

# **The *Access to Information Act*: A Canadian Experience**

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Preparing to Operationalise the New India  
Right to Information Law

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# 1. Summary of the Key Features of the Federal Access to Information Act (Canada)

## a. A Brief Historical Review of its Adoption

The *Access to Information Act*<sup>1</sup> was adopted by Parliament in June 1982 after a long debate and the tabling of multiple bills. It was proclaimed in force on July 1st, 1983.<sup>2</sup> At the same time, Parliament also adopted the *Privacy Act*,<sup>3</sup> which provides for the protection of personal information under the control of government institutions.

### i. The Review Mechanism

In the 1977 Green Paper and 1979 Discussion Paper, on the issue of what kind of complaint review mechanism might be adopted, seven (7) options were listed: 1) Parliamentary option; 2) An Information Auditor; 3) An Information Commissioner with Advisory Powers; 4) An Information Commissioner with Powers to Order Release; 5) Judicial Review; 6) Internal review; and, a combination of all of the above.<sup>4</sup> At the end, Parliament opted for a two-tier process for reviewing departmental decisions on access. According to this scheme, at first level, an Information Commissioner is empowered to receive and investigate any type of complaint relating to obtaining government records under the legislation. Most complaints arise from denials of access, but complaints about excessive fees or unreasonable time extensions are also common. Notwithstanding the intervention of the Information Commissioner, if the applicant is still denied the records, the Act permits the Commissioner or applicant to ask a judge of the Federal Court of Canada to review the matter.<sup>5</sup>

When the *Access to Information Act* was introduced in Parliament in 1980, its goals were stated as:

- A more informed dialogue between political leaders and citizens,
- Improve decision making, and
- Greater accountability by the federal government and its institutions.

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<sup>1</sup> R.S.C. 1985, c. A-1 [ATIA].

<sup>2</sup> For a detailed review of the creation of the *Access to Information Act*, the reader is referred to the following documents : 1) M.W. Drapeau & M.-A. Racicot, *Federal Access to Information and Protection of Privacy Legislation Annotated*, looseleaf (Toronto: Carswell Canada, 2005) vol. 2 at 14-1 to 14-65. Canada, Information Commissioner of Canada, *The Access to Information Act: 10 Years On*, (Ottawa: Public Works and Government Services Canada, 1994) at 5-11, online: Office of the Information Commissioner of Canada <[http://www.infocom.gc.ca/publications/pdf\\_en/Ten\\_y.pdf](http://www.infocom.gc.ca/publications/pdf_en/Ten_y.pdf)> [Information Commissioner of Canada, *Ten Years On*]; and, 3) Canada, *Access to Information: Making it Work for Canadians: Report of the Access to Information Review Task Force*, (Ottawa: Public Works and Government Services Canada, 2002) at 13, online: Access to Information Review Task Force <<http://www.atirtf-geai.gc.ca/accessReport-e.pdf>> [Report of the *ATIA Review Task Force*].

<sup>3</sup> R.S.C. 1985, c. P-21.

<sup>4</sup> M.W. Drapeau & M.-A. Racicot, *supra* note 2 at 13-17 to 13-19 and 13-74 to 13-78.

<sup>5</sup> *Ibid.* at 13-106 to 13-107.

## ii. The Implementation Process

Implementation was an early concern for the drafters of the Act. The 1979 Discussion Paper on Access to Information raised the issue of whether the Act would apply to documents prepared before the legislation came into effect or not.<sup>6</sup> Additional concerns were voiced in the Discussion Paper of 1980:

“Administration of the Access to Information legislation will require considerable work to develop the necessary procedures and organization, and more generally to bring government institutions to the appropriate state of readiness when the time comes. Guidelines for the use of officials throughout the government will have to be prepared and approved. Consideration will have to be given to an appropriate fee schedule. The Index describing the functions of each government institution and the information it holds will have to be finalized and distributed throughout the country so that applicants can use it as soon as the legislation comes into force.

At the departmental level, each institution will attempt to adapt its records management operations to the legislation and try to separate what can be made readily available from the information that might be exemptible. Reading rooms in major cities will likely have to be made available. Management will have to give thought to obtaining the equipment and personnel, both clerical and specialized, which will be required.

As well, if the review mechanism involves an Information Commissioner, a special program will have to be established beforehand for the organization and staffing of his or her Office.

Although much of the preparatory work is already under way, some of it can be undertaken only when the definite contents of the legislation have been decided upon by Parliament.

There are several ways of ensuring that the administrative machinery is ready. One is to have the legislation take effect only upon the date set by proclamation. Another is to require proclamation institution by institution.

Finally, implementation would be greatly facilitated if the legislation did not apply retroactively to documents that are in existence prior to its coming into force.”<sup>7</sup>

The overriding concern was that the government would be overwhelmed by a deluge of Access request upon implementation of the Act. To prevent this, the Act included this transitional provision upon enactment in 1982, which was later repealed:

s. 27(1) Transitional provision – The head of a government institution may refuse to disclose any record requested under this Act

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<sup>6</sup> Canada, Privy Council, *Freedom of Information Legislation – A Discussion Paper (1979)*, (Ottawa: Public Works and Government Services, 1979) reprinted in M.W. Drapeau & M.-A. Racicot, *supra* note 2 at 13-79 to 13-80.

<sup>7</sup> Canada, The Honourable Francis Fox, Secretary of State and Minister of Communications, *Access to Information Legislation – Cabinet Discussion Paper (c. 1980)*, (Ottawa: Department of Canadian Heritage, 1980) reprinted in M.W. Drapeau & M.-A. Racicot, *supra* note 2 at 13-110 to 13-111.

- (a) During the first year after the coming into force of this Act, in the case of a record that was in existence more than three years before the coming into force of this Act;
  - (b) During the second year after the coming into force of this Act, in the case of a record that was in existence more than five years before the coming into force of this Act; and
  - (c) During the third year after the coming into force of this Act, in the case of a record that was in existence more than five years before the coming into force of this Act where, in the opinion of the head of the institution, to comply with a request for the record would unreasonably interfere with the operations of the government institution.
- (2) Limitation – Subsection (1) does not apply in respect of any record that is available to the public at the Public Archives at the time this Act comes into force.

The purpose of the *Access to Information Act* is to 1) 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; 2) that necessary exceptions to the right of access should be limited and specific; and that decisions on the disclosure of government information be reviewed independently of government. When the Act was adopted it was to complement and not replace existing procedures for access and was not intended to limit in any way access to the type of information already available to the public.<sup>8</sup>

However, despite the early fears of a flood of access requests, the threat never materialized. In 1985, two years after the Act came into force, J. Thomas Babcock wrote:

“Federal agencies and departments received only 475 requests<sup>9</sup> for information during the firsts three months the Access to Information law was in effect – far below the 15,000 in governmental plans. Why was this the case? There may be several reasons ascribed. When the law was announced as enforceable in mid-1983, there was little in the way of enthusiastic fanfare. The media were preoccupied with the fact that it would cost \$5.00 per access request plus search fees for extra-long research requirements and photocopying charges. The government amazingly spent little promoting the law and its existence to the general public. Not only was the publicity lacking, but the quality of the Access Register [Info Source] was such that its file descriptions were vague, broad and not able to be correlated easily with actual department files. The Vancouver Sun summed up its frustration with the problems encountered by saying that “several key federal bodies gave bottom drawer priority to the access law, intended to unlock government secrets for ordinary Canadians, and many agencies were confused about their responsibilities under the legislation”.<sup>10</sup>

<sup>8</sup> ATIA, *supra* note 1 at s. 2.

<sup>9</sup> Of these, 289 were processed completely; one quarter of the processed requests were completely rejected (10 % exempted, 3% excluded, 10% did not exist); a further 20% could not be handled because they were either misdirected, abandoned due to fees or insufficiently detailed. Of the remainder, 18% were partially disclosed, with 38% again being fully disclosed. (Babcock, *infra* note 11 p. 111)

<sup>10</sup> J. Thomas Babcock, “Is the Access Act Working?” in Donald C. Rowat, ed., *The Making of the Federal Access Act: A Case Study of Policy-Making in Canada* (Ottawa: Carleton University, 1985) at 108.

“Regarding appeals [reviews], which take longer to launch in the system, at the end of 1984 there had been about 275 complaints to the Information Commissioner, which is believed to be approximately 10 per cent of all requests for records since July 1, 1983.”<sup>11</sup>

Later in 1994, the Information Commissioner wrote:

“The federal government’s 1977 Green Paper projected an estimated 70,000 formal requests each year for government records under any freedom of information law. The projections were highly inflated. In the ten-year experience, 70,385 requests have been filed. Sheer volume is not the sole test, however, of the Act’s usefulness. Simply by existing, the legislation is the cause of uncounted informal releases of information.”<sup>12</sup>

### **iii. Access to Information in Canada in Numbers**

Between 1983 and 2003<sup>13</sup>:

- 230,139 requests received
- 224,295 requests processed
- Request where communication was complete : 34%
- Request where communication was partial: 36%
- 59% of the requests were processed within the 30-day period
- 17% between 31 and 60 days
- 23% more than 61 days
- Operational costs: \$212, 580,762.00
- Average cost per request \$948.00.

## **b. A Right of Access to Records Under the Control of Government Institutions**

The *Access to Information Act* specifically provides any person or organization present in Canada, a right of access to records under the control of government institutions.<sup>14</sup> Originally, the right of access was originally for Canadian citizens or permanent residents but in 1989, this right was extended to any person or organization present in Canada.<sup>15</sup>

The Act defines “government institutions” as any department or ministry of state of the Government of Canada listed in Schedule 1 or any body or office listed in Schedule 1.<sup>16</sup> Hence, Parliament preferred to adopt the approach where an institution has to be identified and listed to be subject to the Act instead of adopting the principle where all government institutions are subject to the Act except those specifically identified. The

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<sup>11</sup> *Ibid.* at 112.

<sup>12</sup> Information Commissioner of Canada, *10 Years On*, *supra* note 2 at 14.

<sup>13</sup> Canada, Treasury Board Secretariat, *Info Source Bulletin No. 26*, (Ottawa: Public Works and Government Services Canada, 2003) at 25-26, online: <[http://www.infosource.gc.ca/bulletin/2003/bulletin\\_e.pdf](http://www.infosource.gc.ca/bulletin/2003/bulletin_e.pdf)>.

<sup>14</sup> ATIA, *supra* note 1, s. 4..

<sup>15</sup> *Access to Information Act Extension Order, No. 1*, S.O.R./89-207

<sup>16</sup> ATIA, *supra* note 2, s. 3.

Government can add to the list but it is only Parliament which can remove an institution listed.<sup>17</sup> The Act defines “records” to include any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable records, and any other documentary material regardless of physical form or characteristics, any copy thereof.<sup>18</sup> Software necessary to read the information does not fall within the definition of “record”.<sup>19</sup>

The term “under the control of” is not a defined term. The Federal Court of Appeal noted that the notion of control referred to in subsection 4(1) is left undefined and unlimited:

“Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or “*de jure*” and “*de facto*” control. It is the duty of the courts to give that provision a liberal and purposive construction without reading in limiting words not found in the Act. It is not the power of this Court to cut down the broad meaning of the word “control” as it was Parliament’s intention to give the citizen’s a meaningful right of access under the Act to government information. It is also very significant that subsection 4(1) contains a “notwithstanding clause” which gives the Act an overriding status with respect to any other Act of Parliament.”<sup>20</sup>

It is important to note that the purpose or motive of the requester is irrelevant. As the Supreme Court of Canada noted “the Access Act does not confer on the heads of government institutions the power to take into account the identity of the applicant or the purposes underlying a request.”<sup>21</sup>

Access does not necessarily means obtaining a copy of a document. For example, if a document is too lengthy, a person may be given an opportunity to examine the record.<sup>22</sup>

Under the ATIA, an access request must be made in writing and be accompanied by a \$5 fee.<sup>23</sup>

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<sup>17</sup> ATIA, *supra* note 1, s. 77(2)

<sup>18</sup> ATIA, *supra* note 2, s. 3.

