



Information
Commissioner
of Canada

Commissaire
à l'information
du Canada

ANNUAL REPORT

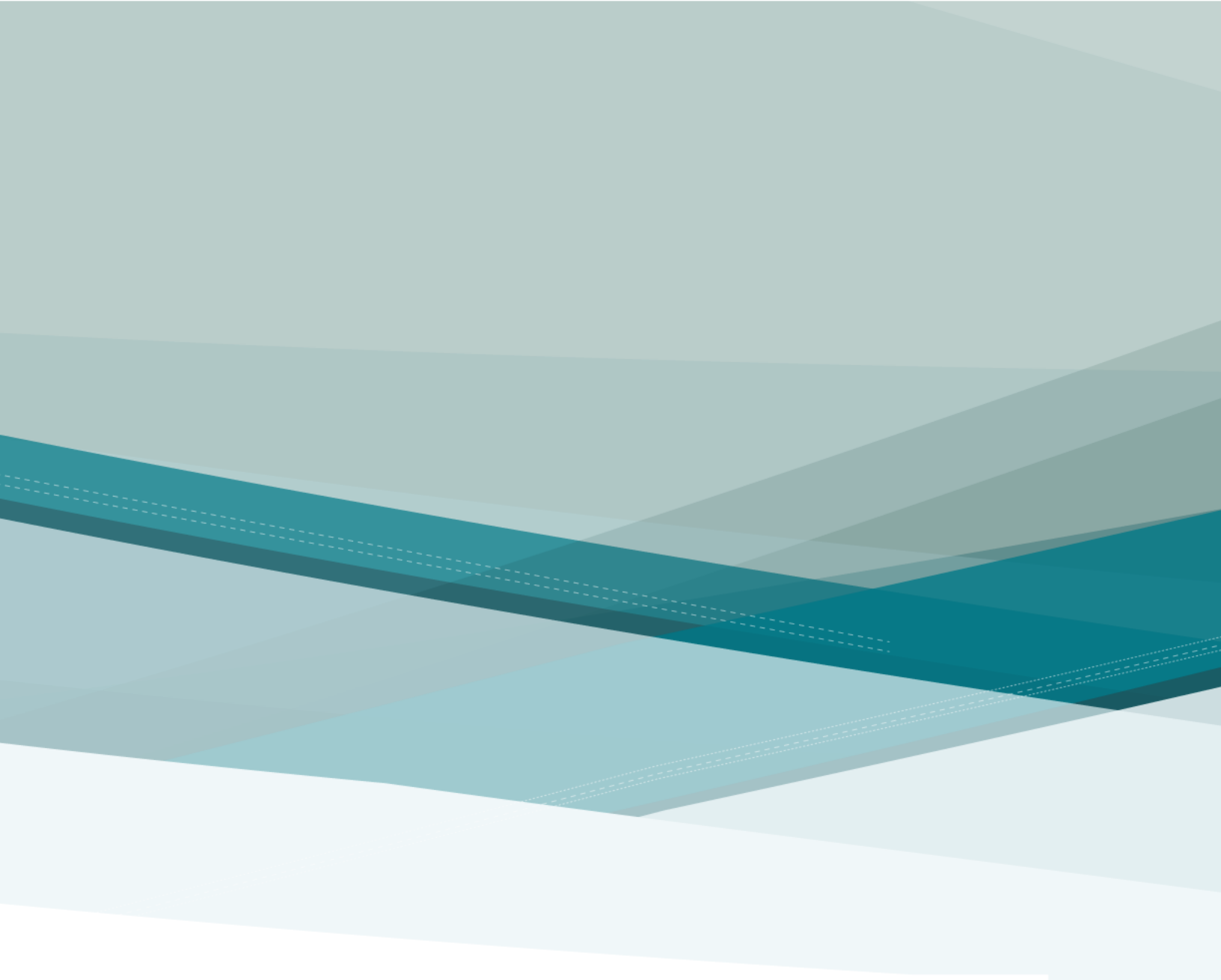
[2014–2015]

Respect

Excellence

Integrity Intégrité

Leadership

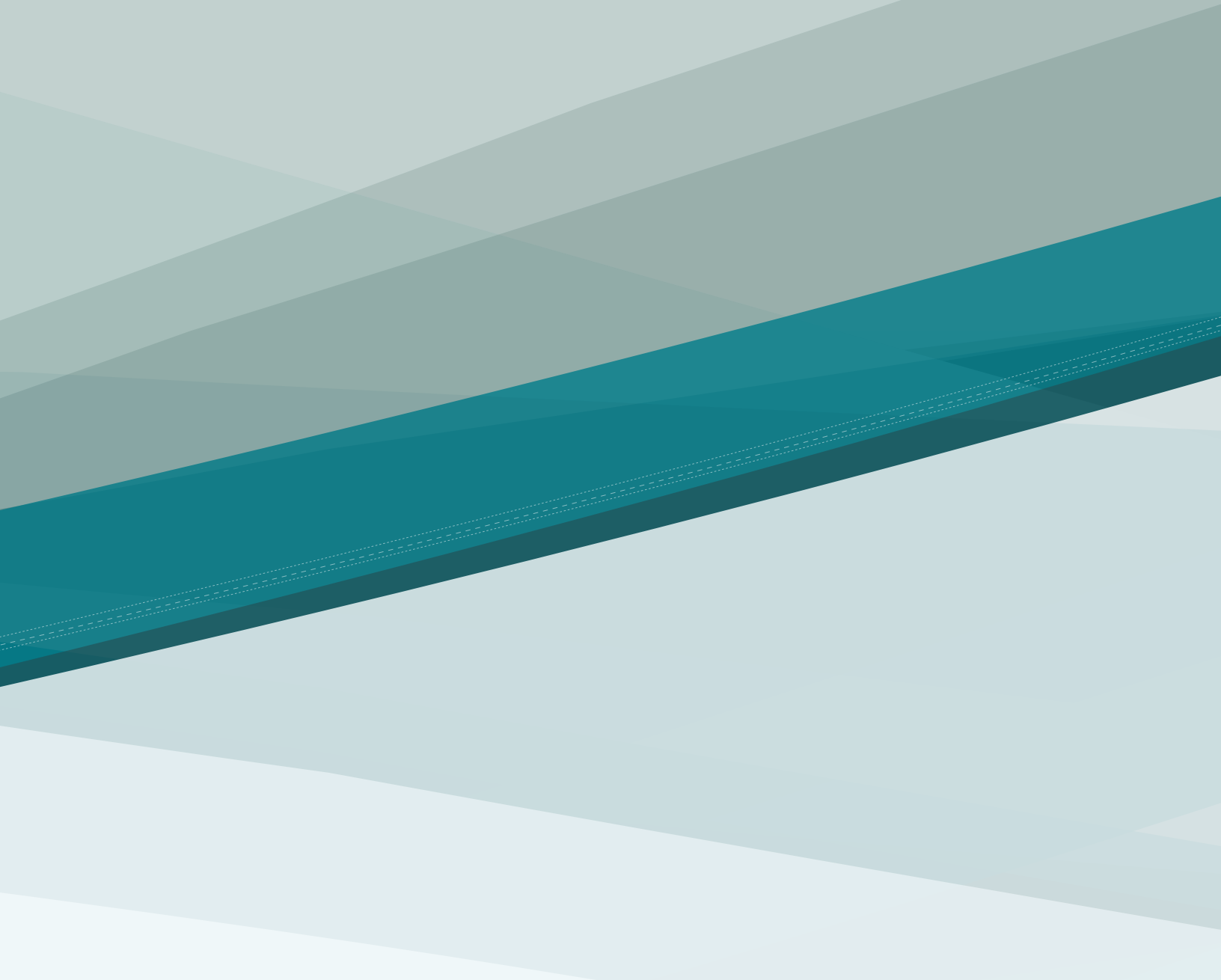


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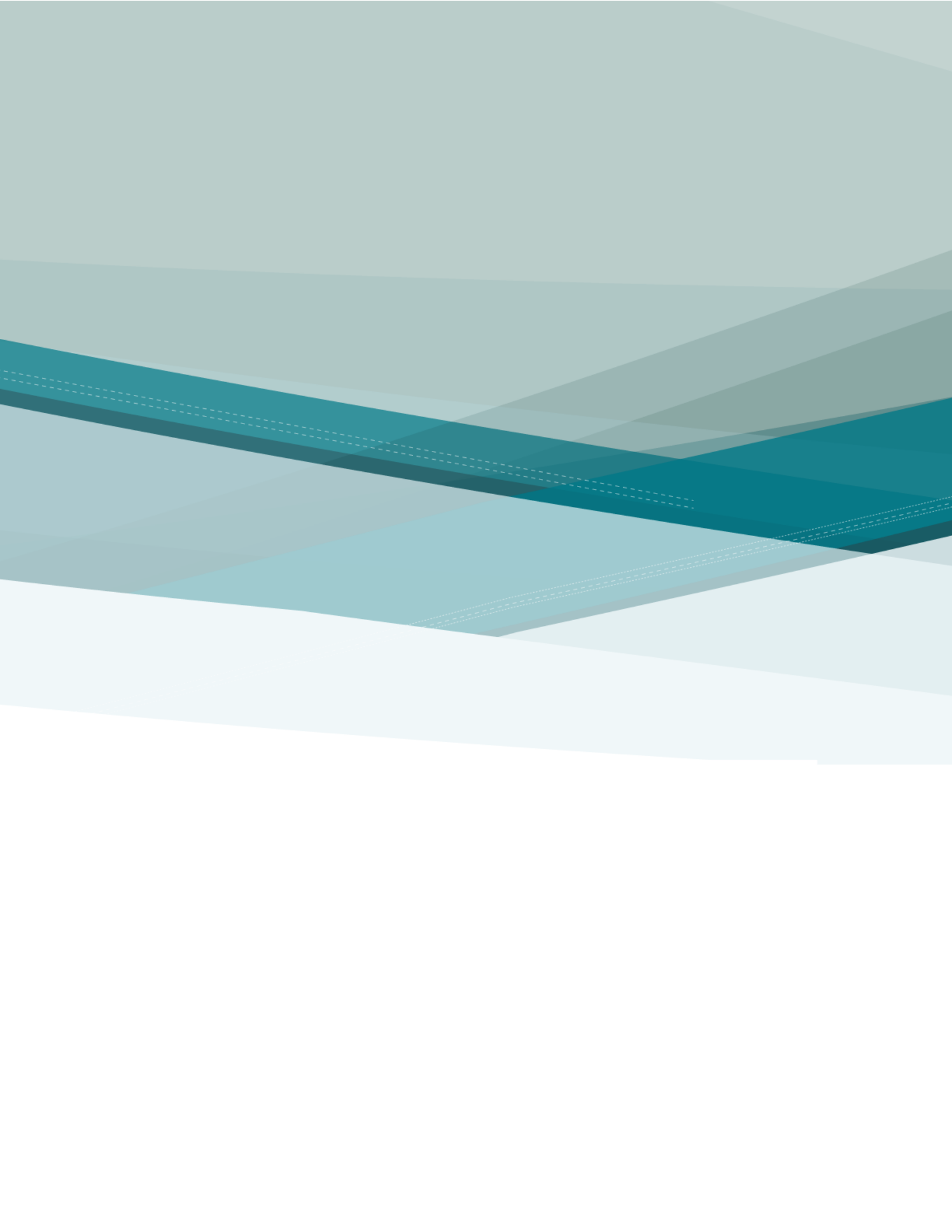
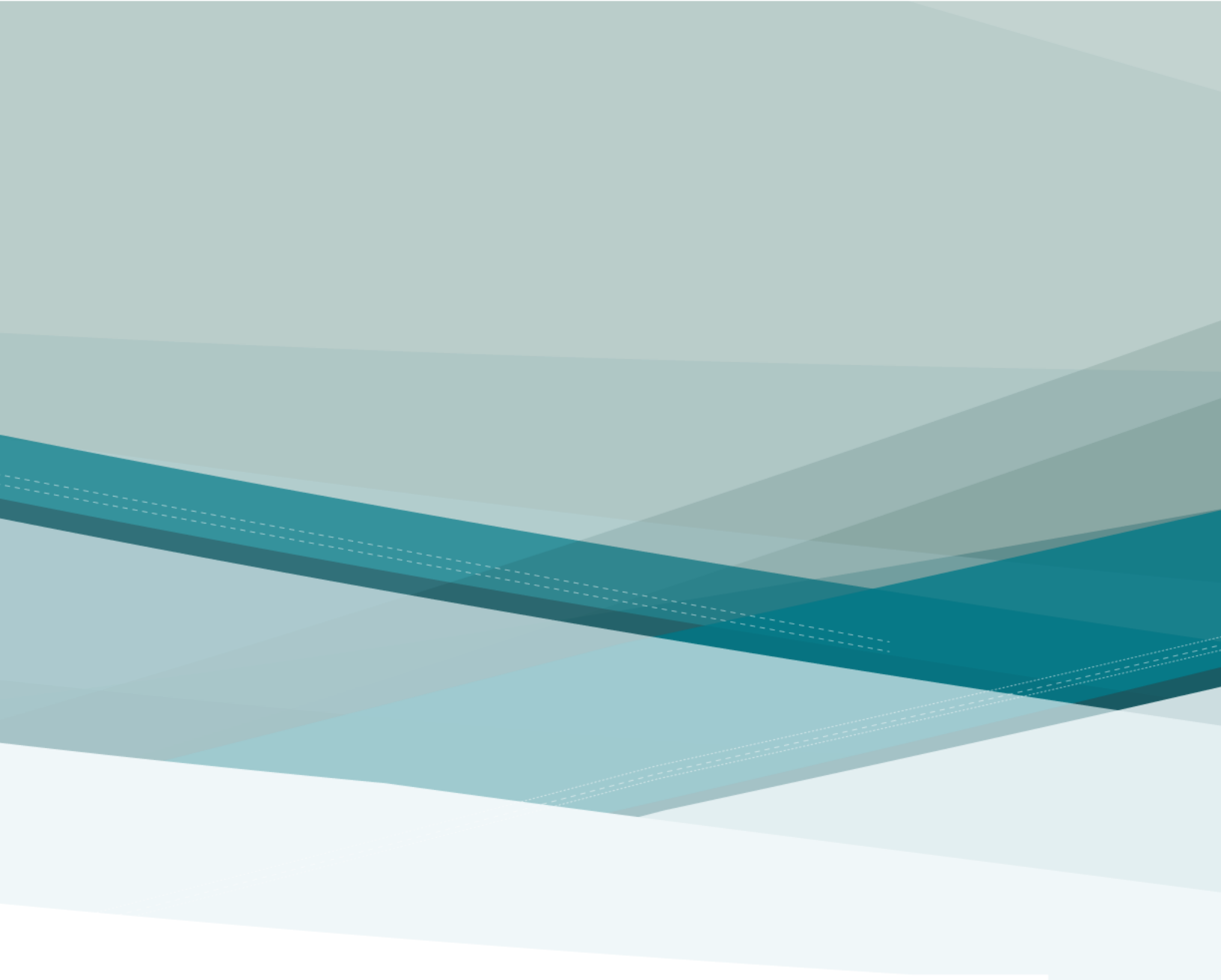


