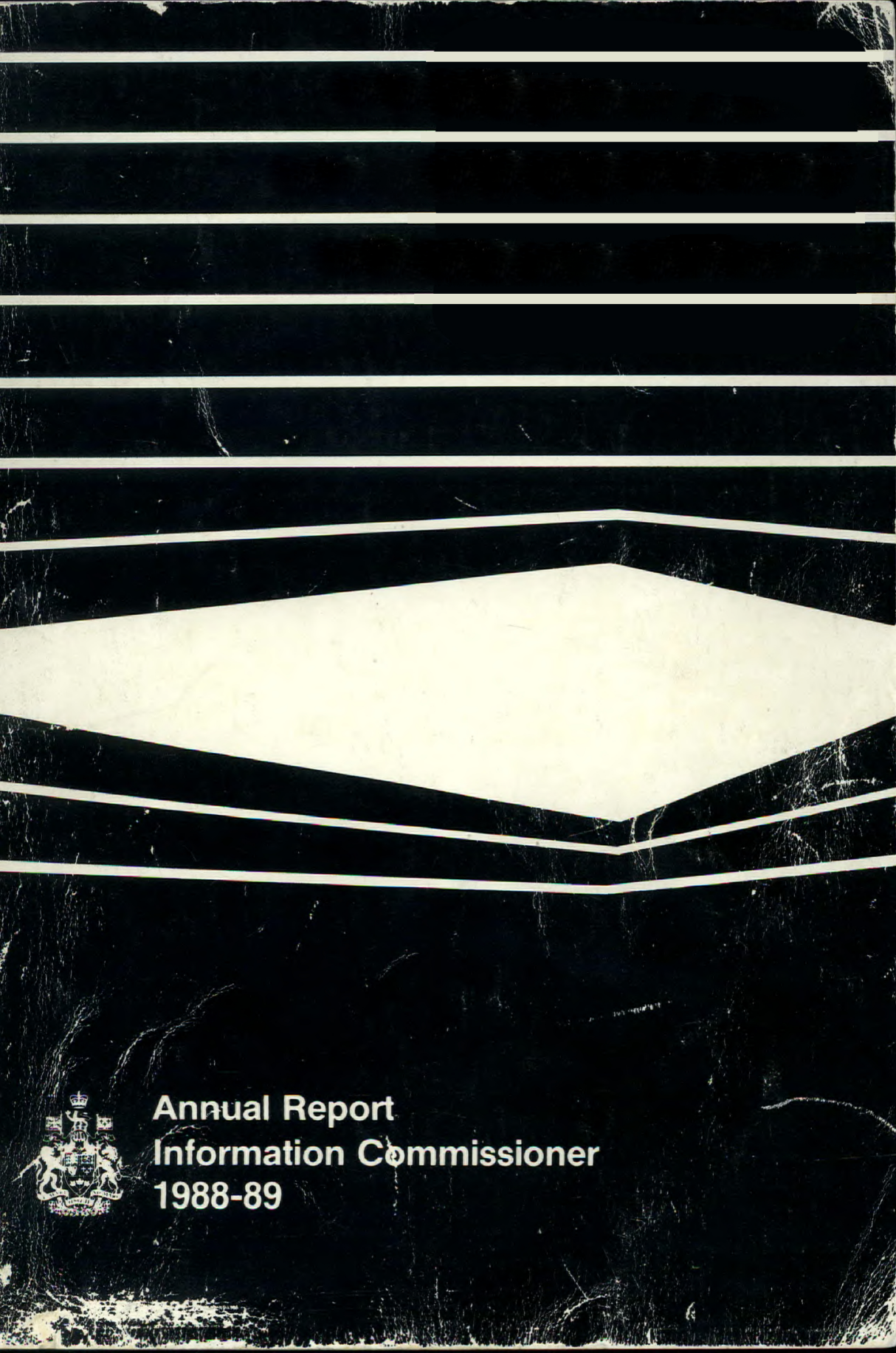

Annual Report
Information Commissioner
1988-89

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Information Commissioner
1988-89

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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 1989

Dear Mr. Charbonneau:

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

This report covers the period from April 1, 1988, until March 31, 1989.

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 1989

Dear Mr. Fraser:

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

This report covers the period from April 1, 1988, until March 31, 1989.

Yours sincerely,

Inger Hansen, Q.C.

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The Sixth Annual Report - Introduction

OPEN GOVERNMENT: WHAT WAS SAID

When the government operates in secrecy and refuses to let the public have certain documents, it creates an atmosphere of public mistrust. . . . It is a question of power and we all know that those who have information are those who wield real power. But in a democracy such as ours, power and information must be widely shared. . . . [Government] information belongs to the people of Canada, unless there is very specific and fundamental reason for keeping it secret.

The Right Honourable Joe Clark, P.C., M.P.
January 29, 1981
on Second Reading of Bill C-43
(*Access to Information Act*)

[Guidelines] will explain how officials can release certain information which technically, in an exemptable category, the government sees no need to withhold. As U.S. experience has shown, guidelines make it possible to achieve more openness in practice that can be reflected in legislation.

The Honourable Francis Fox, Q.C., P.C.
January 29, 1981
on Second Reading of Bill C-43

There can no longer be any justification for the aura of secrecy which surrounds the business of government. Access to government information is essential to participatory democracy. And access must be a meaningful legislative right rather than a sham.

Professor Murray Rankin
University of Victoria
Freedom of Information in Canada
Will the Doors Stay Shut?
Research Study for the Canadian Bar
Association, 1977

Introduction

Previous annual reports have reprinted on their opening pages section 2 of the *Access to Information Act* which outlines the purpose of the law.

This account covering 1988-89 begins the same way but in the body of this report we have added quotations from various individuals. Their words are intended to illustrate the ideological and practical problems inherent in freedom of information laws.

We hope these statements will also add to the debate on whether the *Access to Information Act* strikes a proper balance between competing rights. On the one hand, there are the privacy rights of individuals and business and the right of society to protection against disclosure of such sensitive records as those on defence and criminal matters; on the other hand is the public right to open and accountable government.

The idealism expressed in some of the quotations constitutes the driving force behind our insistence that there be timely and appropriate compliance with the *Access to Information Act.*

The Information Commissioner's mandate is modeled on that of a legislative ombudsman. The business of an ombudsman's office is to resolve complaints. As a consequence, we do not hand out bouquets and this may leave the impression that we interpret our mandate exclusively as one of finding fault. While errors may be found as a result of complaint investigations, the ultimate goal of an ombudsman is to assist those involved to perform better in future, that is to move a little closer to an ideal. We hope that this report will be received in that spirit.

The success of an ombudsman's office is not measured only by the number of complaints it finds to be justified. An ombudsman's function is to mediate and to explain. Complainants may appreciate the existence of a statutory and independent complaint procedure even when their complaints are not supported by the ombudsman, providing they are satisfied that the investigation was thorough and fair and they understand why the government's decision was correct.

A report dealing with complaints may also lead readers to conclude that nothing good ever happens. In this context such an impression is wrong. Nine out of ten access requests do not give rise to complaints and, according to Treasury Board, most requestors receive a complete response within the 30-day limit.

However, the ratio of complaints to access requests is still very high. In addition, the large number of valid complaints of refusals to grant access makes it clear that many requestors do not initially receive all the information to which they are entitled. Moreover, the steady increase in the number of court applications brought in the name of the Information Commissioner and by individuals to review denials of access indicates that public perception of the intent of

Parliament and the meaning of the law differs considerably from that of the government institutions.

The length of time it takes this office, or the legal process, to achieve results is a major problem and indicates that while in the last six years the government may have embraced freedom of information principles, the embrace remains cool and reluctant.

The government still faces practical difficulties in providing the service required under the *Access to Information Act*. Alternatively, access requestors sometimes seek information that is difficult to retrieve or is in quantities that can almost paralyse the capacity of individual departments.

One extreme example will illustrate the problem: during the 1988-89 reporting period, one department received 1,097 access requests from one individual. The same person complained to this office about the institution's response to most of the access requests. The complaints appear to be made solely to pursue rights to which the complainant considers himself to be entitled under the Act.

The range of subjects requestors pursue also staggers the imagination. Here are just a few:

Advance tax rulings
Kingsmere renovations
Low level flights
Meat inspection reports
NATO
Oldman River
Parking spots
Quebecois RCMP
Refugee backlog
Salmonella
Terrorism
UFO reports
Videotapes
War criminals
Youth unemployment
AIDS
Baker Nunn radar
Archeological artifacts
Beer commercials
Cruise missile
Canteen price list
Deschênes Commission
Export permits
Free trade
Granville Island
Hair restorer
Irradiation of food
Job entry coordinators

A continuing concern to our office is the delay by institutions to provide access to requested records. In addition, we are disturbed by delays in the handling of access requests and consideration of complaints when the process moves from departmental to ministerial offices. This increasing failure of government institutions to meet legislated response deadlines leaves users wondering whether problems are operational or attitudinal. This report deals with both causes.

To help readers make their own assessments, we begin this report by restating the role of the Information Commissioner.

We have included an examination of whether attitude plays a role in the implementation of the Act and there is a special report on a general investigation which was conducted in 1988 into the problem of delays. This is followed by a discussion of other factors that contribute to delays. As in previous reports, this one also contains statistics, case summaries, enquiries, public appearances, court cases and corporate management sections.

THE FIRST TIER OF THE REVIEW PROCESS: WHAT WAS SAID

To make the right of access really meaningful, the bill proposes a review process which is truly effective and independent of government. First, there will be an Information Commissioner who will be able to receive all types of complaints about the operations of the Act. The commissioner will also be empowered to initiate investigations himself. I think that it is inevitable that he will become an access advocate who will be pressuring the government to come out with as much information as possible.

The Honourable Walter Baker, Q.C., P.C.
11 December, 1979
Appearing before the Standing
Committee on Justice and Legal
Affairs on Bill C-15
(*Freedom of Information Act*)

But the idea that there can be an intervening force to hear and entertain the application of the review process will probably eliminate many of the contentious issues which in the United States go to court and which are the cause of much of the controversy and the litigation, of course, and the costs there. I think that is very much of a major step forward.

Mr. Ged Baldwin, O.C., Q.C.
11 December, 1979
Appearing before the Standing
Committee on Justice and Legal
Affairs on Bill C-15

I would like to take a few minutes to talk about the independent review system. Without independent review, the individual has no recourse against government institutions and his right of access will be a right in name only. Bill C-43 provides for a two-tiered independent review process. First, . . . the Information Commissioner is responsible for receiving and hearing, free of charge, complaints dealing with various aspects of the processing of requests. At the second level, a person who is refused access to a document, even after examination of his complaint by the commissioner, has the right to apply to the Federal Court for review of this refusal. The Information Commissioner is not a member of government and is, above all, an agent of Parliament. The legislation

gives him extensive powers for examining complaints, and he has access to all information covered by the Bill. He may demand that officials explain their reasons for making a given decision. He may recommend that the institution change a decision that has already been made, and in that case, his recommendations are communicated to the complainant.

The commissioner may initiate an investigation without necessarily having received a complaint. He is empowered to go directly to the courts to obtain a review of a refusal to release information. Finally, he reports directly to Parliament and not through a minister. In fact, the commissioner's powers are very extensive and his main role will be to ensure that government departments and agencies abide by both the letter and the intent of the law. He will not act as a neutral ombudsman. I expect the Information Commissioner to take up the cause of persons seeking information and to defend their interests vis-à-vis ministers and officials. I feel that the Information Commissioner will be the linchpin of access to information.

The Honourable Francis Fox, Q.C., P.C.
28 June, 1982
On Third Reading of Bill C-43

The Role of the Information Commissioner

Individuals who in any way are dissatisfied with a government institution's handling of an access request may complain to the Information Commissioner.

Most complaints are about exemptions claimed by a government institution and resulting refusals to release records, or parts of records. The Commissioner and the two Assistant Commissioners, after investigation, will make findings on whether an exemption was valid and, if the complainant has not received the records he or she was legally entitled to, will challenge the decision of the institutional head (usually a minister).

The Commissioner also has a mandate to deal with complaints concerning delays, fees and the official language of the record as well as complaints about the register and any other matter relating to requesting or obtaining access. The Commissioner has a statutory duty to investigate every complaint lodged with the office and we must report the findings of that investigation to each complainant. There is no authority to dismiss a complaint as frivolous or vexatious, nor does such a power appear necessary.

The Commissioner may initiate complaints. While it might take little to satisfy the requirements of subsection 30(3) which gives the power to self-initiate investigations, we have so far reserved the use of this provision for what appear to be systemic problems.

Complaints are accepted by letter, telephone or in person with written confirmation being requested where the complaint is oral. No forms are necessary but complainants are asked to provide, wherever possible, copies of correspondence exchanged with the government institutions involved as well as any other information that may assist the investigator.

The Act requires that all investigations be conducted in private. Thus, unless a complainant makes a complaint public, its details should not become known outside the Office of the Information Commissioner and the government institution concerned.

Our office will neither confirm nor deny that a complaint has been made and we will not redirect complaints outside our mandate without the consent of the person who complained. Once a finding has been made, we do provide information about the facts and the outcome, but are prohibited from disclosing exempt information.

While our annual reports describe cases and results, identification of the complainant is not disclosed. In rare cases where it may be important to include personal or confidential data, it is done only with the party's consent.

The Process

When a complaint is received it is first acknowledged and an investigator assigned. The investigator contacts the complainant, or the complainant's representative, if additional information is necessary. Next there is a review of the circumstances and the records relevant to the request. The investigator prepares a summary of the complaint and provides it to the access coordinator at the institution concerned.

During the early stages of the investigation attempts are made to clear up any errors, misunderstandings, omissions and lack of knowledge of the Act. A number of complaints are resolved at this stage. If the complaint is considered supportable and is not resolved by the investigator the Commissioner may call informal meetings or, if necessary, initiate formal proceedings.

If a complaint appears not to be supportable (either in whole or in part) a tentative finding is provided to the complainant. In all instances, the complainant, the head of the government institution, and when relevant, the third parties, are given a reasonable opportunity to make representations in writing or in person. Where it is still not possible to resolve a valid complaint one of the Commissioners makes a formal recommendation to the head of the institution.

When the recommendation is not accepted and the complaint remains unresolved the Commissioner makes a formal report to the complainant. This report advises the complainant of the right to judicial review. When considered appropriate the Commissioner offers to take the complaint to the Federal Court of Canada. The Commissioner, since the Act came into force, has brought 35 such applications for judicial review to the Federal Court.

The Commissioner may also, with leave of the Court, intervene as a party to a review applied for by an individual applicant or by a third party. The office did so in twelve cases during 1988-89.

Going to the courts is used selectively since it involves extra expenditures. Generally the Commissioner intervenes if the interpretation of the Act is at issue.

Powers of the Commissioner

The Commissioner's investigatory powers are the same as those of a Justice of a superior court, enabling us to obtain copies of and review all records to which the Act applies. While investigations are normally conducted informally, there are occasions when the Commissioners have used these formal powers and will continue to do so when appropriate.

Sometimes officials question the right of the investigators to review particular records. Where this occurs we cite the provisions of subsection 36(2) that authorizes our investigators to review all records to which the Act applies.

Coordinators

Each institution subject to the Act has an access coordinator whose job it is to process requests received by that institution. They play a key role in the timely and complete delivery of service under the *Access to Information Act*. Previous reports have discussed the problems faced by many of these access coordinators.

Treasury Board Secretariat published a "Study on The Access to Information and Privacy Coordinators: Their Status and Role." It was made public during this reporting year and contains the results of a survey which "illustrates the diversity of coordinators' role between one institution and the next."

We applaud the work which is being done to create better understanding of the responsibilities of the coordinators and believe that the draft description of the role of the coordinator would be very useful. The most important portion of the role is:

> "(c) providing advice on the granting or refusal of access. Treasury Board policy recommends that the decision-making authority for granting or refusing access not normally be delegated much below the deputy minister level. In some institutions, the Coordinator is a senior official who has been

delegated total decision-making authority in regard to the Act. In most circumstances, however, the Coordinator advises the deputy and program areas as to how the exemptions in the Act can be applied. In both instances, the position requires thorough knowledge of the legislation, regulations, government policy and precedent cases and the Coordinator must demonstrate judgement, tact, and good negotiating skills. The position should be an independent source of advice to the deputy and Minister. Normally, the Coordinator will sign the letter to the applicant either giving or denying access, in whole or in part, and, in the latter instance, explaining why access is refused."

Our applause is somewhat diminished, however, by the wording of paragraph (e), which proposes that the coordinator be responsible for:

> "undertaking the primary defence before the Information Commissioner and, where necessary, the Federal Court, of institutional decisions regarding the processing of an access request and ensuring that the staff and records of the institution are available to the Commissioner during the course of an investigation."

Unfortunately, we cannot say we are surprised by the use of the phrase "undertaking the primary defence" since it accurately reflects the government's reaction on some occasions. But how much we would have preferred it to read "participating in mediation and negotiation."

Finally, some coordinators have indicated that the number of justified complaints registered by this office against their institution may be taken into consideration in their performance appraisals as public servants. This is unfortunate. The number of valid complaints and the type of information disclosed or not disclosed has more to do with the nature of the work of the department than the competence of coordinators.

Attitude--Is It Important?

In the fall of 1988, Paul Tetro, general counsel to the Information Commissioner, spoke at the Department of Justice Sixth Administrative Law Seminar. The text of his address follows:

The *Access to Information Act* in comparison to similar statutes in other jurisdictions, appears to be good legislation. The American experience with freedom of information was studied and Canada benefitted from that example by including protection for the interests of third parties. Canada also wished to protect personal information and created a separate *Privacy Act* for that purpose. Finally, the Canadian Act provides a two-tier independent review process.

But, is it working as well as it could? I think not! Are the attitudes of those

who must deal with the Act at the root of the problem? In many cases, I think the answer must be yes and perhaps, as lawyers, we are all a little to blame from time to time.

Section 2 of the Act provides:

> 2.(1) the purpose of the 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.
>
> (2) This Act is intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.

Mr. Justice Jerome in *Re Maislin Industries Ltd. and the Minister of Industry Trade and Commerce, Regional Industrial Expansion* [1984] 1 F.C. 939 at page 943 held that:

> " . . . since the basic principle is to codify the right of public access to Government information two things follow; first that such public access ought not to be frustrated by the courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure; second the burden of persuasion must rest upon the party resisting disclosure . . ."

Nevertheless, from the complaints that we have seen, some officials still place more emphasis on the exemptions to the right of access than on the provision of the right to access. Others seem to believe that you only disclose information when you can't find a way to exempt it. Indeed, classification under the security policy seems to be equated with exemption under the Act. Moreover there appears to be no attempt to distinguish between mandatory and discretionary exemptions.

Subsection 2(2) states that the Act is not intended to replace existing procedures for access to government information. While some departments encourage the informal disclosure of information, we have one case where a departmental news release said that certain information was going to be made public, but the department made the information available only to those requesting it under the Act.

In some respects, the Act is like a coin--it may be looked at (interpreted) from two sides. If you want to accomplish its purpose, to see that all information that can reasonably be disclosed is disclosed, you will exempt only that which

should be exempted. However if your goal is to disclose as little as possible, you will interpret the Act from the opposite point of view, you will exempt everything that can be exempted. In so doing, you may be thwarting the purpose of the Act.

