letters, received by the Treasury Board Secretariat, were available for his review. Copies of the Board's letters were supplied free and the complainant was informed that if he desired copies of the responses he would be charged the normal fee for photocopies of 25 cents per page.

The requestor reviewed the records, selected 41 pages he wished to receive and was charged $10.25. This assessment was based on 25 cents per page and did not consider the Treasury Board Interim Policy Guide suggestion to waive the requirement to pay fees other than the application fee if the amount is less than $25. The request to both Treasury Board Secretariat and the President of the Treasury Board for a fee waiver was denied in both instances, resulting in the complaint.

An investigation was carried out and the inconsistency was raised between the Treasury Board Interim Policy Guide and its practices. The investigator was advised that the President of the Treasury Board would raise the matter of fee policy with the Board and advise the Commissioner in the early fall, 1985.

When no further word was received by November 28, 1985, the Commissioner recommended to the President of the Treasury Board that the Treasury Board put into practice the interim policy set out in the Treasury Board Guidelines. On January 14, 1986, the President again confirmed that he wished to discuss the policy guidelines concerning the waiving of fees with the Treasury Board and that he would inform the Commissioner's Office of the decision.

When no decision was forwarded by March 12, 1986, the Commissioner again wrote to the President explaining that, if a response was not received by the end of March, the complaint would be considered well-founded and would be included in the Information Commissioner's annual report. No response was received.

Fees Reasonable

File: 496(3/6)

Institution: *Canadian Security Intelligence Service*
Complaint: *Fees*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual complained about the fee estimate of $1,050 to respond to his request for weekly intelligence summaries covering the periods 1926 to 1939.

The investigation showed that the estimated cost of $1,050 consisted of $650 for reproduction of 2,600 pages of records and $400 for processing costs, representing 40 hours of work, and based on less than one minute for each page.

The Commissioner was satisfied that the estimated fee was in accordance with the Act and Regulations.

Hourly Fees

File: 588

Institution: *National Defence*
Complaint: *Fees*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual complained about the fee assessed for documents on the PPCLI Corps of Drums. He accepted the application fee of $5 and the 25-cent per page photocopy charge, but objected to the $10 per hour search and preparation fee.

The department informed the complainant that, as approximately 19.5 hours of research time would be required over and above the five free hours to retrieve the information from consolidated records, the estimated fee was $195. One and one-half hours of search time had already been expended.

The investigation revealed that the records requested might, according to National Defence, be in several locations:

- at National Defence Headquarters - Director Ceremonials - consolidated records containing information on all voluntary bands (estimated search time two hours)

- at National Defence Headquarters - Director History - records covering volunteer bands and the PPCLI Regiment (estimated search time 12 hours)

- at Regimental Headquarters, Canadian Forces Base, Calgary - search of copies of the Regimental Magazine "The Patrician" (estimated search time six hours) and search of other regimental files (estimated search time three hours).

A review of the records at the two National Defence Headquarters locations confirmed that the time estimates appeared reasonable. Also Regimental Headquarters in Calgary, National Defence, stated that approximately 60 issues of "The Patrician" were involved in the request, and the Commissioner informed the complainant that six hours of search time was not unreasonable nor was the estimate of three hours to search other records.

As a result, the Commissioner reported to the complainant that the fees quoted by National Defence were in accordance with the legislation and were not unreasonable.

The investigator suggested to the complainant that some of the information might be available through an informal request and/or inter-library loans.

Problem Solved, Complaint Dismissed

File: 592

Institution: *National Parole Board*
Complaint: *Fees*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

This fee waiver complaint arose from an allegation by a penitentiary inmate that he was denied the use of his own money, held for him by Correctional Service Canada, to purchase records which he had requested under the Act.

The Commissioner said that she would support a claim for a fee waiver provided the complainant had sufficient funds to purchase the records but was unable to do so because the Correctional authorities would not let him use his trust funds.

Upon request from the Commissioner's Office, the National Parole Board reconsidered its position but was not prepared to waive the fees. However, Correctional Service Canada reversed its position and permitted the complainant to use his funds to purchase records under the Act. Although the Commissioner could not support the fee waiver complaint, the investigation resolved the problem.

Fees Not Yet Reduced

File: 649(1/2)

Institution: *Revenue Canada (Customs and Excise)*
Complaint: *Fees*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual objected to being charged 25 cents per photocopied page by Revenue Canada.

Although a recommendation to Treasury Board had lowered such charges to 20 cents, the 25 cent per page charge was in accord with the Regulations made under the *Access to Information Act* and applicable at the time the complainant was billed.

Estimate Reduced

File: 704

Institution: *Justice*
Complaint: *Fees*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Reduced in part*

The complaint concerned the fees the Department of Justice estimated in response to an access request for all expense accounts and bills related to the March 1986 National Forum on Access to Information in Ottawa.

Originally, the department estimated a fee of $150 to $170 for search and preparation of the records, plus 20 cents per page for photocopies.

Later the department found too high its estimate of the time required to search for and prepare the requested records and released some documents, including the summary of the conference expenses, with no fee.

The department also agreed to allow the complainant to see the remaining records without charging anything for the search and compilation. The complainant reviewed the records but elected not to pay the reduced fee of $120.

The First Five Free Hours

File: 731

Institution: *Regional Industrial Expansion*
Complaint: *Fees*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

The complaint concerned the department's preliminary estimate of chargeable fees, and particularly the inclusion in that estimate of the first five free hours.

The investigation revealed that the preliminary estimate related solely to the time taken by the department to search for and gather the requested records. Immediately following the initial access request, the department's regional office in Montreal began an extensive search to locate "every single telex or other communiques concerning trade opportunities received by DRIE's Montreal Office during April 1986". After spending six hours' search time, the department realized that substantial costs could be involved. As a result, the complainant revised his request to include "only telexs received from Trade Commissioners abroad for the month of April 1986 by Montreal Regional Offices". At this time the complainant was provided with the preliminary estimate of some 13.5 hours with the five free hours of search and preparation time deducted.

The Commissioner informed the complainant that, if the request is sufficiently complex, the five free hours to which a person is entitled can be used up in the search and/or preparation process without the applicant obtaining actual access to records. Departments usually try to do some search and preparation during these free hours.

Fees Waived

File: 794

Institution: *Employment and Immigration Canada*
Complaint: *Fees*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Waived in full*

An individual found unreasonable the fee estimate of $470 for the provision of records concerning the hiring of temporary help.

As a result of the investigation, it was agreed that the department interpreted too precisely the complainant's request. The department re-examined the request and then located a report in its Accounting Directorate which contained the required record. It was released to the complainant free of charge.

Fees Reasonable

File: 885(2/2)

Institution: *Finance*
Complaint: *Fees*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual complained when he found unreasonable the fees assessed by the Department of Finance in response to his access request.

The investigation revealed that the department estimated fees of $1,100 to search, retrieve and process his request. In addition, the photocopying charges would cost 20 cents per page.

At the same time, the department indicated that, should the complainant reduce the number of records requested, the fee would also be reduced. The complainant did revise his access request and the fee estimate dropped to $240.

The documents requested covered a 26-year period and, based on the number of records requested as a result of the revised request, the investigation confirmed that the department made a fair estimate of the costs involved and was consistent with the Act and Regulations.

MISCELLANEOUS

VIP Flights

File: 337

Institution: *National Defence*
Complaint: *Miscellaneous*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Resolved in full*

In November 1984, an individual sought access to Transport Canada records relating to ministerial use of the department's VIP aircraft. In December, the department advised the individual that the requested records were not under the control of Transport Canada and thus not subject to the *Access to Information Act*. This explanation was subsequently confirmed as an investigation revealed that the records were classed as personal papers of the Minister and not part of the departmental record system.

However, the Information Commissioner believed that the records, which had not yet been examined, should be subject to the Act. Formal notice of intention to investigate on her own initiative was forwarded to the Minister of Transport and the Minister of National Defence.