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Message from the Commissioner



The year 2014–2015 was probably one of the most challenging of my mandate to date. Significant advances were achieved but equally significant regressions also occurred.

First with the positive.

As Canadians, we continue to benefit every day from the results of access to information requests, as is reported daily in the country's public record, be it in traditional or digital media.

The Federal Court of Appeal brought much-needed discipline to the use of time extensions that institutions can claim before responding to requests. Similarly, the Federal Court clarified that government institutions cannot charge fees to requesters for electronic records.

This year, I tabled a special report in Parliament on modernizing the Act to outline the progressive norms in access to information. This followed my recommendations to the government on its second action plan on open government. Although the government is committed to developing a culture of openness within federal institutions, it, unfortunately, continues to refuse to conduct a comprehensive review of the antiquated *Access to Information Act*. The government still does not see the necessity of adopting an integrated vision to ensure a successful open government initiative and a real change of culture toward openness.

The continued refusal to properly fund the Office of the Information Commissioner has led to an increased backlog of complaints, which can only be described as a concerted effort to deny Canadians' right to timely review of government decisions on disclosure.

The most extraordinary regression of access to information rights, however, resulted from the passage of Bill C-59, the *Economic Action Plan 2015 Act, No. 1*. This new legislation contains retroactive amendments to the *Ending the Long-gun Registry Act* that excludes the application of the

Access to Information Act to long-gun registry records. The effects of this Act include nullifying a request for these records and subsequent complaints made to my Office, as well as my entire investigation, recommendations to the Minister of Public Safety, and the requester's ability to seek judicial review from the Federal Court. Essentially, this Act attempts to rewrite history so that the requester's right to seek this information never existed. The Act also retroactively immunizes Crown servants from any finding of administrative, civil or criminal wrongdoing in relation to the request and destruction of the registry records. With the consent of the complainant, I filed an application for judicial review in Federal Court against the Minister of Public Safety and Emergency Preparedness pursuant to section 42 of the *Access to Information Act* in relation to my investigation into an access to information request for the Long-gun Registry. This application has been stayed while the Superior Court of Ontario is considering my application challenging the constitutionality of the *Ending the Long-gun Registry Act* as amended by the passage of Bill C-59.

Throughout this challenging year, the team at the Office of the Information Commissioner came together like never before to support the Commissioner's actions to protect Canadians' quasi-constitutional right of access to government information. They demonstrated resolve, courage, and the highest level of integrity: resolve to continue their important work for Canadians in the face of significant resistance, courage to stand with the Commissioner and demand that the government act at all times in the name of transparency and accountability, and integrity to stand up to attempts to subvert the law of the land and retroactively deny Canadians' right of access. I am profoundly grateful for their support.

Highlights

This annual report sets out the activities of the Information Commissioner of Canada in 2014–2015. This chapter highlights noteworthy examples of the Commissioner’s investigations under the *Access to Information Act* and other related activities.

Access to information: Freedom of expression and the rule of law

In the fall of 2011, the government introduced a law to end the national long-gun registry, the *Ending the Long-gun Registry Act* (ELRA). This law required that all long-gun registry records be destroyed. Although the provisions of ELRA authorizing the destruction of these records specifically excluded the application of the *Library and Archives Act* and the *Privacy Act*, these provisions were silent with respect to the *Access to Information Act*.

In March 2012, an access request was made for the records in the registry. In April 2012, Parliament passed ELRA.

The Commissioner wrote to the Minister of Public Safety in April 2012 informing him that any records under the control of the **Royal Canadian Mounted Police** (RCMP) for which a request had been received before ELRA came into force were subject to the right of access. The records should therefore not be destroyed until a response had been provided to the requester and any related investigation and court proceedings were completed. The Minister of Public Safety assured the Commissioner that the RCMP would abide by the right of access (<http://bit.ly/1f8Yesv>).

In January 2013, the RCMP responded to the request for the data in the registry. The requester then complained to the Commissioner about this response, alleging, among other things, that the response was incomplete. During her investigation in response to this complaint, the Commissioner learned that the majority of the long-gun registry records had, in fact, been destroyed. (The long-gun registry records relating to Quebec residents were maintained due to ongoing litigation.)

On March 26, 2015, the Commissioner wrote to the Minister to report that she had concluded that the response to the requester was incomplete. She formally recommended to the Minister that the RCMP process those remaining Quebec records she considered to be responsive to the request.

The Minister declined to follow the Commissioner’s recommendation to process the Quebec records. He did confirm that the RCMP had preserved a copy of the relevant records (<http://bit.ly/1R9UZSA>).

Based on her investigation, the Commissioner was of the opinion that she had information relating to elements of the criminal offence set out in paragraph 67.1(1)(a) of the Act, which prohibits all persons from destroying records with the intent to deny a right of access. Also on March 26, 2015, the Commissioner referred information collected during this investigation relating to the destruction of the registry records to the Attorney General of Canada for possible investigation.

No response has been received from the Attorney General about this referral. However, media reports indicate that the matter has been referred to the Ontario Provincial Police (Toronto Star, “OPP to investigate allegations of RCMP wrongdoing on gun registry data destruction,” <http://on.thestar.com/1HsLOEP>).

In May 2015, the government introduced Bill C-59, the *Economic Action Plan 2015 Act, No. 1*. Included in the bill were retroactive amendments to ELRA. As amended, ELRA would retroactively oust the application of the *Access to Information Act* to long-gun registry records, including the Commissioner’s power to make recommendations and report on the findings of investigations relating to these records. ELRA would also oust the right to seek judicial review in Federal Court of government decisions not to disclose these records. In addition, the legislation would retroactively immunize Crown servants from any administrative, civil or criminal proceedings with respect to the destruction of long-gun registry records or for any act or omission done in purported compliance with the *Access to Information Act*.

The Commissioner finalized her investigation and tabled a special report of her findings to Parliament in May 2015 while Bill C-59 was still before the House of Commons (<http://bit.ly/1FmLSs5>). She also expressed her serious concerns about the measures in Bill C-59 before both a House of Commons committee (<http://bit.ly/1QJyu1o>) and a Senate committee (<http://bit.ly/1GRMnG2>). (See “On the record,” page 47, for an excerpt of her remarks before the Senate committee.)

No changes were made to Bill C-59 as it applied to ELRA after the committees’ reviews. The retroactive amendments became law on June 23, 2015.

Following the tabling of her special report, the Commissioner applied, with the consent of the complainant, to the Federal Court for a judicial review of the Minister’s refusal to release the records she had determined to be responsive to the request. As part of these proceedings, the Commissioner succeeded in obtaining an order from the Court requiring the Minister of Public Safety to deliver the hard drive containing the long-gun registry records for Quebec to the Federal Court Registry. The Government of Canada complied with this order on June 23, 2015.

On May 7, 2015, Bill C-59, the budget implementation bill, was tabled in Parliament. Division 18 of this bill makes the *Access to Information Act* non-applicable, retroactive to October 25, 2011, the date when the *Ending the Long Registry Act* was first introduced in Parliament. These proposed changes retroactively quash Canadians’ rights of access and the government’s obligations under the Act. They will effectively erase history.

It is perhaps fitting that this past Monday marked the anniversary of the publication of George Orwell’s 1984 and I quote: “Everything faded into mist. The past was erased, the erasure was forgotten, the lie became truth. Every record has been destroyed or falsified...History has stopped. Nothing exists except an endless present in which the Party is always right.”

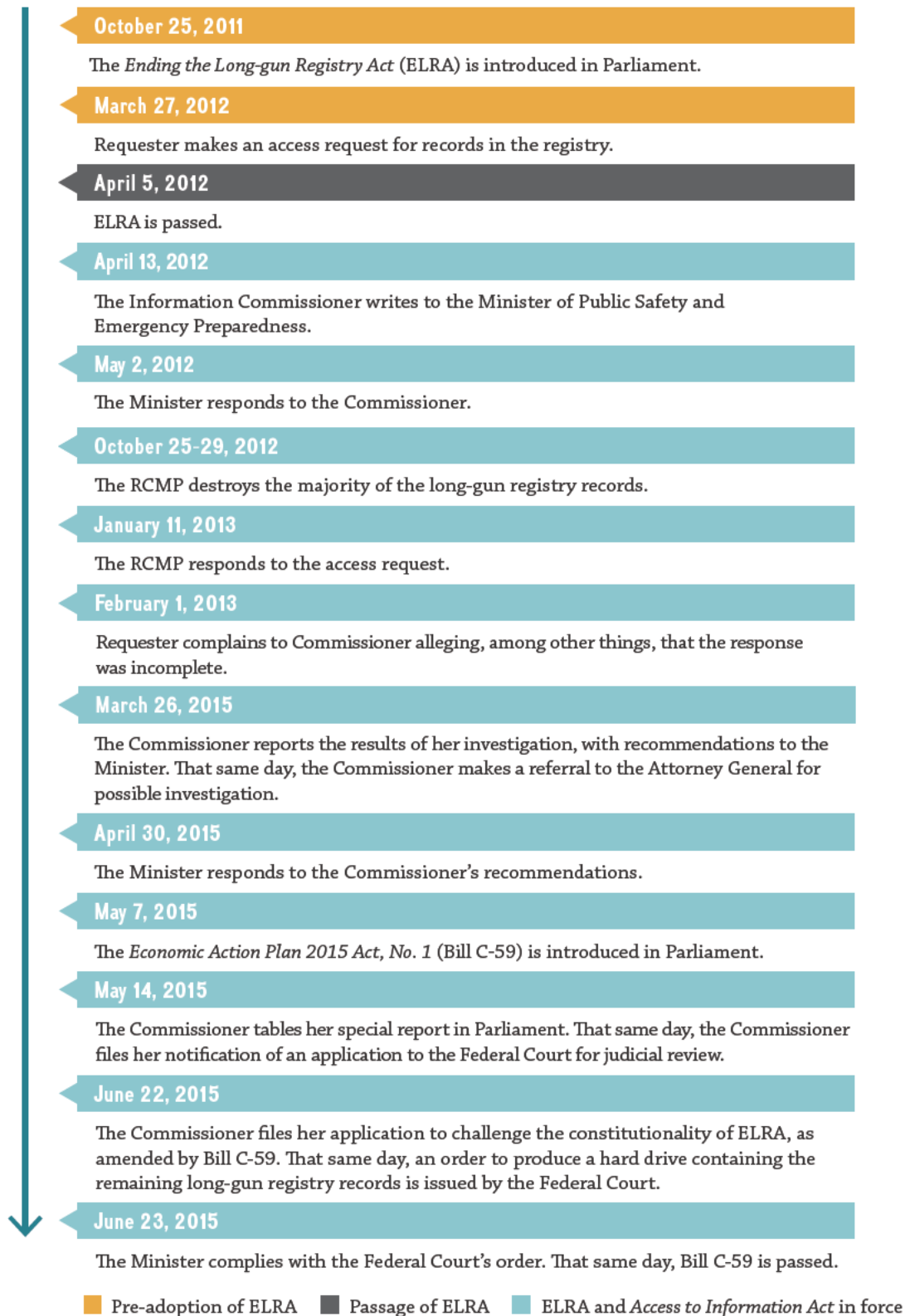
If Bill C-59 passes as is, and it looks like it will, all records related to the destruction of the long gun registry will go through the Memory Holes of the Records Department of the Ministry of Truth.”