<sup>19</sup> *Yeager v. Canada (Correctional Service)*, [2003] F.C. 107, 2003 FCA 30 (F.C.A.).

<sup>20</sup> *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (F.C.A.) at 120-122.

<sup>21</sup> *Canada (Information Commissioner) v. Canada (Royal Canadian Mounted Police Commissioner)*, [2003] 1 S.C.R. 66, 2003 SCC 8 (S.C.C.) at paras. 31-33.

<sup>22</sup> ATIA, *supra* note 1, s. 12; *Access to Information Regulations*, S.O.R./83-507, s. 8 [ATI Regulations].

<sup>23</sup> ATIA, *supra* note 1, ss. 5 and 11(1)(a); ATIA Regulations, *supra* note 22 at ss. 4 and 7. In some provincial jurisdictions, Quebec for example, an access request is free and can be made in writing or orally.



### **c. Limited and Specific Exemptions to the Right of Access**

The Act provides for certain limits to the right of access. Some categories of document are simply excluded from the application of the Act, such as confidences of the Queen's Privy Council (Cabinet confidences).<sup>24</sup> Once an exclusion is claimed, the independent review mechanism provided in the Act is not applicable (i.e. the Information Commissioner cannot investigate the refusal). In 2001, in the wake of September 11, an additional exclusion was adopted for documents containing national security or foreign intelligence information.<sup>25</sup> It is to be noted that similar categories of document at the provincial level are protected by an exception, not an exclusion. Fortunately, it is only a minute portion of the government records that are excluded from the application of the Act.

The Act lists specific exemptions to the right of access. These exemptions can be subdivided into four (4) categories: 1) Mandatory exemptions based on a class-test; 2) Mandatory exemptions based on an injury-test (or harm-based); 3) Discretionary exemptions based on a class-test; and, 4) Discretionary exemptions based on an injury-test (or harm-based).<sup>26</sup> It is to be noted that the Act contains more discretionary exemptions than mandatory ones.

**Mandatory Exemptions** are introduced by the phrase "the head of the government institution shall refuse to disclose..." When information requested under the Act falls within a mandatory exemption, institution normally must refuse to disclose the record. However, most mandatory exemptions provide for circumstances which permit disclosure if certain conditions are met.<sup>27</sup>

**Discretionary Exemptions** are introduced by the phrase "the head of a government institution may refuse to disclose..." Where such exemptions apply to information requested under the Act, government institutions have the option to disclose the information where it is felt that no injury will result from the disclosure or where it is of the opinion that the interest in disclosing the information outweighs any injury which could result from disclosure.<sup>28</sup>

**Class Test Exemptions:** A class test objectively describes the categories of information or documents to which an exemption can be applied. These exemptions describe classes of information that are considered sufficiently sensitive that disclosure of any information in the class could have a detrimental effect. Under class test exemptions, therefore, where a government institution is satisfied that information falls within the class specified, it can refuse access to the information.<sup>29</sup>

**Injury Test Exemptions:** Exemptions based on an injury test provide that access to information requested under the Act may be denied if disclosure could reasonably be

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<sup>24</sup> ATIA, *supra* note 1 at s. 69.

<sup>25</sup> ATIA, *supra* note 1 at s. 69.1.

<sup>26</sup> For a table of these exemptions see M.W. Drapeau & M.-A. Racicot, *supra* note 2 at 12-5; ATIA, *supra* note 1 at ss. 13-26.

<sup>27</sup> *Report of the ATIA Review Task Force*, *supra* note 2 at 207.

<sup>28</sup> *Ibid.* at 206.

<sup>29</sup> *Ibid.*

expected to be injurious to the interest specified in the exemption. In other words, disclosure of the information must reasonably be expected to prove harmful or damaging to the specific public or private interest covered by the exemption in order for access to be refused.<sup>30</sup>

Mandatory exemptions based on a class-test are: information obtained in confidence from other governments; information obtained or prepared by the RCMP for provincial or municipal police services; personal information, trade secrets of third parties or financial, commercial, scientific or technical information received in confidence from a third party (subject to a public interest override); and statutory prohibitions against disclosure.

Mandatory exemptions based on an injury-test are: loss of gain to third party or prejudice to competitive position, and interference with contractual or other negotiations of a third party.

Discretionary exemptions based on a class-test are: information obtained or prepared by listed investigative bodies; information or techniques or plans for investigation; trade secrets or valuable commercial, scientific or technical information; advice or recommendations to government; accounts of deliberations or consultations; government negotiation plans; government personnel or organizational plans; solicitor-client privilege; information due to be published in 90 days.

Discretionary exemptions based on an injury-test are: conduct of federal-provincial affairs; conduct of international affairs or the defence of Canada or her allies; injury to law enforcement and conduct of lawful investigations; threat to individual safety; prejudice to national economic interests; precedence of publishing by a government researcher; national financial interests; and testing procedures, tests and audits.

#### **d. Independent Review Mechanism**

The *Access to Information Act* creates the position of Information Commissioner, who is an officer of Parliament with the power to investigate and make recommendations.<sup>31</sup> In the course of his investigations, the Commissioner has access to all the information he sees fit.<sup>32</sup> Under the Act, the Commissioner cannot order the disclosure of the records. At the end of his investigation, the Commissioner issues a report containing his findings and recommendations.<sup>33</sup> If the head of the government institution does not intend to follow the recommendations,<sup>34</sup> the Commissioner with the consent of the requester (or the requester himself) can file an application for judicial review before the Federal Court of Canada.<sup>35</sup>

It must be noted that: 1) the review under section 41 is not a judicial review of the Information Commissioner's findings and recommendations, but of the decision of the head of the government institution; and, 2) the investigation of the Information Commissioner constitutes a condition precedent to the exercise of the power of review.

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<sup>30</sup> *Ibid.*

<sup>31</sup> ATIA, *supra* note 1 at s. 54.

<sup>32</sup> ATIA, *supra* note 1 at ss. 36(1)(b) and (f), 36(2).

<sup>33</sup> ATIA, *supra* note 1 at s. 37(1).

<sup>34</sup> ATIA, *supra* note 1 at s. 37(1)(b).

<sup>35</sup> ATIA, *supra* note 1 at ss. 37(5) and 41.

The Commissioner's investigation being the cornerstone of the access to information system, government institutions are bound by the exemptions they initially raised to deny access and therefore they cannot raise new exemptions in court.

### **e. Table of Concordance: India *Right to Information Bill, 2004* and the Canadian *Access to Information Act***

In order to facilitate the comparison between Canadian federal *Access to Information Act* and India *Right to Information Bill, 2004*, we have prepared a table of concordance (Schedule A). As it can be seen, they are both very similar. In some instances, the wording of the Indian's Bill is exactly the same. Hence, the jurisprudence developed under the ATIA may shed some light on the interpretation the Indian authorities may wish to give to certain dispositions contained in the Right to Information Bill, 2004.

## **2. Brief Overview of the Office of the Information Commissioner of Canada (OICC)**

The Information Commissioner of Canada is an officer of Parliament. He is appointed by the Governor in Council after approval of the appointment by resolution of the Senate and House of Commons.<sup>36</sup> The principal office of the Information Commissioner must be in the National Capital Region (i.e. Ottawa).<sup>37</sup>

### **a. Staffing Structure**

The Commissioner has the power to appoint such officers and employees as are necessary to enable him to perform the duties and functions.<sup>38</sup> There are presently 49 persons working in the Office, of them, 21 are investigators. A Deputy Information Commissioner assists the Commissioner in his duties. As seen on the organizational chart attached to this text as Schedule D, the Office is subdivided into three branches: (1) Operations branch headed by the Director General Investigations and Reviews. This branch is responsible for all aspects relating to complaints, investigations and reporting; (2) Corporate Management branch headed by the Director General Corporate Services. This branch is responsible for administrative support (financial, human resources, information technology, general administrative and library services), and for ensuring that internal overhead functions are in place to support program management decisions and accountability; and, (3) Legal Services headed by the General Counsel.

### **b. Process Structure**

#### **i. The Access Request**

The Office of the Information Commissioner is not involved in the processing of access to information requests. An access to information request is made, in writing, directly to a government institution. The request is received by an ATIP Coordinator. A table

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<sup>36</sup> ATIA, *supra* note 1 at s. 54.

<sup>37</sup> ATIA, *supra* note 1 at s. 60.

<sup>38</sup> ATIA, *supra* note 1 at s. 58.

summarizing the step by step process of an access request is attached to this text as Schedule B.

If the requester is not satisfied with the head of the government institution's decision to disclose or not disclose the requested information, he may complain in writing to the Information Commissioner. The Information Commissioner will acknowledge receipt of the complaint and will put an investigator in charge of the investigation.

## **ii. The Investigation**

In his 2002-2003 Annual Report, the Commissioner wrote that investigative flexibility is required to respond effectively to variations in:

- Types of complaints;
- Complexity of the factual or legal issues;
- Potential negative impact on individuals;
- Likelihood of related court proceedings;
- Level of cooperation from government institutions, witnesses and complainants; and
- Availability of resources.

He then went on to describe the Informal and the Formal investigation processes. Attached as Schedule E is an excerpt of the 2002-2003 Annual Report.<sup>39</sup> To make this process easier to understand, a table is attached to this text as Schedule C.

## **c. Process for Judicial Review**

Once the investigative process is completed, the Commissioner will send his report, containing the findings and recommendations, to the head of the government institution, and request notification from the head to know if his recommendations will be followed or not. Once notification is received, the Commissioner will issue his report to the complainant.<sup>40</sup> An unsatisfied complainant may file an application for judicial review before the Federal Court of Canada.<sup>41</sup> The Commissioner himself may file the application for judicial review with the consent of the complainant.<sup>42</sup>

If the Commissioner intends to file an application for judicial review, a consent form is forwarded to the complainant. The Commissioner, like the complainant, has 45 days after the issuance of his report to initiate the legal proceedings. Once the consent is received, the file of the investigation is transferred to Legal Services who will prepare the application and initiate the proceedings.

## **d. Powers of the Information Commissioner**

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<sup>39</sup> Canada, *Annual Report: Information Commissioner 2002-2003*, (Ottawa: Public Works and Services Canada, 2003) at 51-54, online: <[http://www.infocom.gc.ca/reports/pdf/oic02\\_03E.pdf](http://www.infocom.gc.ca/reports/pdf/oic02_03E.pdf)> [*Annual Report: Information Commissioner 2002-2003*].

<sup>40</sup> ATIA, *supra* note 1 at s. 37(2).

<sup>41</sup> ATIA, *supra* note 1 at s. 41.

<sup>42</sup> ATIA, *supra* note 1 at s. 42.