The coordination function for VIP flights was transferred to the Department of National Defence in January 1985, and the Commissioner formally asked the Minister of National Defence to review the ministerial requests for flight service. As a result of representations made during the investigation, the Minister agreed that DND records covering the use of such aircraft by ministers would be records of the department, subject to the *Access to Information Act.*

The original complainant was informed of the results of the investigation.

Retrieval Questioned

File: 390

Institution: *Regional Industrial Expansion*
Complaint: *Miscellaneous*
Finding: *Not supportable*
Disposition: *Discontinued by complainant*
Result: *No action*

An individual asked for the Commissioner's intervention concerning his request for access to records about the Canadian Patrol Frigate Program. In his complaint letter, he stated:

> "I wish to file a complaint concerning the withholding of information in the attached responses from Regional Industrial Expansion...
>
> "As well, I wish to complain about the retrieval of records which does not appear to have been complete, even considering the five-hour time limit. Analysis records should have been among the records found, for example."

The preliminary investigation indicated that the complainant had examined the disclosable records on or about August 9, 1985, which was more than two months after the complaint was received. The investigator tried unsuccessfully to clarify exactly what the complainant wanted investigated.

The investigator advised the complainant by letter that he could not proceed further and would recommend that the file be closed unless the complainant responded by April 4, 1986. Nothing further was heard.

One or More Requests?

File: 496(6/6)

Institution: *Canadian Security Intelligence Service*
Complaint: *Miscellaneous*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *No action*

An individual sought access to weekly intelligence summaries from 1926 to 1939. Having reviewed the 1934 records, he requested access to the additional records found as a result of his June 6, 1985, access request. He wrote CSIS in this regard on December 5, 1985, and CSIS responded that

"...because of your previous request to withhold further processing until you had received the 1934 material, we are now considering this as a new access request". CSIS also wrote that, due to the volume of material that must be reviewed, it was applying an extension of 300 days to respond to the request.

The investigator learned that CSIS maintained that the complainant modified his original request when he decided to look only at the 1934 records and sent in estimated costs to cover that portion. When the modified request was satisfied, the remaining portion of the original request was abandoned, according to CSIS, and to take up that portion again constituted a new request.

The investigation also disclosed that:

1. In recording a telephone conversation with the complainant, an official wrote "Instead of accessing all of the documents...[the complainant] stated that he would access the year 1934 only, and then make a decision regarding the rest of the material;"

2. In a letter to CSIS enclosing costs to cover the 1934 records, the complainant wrote: "It is my understanding that this will not in any way jeopardize decisions relating to the additional material for 1935, 1936, 1937 and 1938." CSIS did not object at the time.

3. A letter accompanying the 1934 records to the complainant advised that CSIS was not refunding an excess of $63.60 in fees for the 1934 records because "It is my understanding...that you would decide whether or not to request additional 'summaries'".

These instances indicated on both the part of the complainant and CSIS that the request to process the remaining records was not new. The complainant's decision to initially access only the 1934 records placed the rest of his request in suspension until he asked, in a December 5, 1985, letter, received by CSIS December 9, 1985, that CSIS begin processing the remaining material. Considering that CSIS was entitled not to act on the request from August 1, 1985, when a deposit was requested, until December 9, 1985, the original 120-day extension would run in regard to the remaining records until March 19, 1986. As March 19, 1986, passed without the remaining records being released to the complainant, the Commissioner recommended to the Solicitor General that the additional records requested, and not released, be disclosed to the complainant no later than July 31, 1986. The Solicitor General's response was that more than 1,144 pages of requested records would be available by the end of July and the remaining 900 pages by September 1986.

Location of Reading Room

File: 517(2/2)

Institution: *Canadian Security Intelligence Service*
Complaint: *Miscellaneous*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual had complained that the Canadian Security Intelligence Service (CSIS) was not complying with section 71 of the Act as there was no information about its records in the Solicitor

General's reading room, which CSIS claimed was its compliance with the Act. Later he expanded his complaint, alleging that the reading room was not located at the headquarters of the institution as required by section 71 of the Act.

The Commissioner, however, was satisfied that an appropriate facility had been established at the headquarters of the Department of the Solicitor General as the Solicitor General is the head of CSIS for the purpose of the *Access to Information Act.*

Procedure Non-Compliance

File: 545

Institution: *Canadian Aviation Safety Board*
Complaint: *Miscellaneous*
Finding: *Well-founded*
Disposition: *Report to Minister*
Result: *No action*

The complaint concerned the response to a request for access to documents relating to the crash of Air-India Flight 182 June 23, 1985.

The investigation revealed that the access coordinator responded to the request by advising the requestor that the accident was being investigated in accordance with the standards and recommended practices established in Annex 13 to the Convention on International Civil Aviation. The response added that if more information was desired, she could write to the Delhi High Court in India.

This response contravened section 10 of the Act which states:

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

After the Information Commissioner's investigator contacted Board officials, they wrote to the complainant and exempted the records under paragraph 13(1)(a) of the Act, but did not inform the complainant of her right to complain to the Information Commissioner, again contravening section 10 of the Act.

Cannot Act for Third Party

File: 546

Institution: *Agriculture Canada*
Complaint: *Miscellaneous*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

This Office received a complaint against Agriculture Canada from a solicitor acting on behalf of a company. The complaint concerned the wording of access

requests made by another individual for access to records of the named company and the department's apparent willingness to respond to the requests as worded.

Concurrently, the complainant commenced injunction proceedings in the Federal Court to stop the department from releasing the requested information.

The Commissioner declined to deal with the complaint, because any complaint or investigation relying on paragraph 30(1)(f) must "pertain to the requesting or obtaining access to records" that either has taken place, or is anticipated, and does not include action that would tend to frustrate an access application. Furthermore, interests of third parties are addressed by other sections of the Act which set out procedures for representations to the department concerned as well as the right to seek relief in the Federal Court.

Cabinet Meeting Minutes

File: 562

Institution: *Privy Council Office*
Complaint: *Miscellaneous*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Corrective action*

The complaint involved a request for access to three specific pages of Cabinet minutes dealing with the Commonwealth Economic Conference in Accra in 1961. The Privy Council Office had provided the records, exempting portions under subsection 15(1) of the Act. The complainant objected, stating "the bald citing of a section as portmanteau as 15(1) leaves the requestor at an unfair disadvantage".

The Commissioner concluded that, while the document would not precisely fall under any of the paragraphs (a) to (i) of subsection 15(1) of the Act, it was generally the same as described in paragraphs (g) or (h). PCO felt that by quoting subsection 15(1) in the manner it did it was informing the complainant that the exemption was made because release would be injurious to the conduct of international affairs.

After further consultations, the Privy Council Office agreed to explain the exemption to the complainant.

Meaning of Appropriate Officer

File: 628(1/2)

Institution: *Royal Canadian Mounted Police*
Complaint: *Miscellaneous*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual complained that the Royal Canadian Mounted Police (RCMP) changed the date of receipt of his access request from December 24, 1985, to December 27, 1985.

The enquiries confirmed that the complainant's access request was accepted by staff in the Ministry of the Solicitor General late in the day December 24, 1985. The person who received the request put it in the last mail delivery to the RCMP mailing room at headquarters in Ottawa. December 25 and December 26 were statutory holidays and the access request was routinely distributed to the access coordinator at the RCMP on the next working day — December 27, 1985.

Section 4 of the Regulations to the Act states in part:

> "4. A request for access to a record under the Act shall be made by forwarding to the appropriate office of the government institution that has control of the record...".

Appropriate officer is defined in section 2 of the same Regulations as:

> "the officer of a government institution whose title and address is published pursuant to paragraph 5(1)(d) of the Act".

Paragraph 5(1)(d) of the Act requires the Minister to publish the title and address of the appropriate officer for each government institution to whom requests should be sent for access to records under the Act. The RCMP information is given on pages 85-5 and 85-6 of the 1985 Access Register and lists the appropriate officer as the departmental access coordinator.

The Commissioner informed the complainant that since the RCMP access coordinator received the request December 27, 1985, the complaint could not be supported.