—Information Commissioner Suzanne Legault, speaking at the Access and Privacy Conference, 2015 in Edmonton, hosted by the University of Alberta’s Faculty of Extension

The Commissioner also filed before the Ontario Superior Court of Justice an application challenging the constitutionality of ELRA as amended by Bill C-59. The Commissioner’s application seeks to invalidate these amendments on the grounds that they unjustifiably infringe the constitutional right of freedom of expression and that they contravene the rule of law by interfering with vested rights of access to this information.

The Commissioner’s application to the Federal Court for a judicial review of the Minister’s refusal to release the records responsive to the request was stayed in July 2015 pending the outcome of her constitutional challenge.

Timeline of long-gun registry investigation



Access to information: Senators' expenses

In 2014–2015, the Commissioner completed three investigations concerning the **Privy Council Office's** (PCO) handling of requests for information related to various senators whose expenses and conduct were reported in the media.

Disclosing only meaningless information

The first investigation looked at PCO's refusal to release 27 of 28 pages identified in response to a request for **"any records created between March 26, 2013 to present (Monday, August 19, 2013) related to senators Mike Duffy, Mac Harb, Patrick Brazeau and/or Pamela Wallin."** In particular, the Commissioner examined PCO's use of section 19 (Personal information), section 21 (Advice and recommendations) and section 23 (Solicitor-client privilege) to exempt whole pages of records.

The Commissioner found that portions of the records did not qualify for the claimed exemptions and that PCO also had not reasonably exercised its discretion to release information, bearing in mind relevant factors such as the public interest. She wrote to the Prime Minister (who is the "minister" of PCO) recommending that a significant amount of additional information be released.

PCO, on behalf of the Prime Minister, declined to implement the Commissioner's recommendations, claiming that protection of the information "is appropriate." However, PCO did agree to reassess the records with a view to severing and releasing any information it determined could be disclosed. As a result of this reassessment, small portions of information were released (see box, "Meaningful disclosure?" for a description of what was disclosed). PCO claimed, however, that this release of information was not required under the Act, because the information was "not intelligible, meaningless, or may be misleading."

The information that was severed and released indicates that the records at issue consist of memoranda to the Clerk of the Privy Council, correspondence to and from the Clerk, a memorandum for the Prime Minister, signed and unsigned correspondence, a record of decision, and email exchanges to and from PCO officials. However, the substance of these documents remains protected.

Meaningful disclosure?

PCO agreed to sever and disclose the following types of information:

- signatures of public servants who had consented to their signatures being disclosed;
- date stamps;
- letterhead elements;
- Government of Canada emblems;
- the words "Dear" and "Sincerely"; and
- Document titles: "Memorandum for the Prime Minister", "Memorandum for Wayne G. Wouters" and "Decision Annex."

However, PCO refused to disclose the substance of the records. The Commissioner will seek the consent of the complainant to apply for a judicial review of PCO's refusal of access.

Accessing records in the Prime Minister's Office

PCO received a request for all records related to Senator Mike Duffy's and Senator Pamela Wallin's expenses for a particular time period. PCO responded that no such records existed. The requester complained to the Commissioner about this response.

During her investigation, the Commissioner asked PCO to carry out further searches within the institution, with the same result: no responsive records existed.

As a result of media reports outside the context of the Commissioner's investigation, she learned that the email accounts of some departing PMO employees involved in the payment of Senate expenses that she had been told had been deleted had been saved as part of ongoing litigation on another matter (CBC News, "Senate scandal: Benjamin Perrin's PMO emails not deleted," <http://bit.ly/1MaBDs6>). The Commissioner followed up with PCO to determine whether these records were included in its searches. She ascertained that when the request was received, the Prime Minister's Office (PMO) was not asked whether it had any records responsive to the request.

In response to the Commissioner's inquiries, the relevant emails that were subsequently located within the email accounts of the departing PMO employees were disclosed to the Commissioner. Upon review, the Commissioner determined that these emails were not accessible under the Access to Information Act, since the Commissioner determined that these records did not meet the test for control as set out by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence) et al.*, 2011 SCC 25 (<http://bit.ly/1fjqb0c>). In this decision, the Court determined that ministers' offices, including the Prime Minister's Office, are not institutions subject to the Act. The Court did acknowledge, however, that some records located in ministers' offices may be subject to the Act. A two-part test was devised for determining whether records physically located in ministers' offices are "under the control" of an institution and therefore accessible under the Act.

This investigation highlights the accountability deficit created by the fact that ministers' offices, including the PMO, are not covered by the Act.

Extending coverage

In her special report on modernizing the Act, the Commissioner recommended a number of measures to expand the coverage of the Act (<http://bit.ly/1GSi1SJ>):

- establish criteria for determining which institutions would be subject to the Act, such as that all or part of the organization's funding comes from the Government of Canada, that the organization is (in whole or in part) under public control or that it carries out a public function;
- extend coverage to ministers' offices, including the Prime Minister's Office;
- extend coverage to bodies that support Parliament, such as the Board of Internal Economy and the Library of Parliament; and
- extend coverage to bodies that provide administrative support to the courts.

Assessing information management and recordkeeping policies

Finally, news coverage about the automatic destruction of the email accounts of departing PMO employees, as well as correspondence to the Commissioner on this issue, prompted the Commissioner to initiate an investigation into PCO's and the PMO's information management and recordkeeping policies. Specifically, the Commissioner intended to investigate whether PCO's stated internal practice of deleting email accounts of departing employees resulted in government records of business value being lost, thus preventing PCO from meeting its obligations under the *Access to Information Act*.

The Commissioner found that PCO and the PMO have a comprehensive suite of policies that align with the requirements of the Act, with the *Library and Archives of Canada Act* and with various Treasury Board policies. However, risks with these policies were identified. The main risk related to employees' knowledge of their responsibilities with regard to the retention, deletion, storage and destruction of emails.

During the investigation, PCO reported that it had addressed these risks through its Recordkeeping Transformation Strategy; its Management Action Plan, which it developed after a 2011 horizontal audit of its electronic recordkeeping; and its three-year Risk-Based Audit Plan. The Commissioner reviewed these three documents and concluded that the measures PCO had put in place had mitigated the risks.

The Commissioner did not investigate the implementation of the policies. However, she did inform PCO that it should regularly audit the activities associated with its information management practices in order to meet its obligations under the Act. She also reported to PCO that it should proactively disclose the results of any audits it carries out related to information management.

Missing records at the Canada Revenue Agency

There have been a number of instances in recent years in which the **Canada Revenue Agency** (CRA) has found additional records during or after the completion of the Commissioner's investigation into missing records complaints.

This issue first came to the forefront after a requester asked CRA for all records relating to the reassessment of her tax return. The requester complained that records were missing from the response she received. During the investigation, CRA informed the Commissioner that the records had been disposed of and could not be retrieved.

After the close of the Commissioner's investigation, the requester sought a judicial review in the Federal Court of CRA's use of exemptions on the records that were released. During these proceedings, CRA retrieved the records it previously said had been disposed of (*Summers v. Minister of National Revenue*, 2014 FC 880; <http://bit.ly/1KiPudD>).

The second instance occurred during judicial review proceedings following the completion of the Commissioner's investigations. The proceedings were initiated by seven numbered companies and were about CRA's refusal to release portions of requested records (3412229 *Canada Inc. et al. v. Canada Revenue Agency et al.* (T-902-13); background: <http://bit.ly/1Dx7Bx0>; see also "Missing records," page 34). After the commencement of those proceedings, the numbered companies alleged that there were additional records responsive to their requests that ought to have been disclosed. Since that time, CRA has released more than 14,000 additional pages.

The companies subsequently asked that the judicial review proceedings be put on hold until, among other things, the Commissioner investigated the possibility that more records existed. This investigation is ongoing.

In a third instance, the Commissioner investigated the release of 57 pages, with some exemptions, related to the audit of a taxpayer. The requester said that more documents should exist. During the investigation, CRA was asked to conduct additional searches and ensure that all the required offices had been tasked. This resulted in CRA disclosing an additional 57 pages to the requester in four supplementary releases, since records were found in each subsequent search.

Almost half of all CRA missing records complaints closed between April 1, 2012 and March 31, 2015, were well founded (in contrast to the overall average of 27 percent for all institutions for the same period). CRA has acknowledged to the Commissioner that it has a serious information management and document retrieval problem when it comes to identifying and retrieving records in response to access requests. The Commissioner has instituted a certification process to provide

Missing records certification process with CRA

To ensure that requesters receive all the records to which they are entitled when making access requests to CRA, the Commissioner, in cooperation with CRA, has instituted a certification process.

Prior to the Commissioner closing a missing records complaint against CRA, the Assistant Commissioner or Director General of the identified branch or sector within CRA must certify that all reasonable steps were taken to conduct relevant searches to identify and retrieve responsive documents.

Since implementing this process in March 2015, the Commissioner has received approximately 20 such certifications.

additional assurances that all records have been properly identified and retrieved (see box, "Missing records certification process with CRA").

The culture of delay

In March 2015, the Federal Court of Appeal found that a three-year time extension taken by **National Defence** to respond to a request was unreasonable, invalid and constituted a deemed refusal of access. The request was for information about the sale of military assets (*Information Commissioner of Canada v. Minister of National Defence*, 2015 FCA 56: <http://bit.ly/1ICAolM>; background, "Extensions of time (under appeal)": <http://bit.ly/1IKG477>).

In its decision, the Court of Appeal first addressed whether the Federal Court had jurisdiction to review a decision by a government institution to extend the limit to respond to a request under the Act. The Federal Court had found that it had no such jurisdiction but the Court of Appeal held that the Federal Court did have jurisdiction.

The determination of the jurisdiction issue involved deciding whether a time extension could constitute a refusal of access. Since the Federal Court's jurisdiction is limited to instances of refusals (sections 41 and 42 of

the *Access to Information Act*), the only route by which to challenge a government institution's time extension is by way of a provision that deems government institutions to have refused access in certain circumstances (section 10(3)).

The Court of Appeal concluded that "a deemed refusal arises whenever the initial 30-day time limit has expired without access being given, in circumstances where no legally valid extension has been taken."

A reading of the Act that would prevent judicial review of a time extension would, according to the Court of Appeal, fall short of what Parliament intended.

The Court of Appeal found that an institution may avail itself of the power to extend the time to respond to an access request, as provided by section 9 of the Act, but only when all the required conditions of that section are met.

The Court stated that "one such condition is that the period taken be reasonable when regard is had to the circumstances set out in paragraphs 9(1)(a) and/or 9(1)(b). If this condition is not satisfied, the time is not validly extended with the result that the 30-day time limit imposed by operation of section 7 remains the applicable limit."

In its ruling, the Court of Appeal declared that "timely access is a constituent part of the right of access."

In determining that the time extension asserted by National Defence was not valid, the Court found that National Defence's treatment of the extension had fallen short of establishing that a serious effort had been made to assess the duration of the extension. It further noted that National Defence's treatment of the matter had been "perfunctory" and showed that National Defence had "acted as though it was accountable to no one but itself in asserting its extension."

This decision is expected to introduce much-needed discipline into the process of taking and justifying time extensions. It makes clear that extensions are reviewable by the Court and sets out standards to be met to justify the use and length of extensions.

The Commissioner will issue an advisory notice in 2015–2016 on how she will implement the Court of Appeal's decision when conducting investigations.

"...it is not enough for a government institution to simply assert the existence of a statutory justification for an extension and claim an extension of its choice. An effort must be made to demonstrate the link between the justification advanced and the length of the extension taken."

Institutions "must make a **serious effort** to assess the required duration, and ... the estimated calculation [must] be **sufficiently rigorous, logic[al] and supportable** to pass muster under reasonableness review." [emphasis added]

—*Information Commissioner of Canada v. Minister of National Defence*, 2015 FCA 56, paragraphs 76 and 79 (<http://bit.ly/1ICAolM>)

Removing a barrier to access: Fees and electronic records

In February 2013, the Information Commissioner referred a question to the Federal Court to determine whether an institution could charge search and preparation fees for electronic documents that were responsive to requests made under the *Access to Information Act* (*Information Commissioner of Canada v. Attorney General of Canada*, 2015 FC 405: <http://bit.ly/1NAcWnJ>; background, "Reference: Fees and electronic records": <http://bit.ly/1MPY7zU>; summary: <http://bit.ly/1IzydOz>).

This was the first time the Commissioner had brought such a reference under subsection 18.3(1) of the *Federal Courts Act*. The Court accepted that a reference under this provision was a valid mechanism for the Commissioner to seek guidance on a question or issue of law.

In the reference proceedings, the Commissioner took the position that "non-computerized records," for which a search and preparation fee could be assessed under the Regulations of the Act, means records that are not stored in or on a computer or in electronic format.

On March 31, 2015, the Federal Court rendered its decision and agreed with the Commissioner's interpretation that electronic records are not "non-computerized records." This means that institutions must not charge fees to search for and prepare electronic records.

The Court did not accept the arguments of the Attorney General and of the intervening Crown corporations that, following a contextual analysis, existing electronic records such as emails, Word documents and the like are non-computerized records.

The Court accepted the ordinary meaning of the words "non-computerized records" as being the correct interpretation of that expression. Its view was that "in ordinary parlance, emails, Word documents and other records in electronic format are computerized records" and records that are machine-readable are computerized.

The Commissioner will issue an advisory notice in 2015–2016 on how she will implement the Federal Court's decision when conducting investigations.