The Access to Information Act confers upon the Information Commissioner broad discretion to select the procedures by which investigations are conducted.<sup>43</sup> This discretion recognizes the need for a body charged with conducting investigations of complaints against government institutions to have flexibility in its choice of investigative methods, styles and approaches.<sup>44</sup>

Hence in the conduct of investigations, the Commissioner is master of his own procedure subject only to certain obligations imposed by law (principles of natural justice).<sup>45</sup>

The Information Commissioner enjoys broad powers, including the powers to examine any records covered by the Act and under the control of a government institution.<sup>46</sup> The Commissioner has the power to summon and enforce the appearance of persons before him and compel them to give oral and written evidence and to produce such documents and things as he deems requisite to the full investigation and consideration of the complaint.<sup>47</sup> The Commissioner has the power to receive and accept such evidence and other information as he sees fit, whether or not the evidence is or would be admissible in a court of law.<sup>48</sup> He can enter any premises occupied by any government institution on satisfying any security requirements of the institution relating to the premises.<sup>49</sup>

The Commissioner has the burden to make sure that the information communicated to him during the investigation stays confidential.<sup>50</sup>

## **e. Reporting**

### **i. Annual Report to the House of Commons**

The Information Commissioner is responsible for keeping Parliament informed of the activities of his Office. That responsibility is discharged by publishing an annual report.<sup>51</sup> After the annual report is tabled in both houses of Parliament (House of Commons and Senate), the report is reviewed by the House of Commons Standing Committee on Justice and Legal Affairs, established pursuant to Standing Orders adopted in January 1994.<sup>52</sup>

### **ii. Special Report to the House of Commons**

Pursuant to section 39 of the Act, the Commissioner may, at any time, make a special report to Parliament. Since 1983, the Information Commissioner submitted some special

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<sup>43</sup> ATIA, *supra* note 1 at s. 34.

<sup>44</sup> *Annual Report: Information Commissioner 2002-2003*, *supra* note 39 at 51.

<sup>45</sup> See e.g. Canada, *Annual Report: Information Commissioner 2003-2004*, (Ottawa: Public Works and Services Canada, 2004) at 12, online: < [http://www.infocom.gc.ca/reports/pdf/oic03\\_04E.PDF](http://www.infocom.gc.ca/reports/pdf/oic03_04E.PDF)>.

<sup>46</sup> ATIA, *supra* note 1 at s. 36(2).

<sup>47</sup> ATIA, *supra* note 1 at s. 36(1)(a).

<sup>48</sup> ATIA, *supra* note 1 at s. 36(1)(c).

<sup>49</sup> ATIA, *supra* note 1 at s. 36(1)(d).

<sup>50</sup> ATIA, *supra* note 1 at ss. 35, 61, 62 and 64

<sup>51</sup> ATIA, *supra* note 1 at s. 38.

<sup>52</sup> M.W. Drapeau & M.-A. Racicot, *supra* note 2 at 15-10.

reports to Parliament.<sup>53</sup> The latest - “Response to the Report of the Access to Information Review Task Force” - was tabled in 2002.<sup>54</sup>

### **3. Managing an Access to Information Regime – The Canadian Experience**

#### **a. Implementation of the ATIA: Strategy and Monitoring**

Pursuant to sections 5 and 70 of the Act, the delegated minister is charged with the responsibility of implementing the *Access to Information Act*.<sup>55</sup>

The Treasury Board Secretariat has published Guidelines to ensure effective and consistent administration of the Act and Regulations on a government-wide basis.<sup>56</sup> The Treasury Board Secretariat also publishes implementations reports.<sup>57</sup> Training sessions are available to public officials.<sup>58</sup> As well, the government has adopted an electronic tracking system for access requests, known as CAIR (Coordination of Access to Information Requests). All institutions subject to the Act upload to the system information about requests submitted under the Act. This allows the Treasury Board Secretariat and the Privy Council office to monitor requests, ensure consistency of responses, and facilitate consultations among institutions.<sup>59</sup>

Monitoring of the ATIA implementation is done through report to Parliament. The head of every government institution must prepare for submission to Parliament an annual report on the administration of the Act within the institution during each financial year.<sup>60</sup>

#### **b. Challenges Faced and Lessons Learned by the OICC**

<sup>53</sup> ATIA, *supra* note 1 at s. 39; M.W. Drapeau & M.-A. Racicot, *supra* note 2 at 1-498 to 1-501.

<sup>54</sup> Canada, Information Commissioner of Canada, *Response to the Report of the Access to Information Review Task Force: a Special Report to Parliament*, (Ottawa: Public Works and Government Services Canada, 2002), online: Information Commissioner of Canada <<http://www.infocom.gc.ca/specialreports/pdf/2002special-e.pdf>>.

<sup>55</sup> The President of the Treasury Board is the Minister responsible for government-wide administration of the legislation. This includes issuing to the public a directory of federal government information and related guides known as Info Source. The Secretariat, as the lead agency, co-operates with the Department of Justice in the area of legislative amendments and with the Privy Council Office regarding Cabinet confidences. The Secretariat also initiates and facilitates consultations with the Offices of the Information and Privacy Commissioners on policy matters, online: Treasury Board of Canada Secretariat Access to Information and Privacy <[http://www.tbs-sct.gc.ca/gos-sog/atip-airp/index\\_e.asp](http://www.tbs-sct.gc.ca/gos-sog/atip-airp/index_e.asp)>.

<sup>56</sup> Canada, Treasury Board Secretariat, *Treasury Board Manual – Access to Information*, (Ottawa: Treasury Board of Canada, Secretariat, 1993), online: Treasury Board of Canada Secretariat Access to Information – Policies and Publications <[http://www.tbs-sct.gc.ca/pubs\\_pol/gospubs/tbm\\_121/siglist\\_e.asp](http://www.tbs-sct.gc.ca/pubs_pol/gospubs/tbm_121/siglist_e.asp)> and also at National Library of Canada <[http://collection.nlc-bnc.ca/100/201/301/tbs-sct/tb\\_manual-ef/Pubs\\_pol/ciopubs/TBM\\_121/siglist\\_e.html](http://collection.nlc-bnc.ca/100/201/301/tbs-sct/tb_manual-ef/Pubs_pol/ciopubs/TBM_121/siglist_e.html)>.

<sup>57</sup> M.-W. Drapeau & M.-A. Racicot, *supra* note 2 at 12-39 to 12-45. For a list of these reports, see online: <[http://www.tbs-sct.gc.ca/gos-sog/impl-rep/Impl-Rprts\\_e.html](http://www.tbs-sct.gc.ca/gos-sog/impl-rep/Impl-Rprts_e.html)>.

<sup>58</sup> See online: Treasury Board of Canada Secretariat Access to Information and Privacy <[http://www.tbs-sct.gc.ca/gos-sog/atip-airp/index\\_e.asp](http://www.tbs-sct.gc.ca/gos-sog/atip-airp/index_e.asp)>.

<sup>59</sup> Information Commissioner of Canada, Annual Report 2003-2004, p. 43

<sup>60</sup> ATIA, *supra* note 2 at s. 71.

## **During the Implementation Process**

In the first years, the Information Commissioner noted that there was a total lack of knowledge in the country of the Act and how the Act was supposed to be used.<sup>61</sup> In a report published in 2001, it was noted that most of the criticisms of the Act concerned its implementation, more specifically the fee mechanism, delays incurred, and the lack of consistency that characterizes the application of the Act within and across departments. Unpredictable disclosure decisions, lengthy delays and the inconsistent application of fees across government departments are symptomatic of a lack in co-ordination and information management. Stakeholders have proposed that in order to address this problem, there are needs to be a shift in the mindset of public servants, whereby they acknowledge that they are bound by the Act, and that access underlies their daily decisions regarding information management.<sup>62</sup>

### **c. Problems Faced over the Years and How They Have Been Handled**

#### **i. OICC's Experience in Dealing with Bureaucratic Resistance and Cultures of Secrecy**

To combat the culture of secrecy, steps must be taken to create a culture of access. Access to information work must be defined and legitimated as “real” work, valued work and rewarded work.<sup>63</sup> There are five main steps to create a culture of access:

##### 1) Legitimate Access Work to integrate it into public service culture

- The task of responding to access to information requests should appear in the job description of all those who could be called upon to do this work;
- The task of responding to access to information requests should become part of employment measurement systems, evaluated along with other elements in the job description;
- Time estimates should be prepared for the average number of hours spent on access work in a department over at least one year, and these be built into work schedules of employees involved in access work; and
- The resources used by departments for access work should be estimated, and calculated into departmental budgets for the coming fiscal year.

##### 2) Empower Public Servants to increase their input into the process

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<sup>61</sup> See Babcock, *supra* note 11 at 111.

<sup>62</sup> David Zussman, Nancy Averill, & Geneviève Lépine, *Report on Consultations to Review the Access to Information Act and its Implementation (May-June 2001)*, (N.p.: Public Policy Forum, 2001) at 22 and 26, online: Public Policy Forum < [http://www.ppforum.com/ow/ow\\_e\\_05\\_2001.pdf](http://www.ppforum.com/ow/ow_e_05_2001.pdf)>.

<sup>63</sup> Gladys L. Symons, *Constructing a Culture of Access in the Federal Public Service: Access to Information and the Public Service Work Environment – A Study Commissioned by the Access to Information Review Task Force*, CD-ROM: *Access to Information: Making it Work for Canadians: Report of the Access to Information Review Task Force*, (Ottawa: Access to Information Review Task Force, 2002), also online: Access to Information Review Task Force, < <http://www.atirtf-geai.gc.ca/paper-culture1-e.html>>.

- Public servants should be encouraged to find creative ways to be proactive in providing access to information, and incorporate these into their routine.
- Public servants should be encouraged to develop a professional discussion on access issues, and given time and space to share their perspectives with colleagues and superiors.

### 3) Increase Awareness and Improve Education & Training to inform public servants of the principles and values underpinning access to information

- Sessions on access should be a part of all employees' orientation, including:
  - The principles and values of the Access to Information Act
  - Information access work as part of a public servant's role/organizational identity
  - Importance of a culture of access for public service culture at large.
- Sessions on access to information, including the preceding 3 elements, should be available throughout the year for interested employees.
- Employees called upon to do access to information work should be given the necessary time away from their daily routine to attend training sessions.<sup>64</sup>

### 4) Improve Information Management Tools and Practices to support the efficient and effective provision of Access

All departments and agencies need to receive explicit guidelines that include:

- what constitutes "a record under the control of an institution";
- procedures for filing and managing information; and
- resources to ensure an efficient, effective info-management system.

### 5) Ensure Managerial Support

Without encouragement from superiors, employees can hardly be expected to do their job with enthusiasm or satisfaction.

It is important for managers to:

- make a commitment to access evident by setting an example, getting directly involved in access work and encouraging compliance with the letter and spirit of the law;
- be sensitive to employees' time constraints, helping them to establish priorities to accommodate both access requests and other tasks; and
- openly support and help their employees with the release of information.

Learning networks have served quite successfully in Alberta as a competence-building mechanism for the Access to Information community. These networks provide community members, with common interests, a forum in which to:

- share best practices and lessons learned;
- identify and resolve common issues, and
- use technology to facilitate collaborative learning and networking.

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<sup>64</sup> *Ibid.*



Learning networks help develop and maintain knowledge, skills and contacts, confront new ideas and issues in a collaborative manner, learn with and from others, and ensure the transmission of corporate memory and knowledge.

## **ii. Delays**

“For many of the access law’s 20 years of life, the priority of the Office of the Information Commissioner has been to address a chronic problem in government of delay in answering access requests. At the beginning of the current Commissioner’s term, in 1998, the “Report Card” initiative commenced under which selected departments were graded on the basis of the percentage of access requests received which were not answered within statutory deadlines. Those report cards (37 in all, covering 11 institutions) have been tabled in Parliament either as special reports or, as this year [2002-2003], included within the commissioner’s annual reports.

Since the report card initiative commenced, in 1998, there has been a dramatic reduction in the number of complaints of delay received by the commission, from a high of 49.5 percent of all complaints to a low, this year, of 16.2 percent.”<sup>65</sup>

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<sup>65</sup> *Annual Report: Information Commissioner 2002-2003*, *supra* note 38 at 58.