Greater Interest

File: 635(3/3)

Institution: *Finance*
Complaint: *Miscellaneous*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

In a Department of Finance response to a request for copies of three studies relating to free-trade talks with the United States, the complainant was advised that External Affairs had commissioned two of the studies and that portion of the access request should therefore be directed to External Affairs. The complainant felt that the "Finance Department should have transferred the request to External Affairs itself as permitted under section 8" relating to greater interest.

The investigation determined that the Department of Finance had no knowledge of one of the studies and it was only after making inquiries that they learned External Affairs had commissioned the study. Finance stated that it may have had an early draft of the other study, but that External Affairs had also commissioned it and, in Finance's view, this went beyond simply having 'a greater interest' as set out in subsection 8(1).

The Commissioner was satisfied that Finance had properly responded to the access request with regard to the document under its control and was trying to be helpful in determining the department that had possession of the other two studies. While the department's letter to the complainant should have clarified the status of the two studies with respect to Finance, the Commissioner did not find that the department denied the complainant any rights under the Act.

Too Much

File: 681

Institution: *Correctional Service Canada*
Complaint: *Miscellaneous*
Finding: *Not supportable*
Disposition: *Dismissed*
Result: *No action*

An individual complained on May 12, 1986, that he had met "nothing but resistance" and that he was "being stonewalled, brushed aside and rebuffed" with respect to two access requests to Correctional Service Canada (CSC).

The investigation confirmed that the complainant had submitted two requests on April 7 and 29, 1986. The request submitted April 7 was received at CSC on April 17. On April 23, a department official telephoned the complainant to get clarification of the request which could reduce search time and costs. As a result of the conversation, the request was withdrawn. CSC suggested that another request be submitted, elaborating on the nature of the documents required. A CSC letter dated May 15, 1986, corroborated this arrangement.

CSC received the April 29 request May 5, 1986, and had until June 4, 1986, to respond.

One of the access requests was for information in respect of ten correctional facilities as follows:

> "Recreation - indoor, outdoor, individual, team, space allotment, facilities, activities.
>
> "A comprehensive quantitative analysis, inventory, stock taking tally and description of recreational facilities, activities, equipment, space allotment (measurements) maps, diagrams, photos of recreational area, programs, opportunities.
>
> "(i.e. Indoor - badminton, basketball, aerobics, billiards, swimming, bowling, minigolf, floor-hockey, nautalis, volleyball, pinball, video games, board games etc...
>
> "Outdoor - baseball, hockey, croquet, tennis, volleyball, jogging, picnic tables, trees, landscaping, lawn furniture, etc....)
>
> "Social/Cultural - A comprehensive quantitative analysis, inventory, stock taking tally and description of social and cultural facilities, activities, equipment, space allotment, maps, diagrams, photos, programs, opportunities.
>
> "(i.e. number of BW TV's, Colour TV's, VCR's, library number of volumes, number of new volumes in 1983, 84, 85 tables, chairs, magazines, periodicals, newspapers, number of and type, big screen TV's, arts and crafts, carpeting, throw rugs, etc.
>
> "Educational, Living Unit, Work/Jobs - A comprehensive quantitative analysis, inventory, stock taking tally, and description on all educational, living unit, employment, activities, facilities, equipment and space allotment, diagrams, photos, programs, opportunities."

The Information Commissioner's enquiries revealed that as of May 22, the department had asked the 10 institutions to submit an estimate of the search time required to locate the records. Some of them responded that more time was required to provide the estimate and the investigator so advised the complainant.

The Commissioner was satisfied that there was no resistance concerning the first request and that the department was actively processing the second.

Which Act Should be Used?

File: 683

Institution: *Royal Canadian Mounted Police*
Complaint: *Miscellaneous*
Finding: *Supportable*
Disposition: *Resolution negotiated*
Result: *Corrective action*

An individual complained when the Royal Canadian Mounted Police (RCMP) responded under the *Privacy Act* to his *Access to Information Act* request for records contained in a file concerning an investigation resulting from a complaint the individual had made to the Solicitor General of Canada.

The Commissioner's investigation determined that the RCMP responded to the complainant under the *Privacy Act* because it believed this would make more records releasable and also because there are no fees involved in obtaining records under the *Privacy Act.*

The *Privacy Act* provides individuals with a right of access to information about themselves held by a government institution. The *Access to Information Act* provides a right of access to information in records under the control of a government institution. An individual can obtain personal information about himself or herself under the *Privacy Act* that no one else can access, but if the area of interest also includes non-personal information, the *Access to Information Act* might be the better vehicle.

The complainant argued that because the response to his request was under the wrong Act the material suffered from deletions and exemptions based on the *Privacy Act,* which, in the opinion of the complainant, is in some respects more restrictive than the *Access to Information Act.*

As a result of the investigator's contact with the RCMP, the agency agreed to look at the possibility of processing the application under the *Access to Information Act.* Later the investigator was informed that the RCMP would proceed under that Act and would waive the $5 application fee. However, it would be necessary to obtain files from the region involved. The complainant, informed of this by telephone, indicated he would be in Ottawa to discuss this case with the investigator handling the current complaint and with the investigator who handled the complaint under the *Privacy Act.* At the ensuing meeting, the complainant sought out advice on how to proceed with his application and on the rights of individuals under the *Access to Information Act.*

After some follow-up contacts between the parties, the complainant was dissatisfied with exemptions to records released by the RCMP under the *Access to Information Act.* Advice was provided by the investigator regarding the right to make a further complaint, which the complainant subsequently did.

Federal Court Review

Increased Number of Applications

During the reporting year there was a sharp increase in the number of applications to the Federal Court of Canada for reviews of the decisions government institutions made in response to requests under the Act. There were 54 such applications compared to only 47 in the preceding two and one-half years that the Act has been in effect.

Table 6 provides further statistics of the applications brought under section 41 or 44 of the Act. Under section 44, companies or individuals may try to block the release of information that the government has decided to disclose. Under section 41, either the complainant or the Commissioner may seek a court review where the government has refused to release some or all of the requested information.

A dramatic increase in the number of applications occurred under section 41. We believe that this increase was largely due to the increased complexity of complaints. As users of the Act become more familiar with its provisions, problems with volume of records to be searched and inexperience of staff in this particular work have in part given way to a multiplicity of more difficult issues, the most time-consuming and contentious of which have been problems of interpretation.

The number of applications under section 44 may seem rather high. However, more than half of last year's 39 applications under this section resulted from two access requests. Ten of them arose from a request for Indian band financial statements. Another access request for meat inspection reports was initially accepted by the government institution after the recommendation of the Information Commissioner. The Minister gave notice to the third parties concerned, and 11 of them sought to prevent access.

Participation by the Commissioner

In the last annual report, the Commissioner said that her Office was prepared to apply for judicial review each time a recommendation for disclosure was not resolved. In view of the decision in the case of *Information Commissioner of Canada v. Canadian Radio-Television and Telecommunications Commission of Canada et al.*, which was summarized in the last annual report, it is improbable that an action by or on behalf of a complainant would succeed in similar circumstances. Accordingly, in cases where a government institution has based a refusal to disclose an account of consultations or deliberations on paragraph 21(1)(b) of the Act, the Commissioner will offer to seek judicial review only if the issue can be distinguished from that in the CRTC case.

During the reporting year, the Information Commissioner initiated nine applications for judicial review. As well, the Information Commissioner has intervened in an additional six cases, four of which were in response to requests by the complainants.

Cases Commenced by the Information Commissioner

Information Commissioner v the Minister of Employment and Immigration. (Federal Court Nos. T-1041-86 and T-1446-86) Filed May 9, 1986, and June 23, 1986, respectively.

Two researchers made independent application for information concerning Count de Bernonville, including investigations and hearings about his arrival in and departure from Canada. The department refused to release any material, claiming that the record consisted entirely of personal information and thus must be exempted under section 19. The Commissioner took the position that some of the information was publicly available and thus releasable under subsection 19(2). At issue as well is whether paragraph 8(2)(j) of the *Privacy Act* applies. This paragraph provides that personal information may be disclosed for research purposes if certain conditions are satisfied.