Attitude Can Cause Delay

The attitude of the administrators of the Act can clearly be of great consequence. If these people want to fulfill the purpose of the Act they will expedite the processing of requests. Let's look at some examples.

The access process is initiated when someone makes a request in writing to the institution which controls the record. It isn't difficult to determine which department controls the requested records provided the individual has a thorough knowledge of the machinery of government. But, if one has to depend on the Access Register there may be a problem. Some people find the Access Register difficult to use.

Section 6 of the Act requires that a request contain sufficient detail to enable an experienced employee of the institution to identify the relevant records with a reasonable effort. Does the wording of the request really need clarification, or is this an excuse to thwart the purpose of the Act? If it does need clarification, why not telephone the requestor instead of writing a letter? Could it not be done the day the request is received instead of waiting until the 30-day time limit has almost expired? If it did require clarification, was the change in the wording so material that it became a new request with a corresponding new 30-day time limit, or should the original time limit not be allowed to stand?

And when may an extension be claimed to process an access request? Legally, the extension need only be claimed before the original 30-day time limit expires. But is this helpful? When an extension is needed why not tell the requestor as soon as possible?

When is a time limit extension justified? The Act (section 9) seems clear enough but the attitudinal approach to the wording becomes all important.

> 9.(1) The head of a government institution may extend the time limit . . . for a reasonable period of time . . . 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 . . ."

These words clearly invite different interpretations. What is a reasonable extension of time? Since "reasonable" is an imprecise term, it usually has a minimum and maximum limit where time is concerned. For example, in a given situation, 15 days may be

reasonable as a minimum and 60 days may be reasonable as a maximum.

But the only reference to time extensions in Treasury Board's Interim Policy Guide merely instructs institutions to inform the Information Commissioner each time an extension of longer than 30 days is taken. The Guide does not suggest that extensions should be for as short a period of time as is reasonable in the circumstances. There is no guidance as to what might be the minimum even if only a few extra days are required. As a consequence, extensions invariably are invoked for a minimum of 30 days and, if longer periods are required, they are in 30-day multiples.

Section 9 also allows extensions when consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit. What does this mean? Subject to Treasury Board's Guidelines there is ample scope for interpreting the meaning of "consultations", whether consultations are necessary, and whether they can or cannot reasonably be completed within the original time limit.

I suggest:

(a) where a portion of the records cannot be processed pending consultations with another government department, those records that have been processed should be released prior to the expiration of the time limits and an appropriate notice sent to the requestor;

(b) where an institution takes an extension which is reasonable in the circumstances (say 20 days) but in fact needs only five days to complete processing the request, the institution is at fault if it does not release on the sixth day.

The Effect of Attitude on Exemptions

Subsection 2(1) of the Act says that "necessary exceptions to the right of access should be limited and specific." However, we have seen that exemptions are often given wide and liberal interpretation, the opposite of what is required under the Act.

Sometimes the problem starts when the requestor is told pursuant to subsection 10(2) that the institution neither confirms nor denies the existence of the records sought and if they existed they would be exempt. Clearly this provision is designed for those few instances where knowledge of whether the record exists would itself convey information and would cause injury. I suggest this provision only be used where:

(a) the record(s), if existing, would be exemptable in total under one or more of the exemptive provisions of the Act; and

(b) confirmation of whether the record exists would itself cause injury, i.e. an injury related to one of the exemptive provisions in the Act.

Section 25 Considerations

The proper application of section 25 continues to be one of the more contentious areas of the Act. The Federal Court of Appeal in its July 6, 1988, decision in the case of *Ken Rubin v. Canada Mortgage and Housing Corporation* (Court file A-108-87) may have removed one misapprehension when it ruled that even though officials feel that records should be wholly exempted they are nevertheless under an obligation to review all records that are subject to the request to determine whether any portions of those records could be released. I think as well that the judgment means that where the exemption is a discretionary one, the discretion must be exercised on a case-by-case basis. In other words the head of an institution, on a case-by-case basis, may exercise the discretion and refuse to disclose information. However, the institution may not have a formal general policy which stipulates those instances where information will or will not be disclosed.

Finally, there continues to be disagreement over the meaning of the words "and can reasonably be severed." This issue is before the Federal Court of Appeal and clarification should be forthcoming. Until then our office will continue to urge that all possible information be disclosed.

Third Party Information

Section 20 would be the most important exemption if importance was measured by the number of applications launched for judicial review. In fact, two-thirds of all court cases are brought by third parties to block the disclosure of this type of information.

These cases usually arise when the head of an institution proposes to disclose requested information after following the procedure prescribed by sections 27 and 28, and the third party files an application in Federal Court to block such disclosure. In these circumstances, I believe the government should:

(a) actively pursue its decisions to disclose such information by seeing that the cases are dealt with as soon as reasonably possible. Moreover no pressure should be put on the requestors to intervene in the litigation. They are entitled to their anonymity and to have their rights (to information) defended by the government;

(b) disclose all other requested information. Failure to do this delays the request and may deprive the requestor of the right to complain if the litigation takes more than a year to resolve.

The decisions announced on July 8, 1988, by the Federal Court of Appeal

in the meat inspection cases (Court files A-1330, 1331, 1341, 1345 and 1393-87) should help in the interpretation of the harms test stipulated in section 20. Mr. Justice Martin, in *St. John's Shipbuilding Limited and the Minister of Supply and Services* (Federal Court File T-1682-87) said at page 7 of his reasons:

> "What the Applicant has established, in my view, is a possibility of prejudice to its competitive position. However, the possibility of prejudice to its competitive position does not meet the test established by MacGuigan J. in *Canada Packers Inc. v. The Minister of Agriculture et al* (Federal Court of Appeal, Court File No. A-1345-87) in which he found that one must interpret the exceptions to access in paragraphs (c) and (d) of subsection (1) of section 20 of the Act to require a reasonable expectation of probable harm. The expectation of harm which has been shown by the applicant in this matter has far too large an ingredient of speculation or mere possibility to meet the standard described by MacGuigan J."

This test and the extent of section 20 still leaves a great deal of scope for interpretation and argument since the most difficult part of the exercise may well be to properly apply the facts to the law.

However, I suggest that the harms test established by the decision in the meat packers case is important as well because the wording of the harms tests in 20(1)(c) and (d) is so similar to the wording of the harms tests in the rest of the Act. The burden imposed on the government to justify the refusal to withhold information is clearly higher than many had believed it to be.

Finally

It is not my intention to leave the impression that attitude is the sole cause of problems under the Act. There are others. For example there will be delays that seem to be impossible to overcome; there will be problems of interpretation where attitude is not a factor. There are a number of such problems before the Federal Court and more such applications will probably be launched over the next few years. Nevertheless I believe that the approach or attitude of government advisors and administrators can have a positive effect on the operation of the *Access to Information Act*.

Mr. Tetro's speech was well received. Our office is aware of the difficult situation in which government lawyers find themselves. In the field of access to information, they must assist the government in upholding the principles of the *Access to Information Act*: that is, whatever is not exemptable should be released. However, government lawyers are also required to advise administrators who believe disclosure should be resisted.

Delays

DEADLINES: WHAT WAS SAID

Thus the bill sets down a precise deadline for responding to requests: 30 days. At the same time it allows a government institution in certain specified circumstances to extend that deadline. So that no extension is decided upon arbitrarily, the bill provides for the Information Commissioner to intervene and to review the extension. Experience has shown that the too rigid deadlines of the United States legislation are systematically disregarded because they are not very realistic and cannot be enforced by the courts. I fully expect that in those instances, when a request can be met in fewer than 30 days, this would be done. I think there would be that kind of co-operation and help within the public service and the government. And the best way to ensure that the legislation is administered with enthusiasm and despatch is to protect the ability of the government to administer it within the law. And that is the philosophy behind that aspect of the bill.

The Honourable Walter Baker, Q.C., P.C.
11 December, 1979
Appearing before the Standing
Committee on Justice and Legal
Affairs on Bill C-15

The rationale for the time limits in the Act is clear: Parliament wanted release to be made within reasonable periods of time. However, a government institution that wishes to avoid disclosure of a particular record has everything to gain by delay and the requestor has much to lose.

Unfortunately, delays continue to present a major difficulty in compliance with the Act and we therefore conducted a special examination of the problem this year. What follows are our findings.

We began giving priority to delay and time extension complaints in the fall of 1986 and one investigator is now assigned to deal exclusively with such complaints. That approach has greatly accelerated the processing of those complaints and resulted in a number of records being released earlier than they would otherwise have been.

The speeding up of our investigation of delay complaints helps but the elimination of the cause of delays is our goal. However, without a determined effort by government institutions, that is not likely to happen. This is because delays are largely systemic in nature: it is the way the requests are handled that results in delays and the process can only be

changed by government institutions, if the will and necessary resources are available.

When our investigation confirms an unjustified delay we report the matter to the minister concerned and recommend the immediate release of the records, subject to possible exemptions. If that recommendation is not acted upon we use the right to apply to the Federal Court for a review of a so-called deemed refusal to pry the records loose. On eleven occasions during the reporting year we instructed counsel to commence legal action in cases of delay and, in all eleven cases, the records were released before the matter could be heard by the Court.

Recently, we have, with some success, subpoenaed officials to explain the reasons for delays both before or after reporting our findings to ministers. The records were released promptly as a result of taking such drastic steps. However, one is left to wonder whether others who did not complain have had to wait even longer and, it goes without saying, that these formal processes ought not to become routine for an office modelled on the ombudsman. Further, they are costly and time-consuming and time is of the essence for most access requestors.

Usually, when we have resorted to legal action or the use of subpoena, the delay prompting the action was in the minister's office or at the direction of the minister's office. Departmental ATIP staff often have difficulty retrieving draft responses which have gone to the minister's office for approval. It seems that ministers' staff are not adequately briefed on the need for coping with the strict time limits imposed in the Act, nor are they always aware of the Information Commissioner's statutory role and authority.

During 1989-90, the Commissioner will seek meetings with deputy ministers to try to work out a solution to this particular problem.

TIME LIMITS: WHAT WAS SAID

I think you can have an unrealistic timeframe. The Americans have a 10-day timeframe, but the 10-day timeframe is never respected, basically--or very rarely, according to the information that I have. I think this is more properly the type of thing that the parliamentary committee that is going to be examining the act over its first few years of implementation would want to have a look at and make recommendations on after they have seen the act in operation.

I find it rather difficult to set a definitive period of time within which the head of the institution must give access to the record. Basically, if no notice is given the request is deemed refused and there are appeals to the Information Commissioner and from the Information Commissioner to the court. It is difficult to say, when you may have a request for a whole flood of material. I remember when I was solicitor general and a request came in from the Keable commission, for instance, for all the documents in possession of the RCMP in certain areas. The amount of time required to go through that is rather large, so it is rather difficult to give the undertaking that the answer must be given within a certain period of time. That is why we are trying to build into the clause the type of amendment recommended this morning, ensuring that notice be given to the Information Commissioner, which always gives the Information Commissioner the opportunity to ask questions. And there are limits set up in Clause 9(a)(b). You can go beyond the 30 days, having regard for the circumstances, if the request is for a large number of records, if consultations are necessary to comply with the request, and all that is reviewable by the Information Commissioner. That is the reason why I thought the additional safeguard of going the information commissioner route would be the appropriate way of handling the problem that has arisen and has been referred to in the committee.

The Honourable Francis Fox, Q.C., P.C.
11 June, 1981
Appearing before the Standing
Committee on Justice and Legal
Affairs on Bill C-43

The Act specifies that requestors must be given a reply within 30 days, either giving them access to the records or explaining why they cannot be released. That statutory time limit of 30 days may be extended for a reasonable period if the request is for a large number of records or requires

a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the government institution. The time can also be extended if there is a need to consult another party who has an interest in the record and that such consultation cannot reasonably be completed within the statutory time limit.

The key word is "reasonable." For example, there may be a legitimate need to consult but if that consultation can be done by telephone in a matter of minutes or hours it would be unreasonable to extend the time limit. The provision for extension is there to satisfy specified problems which the department would otherwise face in meeting the time limit. It is not there to be used as a convenient delay mechanism. The statutory time limit ensures that information is provided in a timely fashion and not at the convenience of the government institution. Abusing the time limits either by ignoring them or claiming unreasonable extensions is the same as denying access altogether.

The Problem

In the first five years of the existence of the *Access to Information Act* there were 362 delay and extension complaints representing 28 per cent of all complaints. Sixty per cent of them were found to be justified.

This, however, tells only part of the story. Our files show that almost 17 per cent of complaints about fees or exemptions also involve a delay about which no complaint was filed. The Act provides that information delayed is information denied. The 1987-88 annual report highlighted the problem of delays and indicated that the number of complaints about delay and time extensions had increased disproportionately each year. Again this year, more than a third of our investigations dealt with complaints about delays and unreasonable time extensions.

As a result, a general complaint about delays was initiated in September 1988 to identify the problem and possible solutions. The objective was to determine whether there were systemic causes behind the frequent failure to comply with legislated deadlines for release of records.

Method of Investigation

Data covering the first five years of operation were gathered from Treasury Board and from our own sources. These data enabled us to identify 31 institutions which had received more than 120 requests during that period. Together these institutions had received 92 per cent of all the access requests.

We then established a ratio of delays to total requests for each institution and selected nine for more detailed examination: National Archives, National Defence, Employment and Immigration, Finance, Health and Welfare, Indian Affairs and Northern Development, Revenue Canada (Taxation), National Capital

Commission and Supply and Services Canada. Five of these institutions had a high ratio of delays, three had a low ratio and the other was in the middle.

The annual reports these institutions produced on the administration of the Act in the first five years of operation were reviewed together with all the complaint files. Interviews were conducted with the access coordinators and, in some cases, with others involved in the response process.

The Result

All those interviewed were helpful and cooperative. They discussed the reasons for delays as they saw them and offered suggestions to solve some, if not all, of the problems.

The investigation identified the major problems to be staffing, the signing process, the consultation process and systems/resource problems.

Staffing

The largest single issue contributing to delays is the lack of human resources and the salary levels of those in some Access to Information/Privacy (ATIP) positions.

Delays occur most frequently when the ATIP staff, or a particular operational area in a government institution, has too many requests to manage at one time. This may happen because some positions are vacant or the number of requests has grown beyond the capacity of the staff to handle within the 30-day or extended time frames.

During the year there have been many changes within the ranks of ATIP staffs as experienced personnel move to better paying positions and lower-ranked positions are then left vacant or filled by inexperienced people.

A case in point is Indian Affairs and Northern Development which had a relatively low-paying level in the ATIP office and as a result experienced a 100 per cent change of staff over an 18-month period. Some of the positions remained vacant until they were recently upgraded. Clearly, staffing in this department was a major delay factor.

When the Act came into effect in 1983, many government institutions recognized the potential magnitude of the task facing them and asked Treasury Board for additional person-years (PYs). At that time they were told that no PYs would be made available until they had established the need based on actual experience and that whatever resources were committed to the access program had to come from existing personnel resources. As a consequence most ATIP organizations were started with few people and they stayed that way. Others have only recently increased their staff.

Some government institutions have recognized that additional staff is needed to manage the growing

number of information requests. Revenue Canada (Taxation) was faced with a sevenfold increase in requests in 1987-88 and responded by adding five new positions in the ATIP section and additional person-years in the operational area most directly affected by the requests.

National Defence has added three positions to its Access staff. Supply and Services has reacted to an increase in requests by adding six positions in the past year and it had plans to add three more but Treasury Board did not approve the latter increase. The National Capital Commission employed no person full-time on ATIP in the past but now recognizes that the number and complexity of requests warrant a full-time position. National Health and Welfare has added a position to the corporate ATIP Group and both National Health and Welfare and Employment and Immigration Canada have added person-years to the program areas where backlogs of access requests have developed.

Responding to access requests within the statutory or extended time limits requires an adequately-sized and fully-staffed ATIP organization. Many institutions have recognized this and have taken the first steps towards resolving the problem.

The Signing Process

The legislation gives the head of the institution the authority to grant access or apply exemptions to records requested under the Act. It also permits the head of the institution to delegate such authority to one or more officers of the institution. We found, however, that the number and level of the officers to whom power has been delegated can have an effect on the time required to obtain the necessary signature.

In four of the nine institutions we examined, the head of the institution has delegated the authority to release records and apply exemptions to the access to information coordinator. In three of these cases the institutions have low or better than average ratios of delay. In the fourth case the ratio is high but the delegation to the coordinator only occurred in December 1987 and before that the authority lay at the deputy minister level. In two other institutions the head has not delegated any authority to grant or deny access. At Finance, the Minister signs all responses and only when he is absent for ten days or more is authority delegated to senior management. In Health and Welfare the Deputy Minister recommends and the Minister approves all release decisions.

Retention of authority to release or deny access at the top-most level provides the head with maximum control over the content of responses but the price for that control is an increase in the number of clearance levels the response must pass through on its way to the top and the attendant risk of delay which increases with each level of review.

Two recent cases in Health and Welfare Canada illustrate the point. In one, a notice to a third party was sent 67 days after the request was received instead of within 30 days as required by the Act -- this because it took 34 days to obtain deputy minister approval to send the notice. In the second case the response to a simple request was 15 days late because it took 26 days to obtain ministerial authority to release the record.

At the other end of the scale is Indian Affairs and Northern Development where the authority is delegated to all managers down to directors general, regional directors general and directors who report to assistant deputy ministers. This represents about 40 people. We asked how the department achieved any consistency in its response decisions with such a large number of delegated officers. We were told that "with the increase in volume and complexity of requests over the years since the Act's inception, it has evolved in practice that only one ADM and the ATIP coordinator actually exercise the authority." Thus, the department functions like many others and the question is why so many individuals are given the authority in writing but not in practice.

Our conclusion is that the most effective delegation of power, to avoid delay, is where the authority to grant or deny access is given to the coordinator, particularly when this person holds a sufficiently senior position in the management scale and has direct access to the deputy head of the institution. Straightforward responses can be signed and released by the coordinator with the least possible delay while sensitive issues can be referred directly to the deputy head or the head for decision.

The Consultation Process

When one government institution consults another about records requested under the Act it normally gives the second institution a deadline for reply so that the first can meet its obligations under the Act. Generally speaking government institutions try to honour these deadlines because they know that next time they may be the ones seeking a quick reply from another department.

It is less easy and sometimes impossible, however, to impose such deadlines when consultations are necessary with an agency of another government or nation. In these cases it is extremely difficult to determine how long any extension of the initial 30-day time limit ought to be and many delays are the result of missing these extended time limits.

Unfortunately, there is no simple solution. Institutions use their best judgment based on experience but theirs is an educated guess at best. Many institutions follow the practice of releasing what material they can by the deadline and advising the requestor that the decision on the remaining material will be made when the results of the consultation are known.

In some cases when a reply to a consultation has not been received by the deadline it may be acceptable to deny access pending receipt of the authority to release from the party being consulted. This could apply, for example, where a document was originally received in confidence from another government but there is reason to believe it may now be releasable.