### iii. Record Management

“Weak record keeping and information management have been noted in numerous annual reports of the Commissioner and of the Auditor General as jeopardizing public programs and services and impeding openness and accountability. The Commissioner, in his 2000-2001 Report to Parliament, made recommendations for improvements to federal government record keeping many of which are being implemented.

These included:

- establishing a legal framework for information management which would, as a primary feature, require federal departments, agencies and institutions to create and appropriately maintain, records that adequately document their organization, functions, policies, decisions, procedures, and essential transactions;
- developing, disseminating and measuring effective standards for adequately documenting government decision-making and activities in the Government of Canada;
- auditing the effectiveness of government information management activities;
- ensuring that systematic evaluations of information management infrastructure and activities occur at the department level;
- establishing training and orientation programs to strengthen awareness, by public servants at all levels, of their responsibilities for government information and to provide the necessary skills for the effective development, management and use of information and knowledge;
- developing the professional staff who will be needed to support the emerging information and technology management environment; and
- assigning the overall responsibility for information management at the highest level possible in the institution closely aligned with the strategic management of information technology and clearly assigning responsibility for information management across the organization.

It is encouraging to see that key roles, to improve records and information management, are being played by the Chief Information Officer Branch of Treasury Board Secretariat, the Library and Archives of Canada and several government departments.”<sup>66</sup>

### iv. Major Amendments

#### Wilful destruction of records (s. 67.1)

Following two investigations,<sup>67</sup> the Commissioner recommended that there should be a specific offence in the access act for acts or omissions intended to thwart the rights set out in the law. In response to that recommendation, section 67.1 was introduced before Parliament in 1997 and adopted in 1999.<sup>68</sup>

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<sup>66</sup> Canada, Offices of the Information and Privacy Commissioners, *Performance Report for the Period Ending March 31, 2003* (Ottawa: Government Review and Quality Services, Treasury Board Secretariat, 2003) at “Section II - Context”, online: [http://www.tbs-sct.gc.ca/rma/dpr/02-03/OIPC-CIP/OIPC-CIP03D01\\_e.asp](http://www.tbs-sct.gc.ca/rma/dpr/02-03/OIPC-CIP/OIPC-CIP03D01_e.asp).

<sup>67</sup> Information Commissioner of Canada, Annual Report 1996-1997, p. 13

<sup>68</sup> Information Commissioner of Canada, Annual Report 1998-1999, p. 39

## National Security – Anti-Terrorism Act (69.1)

In the weeks following the horrific events of September 11, 2001, the government rushed to put in place legislative tools for use in the so-called “war on terrorism”. One of those initiatives was the antiterrorism bill (Bill C-36), introduced into the House of Commons on October 14, 2001. Contained in that Bill was a sweeping derogation from the right of access contained in the *Access to Information Act*.<sup>69</sup>

The Commissioner wrote:

“The challenge for any healthy democracy is to resist the temptation of states to overreach. Our government failed the challenge when it gave itself the power, through the secrecy certificate, to escape independent scrutiny of its decisions to keep secrets from its citizens. “Trust me”, the former minister said; these provisions will be rarely, carefully and fairly used! The bill having now been passed into law, we have no choice but to trust, because we have lost the ability to independently verify that our trust is well founded.”<sup>70</sup>

### **d. Current Procedures for Processing Complaints, and Monitoring Effectiveness**

In recent years, the Commissioner has adopted a Policy on Service Standards, a series of service timelines and standards to guide the work of his investigators and government officials with whom they deal. For ease of reference, we have attached to this text a copy of this Policy as Schedule F.<sup>71</sup>

### **e. Case Studies – Exercise of Investigative Powers**

For an example of the Commissioner’s Investigation, see the Case Report attached as Schedule G.

### **f. Information Commissioner’s Recommendations – Enforcement?**

The Information Commissioner is an ombudsman. At the completion of his investigation, he issues findings and recommendations.<sup>72</sup> His recommendations are not binding. If the head of a government institution does not intend to comply with the Information Commissioner’s recommendations, the complainant (or the Information Commissioner with the complainant’s consent) may file an application for judicial review (of the head’s refusal) before the Federal Court of Canada.<sup>73</sup> The Court has the power to order disclosure if it conclude that the refusal was not warranted.<sup>74</sup> Another tool for the Commissioner is the Special Report, which can be tabled before Parliament.<sup>75</sup>

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<sup>69</sup> Information Commissioner of Canada, Annual Report 2001-2002, p. 15

<sup>70</sup> Information Commissioner of Canada, Annual Report 2001-2002, p. 20

<sup>71</sup> *Annual Report: Information Commissioner 2002-2003*, *supra* note 39 at 54-58.

<sup>72</sup> ATIA, *supra* note 1 at s. 37.

<sup>73</sup> ATIA, *supra* note 1 at s. 37 and s. 41 or 42.

<sup>74</sup> ATIA, *supra* note 1 at s. 49.

<sup>75</sup> ATIA, *supra* note 1 at s. 39(2).

## **g. Tracking of the Information Commissioner's Reports**

The Information Commissioner's letters of findings and recommendations are not publicly released. Case summaries are published every year in the Annual Report.<sup>76</sup> Annual Reports are tabled before Parliament and then made public through hard copies or the Internet.

## **h. Access Innovation Developed Over Time**

### **i. Proactive Disclosure of Officials' Travel and Hosting Expenses**

On December 12, 2003, the Prime Minister announced a new policy on the mandatory publication of travel and hospitality expenses for selected government officials.<sup>77</sup>

## **4. OICC as an Independent Body**

In Canada, independence of the Commissioner has never been and still is not a concern. The Act specifically safeguards the independence of the Commissioner and his office from the government. However, it must be noted that budgetary constraints on the Office may have an impact on the Commissioner's capacity to fulfil his duties in an effective manner. Presently, the Treasury Board determines the Commissioner's budget.

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<sup>76</sup> In the 2002-2003 Annual Report, a Cumulative Index of the Case Summaries 1994-2002 can be found at pp. 59 to 74.

<sup>77</sup> Canada, Treasury Board Secretariat, *Guidelines for Ministers' Offices*, (Ottawa: Treasury Board of Canada Secretariat, 2004) at 33-34, online: Treasury Board of Canada Secretariat <[http://www.tbs-sct.gc.ca/pubs\\_pol/hrpubs/mg-ldm/dwnld/gfmo\\_e.rtf](http://www.tbs-sct.gc.ca/pubs_pol/hrpubs/mg-ldm/dwnld/gfmo_e.rtf) >. Policy announcement online at [http://www.chrc-ccdp.ca/about/expenserpts\\_rappdepenses/expenserpts\\_rappdepenses-en.asp](http://www.chrc-ccdp.ca/about/expenserpts_rappdepenses/expenserpts_rappdepenses-en.asp).

## 5. Managing Access to Information from a Provincial Perspective

### a. ATI at the Provincial Level: the Alberta Experience From Commissioner Frank Work's Perspective

#### Introduction

I am pleased to offer some thoughts on implementing an access to information regime based on my experience in Alberta, Canada. We began in 1995 (this is our 10th Anniversary). I was the second employee hired after the Information and Privacy Commissioner. We now have about 35 staff and are responsible for 3 statutes.

I will describe the legislation under which this Office operates. I will discuss some factors which I believe are important in terms of the success of an access to information regime.

#### Legislation

The Office of the Information and Privacy Commissioner is responsible for 3 pieces of legislation:

- The *Freedom of Information and Protection of Privacy Act* which applies to access to information held by "public bodies" and to the collection, use and disclosure of personal information of members of the public. I will refer to this as "FOIP"
- The *Health Information Act* which applies to the collection, use and disclosure of the personal health information of members of the public. It also allows a person to have access to her personal health information. I will refer to this as "HIA".
- The *Personal Information Protection Act* deals with the collection, use and disclosure of personal information by the private (non-government) sector.

The *Freedom of Information and Protection of Privacy Act* ("FOIP") is very similar to access and privacy legislation in other provinces.

Please go to our website at [www.oipc.ab.ca](http://www.oipc.ab.ca) for more information on the laws, procedures, orders we have issued and links to the offices of other Commissioners in Canada.

The Office of the Information and Privacy Commissioner of Alberta was established in 1995. FOIP came into effect in 1996.

The first Commissioner was Robert Clark. Mr. Clark was well-known to Government. Mr. Clark had been a Member of the Legislative Assembly and a Cabinet Minister years before (that is, not in the currency of the present Government). At the time he was appointed Information and Privacy Commissioner, Mr. Clark held the position of Ethics Commissioner. Mr. Clark was not viewed as some kind of radical who would want to give out all of Governments secrets, or try to embarrass Government. I think that the provincial government knew him well enough to trust him to be at least fair.

Any Access to Information Commissioner has to develop his or her own “style”. I would suggest that this style should depend in large part on a reading of the political culture in which one operates. The 2 extremes of style might be characterized as “patient persuader” and “avenging angel”. I would characterize Mr. Clark as mostly the former. That style worked in this political culture. In other places the Commissioner might have to resort to the “avenging angel”. But, as some Commissioners have learned, if every access issue is going to become a battle with the public body, both sides develop “siege mentalities”. Public bodies will likely have more resources than the Commissioner and these resources can be used to mount extensive and interminable court challenges to everything the Commissioner does. This is expensive for both sides and it results in huge delays. I think once this kind of relationship is born, neither side ever fully trusts the other and all dealings are coloured by it.

This brings up something that is often underestimated by many access to information offices. It goes like this:

- The objective of politics is to gain power by being elected by gaining the support of a sufficient number of voters.
- Once a party gains power, it does not want to lose that power.
- Hence, governments do not want to lose support.
- Making public information which is adverse to or casts government in an unfavourable light may cause the loss of support for the government.
- The media (and the public to some extent) have less interest in information which casts government in favourable light than they do in information that casts government in an unfavourable light. For example, no one will congratulate a government for making 1000 pages of information available. There will however, be criticism of the fact that one page is not made available.
- Governments therefore tend to only like to give access to information that either casts them in a good light or is accompanied by the government’s explanation (or “spin”) on that information. The last thing a government wants to give out is unfavourable information with no explanation attached to it.
- Public servants know these things about governments and, since public servants want to be regarded favourably by the public and by the government, they do not like to give out information which is unfavourable to either the public service or the government. This is not to say that public servants are either corrupt or cowardly. Like any of us, they are intelligent enough to know the environment in which they work. Like any of us, they will exercise discretion in dealing with their employers and supervisors.

“But access to information is the law!” one might say. “It must be obeyed. The Commissioner must see that it is obeyed.” Of course this is right. It is the law and it was made law by the government. Like our FOIP Act, it may even contain a statement of purpose (which is unusual in writing laws in Canada). Nevertheless, successful implementation of the law requires changes in attitude on the part of many politicians and civil servants and changes in political culture on the part of government and public service as well. These changes do not happen overnight.

For example, sometimes government communication offices are based on the philosophy that government must control access to information. This of course runs

counter to the concept of access to information. Communication offices should change from controlling information flow to explaining government programs and policies to the public, based on information flow.

Even though most access laws allow governments to refuse to disclose certain records like “cabinet confidences”, “trade secrets”, “advice from officials”, and various kinds of “privileged documents” including parliamentary privilege, litigation privilege, public interest privilege and solicitor client privilege, governments and administrations still feel threatened by access to information laws. And, to the extent they feel threatened, the access laws themselves make it possible to delay or even frustrate the law. I think the Access to Information Commissioner of Canada for example has had to deal with a great deal of delay and tactics designed to frustrate.