The Information Commissioner of Canada v the Minister of External Affairs. (Federal Court Nos. T-1042-86, T-1090-86, and T-1200-86) Filed May 9, 1986, May 14, 1986, and May 26, 1986, respectively.

In each of these three cases a request was made to the department for studies relating to free trade with the United States. The department extended the time limit beyond the 30-day statutory period in which the request would otherwise have to be dealt with. Although specifically asked to do so, the department failed to provide any information or explanation to justify the extension of time. The Commissioner applied to the Court for review of the delay, alleging that there had been an improper extension of the statutory time limits.

The Information Commissioner of Canada v Solicitor General of Canada. (Federal Court No. T-1467-86) Filed June 25, 1986.

A request was made for documents that would enable the requestor to know what information concerning a named Canadian had been supplied to an agency of the United States Government. The department released some of the records but claimed exemption for the balance. After investigation, the Commissioner questioned the validity of the claims for exemption of one document. Those claims were made under paragraph 21(1)(b) (an account of consultations or deliberations involving officials or employees or a Minister or a Minister's staff) and under subparagraphs 16(1)(a)(i) and (iii) (certain information obtained or prepared by an investigative body). The Commissioner is seeking an order for disclosure on the ground that those exemptions were not validly claimed in this case.

Information Commissioner v Minister of Employment and Immigration. (Federal Court No. T-344-87) Filed February 18, 1987.

The department was asked to disclose records to enable a requestor to know the administrative procedures dealing with visitors' visas. The department claimed that on the basis of subsection 15(1) of the Act (relating in part to the conduct of international affairs) and subsection 16(2) (information that might facilitate the commission of an

offence) certain portions of the record were exempt. Both exemptions include a harms test but the department refused to provide particulars of the harm that could reasonably be expected to result if the information was disclosed. The Commissioner is seeking an order for disclosure on the ground that the exemption was claimed improperly.

Information Commissioner v Solicitor General. (Federal Court No. T-2783-86) Filed December 23, 1986.

The complainant sought a report made to Correctional Services Regional Headquarters in Saskatoon with respect to the food services unit of a penitentiary. The department released some of the material requested, but sought to exempt other portions. During the investigation additional parts of the record were released but the department continued to withhold some items, claiming exemption under subsection 19(1) of the Act (personal information). At issue is whether the information sought is about an individual employee's position or functions (paragraph 3(j) of the *Privacy Act*) since, if this is so, the information is not "personal information".

Information Commissioner v Minister of National Health and Welfare. Federal Court No. T-1823-86) Filed November 11, 1986.

The department was asked to release records relating to meetings of the National Advisory Committee on Immunization. None of the requested records were released. The department claimed that all of the records were exempt on the basis of paragraph 21(1)(b) of the Act (an account of consultations or deliberations) and that other exemptions applied to other unspecified portions of those records. The issue is whether the documents are totally exemptable under paragraph 21(1)(b).

Interventions by the Information Commissioner

Piller Sausages and Delicatessens Inc. v The Minister of Agriculture et al. (Federal Court No. T-1024-85). J.M. Schneider Inc. v Her Majesty the Queen (Federal Court No. T-1025-85) and In the Matter of Canada Packers Inc. (Federal Court No. T-1026-85) all filed May 10, 1985.

These cases were filed with the Federal Court pursuant to section 44 to block the disclosure of meat-packing inspection reports following a recommendation by the Information Commissioner that the records be disclosed (see pages 176-77, 1985-86 Annual Report).

At the request of the complainant, the Information Commissioner applied to intervene to assist the Court in ensuring that there will be a full canvassing of the matters pertinent to these applications. At issue is whether disclosure could result in material financial loss or gain or prejudice the competitive position of a third party and whether the public health interest in disclosure overrides any such injury.

Société de Transport de la Communauté Urbane de Montréal v L'honorable Thomas McMillan et al. (Federal Court No. T-1202-86) Filed November 26, 1986;

and

Frozen Desserts Ltd. v Her Majesty The Queen (Federal Court No. T-1213-86) Filed November 27, 1986.

These cases arise out of a request to the Department of the Environment for a list of equipment in the Montreal area containing polychlorinated biphenyls (pcb's). Of the 271 firms consulted by the department pursuant to section 28, almost all consented or did not object to the disclosure of the list which contained the name and address of each third party where such equipment was located.

The Information Commissioner's investigation having resulted in a recommendation supporting the disclosure of the list, it was considered appropriate to apply to intervene. The applications were discontinued after the Court determined that there was a technical deficiency in the section 28 procedures carried out by the department.

Mary Bland v The National Capital Commission (Federal Court No. T-2300-86) Filed October 21, 1986.

This case concerns the refusal of the NCC to disclose information with respect to NCC leases which had been exempted as personal information under section 19(1) of the Act. For further information see Refusal - exemption 171(1/3).

Upon the application of Mary Bland, and with the consent of all other parties, including the Privacy Commissioner who had applied previously, the Information Commissioner was added as an Intervenant.

Corporate Management Branch

Corporate Management provides both the Information and Privacy Commissioners with financial, personnel, administrative, data processing and library services. During the year responsibility for public affairs was transferred to the respective Commissioners.

Finance

The Offices' total resources approved by Parliament for the 1986-87 fiscal year were $3,624,730 and 56 person years, an increase of approximately $400,000 over the 1985-86 expenditures. Personnel costs of $2,783,000 and professional and special services expenditures of $393,000 accounted for more than 88 per cent of expenditures. The remaining $438,000 covered all other expenses.

Personnel

Staff increased by two during the fiscal year, to a total of 53 on March 31, 1987. There were 11 staffing actions during the year, including appointments to three senior management positions: assistant Information Commissioner, director of Privacy Compliance, and director general of Corporate Management.

Administration

During the year, Treasury Board authorized additional office space to relieve a serious shortage of accommodation. The Office upgraded its telephone system and added a second toll-free telephone line to help out-of-town callers reach the Offices.

The following are the Offices' expenditures for the period April 1, 1986 to March 31, 1987.

	Information	Privacy	Administration	Total
Salaries	$ 906,344	$ 975,118	$ 546,389	$2,427,851
Employee benefit plan contributions	135,300	129,950	89,750	355,000
Transportation and Communications	44,585	43,984	82,598	171,167
Information	84,274	38,567	4,816	127,657
Professional and special services	335,093	37,970	20,323	393,386
Rentals	—	75	14,697	14,772
Purchased repair and maintenance	—	322	5,103	5,425
Utilities, material and supplies	1,779	3,694	36,695	42,168
Construction and equipment acquisition	3,220	7,642	64,753	75,615
All other	46	753	12	811
TOTAL	**$1,510,641**	**$1,238,075**	**$ 865,136**	**$3,613,852**

Data Processing

The Office continued to convert data it previously gathered manually to electronic systems. This improved efficiency and the Offices' ability to handle an ever-increasing workload without increasing personnel.