A letter from the Executive Secretary of the Security Review Committee to the Information Commissioner illustrates the dilemma an institution faces when control of the response is not within its power:

> "I think you know that our Chairman has a long history of personally supporting greater access for Canadians to their Government's information. The Review Committee and its staff have made a great deal of long-secret information public during the last four years. I strongly believe that there is still far too much unnecessary secrecy. Yet, despite these attitudes and our best efforts, we have now had two complaints against us judged to be well-founded by your office.
>
> Though we must make forecasts about how much time will be required to respond to an applicant, we have no control over the departments doing the work. In such a situation, I cannot see how we can avoid being wrong fairly often. Surely it would be more sensible to decide whether complaints were well-founded based upon the actual time taken to respond, relative to the workload involved, rather than upon an initial forecast of the time required to respond.
>
> In any event, I think you should know that you have some very strong supporters of your mandate in this organization; supporters who find the process extremely frustrating."

We do understand, but must always explain that whatever the past record of an institution might be, we must still deal with each complaint on its particular merits and the wording of the Act.

The Act stipulates extensions must be for fixed periods and the institution receiving the access request must press the other party for a response within a reasonable, fixed time. While we sympathize with the difficulties the responsible institution may experience we have no choice other than to find a complaint justified when the time limit has been exceeded.

Systems/Resource Problems

Other problems which contribute to delays are a lack of such technical resources as EDP tracking systems, poor record retrieval systems, a lack of operating instructions for the ATIP function and decentralized response systems which give coordinators little control over timing.

Tracking

While lack of an EDP system may not be a primary cause of delay it contributes to the problem when other factors are present. For example, the lack of a computer system exacerbates the problem caused by a shortage of personnel and it may greatly extend the time required to prepare statistical and other returns, time which could otherwise be spent on processing access requests.

Most large government institutions have computer tracking systems to help manage access requests. Some, like Supply and Services Canada and Employment and Immigration, have recently acquired such systems while others are planning to do so. Since many ATIP offices do not have enough personnel to begin with, labour intensive manual systems are not an effective means of tracking the progress of access requests.

Retrieval

Some institutions have difficulty identifying and retrieving records because of inadequate cataloguing and retrieval systems. This does not appear to be a major cause of delay but it is a contributing factor.

The improvement of records management in government institutions is a high priority in the National Archives' current five-year plan. A new training program in the field of records management is one of several initiatives designed to improve the situation but inadequate retrieval systems problems will not be solved quickly.

Instructions

Almost six years after introduction of the *Access to Information Act* some government institutions have yet to publish operating procedures for the ATIP function. Again, this may not be a major factor contributing to delays but it can and does lead to problems when new ATIP staff and people responsible for reviewing records do not know what is required of them.

Decentralization

National Health and Welfare is the one department we are aware of with a decentralized ATIP system. At this department, requests may be addressed to the corporate access coordinator or to any one of eight branch coordinators. The ATIP coordinator and other resources in the branches are not under the control of the corporate coordinator. That person is not always aware of what requests have been received by a branch, what extensions have been invoked, what consultations are in progress or when the response is due. Even though all responses are routed through the corporate coordinator before going to the Minister for approval, the corporate coordinator does not exercise sufficient control over the process. This may change when the planned computer tracking system linking the corporate and branch

coordinators is installed but it remains to be seen what degree of effective corporate control can be exercised when the ATIP resources are not centrally controlled.

Solution to the Delay Problem

Our investigation has concluded that most delays are caused by shortages of trained staff, the procedures for obtaining signed authorizations and the need for consultation.

Except in the case of some delays due to consultations, we believe the solution must be found within the institution concerned. Further, if delays persist after all other remedies have been exhausted the only solution is to commit enough resources to enable both ATIP and other departmental staffs to process access requests within the time constraints imposed by the Act. Coupled with a commitment of resources is the establishment of a signing process which does not have so many approval levels making delays inevitable.

The achievement of both these aims requires the strong support of both the head and deputy head of an institution.

The head of the institution must be prepared to delegate others to make judgments on the release of records. Furthermore, when it is necessary to refer an access request to the head of the institution, the staff surrounding the head must be aware of the legal obligations imposed by the Act.

Why The Process is Slow--Other Factors

Two other factors lengthen the time between access request and receipt of records: the need for institutions to sever and release non-exempt portions and the duty to treat individuals and third parties fairly.

SEVERANCE: WHAT WAS SAID

[The department] informed me that "all the remaining records are exempt from disclosure in their entirety pursuant to subsections 13(1) and 15(1)."

It seems to me that this violates the principle of severability, given in section 25 of the Act. I also suspect that much of the severance that they have made could not be justified under 13(1) and 15(1). However, I cannot determine if this is in fact the case. It may have been possible for me to assess the reasonableness of the severances if the severances were discrete, leaving at least some of the context. I must say that, overall, [the department] seems to be ignoring more and more the principle of severability. It may be that they are overworked; it may be that, by so doing, access to records can be restricted by procedural means.

I ask you, then, to investigate the above request.

A Complainant
From a 1988 letter to the
Information Commissioner

Section 25 requires the institution to disclose any part of the record that can "reasonably be severed from" the parts that are exemptable.

This provision continues to cause problems. Records can be voluminous and institutions are reluctant to spend hours identifying and preparing for release of the non-exemptable parts. Often they claim that without the parts that are exempted the remainder is meaningless.

We believe that only the requestor can say that part of the record is meaningless. For example, a subject heading may amount to meaningful information, despite the deletion of the material following the heading.

The size of the record may convey something to the requestor, so the inclusion of blank numbered pages may be useful, although in some instances the size of the record may itself be exemptable. Material that indicates the length of a discussion, or the fact that a decision was not unanimous, will probably be useful to the requestor although the substance of the discussion or decision may have been exempted.

Frequently our investigations have shown that institutions have not made the severance that we think should have been made. In these cases, we recommend that officials consider the application of section 25. Often we are then asked to specify those parts

[redacted] 21(1)(a) [redacted]

On a motion by V. Dupuis, seconded by B.C. Ross, ADOPTED.

Sur une motion de V. Dupuis, appuyée par B.C. Ross, ADOPTÉE.

4.2 Appointment to the Advisory Committee on Real Property

4.2 Nomination au Comité consultatif des Biens immobiliers

[redacted] 19(1) 21(1)(b) [redacted]

The Committee, having considered the motion by the Vice-Chairman of the Commission,

Le Comité prend en considération la motion proposée par le Vice-président de la Commission, et

MADE THE FOLLOWING DECISION:

DÉCIDE CE QUI SUIT:

[redacted] 21(1)(a) [redacted]

On a motion by P. Bastien, seconded by B.C. Ross, ADOPTED.

Sur motion de P. Bastien, appuyée de B.C. Ross, ADOPTÉE.

[redacted] 5.0 21(1)(a) [redacted]

of the record that we think should be severed and released. While we are willing to give examples to assist the institution, section 25 requires the institution, not us, to examine the record and find the parts that the requestor is entitled to have. Nonetheless, institutions often release only the particular parts that we have specified as examples. This produces further protracted discussions and attempts to have institutions do what is required of them, while the requestor must continue to wait for records to which he or she is entitled.

Institution officials may think that we are being unreasonable in our efforts to see that requestors get every word of a record that may be meaningful to them and which is not exemptable. When we cannot reach agreement with an institution, and the words in question seem unlikely to add materially to the information of the requestor, we will so tell the requestor. At the same time, however, we explain that the requestor must decide whether we should pursue release of the severable material.

We believe we must continue to monitor closely application of section 25. If we do not do so, there may be a tendency to less and less severance and, therefore, an unwarranted and improper failure to provide disclosable parts of requested records.

The preceding page is taken from released records to indicate the amount of work and thought that must go into proper severance.

THIRD PARTY RIGHTS

The process is inevitably slowed down by the requirement in the Act to consider the rights of individuals and third parties whose information may be the subject of access requests.

Records must be reviewed at the departmental level to ensure that no protected personal information is released under the Act. This may involve contact with the individual, departmental lawyers and the Privacy Commissioner. The Act sets out specific procedures for notifying third parties before an institution releases confidential business information. The third parties may consent or seek judicial review to try to prevent release.

Similarly, the Information Commissioner must notify third parties and give them an opportunity to make representations before a recommendation for release is made to a minister.

There can be no quarrel with the need to follow procedures that are intended to introduce a proper balance among competing interests. They are mentioned here only to illustrate that one person's right to timely release of a record may be severely hampered by another party's right to try to block such disclosure.

Third party procedures inevitably delay access requests and court procedures commenced by third parties cause particular problems of delay for access seekers.

Third Party Rights to Block Release

When a person requests records that contain information about a third party, it is possible that section 20 of the Act will apply. The section contains a prohibition (with some exceptions) against the disclosure of records where disclosure is likely to injure third parties. These include records containing trade secrets, confidential financial or commercial information supplied in confidence by the third party to the government, and other records where disclosure might reasonably be expected to prejudice the competitive position of the third party or interfere with negotiations by the party.

When the institution examines the records requested and intends to disclose them, but believes that they might contain material described in section 20, it must, within 30 days after receiving the request, notify the third party and give it an opportunity to make representations against disclosure.

The third party has 20 days in which to do this, following which the institution has a further ten days in which it must make a decision on whether it intends to release the record. The third party is notified of the decision, and if the decision is to release the records the third party has another 20 days after the notice is given in which to request a judicial review under section 44. The government institution must notify the requestor when a review under section 44 has been sought.

Since the Act came into force there have been 133 applications under section 44. When one is filed the government institution is unable to provide the records to the requestor unless the application for review is withdrawn or judgment is given mandating release.

This process frequently takes a great deal of time. An application under section 44 is heard at a date to be fixed by the Court, and the Court is unlikely to do so until one of the parties makes application for this to be done.

In the 29 cases in which the Court has pronounced judgment the average time from the launching of the application to the date of the judgment was about two years. In 51 cases the third party withdrew the application for review before the case was heard. On average, the withdrawal did not take place until more than a year after the application was made.

The requestor, unless he or she chooses to become a party to the action, is powerless to expedite matters. The third party will probably think its interests are best served by a delay in hearing the case, thus putting off any possible court order for the release of the record. The government

institution may, for one reason or another, make no effort to bring the case on for hearing. At the end of the fiscal year there were 53 section 44 cases outstanding, many of which have likely remained on the Court records because neither the third party nor the government institution has moved to expedite the hearing.

Who is, or should be, responsible for seeing that section 44 applications are dealt with within a reasonable time? Is it the third party, which has applied for an order prohibiting release? Is it the government institution, whose willingness to comply with an access request has for the time being been thwarted by the application? Or is it the requestor, whose wish to have access to records continues to be frustrated?

Requestors could, under subsection 44(3), become a party to the review, and thus be able to apply to have the case heard without further delay. But, we believe, they should not have to do this. Treasury Board has recently publicly confirmed that the anonymity of requestors under the Act should be preserved. (Access to Information and Privacy Implementation Report No. 15, January 18, 1989) We agree. And even if requestors do not object to disclosing their identities, there seems to be no reason that they should have to make special efforts to ensure that a disagreement between the government institution and the third party be speedily resolved. If the requestor chooses not to appear as a party, responsibility for eliminating undue delays must rest on either the government institution or the third party.

Normally an applicant in any matter before a court has the conduct of it and responsibility for bringing it on for hearing. But, as we said, in section 44 applications, delay serves the interests of the third party, and it would be unrealistic to expect it to expedite such a hearing.

What is the responsibility of the government institution? It is under a statutory duty to release records when a request is made under the Act, unless there is an exemption provided by the Act. It has examined the record and concluded that there is not an exemption that should be claimed (at least for certain parts of the record) and, particularly, that section 20 does not apply.

The institution is, because of the section 44 application, prevented from carrying out its duty under the Act until the application is heard and judgment given. Accordingly, we believe, the head of the institution is under a duty to see that section 44 applications are reviewed by the Court as speedily as is practical.

Should the Commissioner seek to intervene in section 44 cases? We could become a party under paragraph 42(1)(c) with leave of the Court, and leave would likely be forthcoming if we could show that we had an

involvement in the matter or that a novel point of law affecting the operation of the Act was likely to arise. However, since the government institution had decided to release the records, and was only prevented from doing so by the action of the third party, we would probably not have received a complaint from the requestor. Indeed, in the vast majority of instances the first indication we have that a section 44 application has been launched is when we examine the Court register. We have no knowledge of the facts involved if we have not received a complaint. Frequently the arguments of the third party are in a confidential affidavit to which we would have no access unless we became a party.

It would be quite impractical for us to inquire into the facts of the many section 44 applications, 49 of which were filed in this reporting year. Nor should we need to consider applying to intervene as a party. The government, in these cases, has taken the position that the records should be disclosed since they were not within section 20. We would certainly not argue against the government's view, so that for us to intervene would be quite unnecessary so far as the issue before the Court is concerned. For us to become involved in the court proceedings would be to spend time and money doing something that the institution should be doing.

We are concerned that the government has not brought these cases on for hearing expeditiously. Our concern is serious because delay can mean a requestor is deprived of his or her rights. Section 31 of the Act requires that a complaint be made within one year from the time the request for the record is made. A third party, by making an application under section 44, blocks the disclosure of records until final disposal of the action. As noted earlier, frequently this takes more than a year.

Thus, the requestor is left unable to make a complaint under the Act and the failure of the government to press for timely disposition of the case has meant the loss of a requestor's right.

Delays in our Office

A major portion of this report deals with the matter of delays generally in government institutions but we would be remiss if we did not acknowledge that this office has its share of delayed investigations.

One problem is that not only is the number of complaints increasing but so is the complexity of the records involved. In the early years only one visit to a department was required to

resolve most complaints. Now it takes on average between five and six visits.

Another problem arises from the limitations on the delegation of investigations relative to international affairs and defence contained in subsection 59(2) of the *Access to Information Act*.

The subsection reads:

> 59.(2) The Information Commissioner may not nor may an Assistant Information Commissioner delegate the investigation of any complaint resulting from a refusal by the head of a government institution to disclose a record or a part of a record by reason of paragraph 13(1)(a) or (b) or section 15 except to one of a maximum of four officers or employees of the Commissioner specifically designated by the Commissioner for the purpose of conducting such investigations.

The investigators assigned to these investigations carry a heavy caseload not only because of the limitation in their number but also because the sections mentioned relate to international relations or defence, and complaints in those areas generally are complex and usually concern voluminous records. The result is an even greater backlog of these type of complaints.

Delayed investigations contribute to the frustrations of those who seek access to government records and we are acutely aware of the need to improve our response time to complaints.

SUMMING UP

ON PATIENCE: WHAT WAS SAID

To turn around a huge loaded oil tanker steaming full speed ahead is child's play when compared with the difficulty of engineering a significant change of direction for the ship of state. The latter task is beyond the capacity of particular governments between elections. It is a task for decades of clear-sighted leadership possessed of a vision of an alternative relationship between state and society.

Alan Cairns
"The Embedded State: State-Society Relations in Canada"
from *State and Society: Canada In Comparative Perspective*
Keith Banting, Research Coordinator, p.57, Vol.31, 1985
University of Toronto Press

The Canadian experience with freedom of information bears out the truth of those words. After six years, it still appears that those who pressed for the enactment of what became the *Access to Information Act* were ahead of their times. Will the year 2001 be the year Canadians can finally take the right to access to information for granted?

The Canadian *Access to Information Act* is one of the best access laws in the world. This is partly because the Act gives the Information Commissioner direct access to all records subject to the Act and to all administrators. Our investigators review the records that are in issue and try to persuade the government institutions to abide by the time limits and to release everything that is not subject to exemption. They insist on adherence to the severability principle because, to do otherwise, amounts to taking the path of lesser resistance, that is, substituting our judgment arbitrarily for that of the information seeker.

Consequently, both the government and the bureaucracy may consider the Act more intrusive than they would a law that provides for judicial review in the first instance.

Open government costs money and requires a positive attitude. Canada's federal government has taken some steps forward in its commitment to enhance the status of its access coordinators and in its plans to create a training program on access and privacy. They have also provided more staff for our office, another positive sign of its willingness to assist users of the Act.

Could it be that there has been an order to the helmsman to sharply change course?

Complaints by Number

THE NUMBERS

Since the *Access to Information Act* came into effect July 1, 1983, 4,535 complaints have been received. Table 1 shows the status of complaints while the other tables show their distribution and disposition.

Of the 2,811 complaints received this year, 2,235 concerned a series of related access requests made to one department.

Table 1
STATUS OF COMPLAINTS

April 1, 1988 to March 31, 1989

PENDING FROM PREVIOUS YEAR	431
OPENED DURING THE YEAR	2,811
COMPLETED DURING THE YEAR	642
PENDING AT YEAR-END	2,600

THE TERMINOLOGY

Unlike civil court proceedings, where a plaintiff's case is either allowed or dismissed, or criminal proceedings where an accused is found guilty or not guilty, complaints before the Information Commissioner are dealt with by mediation, a process which leads to a variety of findings, dispositions and results.

The **complaint category** describes the kind of complaint we dealt with. Most complaints concern a government institution's refusal to disclose all or part of a record requested under the Act, but we are also required to investigate complaints about extended time limits to respond, fees assessed, the language of records disclosed, publications required under the Act and other related matters.

Our **finding** is our assessment, on the merits, whether a complaint was justified or not justified. The complaint may be relatively minor--one page exempted out of several hundred--or may be rectified immediately by the department. In making our finding, however, we ask ourselves whether the complainant was justified in lodging the complaint. It is not for us to decide whether the single page that the department withheld and the complainant was concerned about really was not very important.

The **disposition** of a complaint describes what we did about it. We attempt to mediate disputes between the complainant and the government institution concerned to achieve an acceptable resolution. If these efforts are not successful, the complaint will be reported to the head of the government institution as well-founded and, depending upon the

circumstances, specific remedial action may be recommended. If we find a complaint to be not justified, it is dismissed with no further action required by the government institution involved. Occasionally complaints are discontinued or abandoned while our investigation is still in progress. In such instances our finding will depend upon the merits of the case as we were able to assess them up to the time that our investigation was terminated.

The **result** of the complaint is the action taken by the government institution following our investigation. In many instances no action was required because steps had been taken to rectify the matter complained about as soon as we became involved.

A **government institution** is a department or agency listed in Schedule I of the *Access to Information Act* and is therefore 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 the head of the government institution. For example, the Chairman of the Canadian Aviation Safety Board is the head of that government institution.

COMPLAINT CATEGORY

The Information Commissioner is required to receive and investigate complaints about the following:

Refusal to Disclose

Complaints from persons who have been refused access to a record requested under the Act or a part thereof. These complaints include matters such as the ground under the Act cited by the government institution to exempt the record from disclosure or to exclude it from the ambit of the Act, inability to find the requested record immediately, or the failure to provide an acceptable reason for non-disclosure.

Delay (Deemed Refusal)

Complaints from persons who allege that they have not been given a response to their access request within the time limits prescribed under the Act. (If a response is late, the government is deemed to have refused disclosure.)

Time Extension

Complaints from persons who consider extensions of time limits to respond to access requests to be unreasonable.

Fees

Complaints from persons who have been required to pay fees under the Act which they consider unreasonable.