"There is a hint of Lewis Carroll in the position of those who oppose the Information Commissioner:

'[w]hen I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'

'The question is,' said Alice, 'whether you can make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'

—*Information Commissioner of Canada v. Attorney General of Canada*, 2015 FC 405, paragraph 65
(<http://bit.ly/1NAcWnJ>)

Who controls the records?

The Commissioner investigated a complaint that a requester had not received from **Public Works and Government Services Canada** (PWGSC) all the relevant records in response to his request for information about building work carried out in relation to a health and safety complaint. A subcontractor to the principal contractor—the principal contractor was hired by PWGSC to provide building management services—had carried out the work.

Over the course of the investigation, the principal contractor found several batches of relevant records. Although these records were eventually disclosed to the requester, PWGSC claimed that they were not under its control, but rather under the control of the contractor. It asserted that it had no "legal or contractual obligation to retrieve documents" from third-party contractual service providers.

The Commissioner provided PWGSC with formal recommendations about its approach to retrieving records held by third-party contractual service providers, including the following: that PWGSC ensure that all records under its control, whether or not they are in its physical possession, are retrieved and processed in response to requests; that policies and supporting training to employees be implemented explaining the issue of control as it applies to contractors; and that PWGSC ensure that all contractors are aware of the requirements of the Act.

In its response to the Commissioner's recommendations, PWGSC continued to maintain that the determination of whether PWGSC has control of a record held by a third party is established, in part, by determining whether it has the "legal or contractual obligation to retrieve documents." The Commissioner has told PWGSC that this restrictive definition is inconsistent with the Supreme Court of Canada's decision about the control of records and is inconsistent with accountable and transparent delivery of PWGSC's provision of real property services.

This issue remains outstanding between the Commissioner and PWGSC, although PWGSC has agreed to continue to work with the Commissioner to reach a solution for future requests.

Recommendations for transparency

On March 30, 2015, the Commissioner released a special report to Parliament called *Striking the Right Balance for Transparency* (<http://bit.ly/1Ce7y8W>). In this report, the Commissioner describes how the *Access to Information Act* no longer strikes the right balance between the public's right to know and the government's need to protect limited and specific information. She concludes that the Act is applied to encourage a culture of delay and to act as a shield against transparency, with the interests of the government trumping the interests of the public.

To remedy this situation, the Commissioner issued 85 recommendations in the report that propose fundamental changes to the Act, including the following:

- extending coverage to all branches of government;
- improving procedures for making access requests;
- setting tighter timelines;
- maximizing disclosure;
- strengthening oversight;
- disclosing more information proactively;
- adding consequences for non-compliance; and
- ensuring periodic review of the Act.

The Commissioner's recommendations are based on the experience of the Office of the Information Commissioner with the Act, as well as comparisons to leading access to information models in provincial, territorial and international laws.

Updating the law becomes more urgent with each passing year. The Act came into force in 1983. Much has changed within government since that time, including how the government is organized, how decisions are made and how information is generated, collected, stored, managed and shared. The Open Government movement has increased Canadians' expectations and demands for transparency. The law has not kept pace with these changes. There has been a steady erosion of access to information rights in Canada over the last 30 years that must be halted with a modernized access to information law.

Investigations

The Information Commissioner is the first level of independent review of government decisions relating to requests for access to public-sector information. The *Access to Information Act* requires the Commissioner to investigate all the complaints she receives.

In 2014–2015, the Commissioner received 1,738 complaints and closed 1,605. The difference in the total number of complaints closed as compared to 2013–2014 is due to two reasons. First, there were a number of complex investigations in 2014–2015 (as described in Chapter 1) that required the dedicated attention of a number of investigators. Second, there was a reduction in financial resources available.

The overall median turnaround time from the date a file was assigned to an investigator to completion was 83 days.

At the end of the fiscal year, the Commissioner's inventory of complaints was 2,234 files.

Appendix A contains more statistical information related to the complaints the Commissioner received and closed in 2014–2015.

Summary of caseload, 2010–2011 to 2014–2015

	2010–2011	2011–2012	2012–2013	2013–2014	2014–2015
Complaints carried over from previous year	2,086	1,853	1,823	1,798	2,090
New complaints received	1,810	1,460	1,579	2,069	1,738
New Commissioner-initiated complaints*	18	5	17	12	11
Total new complaints	1,828	1,465	1,596	2,081	1,749
Complaints discontinued during the year	692	641	399	551	416
Complaints settled during the year	18	34	172	193	276
Complaints completed during the year with finding	1,351	820	1,050	1,045	913
Total complaints closed during the year	2,061	1,495	1,621	1,789	1,605
Total inventory at year-end	1,853	1,823	1,798	2,090	2,234

*The Commissioner may launch a complaint under subsection 30(3) of the *Access to Information Act*.

Mediation

The Commissioner conducted a mediation pilot project in 2014–2015 to resolve certain complaints more quickly, without the need for full investigations.

Of the 318 files chosen for the project, 70 percent were mediated to one of the following outcomes:

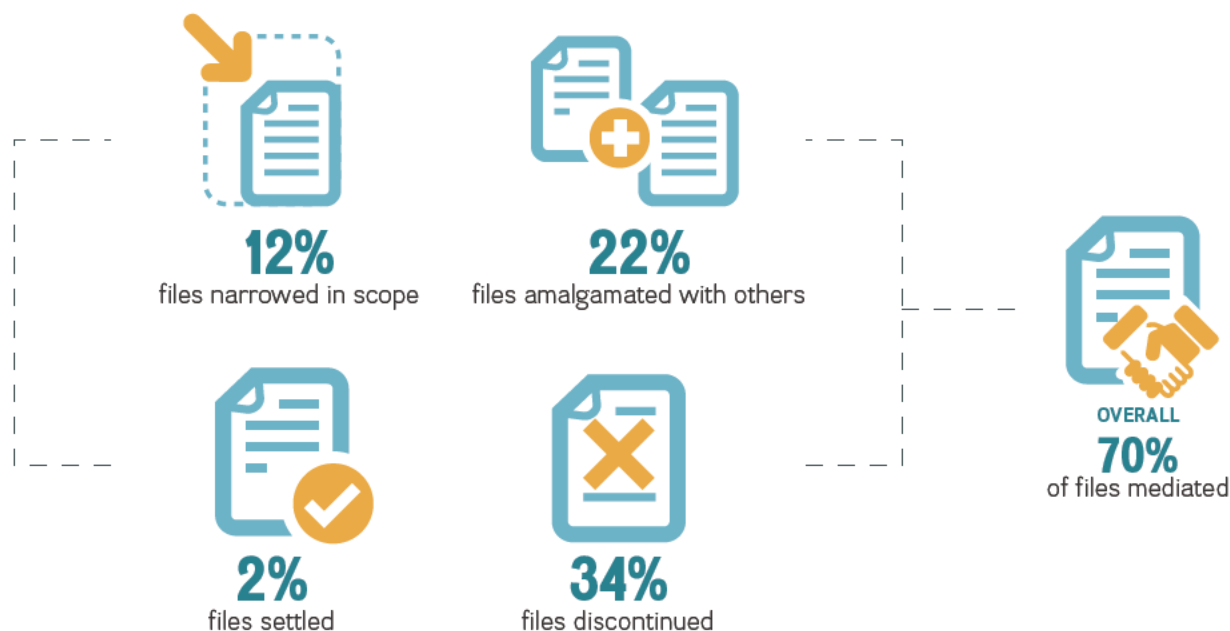
- scope narrowed;
- amalgamated with other similar files;
- settled by agreement of the parties; or
- discontinued.

An example of the scope of a file being narrowed occurred when a complaint against **Aboriginal Affairs and Northern Development Canada** that originally involved roughly 11,500 pages was narrowed to 500 following discussions with the complainant. In another file, against **Industry Canada**, approximately 4,700 pages were narrowed to 10. Narrowing the scope of files allows the investigator to focus on the records that are of greatest importance to the complainant and often results in files being completed more quickly. It also reduces the workload for institutions and the Commissioner.

When the Commissioner amalgamates files, it is usually because a single complainant has a number of complaints against one institution, often on the same or similar subject matters. Joining the files together makes it possible for the Commissioner to determine what information is the most important to the complainant and to work on those priorities, thus increasing efficiency. For example, the Commissioner amalgamated 25 files against the **Canada Revenue Agency** and was able to settle them all at once.

When matters are settled, the institution and complainant agree to close the file without a full investigation. For example, a meeting between representatives of the Commissioner and **Bank of Canada** officials, plus correspondence between the Office of the Information Commissioner and both the institution and the complainant, led the Bank to agree to fully disclose records about a complaint of alleged employee misconduct. In another instance, a complainant agreed to settle a complaint against **Citizenship and Immigration Canada** after being given the opportunity to confirm that the document the institution proposed to release was the document he sought.

Outcome of mediated files



A complaint may be discontinued at any time, either as a result of mediation efforts or during an investigation. For example, when mediating a complaint against **National Defence**, an investigator found that some records a complainant sought were available from the courts. The complainant obtained the records and the complaint was discontinued. In another instance, the Commissioner determined that she had previously dealt with a complaint similar to one against the **Bank of Canada**, which had resulted in the release of additional records. These records were sufficient for the complainant, who then discontinued the complaint.

Timely access: A basic obligation under the Act

In the era of social media and the 24-hour news cycle, requesters expect a constant stream of information at their fingertips. However, responses to access requests often do not live up to that expectation.

In the spring of 2015, for example, the response to a parliamentary written question showed that many institutions had active requests dating back several years, with the oldest originating in January 2009. In addition, the responses to 58 percent of the 251 requests reported were overdue, even though institutions had claimed lengthy time extensions in some instances.

The use of long extensions or failing to meet deadlines indicates that institutions are not fulfilling one of their most basic duties under the Act, that of timely access.

In 2014–2015, the Commissioner registered 569 delay-related complaints against 47 institutions. Delay complaints are either about institutions missing the deadline for responding to requests or about the time extensions they take to process requests.

The following are noteworthy investigations related to timeliness that the Commissioner completed in 2014–2015.

Parks Canada

The Commissioner investigated why **Parks Canada** had missed its March 2014 deadline to respond to a request for information about Parks Canada's purchase of an Ontario property. Through her investigation, the Commissioner learned that the delay had been caused in part by the subject-matter expert within Parks Canada,

Timeliness of responses to access requests eroding

The most recent annual statistics from the Treasury Board of Canada Secretariat suggest that timely access to government information is still out of reach in many regards (figures from 2013–2014:

<http://bit.ly/1Kxm9xa>):

- **Fewer requests completed in 30 days.** The proportion of requests institutions completed in 30 days in 2013–2014 dropped to 61 percent, from 65 percent in 2012–2013.
- **More request responses late.** The proportion of all requests institutions answered after the deadline grew to 14 percent, up from 11 percent in 2012–2013.
- **Longer time extensions to respond to requests.** Between 2012–2013 and 2013–2014, the proportion of all time extensions of more than 120 days climbed from 13 percent to 19 percent. Over the same period, the proportion of extensions for 30 days or less dropped from 34 percent to 21 percent.

who had sent the requested records to the access office for processing one month after the response to the requester was due. The file had also lain dormant in the access office at various times.

During the investigation, the Commissioner asked Parks Canada on more than one occasion to commit to a date to respond to the requester. Each time, the Commissioner found the proposed timeframe to be too long, with too much time set aside for various steps in the response process, including taking 11 weeks for internal approvals. After the Commissioner gave the institution's chief executive officer her recommendations to release the records, the institution committed to releasing the requested records in January 2015.

In light of this complaint and others like it, the Commissioner launched a systemic investigation in 2014–15 to examine Parks Canada's approach to processing access requests.

Delays responding to the Parliamentary Budget Officer

Delays in the response process also became evident during three investigations of complaints made by the Parliamentary Budget Officer. The Parliamentary Budget Officer provides independent analysis of the nation's finances, the government's estimates and trends in the Canadian economy. He complained to the Commissioner

Access delayed is access denied

In her special report to Parliament on modernizing the Act, the Commissioner made a number of recommendations to amend the *Access to Information Act* to promote timeliness (<http://bit.ly/1KvIUDd>):

- limit time extensions for responding to requests to 60 days, and require the Commissioner's permission to take longer ones;
- allow extensions, with the Commissioner's permission, when institutions receive multiple requests from one requester within 30 days;
- replace the exemption for information about to be published with an extension covering the publication period and require the institution to release the information if it is not published when the extension expires; and
- give the Commissioner the power to order institutions to release records to requesters.

about delays in receiving information from various institutions about the possible impact fiscal restraint measures announced in Budget 2012 might have on their service levels.

The Parliamentary Budget Officer had originally asked deputy ministers for this information outside the access to information regime in April 2012. Having received few responses to his queries, he sought the same information through formal access to information requests in the summer of 2013. However, several institutions, including **Fisheries and Oceans Canada**, the **Royal Canadian Mounted Police** (RCMP) and **Environment Canada**, did not meet their deadlines for responding.

Through her investigations, the Commissioner found that a number of circumstances had led to the delays. Indeed, these three files featured several of the common problems that result in delays: files not advancing in the access office, unnecessarily long time extensions taken for consultations on a small number of pages, and multiple consultations taken consecutively rather than concurrently.

To resolve the complaints, the Commissioner asked the three institutions for a work plan and commitment date for responding to the requester. Fisheries and Oceans Canada provided a response in February 2015, and the RCMP and Environment Canada in March 2015.