I certainly do not think the situation is hopeless by any means. It does mean that a successful access to information office will have to have a long term strategy with respect to implementation: it will not happen overnight. The factors I think are most important in this strategy are these:

- The Commissioner’s office must be independent of government.
- The Commissioner should have order making power (i.e. the power to order a public body to disclose records).
- The Commissioner has to look for allies and champions within public bodies. Not all elected people or public servants are opposed to open government. I would say that most think it is a good idea in principle. It is when it is their records that have to be disclosed that they start thinking about the consequences. Use these allies and champions to build bridges and persuade and educate.
- In that respect, the most valuable allies are the public servants whose role it is to respond to access to information requests. In Alberta, they are called “FOIP coordinators”. Not only are these people invaluable in responding to requests for access to information, many of them are trusted public servants who can also educate and persuade politicians and senior public servants in the direction of access to information. I have found many of them to be ideologically in favour of access to information. They are also a very good resource for finding out about problems and concerns within government. I am not saying they breach any confidences: but they may tell the Commissioner that, for example, a certain Minister is concerned that advice from her advisors will have to be made public. Knowing this, the Commissioner could issue guidelines or explanatory notes on how the section might apply. Governments hold a lot of records. It is not possible for an office like mine to physically force government to find and disclose the information they are supposed to according to the law. Inevitably I must rely on government itself to :
  - Search diligently for the records which are responsive to the request for access.
  - Apply the exceptions to disclosure to those records as required by the law.
- The Commissioner has to look for allies and champions among the media and the public. These groups usually favour access to information in principle. They can be valuable in bringing pressure to bear on public bodies to release

information. It is important to release the Commissioner's decisions publicly and to explain them to the media and public. These laws are complicated and sometimes seem to defy logic.

- The Commissioner's staff must of course be independent. But they also should be able to persuade public servants and politicians to apply the law in a proper and generous manner. Some awareness of the public service is useful in that regard. They also must be able to persuade applicants when they have received as much information as they can under the legislation. Negotiation and mediation skills are therefore useful. In this Office we call these people Portfolio Officers. If these people cannot win the trust of applicants, many cases will have to go to formal adjudication processes which are time-consuming and expensive. In Alberta, about 9 cases out of 10 are resolved by the Portfolio Officers.

In the long run, professional education for both public servants responsible for dealing with access requests and for staff of the Commissioner's office is most important. It would certainly be beneficial if government communications staff also acquired such professional training in the legislation. The Province of Alberta has been fortunate in this regard since the University of Alberta has taken the lead in Canada in developing the Information Access and Protection of Privacy Program. Professional training not only creates more effective and credible access to information professionals, but also moves political and bureaucratic cultures in the direction of more openness. I think the ideal situation would be to have a cadre of trained professionals in governments who deal with information management, access to information and government communications. Having separate entities performing these functions creates too many "silos", where for example, access to information staff whose job it is to apply the law in favour of access have to deal with communications officers who want to control the release of information. To achieve this ideal state, access to information training would be a part of the curriculum in any academic program in public administration or communications.

These are my immediate observations. I regret being unable to share these with you in person. I would be delighted to meet with you, or any of you, on another occasion. I think it would be good if personnel from India were able to spend some time in Office like ours. This of course becomes a question of resources, but if and when we can find the resources, such exchanges would be most welcome.



## **b. Comparison and Contrast of Successful and Problematic Features with Other Canadian Jurisdictions**

Access to information legislation in the provinces is similar but not identical. For example, in some provinces: (1) there are no exclusions just exemptions; (2) the Commissioners have the power to make binding orders; (3) all public bodies are subject to the access legislation by default unless specifically excluded.<sup>78</sup>

## **c. Nature of the Interaction: Federal, Provincial, and Municipal (local)**

Pursuant to the sections 91 and 92 of the *Constitution Act, 1867*, each level of government (federal and provincial) has its own sphere of jurisdiction. Parliament was therefore not competent to adopt an access legislation that would have applied to all the provinces, and so the *Access to Information Act* applies only to federal government institutions. Each province and territory has also adopted access to information legislation.<sup>79</sup> In some provinces that legislation applies to local bodies,<sup>80</sup> while in other provinces specific access legislation was adopted for local bodies.<sup>81</sup>

At the “access to information” level, the interaction between the provinces and the federal or between the federal Information Commissioner and the provincial Information Commissioners is very low. They meet at least once a year. More recently, the Parliament adopted the *Personal Information Protection and Electronic Documents Act*<sup>82</sup> which, in general terms, applies to all private organizations in Canada. We have seen at that level more interaction between the federal Privacy Commissioner and her provincial colleagues.

## **6. Challenges Ahead for India**

### **a. Public Education and Awareness**

Citizens of India have a right to know. But they won't be able to fully exercise this right if they are not educated and made aware of the new legislation. Publicity of the new legislation must be broad and massive. Workshops should be available to citizens on how to make an access to information request. An index of government files and Access personnel must be readily available. In Canada, this was accomplished through creating Info Source, an online and print database of information about the organization and information holdings of the government of Canada.<sup>83</sup>

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<sup>78</sup> See M. W. Drapeau & M.-A. Racicot, *supra* note 2 at 12-4 for a Table of concordance between Federal and Provincial Access Statutes – Exemptions; see also Colin H.H. McNairn & Christopher D. Woodbury, *Government Information: Access and Privacy*, (Toronto: Carswell, 1992).

<sup>79</sup> *Annual Report: Information Commissioner 2002-2003*, *supra* note 39 at 119-120.

<sup>80</sup> Alberta, British Columbia, Manitoba and Québec.

<sup>81</sup> Ontario and Saskatchewan.

<sup>82</sup> S.C. 2000, ch. 5.

<sup>83</sup> See Info Source at < [http://www.infosource.gc.ca/index\\_e.asp](http://www.infosource.gc.ca/index_e.asp)>.

## **b. Create a Culture of Access in the Public Sector**

Public servants must understand that this right of access is part of their everyday work. Access to information is something good for the government and for democracy. It allows the government to be transparent and accountable to the people. Managers should have a positive attitude towards access legislation and promote it in their department. This has to be done right away, not ten years from now. Access work should be part of job descriptions and be evaluated as part of an employee performance.

Public servants will also need ATI awareness training. According to CHRI's briefing paper 'Preparing for Implementation', a recent audit found many public officials did not even know about the Karnataka RTI Act. If RTI is to be effective, it must receive proper publicity within the government. In-house training is useful, but outside educational organizations such as universities should be encouraged to develop educational programs, including distance education. The benefit of outside training is that outside organizations are better equipped to give objective training. In Canada, such outside training is provided through the Information Access and Protection of Privacy IAPP Certificate Program offered by the University of Alberta's Faculty of Extension.<sup>84</sup> A certificate or diploma program also offers the benefit of giving employees the confidence in their capacities and increases their ability to explain their position on access requests with senior officials.

## **c. Create an Efficient and Effective Access Request Process**

### **i. Reduce Delays**

When adopting policies and procedures, officials must be aware that "access delayed is access denied".<sup>85</sup> They must make sure that any system adopted must support the administration in providing access to the records in very short time frames.

### **ii. Create Guidelines and Procedures**

A comprehensive procedural framework for processing access requests will ensure fairness and completeness. Established guidelines will reduce processing time and will ensure consistent responses to requests. Many Canadian jurisdictions have created guidelines and practices manuals which could be useful as a basis for an Indian access procedure.<sup>86</sup> Given the time limits (30 days in Canada), established procedures serve as a way of ensuring requests will be met by the deadline.

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<sup>84</sup> See Government Studies Information Access and Protection of Privacy (IAPP) Certificate Program, University of Alberta <<http://www.govsource.net/programs/iapp/index.ncl>>.

<sup>85</sup> Information Commissioner of Canada, Annual Report 1996-1997, p. 7

<sup>86</sup> See, e.g. Alberta, Access and Privacy Branch, *Freedom of Information and Protection of Privacy Guidelines and Practices 2005* (Edmonton: Government of Alberta, 2005) online: <[http://www3.gov.ab.ca/foip/guidelines\\_practices/2005/index.cfm](http://www3.gov.ab.ca/foip/guidelines_practices/2005/index.cfm)>; Newfoundland and Labrador, Department of Justice, *Access to Information and Protection of Privacy Act Policy and Procedures Manual* (Access to Information and Protection of Privacy Coordinating Office, 2004) online: <<http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf>>; British Columbia policy and procedure documents are available at: <[http://www.oipc.bc.ca/sector\\_public/resources/index.htm](http://www.oipc.bc.ca/sector_public/resources/index.htm)>.

### **iii. Create Legal Reference Service**

The Department of Justice should have a special unit or designated individuals to whom the PIO could direct inquiries regarding access to information. Given the time constraints of responding to access requests, having designated units will help ensure legal questions are dealt with quickly so that the request can be fulfilled within delays.

### **iv. Delegate Where Possible**

To the extent that the Act allows, powers should be delegated to facilitate the processing of access requests. Certain government departments will tend to be subject to more access requests than others, and delegation may help process the larger volume of claims more efficiently.

## **c. Issues to Consider Regarding the Structure of the Bill**

### **i. Fee Waivers**

The Rules should include a fee waiver for case where the cost of collecting the fee is higher than the cost of providing the information.

### **ii. Protection of Privacy**

Some people may have concerns over exposure of their name or personal information through the publication of access requests. In Canada, the identity of the requester is confidential and known only to the ATIP coordinator.

### **iii. Scope of the Bill**

Should the Bill apply to private bodies? In Canada, the *Access to Information Act* only applies to public organizations and Crown corporations. Private organizations are only subject to privacy laws which require the protection of personal information held by those organizations. Allowing access laws to apply to private organizations may result in sensitive financial and employee information being accessible to the general public.

## SCHEDULE A

### TABLE OF CONCORDANCE

Topic	Right to Information Bill, 2004 INDIA	Right to Information Bill, 2005 INDIA	Access to Information Act, CANADA
Purpose	Introductory notes	Introductory notes	2
Title	1(1)	1(1)	1
Extent	1(2)	1(2)	1
Commencement	1(3)	1(3)	---
Definitions	2	2	3
	(f) Information (i) records	(f) Information (i) records	-records
	(j) right to information	(j) right to information	---
	(h) public authority	(h) public authority	- government institution (+ Sch. I)
	(n) third party	(n) third party	- third party
Right to Information	3	3	4
Obligations Public Catalogue / Index	4(1)	4(1)	5 [70, 71(1)]
Proactive disclosure of info relating to the Act	4(2)	4(2)	5
Public Information Officer	5	5	5(1)(d)
Request for access to information in writing	6(1)	6(1)	6
Fee for access	6	6	11(1)
Delays (30 days)	7(1)	7(1)	7
Deemed refusal	7(2)	7(2)	10(3)
Additional costs	7(3)	7(3)	11(1)(2)(5); Regs. 5, 7
Alternative format	7(4)	7(4)	12(3)
Additional fees	7(5)	7(5)	11(3)(4); Regs. 5, 7
Fee waived if out of delays	7(6)	7(6)	---
Third party representations	7(7)	7(7)	9(1)(c)
Notification when deemed refusal	7(8)	7(8)	[10(3)]
Form of access	7(9)	7(9)	12; Regs. 8
Exemption	8(1)	8(1)	13-26
"defense, security of the country"	8(1)(a)	8(1)(a)	15
"information disclosure of which is forbidden by court"	8(1)(b)	8(1)(b)	---
"third party"	8(1)(d)	8(1)(d)	20
"investigations"	8(1)(g)-(h)	8(1)(g)-(h)	16
"cabinet papers"	8(1)(i)	8(1)(i)	69(exclusion)