Language

Complaints from persons who have not been given access to a record in the official language requested or have not been given access in that language within a period of time that they consider appropriate.

Publications

Complaints in respect of the Access Register, periodic bulletins or other publications which the government is required under the Act to make available throughout Canada.

Miscellaneous

Complaints in respect of any other matter relating to requesting or obtaining access to records under the Act.

FINDING

Justified

We found merit in the complaint. A legal right had been denied or the spirit of the Act had not been followed.

Not Justified

We were unable to find any denial or legal rights or unfair treatment. In some instances, the complaint was outside the Commissioner's mandate.

DISPOSITION

Reported as Well-Founded

We were not able to achieve a satisfactory resolution through mediation. The Commissioner reported the findings of the investigation to the Minister, along with any recommendations for remedial action which the Commissioner considered appropriate. In some instances it was too late for mediation or remedial action. A report was made to the complainant.

Resolution Mediated

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.

Discontinued

Our investigation was terminated at the request of the complainant or was abandoned by the complainant before its merits could be fully determined. Discontinued cases are dismissed as unjustified unless it was reasonably clear at the time our investigation was terminated that there was some merit to the complaint. A report was made to the government institution and to the complainant, where feasible.

Dismissed

Because we did not consider the complaint justified, no further action by the government institution was called for. No recommendation was made to the Minister. A report was made to the complainant and to the government institution about the investigation.

RESULT

Remedial Action

Remedial action was taken (or proposed) by the government institution and we were satisfied that this action was sufficient to rectify the matter complained about.

Insufficient Action

Although we recommended that the government institution take some remedial action in response to the complaint, the Minister refused to implement our recommendation, or the action taken (or proposed) was inadequate or inappropriate.

No Action Required

In the circumstances it was not necessary or not possible for any remedial action to be taken. In some instances the government institution had resolved the complaint before we became involved, or it was too late to do anything about the complaint.

Table 2
FINDINGS, DISPOSITIONS AND RESULTS OF COMPLAINTS (BY COMPLAINT CATEGORY)

April 1, 1988 to March 31, 1989

FINDING	JUSTIFIED					NOT JUSTIFIED			
DISPOSITION	REPORTED TO MINISTER AS WELL-FOUNDED			RE-SOLUTION MEDIATED	DISCON-TINUED	DIS-MISSED	DISCON-TINUED		
RESULT	REMEDIAL ACTION	NO ACTION REQUIRED	INSUF-FICIENT ACTION	REMEDIAL ACTION	NO ACTION REQUIRED	NO ACTION REQUIRED	NO ACTION REQUIRED	TOTAL	
REFUSAL TO DISCLOSE	15	2	14	83	6	190	18	328	51%
DELAY (DEEMED REFUSAL)	44	58	11	2	1	33	2	151	24%
TIME EXTENSION	7	19	4	9	0	49	0	88	14%
FEES	0	0	0	7	0	23	8	38	6%
LANGUAGE	0	0	0	0	0	2	0	2	-
PUBLICATION	0	0	0	0	0	0	0	0	-
MISCEL-LANEOUS	0	1	0	2	0	28	4	35	5%
TOTAL	66	80	29	103	7	325	32	642	100%
	10%	12%	5%	16%	1%	51%	5%	100%	

HOW DO OUR FINDINGS REFLECT ON THE GOVERNMENT INSTITUTION?

It is difficult to assess a government institution's performance under the Act simply by looking at the numbers of complaints we consider justified and not justified.

As can be seen from our case summaries, many justified complaints entail serious breaches of rights under the Act or manifestly improper treatment of access requests. Others are less serious in nature. Occasionally government access to information officials will say that it seems unfair for us to consider a complaint about one aspect of an access request to be justified when the request in all other respects was handled properly. It may also seem unfair to tag a complaint as justified when the government institution took immediate steps to remedy the complaint and did so to the complainant's satisfaction.

Our statutory mandate under the *Access to Information Act* is to investigate and report on the complaint as it was lodged with us. Our finding is not altered because the matter complained about may seem insignificant or because we considered only one portion of the complaint to be justified. However, wherever possible we try to point out the positive aspects of the manner in which a request was dealt with.

By the same token, we do not make findings in respect of matters not complained about, even though in the course of our investigation we may notice, for example, that an improper time extension has been invoked or a statutory time limit has been exceeded.

When looking at the numbers of complaints against a government institution, one must also bear in mind how many access requests they have processed (the Treasury Board maintains this data) and the nature of the organization. Departments such as Revenue Canada deal with confidential taxpayers' information which they must exempt, and in doing so tend almost to invite complaints.

This year we have expanded Table 3 to show another feature of the performance of individual government institutions--the results of complaints.

It is significant to note that in the vast majority of cases no further action was required by the institution, either because the complaint was not justified or because action had already been taken by the time we became involved.

Table 3
FINDINGS AND RESULTS OF COMPLAINTS (BY GOVERNMENT INSTITUTION)

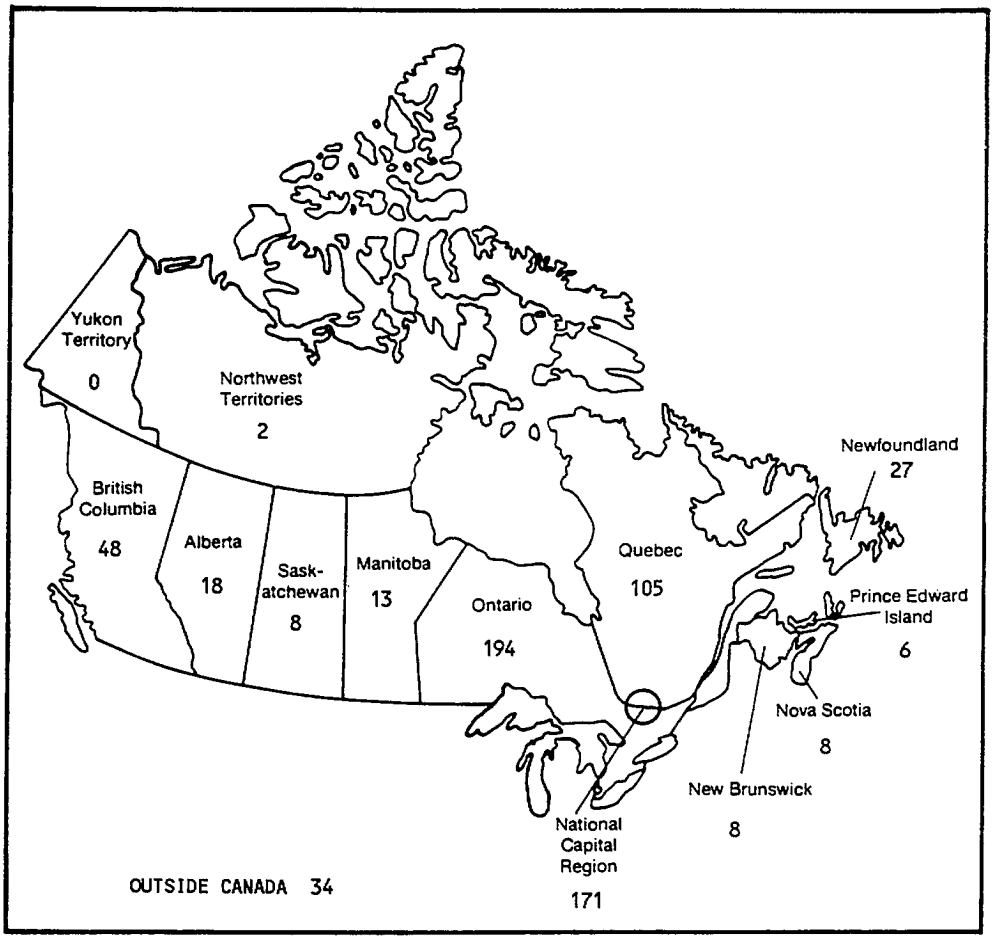
April 1, 1988 to March 31, 1989

FINDING	JUSTIFIED			NOT JUSTIFIED	
RESULT	INSUF-FICIENT ACTION	REMEDIAL ACTION	NO ACTION REQUIRED	NO ACTION REQUIRED	TOTAL
AGRICULTURE	2	2	-	10	14
ATOMIC ENERGY OF CANADA LIMITED	-	-	-	1	1
ATOMIC ENERGY CONTROL BOARD	-	1	1	1	3
CANADA COUNCIL	-	-	-	1	1
CANADA MORTGAGE & HOUSING CORPORATION	-	1	1	2	4
CANADIAN AVIATION SAFETY BOARD	-	1	-	3	4
CANADIAN COMMERCIAL CORPORATION	-	1	-	-	1
CANADIAN HUMAN RIGHTS COMMISSION	-	1	-	1	2
CANADIAN INTERN'L DEVELOPMENT AGENCY	-	-	-	2	2
CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION	1	1	1	1	4
CANADIAN SECURITY INTELLIGENCE SERVICE	1	4	1	35	41
COMMUNICATIONS	-	4	1	2	7
CONSUMER AND CORPORATE AFFAIRS	-	-	1	6	7
CORRECTIONAL INVESTIGATOR	2	-	-	1	3
CORRECTIONAL SERVICE OF CANADA	-	26	10	37	73
EMPLOYMENT AND IMMIGRATION	3	16	9	23	51
ENERGY, MINES AND RESOURCES	-	2	-	5	7
ENVIRONMENT	1	-	7	12	20
EXTERNAL AFFAIRS	3	12	2	23	40
FEDERAL BUSINESS DEVELOPMENT BANK	-	2	-	3	5
FISHERIES AND OCEANS	1	1	1	5	8
FINANCE	-	3	1	7	11
FOREIGN INVESTMENT REVIEW AGENCY	-	1	-	-	1
HEALTH AND WELFARE	5	16	10	20	51
INDIAN AFFAIRS & NORTHERN DEVELOPMENT	-	3	2	7	12
INSURANCE	-	-	-	2	2

FINDING	JUSTIFIED			NOT JUSTIFIED	
RESULT	INSUF-FICIENT ACTION	REMEDIAL ACTION	NO ACTION REQUIRED	NO ACTION REQUIRED	TOTAL
INVESTMENT CANADA	-	-	-	2	2
JUSTICE	-	7	1	2	10
LABOUR	-	-	-	1	1
NATIONAL CAPITAL COMMISSION	1	3	2	6	12
NATIONAL DEFENCE	2	7	5	12	26
NATIONAL ENERGY BOARD	-	-	-	1	1
NATIONAL PAROLE BOARD	1	-	1	2	4
NATIONAL RESEARCH COUNCIL	-	-	-	1	1
PRIVATIZATION AND REGULATORY AFFAIRS	-	3	1	1	5
PRIVY COUNCIL OFFICE	2	2	-	4	8
PUBLIC ARCHIVES	-	2	-	7	9
PUBLIC SERVICE COMMISSION	-	1	-	-	1
PUBLIC WORKS	-	3	2	6	11
REGIONAL INDUSTRIAL EXPANSION	1	-	-	5	6
REVENUE CANADA (CUSTOMS AND EXCISE)	-	4	9	7	20
REVENUE CANADA (TAXATION)	1	16	8	37	62
ROYAL CANADIAN MINT	-	-	1	-	1
ROYAL CANADIAN MOUNTED POLICE	-	4	-	13	17
SECRETARY OF STATE	-	1	-	3	4
SECURITY INTELLIGENCE REVIEW COMMITTEE	-	1	1	-	2
ST. LAWRENCE SEAWAY AUTHORITY	-	-	-	1	1
SOLICITOR GENERAL	-	4	1	6	11
SUPPLY AND SERVICES	1	3	2	22	28
TARIFF BOARD	-	-	-	1	1
TRANSPORT	-	6	3	7	16
TREASURY BOARD	1	2	2	-	5
MULTIPLE DEPARTMENTS	-	2	-	-	2
TOTAL	29	169	87	357	642

Table 4
GEOGRAPHIC DISTRIBUTION OF COMPLAINTS
(BY LOCATION OF COMPLAINANT)

April 1, 1988 to March 31, 1989



Cabinet Confidences (Section 69)

The *Access to Information Act* does not apply to confidences of the Queen's Privy Council for Canada --Cabinet confidences, as described in section 69--even though these records may be under the control of a government institution. Thus, the government may cite this provision when refusing disclosure of such a record requested under the Act.

The Information Commissioner, during a complaint investigation, has the authority, notwithstanding any other Act of Parliament or any privilege under the law of evidence, to examine any record to which the Act applies. However, Cabinet confidences are subject to the "normal" laws of evidence, including the *Canada Evidence Act*. Under that statute, a Minister of the Crown or the Clerk of the Privy Council can certify in writing to a court, or other authority with the power to compel production of information, that the information sought constitutes a Cabinet confidence and does not have to be produced. As a result, when we receive a complaint involving non-disclosure of Cabinet confidences, we accept the fact that a government institution may refuse to let us examine the records in question.

Upon request, the Minister responsible for the government institution involved, or the Clerk of the Privy Council, will certify to the Information Commissioner in writing that the records fall within the description in section 69 of the Act and therefore are not subject to disclosure even to the Commissioner.

Of the 642 complaints investigated and reported on this year, 35 involved claims of Cabinet confidence, usually in conjunction with other grounds for refusing disclosure. In 19 cases the non-disclosure complaint was dismissed completely, while 16 cases resulted in a mediated resolution. We did not recommend disclosure of any records claimed by a government institution to be Cabinet confidences.

Table 5
COMPLAINTS INVOLVING REFUSAL TO DISCLOSE CABINET CONFIDENCES

April 1, 1988 to March 31, 1989

DISPOSITION OF THE CABINET CONFIDENCE EXCLUSION	DISCLOSURE RECOMMENDED	RESOLUTION MEDIATED	DISMISSED	TOTAL
CERTIFICATE NOT REQUIRED	0	8	11	19
CERTIFICATE REQUIRED	0	8	8	16
TOTAL	0	16	19	35

Case Summaries

This report summarizes 20 cases typical of those dealt with by the three commissioners between April 1, 1988 and March 31, 1989. Each case has a caption 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.

Third Parties Get Second Chance

File: *0524*

Institution: *External Affairs*
Complaint: *Refusal - [20(1)(b), (c), (d)]*
Finding: *Justified*
Disposition: *Reported as Well-Founded*
Result: *Remedial Action Taken*

An individual made a request under the *Access to Information Act* to the Department of External Affairs for

> "copies of export permits for goods that fall under section 7 of the *Export Control List* [military hardware] for the period beginning January 1, 1984, to the present for ...Angola, Central African Republic, Chad, Ethiopia, Namibia, Uganda, Zimbabwe, El Salvador, Haïti, Pakistan, Libya, Iraq, Iran, Lebanon, Syria, Yemen (People's Democratic Republic)."

Export permits indicate the name of the exporter, the destination of the goods, their country of origin, a description of the goods, their quantity and approximate value. Permits are necessary to export goods on the Export Control List but a permit is simply permission and does not mean that the goods actually were shipped.

External Affairs exempted everything except the permit number and date of issue on the ground that disclosure would reveal commercial information provided to the government in confidence by a third party, or information which could be materially injurious to a third party, prejudice its competitive position or interfere with contractual or other negotiations.

When External Affairs consulted the third parties about disclosure, most objected, explaining that the information in the export control permits was provided in confidence and has consistently been treated that way by them. In some cases the third parties pointed out that the terms of their contracts, or the laws of foreign countries, impose an obligation of confidentiality. They also argued that in the business of military goods, their market activities and prices generally are not known to their competitors, and disclosure even of the fact that a third party proposes to export to a particular country could be damaging to its competitive position or to contractual negotiations in which it is involved. We accepted these explanations and did not recommend

disclosure over the third parties' objections.

However, we did not agree that copies of permits to export goods should be withheld from disclosure in five cases where the relevant third parties, having been given notice of the department's intention to disclose and the opportunity to present reasons against disclosure, failed to do so. Of these five, three even consented to disclosure.

Yet, External Affairs officials refused to release these records on the ground that, even though third party "A" consents or has no objection to disclosure about its own export permit, External Affairs should not disclose the record because disclosure could have an adverse effect on third parties "B", "C", and so on.

The officials said that the Minister could refuse disclosure where he believes it is in the third parties' best interests. They also pointed to the "mosaic effect" whereby information released about some of the third parties would reveal a pattern which would disclose information about other third parties. No evidence supported this argument and it was not one which we found intrinsically credible. To the contrary, the representations made by many third parties spoke strongly about the effect which disclosure of their own export permits would have on their own competitive position but none of them even suggested that they would be adversely affected by the disclosure of export permits dealing with other exporters.

After more than two years of meetings and exchanges of correspondence, we recommended to the Secretary of State for External Affairs that he disclose to the complainant full copies of the export permits requested under the Act where the relevant third party had no objection.

The department responded:

> "We are seeking comprehensive legal advice and are also consulting again with the companies to whom the export permits in question were issued. We are of the opinion that too much time has passed since our earlier correspondence with the companies. Furthermore, the political sensitivities of some of the export destinations for the goods being exported has changed and it would not be correct to disclose documents today on the basis of approval, or no comment, in response to departmental correspondence sent over two years ago."

This concerned the Commissioner. We of course would not favour disclosure if a third party had given an uninformed consent or had been tricked or misled into consenting to disclosure, but we felt that the department should consider seriously the prejudicial effect on the rights of the requestor where a third party is

asked whether it wants to reconsider the whole matter. The third party's perception of a lot of red tape, from which it could extricate itself simply by withdrawing consent, could have a coercive effect which could be as unfair to the requestor under the *Access to Information Act* as an uninformed consent would be to the third party. We suggested that the change in circumstances referred to by the department would have to be very grave indeed to warrant the prejudicial effect which such action would likely have on the requestor's rights under the Act.

External Affairs nevertheless went ahead with further consultations and reported that three of the exporters had indeed changed their minds and were now asking that External Affairs not disclose the information provided on their export permit applications. The fourth reiterated its consent to disclosure and the fifth did not reply at all. Records about the fourth and fifth exporters were disclosed to the complainant.

We reported to the complainant that the department was unfair in its handling of the request by refusing to disclose records where initially there was no protest and then by effectively coaxing third parties into objecting to disclosure. However, it would have been equally unfair to recommend disclosure where there is reason to believe that a third party has a legitimate objection and for this reason only we did not do so.

Exemption May Depend On Context

File: *0644*

Institution: *External Affairs*
Complaint: *Refusal - [16(1)(a)(i)]*
Finding: *Not Justified*
Disposition: *Dismissed*
Result: *No Action Required*

It is an accepted principle of access to information that use of an exemption may depend upon the context in which information appears. A journalist asked the Department of External Affairs for all records related to the monitoring of a certain corporation's activity, including export permits, inspection reports, warnings about import/export controls and related correspondence with United States officials. One document was withheld on the ground that it contained information obtained or prepared by an investigative body in the course of lawful investigations pertaining to the detection, prevention or suppression of crime.

When the journalist complained about this exemption, we questioned its validity because the document initially had been prepared by the Department of External Affairs and subsequently given to the investigative body. We thought it would be unfair for External Affairs to exempt an otherwise innocuous record from disclosure simply because an investigative body had requested and obtained the same information. Was it possible that by claiming the exemption External Affairs had in effect disclosed that an investigative

body was interested in the document, effectively creating a ground for withholding it where none existed before?