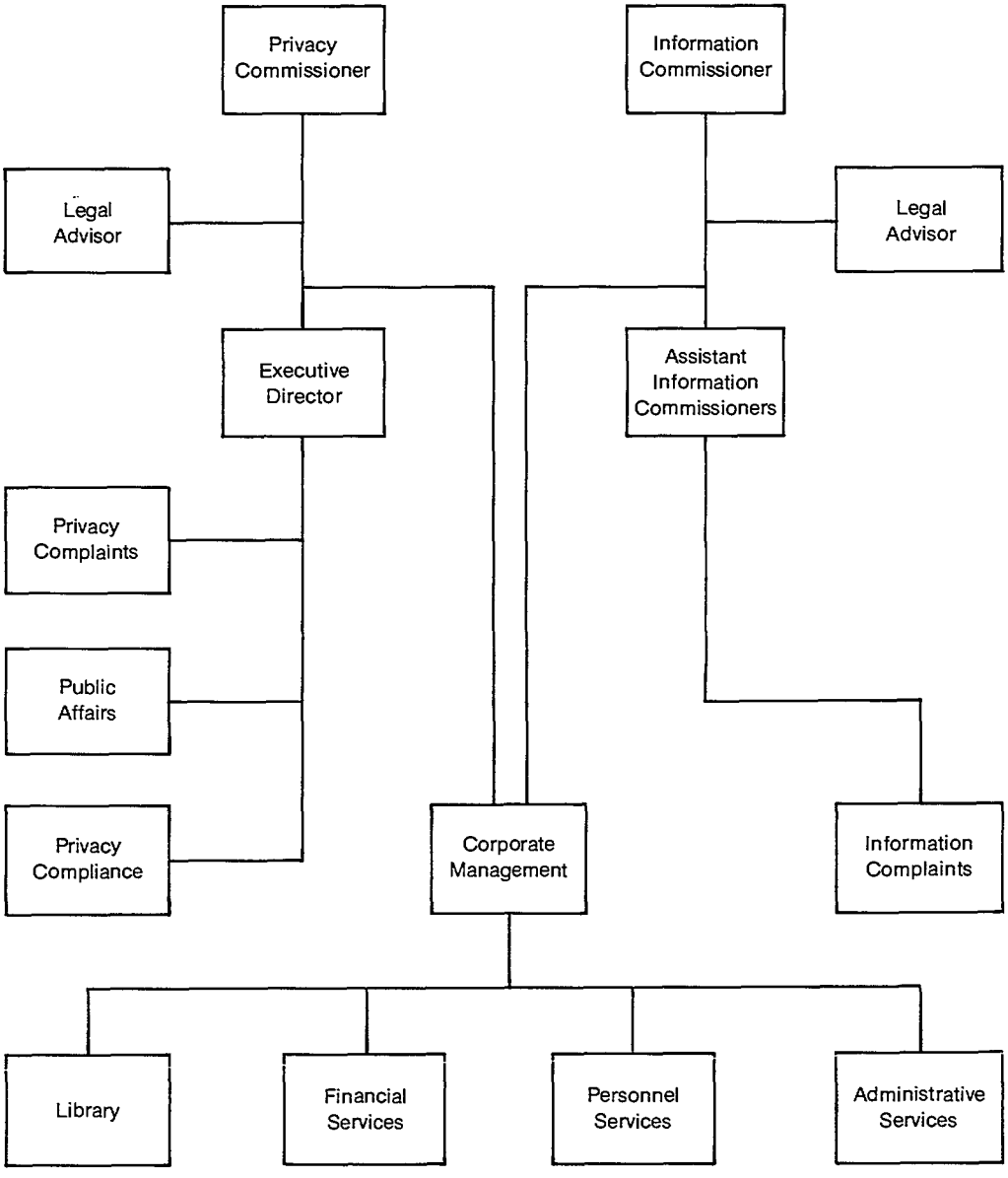
Library

This special library provides an information and referral service for both Commissioners. Its collection is open to the public for reference and research, and interlibrary loans may be arranged. The collection includes books, magazines and government reports, newspaper clipping files and periodical articles on privacy, access to information, and the ombudsman function. The library also has access to several automated bibliographic data bases. During the past year, the library acquired approximately 440 books and answered 512 reference questions.

Appendix I

ORGANIZATION CHART

Offices of the
Information and Privacy
Commissioners of Canada



Appendix II

PROCEDURES FOR COURT REVIEW

Frequently we have been asked to explain the procedures for review by the Court. The following is a short summary of the provisions in the Act and of the Office procedures relating to applications for court review.

REFUSAL OF ACCESS TO AN INDIVIDUAL

Review of Refusal to Disclose

The Federal Court, Trial Division, has authority to review any refusal by a government institution to release a record requested under the *Access to Information Act.*

Conditions Precedent to Court's Jurisdiction

A complaint must have been made to the Information Commissioner and the Commissioner's report on the results of the investigation must have been received by the complainant before the Court will hear the application for review.

The Commissioner's Procedures Leading to Court Review

The Commissioner's tentative report on a complaint investigation is provided to the complainant in writing. It outlines the results of the investigation and describes the basis for the decision in as much detail as possible. The Commissioner through the investigators' reports knows the exact nature of the record or portions of records that have been exempted. However, the Commissioner is not entitled to disclose that which has been exempted, which can prevent the Commissioner from fully explaining the rationale for the conclusions reached.

Occasionally, all the Commissioner is able to establish is that the record is of the kind that must be withheld. In essence, she has to ask a complainant to trust her.

The Commissioner's findings on complaints are basically divided into those that are supportable and those that are not. The supportable complaints are further divided into those that are resolved during the course of the investigation and the ones where the government institution does not agree that the complaint is valid. Most complaints involve multiple exemptions and the Commissioner may support some exemptions and challenge others. (A complaint about multiple exemptions is recorded as one complaint only—but where some exemptions are considered not justified, it will be recorded as supportable or well-founded if a report to the Minister concerned becomes necessary.)

Unless the Commissioner supports all aspects of a complainant's case, tentative findings are provided to a complainant in the first instance so that the complainant can exercise the right to make representations to the Commissioner.

If, as a result of the investigation or the complainant's representations, the Commissioner maintains that a refusal complaint is supportable and the officials disagree, the Commissioner provides a report, with recommendations, to the head of the government institution. The Commissioner may impose a time limit on the response to the report but in that event the Commissioner may not make a report to the complainant until after the Minister's response has been received or the time limit has expired.

The Commissioner will almost always offer to apply to the Court for a review when a recommendation for release is not accepted. So far, the only exception to this has been on recommendations for release of records exempted under section 21. Section 21 contains a class test but no injury test and the Commissioner feels obliged to recommend release when, in her opinion, the department ought to release in compliance with the spirit of the Act. Because of the decision in the CRTC case (The *Information Commissioner v. The Chairman of the Canadian Radio-Television and Telecommunications Commission, et al.* reported [1986] 3 F.C. 413), the Commissioner will not at this time apply for a court review in respect of complaints about the use of section 21 where it appears that the issues are the same as in the CRTC case.

When the Commissioner finds that a complaint is not supportable in whole or in part, the complainant is informed of the right to seek a court review. To establish the conditions precedent for an application for court review, the complainant is offered a certificate showing that a complaint has been made under the Act and that the Commissioner reported on the complaint. It is up to the complainant to decide whether to provide the Commissioner's report to the Court because the hearing is into the department's refusal—not an appeal from the Commissioner's decision.

Limitation Period

The application for review of a refusal must be made within 45 days after the results were reported to the complainant. There is, however, provision for the Court to allow an extension of that period both before and after its expiry time.

Unjustified Delay is Deemed a Refusal

A failure to give access to a requested record, or a part of it, within the time limitations of the Act is deemed to be a refusal and therefore the Court has jurisdiction to review whether a delay is unjustified.

Parties to Review of Refusal

- The complainant
The complainant may seek the review but is then responsible for the expenses involved. However, the *Access to Information Act* provides a novel provision as to costs. The Act stipulates that where the Court is of the opinion that an application for review has raised an important new principle in relation to the Act, the Court "shall" order that costs be awarded to the applicant, even an unsuccessful one.

- The Information Commissioner
The Commissioner may apply for the court review with the consent of the complainant, or may appear on behalf of any person who has applied for a review. In the first instance the application would be brought in the name of the Commissioner; in the second instance it is in the name of the complainant.

Burden of Proof

The burden of proof of the authority to withhold a record rests on the government institution claiming the exemption.

Court Orders

Except as described further on, the Court shall, if it determines that the head of the institution is not authorized to refuse disclosure, order disclosure of the record on appropriate conditions or make such other order as the Court deems appropriate.

If in the case of records exempted under section 14 (federal-provincial affairs), section 15 (international affairs and defence) or paragraphs 16(1)(c) (law enforcement) or (d) (security of penal institutions) or 18(d) (Canada's financial interests), the Court determines that the head of the institution did not have reasonable grounds on which to refuse to disclose, it shall order disclosure on appropriate conditions or make such other order as the Court deems appropriate.