<b>Topic</b>	<b>Right to Information Bill, 2004 INDIA</b>	<b>Right to Information Bill, 2005 INDIA</b>	<b>Access to Information Act, CANADA</b>
“personal info”	8(1)(j)	8(1)(j)	19
“general public interest override clause”	8(2)	8(2)	---20(6) (specific override for third party information)
“passage of time” override clause	8(3)	8(3)	[in some specific exemptions, e.g 16(1), 21(1), 69(1)]
Copyright	9	9	[20]
Severability	10(1)	10(1)	25
Notification to requester where refusal	10(2)	10(2)	7, 10
Third party notification	11	11	27, 28
Constitution of Central Information Commission	12(1)	12(1)	---
Commissioner /Deputy Commissioner	12(2)	12(2)	54, 56
Appointment	12(3)	12(3)	54(1), 56(1)
Functions	12(4)	12(4)	55(1)
“Qualifications”	12(5)	12(5)	---
Principal office	12(7)	12(7)	60
Terms of office – Commissioner	13(1)	13(1)	54(2), (3)
Terms of office – Deputy Commissioner	13(2)	13(2)	56(2), (3)
Oath of Office	13(3)	13(3)	---
Resignation	13(4)	13(4)	---
Salaries	13(5)	13(5)	55(2), (3), (4) 57(2), (3), (4)
Staff	13(7)	13(6)	58
Removal	14(1), (2), (3), (4)	14(1), (2), (3), (4)	54(2), 55(1) 56(2), 57(1)
State Information Commission – Public Information Officer	---	15	--- (The Canadian government does not have jurisdiction to appoint provincial officials)
Receive & Inquire into complaint	15(1)	18(1)	30
Information Commissioner may initiate complaint	15(2)	18(2)	30(3)
Powers of I.C. in carrying out investigations	15(3)	18(3)	36(1)
Access to records	15(4)	18(4)	36(2)
Appeal	16	19	---
Penalties	17	20(1)	[67, 67.1]
Protection of action taken in good faith	18	21	74
Notwithstanding clause	19	22	[4(1)]

<b>Topic</b>	<b>Right to Information Bill, 2004 INDIA</b>	<b>Right to Information Bill, 2005 INDIA</b>	<b>Access to Information Act, CANADA</b>
Bar of jurisdiction of the court "Privative clause"	20	23	---
Exclusion of some organizations (Intelligence)	21	24	---
Annual Report	22(1)	25(1)	38
Report to Parliament	22	25(4)	72
Appropriate government prepare programs (education, training...)	23	26(1)	70, [5]
Regulations / Rules	24-25	27-28	77
Laying of rules	26	29	---
Power to remove difficulties	27	30	---
Repeal	28	31	---

## SCHEDULE B

### PROCESS OF AN ACCESS REQUEST: STEP BY STEP

Step	Title	Action
1	Receive the Request	<ul style="list-style-type: none"> <li>• Date stamp the letter</li> <li>• Retain the envelope</li> <li>• Copy the cheque, money order or other form of payment or transaction record.</li> </ul>
2	Open a file	<ul style="list-style-type: none"> <li>• Placement in an official numbered file</li> <li>• Destroy only as per record management and privacy regulations</li> </ul>
3	Track the request	<ul style="list-style-type: none"> <li>• Ledger and file control form</li> <li>• Use software application</li> </ul>
4	Assign/Acknowledge the request	<ul style="list-style-type: none"> <li>• Paraphrase the wording of the request</li> <li>• Invite the application to contact the assigned officer</li> </ul>
5	Coordinate processing of requests with other public bodies	<ul style="list-style-type: none"> <li>• Develop a process by which other institutions will know is a similar request for similar records as been made</li> </ul>
6	Confirm required fee as part of the request	<ul style="list-style-type: none"> <li>• Request is incomplete without the fee and time frame for responding to it does not begin until the fee has been received.</li> <li>• Contact requester by letter, phone or email to explain the situation and request payment of fee</li> </ul>
7	Clarify the request	<ul style="list-style-type: none"> <li>• In addition to missing fees, you may need to call applicants</li> <li>• If ambiguity, request clarification</li> <li>• Negotiate the scope of a request</li> <li>• Explore possibility of providing previously processed records</li> <li>• Discuss option of processing the request informally.</li> </ul>
8	Evaluate	<ul style="list-style-type: none"> <li>• Volume of records required</li> <li>• Whether or not the request is specific or general</li> <li>• Time permitted for reply</li> <li>• Nature of records involved</li> </ul>
9	Determine if "greater interest"	<ul style="list-style-type: none"> <li>• Transfer request if another public body has a greater interest</li> </ul>
10	Negotiate the transfer	<ul style="list-style-type: none"> <li>• Forward the file</li> <li>• Notify the applicant that the transfer has occurred</li> <li>• Complete tracking in the CAIR system (computer program to log access requests)</li> </ul>
11	Watch for overlap with the Privacy Act	<ul style="list-style-type: none"> <li>• Contact the applicant to explain and clarify the situation</li> <li>• Protect the applicant's identity by not sharing it with program officials</li> </ul>

12	Estimate/Assess additional fees	<ul style="list-style-type: none"> <li>• May include reproduction fees, surcharges for searches requiring more than 5 hours of work, fees for computer processing time. Advance deposits may be requested</li> <li>• Fee assessment procedure: <ul style="list-style-type: none"> <li>○ record time spent on search and retrieval</li> <li>○ consult with program officials to see if fee will be charged</li> <li>○ if fee is to be charged, contact applicant with estimate, whether deposit is required, if the fee can be reduced by viewing records in person, and requester's right to complain to the Information Commissioner</li> </ul> </li> <li>• Fees not charged for reviewing documents to determine if they are exempt, filing records, providing facilities for processing or public access, shipping records, or for information already searched or prepared for another request</li> </ul>
<b>OR</b>		
12	Waive/Reduce fees on case by case basis	<ul style="list-style-type: none"> <li>• May be waived/reduced due to financial hardship to the requester, public interest, timeliness of response to the requester, and whether fee would be less than it would cost to administer the fee</li> <li>• Record reasons for waiver, refund or reduction of fees</li> <li>• Track the time spent in processing after decision to waive fee has been made</li> </ul>
13	Observe time frames, delays and extensions	<ul style="list-style-type: none"> <li>• Basic 30-day limit to respond once request is received</li> <li>• Extension possible if request involves a large number of records or searching through a large number of records and meeting the 30-day limit would unreasonably interfere with operations; extra-departmental consultations are required that cannot be reasonably completed within the 30 days; or third party notification is required</li> <li>• Notify requester of extension, reasons for it, and right to complain to Information Commissioner</li> <li>• Notify Commissioner of extension if it exceeds 30 days</li> </ul>
14	Search the requested records	<ul style="list-style-type: none"> <li>• 'Records' defined broadly under the Act: software needed to read a machine readable record, published material available to the public, and Cabinet confidences are excluded</li> <li>• Records under control or custody of a government institution are subject to search – includes records held outside Canada, records merely physically possessed by government, or held elsewhere on the</li> </ul>



		government's behalf
15	Establish if other legislation applies to override the Act and conduct paramountcy analysis	
16	Apply the relevant exemptions to disclosure, including severing	<ul style="list-style-type: none"> <li>• Exclusions (records outside scope of Act)</li> <li>• Mandatory exceptions</li> <li>• Discretionary exceptions</li> <li>• Look for situations where severing exempt or excluded material can maximize disclosure</li> </ul>
17	Prepare your response	<ul style="list-style-type: none"> <li>• Documents for disclosure, with notations of severances and reasons for them, or</li> <li>• Grounds for withholding the requested materials and any other necessary explanation</li> </ul>
18	Submit recommendations for approval according to departmental procedure	
19	Notify the requester of decision, reasons and right to appeal	
20	Be prepared to advise your organization and defend your decision in any resulting reviews or appeals	