Our inspection of the document found that it had been prepared solely for the investigative body and its contents made this obvious; consequently, the exemption was legitimate and our concern unfounded.

Income Tax Records Remain Secret

File: *0792*

Institution: *Revenue Canada (Taxation)*
Complaint: *Refusal - [16(2)(c), 21(1)(a), (b), 22, 24(1)]*
Finding: *Not Justified*
Disposition: *Dismissed*
Result: *No Action Required*

A lawyer acting on behalf of corporation X asked Revenue Canada for records dealing with corporation X's forgiveness of a loan owed by corporation Y, including audit working papers and other internal documents used by Revenue Canada. The lawyer complained to our office when Revenue Canada exempted portions of the requested records under subsection 24(1) [disclosure is restricted under another statute--section 241 of the *Income Tax Act*], paragraph 16(2)(c) [disclosure could facilitate the commission of an offence], paragraph 21(1)(a) [advice or recommendations developed for a government institution] and section 22 [tests or auditing procedures would be prejudiced by disclosure].

We found each of the exemptions to be valid, and explained our findings.

Subsection 24(1)

The complainant was concerned about the mandatory nature of the exemption of records requested under the *Access to Information Act* even though the statute triggering the operation of section 24 is not itself a complete bar to disclosure. In this vein, the complainant pointed out that subsections 241(3) and (5) of the *Income Tax Act* permit the Minister of National Revenue to disclose information for court proceedings relating to the administration or enforcement of the *Income Tax Act*. We did not agree, however, that these provisions permitted disclosure under the *Access to Information Act*. The bar on disclosure of information under section 241 of the *Income Tax Act* is removed only for court proceedings and not for other purposes.

Thus while a Revenue Canada official would not be forbidden from disclosing information in conjunction with court proceedings, this did not at the same time mean that section 24 of the *Access to Information Act* ceased to have effect. Even though the lawyer might be entitled to gain access to the records about his client in the course of court proceedings, we did not agree that this gave the lawyer and his client a special privilege under section 24 of the *Access to Information Act*.

Paragraph 16(2)(c)

The lawyer did not question the government's right to withhold information on the ground that disclosure could reasonably be expected to facilitate the commission of an offence, including information on the vulnerability of particular computer or communication systems or methods employed to protect such systems. However, he did want to know why such information was in his client's tax files.

This was a case where an explanation of the nature of the information provided the answer. Revenue Canada uses a variety of codes on information in its files. While these codes may mean nothing to an "outsider", their disclosure in conjunction with other information in case after case could facilitate the commission of a tax-related offence by a person piecing together all such information. The government has no way of controlling the subsequent disclosure of information obtained by any requestor under the Act and it is reasonable for Revenue Canada to consider a "worst case scenario" when deliberating upon the disclosure of coded information in its files.

Paragraphs 21(1)(a) & (b)

The lawyer believed it unfair to use these exemptions because practically anything in a taxpayer's income tax file could fall within the broad definition of advice and recommendations or consultations and deliberations. We agreed that there is a potential for abuse, but assured the lawyer that Revenue Canada used section 21 sparingly and, more importantly, with justification. After examining the records, we concluded that a legitimate interest exists in maintaining candour in such departmental records. While there is some merit to the argument that a taxpayer should be entitled to a clear understanding of the issues and facts as understood by the department, any decisions affecting the taxpayer as a result of information in such documents are subject to scrutiny by both the taxpayer and the courts.

Section 22

The argument supporting an exemption of portions of the requested records on the ground that they contained information relating to tests or auditing procedures where disclosure would prejudice the use of results of such tests or audits was similar to that concerning the security of Revenue Canada's information and computer systems.

It could be prejudicial to disclose portions of the records which might by themselves, or in conjunction with other disclosed records, reveal procedures or techniques used by the department to determine whether an audit should be conducted. We found that the exemption was legitimate.

While we were inclined to dismiss the complaint, we suggested to the complainant that he pursue the issue under section 241 of the *Income Tax Act* which allows disclosure for the purposes of court proceedings.

Minister Volunteers Disclosure

File: *0826/8*

Institution: *Energy, Mines and Resources*
Complaint: *Refusal - General*
Finding: *Not Justified*
Disposition: *Dismissed*
Result: *No Action Required*

In response to a request, the Department of Energy, Mines and Resources told a journalist that it had no specified records about "the costs associated with, or arising from, the Minister of Energy, Pat Carney's visit to Vancouver in May 1986 during which visit she attended Expo '86."

However, the department had contacted her office for such details and attached a copy of a letter from the Minister with a breakdown of expenses by category. The complainant then requested invoices of the expense items. Once again, the Minister's office provided these to departmental officials who passed them on to the journalist.

The journalist subsequently complained to our office because the department had to get the records from the Minister and questioned whether the accounting system was so bad that the department did not keep its own documents about expenses paid.

After our investigation we told the journalist that under Cabinet Directive 64 ministers are required to provide to their departments only periodic accounts of travel and other expenses, not copies of all receipts, invoices and records of specific trips. The detailed records given to the complainant, including items paid by the Minister personally, were provided voluntarily by the Minister for disclosure. (The House of Commons and ministers' offices are not subject to the *Access to Information Act*.) The department and the Minister had actually gone beyond the requirements of the Act to provide these records. Thus, we dismissed the complaint.

Similar complaints were made to other departments with like results. Ministers voluntarily provided detailed records of expenses and indicated whether they related to the Expo '86 opening or to other official duties.

A Sticky Problem

File: *0972*

Institution: *Agriculture*
Complaint: *Refusal - General*
Finding: *Not Justified*
Disposition: *Dismissed*
Result: *No Action Required*

A maple syrup producer complained to us that the Department of Agriculture failed to locate a document requested under the *Access to Information Act* indicating the

financial responsibility for missing maple syrup. The producer told us that he had turned his maple syrup over and received an advance payment from an agent of the local agricultural pool. Shortly afterwards maple syrup was seized in legal proceedings involving the agent. When claims over the agent's assets were settled, it appeared that the producer's maple syrup was not accounted for, and the agricultural pool demanded repayment of the advance.

According to the producer, the former Minister of Agriculture Hon. Eugene Whelan had assured him by letter that he should not be responsible for the repayment. The complainant said that the letter was sent by him to his lawyers but they denied receiving any such document. The complainant believed that an identical letter went to the agricultural pool, and he was looking for a copy in Agriculture Canada's files.

Although Agriculture Canada could not find the letter, they suggested that a copy might be located in Mr. Whelan's personal correspondence, which had been turned over to Public Archives.

Public Archives would not let anyone see the former Minister's correspondence without his permission because they constituted personal information. [It is arguable as well that such *personal* record collections placed in the Public Archives are not even subject to the *Access to Information Act*.] Our investigator explained the problem to the former Minister who gave his consent but provided an assistant to help our investigator. However, the only document retrieved, one which was also found in Agriculture Canada's files, was a letter from the Minister of Agriculture to the producer's Member of Parliament. It gave only a general description of the producer's predicament but made no statements about legal liability.

Because we were unable to find a letter like the one described by the complainant, or any indication that such a letter existed, the complaint was dismissed.

Limited Time for Consultations about Disclosure

File: *1092*

Institution: *National Capital Commission*
Complaint: *Refusal - [26]*
Finding: *Justified*
Disposition: *Reported as Well-Founded*
Result: *Insufficient Action*

A researcher asked the National Capital Commission for records on the "Parliamentary Precinct Area", including preliminary or final plans, consultants' reports, and cost and timing projections for development. Along with receipt of available records, he asked for a briefing, particularly if plans were not final.

The Commission promised to release some documents, but said that a briefing would serve no useful

purpose since the most current information be contained in a consultant's report to be published within 90 days.

They referred to section 26 of the *Access to Information Act*, which permits a government institution to refuse disclosure of records about to be published.

The researcher complained to us that a key document, the du Toit Report, was not disclosed although it appeared that the NCC had received a draft or preliminary report.

After the 90-day period expired, the researcher told us that NCC still had not released the report, and would not until they had received the "final" report from the consultant. He pointed out that in his access request he had asked for all documents dealing with the consultants' work--in draft or final form.

We made a formal recommendation that records pertaining to the Parliamentary Precinct be disclosed forthwith. The Chairman of the National Capital Commission responded that a report had been printed but more time would be required for translation before it could be published. The Chairman also said:

> "The more fundamental question I need to address at this time is the consultation that is required with the members of the House of Commons and the Senate. Needless to say that the report must be submitted to them in both official languages and since the report is not yet available in French the consultation process has not yet been initiated. I feel it would be totally inappropriate and unethical for me at this time to release a report under an access to information request without first submitting it to the parties directly affected by the report in question. When the document is ready, I wish to assure you that I will inform both the members of the House of Commons and the Senate that the report was the subject of an access to information request and we will thereafter be happy to provide [the requestor] with a copy thereof."

We reported to the researcher that we considered the complaint well-founded and had informed the National Capital Commission that while the need to consult with members of the Senate and the House of Commons presented a problem, the *Access to Information Act* did not permit the continued delay in responding to the access request for that reason. We offered to bring the matter before the Federal Court for judicial review, but with the understanding that should the report be published before the court review could take place, we would likely withdraw the court action.

We filed a Federal Court application, but the du Toit Report was made

public shortly afterwards. We could see no real purpose in a court hearing. The researcher still was concerned about discrepancies in the reasons the NCC had given for refusing to disclose the record and we agreed to launch a separate investigation into that matter.

Difficult to Prove the Negative

File: *1094*

Institution: *Supply and Services*
Complaint: *Refusal - General*
Finding: *Not Justified*
Disposition: *Dismissed*
Result: *No Action Required*

A former government employee requested specific records from the Financial Management Information System, Department of Supply and Services. When records responsive to the request were sent to him, he complained to our office that they were incomplete, alleging that a duplicate set existed. He gave us a copy of a document which he said we would probably find in the set.

Our extensive investigation was unable to find any additional records or cross-references suggesting the existence of a duplicate records set. The document which the complainant gave us matched a document which Supply and Services had already sent him.

When we reported our investigation to the complainant, he told us that he could name persons who could verify the existence of a duplicate records set. However, when we asked him to provide the names, he declined because he believed it would put them in jeopardy.

In the circumstances, we dismissed the complaint.

Opinion Exempt, but Government's Lawyers Approachable

File: *1166*

Institution: *Revenue Canada (Taxation)*
Complaint: *Refusal - [23]*
Finding: *Not Justified*
Disposition: *Dismissed*
Result: *No Action Required*

When the tax lawyer for a cheese producer challenged the reassessment of his client's income tax, Revenue Canada tax officials told him their Ottawa lawyer's opinion refuted his submissions. His request for a copy of that legal opinion under the *Access to Information Act* was denied on the ground of solicitor-client privilege. He questioned the fairness of this exemption

> [translation]
> "because the legal opinion supposedly gives the reasons supporting Revenue Canada's rejection of our client's submissions in its notice of objection.
>
> "These reasons are at the very heart of one of the elements of the contested assessment and are not so-called confidential

information. Since the taxpayer has the burden to prove that an assessment is incorrect, he has to know the facts and the law that Revenue Canada bases its assessment notice on. This is the only way that the taxpayer can discharge the burden of proof resting on him."

We inspected the document and assured the complainant that it fell under section 23 because it was a legal opinion provided to the department by a lawyer in the course of duties as a legal adviser. While section 23 is a discretionary exemption, we could see no reason why the department should effectively waive the solicitor-client privilege by disclosing the advice. The complaint was dismissed as not justified but we pointed out that there was no reason that the tax lawyer could not discuss the reassessment with the department's lawyers.

Manuals Disappeared from Library

File: *1178/1*

Institution: *Correctional Service Canada*
Complaint: *Refusal - [68]*
Finding: *Justified*
Disposition: *Resolution Mediated*
Result: *Remedial Action Taken*

A penitentiary inmate complained about the difficulty in obtaining various documents produced by the Correctional Service of Canada. We reformulated the inmate's specific complaints and subsequent questions and comments into a single, comprehensive complaint that the Correctional Service had refused to disclose its directives, regional instructions and standing orders on the ground that they are excluded from the ambit of the *Access to Information Act* pursuant to section 68, which reads:

> 68. This Act does not apply to
> (a) published material or material available for purchase by the public;
> (b) library or museum material made or acquired and preserved solely for public reference or exhibition purposes...

The complaint alleged that during the past year complete sets of the documents in question had not been available in the penitentiary library or any other location readily accessible by inmates.

Section 68 provides that the government is not required to answer access requests by providing material which can be purchased from a bookstore or a publisher, or obtained through a library. Our experience is that government departments, being fair about this provision, do not refuse to disclose records simply because they are available in a library somewhere in Canada, but invoke the provision only when satisfied that a requestor could obtain the material easily from a library or other source. Most penitentiary inmates have reasonable access to the library or information services offices where such documents are maintained.

At issue in this case was whether the requested records were available to the inmate at the time he requested them.

Our investigator went to the penitentiary and met the complainant, who explained that a full set of the relevant Correctional Service manuals were in the library a year ago but elements had gone missing from the collection and it was still not complete. The complainant cited specific examples:

1. Standing Order 095-1, "Publications by Inmates" was missing from the set of standing orders in the library; and

2. Regional Instruction 580-1 was missing from the set of regional instructions in the Information Services area.

Our investigator interviewed appropriate administrative staff who explained what records were maintained and how they were updated. It was conceded that some portions of the manuals were removed from the library in order to update them, but according to penitentiary records, the library set of manuals had been completely restored three months earlier. However, the complainant's two examples proved to be correct.

Although the table of contents listed standing order 095-1 "Publications by Inmates", no such item could be found at the appropriate spot in the manual. Administrative staff discovered that this document had been renumbered but the table of contents had not been amended to delete the "old" reference. Regional instruction 580-1 was missing from the set of records in the information services office, but it was located in the library set.

The complainant's examples of missing items were technically valid, but the complaint was considered justified because complete sets of directives, orders and instructions had not at various times over the past year been available to the inmates in the institution's library or the Information Services office.

It was impossible to say with certainty that the records which the requestor wanted were not in the library just at the time his access request was processed. It would not be appropriate to recommend disclosure of the entire set of manuals under the *Access to Information Act* simply because some portions probably were not available at the time the access to information coordinator said they were. We considered restoration of the penitentiary library records to be a satisfactory resolution to the complaint.

Timber Evaluation Confidential

File: *1190*

Institution: *Environment Canada*
Complaint: *Refusal - [14]*
Finding: *Not Justified*
Disposition: *Dismissed*
Result: *No Action Required*

When an individual requested a copy of Environment Canada's independent evaluation of timber on land being considered for South Moresby Park, all relevant records were exempted under section 14 of the Act on the ground that disclosure could reasonably be expected to be injurious to the conduct of federal-provincial affairs. He accompanied his complaint with newspaper clippings which he said showed that the government had given the report to the press. He also told us that an agreement had been reached between British Columbia and the Government of Canada to establish the park, so no harm could result from disclosing the report.

Our review found that while some public statements had appeared in the media on how much the federal and provincial governments were committed to pay to establish the park, the question of compensation to forest companies for lost timber rights had not yet been settled. On this basis we concluded that disclosure of the evaluation report could still be injurious to federal-provincial affairs and therefore the complaint was not justified.

Sound Deleted from Air Crash Tape

File: *1204*

Institution: *Canadian Aviation Safety Board*
Complaint: *Refusal - [19(1), 24(1)]*
Finding: *Justified*
Disposition: *Resolution Mediated*
Result: *Remedial Action Taken*

A television network executive learned that a small aircraft which crashed in British Columbia, killing several persons, carried an operating video camera. Under the *Access to Information Act* he obtained a copy of the videotape recording from the Canadian Aviation Safety Board but the sound track had been deleted on the ground that it contained personal information.

In his complaint to us he said:

> "It is our contention that the sound track, containing among other things the audible stall warning signal from the aircraft, is crucial in allowing the public to assess whether there was sufficient warning to the pilot before the crash occurred. The timing of the signal . . . where it occurs on the video, is critically important from the point of view of the public's right to know exactly what happened here."

The *Access to Information Act* provides that where it is possible to do so, a government institution should release as much of a record as

possible, withholding only those portions essential to the ground for exemption. As our investigator was inquiring into the technical possibility of deleting the conversation from the videotape but leaving such sounds as the audible stall warning signal, the Canadian Aviation Safety Board pointed out that it should have referred to section 24 of the *Access to Information Act*, which prohibits disclosure of information restricted under certain other statutes. Section 26 of the *Canadian Aviation Safety Board Act* forbids the disclosure of "cockpit voice recordings" and includes in its definition "the aural environment of the flight deck, voice communication to and from the aircraft or audio signals identifying navigation and approach aids."

We agreed that sounds other than human voices could fall within this definition. In particular, the audible stall warning signal appeared to be part of "the aural environment" and consequently was material which the Board was prohibited from disclosing. Although the Board had not cited this statutory provision at the outset, it nevertheless was relevant, and meant that no part of the sound track could be disclosed.

The complaint was considered justified because the exemption originally claimed did not apply to the entire sound track. Notifying the requestor of the proper exemption was the best that could be done in the circumstances.

Poor Prospects for Disclosure

File: *1279*

Institution: *Energy, Mines and Resources*
Complaint: *Refusal - [20(1)(c)]*
Finding: *Justified*
Disposition: *Resolution Mediated*
Result: *Remedial Action Taken*

In response to an access request for records about some legal surveys and mineral claims in the Yukon Territory, the Department of Energy, Mines and Resources exempted records under paragraph 20(1)(c) of the Act on the ground that disclosure could have an adverse financial effect on third parties. Eventually, after consulting relevant third parties, all except one page of the exempted documents were disclosed. Although they had initially claimed that the document was exempt from disclosure, the department changed its tack and insisted that the single document was not relevant to the access request. The complainant argued that he should see the record anyway and challenged the exemption.

Although we considered the complaint justified because some of the documents had originally been improperly exempted, we told the complainant that we agreed that the remaining document was not relevant to his request and even if it were, it would be exempt. We suggested that if the complainant wanted to pursue the matter further, he should pay another $5 and file another access request for

the disputed document in order to overcome any argument about its relevance. He could then pursue the matter of its exemption.

Official Definition Does Not Answer Question

File: *1304*

Institution: *Transport*
Complaint: *Miscellaneous*
Finding: *Not Justified*
Disposition: *Dismissed*
Result: *No Action Required*

When the Department of Transport was asked for an official definition of the term "actual flying time" and its French translation and definition, the department furnished the requestor with some definitions taken from official publications and told him where he could purchase the publications. Finally, they refunded his $5 application fee because the response had been provided informally.