Counteracting the culture of delay

Counteracting the culture of delay that leads to complaints about timeliness requires senior officials in institutions—up to and including deputy ministers and ministers—to exercise consistent and continuous leadership. The Commissioner made a number of timeliness-related recommendations in her special report on modernizing the Act that are intended to bring discipline to the Act with regard to response times (see box, “Access delayed is access denied”). The Federal Court of Appeal's decision in *Information Commissioner of Canada v. Minister of National Defence*, 2015 FCA 56, is also expected to instill more discipline in the process of taking and justifying time extensions (see “The culture of delay,” page 9). The Commissioner will issue an advisory notice in 2015–2016 on how she will implement the Court of Appeal's decision when conducting investigations.

Maximizing disclosure for transparency and accountability

The Supreme Court of Canada has recognized that the “overarching purpose” of the *Access to Information Act* is to facilitate democracy (see *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403 at para. 61, <http://bit.ly/1LL2WtL>). Having access to information held by government institutions helps ensure citizens can participate meaningfully in the democratic process and also increases government accountability.

However, the right of access is not absolute. The Act stipulates that the general right of access may be restricted when necessary by limited and specific exceptions (<http://bit.ly/1HA1BoN>).

The Commissioner has come to the conclusion that the current exceptions to the right of access do not strike the right balance between the public's right to know and the government's need to protect limited and specific information. Broad exemptions and exclusions in the Act allow more information to be withheld than is necessary to protect the interests at stake.

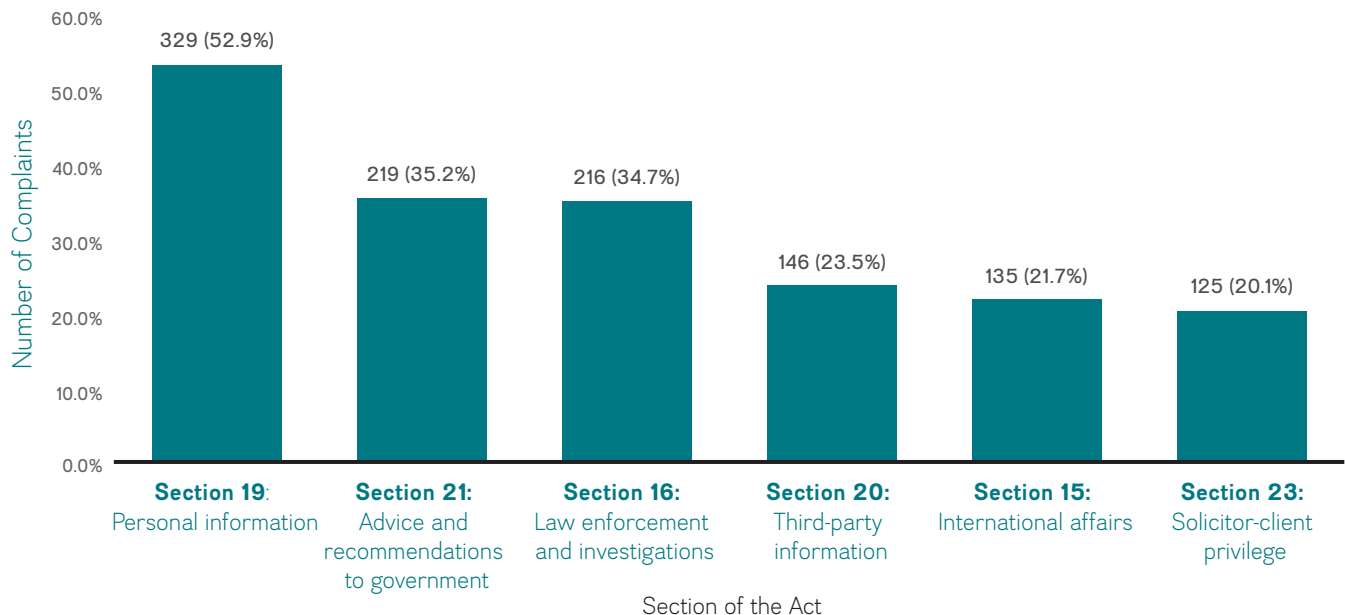
This conclusion is supported by disclosure rates across the government. There has been a significant drop in the percentage of requests for which institutions release all information over the years.

The graph below sets out the most common exemptions cited in complaints the Commissioner registered in 2014–2015.

“The public is prevented from holding its government to account under the current regime. And it’s not necessarily the fault of people who administer the system—the people who work and process your access requests—but the law is very heavily tilted in favour of protecting government information.”

—Information Commissioner Suzanne Legault, speaking to Carleton University students during Right to Know Week, 2014

Commonly cited exemptions in refusal complaints registered, 2014–2015



NOTE: The sum of all percentages may exceed 100 percent, because a single complaint may involve multiple exemptions.

Section 19 (Personal information)

Section 19, which is a mandatory exemption for personal information, is by far the most cited exemption by institutions when they respond to access requests. Institutions invoked it more than 20,000 times in 2013–2014. More than half (53 percent) of the refusal complaints the Commissioner registered in 2014–2015 (329 complaints) involved section 19.

The *Privacy Act* defines “personal information” as “information about an identifiable individual that is recorded in any form.” (<http://bit.ly/1DwWFiQ>). This definition is incorporated into the *Access to Information Act* by reference.

Section 19 contains a number of circumstances that allow institutions to release personal information that they would otherwise have to withhold. These circumstances include that the person to whom the information relates consents to its release or that the information is publicly available.

Bringing section 19 up to date

In her special report on modernizing the Act, the Commissioner made the following recommendations related to section 19 (<http://bit.ly/1f696Yi>):

- require institutions to seek the consent of individuals to whom personal information relates, whenever it is reasonable to do so, and require institutions to disclose that information once consent is given;
- allow institutions to disclose personal information to the spouse or relatives of deceased individuals on compassionate grounds;
- allow personal information to be disclosed when there would be no unjustified invasion of privacy; and
- exclude workplace contact information for non-government employees from the definition of “personal information.”

Applying section 19 too broadly

While acknowledging that the exemption is mandatory, the Commissioner has found that institutions apply it too broadly in many instances.

A notable example of this in 2014–2015 related to a request for records about the seizure by RCMP officers of improperly stored firearms from homes affected by the 2013 flood in High River, Alberta. Citing section 19, the **RCMP** withheld information that identified where in each residence the weapon had been recovered. The descriptions of the locations ranged from the vague (“in residence”) to the more specific (“closet of master bedroom” and “under the bed in the bedroom”). The RCMP argued that releasing such information could make it possible to identify the homeowners. The Commissioner did not agree with the RCMP. As a result of the Commissioner’s investigation, the RCMP released the information.

Seeking consent

Section 19 allows institutions to release personal information when the person to whom it relates consents to its disclosure. However, the Act is silent as to when an

institution should seek the consent of an individual. While some individuals refuse to grant consent when asked, others agree, which often results in more information being released to the requester. During two investigations closed in 2014–2015, the Commissioner recommended that institutions seek consent from individuals to release their personal information. In the first instance **National Defence** asked eight individuals to release their names and scores on a job competition. These individuals declined. In contrast, 10 people involved in meetings with the **Department of Finance Canada** related to possible changes to the *Income Tax Act* did consent to having their personal information released, and additional information was disclosed to the requester.

Releasing information on compassionate grounds

The Commissioner often receives complaints from relatives who are seeking information about the death of a loved one. A common reason they complain to the Commissioner is that an institution withholds information under section 19. In these situations, the Commissioner frequently recommends that the institution consider releasing the information on compassionate grounds, when doing so would be in the public interest and would clearly outweigh the invasion of privacy of the deceased. As a result of an investigation into a complaint about the **RCMP** refusing access to information related to a workplace accident that resulted in a death, the Commissioner made this recommendation. The RCMP consulted the Office of the Privacy Commissioner on the matter. The requester, a relative of the deceased, subsequently received additional records from the RCMP.

Publicly available information

Work-related contact information of non-government employees is personal information and is therefore protected from disclosure by section 19 (*Information Commissioner of Canada v. Minister of Natural Resources*, 2014 FC 917; see “The scope of personal information,” page 37).

One complaint about **Health Canada**’s refusal to release work-related contact information of non-government employees centred on the names and contact information of participants in a study on the possible health effects of wind turbines. The institution argued that some

participants were not government employees and that, therefore, their personal information had to be protected. However, subsection 19(2) allows for the release of personal information when it is already publicly available. The investigator found that much of the information at issue was on Health Canada's website, although the institution said that it was not at the time of the request. Health Canada subsequently released the information in question to the requester.

Section 21 (Advice and recommendations to government)

This provision exempts from disclosure a wide range of information relating to policy- and decision-making. There is a public interest in protecting such information to ensure officials may provide full, free and frank advice to the government. There is also a public interest in releasing this kind of information so citizens may get the information they need to be engaged in democracy and hold the government to account.

Institutions invoked this exemption nearly 10,000 times in 2013–2014. More than one third (35 percent) of the refusal complaints the Commissioner registered in 2014–2015 (219 files) involved section 21.

In her investigations, the Commissioner often finds that institutions have applied section 21 too broadly and are unable to show how the information falls within one of the various classes of information the exemption is designed to protect.

Partisan letters on a website

Foreign Affairs, Trade and Development Canada (DFATD) cited section 21 when it withheld large portions of communications and briefing materials about the posting of partisan letters on the former Canadian International Development Agency's website. The requester noted in her complaint that she had made similar requests in the past but had never seen the records treated in this manner before.

The Commissioner's investigation found that some of the withheld information did not qualify for the section 21 exemption. For example, DFATD had exempted factual information, which does not fall within the parameters of section 21. In addition, DFATD had redacted some details in certain places but released the same information in others. In response to the Commissioner's recommendations, DFATD provided more information to the requester.

Narrowing section 21

In her special report on modernizing the Act, the Commissioner recommended the following to narrow the scope of section 21 (<http://bit.ly/1GRGmsW>):

- extend the list of specific examples of information to which section 21 does not apply to include factual materials, public opinion polls, statistical surveys, appraisals, economic forecasts, and instructions or guidelines for employees of a public institution;
- reduce the time the exemption applies from 20 years to five years or once the decision to which the advice relates has been made, whichever comes first; and
- add a "reasonable expectation of injury test."

In her report, the Commissioner also recommended that there be a general override for all exemptions to ensure that institutions take the public interest in disclosure into account when considering whether to apply any of the exemptions within the Act. Institutions should be specifically required to consider factors such as open government objectives; environmental, health or public safety implications; and whether the information reveals human rights abuses or would safeguard the right to life, liberty or security of the person. Given the type of information covered by section 21, this override would be particularly useful in helping maximize disclosure and fostering transparency and accountability.

Defunding the Canadian Environmental Network

Environment Canada exempted under section 21 large portions of a briefing note to the Minister of the Environment about whether to continue funding the Canadian Environmental Network. The requester complained to the Commissioner about this response. The institution argued that most of the information in the briefing note was advice and recommendations to the Minister. Through her investigation, however, the Commissioner found that not all the information qualified for the exemption and recommended the

institution complete a detailed review of the records. Following this recommendation, Environment Canada reconsidered its use of section 21 and in some instances exercised its discretion to release additional information. This resulted in the institution withholding only the minimum amount of information that specifically required protection. The additional information released included background, contextual material related to the decision, headings and references to attachments.

Funding of programs related to violence against Aboriginal women

A requester asked the **Department of Justice Canada** for information regarding violence against Aboriginal women that was created during a specific time period. In its response, the institution withheld under section 21 information on approval documents and applications for funding under two programs related to violence against Aboriginal women. Through her investigation, the Commissioner found that the institution had broadly applied section 21. The Commissioner concluded that much of the withheld information did not meet the requirements for the exemption and asked the institution to reconsider its position. In response, the institution abandoned the application of section 21 in some instances. In others, the institution took into account the passage of time and the fact that the funding decision had been made and decided to exercise its discretion to release more information. In the end, all but limited and specific information was released.

An additional positive outcome of the investigation was that the institution changed its approach to processing access requests related to grants and contributions records. The institution also said it would amend a paragraph of the Conditions section of the application form for these programs to indicate that in the event of an access request the information in the application would be disclosed, except for personal information.

Section 16 (Law enforcement and investigations)

This provision protects information related to law enforcement. Section 16 covers the work of a wide range of federal bodies, including the RCMP, the Canadian Security Intelligence Service and the Canada Revenue Agency.

Institutions invoked section 16 more than 7,900 times in 2013–2014. Section 16 was the subject of 35 percent of the refusal complaints the Commissioner registered in 2014–2015 (216 files).

Narrowing the scope of section 16

In her special report on modernizing the Act, the Commissioner noted that paragraph 16(1)(c), which exempts information the disclosure of which could harm law enforcement activities and investigations, is sufficient to balance the protection of law enforcement-related information with the right of access (<http://bit.ly/1f6aTMZ>). In light of this, she recommended that other paragraphs under section 16—related to techniques for specific types of investigation, for example—be repealed.

There is a public interest in both protecting information under this provision, to ensure law enforcement activities can progress unimpeded, as well as ensuring that information is released such that Canadians can hold law enforcement bodies to account.