When the Court determines that the head of the institution is required to refuse to disclose a record or part of a record, the Court shall order the head of the institution not to disclose the record or part thereof or shall make any other appropriate order.

ACTIONS BY THIRD PARTIES

Nature of Action - Time Limits - Notice

Third parties are those whose confidential business information may be protected from disclosure under section 20. The Act entitles third parties to apply for a court review of a government institution's intent to give access to a requested record that might contain confidential business information. The intention to disclose may be the original response to a request or, later, as a result of a department's acceptance of a recommendation from the Information Commissioner. The third party must apply for the review within 20 days after receipt of the notice of the intention to release. The Act says "within 20 days after the notice is given" but the Federal Court has ruled that the 20 days begin when the notice is received. (See *J.M. Schneider Inc. vs. The Queen* (T-1717-86) - unreported order of Cullen J., September 8, 1986.) The head of the government institution, once notified of the application for review by the third party, is required to notify the person who applied for access. That person is entitled to appear as a party to the review and the Information Commissioner may apply for leave to intervene in third party proceedings.

GENERAL PROVISIONS

Hearings

The Act provides that applications for review are to be heard and determined in a summary way in accordance with any special rules that may be made pursuant to section 46 of the *Federal Court Act.* No such rules have been made. Most applications to date have been based on affidavit evidence, although it is likely that oral evidence will become necessary in the future.

The Act requires that the Associate Chief Justice or a judge of the Court designated by him must hear and determine any application for review concerning records withheld because of the sections dealing with international affairs or defence. Those hearings must be held *in camera* and, at the request of the minister, in the National Capital Region. Furthermore, the minister is entitled to be heard *ex parte* on any such application.

Access to Records by the Court

The Court is specifically authorized to examine any record to which the Act applies that is under the control of a government institution "notwithstanding any other Act of Parliament or any privilege under the law of evidence...". Section 69 of the *Access to Information Act* states, subject to some exceptions, that it does not apply to confidences of the Queen's Privy Council. The *Evidence Act* permits a minister of the Crown and the Clerk of the Privy Council to object to disclosure of such a confidence without the Court having an opportunity for its review. The combined effect of these two provisions is that the Court probably will decline to review an application that involves a record that has been certified by a minister or the Clerk of the Privy Council as being a confidence of the Queen's Privy Council. (An interesting wedge into the concept of Cabinet confidences may be found in a recent Supreme Court of Canada decision in the Minaki Lodge case. (See *H. Rod Carey* v. *Her Majesty The Queen in Right of Ontario et al.,* S.C.R. Part 5, 1986, Vol. 2, 637.)

Appeals

Appeals will lie to the Federal Court of Appeal and the Supreme Court of Canada in accordance with the law regarding appeals to those courts.

Sections 18 and 28 of the Federal Court Act

The Commissioner is subject to the provisions of sections 18 and 28 of the *Federal Court Act.* One *mandamus* application was brought against the Commissioner to force the Commissioner to report. It was *H. Berkal* vs *The Information Commissioner* (T-2629-84). (See Annual Report 1984-85). Mr. Justice Jerome dismissed the application on February 15, 1985. At that time the report to the complainant had been made.

Appendix III

RECOMMENDATIONS OF STANDING COMMITTEE ON JUSTICE AND SOLICITOR GENERAL ON THE REVIEW OF THE *ACCESS TO INFORMATION ACT*

THRESHOLD CONCERNS

2.1. The Committee recommends, that, for purposes of clarification, the *Access to Information Act* and the *Privacy Act* mandate that the Treasury Board, the Information Commissioner, and the Privacy Commissioner foster public understanding of the *Access to Information Act* and the *Privacy Act* and of the principles described in section 2 of each Act. Such education should be directed towards both the general public and the personnel of government institutions. The appropriate provision in the statutes should follow the model of section 22 of the *Canadian Human Rights Act.* (p.7)

2.2 The Committee further recommends that the Treasury Board undertake a public education campaign in conjunction with the proclamation of any amendments to the *Access to Information Act* and the *Privacy Act* and also consider printing notices about individual rights under both the *Access to Information Act* and the *Privacy Act* to be included in standard government mailings. (p. 8)

2.3 The Committee recommends that all federal government institutions be covered by the *Access to Information Act* and the *Privacy Act*, unless Parliament chooses to exclude an entity in explicit terms. Thus the Committee recommends the repeal of Schedule I to the *Access to Information Act* and the Schedule to the *Privacy Act.* The criteria for inclusion should be as follows: Firstly, if public institutions are exclusively financed out of the Consolidated Revenue Fund, they should be covered. Secondly, for agencies which are not financed exclusively in this way, but can raise funds through public borrowing, the major determinant should be the degree of government control. (p. 9)

2.4 The Committee recommends that the *Access to Information Act* cover all federal government institutions, including all administrative tribunals, the Senate, the House of Commons (but excluding the offices of Senators and Members of the House of Commons), the Library of Parliament, and such offices directly accountable to Parliament as the Auditor General, the Official Languages Commissioner, the Chief Electoral Officer and the Office of the Information and Privacy Commissioners. The criteria for inclusion should be as follows: Firstly, if public institutions are exclusively financed out of the Consolidated Revenue Fund, they should be covered. Secondly, for agencies which are not financed exclusively in this way, but can raise funds through public borrowing, the major determinant should be the degree of government control. (p. 9)

2.6 The Committee recommends that the *Access to Information Act* and the *Privacy Act* be extended to cover those Crown corporations and wholly-owned subsidiaries as are listed in the Treasury Board's *Annual Report to Parliament on Crown Corporations and Other Corporate Interests of Canada.* For this purpose, the Committee recommends that the *Access to Information Act* and the *Privacy Act* be amended to include such a definition of "Crown corporation". (p. 11)

2.7 The Committee further recommends that if the Government of Canada controls a public institution by means of a power of appointment over the majority of the members of the agency's governing body or committee, then both the *Access to Information Act* and the *Privacy Act* should apply to such an institution. (p. 11)

2.8 The Committee recommends that, with respect to the Canadian Broadcasting Corporation (CBC), the *Access to Information Act* not apply in relation to program material; otherwise, the Corporation should be fully subject to both the *Access to Information Act* and the *Privacy Act.* (p. 11)

2.9 The Committee recommends that any natural or legal person be eligible to apply for access to records under the *Access to Information Act.* The location of the applicant should no longer be relevant. Corporations, non-profit associations, employee associations, and labour unions should also be able to avail themselves of this legislation. (p. 12)

2.11 The Committee recommends that the *Access Register* be combined with such other government publications as the *Index of Programs and Services* and the *Organization of the Government of Canada.* (p. 13)

2.12 The Committee further recommends that this omnibus access tool and the *Personal Information Index* be made available by the Treasury Board and individual government institutions on an online basis and/or through their sale in digital form for use on computers. (p. 13)

2.13 The Committee further recommends that the Treasury Board and individual government institutions make available segments of these various user guides on a customized basis to suit the needs of particular user groups. (p. 13)

2.14 The Committee recommends that the status and role of Access and Privacy Coordinators be given explicit recognition in section 73 of the *Access to Information Act* and section 73 of the *Privacy Act,* since they are the prime movers for implementation of the legislation within government institutions. (p. 15)

2.15 The Committee recommends, in light of the Treasury Board's 1986 consultation with Access and Privacy Coordinators, that the Treasury Board directly address the problem of ensuring that Coordinators, who should be senior level officials wherever possible, have direct reporting and working relationships with senior management and senior program officials of government institutions in order to ensure necessary support for, and understanding of, their complicated, demanding, and expanding tasks in information management. The Treasury Board should also update its requirement statement concerning the role of Coordinators, especially in such areas as information collection policy, information inventories, privacy protection, and security issues. (p. 15)

2.16 The Committee recommends that the Treasury Board organize standard, formal training for Access and Privacy Coordinators, perhaps using automated training modules, audiovisuals, and films. (p. 15)

2.17 The Committee further recommends that the Treasury Board and the Department of Justice become more active in central coordination and policy leadership on issues with government-wide implications for Access and Privacy legislation. (p. 15)