The requestor was not happy with this response, however, and explained his predicament. He referred to a Department of Labour document which described air-crew working hours as "*actual flying time* as prescribed by Department of Transport." The definitions in the Transport Canada document did not really answer his question. They read as follows:

> "*Air Time* is the period of time commencing when the aircraft leaves the supporting surface and terminating when it touches the supporting surface at the next point of landing.
>
> "*Temps de vol effectif* : Désigne la période de temps commençant au moment où l'aéronef quitte la surface et se termine au moment où il touche la surface au point d'atterrissage ou d'amerrissage.
>
> "*Flight Time* is the total time from the moment an aircraft first moves under its own power for the purpose of taking-off until the moment it comes to rest at the end of the flight and should be recorded in all Pilot Log Books.
>
> "*Temps de vol* : Désigne le total du temps décompté depuis le moment où l'aéronef commence à se déplacer par ses propres moyens en vue du décollage jusqu'au moment où il s'immobilise à la fin du vol. Tous les pilotes sont tenus de noter ce temps de vol sur leurs carnets de vol."

In the course of our investigation we consulted the Air Regulations and the Aircraft Technical Log Order and verified that the definitions in the publications given to the complainant were the only official definitions of "air time" and "flight time." We were not able to do anything about the problem that the government publications did not provide an official definition for "actual flying time" or a French language translation.

Got Everything; Wanted More

File: *1366*

Institution: *Solicitor General*
Complaint: *Refusal - [13(1)(d), 21(1)(a)]*
Finding: *Justified*
Disposition: *Resolution Mediated*
Result: *Remedial Action Taken*

An Ottawa researcher filed an access request with the Department of the Solicitor General for a 1985 report: "Police Officers and Public Safety--the use of lethal force by and against police."

The department withheld portions of the report on the grounds that they contained information provided in confidence by municipal police forces and advice or recommendations developed for the Solicitor General.

Our investigator contacted the police departments which had provided information for the report and he learned in each case that the information had been extracted from their manuals (which were already publicly available) or that they had no concern about the information being disclosed. Ultimately he persuaded the Department of the Solicitor General to withdraw all the exemptions and release the entire report.

The researcher was still not satisfied because two police forces were referred to in the report simply as "force A" and "force B." He argued that we should request these police forces to disclose their identities and asked us if we could assure him that he had received all research documents used to prepare the report.

We told him that probably he had not received all research documents since his request was for the report itself. He would have to file another access request to obtain related information.

Further, information in the report could be disclosed with the consent of the police forces. However, the identities were not in the report in the first place and it is not within our mandate to pursue a complaint about how the report was written.

The complainant could file another access request for any records which would identify the two police forces, but we suggested that he first simply contact the departmental coordinator to find out if the department had such records and whether the police forces had opted to avoid being identified. It might save time and money.

Difficult to Estimate Consultation Time

File: *1400*

Institution: *Communications*
Complaint: *Time Extension*
Finding: *Justified*
Disposition: *Reported as Well-Founded*
Result: *Remedial Action Taken*

Frequently a department will claim that an extension of the response time limit is necessary to allow for consultations with another department

about the disclosure of requested records. It can be difficult to estimate the length of time needed when the first department does not know how quickly the second department will act.

When a parliamentary researcher asked the Department of Communications for a consultant's report about tariff and non-tariff barriers in the sound recording industry, she was told that a time extension of up to 120 days would be necessary "for consultation."

She complained to our office and we launched an investigation into the lengthy delay forecast.

We found that the Department of Communications officials had consulted the Department of External Affairs about disclosure and they expected a reply in about a month. However, Communications officials explained that based on past experience with External Affairs, 120 days was a more reasonable estimate of the time that would actually be taken.

We recommended to the Minister of Communications that External Affairs be reminded of their one month promise and that the records be disclosed as soon as possible. Within a week, we received this reply from the Minister:

> "I appreciate your understanding of the dilemma in which my officials found themselves, being torn between the desire to cite a reasonable extension, and the necessity to give their best estimate of the time required for this consultation.... Please be assured that my officials have done everything which they can to hasten the response from External Affairs."

Two weeks later, the consultations were completed and the complainant received her response. Our intervention may have helped to speed up the process, shaving 70 days from the original time estimate. Yet, we felt that the 80 days taken to actually process the request was still excessive.

Three Months Search for Ten Pages

File: *1457*

Institution: *Health and Welfare*
Complaint: *Time Extension*
Finding: *Justified*
Disposition: *Reported as Well-Founded*
Result: *Insufficient Action*

On February 18, 1988, the Department of National Health and Welfare received a request for its Inspection Report of a certain drug laboratory. On March 17 Health and Welfare told the requestor that an additional 30 days would be required

to respond to the request because meeting the original time limit would unreasonably interfere with the operations of the department. The records were identified on April 7 and a proposal for their exemption had been sent to the Minister, yet the April 18 deadline for disclosure was missed. On April 27 the department told the complainant that it could not meet the deadline. Not until June 3 was she told that the ten-page document was exempt from disclosure.

In the meantime we had received a complaint about the time extension and had questioned in a letter to the Minister of National Health and Welfare the need for such extension. We asked that we be informed of the size of the record requested, the volume of records that had to be searched, the number of employees involved in the search and the exact nature of the interference the department would experience as a result of the access request.

The Minister responded July 29 that "up to eight staff members" had been involved in searching departmental files in both Ottawa and Montreal. The extension took into consideration the time required to transfer documents between Ottawa and Montreal. During the same period staff of the Health Protection Branch were involved in investigations that included the inspections associated with the discovery of shellfish toxin on the east coast.

Our final report to the Minister pointed out that we still had no knowledge of the volume of records that had to be searched to find the requested document. Further, the reply that "up to eight" individuals were involved in the search was not a very precise answer to our question. There was no explanation of the alleged interference the search would cause the department, nor any demonstration that the alleged interference would be unreasonable.

We had no specific recommendation to make other than to restate a concern expressed earlier that this was only one of a number of similar complaints made against the department in the past two years.

Opinions About Prize Recipients

File: *1460*

Institution: *Canada Council*
Complaint: *Exemption - [19(1)]*
Finding: *Not Justified*
Disposition: *Dismissed*
Result: *No Action Required*

The Canada Council administers the Izaak Walton Killam Memorial Prizes to honour eminent Canadian scholars engaged in research in the Natural Sciences, Engineering, and the Health Sciences. Scholars must be nominated by three experts in their fields who provide the Killam Selection Committee with information used to make the decision.

The Canada Council received a request under the *Access to Information Act* for an explanation why a specific prize was awarded. The requestor wanted:

- -copies of the nominating papers,
- -a brief description of the nature of the nominee's distinguished contributions to the field in question,
- -a brief indication of the nominee's current research interests,
- -a copy of the nominee's curriculum vitae, including a list of publications,
- -a list of approximately ten referees in Canada or abroad who could provide reference letters at the request of Killam Program staff,
- -copies of any such reference letters,
- -other statements taken under consideration by the Committee.

The Canada Council offered a press release and the text of a speech given at the prize presentation, but refused to disclose any other information on the ground that it constituted personal information which is protected from disclosure under section 19 of the Act. After the complainant wrote to us about the exemption the Canada Council provided a list of the prize winner's publications and answered some questions about the administration of the Killam Trust. The complainant then focused on the reference letters used by the Committee in selecting the prize winner and argued that by reading paragraphs (e), (f) and (g) of the definition of personal information, it appeared that a letter of reference is not personal information about either the prize recipient or the referee, and therefore should be disclosed under the Act.

We did not agree and explained that the difficulty in interpreting the definition of personal information under *Access to Information Act* arises because the definition serves two statutes. Under the *Privacy Act* it defines the kind of information that individuals can obtain about themselves. Under the *Access to Information Act* the same definition is used to describe a class of information which the government is prohibited from disclosing in the context of an access request.

The parts of the definition referred to by the complainant dealing with the award of grants and prizes were designed specifically to maintain the system of anonymous assessments by peers. A prize nominee can gain access to the comments made about him or her, but is not entitled to know the name of the referee who made the comment. No other persons (not even the referee who provided the comments about the prize nominee) is entitled under the *Access to Information Act* to those comments.

As a result, we were unable to recommend disclosure of the names of the referees or their comments.

Time Limit to File Complaint Would Expire

File: *1599/1*

Institution: *National Defence*
Complaint: *Time Extension*
Finding: *Justified*
Disposition: *Resolution Mediated*
Result: *Remedial Action Taken*

A British Columbia researcher complained that the Department of National Defence wanted a 360-day extension for each of his 26 access requests in order to consult foreign governments about disclosure.

The researcher told us that the long period between requests and responses made research difficult and effectively prevented him from lodging complaints under the Act. That was because the *Access to Information Act* stipulates that a complaint about the refusal to disclose records must be made within one year of receipt of the access request by the government institution. By adding a 360-day time extension to the initial 30-day response, reasons for refusing disclosure might not be given before the one-year limit expired.

Furthermore, the right to judicial review might be lost since the Act permits applications for review of non-disclosure decisions only after a complaint has been investigated and reported on by our office.

The lengthy time extensions were claimed by National Defence because consultations with foreign countries, not bound by the *Access to Information Act*, can be slow. We urged the department to reconsider and they agreed to reduce the time extensions by two months in each case. We thought that this was reasonable since it would give the complainant about one month upon receiving records, or reasons why records were being withheld, to lodge a complaint. The complainant agreed.

Summons to Explain Delays Issued

File: *1615/1*

Institution: *Employment and Immigration*
Complaint: *Time Extension*
Finding: *Justified*
Disposition: *Reported as Well-Founded*
Result: *Remedial Action Taken*

The Information Commissioner, in carrying out an investigation of a complaint under the Act, has the same powers as a superior court of record to summon the appearance of persons to give evidence and produce documents as required. While most complaints are resolved on an informal basis, it is occasionally necessary to use the powers provided by the Act.

On June 20, 1988, the Department of Employment and Immigration received an access request from an Ottawa researcher for certain recent audit reports. When the department told the researcher that it would take up to

60 days to process the request because it required a search through a large volume of records, the requestor complained to our office, pointing out that it should not be that time-consuming to locate and search the reports he was interested in.

Our investigator believed that such a lengthy time extension was unnecessary, but was not able to speed up the process. Ultimately, the department failed to meet its own extended deadline and on September 6, 1988, we recommended that the Minister of Employment and Immigration disclose the records and let us know by September 28, 1988, what action had been taken.

Through the access coordinator's office we learned only that the access request had been sent to the Minister's office for a decision, but no reply to our recommendation was received and no records were disclosed. On November 7, 1988, we issued a summons to the Minister's executive secretary, who is the access to information coordinator for the department, to attend a hearing and explain why there had been no response to our disclosure recommendation.

The next day the requested records were given to the complainant.

We nevertheless continued with the hearing on November 14, 1988, and the Minister's executive secretary answered questions about the lengthy delay:

Q. In functional terms, who actually processes the access requests?

A. The processing is divided between the Public Rights Directorate, and the branch responsible for the material that has been requested.

The general procedure that is followed is that the request comes in the first instance to the Public Rights Directorate where it is registered and handled. It is then sent to the responsible program group, which is responsible for doing the search of the files, for reviewing the material, for making recommendations concerning release, concerning any possible exemptions, for identifying any material that might be eligible for an exclusion.

Public Rights has ultimately the responsibility for all exemptions. They also have the overall responsibility for tracking these things, and shepherding them through the process.

Q. And once the documents are collected in response to an access request, they are then collected and held by the Public Rights Directorate, is that correct?

A. That is right, they go back to the Public Rights Directorate after they have been reviewed by the program group.

Q. And then what happens, once they are collected?

A. What happens then is that, depending on the content, they are sent up for my review. They are sent for the Deputy's review.

Q. Deputy being Deputy Minister?

A. The Deputy Minister. And material that is going to be released is then sent to the Minister's office prior to its being released.

. . . .

Q. So, by August the sixteenth, all of the documents had been collected and were in a position to be released. Is that correct?

A. They had all been collected and had been reviewed, yes. That is right.

Q. Then what happened to the documents?

A. Then the documents were sent forward. The documents were sent to the Minister's office.

Q. Pardon me. On your chronology you have "August seventeenth, remaining audit sent to [Parliamentary Affairs Unit]."

A. Yes. From our point of view that constitutes--that is the equivalent to sending it to the Minister's office. We send it to our Parliamentary Affairs Unit which then passes it on to the Minister's office.

Q. Is the Parliamentary Affairs Unit in the Minister's office?

A. No, it is part of the department. It is attached to the Deputy Minister's office and they have the primary role of liaison with the Minister's office, on a wide range of matters.

Q. And then what happened once they were sent up to the Parliamentary Affairs Branch? What happened to the documents then?

A. Well, from the time they were sent to the Minister's office--I can only report what I was able to learn by looking into this matter, they were handled by [an official] in the Minister's office. . . This is one of his responsibilities within the Minister's office. He told me he sent them to another staff member for review.

Q. Do you know why it was sent to another staff member?

A. Well, I think he wanted someone else from a policy or a communications point of view, to have a look at them. . . He told me that he sent them to someone else for review and either he did not ask for them

back, or they were not sent back. They were lost from view, effectively, for some period of time.

. . . .

Q. So, from sometime in mid-August until into the first week of November, these documents then were up in the Minister's office?

A. That is right.

Q. Now, were you able to learn why the Minister did not respond to the Information Commissioner's letter?

A. The letter when it first came in was handled--according to the Minister's office there was an administrative bungle, and they did not receive the letter. Neither the Minister, nor the Minister's chief of staff, nor her executive assistant, saw the letter when it first came in. It was routed directly to the department, so the department was aware of it, the Minister's staff was not.

Q. Where in the department did it go?

A. It would have come to us, to the Public Rights Directorate, in the Executive Secretariat. However, it was only approximately a week until the Minister's staff was made aware of the letter by the Executive Secretariat.

. . . .

Q. What caused the production of, the release of, the documents on November eighth and ninth?

A. I cannot answer with any certainty, but I would speculate that the receipt of a summons might have been linked to these documents being made available.

Q. It is probably a reasonable supposition.

A. The timing would suggest there might be a link.

On December 16, 1988, the Minister acknowledged receipt of our September 6, 1988, recommendation for disclosure and explained that it had not been brought to her attention or that of her assistants. She assured us that processes were being reviewed and later the Deputy Minister assured the Commissioner that problems of this kind should not occur again.

Earlier Request Is Old History

File: *1729/1*

Institution: *Communications*
Complaint: *Time Extension*
Finding: *Not Justified*
Disposition: *Dismissed*
Result: *No Action Required*

A researcher interested in records about negotiating a Canada-United States agreement to protect archaeological and ethnological materials was dismayed when the

Department of Communications told him that processing time would have to be extended by a further 120 days for consultation with other departments. In a letter of complaint to our office he said:

> "I suggest that the claiming of an extension is inappropriate in this case in that some of the material I have requested access to has already been the subject of an access to information request and prepared for release. At the very least, this information should be released without any delay."

Our investigation revealed that the requestor had asked for the same information in 1986, at which time documents were assembled, consultations with other departments were conducted and the records were made available for his inspection, with portions exempted from disclosure. He was advised in writing at that time that the copies of the records would be retained for two years to allow him further access. When the two years expired the records were destroyed. Three weeks later the second access request was received.

To respond to the second request the department would have to again search for and assemble the same records, plus any which had come into existence since 1986. Further, consultations about disclosure would have to be conducted again in both Canada and the United States.

Regrettably, the lengthy search and preparation of records would have to be repeated.

Self-Initiated Complaints

For the most part, the work of the Information Commissioner's office entails the investigation of individual complaints received from those who use the *Access to Information Act*. Occasionally, however, our vantage point will reveal problems that appear to be systemic in nature or are not solved by remedial action in isolated cases.

The Act states:

> 30.(3) Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining records under this Act, the Commissioner may initiate a complaint in respect thereof.

Since the Act came into force in 1983, seven "self-initiated" complaints have been launched by the Information Commissioner and investigated pursuant to this provision.

Special Fee Privileges for Journalists

One of the first complaints processed under the *Access to Information Act* questioned whether certain requestors, by virtue of their circumstances and what they planned to do with information received, should be entitled to a waiver of the normal access fees. The United States, which has a public interest test for fee reductions, waives or reduces fees under the *Freedom of Information Act* for requestors with expertise in the subject area who have the ability and intention to disseminate information to the public. On the other hand, fee waivers are not appropriate for requestors who would derive some commercial benefit from disclosure. The United States practice has been to waive fees for journalists, in order to serve the public interest and encourage vigorous, healthy and informative debate on public issues.

Under Canada's *Access to Information Act* there are no regulations in this area, and Treasury Board guidelines dealing with waiver where there is a public benefit do not provide specific criteria. Consequently, in January 1984, the Information Commissioner undertook a study among journalists, who then appeared to be the single largest identifiable group of users of the Act, to determine their views on fee waivers.

The results of our survey were inconclusive. Approximately 50 per cent of the respondents favoured fee reductions for various reasons, while 50 per cent indicated that members of the media should be treated like any other applicant.

Photocopy Fees

Following numerous complaints about fees for photocopying records, the Information Commissioner initiated a complaint in June 1984 to determine whether the photocopy fee of 25 cents per page, set out in the *Access to Information Regulations*, was reasonable.

Our investigation revealed that Department of Supply and Services

data show the actual cost of maintaining photocopiers and related supplies in government offices at between one cent and two cents per page. Public libraries in Ottawa charged 15 cents per page for coin-operated photocopiers, and commercial establishments charged between seven and 15 cents per page.

After discussions with Treasury Board officials, the Commissioner was prepared to agree to 15 cents per page, but the President of Treasury Board announced that the new fee would be 20 cents per page. He recognized that 25 cents was "on the high side of the scale," but also took into account the fact that fees above the $5 application fee were waived in most cases. (There is no charge for the first five hours of search time and most government institutions do not bill users unless additional costs exceed $25.) Further consideration of the fees was left to the Parliamentary Committee to review the provisions and operation of the *Access to Information Act*.

Fee Waiver Policy at Agriculture Canada

In the course of an investigation of a complaint about fees, the Information Commissioner learned that the Department of Agriculture had modified its policy on fee waivers, effectively precluding the waiver of fees assessed at more than $25.

In March 1985 the Commissioner initiated an investigation of the policy, which appeared to unreasonably fetter the Minister's discretion to waive fees in special cases. The Minister amended the policy, restoring an element of discretion, and delegated fee waiver authority to the departmental access coordinator.

One aspect of the policy, which depended upon the development of "general public benefit" guidelines, remained unclear. It became apparent that a broader examination of the issue was required. This investigation was discontinued in favour of a new investigation into government-wide fee waiver policy, as described subsequently.

Diverse Government Fee Waiver Policies

Following sporadic complaints about government institutions refusing to waive fees under the Act, the Information Commissioner in October 1985 undertook to investigate the fee waiver policies of 23 government institutions. (This accounted for all institutions that had received more than a few access requests.)

While some had developed extensive criteria for fee waivers, most institutions considered waiver on a case-by-case basis, with reference to the Treasury Board guidelines which included waiver where there was a "general public benefit." Almost all institutions waived the fees (beyond the $5 application fee) where the amount assessed under the Regulations was less that $25. The Treasury Board

Secretariat appeared to be the most inflexible, normally not waiving fees.

The results of the investigation were presented to the Parliamentary Committee which reviewed the *Access to Information Act* in 1986. The Committee subsequently recommended that a consistent standard be applied by all government institutions.