Political activities of registered charities

In 2014–2015, the Commissioner investigated a complaint against the **Canada Revenue Agency** (CRA) related to letters it had sent to registered charities reminding them of the limits they must respect with regard to their political activities. In response to an access request, CRA had refused to release a two-page document containing instructions for preparing these letters, saying that disclosing the instructions would prejudice future enforcement of the *Income Tax Act*. The Commissioner questioned CRA about its use of section 16 for procedural information of this type and found that the institution could not substantiate the harm that could occur if the documents were disclosed. CRA subsequently released the two pages to the requester.

Prejudicing an investigation that is closed

Institutions often cite section 16 in order to withhold information so as not to prejudice ongoing investigations. The **Canadian Human Rights Commission** (CHRC) took this approach and withheld an entire investigation file in response to a request, without considering whether any information could be severed and the rest released. During the investigation into the resulting complaint, the Commissioner learned that the institution had refused to release the file, despite the fact that the matter was concluded, although not officially closed in the case management system. The Commissioner questioned how releasing the requested records could prejudice an

ongoing investigation when the one at issue was essentially complete. Although the requester did receive the records, it was only as the result of a second request he made at the suggestion of the CHRC.

Section 20 (Third-party information)

This provision protects third-party business information, including trade secrets. The government collects third-party information through a number of avenues, such as during the grants, contributions or contracting process, as a part of regulatory compliance, or through public-private partnerships. The Supreme Court of Canada has noted that third-party information may often need to be protected, since it “may be valuable to competitors ... and [disclosure] might even ultimately discourage research and innovation” (see *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 2, <http://bit.ly/1NzRMWI>). At the same time, dealings with private sector entities should be as transparent as possible for accountability reasons.

Institutions invoked this provision 5,300 times in 2013–2014. It was cited in nearly one quarter (24 percent) of the refusal complaints (146 files) the Commissioner registered in 2014–2015.

Proprietary information

A requester asked **Public-Private Partnership Canada** (PPP Canada) for records about its dealings with a company, Geo Group Inc., a provider of correctional, detention and community re-entry services. The institution refused access to some of the records, claiming section 20. During her investigation, the Commissioner learned that Geo Group had been asked for its position on disclosure by telephone only. Geo Group’s position at that time was that all the information in question was proprietary and that releasing it would damage the company’s ability to market its services.

The Commissioner questioned both PPP Canada’s use of section 20 and the process undertaken to consult Geo Group. Under section 27, an institution is required to advise a third party of its intention to disclose third-party records and provide a third party with an opportunity to make representations in writing. The third party is to be given 20 days to provide these representations.

As a result of the Commissioner’s investigation, an appropriate consultation was undertaken with Geo Group, after which PPP Canada decided that some of the information should, in fact, be released. (Geo

Group Inc. had the opportunity to seek judicial review of this decision but did not do so.) The Commissioner then asked PPP Canada a second time to reconsider its position on continuing to withhold other information under section 20, which it did. In the end, the institution released all but a small amount of the withheld information to the requester.

Harm to commercial interests

In 2013 the **Financial Consumer Agency of Canada** published a paper on mobile telephone payments and consumer protection in Canada. In this paper, the authors referred to a study by the agency about the communications habits of new Canadians and urban Aboriginals. A requester asked for a copy of this study. In response to this request, the institution withheld 100 of 106 pages, citing section 20. The institution took the position, based on the representations of the third party that had prepared the study, Environics Analytics, that the exempted information was proprietary and that releasing it would harm its commercial interests.

Striking the right balance with section 20

In her special report on modernizing the Act, the Commissioner recommended that section 20 contain a two-part test. The test would allow third-party information to be withheld only when:

- the information falls within a specific class; and
- disclosure of the information could reasonably be expected to result in a specific injury, such as significant harm to a third party’s competitive or financial position, or result in similar information no longer being supplied voluntarily to the institution (<http://bit.ly/1NA5Q2v>).

To maximize disclosure, the Commissioner also recommended that the Act explicitly state that institutions be required to release information when the third party to whom it relates consents.

In addition, she recommended that institutions not be allowed to apply section 20 to information about grants, loans and contributions third parties receive from the government, since Canadians have a right to know how this public money is spent.

However, the Commissioner found through her investigation that the institution could not substantiate the expected harm. The Commissioner explained to the institution the criteria that needed to be met in order to apply section 20, after which the institution agreed to go back to the third party to reconsider its position. Subsequently, the institution released some additional information to the requester.

Section 15 (International affairs)

This provision exempts information from disclosure which, if released, could reasonably be expected to injure the conduct of international affairs or the detection, prevention or suppression of subversive or hostile activities.

Institutions invoked section 15 more than 11,100 times in 2013–2014, an increase of 4 percent from 2012–2013. The provision was cited in 22 percent of refusal complaints the Commissioner registered in 2014–2015 (135 files).

Conference contribution and budget figures

In 2014–2015, the Commissioner investigated a decision by the **Canadian Security Intelligence Service** (CSIS) to withhold under section 15 the amount it had contributed to a 2011 conference at Université Laval and the annual budget of its Academic Outreach program. In her investigation, the Commissioner found that CSIS had not provided sufficient evidence to show that releasing the information could reasonably be expected to injure

efforts to detect, prevent or suppress subversive or hostile activities. Moreover, the Commissioner discovered that CSIS's logo had appeared on the conference program, which was posted on the Internet, so its involvement in the event was publicly known. In light of the Commissioner's investigation, CSIS agreed to release the amount of its contribution to the conference but not the Academic Outreach budget figures. The Commissioner continues to disagree with CSIS about withholding this information but the complainant did not provide consent for the Commissioner to file an application for judicial review.

Section 23 (Solicitor-client privilege)

This provision covers information subject to solicitor-client privilege.

Institutions invoked section 23 nearly 2,250 times in 2014–2015. The provision was cited in 20 percent of the refusal complaints the Commissioner registered in 2014–2015 (125 files).

Section 23 is a discretionary exemption that applies both to information privileged as legal advice and records that were created for the dominant purpose of contemplated, anticipated or existing litigation. While the latter privilege expires at the conclusion of litigation, legal advice privilege has no time limit. In some instances in the government context, there are public interest reasons to release information protected by solicitor-client privilege in order to ensure greater transparency and accountability. Consequently, when exercising their discretion to withhold information that is protected by solicitor-client privilege, institutions should consider all relevant factors, such as the age of the information, its subject matter and historical value.

Records of historical value

The issue of protecting historical records under section 23 arose during an investigation with **Library and Archives Canada** in 2014. The request had been for information that dated from the First World War and had to do with an application to the Supreme Court about why a soldier had been detained and sent to prison on charges of refusing to obey orders while on military service. The requester was confused as to why the institution had released personal records related to the soldier, but would not release those related to the government's work to prepare for the soldier's court hearing.

Bringing clarity to section 15

In her special report on modernizing the Act, the Commissioner recommended replacing the word "affairs" in section 15 with "negotiations" and "relations" to be clearer about what aspects of Canada's international dealings would be harmed by releasing information (<http://bit.ly/1UdTr9h>).

Since institutions often rely on the classification status of historical information to justify non-disclosure under section 15, the Commissioner also recommended that the government be legally required to routinely declassify information to facilitate access.

Narrowing the application of section 23

In her special report on modernizing the Act, the Commissioner recommended that section 23 not apply to aggregate total amounts of legal fees (<http://bit.ly/1T8JmbW>).

She also recommended imposing a 12-year time limit on when institutions could withhold information under section 23 as it relates to legal advice privilege, starting from when the last administrative action was taken on the file.

The requester complained to the Commissioner, who asked Library and Archives Canada to review the records. This resulted in its releasing one of four pages. The remaining pages at issue were a 1918 legal opinion from the Department of Justice. The legal opinion was on the meaning of the term “commitment” in what was then section 62 of a since-repealed version of the *Supreme Court Act*. The legal opinion referred to case law, some of which dated to the 1800s, as well as statutes such as the *Lunacy Act* and the *Hospitals for the Insane Act* of 1914. Both of these statutes were repealed decades ago.

The Commissioner found that the institution had properly determined that legal advice privilege applied to the legal opinion, but that it had not considered all the relevant factors for and against disclosure, including the age and historical significance of the information, when deciding to withhold it.

Throughout the investigation, the institution, on the advice of the Department of Justice Canada, refused to waive solicitor-client privilege on the records, despite their being nearly a century old.

At the conclusion of her investigation, the Commissioner formally recommended to the Minister of Canadian Heritage that the three pages be disclosed in light of the relevant factors that favoured disclosure. In response, the Minister referred the matter to the Librarian and Archivist for Canada, since he has delegated authority for access matters at the institution. The Librarian and Archivist responded that the three pages of records would be disclosed.

Section 23 and legal fees

The Commissioner is often asked to investigate complaints about institutions withholding billing information for legal counsel.

One such file involved **Blue Water Bridge Canada**, which had withheld in its entirety a two-page document comprising a cover letter and a statement of account from a legal firm. The Commissioner disagreed that solicitor-client privilege applied to these records. Upon consideration, the institution agreed with the Commissioner that the cover letter was not covered by solicitor-client privilege and released it to the requester. With respect to the statement of account, the Commissioner advised the institution that aggregate total amounts billed (such as appeared on the statement of account) tend to be neutral information and disclosing them does not reveal privileged information. Subsequently, the institution released these totals to the requester.

The **Department of Justice Canada** is frequently the subject of complaints about its decisions to withhold legal fee amounts. In two investigations the Commissioner closed in 2014–2015, the institution took the position that it could exempt this information under section 23 because it was related to ongoing litigation. In contrast, the Commissioner determined, based on case law, that releasing that information would not reveal any privileged information. The investigations resulted in more information, including the fee totals, being released to the requesters.

Other notable investigations

Neither confirming nor denying the existence of a record

Subsection 10(2) of the Act allows institutions, when they do not intend to disclose a record, to neither confirm nor deny whether the record even exists. When notifying a requester that they are invoking

Limiting subsection 10(2)

To help curb the misuse of subsection 10(2), the Commissioner recommended in her special report on modernizing the Act that the provision be limited to several very specific purposes—for example, when releasing the information would injure a foreign state or organization’s willingness to provide Canada with information in confidence or when it would injure law enforcement activities or threaten the safety of individuals (<http://bit.ly/1CeeGSA>).

subsection 10(2), institutions must also indicate the exemptions on which they could reasonably refuse to release the record if it were to exist.

Since 2012–2013, the Commissioner has received 50 complaints about institutions' use of subsection 10(2), with half of them coming in 2014–2015.

Subsection 10(2) was intended to address situations in which the mere confirmation of a record's existence (or non-existence) would reveal information that could be protected under the Act. This could include, for example, the identity of CSIS targets or the activities of RCMP investigators.

However, the Commissioner's investigations found several examples of institutions using subsection 10(2) inappropriately. For instance, the **Department of Justice Canada** cited the provision in response to a request for a letter from the Costa Rican foreign minister in which the minister asked for information from the institution, and the institution's response. Through her investigation, the Commissioner learned that Costa Rican authorities had essentially publicly acknowledged that it had asked the Department of Justice Canada for the information in question. As a result, the institution ceased to rely on subsection 10(2) and released the records to the requester, albeit with many exemptions applied.

In another instance, **DEATD** cited subsection 10(2) in its response to a request for information about the visit of a Canadian consular official to an internment camp in Afghanistan. The Commissioner found through her investigation that the official did, in fact, visit the camp and that the institution's public affairs group had released this information. In light of this, the institution reconsidered its position and released all the requested records to the requester.

Does dressing up in a costume threaten a person's safety?

A request was made to the **Canada Revenue Agency** for copies of videos presented to CRA staff. CRA released a DVD containing a number of the requested video clips introducing various parts of the organization, but withheld one clip. The withheld clip showed various employees wearing Batman costumes and was protected under section 17. The requester complained to the Commissioner about the institution's response.

Section 17 protects information when disclosure could reasonably be expected to threaten the safety of a person; it should not be used for the purpose of concealing embarrassing information. In light of the requirements of section 17, the Commissioner asked CRA to provide evidence of the harm that would result if the video clip were released. Initially, CRA maintained the application of section 17. After further requests from the Commissioner to show evidence of the harm, the institution eventually offered to allow the requester to view the clip on site, but the requester refused. CRA then proposed sending the requester the clip with the faces of the employees blurred. The requester agreed to this approach.

Costs associated with mailbox vandalism and graffiti

Canada Post Corporation (Canada Post) received a request for incidents reports of vandalism and graffiti to Canada Post mailboxes. The associated repairs and cleanup costs were also requested. In response, Canada Post withheld the information under paragraphs 18(a) and 18.1(1)(a). Section 18 protects the economic interests of government institutions, and paragraph 18.1(1)(a) is Canada Post's unique exemption under the Act to protect its economic interest. The requester complained to the Commissioner and asked her to investigate Canada Post's refusal to disclose the cost information.

Exemptions and exclusions added by the *Federal Accountability Act*

In 2006, the Act was extended to cover a number of Crown corporations, agents of Parliament, foundations and a series of other organizations as a part of the *Federal Accountability Act*. A number of institution-specific exemptions and exclusions, such as section 18.1, were also added to the Act at this time.

In her special report on modernizing the Act, the Commissioner recommended that a comprehensive review be undertaken of the institution-specific exemptions and exclusions added by the *Federal Accountability Act* to determine their necessity (<http://bit.ly/1SJVHS0>).