EXEMPTIONS AND CABINET CONFIDENCES: SAYING NO

3.1 The Committee recommends that subject to the following specific proposals, each exemption contained in the *Access to Information Act* and *Privacy Act* be redrafted so as to contain an injury test and to be discretionary in nature. Only the exemption in respect of Cabinet records (which is proposed later in this Report) should be relieved of the statutory onus of demonstrating that significant injury to a stated interest would result from disclosure. Otherwise, the government institution may withhold records or personal information only "if disclosure could reasonably be expected to be significantly injurious" to a stated interest. (p. 20)

3.2 The Committee recommends that the exemption contained in section 13 of the *Access to Information Act* and section 19 of the *Privacy Act* be redrafted to be discretionary in nature and to contain an injury test. In addition, the exemption should permit other governments to be notified of an application for the disclosure of records or personal information that they have submitted in confidence and also permit them to dispute recommendations for the release of such information before the Information Commissioner or Privacy Commissioner and the Federal Court. The burden of proof in such cases should be placed upon the other governments. Where foreign governments are concerned, a time period of three months should be allowed for response and the Secretary of State for External Affairs should be served with the notice of application. (p. 21)

3.3 The Committee further recommends that section 13 of the *Access to Information Act* and section 19 of the *Privacy Act* be redrafted to clarify that institutions or governments of component elements of foreign states (such as State governments in the United States and their agencies) are included for purposes of this exemption. (p. 22)

3.4 The Committee further recommends that section 13 of the *Access to Information Act* and section 19 of the *Privacy Act* be amended so that institutions of native self-government are accorded the same protection as other governments for purposes of this exemption. (p. 22)

3.6 The Committee recommends that the term "affairs" in section 14 of the *Access to Information Act* and section 20 of the *Privacy Act* be deleted and be replaced by the term "negotiations". (p. 22)

3.7 The Committee recommends that the Acts be amended to clarify that the classes of information listed in section 15 of the *Access to Information Act* and incorporated by reference in section 21 of the *Privacy Act* are merely illustrations of possible injuries; the overriding issue should remain whether there is an injury to an identified state interest which is analogous to those sorts of state interest listed in the exemption. (p. 23)

3.8 The Committee recommends that minor amendments to the definition of "personal information" be considered in order to address certain technical issues which have arisen in submissions to this Committee and to the Department of Justice. (p. 24)

3.9 The Committee recommends that the substance of sections 3 and 8 of the *Privacy Act* be incorporated in the body of the *Access to Information Act.* (p. 24)

3.10 The Committee recommends that section 19(2) of the *Access to Information Act* be amended to provide as follows: "Notwithstanding subsection (1) the head of a government institution shall disclose..." (p. 24)

3.11 The Committee recommends that the definition of "personal information" under the *Privacy Act* be amended so that the exact salaries of order in council appointments be available pursuant to a request under the *Access to Information Act,* and that only the salary range of other public servants be excluded from this definition. (p. 24)

3.12 The Committee recommends that section 8(5) of the *Privacy Act* be amended to require that individuals generally be notified of the impending disclosure of personal information about them and be entitled to contest this disclosure before the Privacy Commissioner and Federal Court. When considerable numbers of people are affected, the Privacy Commissioner should have the authority to determine whether the disclosure of personal information under section 8(2)(m) constitutes an unwarranted invasion of personal privacy. If the Commissioner so determines, he shall order the government institution to make reasonable attempts to notify the individuals concerned, who should have such time as the Commissioner stipulates to contest the disclosure before the Federal Court. (p. 26)

3.13 The Committee further recommends that the head of the government institution be permitted to appeal the Privacy Commissioner's determination that a particular disclosure of personal information under section 8(2)(m) of the *Privacy Act* constitutes an unwarranted invasion of personal privacy to the Federal Court in the event of a disagreement. (p. 26)

3.14 The Committee recommends that the following definition of "trade secrets" should be contained in the *Access to Information Act:*

> A secret, commercially valuable plan, formula, process or device, that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort. (p. 26)

3.15 The Committee recommends that section 18 of the *Access to Information Act* require disclosure of the results of product or environmental testing, along the lines of section 20(2). (p. 27)

3.16 The Committee recommends that the public interest override contained in section 20(6) of the *Access to Information Act* extend to all types of third-party information set out in section 20. (p. 27)

3.17 The Committee recommends that, where many third parties are involved or such parties reside outside of Canada, the *Access to Information Act* be amended to provide for substitutional service of notification by means of notice in the Canada Gazette and advertisement in any relevant trade journal, periodical or newspaper. (p. 28)

3.18 The Committee further recommends that the *Access to Information Act* be amended to clarify that third parties bear the onus of proof before the Federal Court when they challenge decisions to disclose records that may contain confidential business information. (p. 28)

3.19 The Committee recommends that section 21 of the *Access to Information Act* be amended not only to contain an injury test but also to clarify that it applies solely to policy advice and minutes at the political level of decision-making, not factual information used in the routine decision-making process of government. The exemption should be available only to records that came into existence less than ten years prior to a request. (p. 29)

3.20 The Committee recommends that section 23 of the *Access to Information Act* and section 27 of the *Privacy Act* be amended to clarify that the solicitor-client exemption is to apply only where litigation or negotiations are underway or are reasonably foreseeable. (p. 29)

3.21 The Committee recommends that section 10(2) of the *Access to Information Act* and section 16(2) of the *Privacy Act* be amended to permit the government institution to refuse to confirm or deny the existence of a record only when disclosure of the record's existence would reveal information otherwise exempt under sections 13, 15, 16 or 17 of the *Access to Information Act* or sections 19, 21, 22 or 25 of the *Privacy Act* (information from other governments, international affairs and national defence, law enforcement and investigations, and safety of individuals). (p. 29)

3.22 The Committee recommends that the exclusion of Cabinet records found in section 69 of the *Access to Information Act* and section 70 of the *Privacy Act* be deleted. In its place, an ordinary exemption for Cabinet records should be added to the *Access to Information Act* and the *Privacy Act*. No injury test should be included in this exemption. (p. 32)

3.23 The Committee recommends that section 69(1)(a) [Cabinet memoranda], section 69(1)(b) [discussion papers] and section 69(1)(e) [Ministerial briefing notes], as well as section 69(3)(b) of the *Access to Information Act* [section 70(1)(a), (b) and (e) and section 70(3)(b) of the *Privacy Act*] be deleted. The amended exemption for Cabinet confidences should be drafted in the following terms:

> (1) The head of a government institution may refuse to disclose a record requested under this Act where the disclosure would reveal the substance of deliberations of the Queen's Privy Council for Canada, contained within the following classes of records:
>
> (a) agenda of Council or records recording deliberations or decisions of Council;
>
> (b) a record used for or reflecting consultation among Ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
>
> (c) draft legislation or regulations;
>
> (d) records that contain information about the contents of any records within a class of records referred to in paragraph (a) to (c).