Ministers' Use of Government Aircraft

The Department of Transport refused to disclose the reasons for trips and other details of Cabinet Ministers' use of government executive aircraft, arguing that these records were not under the control of a government institution and consequently were not subject to the *Access to Information Act*. (Requests and approvals for use of the aircraft were handled exclusively within the office of the Minister of Transport.) However, the Commissioner believed that these records ought to be subject to the Act since the travel undertaken by ministers was for general government purposes or business related to government programs.

During our investigation the responsibility for VIP flight services was transferred to the Department of National Defence. After hearing representations on the matter the Minister of National Defence ruled that in future all records of requests for the use of executive aircraft by ministers, including records authorizing the use of such aircraft, would be subject to the *Access to Information Act*.

Health and Welfare Delays

Because of a high number of well-founded delay complaints against the Department of National Health and Welfare, we initiated an examination covering the period from July 1983 to November 1986.

The investigation revealed difficulties common to many government institution. This led to a more extensive investigation of the root causes of delays in processing *Access to Information Act* requests.

Increasing Problem of Delays Government-Wide

Stemming from the self-initiated complaint involving Health and Welfare, in July 1988 the Information Commissioner initiated a general investigation to determine how extensive the delay problem was throughout the government. Analysis of our complaint data indicated that during the first five years of the *Access to Information Act* the number of delay complaints against government institutions had increased out of proportion to the number of access requests processed. The problem appeared to be getting worse in the 1988-89 fiscal year.

In September 1988 the Commissioner assigned an investigator to conduct an in-depth study of the extent and causes of the problem and to seek possible solutions. The results of the investigation are described in the Information Commissioner's introduction to this report.

Enquiries

During this reporting year our office handled 1,204 inquiries about the *Access to Information Act* and related issues and 389 requests for publications. In addition, the receptionist diverts about a dozen calls each day to appropriate federal or provincial information agencies.

Although the number of inquiries has decreased slightly the pattern has not changed significantly from past years. A quarter of the enquiries originated from the Ottawa region. The origins of the remainder were commensurate with the population distribution of Canada.

Most enquiries were by telephone. Approximately 85 percent were in English, 15% in French.

In 75% of the cases we were able to answer questions without any delay, while 20% were referred elsewhere. We were unable to assist 5% of our callers on matters unrelated to access to information.

Often a problem in using the *Access to Information Act* can be cleared up by a telephone call, and we invite people to telephone us and speak to one of our investigators if in doubt whether to lodge a complaint under the Act. Our Canada-wide toll-free telephone number is 1-800-267-0441, but we will also accept collect calls to our Ottawa number (613) 995-2410. In addition, we now receive and despatch corrrespondence by facsimile transmission. Our FAX number is (613) 995-1501.

Public Appearances

As the public becomes increasingly interested in freedom of information issues, the Information Commissioner, the Assistant Commissioners and staff respond to many invitations to explain the functions of the office to audiences in Canada and abroad.

In the past year, this included the Commissioner's regular presentations on the *Access to Information Act* to senior federal public servants at the Centre for Executive Development at Touraine, Quebec, and to the participants of the Career Advancement Program.

The Commissioner addressed students and faculty members at Loyalist College in Belleville, Ontario, Carleton University in Ottawa, and the University of New Brunswick in Fredericton. She was also invited to speak to the Computer Society in Stockholm, the University of Amsterdam and the Tillburg University in the Netherlands.

While in Europe for personal reasons, the Commissioner spoke on Canada's access laws to the Danish Centre for Human Rights at the University of Copenhagen. She also explained Canada's right to access and investigative procedures to staff at the Office of the Ombudsman and the Head of the Judicial Section of the Council of State in the Hague. The Commissioner addressed members of Canada's Press Councils in Winnipeg and was a panel member at the Centre for Investigative Journalism seminar in Montreal.

She made presentations at the FOI and Privacy Conference hosted by the Government of Ontario in Toronto, and at the International Computers and Communications Conference in Washington, the Gordon Group in Toronto and at an Ontario Bar Association meeting. She was a luncheon speaker at the Ontario Association of Community Correctional Residences conference in Ottawa.

In June the Commissioner, together with the Privacy Commissioner, appeared on the television program "Question Period" to speak on freedom of information legislation and, in September, they were interviewed in Toronto by Dian Cohen for "Open College." The Information Commissioner was interviewed during a program prepared by Professor Kealey of Memorial University for CBC's "Ideas". A number of Canadian radio stations also conducted interviews.

Assistant Commissioner Bill McGibbon chaired a panel at the Canadian Ombudsmen Workshop in Fredericton in July.

Assistant Commissioner Bruce Mann addressed senior managers at Touraine, Quebec, members of the Canadian Historical Society in Windsor, Ontario, and students of Queen's University's School of Public Administration. Mr. Mann also chaired a session of the International Ombudsmen's Conference in Canberra in October 1988.

Paul Tetro, General Counsel for the Office of the Information Commissioner, spoke to the Canadian Bar Association on the "Strengths and Pitfalls of the Freedom of Information Act." In October he made a presentation on "Access - Is Attitude the Problem" to Sixth Administrative Law Seminar on access to government information. He also spoke on The Role of the Information Commissioner at a seminar organized by the Department of Justice on Access to Information and Privacy.

Kevan Flood, Director of Investigations, gave a presentation on the *Access to Information Act* to participants of Health and Welfare Canada's Departmental Staff Relations Workshop in June. He was co-chairperson of a panel session at the Canadian Ombudsmen Workshop in Fredericton and spoke on the Act to students of Ryerson Polytechnical College in Toronto and to participants of a seminar organized by Reference Canada.

Jocelyn Beland, an investigator, made a presentation on the Act at a February seminar organized by the Centre for Research Action on Race Relations.

Federal Court Review

Subsection 2(1) of the *Access to Information Act* sets out the principle that "decisions on the disclosure of government information should be reviewed independently of government."

Under section 41 of the *Access to Information Act* an individual who has been refused access to a record may apply for judicial review of the government's decision. With the consent of that person, the Information Commissioner under section 42 may file the court application.

In cases where the government proposes to disclose records and notifies third parties who may be materially affected, the third parties may apply to the Federal Court under section 44 of the Act for an order prohibiting disclosure.

From July 1, 1983 to March 31, 1989, 1,935 complaint investigations were completed by the Information Commissioner, 42 judicial review applications were heard and decided by the Federal Court, and two cases were carried through the Federal Court of Appeal. Highlights of court cases are described. Judgments rendered during the period of this report (April 1, 1988 to March 31, 1989), or cases pending at the end of the period, in which the Information Commissioner was involved as a party, follow in detail.

Table 6
STATUS OF FEDERAL COURT APPLICATIONS UNDER ACCESS TO INFORMATION ACT

July 1, 1983 to March 31, 1989

STATUS	JUDGMENT RENDERED		NO JUDGMENT		
RESULT	DISCLOSURE	NO DISCLOSURE	CASE WITHDRAWN	CASE PENDING	TOTAL
SEC. 42 (INFO.COMM'R)	1	1	14	17	35
SEC. 41 (REQUESTOR)	4	5	6	13	28
SEC. 44 (THIRD PARTY)	22	7	51	53	133
TOTAL	27	15	71	83	196

HIGHLIGHTS

Severance Must Be Considered

The first *Access to Information Act* decision of the Federal Court of Appeal was a case brought by a requestor privately. Our office did not intervene. In fact, while we agreed that there was no apparent reason for CMHC to withhold portions of minutes of their executive committee meetings, we declined to take the case before the Federal Court because that Court had already ruled, in an earlier decision involving the Canadian Radio-Television and Telecommunications Commission, that the discretion to refuse disclosure, if exercised validly, could not be overturned by the Court. The complainant pursued the matter, and although the Trial Division followed the earlier CRTC decision, the Federal Court of Appeal ordered CMHC to reconsider the matter to see whether portions of the record could be released.

Referring to section 21 of the Act, which permits a government institution to refuse to disclose accounts of consultations and deliberations of government employees, the Appeal Court observed

> "the broad exemption claimed in this case by the respondent does violence to the purposes of the Act as expressed in section 2 of the Act,"

and found that at least some portions of the records did not properly fall within the grounds of the exemption. Because the decision to withhold all the records, which numbered in the thousands of pages, had been reached within 24 hours of receipt of the access request, the Court concluded that CMHC had failed in its obligation to consider whether portions of the records could be severed and released.

This case is important because it means that a government institution cannot simply withhold records which appear to be of a class involving a discretion to refuse disclosure. Severance must be considered seriously.

Limits on Obligation to Sever

Just how far the obligation to sever and disclose must be taken is not clear. In a case involving a report on food services in a Canadian Penitentiary, the Trial Division of the Federal Court said that it is not necessary for a government institution to perform a surgical process and release all portions of a record not subject to exemption where the result might be meaningless or misleading. We have appealed that decision, believing that the requestor is the best judge of what is meaningful. The government institution can always supplement possibly misleading information to make it clearer.

Expectation of Harm to Third Party

Shortly after the CMHC decision the Federal Court of Appeal released its judgments in a group of appeals collectively referred to as the

"meat packing" cases, marking the end of lengthy litigation in which several meat producers, afraid that disclosure of federal government inspectors' reports of plant conditions would affect domestic and foreign sales, opposed the information requestors, the Department of Agriculture, and the Information Commissioner. The importance of these cases is the delineation of the injury which must be likely to occur to third parties to warrant the withholding of information from the public.

Paragraphs 20(c) and (d), the relevant exemptive provisions of the Act, state that records must be withheld where disclosure

> "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 . . . could reasonably be expected to interfere with contractual or other negotiations of a third party."

The meat producers filed expert evidence about the possible outcome should the reports be turned over to the public. The Court of Appeal said that the words of the Act require a "reasonable expectation of probable harm" for the exemptions to be invoked, but the expert testimony that the reports would lead to unfair press coverage, which in turn would affect sales, was "the sheerest speculation." Such reports had been disclosed in the United States and the experts were unable to show material injury to producers as a result.

The public interest test of subsection 20(6), which would disallow the exemptions in cases where the public health interest outweighed any harm from disclosure, did not have to be considered because no harm had been established. The Appeal Court noted, however, that if the public interest test came into play, it would be appropriate for the head of the government institution, not the Court, to make such a determination in the first instance.

Injury to International Affairs

Meat producers' inspection reports where a different exemption was claimed are the subject of two cases pending before the Court. Because the meat packers in those cases are located in foreign countries, Agriculture Canada, acting on advice from External Affairs, decided that disclosure would be injurious to Canada's conduct of international affairs with those countries.

Our concern is that the department has not established that the information is the type described in the exemptive provision, subsection 15(1) of the Act. In any event, we question whether the alleged injury is so great as to warrant withholding the reports. Why should foreign producers of meat destined for consumption by Canadians be treated any differently than domestic producers?

Access to Information Act Paramount

The paramount status which Parliament intended for the *Access to Information Act* was upheld in a case where the Immigration Appeal Board refused to disclose records of a hearing conducted under a board order that the hearing be held *in camera* and the record sealed. In ordering that the record be reviewed for possible disclosure under the Act, the Court noted that the Act was very clear in its application to Immigration Appeal Board records, and took precedence.

Reason for Time Extension

Although judicial review proceedings normally are confined to cases where the government refuses to disclose a requested record, a case is still pending before the Trial Division of the Federal Court where External Affairs failed to meet the time limits of the Act and then, just before a scheduled hearing of their "deemed refusal" to disclose, released the requested records to the complainant.

Over the objection of government counsel that there is no jurisdiction to carry out judicial review of the validity of a time extension once records have been released, the Court ruled that in order to decide whether there has been a deemed refusal to disclose, it is necessary to examine the circumstances of the time extension to determine whether it is authorized under the Act. In addition, it still might be useful for the applicant to obtain a declaratory judgment which would give practical guidance to the parties respecting future relations or situations which might subsequently arise. The Court ordered that the case proceed with a hearing on the validity of the time extension.

Specific Ground for Refusal

Requestors' rights are at issue in a pending case where we contend that a government institution is required to tell a requestor not only the nature of the injury that would be occasioned by disclosure, but the portion or portions of the exemptive provision which describe the records in question. While the government maintains that a descriptive list of classes of records included in the exemption merely illustrates the possible use of the exemption, and not its scope, our position is that records must at least be of the same general nature as those in the descriptive list, and the requestor should be told the relevant paragraph or paragraphs of the exemption unless there are valid reasons that even the nature or the existence of the relevant document cannot be disclosed.

Public Servants' Names Disclosed

In a case about the names of public servants involved in a decision to ban the importation of alleged hate literature on video tape, Revenue Canada (Customs and Excise) reversed its stand and decided to disclose the documents about the decision, including the names of government employees involved.

CASES IN DETAIL

The following Federal Court cases involved the Information Commissioner as a party.

Bindman v. Immigration Appeal Board (Federal Court No.T-931-87) Filed April 30, 1987

Information Commissioner v. Immigration Appeal Board (Federal Court Nos. T-1051-87, T-1169-87, and T-1355-87) Filed May 21, 1987, June 5, 1987, and June 26, 1987, respectively

Facts

These cases, included in the 1987-88 Annual Report (page 88), concerned a refusal by the Immigration Appeal Board to release records enabling the requestors to know why a named individual had been granted convention refugee status. The board had made an order under the *Immigration Act* that the proceedings be conducted *in camera* and the record sealed.

Issues

Two preliminary questions were formulated by Mr. Justice Rouleau:

1. Does the *Access to Information Act* apply to the Immigration Appeal Board records which are the subject of these four proceedings?

2. In the alternative, are the Immigration Appeal Board records properly subject to examination under the *Access to Information Act*?

Arguments

The preliminary questions were argued before Mr. Justice Pinard on March 30, 1988.

The Immigration Appeal Board contended that the order of the board that the proceedings be held *in camera* and the record sealed was paramount and prevented access under the Act.

The applicants position was that Parliament intended that restriction of access by provisions in statutes other than the *Access to Information Act* could only be effected by the use of section 24, and that section contained no reference to the *Immigration Act*.

Finding

The Court held that the plain words of the *Access to Information Act*, which was a well structured Act with clear sections and correlated Schedules, showed that it was intended to prevail over other acts, unless there was a clear exception stipulated in the Act itself. Accordingly the preliminary questions were answered in the affirmative, with the qualification that the second question should be answered "The Immigration Appeal Board records which are the subject of these four proceedings are properly subject to an examination under the *Access to Information Act*." This did not mean that the records would be disclosed, just that they were subject to the Act

and must be reviewed with disclosure in mind.

The person who had been granted refugee status applied for an order extending the time within which an appeal of this decision could be filed. Mr. Justice Pinard, on October 7, 1988, dismissed the application.

Information Commissioner v. Secretary of State for External Affairs (Federal Court No. T-2661-87) Filed December 23, 1987

Facts

This case was included in the 1987-88 report (page 89). It involved the department's refusal to release two telex messages about matters concerning Atomic Energy of Canada Limited.

Disposition

The records were released to the requestor before the action could be heard. The application for review was withdrawn with the consent of the requestor.

Information Commissioner 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

Facts

These cases, included in the 1986-87 Annual Report (page 97) and in the 1987-88 Annual Report (page 95), concerned an application to the Court for review of a delay, alleging an improper extension of the statutory time limits. The records were released before the date of the hearing, and the government moved to dismiss the application for that reason. We filed a motion for trial of an issue.

Disposition

As reported in the 1987-88 Annual Report, both motions were dismissed from the bench by Mr. Justice Jerome on March 9, 1988. Written reasons were issued on April 15, 1988. The Court found that it was required, in order to determine its jurisdiction under section 42 of the Act, to decide whether there had been a refusal to disclose records. That being so, the Court must be able to review an extension of time and the reasons given for the extension to ascertain whether there had been a deemed refusal.

The release of the documents before the hearing did not cause the Court to lose jurisdiction. The Court's powers are not limited to granting an order to disclose. Because of subsection 10(3) and sections 42 and 49 of the Act, cases of delayed access may also, in some circumstances, be reviewed by the Court.

The parties to the action had a real interest in obtaining guidelines to assist in the future, hence a declaratory order could be useful.

The case is still pending, since the Court disposed of the preliminary

applications only, and directed that the review under section 42 proceed. We have asked the Court to determine whether a department is required to establish the ground for claiming a time extension pursuant to section 9 of the Act.

Information Commissioner v. Solicitor General (Federal Court No. T-2783-86) Filed December 23, 1986 (Appeal No. A-679-88)

Facts

This case concerned a report on the food services of a penitentiary. The issue was whether parts of the report related to the position or function of employees of a government institution and were therefore not "personal information." An oral decision was rendered from the bench on March 9, 1988, with written reasons to follow. The case is dealt with in the 1986-87 Annual Report (page 98) and in the 1987-88 Annual Report (page 95).

Findings

Written reasons were delivered by Mr. Justice Jerome on May 4, 1988.

The Court held that neither the *Access to Information Act* nor the *Privacy Act* was pre-eminent. The purpose of incorporating a section of the *Privacy Act* in subsection 19(1) of the *Access to Information Act* was to ensure that the principles of both statutes would come into play in a decision as to whether to release personal information. The definition of personal information is deliberately broad, consistent with safeguarding individual identity.

The examples of releasable employment information contained in paragraph 3(j) of the *Privacy Act* are, with one exception, matters of objective fact. There is no indication that qualitative evaluations of an employee's performance were intended to be made public. Accordingly, opinions in the record concerning individuals and their training, personality, experience or competence were not releasable.

The Court considered severance under section 25 of the Act, but held that while some of the deletions from the record were perhaps broader than required by the statute, they were in accordance with the principles of the Act and there would be no order that they should be disclosed. The Act did not require a surgical process by which disconnected phrases, not themselves exempt, were to be picked out of the exempt material and released. To do so might make the resulting document meaningless or misleading. Also material so released might provide clues to the content of the deleted portions. Parliament seemed to have intended that severance of exempt and non-exempt portions be attempted only when the result is a reasonable fulfillment of the purposes of the statutes.

The application was dismissed with costs. With the consent of the requestor the Information Commissioner has appealed the decision.

Ken Rubin v. President of Canada Mortgage and Housing Corporation (Federal Court No. A-108-87)

Facts

This case was dealt with in the Annual Report of 1986-87 (page 40). The applicant sought disclosure of the minutes of the board and executive meetings from 1970 to 1985. These minutes consisted of over 4 metres of records. The day after the access request was received CMHC refused to disclose any of the minutes on the ground that they were exempt under paragraph 21(1)(b) of the Act as accounts of consultations or deliberations involving officials or employees of a government institution.

The Commissioner attempted to have the CMHC President release some portions of the minutes in accordance with section 25 of the Act. When the suggestion was rejected, the Commissioner reluctantly concluded that an application for judicial review, at public expense, was not appropriate, because of a decision in a similar case (*Information Commissioner v. CRTC* See 1985-86 Annual Report, page 174). In that case the Trial Division of the Federal Court had held that where it was established that a record was subject to a discretionary exemption under the Act the Court could not interfere with the decision of the head of the government institution to refuse disclosure.

The complainant brought an application for judicial review. His application was dismissed in the Trial Division, where the Court followed the *CRTC* case, considering the factual situation to be clearly parallel. The complainant appealed to the Federal Court of Appeal.