As a result of her investigation, the Commissioner determined that the institution had neither provided sufficient justification for the use of the exemptions nor properly exercised its discretion to release information. The Commissioner formally asked Canada Post to substantiate its position, at which point it withdrew its application of paragraph 18(a). It did provide arguments in favour of its continued exemption of information under paragraph 18.1(1)(a), but the Commissioner found them lacking. She wrote to the head of the institution and recommended that Canada Post release the specific cost information, which it did.

Duty to document decisions

The right of access relies on good record-keeping and information management, so that records are available for access. This right is denied when decisions taken by public officials are not recorded, particularly decisions that directly affect the public and involve the spending of public funds.

In 2014–2015, the Commissioner closed two investigations that determined that officials had not created records to document their decisions. The first investigation, at **Transport Canada**, revealed that the institution had taken no notes or minutes at some of the regular meetings officials had held with the City of Victoria, especially meetings related to the expansion of the harbour in 2010. The Commissioner asked the institution to do another search for records within various divisions and branches, and also to look for information discussed at regular meetings with the City of Victoria. Through these searches, Transport Canada located 10 pages and released them to the requester.

In the second investigation, into a complaint about a request for records regarding a decision to reduce the number of parking spaces in one part of the Experimental Farm in Ottawa, the Commissioner found that **Agriculture and Agri-Food Canada** staff had never created a record of their discussions and the arrangements for implementing this decision. All the records the institution released in response to the access request were from after the decision was taken. The Commissioner learned through her investigation that the decision to reduce the number of parking spots was made verbally and the work had been completed by employees of the Experimental Farm, resulting in minimal documentation. The Commissioner sought and received assurances from the institution that a complete search for records had been done and that any and all employees

who might have been involved in the decision had been asked for records. Some additional records that were created after the requester submitted his request were found during subsequent searches. These were provided to the requester.

Documentary evidence

In her special report on modernizing the Act, the Commissioner recommended establishing a comprehensive legal duty to document decisions within government, with sanctions for non-compliance (<http://bit.ly/1JAHVBy>). As a result, more information would be subject to the right of access. This would also facilitate better governance, ensure accountability and enhance the historical legacy of government decisions.

Systemic investigations

Delays stemming from consultations on records related to access requests

The Commissioner has long been concerned about the impact of inter-institution consultations on the timely processing of requests. Institutions carry out these consultations with other federal organizations, international governments and organizations, other levels of government and third parties about records related to access to information requests.

In 2010, the Commissioner launched a systemic investigation into the use, duration and volume of time extensions for consultations, especially ones that at the time were mandatory under the Act, and the delays to respond to access requests that may have resulted. The investigation focussed on nine common recipients of mandatory consultations under the Act: **Canada Border Services Agency**, the **Canadian Security Intelligence Service**, **Correctional Service of Canada**, **Foreign Affairs and International Trade**, the **Department of Justice**, **National Defence**, the **Privy Council Office-Cabinet Confidences Council** (PCO-CCC), **Public Safety Canada** and the **Royal Canadian Mounted Police**.

The challenges of consulting with foreign governments

As part of the systemic investigation on consultations, the Commissioner commissioned a study on the treatment of consultation requests by Foreign Affairs, Trade and Development Canada (DFATD) under sections 13, 15 and 16 of the Act (<http://bit.ly/1LMMV6K>).

At the time the study was prepared (2010), these consultations were mandatory. This meant that in most years, DFATD received more consultation requests than it did access requests.

The study's author, Paul-André Comeau, found that in many instances DFATD had to consult with foreign governments in order to respond to consultation requests. This led to response times of up to 151 days for consultations and had a ripple effect on how

quickly institutions could respond to the original access requests.

The report recommended several ways DFATD could streamline the process it followed at that time for consulting with foreign governments and organizations.

Now that consultations under sections 13, 15 and 16 are no longer mandatory—as a result of the Commissioner's investigation—the number of consultation requests DFATD receives has dropped by 40 percent. The institution reported to the Commissioner in March 2015 that this fact, as well as specific measures it took in response to the systemic investigation, has meant that its average time to respond to a consultation request is now 58 days.

During the investigation, a considerable amount of information was collected from the institutions by way of a questionnaire. The Commissioner commissioned a comparative analysis of international consultations (see box, "The challenges of consulting with foreign governments"). The Commissioner also sought and obtained representations from the nine institutions on their handling of both incoming and outgoing consultation requests.

On the basis of the representations received and evidence gathered in the investigation, the Commissioner concluded that the mandatory consultation process impeded the ability of institutions to provide timely access to requesters under the Act. As a result, the Commissioner made recommendations to the Clerk of the Privy Council

and the Minister of Foreign Affairs to resolve the matter and improve various practices related to consultations to these institutions (see table, page 27). Both have accepted the recommendations.

During the investigation, significant changes were made by the government to two aspects of processing requests that were significant sources of delays: consultations on Cabinet confidences (see "Shedding light on decision making by Cabinet," page 42) and consultations with respect to section 15 (International affairs) and section 16 (Law enforcement and investigations) of the Act. The Commissioner is still monitoring the effects of the changes to the Cabinet confidences process.

Recommendations to the Clerk of the Privy Council	Recommendations to the Minister of Foreign Affairs
[1] That, where it is consulted under the new policy, PCO-CCC respond to such consultations within 30 days, the time within which institutions are generally required to respond to access requests.	[1] That DFATD strive to reduce the average time it takes to complete a consultation request, targeting the 30-day timeframe, mirroring the time period within which institutions are generally required to respond to access requests.
[2] That PCO-CCC ensure it is sufficiently staffed to handle the volume of consultation requests it continues to receive under the new policy.	[2] That DFATD continue its efforts to ensure that its access to information office is sufficiently staffed to handle the volume of both access requests and consultation requests received. In addition, that DFATD carry out awareness and training in program areas to emphasize that meeting access to information requirements is a legislative duty.
[3] That when it is consulted, PCO-CCC provide file-specific response times to institutions based on all relevant factors, including the number of pages and the subject matter involved.	[3] That DFATD cease providing to the access community its current average turnaround time for responses to consultation requests and instead provide individual guidance on receipt of each request, based on relevant factors, including the number of pages and the subject matter involved.
[4] That PCO-CCC take measures to ensure that there is sufficient training for institutions on the scope and application of section 69 of the Act so as to ensure consistency across government.	[4] That DFATD continue to pursue the possibility of sending consultation requests to foreign governments to those countries' embassies or consulates in Ottawa, or develop an alternative solution to ensure that consultations with foreign governments are completed in a more efficient and timely manner.
[5] That PCO-CCC collect detailed data on the consultation process, statistical or otherwise, which it continues to receive under the new policy.	[5] That DFATD, with a view to making consultations with foreign governments more efficient, consider implementing elements of existing processes that allow Canadian institutions to consult directly with international organizations or pursue other options that would help ensure faster response times from foreign governments.
	[6] That DFATD set fixed time frames for receiving responses to its consultations, and exercise its own authority under the Act to apply relevant exemptions and sever information when consulted institutions fail to respond within the time frames prescribed.
	[7] That DFATD enable its case management system to track the full range of activities associated with both incoming and outgoing consultation requests. In addition, that DFATD carry out in-depth analysis of the information gathered in order to gauge and improve its performance with regard to consultation requests, and inform its decisions on workload allocation of resources.

The Commissioner also made eight recommendations to the President of the Treasury Board in his capacity as the minister responsible for the proper functioning of the access

to information system on measures that would improve practices related to consultations across the federal access to information system (see table below).

Recommendations to the President of the Treasury Board	Response
Clarify in the <i>Directive on the Administration of the Access to Information Act</i> that consulting institutions must fully and accurately respond to an access request when a response to a consultation request is not received from the consulted institution prior to the expiry of the extended due date.	Did not agree
Address the use of lengthy time extensions based solely on average response times by clarifying in the <i>Access to Information Manual</i> that, to be consistent with the statutory duty to assist and the directive, time extensions must take into consideration the volume and complexity of the information at issue.	Agree
Clarify in the manual that while appropriately established precedents may assist in establishing the length of extensions per paragraph 9(1)(b), it is a best practice to obtain an agreed-to response time from the consulted institution.	Agree
Issue guidance to institutions clarifying that closing files with outstanding consultation requests is not consistent with the Act, including the duty to assist.	Agree
Clarify in the manual that institutions consider and apply all exemptions and/or exclusions that they rely on to justify withholding information at the time they respond to the access request, to resolve the issue of institutions' subsequently applying additional exemptions and exclusions during a complaint investigation.	Did not agree
Work closely with PCO and the Department of Justice Canada to ensure consistency in the application of section 69.	Agree
Amend the manual to provide guidance about the timelines for conducting third-party consultations set out in the Act, including advising that an extension per paragraph 9(1)(c) not exceed 60 days, given the statutory requirements of sections 27 and 28.	Did not agree
Clarify in the manual that when an institution does not receive a response from a third party within the statutory timeframe, the institution must issue a decision letter to the third party and make a subsequent release if no application for judicial review is initiated in accordance with the Act.	Agree

In April 2015, the Clerk confirmed progress on the implementation of the recommendations as they related to consultations for Cabinet confidences. She reported that the changes to the consultation process had substantially reduced the number of consultations with PCO-CCC. A significant improvement in response times was observed after PCO-CCC eliminated its backlog of consultations on Cabinet confidences in August 2014. For the remainder of 2014–2015, PCO-CCC completed 79.6 percent of its consultations within 30 days. PCO-CCC also undertook on-the-job training with seven departmental legal services units and two lawyers from Department of Justice Canada, which allowed for knowledge to be shared and contributed to further reduce the backlog.

Further consultation-related recommendations

In her special report on modernizing the Act, the Commissioner made other recommendations aimed at addressing problems associated with consultations (<http://bit.ly/1HBw2cl>):

- clarify that institutions may not take extensions to consult internally; and
- state that third parties that do not respond to a consultation request on time will be presumed to have consented to having their information released in response to an access request.

In April 2015, the Deputy Minister of Foreign Affairs also confirmed progress on the implementation of the recommendations. He confirmed that the changes to the Directive on the Administration of the *Access to Information Act* have had a significant positive impact on the consultations files at DFATD. The number of consultation requests has declined by 40 percent since 2011–2012. The institution has also improved its turnaround time from 2010 by almost 50 percent. Further, the institution is pursuing discussions with the United States and Australia on ways to improve state-to-state consultations.

In June 2015, TBS officials confirmed that changes had been made to the access to information manual to reflect the Commissioner's recommendations.

Delays stemming from interference with processing access requests

The Commissioner closed a second systemic investigation in 2014–2015. This investigation, launched in 2010, looked

into political or other interference with the processing of access requests and the delays to respond to access requests that may have resulted between April 1, 2009 and March 31, 2010. This investigation was launched as a result of evidence gathered from the institutions surveyed in the 2008–2009 report card process (<http://bit.ly/1NcJ1Sd>).

The investigation focussed on eight institutions: **National Defence, Public Safety Canada, the Canadian International Development Agency** (now Department of Foreign Affairs, International Trade and Development), the **Privy Council Office-ATIP, Health Canada, Canadian Heritage, Natural Resources Canada** and the **Canada Revenue Agency**.

During the investigation, a considerable amount of information was collected from the institutions by way of a sampling of files and interviews with officials.

As part of the investigation, the Commissioner found evidence of delay caused by established delegation orders and resulting from protracted approval processes (see table below).

Issues	Examples
Interference	<ul style="list-style-type: none"> Non-delegated individuals (including from a minister's office*) directing access officials to make additional severances or questioning the release of certain records, leading to delay and additional severances Staff from ministers' offices conducting consultations outside the access process, resulting in delays and additional severances*
Delays caused by non-delegated individuals	<ul style="list-style-type: none"> Program areas not responding to tasking requests in a timely manner Non-delegated individuals directing access offices to delay the release of records Review of responsive records by the departmental legal services unit Approval or review of release packages by non-delegated individuals such as program areas, communications groups, deputy ministers' chief of staff, issues management and ministers' office staff (including requests flagged as sensitive or for briefing)
Delays caused by delegated individuals	<ul style="list-style-type: none"> Protracted approval process in the processing of requests, including sign-offs Delegated individuals not responding within allotted period Hiring of a consultant by a delegated individual to review the work done by access officials Requests lying dormant for long periods Frequent questions to access officials on release packages, leading to delay

* See Interference with Access to Information, Part 2, p.37.

continued on next page

Issues	Examples
Delegation of authority	<ul style="list-style-type: none"> • Horizontal delegation of authority, where a number of individuals across an institution had the authority to apply the Act • Delegation orders requiring multiple layers of senior management review, leading to delays or additional severances • Coordinators not having full delegation • Approval processes not reflecting the delegation of authority (for example, a number of non-delegated individuals involved in the approval of the release package)
Delays due to the ATIP unit	<ul style="list-style-type: none"> • Lack of resources within access offices • Requests lying dormant for long periods • Lack of monitoring to ensure proper handling of requests
Other	<ul style="list-style-type: none"> • Lack of proper documentation of interference and delays in the case management system • Retrieval of records stored off-site, in regions and abroad, resulting in delays

As a result of the investigation, most delegation orders of the reviewed institutions were amended to give full delegation to the access coordinator and/or to remove redundant levels of delegation.

This systemic investigation coincided with two individual investigations into allegations of interference at **Public Works and Government Services Canada** (PWGSC) (Part 1: <http://bit.ly/1NDA3hl>; and Part 2: <http://bit.ly/1FYrQxM>) in which the Commissioner made several recommendations to the institution to prevent political interference from recurring. She also encouraged all institutions and the Treasury Board of Canada Secretariat to take note of the recommendations and implement them, as needed.