(2) For the purposes of subsection (1) "Council" means the Queen's Privy Council for Canada, committees thereof, Cabinet and committees of Cabinet. (p. 32)

3.24 The Committee recommends that the twenty-year exemption status for Cabinet confidences be reduced to fifteen years. (p. 33)

3.25 The Committee recommends that the *Access to Information Act* and the *Privacy Act* be amended to contain a specific framework for the review of Cabinet records. Appeals of decisions under the Cabinet records exemption should be heard solely by the Associate Chief Justice of the Federal Court, with procedures similar to those contemplated in section 52 of the *Access to Information Act* and section 51 of the *Privacy Act.* (p. 33)

THE COMMISSIONERS AND THE COURT

4.1 The Committee recommends that the central mandate of the Information Commissioner and Privacy Commissioner to make recommendations on disclosure be confirmed, but that the power allowing the Information Commissioner to make binding orders for certain subsidiary issues (relating specifically to delays, fees, fee waivers, and extensions of time) be provided by amendments to the *Access to Information Act.* (p. 38)

4.2 The Committee recommends that the Information Commissioner be statutorily authorized to conduct audits of government institutions, *inter alia,* to assess the degree to which the policy of open government contained in the *Access to Information Act* has been implemented. The resources necessary to undertake this additional responsibility should be provided. (p. 38)

4.3 The Committee recommends that the Office of the Information Commissioner and Privacy Commissioner be separated in order to avoid any real or perceived conflict of interest in the discharge of the Commissioners' two mandates. A separate parliamentary vote for each Office should likewise be required. (p. 38)

4.4 The Committee recommends that sections 49 and 50 of the *Access to Information Act* and sections 48 and 49 of the *Privacy Act* be amended so as to provide a single *de novo* standard of judicial review. (p. 39)

4.5 The Committee further recommends that the Acts clarify the Federal Court's general jurisdiction to substitute its judgment for that of the government institution in interpreting the scope of all exemptions. (p. 39)

PARTICULAR ISSUES UNDER THE ACCESS TO INFORMATION ACT

6.1 The Committee recommends revising the relevant regulations so that no mandatory form be required to make a request under the *Access to Information Act.* (p. 63)

6.2 The Committee recommends that for statistical and administrative purposes, a written request for records which refers to the *Access to Information Act* be deemed to constitute a request under the Act. (p. 63)

6.3 The Committee recommends that the *Access to Information Act* be amended to rescind the requirement of an application fee. However, the *Access to Information Act* should be amended to authorize the Information Commissioner to make a binding order enabling a government institution to disregard frivolous or vexatious requests under the Act. Such an order should be appealable to the Federal Court. (p. 64)

6.4 The Committee recommends that there continue to be no fee levied for the first five hours of search and preparation time. (p. 64)

6.5 The Committee recommends that no fees be payable if a search does not reveal any records. (p. 65)

6.6 The Committee recommends that once a document has been released to a particular applicant, subsequent applicants should be able to review this record in the reading room of the government institution. A list of records released under the *Access to Information Act* should be available in the reading room and in the Annual Report of the government institution. Should a copy be desired by subsequent applicants, they should be required at most to pay reasonable photocopying expenses without any additional expense for search and preparation. (p. 65)

6.7 The Committee recommends that the Access to Information Regulations be amended to stipulate a market rate for photocopying. The rates for photocopying should generally be consistent with the rate charged by the Public Archives of Canada, so long as this rate generally reflects prevailing market conditions in the National Capital Region. (p. 65)

6.8 The Committee recommends that a fee waiver policy be enacted by an amendment to the *Access to Information Act* or by regulation so that a consistent standard is applied across the Government of Canada. The following criteria should be considered:

1. Whether there will be a benefit to a population group of some size, which is distinct from the benefit to the applicant;

2. Whether there can be an objectively reasonable judgment by the applicant as to the academic or public policy value of the particular subject of the research in question;

3. Whether the information released meaningfully contributes to public development or understanding of the subject at issue;

4. Whether the information has already been made public, either in a reading room or by means of publication;

5. Whether the applicant can make some showing that the research effort is likely to be disseminated to the public and that the applicant has the qualifications and ability to disseminate the information. A mere representation that someone is a researcher or "plans to write a book" should be insufficient to meet this latter criterion. (p. 66)

6.9 The Committee further recommends that complaints to the Information Commissioner on fee waivers continue to be available, and that the Commissioner be empowered to make binding determinations in this regard, without further recourse to judicial review. (p. 66)

6.10 The Committee recommends that the *Access to Information Act* be amended to specify that the period for processing an application commences on receipt of the application. (p. 67)

6.11 The Committee recommends that where the government institution fails to provide access within the time limits set out in the Act, the applicant should thereupon be notified of his or her right to complain to the Information Commissioner. (p. 67)

6.12 The Committee recommends that the initial response period available to government institutions be reduced from thirty days to twenty days, with a maximum extension period of forty days, unless the Information Commissioner grants a certificate as to the reasonableness of a further extension. The onus for justifying such extensions shall be on the government institution. The Treasury Board is urged to monitor the cost implications of this recommendation and to report to the Standing Committee on Justice and Solicitor General on its findings within one year of the implementation of this measure. (p. 67)

6.13 The Committee recommends that the *Access to Information Act* be amended to authorize the Information Commissioner to make an order waiving all access fees if a government institution fails to meet specified time limits without adequate justification. (p. 67)

6.14 The Committee recommends that the Treasury Board, in conjunction with the Public Service Commission, undertake a study to investigate methods for enhancing timely compliance with the *Access to Information Act*. This investigation should commence as soon as possible and a report to the Standing Committee on Justice and Solicitor General be submitted within one year. (p. 67)

6.15 The Committee recommends that both Acts be amended to impose a time limitation of sixty days on investigations by the Information Commissioner and the Privacy Commissioner. If a report of the investigation is not forthcoming within this period, a certificate shall be given to the applicant permitting a direct resort to judicial review. The certificate should contain no recommendations but simply a statement that the investigation could not be completed within the allotted sixty-day period. The applicant would then have the choice either to wait until investigation has been completed or to seek immediate review in the courts. (p. 68)

6.16 The Committee recommends that the *Access to Information Act* be amended to add a provision requiring a government institution to reveal information as soon as practicable where there are reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard. (p. 69)

OTHER ACCESS ISSUES

8.1 The Committee recommends that section 36.3 of the *Canada Evidence Act* [Cabinet confidences] be deleted and that section 36.2 of this Act be amended to add a reference to disclosure on the grounds that the disclosure would reveal Cabinet confidences. For the purpose of this provision the definition of "confidence of the Queen's Privy Council for Canada" should be amended to conform with the amended definition of this provision as recommended in Chapter 3 of this Report. (p. 88)

CONCLUSIONS

9.1 The Committee recommends the revision of the *Access to Information Act* and the *Privacy Act* to require the Standing Committee on Justice and Solicitor General to hold hearings on the Annual Reports of the Information Commissioner and the Privacy Commissioner within 90 sitting days of their being tabled in the House of Commons. This review should occur on the basis of a permanent Order of Reference and should provide for engaging the professional staff necessary to assist the Committee. (p. 94)

9.2 The Committee recommends that the Standing Committee on Justice and Solicitor General, on a cyclical basis or with respect to specific issues, hold hearings to review the Annual Reports from institutions and organizations that are subject to the *Access to Information Act* and the *Privacy Act.* (p. 94)

9.3 The Committee recommends that government institutions continue to prepare Annual Reports on the *Access to Information Act* and *Privacy Act* under section 72 and that these continue to be sent to Parliament, the Information and/or Privacy Commissioner, as appropriate, the Department of Justice, and the Treasury Board. (p. 95)

9.4 The Committee recommends that, on a periodic and rotating basis, and as the need arises, the Standing Committee on Justice and Solicitor General review and hold hearings on specific Annual Reports received from government institutions under section 72 of the *Access to Information Act* and the *Privacy Act.* (p. 95)

9.5 The Committee recommends that section 72 of the *Access to Information Act* and the *Privacy Act* be ameneded to require the Treasury Board to prepare Consolidated Annual Reports on the administration of the legislation, based on Annual Reports received from government institutions. The Treasury Board should issue specific instructions to such institutions about the contents of such Annual Reports. Such a Consolidated Annual Report should be submitted to Parliament by October 1 of each year. (p. 95)

9.6 The Committee recommends that the Standing Committee on Justice and Solicitor General hold annual hearings and prepare a Report, if necessary, on the Consolidated Annual Reports of the Treasury Board on the administration of the *Access to Information Act* and the *Privacy Act* within ninety days of their receipt by the House of Commons. (p. 95)

9.7 The Committee recommends that section 75(2) of the *Access to Information Act* and the *Privacy Act* be amended to require the Committee established by Parliament under section 75(1) to undertake a comprehensive review of the provisions and operation of these Acts within four years of the tabling of the present Report in Parliament and, within a year after the review is undertaken, to submit a Report to Parliament thereon, including a statement of any changes the Committee would recommend. (p. 96)