Arguments

For the respondent it was argued that the evidence was overwhelming that the minutes of the meeting would be an account of consultations or deliberations involving officials or employees of a government institution. Also, it was urged that there was no evidence to show it would be reasonable in the circumstances to sever any of the information.

The appellant argued that not all of the documents involved consultations or deliberations. The Court had been provided with sample agenda of the meetings, and agreed that some items did not come within the exemption claimed. Further, the institution could not have examined the records with a view to releasing those that were not exempt. It would be impossible to review the thousands of pages of records in the 24 hours that elapsed between receipt of the access request and the refusal to disclose.

Findings

The unanimous decision of the Federal Court of Appeal, consisting of Justices Heald, Urie and Stone, was delivered by Mr. Justice Heald on July 6, 1988.

The Court did not consider that the facts were parallel to those in the *CRTC* case and noted that in that case what was sought was disclosure of one specific part of minutes relating to a decision concerning an application by the requestor. The Court observed that in the *CRTC* case there had been no suggestion that section 25 of the Act applied, but in the present case where a broad range of documents was sought, section 25 clearly applied.

Section 25 is a paramount section since it begins with the words "notwithstanding any other provision of this Act." Once the institutional head has determined that some records are exempt the head must consider whether any part of the material can reasonably be severed. From the record, it was apparent that no such examination was made, and counsel made no suggestion that it had been.

The Court held that the broad exemption claimed did violence to the purpose of the Act, as expressed in section 2. In particular, it did not conform to the concept that exceptions to the right of access should be limited and specific. The failure to perform the severance examination was fatal to the validity of the decision.

The Court has power under section 49 to determine whether the head of the institution was authorized to refuse disclosure. The head's discretion must be exercised in accordance with recognized legal principles and in accord with the statute conferring the discretion. When exercising the discretion given by subsection 21(1) of the Act the institutional head must have regard to the policy and object of the Act. Parliament intended the exemptions to be interpreted strictly.

An examination of the agenda filed with the Court showed many items which did not in any way come within either 21(1)(a) or (b). What was crucial was the failure by the institution to examine the material requested in order to see what did and what did not come within the exemption claimed.

Section 46 showed that Parliament intended the Court to have the information and material necessary to fulfill its mandate to ensure that the discretion given to the administrative head has been exercised within proper limits and on proper principles. Deference to the exercise of that discretion must be confined to the proper limits of the power of decision, and the determination of those limits is a task for the Court.

The matter was referred back to CMHC for re-examination and re-determination of the application of the exemption under paragraph 21(1)(b) and section 25.

Information Commissioner v. The Minister of National Defence (Federal Court No. T-746-88) Filed April 27, 1988

Facts

The requestor sought records from the Department of National Defence concerning agreements on defence and related matters between Canada and the United States. The department released a number of records but refused to disclose six agreements, claiming they were exempt under paragraph 13(1)(a) and subsection 15(1) of the Act.

The requestor complained of the exemptions invoked and in particular about the department's failure to specify which paragraph or paragraphs of subsection 15(1) were relied on.

On reviewing the records we were satisfied that the exemptions claimed were fully supportable, but believed that the department was required to specify which paragraph of subsection 15(1) was relied on if doing so would not itself cause the injury contemplated by the subsection.

We recommended to the department that the requestor be informed of the paragraph in point, but the department refused, stating that their interpretation of the Act did not require that they specify a particular paragraph.

With the consent of the requestor, an application was made for judicial review.

Issue

Is a government institution which invokes subsection 15(1) as an exemption required to inform the requestor of the paragraph of the subsection on which it relies? The case is pending before the Court.

Information Commissioner v. The Minister of Agriculture (Federal Court No. T-1583-88) Filed August 18, 1988

Facts

The requestor asked for inspection reports on certain foreign meat-packing firms which exported meat products to Canada. The department, through the Department of External Affairs, consulted the countries in which the firms were located about whether the reports should be released. Many of the countries agreed, but three did not. As a result, the department then informed the requestor that subsection 15(1) of the Act required the exemption of the documents from those three countries. The requestor complained to us.

We recommended to the department that the reports be released, as we believed that disclosure could not reasonably be expected to be injurious to the conduct of international affairs. Also, it did not appear to us that the subject matter of the records fell within, or was similar in nature to, any of the descriptive paragraphs of subsection 15(1).

The department, which had been guided by External Affairs, obtained a further opinion of the need to exempt. This confirmed the earlier opinion and they continued to refuse disclosure. With the consent of the requestor we filed an application for judicial review.

Issues

1. Would the magnitude of injury to the conduct of international affairs that might be caused by release of the reports justify the exemption of the whole of the reports?

2. Is it necessary to the validity of an exemption under subsection 15(1) that the subject matter of the records be described in or be akin to one of the paragraphs of that subsection?

The case is pending before the Court.

Information Commissioner v. The Minister of Agriculture (Federal Court No. T-1885-88) Filed October 4, 1988

Facts

This case is almost identical to Federal Court action T-1583-88 (the previous case). The requestor asked the department for reports on conditions in European meat-packing plants. The department refused to release any part of the reports from two countries which did not agree to disclosure, because the Department of External Affairs had advised them that disclosure could reasonably be expected to be injurious to the conduct of international affairs. In addition, parts of the reports were said to be exempt under subsection 20(1) since they reflected production figures and similar information. The requestor complained to us.

We agreed that some parts of the reports might be exempt under subsection 20(1) but, as before, did not feel that subsection 15(1) could be used to completely exempt reports. We also pointed out the public interest in obtaining information about foreign plants which produce meat for consumption in Canada as a factor calling for departmental discretion in favour of disclosure.

The department did not accept these arguments. With the consent of the requestor we filed an application for judicial review. The case is pending before the Court.

Information Commissioner v. The Minister of National Revenue (Federal Court No. T-291-88) Filed February 22, 1988

This case, dealt with at page 94 of the 1987-88 Annual Report, involved the release of the names of public servants involved in the department's decision not to allow the importation of a video tape. The department had claimed an exemption for the individuals' names and job titles, on the ground that disclosure might threaten their safety.

The Minister reviewed the matter once more and decided to release the material that had previously been withheld. As a result, the action was discontinued with the consent of the requestor.

Canada Packers Inc. v. The Minister of Agriculture (Federal Court Nos. A-1345-87 and A-540-87)

Gainers Inc. v. The Minister of Agriculture (Federal Court No. A-1331-87)

Burns Meats Ltd. v. The Minister of Agriculture (Federal Court Nos. A-1330-87 and A-1332-87)

Toronto Abattoirs Limited v. The Minister of Agriculture (Federal Court No. A-1341-87)

Intercontinental Packers Limited v. The Minister of Agriculture (Federal Court No. A-1393-87)

Facts

Several years ago 10 Canadian meat packing companies filed court applications under section 44 of the *Access to Information Act* to block the release of their meat-packing inspection reports by Agriculture Canada. (Information Commissioner Annual Reports 1985-86, page 176;, 1986-87, page 98; and 1987-88, page 96). The Trial Division of the Federal Court ordered that the reports be released in all cases. Half of the companies appealed those decisions. The Information Commissioner, who had recommended disclosure from the outset, obtained leave to appear as a party intervenant in all the appeals.

Issues

Could disclosure reasonably be expected to result in material financial loss to or prejudice the competitive position of the companies? If so, did the public health interest in disclosure outweigh any such injury?

Arguments

The arguments on appeal were essentially the same as at trial. The companies said that their markets would be substantially damaged by disclosure; in favour of disclosure it was contended that no examples had been given to show this. Some reliance was placed on the argument that disclosure was in the public interest.

Findings

Paragraph 20(1)(b) of the Act did not come into play because the records contained observations and judgments by government inspectors and not information obtained by the government from the third parties.

Paragraph 20(1)(c) and (d) exemptions under the Act apply where disclosure could reasonably be expected to result in material financial loss or gain to a third party, prejudice the competitive position of a third party, or interfere with a third party's contractual or other negotiations. The Court determined that the application of these exemptions required a reasonable expectation of probable

harm. No such expectation was established by the evidence the companies filed. The evidence of injury was considered by the Court to be speculative.

Subsection 20(6) can override the paragraph 20(1)(b), (c) and (d) exemption of records where disclosure would be in the public interest as it relates to health, safety, or protection of the environment, but the Court did not consider it relevant because the government institution had at no time exempted the records under section 20.

The Court dismissed all the appeals.

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

These cases were summarized in the 1986-87 Annual Report (page 97). They concerned independent applications by two researchers for information concerning Count de Bernonville.

After prolonged negotiations between the department and our office a number of further records were disclosed to the requestors, who were then satisfied. The application for review was withdrawn.

Information Commissioner v. The Minister of National Revenue (Federal Court No. T-1758-88) Filed September 14, 1988

Facts

The requestor asked Revenue Canada to release records of the number of life insurance companies in Canada which had income taxes reassessed during two specified years, and the total value of reassessment notices sent to the companies. The access request said that the names of companies that received reassessment notices was not sought.

The department disclosed the total number of audits carried out in the years concerned but refused to give the number of reassessments or the total value of the reassessment notices.

Exemption was claimed on the basis of subsection 24(1) of the Act on the ground that section 241 of the *Income Tax Act* restricts disclosure of information obtained by the Minister of National Revenue for the purposes of the *Income Tax Act*.

The requestor complained to us. We argued that the requested information was compiled by the department from its records, and hence was not "obtained" within the meaning of section 241 of the *Income Tax Act*. We noted that the department had occasionally disclosed to the press the average income in recent years of various classes of taxpayers.

The department replied that they interpreted section 241 of the *Income Tax Act* as prohibiting the disclosure of aggregate data where their doing so might disclose confidential information concerning particular taxpayers. They had concluded that in this instance the disclosure of the requested records would entail such a risk.

The department refused to reverse its stand. With the consent of the requestor we filed an application for judicial review.

Issue

Does subsection 24(1) of the Act, in conjunction with section 241 of the *Income Tax Act*, prohibit disclosure of aggregate information compiled by the Department of National Revenue from records maintained by it?

The case is pending before the Court.

Information Commissioner v. The Minister of Employment and Immigration (Federal Court No. T-1402-88) Filed July 20, 1988

Facts

On November 5, 1987, the requestor sought records concerning screening procedures for persons wishing to enter Canada. On December 10, 1987, the department invoked a delay of 90 days because consultations with other departments were necessary. The extension expired on March 9, 1988.

On March 17 the requestor complained that no records had been released.

Our investigation found that the original consultations by the department had been completed on January 14, 1988. On April 15 we recommended by letter to the Minister the immediate release of the records, subject to any exemptions. The Minister's officials told us later that this letter was never received and on May 18 we delivered a copy of it to the departmental access to information coordinator. The coordinator informed us on June 1 that the requested records had been sent to the deputy minister for final approval before being released.

On June 30 we again wrote to the Minister, saying this time that we were prepared, if the requestor consented, to apply for judicial review of the failure to disclose. A few days later we received a letter from the Minister dated June 28 stating that consultations had been necessary with two more departments, that these had been completed on May 20, and that exemptions had been sent to the deputy minister for approval.

On July 20, after ascertaining that the records had still not been released, we filed an application for judicial review by the Federal Court. On July 29 the records were released to the requestor and the court application was withdrawn.

Information Commissioner v. The Solicitor General (Federal Court No. T-1359-88) Filed July 13, 1988

Facts

A request was made to the Canadian Security Intelligence Service on September 21, 1987, for records concerning the processing of government security clearances and related matters. The coordinator at CSIS notified the requestor on November 2, 1987, that an extension of up to 90 days was required for necessary consultations.

On February 2, 1988, the coordinator informed the requestor that consultations were taking longer than expected, and the extended time limit would not be met. On February 26 the coordinator again wrote the requestor saying the consultation process had not been completed. A complaint was made on March 3.

Our investigation showed that CSIS had consulted with six other government departments, all consultations being completed by February 11 except for consultations within the Department of the Solicitor General.

On March 29 we recommended that the Solicitor General give the records to the requestor forthwith, and that we be informed by April 18 of any action taken or proposed to implement the recommendation. The Solicitor General replied on April 20, saying that the processing of the records had been completed and that the material to be released had been sent to the requestor on April 18.

When we sought details of the release we discovered on May 4 that no release had been made. We wrote to the Solicitor General on May 13, noting that fact and asking for compliance with his previous undertaking and notification to us that this had been done. In a June 14 letter we were told that a partial release had been made on May 24 and that the rest of the documents would be processed as soon as necessary consultations had been completed. An inquiry to the requestor showed that on June 28 approximately 92 pages of the records were still being processed and had not been released.

On July 12 we found that the remaining parts of the records had still not been released, and on July 13, with the consent of the requestor, we filed an application for judicial review. On August 2 we were informed that the documents in question had been released, and the application was withdrawn.

Information Commissioner v. The Solicitor General (Federal Court No. T-1225-88) Filed June 28, 1988

Facts

On November 27, 1987, the requestor asked Correctional Services Canada

for records regarding contracts awarded since September 4, 1984, involving CACI Canada Ltd. The requestor was told on December 15 that an extension of time of up to 30 days was required for necessary consultations. On January 20, 1988, the access coordinator again told the requestor that the requested material could be expected within two to three weeks.

On April 12 the requestor complained to us that the records had still not been received. On May 16 we recommended to the Solicitor General that the records be released forthwith, subject to any exemptions. The Solicitor General's May 31 reply said that it was the department's intention to release the records, but there was no indication when that would be done.

On June 6 we wrote the Solicitor General that in our view his reply was inadequate. It was our understanding that the records had been ready for release as early as May 25 and should have been forwarded to the requestor at that time.

No records were released by June 28 and, with the consent of the requestor, we then filed an application for judicial review. The department released the records on June 30 and the court application was withdrawn.

Information Commissioner v. Minister of National Defence et al. (Federal Court No. T-333-89) Filed February 17, 1989

Facts

In 1985, in response to a request under the Act, the department supplied photocopies of photographs of some personnel who had been part of one of its units. In December 1987 the requestor sought further photographic copies of the photographs with references showing where and when they were taken, and the identities of the groups or individuals in them.

The department claimed an extension of time to consider the request and on April 7, 1988, informed the requestor that the records were personal information, and therefore exempt from disclosure. On April 13 the requestor complained to us.

After investigating we contended in a letter to the Minister that the records were not exempt. We argued that the records related to the position or functions of government employees. Even if that were not so, we considered that these were the kind of photographs that the persons in them would expect to see displayed in public. Therefore to furnish them to the requestor was a use consistent with the use for which the record was compiled.

The department disagreed, saying that the photographs did not provide information about the performing of government functions and that disclosing them would not be consistent with the purpose for which they were taken.

Further discussions with the department did not change either position. With the consent of the requestor we sought judicial review.

Issues

Do the photographs constitute personal information? Are the names of the government employees exempt? Can the department refuse to disclose where and when the photographs were taken?

The case is pending before the Court.

Information Commissioner v. Minister of External Affairs (Federal Court No. T-895-88) Filed May 17, 1988

Facts

This request was for the record which showed the largest single annual quota for import of foreign cheese in 1985. The company concerned, when contacted by the department, objected to the release of the information, alleging that release would damage its competitive position. The department accordingly claimed that the records were exempt under paragraphs 20(1)(b) and (c) of the Act. The requestor complained to us.

We did not consider that the exemptions claimed by the department were substantiated. We notified the company that this was our tentative conclusion, but that we would give them an opportunity to make representations. They did so at length, including a further argument that disclosure of quota allocations could adversely affect contractual negotiations.

We continued the investigation, obtaining further information from External Affairs that helped assess the company's contentions and the departmental position. The additional information did not convince us that the exemptions claimed were valid, nor were we able to persuade the department to modify its position. Accordingly, with the consent of the requestor, we filed an application for judicial review.

The case is pending before the Court.

The Information Commissioner v. The Minister of National Health and Welfare (Federal Court No. T-1987-88) Filed October 20, 1988

Facts

An individual had sought certain records from the Department of National Health and Welfare, including some relating to the Canadian Football League.
A few records were released but the department withheld the balance pending the outcome of section 44

applications brought to the Federal Court by the CFL in relation to another access request.

We believed that the complainant was entitled to have his request dealt with separately and that third party notification was necessary, even though the department knew there would probably be an objection by the CFL in this instance as well. Also, we considered it improper to deny release of some records based on a court action which which did not involve those particular records.

Because the department refused to continue to process the access request before it, we obtained the requestor's consent to file an application for judicial review. Additional records were then identified and some were released, but the balance were withheld pending the completion of the judicial review under section 44.

The case is pending before the Federal Court.

Vienneau v. The Solicitor General of Canada (Federal Court No.A-346-88)

Kealey v. The Solicitor General of Canada (Federal Court No.A-347-88)

These two cases, described in detail in our 1987-88 annual report, have been taken to the Federal Court of Appeal by the Information Commissioner, with the consent of the complainants.

Corporate Management

Corporate Management provides both the Information and Privacy Commissioners with financial, personnel, administrative, data processing and library services.

Finance

The offices' total resources approved by Parliament for the 1988-89 fiscal year of $5,074,000 and 69 person-years, an increase of $1,152,000 and 11 person-years over 1987-88. Personnel costs of $3,837,201 and professional and special services expenditures of $702,567 accounted for more than 88% of expenditures. The remaining $603,137 covered all other expenses.

Personnel

A substantial increase in person-years for the Privacy Commissioner produced a very active personnel program. New positions were classified and there were 42 staffing actions including two senior management appointments. In addition, the offices underwent a biennial classification audit by Treasury Board and the program management (PM) and information services (IS) positions were reviewed in line with the new classification standards.

EXPENDITURES

April 1, 1988 to March 31, 1989

	Information	Privacy	Corporate Management	Total
Salaries	$1,268,673	$1,469,048	$568,480	$3,306,201
Employee Benefit Plan Contributions	202,500	246,600	81,900	531,000
Transportation and Communication	29,363	66,204	118,094	213,661
Information	57,681	38,815	1,526	98,022
Professional and Special Services	506,936	144,959	50,672	702,567
Rentals	2,898	64	15,294	18,256
Purchased Repair and Maintenance	1,337	5,112	21,940	28,389
Utilities, Materials and Supplies	9,957	14,738	37,264	61,959
Acquisition of Machinery and Equipment	43,232	85,986	48,464	177,682
Other Payments	1,630	1,569	1,969	5,168
TOTAL	$2,124,207	$2,073,095	$945,603	$5,142,905

Administration

The offices were relocated to the 3rd and 4th floors of Tower B, Place de Ville. Improved security measures were implemented for the new premises and a security manual was prepared. In addition, a records management audit was completed by National Archives.

Informatics

A review of informatics was undertaken with the assistance of outside consultants. The major recommendations of the study will be undertaken with regards to the renewal of the case management system and the expansion of report and text production facilities.

Library

The library continues to provide an information and referral service for both Commissioners. It offers a full range of library services, including interlibrary loan, automated reference, and literature searches.

Last year, approximately 500 publications about access to information, the protection of privacy and the ombudsman function were added to the library's inventory. The public is welcome to consult our collection, which also includes newspaper clipping files, periodicals, and annual reports.