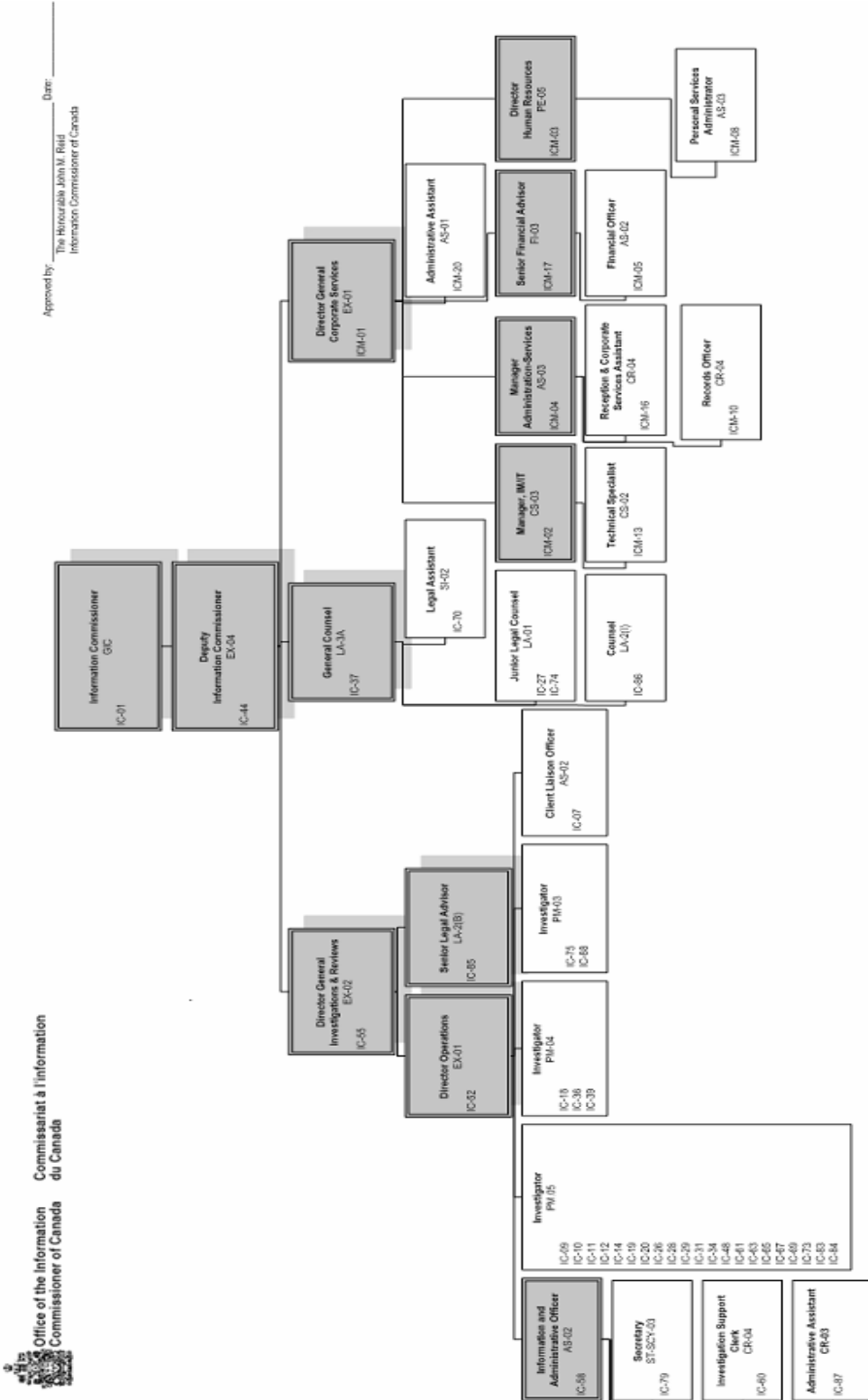
## SCHEDULE C

### PROCESS OF A COMPLAINT: Investigation

Step	Action	Considerations
1	Establish Validity	<ul style="list-style-type: none"> <li>• Is it in writing?</li> <li>• Is it within one year of original request?</li> <li>• Is complaint about matters within Commissioner's jurisdiction?</li> </ul>
2	Open the investigation	<ul style="list-style-type: none"> <li>• Create a file</li> <li>• Assign an investigator</li> <li>• Acknowledge the complaint by letter to applicant</li> </ul>
3	Clarify complaint, if necessary	
4	Create and send Summary of Complaint to government institution	
5	Determine mode of investigation	<ul style="list-style-type: none"> <li>• Formal or informal?</li> </ul>
6	Create investigation plan	<ul style="list-style-type: none"> <li>• Tasks</li> <li>• Information required</li> <li>• Time frame</li> </ul>
7	Engage in representations	<ul style="list-style-type: none"> <li>• Ongoing process of meeting with parties, hearing statements, providing feedback to confirm statements Use good listening skills to earn trust</li> <li>• Maintain confidentiality; disclose only what is necessary to ground findings</li> </ul>
8	Draw conclusions	<ul style="list-style-type: none"> <li>• Check with all parties, including complainant, to ensure accuracy of conclusions</li> </ul>
9	Make Report of Findings	<ul style="list-style-type: none"> <li>• If no breach of Act found, file closed marked 'not substantiated'</li> <li>• If breach of Act resolved, file closed marked 'resolved'</li> <li>• If breach of Act found and unresolved, recommend method to resolve complaint and deadline to implement method before Commissioner takes court action</li> </ul>
10	Respond to government institution's response	<ul style="list-style-type: none"> <li>• Report to complainant</li> <li>• Send final letter to institution's Access to Information Coordinator evaluating strengths and weaknesses encountered in investigation and solutions reached, reference to Report of Findings, arrangements for returning institution's documents</li> </ul>
11	Go to court, if necessary	<ul style="list-style-type: none"> <li>• Must have consent of complainant</li> </ul>

# SCHEDULE D

## Organization of the Canadian Office of the Information Commissioner



Approved by: \_\_\_\_\_ Date: \_\_\_\_\_  
The Honourable John M. Reid  
Information Commissioner of Canada

Office of the Information Commissioner of Canada  
Commissariat à l'information du Canada

NDMS # 9714

## SCHEDULE E

### The Investigative Process

#### B. Demystifying the Investigative Process

The *Access to Information Act* confers upon the Information Commissioner broad discretion to select the procedures by which investigations are conducted. This discretion recognizes the need for a body charged with conducting investigations of complaints against government institutions to have flexibility in its choice of investigative methods, styles and approaches. Investigative flexibility is required to respond effectively to variations in:

- Types of complaints;
- Complexity of the factual or legal issues;
- Potential negative impact on individuals;
- Likelihood of related court proceedings;

- Level of cooperation from government institutions, witnesses and complainants; and
- Availability of resources.

While recognizing the need for such flexibility, the Information Commissioner also recognizes the importance of assisting all parties involved in investigations to better understand what procedural options are open to the commissioner and the circumstances in which they are likely to be used.

#### Informal Process

The investigative method of choice for fact-finding (used in well over 90 percent of investigative activities) is the **informal interview** conducted by an investigator delegated for the purpose by the commissioner. Informal interviews are pre-arranged at mutually convenient times, face-to-face or by telephone, at venues usually

chosen by the interviewees. Such interviews are not conducted under oath. Informal interviews are rarely recorded and never without the knowledge of the interviewee.

In the informal interview process, investigators take care to ensure that interviewees are interviewed in private and out of the presence of others (including co-workers, supervisors and legal representatives of the employer). Only if an interviewee asks to be accompanied by others, and only if the investigator is convinced that the others will assist the investigation and not impede the candor of the interviewee, will others be permitted to be present during an informal interview.

The informal investigative method of choice for obtaining representations from complainants and government institutions is a combination of interviews (face-to-face or telephone) and exchanges of letters. With respect to obtaining the representations from heads of government institutions, investigators deal directly with the official delegated by the head of the institution to provide representations to the commissioner.

This description of the informal investigative process should be read in conjunction with the commissioner's **Quality of Service Standards for Investigations** which are set out at pages 54 to 58.

### **Guidelines for Formal Investigations**

When the Information Commissioner is of the view that evidence or representations should be offered "on the record", the investigative process may become more formal. Situations

which may trigger a more formal process include:

- 1) Lack of cooperation by a witness/departmental official with the informal process (i.e. failure to agree to an interview time; failure to appear for interview; refusal to answer a question; insistence on a formal, on-the-record process; refusal to provide records; inappropriate behaviour);
- 2) Presence of circumstances (such as, for example, allegations of wrongful destruction of records) which may give rise to a finding, comment or recommendation which is adverse to an individual;
- 3) The existence of conflicting evidence and issues of credibility;
- 4) Potential that judicial proceedings may ensue;
- 5) Insistence by a witness that he or she be accompanied by counsel; and
- 6) The need to ensure that a witness fully understands the nature, quality and gravity of the evidence which they have offered informally.

In the formal process, evidence is taken during a proceeding conducted by a presiding officer delegated for the purpose by the Information Commissioner. Formal proceedings are arranged by invitation, at a mutually convenient time. Only if it is not possible to secure the witnesses' participation voluntarily will a subpoena be issued to compel attendance. Usually, formal proceedings are conducted on the premises of the Information Commissioner. The formal proceeding is recorded (usually audio only, although audio-visual recording may be made to facilitate investigative

training) and witnesses swear an oath to be truthful and complete in their evidence. Witnesses may be accompanied by counsel but not by co-workers, supervisors or representatives of the witness's employer. Evidence may be received from more than one witness during a proceeding if the presiding officer is satisfied that a panel of witnesses would assist the investigation and all witnesses agree to be interviewed in the presence of the others.

The presiding officer conducts all aspects of the proceeding including the conduct of the questioning and ruling on procedural and evidentiary issues. The presiding officer may be assisted by counsel and investigative staff during the proceeding. The presiding officer is not constrained by the rules of evidence applicable to the courts and, hence, may require evidence on any matter he or she considers relevant to the full investigation and consideration of the complaint(s).

#### **i) Role of Counsel**

Lawyers have no greater role or rights during a formal proceeding than would counsel for a witness in a civil judicial proceeding or a proceeding before a commission of inquiry.

During the formal proceeding, witnesses and their counsel are asked to communicate only with the presiding officer and not with each other. Should either the witness or counsel wish to communicate with each other, the presiding officer will ordinarily agree to such a request and will adjourn for the purpose of permitting the witness and counsel to have a private communication.

It is not the role of counsel to examine his or her witness. However, at the

end of the questioning by the presiding officer, counsel may ask the presiding officer for permission to put questions to the client--a request which, ordinarily, will be granted.

Counsel will not be permitted to represent a witness if the counsel also represents other witnesses or the witness's employer, unless it is reasonably possible--by means of confidentiality orders and undertakings--to ensure that the witness has an opportunity to offer evidence "in private" and that the private nature and integrity of the investigation is preserved.

#### **ii) Confidentiality Orders**

The requirement of law that the commissioner's investigations be conducted "in private" entails obligations on all parties involved to maintain confidentiality. From time to time, however, the presiding officer will reinforce the obligation with specific confidentiality orders addressed to the witness, the counsel or both. Such orders may be issued in the following circumstances:

- 1) A witness is accompanied by Crown counsel or by a counsel who also represents other witnesses or the witness's employer. (dealt with above under **Role of Counsel**)
- 2) The evidence of one witness in a prior proceeding is likely to be disclosed by the presiding officer during questions to another witness.
- 3) The integrity of the investigation is served by limiting disclosure of evidence amongst potential witnesses.

It is also as a result of the "in private" requirement for investigations that copies of the tapes or transcripts of

formal proceedings are not given to witnesses. Witnesses (or their counsel) may consult the tapes or transcripts of their own evidence but only on a supervised basis at the premises of the Information Commissioner.

### **iii) Potential Adverse Comment**

During either the formal or informal process, evidence may be presented or discovered which raises the possibility that the Information Commissioner may make comments or recommendations (in his reports to the complainant, the government institution or Parliament) which are negative or adverse towards identifiable individuals. In such cases, any such individual will be (1) notified in writing of the potential of an adverse comment or recommendation; (2) informed of the evidentiary basis for the potential adverse comment or recommendation; and (3) afforded a fair and reasonable opportunity to offer evidence and make representations in response to the notice of potential adverse comment or recommendation.

In no case will the Information Commissioner make findings of criminal or civil wrongdoing against an individual (except in the context of contempt proceedings).

Should the commissioner come into possession of evidence suggesting that a federal or provincial offence has been committed, he is authorized to disclose such evidence to the Attorney General of Canada. If the possible offence is that of perjury, or if it arises under the *Access to Information Act*, the commissioner may refer the matter to the RCMP for criminal investigation.

Last year, the commissioner invoked his powers to order the appearance of

witnesses and production of records, on 7 occasions. This year, 9 orders were issued, as follows:

3 compelled the appearance of witnesses and the production of records

2 compelled the appearance of witnesses

4 compelled the production of records.

In accordance with standard practice, all witnesses who received subpoenas were first invited to cooperate voluntarily. No witness who received a subpoena challenged its legality.

## **SCHEDULE F**

### **Policy on Service Standards**

#### **C. Quality of Service Standards**

In last year's annual report, the view was offered that one of the reasons for the lengthy duration of the commissioner's investigations (in addition to insufficiency of resources) is the slowness by institutions in responding to investigative requests for meetings, explanations and documentation. As well, last year, the commissioner informed government to his intention to develop timelines for investigative activities designed to bring investigations to completion by fixed target dates or "standards". Such timelines and standards were developed, shared with Treasury Board and discussed with the community of access to information coordinators. Having taken into account comments and suggestions made during the consultation process, the commissioner has adopted the following service timelines and standards to guide the work of his investigators and government officials with whom they deal.

#### **Policy on Service Standards**

It is the policy of the Office of the Information Commissioner that every reasonable effort will be made, in cooperation with complainants and government institutions, to complete all "administrative" complaints (delays, fees, language and extensions) within 30 days from the issuance of the notice to the department under section 32 of the Act. With respect to all other complaints (exemptions, exclusions and missing records), every reasonable effort will be made to complete them within 90 days from the date of the issuance of the notice.

In order to achieve these targets, it will be necessary to expect staff of the Office of the Information Commissioner, and staff of government institutions against which complaints are made, to respect certain timelines and processes in their dealings. In excess of 90 percent of investigations are informal (evidence is not taken under oath or recorded, the production of records or witnesses is not compelled by order, original records are rarely required). Consequently, these service standards guide the informal investigative process.

- A. Within five days of being assigned a complaint, the investigator will make every reasonable effort to communicate in person or by telephone with the complainant for the following purposes:
  - i) to make introductions and provide the complainant with information concerning how to contact the investigator;
  - ii) to explain the commissioner's investigative process and the complainant's right to make representations;



iii) to discuss the nature of the complaint to ensure that it is well-understood by the investigator and well-focused by the complainant; and

iv) to obtain all supporting evidence available to the complainant.

B. Based on a review of the wording of the complaint, supporting evidence provided by the complainant and any clarifications provided by the complainant, the investigator will make a determination as to whether or not the complaint constitutes a matter falling within the commissioner's jurisdiction as set out in subsection 30(1) of the *Access to Information Act*. If the investigator determines that the matter of the complaint does not fall within the investigative jurisdiction of the Information Commissioner, the investigator will report the matter to the Information Commissioner with a recommendation that the complainant be so informed. The final decision whether or not the commissioner has jurisdiction to investigate a matter rests with the Information Commissioner.

C. If the complaint concerns a matter falling within the commissioner's jurisdiction, the investigator will formally initiate the investigation by personally serving a notice of intention to investigate, containing a summary of the substance of the complaint (as required by section 32 of the Act), on the delegate of the head of the institution against which the complaint is made. Normally, the delegate receiving the commissioner's section 32 notices is the institution's access to information and privacy coordinator.

D. Investigators and institutional access coordinators are expected to work together to arrange a mutually convenient time, within five days of a request to the coordinator by the investigator, for the initial investigation meeting. The purpose of the initial meeting will be:

- i) to effect personal service of the section 32 notice;
- ii) to ensure that there is a common understanding of the complaint;
- iii) to provide the investigator with the original of the institution's administrative file(s) relating to the processing of the access request(s) to which the complaint relates as well as a copy of the ATIPflow record related to the request(s) to which the complaint relates. The original file will be copied by the investigator on-site or returned to the institution within 10 days after a copy is made.
- iv) to ensure that the investigator has an up-to-date copy of the institution's designation order pursuant to section 73 of the Act;
- v) to obtain copies or originals of all records relevant to the access request(s) in respect of which a complaint of improper denial of access has been made. These records are to be provided in their entirety except in cases where the institution has relied on section 69 of the Act to deny access to the requester and there is appropriate documentation from PCO in the processing file

- E. The purpose of the second investigative meeting between the investigator and the ATIP coordinator will be:
- to address any outstanding information deficiencies;
  - to discuss and finalize the investigator's plan for future steps in the investigation. The investigation plan will include specific dates for completion of investigative steps designed to bring the investigation to a conclusion within the target dates (i.e. 30 days (administrative complaints); 90 days (denials of access)).
- F. The investigator will, after receiving the institution's representations, afford the complainant an opportunity to make representations and to respond to the substance of the institution's representations (subject to the investigator's confidentiality obligations under sections 63 and 64 of the Act).
- G. Within five days of completion of the steps set out in the investigation plan, the investigator will complete and submit to the Information Commissioner a report of the results of the investigation including the investigator's recommendation as to whether the complaint is:
1. not well-founded
  2. resolved
  3. well-founded with recommendations to the head of institution for remedial action.

The investigator's report will, when warranted, specify reasons why the 30-

day or 90-day service standard was not met.

## The Investigation Plan

Since it is the role of the Information Commissioner to conduct independent, thorough investigations, it is essential to avoid the reality or appearance that government institutions control how investigations of complaints against them will be conducted.

Nevertheless, it is also important to make investigations as efficient as possible by securing, informally, the cooperation of institutions in assisting investigators in fact-finding, obtaining representations and finding solutions. It is for this latter purpose that investigators will discuss, with ATIP coordinators, certain elements of their investigation plans. In rare cases, where there may be allegations of wrongdoing, issues of credibility or special confidentiality requirements, investigators may choose to refrain from sharing elements of the investigation plan with ATIP coordinators.

Ordinarily, the investigator seeks the agreement of the ATIP coordinator to facilitate specific activities within specific times. The elements of the investigation plan for which timelines are to be discussed and agreed upon at the second investigative meeting include:

1. interviews with officials;
2. provision of additional records to the investigator;
3. provision by investigator to ATIP coordinator of his or her analysis of the merits of the position of the institution;

4. provision by the designated official to the investigator of representations in support of his or her decisions;
5. provision by the investigator to the designated officials of a proposal for resolution (subject to the approval of the Information Commissioner);
6. provision by the designated officials to the investigator of a response to the investigator's proposed solution; and
7. when relevant, a statement of reasons why it was not possible to agree on times which permit the investigative activities in the plan to be completed within the 30-day or 90-day service standard.

The Information Commissioner recognizes that the ability of his office, and government institutions against which complaints are made, to meet these investigative service standards will depend on adequate resources, efficient processes, as well as mutual cooperation, respect and goodwill. Experience will be carefully monitored in consultation with Treasury Board Secretariat. If service standards cannot be met, early action will be taken to address the causes.

## SCHEDULE G

### Case Report Example

#### *To shred or not to shred* (03-99)

##### **Background**

During the reporting year, the Senate Standing Committee on Agriculture and Forestry undertook an inquiry into the safety of the bovine growth hormone Nutrilac (rBST). For almost 11 years Health Canada has been considering whether or not to approve rBST for use in Canada. Consequently, much of the Senate Standing Committee process involved assessing Health Canada processes, considering the state of scientific knowledge and interviewing Health Canada (HC) officials and scientists.

In the course of the review, the Committee was denied access to some information it requested from HC. As a result, a special assistant to one of the committee members applied under

the *Access to Information Act* for access to the withheld record as well as to the records relevant to rBST.

After receiving HC's response, which exempted portions of the records, the special assistant complained to the Information Commissioner about three matters. First, she alleged that additional records must exist. Second, she objected to the fact that HC had applied exemptions to the bulk of the records she requested. Third, she expressed concern that some records relevant to rBST may have been improperly shredded. An unnamed source had reported to the senator's office that there was an unusually high level of shredding activity in Health Canada's Bureau of Veterinary Drugs. The shredding was alleged to have occurred in the days immediately following allegations by scientists, before the Committee, that management of HC had interfered with their work.

##### **Legal Issues**

Since the requester made public the commissioner's report of the results of this investigation, the verbatim text may be made public here. It is as follows:

I write to report the results of our investigation of your complaints made under the *Access to Information Act* (the Act) against Health Canada (HC) concerning your request for records relating to the rBST (Nutrilac) GAPS Analysis Report and Review Team meetings.

You complained about three separate matters concerning your request for records relating to the



drug Nutrilac (rBST). First, you complained that you had not been given access to all the records you had requested in an access request dated June 1, 1998. Second, you complained about exemptions applied by HC to the records provided to you in response to your access request. Third, you complained of possible wrongful destruction of rBST-related records. I will address each matter separately.

1. Completeness of response:

You expressed particular concern about the department's failure to provide you with a copy of the audio recordings of the Gaps Analysis Review Team meetings when HC responded to your June 1 access request.

The investigation has satisfied me that the audio recordings were relevant to your access request and they should have been processed and provided to you, subject to applicable exemptions. Your request was given a narrower interpretation than necessary. During the investigation, the tapes were transcribed and reviewed under the Act. The accessible portions were made available to you on December 23, 1998, when the record was placed on the Health Canada website.

I hasten to add that the investigation has also satisfied me that the failure to disclose these audio tapes was not part of a deliberate cover-up or bad faith

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attempt to suppress information concerning rBST. The audio tapes were identified as relevant to an access request received at HC nine days after receipt of your request. In other words, there was no general effort to conceal these audio tapes from the right of access.

In addition to the audio tapes, other records relating to rBST were also overlooked by HC in responding to your June 1 request. Some were recently located in the possession of Dr. Lambert, a scientist in the Bureau of Veterinary Drugs (BVD) and others were located elsewhere in the Food Directorate.

The investigation showed that your request was initially answered based upon a search for records concerning rBST held in the central registry of the BVD. A restricted search of that nature was inadequate given the rudimentary state of the records management system in the BVD.

These additional records are currently being reviewed for possible application of exemptions, prior to disclosure to you. I am assured that the review will be completed expeditiously. As well, HC has accepted my recommendation that you will not be charged fees for the additional disclosures.

I have also reminded HC that, consistent with the purpose clause of the Act, access requests should be given a liberal interpretation. Where there is doubt, there should

### 3. Improper records destruction

On October 28, 1998, you complained about the possibility of records being destroyed which were relevant to your access request and/or the Senate Committee on Agriculture and Forestry hearing into rBST-related issues. In particular, you alleged that an unusually high level of shredding activity occurred in the BVD on October 23, October 26 and October 27. Specific allegations were made that Dr. Lachance's secretary and Drs. Alexander and Yong had been observed making frequent trips to the shredder during these days.

In view of the seriousness of these allegations, I dispatched officials immediately to commence our investigation by meeting with the Deputy Minister of Health and other senior HC officials. Those meetings took place on October 28 and were followed by others in the intervening days. At my request, all employees of HC were instructed to cease all disposal and destruction activities relating to rBST records.

To establish the facts, my investigator interviewed all BVD scientists and managers, as well as other relevant BVD office staff members to determine:

- Who was on BVD premises on October 23, 26 and/or 27;
- if anyone did shredding in BVD on those days;
- if yes, who did the shredding, and who saw them;
- what records were shredded, if any, and why;

- if the records destruction was in conformity with government information management policies;
- whether the shredding activities within BVD were higher than usual on those three days;
- whether anyone was asked to shred rBST records on behalf of someone else;
- whether anyone saw a high volume of powder residue at the shredder; and
- whether any rBST records are missing.

In addition to the interviews, officials from my office:

- Interviewed other senior managers within HC and the Health Protection Branch;
- tested the BVD shredder and inspected it, its work area and the BVD shredding bin;
- took possession of the original audio tapes and copies of all rBST records under the custody of Dr. Alexander;
- obtained copies of notes relating to the Daily Issues Management Committee meetings from individuals attending rBST-related sessions;
- obtained various listings of rBST and Monsanto-related files;
- reviewed hundreds of rBST-related records; and
- noted the physical security measures in place within BVD.

As a result, I make the following findings of fact:



- 1) Shredding of records did occur in the BVD during the period October 23-27, 1998.
- 2) The amount of shredding (59 pages) was not unusually high and none of the shredding was improper.
- 3) Four documents relating to rBST were shredded being:
  - A 3-4 page draft memo to the Clerk of the Senate Committee which had been printed for proof-reading purposes.
  - A 17-page copy of the October 22 Senate transcripts of the rBST hearing.
  - Two documents totalling 33 pages relating to the CODEX Committee. The documents had been printed to be reviewed and remain intact in electronic form.
- 4) Some 5 pages of records, unrelated to rBST, were also shredded during the same period.
- 5) No official of HC, at any level, has taken any deliberate step to interfere with your right of access to rBST records.

For the foregoing reasons, I find your complaint about wrongful destruction of records to be not substantiated.

In conclusion, I wish to thank you, the Deputy Minister of Health and all those who assisted my office in the conduct of this investigation, for the helpful representations provided and the respectful cooperation extended to my office.

### **Lessons Learned**

This case demonstrated both the practical and legal problems which can occur when access requests are given an overly narrow interpretation. When the department decided that the audio recordings of the GAPs Analysis Review team meetings need not be provided so long as the GAPS Analysis Report was provided, it set an unfortunate and unnecessary train of events in motion. It earned the distrust of the requester who heard from elsewhere (as is often the case) that additional records concerning rBST exist. Legally, of course, the department also exposed itself, because the law is clear that access requests are to be given a liberal interpretation.

As for the allegations of improper record destruction, the main lesson is that not all shredding is improper. Where there is an atmosphere of discontent and distrust in any workplace, even innocuous shredding activity can be misinterpreted. Having a good understanding of government records retention and disposal requirements is essential for all employees to prevent them, even by inadvertence, from destroying a record which may have archival value or may be relevant to a current access to information request.

Perhaps the most important lesson from this case is the degree to which the right of access depends on good records management practices. If departments don't know what records they hold or where they are filed, they

cannot respond completely and efficiently to access requests. This is an area of responsibility which the Act specifically gives to the President of Treasury Board and all departments need the Board's leadership in addressing the poor state of records management in the federal government.