In light of the two PWGSC investigations, the measures implemented by the reviewed institutions in the course of the systemic investigation, turnover of staff within the reviewed institutions and the merger of CIDA with DFATD, the Commissioner decided that the most efficient way to conclude this systemic investigation was to make five recommendations to the President of the Treasury Board in his capacity as the minister responsible for the proper functioning of the access to information system (see box, “Recommendations following the Commissioner’s systemic investigation into interference with the processing of access requests”). The Commissioner also discontinued the systemic investigation against the eight institutions. The President of the Treasury Board did not address the Commissioner’s recommendations in his response, instead asking for information about specific instances of interference.

Recommendations following the Commissioner's systemic investigation into interference with the processing of access requests

- That the Comptroller General undertake a horizontal audit to assess compliance with elements of the *Policy on Access to Information* that related to the treatment of requests.
- That TBS specifically include in its annual statistical report data related to high-profile subject matters and delays as a result of internal approvals.
- That TBS implement recommendations stemming from the Commissioner's interference investigations at PWGSC:
 - > amend current policies and/or directives governing the processing of requests to set clear protocols for the interaction of departmental access officials and ministerial staff when processing requests;
 - > train access and ministerial staff specifically on the latter's lack of delegation for, and limited role in, access matters;
 - > review the procedures institutions have in place for reporting instances of possible contraventions of section 67.1 of the Act (destruction of records) to ensure they are sufficient and that the guidelines establishing the procedures, as found in the *Directive on the Administration of the Access to Information Act* and the *Access to Information Manual*, have been considered;
 - > reinstate the mandatory requirement in the Directive that institutions have policy measures in place on reporting and investigating alleged breaches of section 67.1 to the head of the institution and to relevant law enforcement authorities;
- > ensure that departmental and ministerial staff are trained on the policies established to report allegations of interference;
- > require institutions to establish and communicate a process that will address requests by delegated authorities (access coordinators, deputy heads, heads, etc.) and/or non-delegated groups (communications, legal services, Minister's office) for notification about impending disclosures;
- > train departmental and ministerial staff members on the requirements of the duty to assist, including the obligation to respond to requests as soon as possible; and
- > require institutions to inform the Commissioner about alleged obstruction under section 67.1.
- That TBS consider/study centralizing the access function for institutions.
- That TBS review the legislative changes related to sanctions found in the Commissioner's special report on modernizing the Act and take steps to implement them by way of proposed legislative amendments.

Court proceedings

A fundamental principle of the *Access to Information Act* is that decisions on disclosure should be reviewed independently of government.

In the case of an access refusal, the Act sets out two levels of independent review. The Commissioner carries out the first review through the investigation process.

When the Commissioner concludes that a complaint is well-founded and the institution does not act upon her formal recommendation to disclose records she may, with the complainant's consent, seek judicial review by the Federal Court of the institution's refusal.

A complainant may also seek judicial review by the Federal Court of a government institution's access refusal, after receiving the results of the Commissioner's investigation.

The Act also provides a mechanism by which a "third party" (such as a company) may apply for judicial review of an institution's decision to disclose information that the third party maintains should be withheld from a requester under the Act.

The Commissioner closely monitors all cases with potential ramifications on the right of access to information and may seek leave to participate in proceedings with potential impact on that right. This includes cases in which a third party has challenged an institution's decision to disclose requested information.

The following summaries review ongoing cases and court decisions rendered in 2014–2015.

Ongoing cases

Commissioner-initiated proceedings

Through her investigations, the Commissioner determines, among other things, whether government institutions are entitled to refuse access to requested information based on the limited and specific exceptions to the right of access set out in the Act.

When the Commissioner finds that an exception to the right of access has not been properly applied, she informs the head of the institution that the complaint is well-founded, and formally recommends that the withheld information be disclosed. On occasions when the head of an institution does not agree to follow this recommendation, the Commissioner may, with the consent of the complainant, ask the Federal Court, under section 42 of the Act, to review the institution's refusal to release the information.

Access to long-gun registry information and challenge to the constitutionality of the *Ending the Long-gun Registry Act*

On May 14, 2015, the Commissioner applied, with the consent of the complainant, to the Federal Court for a judicial review of the Minister of Public Safety's refusal to process additional records in the long-gun registry that she had determined to be responsive to the complainant's underlying access request. (For more information, see "Access to information: Freedom of expression and the rule of law," page 4.)

Earlier that same day, the Commissioner had tabled in Parliament a special report detailing her investigation into this complaint (<http://bit.ly/1FmLSs5>).

This special report was tabled shortly after the Government had introduced Bill C-59, the *Economic Action Plan 2015 Act, No. 1*, which included retroactive amendments to the *Ending the Long-gun Registry Act* (ELRA).

As amended, ELRA retroactively ousts the application of the *Access to Information Act* to long-gun registry records, including the Commissioner's power to make recommendations and report on the findings of investigations relating to these records and the right to seek judicial review in Federal Court of government decisions not to disclose these records. The legislation also retroactively immunizes Crown servants from any administrative, civil or criminal proceedings with respect to the destruction of long-gun registry records or for any act or omission done in purported compliance with the *Access to Information Act*.

On June 22, 2015, the Commissioner and Bill Clennett, the individual who had requested the long-gun registry records and made the complaint regarding the handling by the **Royal Canadian Mounted Police** (RCMP) of his request, filed an application in the Ontario Superior Court challenging the amendments to ELRA enacted by Bill C-59.

This application challenges these amendments on the grounds that they unjustifiably infringe the right of freedom of expression protected in section 2(b) of the *Canadian Charter of Rights and Freedoms* and that, in their retroactive effects, they contravene the rule of law.

As part of the Federal Court proceedings, the Commissioner succeeded in obtaining an order from the Court directing the Minister of Public Safety and the Commissioner of Firearms (who is the Commissioner of the RCMP) to deliver the hard drive containing the remaining long-gun registry records to the Federal Court Registry. The Government of Canada complied with this order on June 23, 2015.

In July 2015, the Commissioner's Federal Court application was stayed pending the outcome of the application to the Ontario Superior Court, which is ongoing.

Withholding minutes of a public board

The Information Commissioner of Canada v. Toronto Port Authority (T-1453-14)

Background, "The Information Commissioner filed an application for judicial review in *Information Commissioner of Canada v. Toronto Port Authority*": <http://bit.ly/1eVCoYw>.

In June 2014, the Commissioner initiated a judicial review of the **Toronto Port Authority's** refusal to disclose portions of the minutes of a 2008 meeting of its audit committee.

The institution withheld large swaths of the minutes under sections 18 and 20, claiming that releasing the minutes would harm the organization and reveal confidential third-party information. However, the Commissioner was of the view that the information should not be withheld.

In her investigation, the Commissioner found that the institution did not exercise its discretion reasonably, since there was no indication that it had considered the facts in favour of disclosure, such as the passage of time and that much of the information was in the public domain. She was of the view that the minutes should be disclosed in their entirety.

Before the Federal Court, the institution is also claiming that section 21 (Advice and recommendations to government) applies to the minutes.

The court hearing will be held on October 19, 2015.

In her special report on modernizing the Act, the Commissioner recommended that section 21 be amended to limit its application to five years (<http://bit.ly/1GRGmsW>).

Number of individuals on Canada's "no-fly list"

Information Commissioner of Canada v. Minister of Transport Canada (T-911-14 and T-912-14)

Background, "Injury to international affairs": <http://bit.ly/1gwA2k4>

In April 2014, the Commissioner applied for judicial review of **Transport Canada**'s refusal under section 15 of the Act to release the number of individuals named on the Specified Persons List (otherwise known as Canada's "no-fly list") between 2006 and 2010, and the number of Canadians on the list during the same period.

Transport Canada said that releasing these numbers could reasonably be expected to injure international affairs and the detection, prevention or suppression of subversive or hostile activities. However, the Commissioner found that the figures did not meet the criteria of section 15 and recommended that the Minister of Transport release them. The Minister declined to do so.

The court hearing will begin on January 20, 2016.

Complainant-initiated proceedings

After the Commissioner reports to the complainant the results of her investigation of an institution's decision to refuse access to requested records, the complainant may be of the view that more information should be disclosed. A complainant is entitled to ask the Federal Court, under section 41 of the Act, to review an institution's refusal to disclose information. A precondition for such a judicial review is that the Commissioner has completed an investigation of a refusal of access.

Missing records

3412229 Canada Inc. et al. v. Canada Revenue Agency et al. (T-902-13)

Background, "*3412229 Canada Inc. et al. v. Canada Revenue Agency et al.* (T-902-13)": <http://bit.ly/1Dx7Bx0>
See also, "Missing records at the Canada Revenue Agency," page 8.

The Commissioner investigated the complaints initiated by seven numbered companies about the **Canada Revenue Agency**'s (CRA) refusal to release portions of requested records for various taxation years.

As a result of the Commissioner's investigations, CRA disclosed additional information. However, the companies were not satisfied that they had received all the information to which they were entitled and initiated six judicial review proceedings (later consolidated into one).

Within the context of the judicial review proceedings, the companies indicated that CRA had identified additional records that were responsive to the access requests after the completion of the Commissioner's investigations, and alleged that still more records should exist.

The Commissioner obtained leave to be added as a party to the judicial review proceedings.

The companies subsequently filed complaints with the Commissioner, alleging that there were missing records that would respond to its requests and that CRA had improperly applied exemptions to the additional records that CRA had identified in response to its requests.

Thereafter, the companies asked (and the court agreed) that the judicial review proceedings be held in abeyance until the Commissioner finished investigating the companies' further complaints. These investigations are ongoing.

Third-party-initiated proceedings

Section 44 of the *Access to Information Act* provides a mechanism by which a "third party" (such as a company) may apply for judicial review of an institution's decision to disclose information that the third party maintains should be withheld under the Act.

Notices of any applications third parties initiate under section 44 are required to be served on the Commissioner under the *Federal Courts Rules*. The Commissioner reviews these notices and monitors steps in these proceedings through information available from the Federal Court Registry and, in some instances, from the parties themselves. The Commissioner may then seek leave to be added as a party in those cases in which her participation would be in the public interest.

In 2014–2015, the Commissioner sought and obtained leave to be added as a party to a number of applications for judicial review initiated under section 44, as follows.

Personnel rates for government contracts

Calian Ltd. v. Attorney General of Canada and the Information Commissioner of Canada (T-291-14 and T-1481-14)

Calian Ltd. filed two applications for judicial review in January 2014 (later consolidated) regarding decisions by **Public Works and Government Services Canada** (PWGSC) to release the "personnel rates" Calian had submitted as part of a government tendering process.

Calian, the successful bidder, claimed that the rates should not be disclosed as per section 20, because they contain confidential third-party information which, if released, would cause harm to the company. Calian also claimed that PWGSC should have exercised its discretion to refuse to disclose these rates because disclosure would interfere with the government's contractual negotiations and result in undue benefits to Calian's competitors.

The Attorney General claimed the inclusion of a disclosure-of-information clause in the contract meant that the information must be disclosed to the requester. The Commissioner agreed with the Attorney General, arguing that the claims of harm were not sufficiently substantiated.

The hearing was held before the Federal Court in Ottawa on June 2, 2015.

In her special report on modernizing the Act, the Commissioner recommended that the mandatory exemption to protect third-party information be amended to include a two-part test. Part of this test would require, when relevant, that institutions show evidence that disclosure could reasonably be expected to significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization (<http://bit.ly/1NA5Q2v>).

Contract and tender information

Recall Total Information Management Inc. v. Minister of National Revenue (T-1273-14)

Background, "*Recall Total Information Management Inc. v. Minister of National Revenue*, 2015 FC 848": <http://bit.ly/1gwEr6D>

Recall Total Information Management filed an application for judicial review in May 2014 to challenge **CRA's** decision to disclose contract and tender information related to Recall and the storage of CRA's tax files, which Recall considered ought to be exempt from disclosure under section 20.

Subsequently, the Court allowed a motion by Recall to file additional evidence. On the basis of this new evidence, CRA advised Recall, the Commissioner and the Court that it had reconsidered its original decision to release the information. CRA purported to issue a new decision, by which it would exempt from disclosure parts

of records it had already decided to release. Recall filed a notice of discontinuance on the basis that CRA's original decision on disclosure was no longer operative and was superseded by the second decision.

The Commissioner made a motion seeking a ruling on the legal significance of CRA's second decision, taking the position that the CRA had no authority to issue a new or amended decision, as set out in *Porter Airlines Inc. v. Canada (Attorney General)*, 2013 FC 780 (<http://bit.ly/1V8fPkT>). On July 9, 2015, the Court allowed the Commissioner's motion, finding that CRA's second decision, following the Porter Airlines and other decisions, "has no force and effect." The Court added: "Once a proceeding is initiated, it is the obligation of the Court to determine whether the exemptions to disclosure are applicable; it is not the Minister's decision that determines the exemptions."

The Court ordered the Minister of National Revenue to advise the requester of the position CRA would now be taking in this proceeding.

A hearing date for this matter has been set for September 21–22, 2015.

Personal information of private-sector employees (1)

Suncor Energy Inc. v. Canada–Newfoundland and Labrador Offshore Petroleum Board et al. (T-1359-14)

Suncor Energy Inc. filed an application for judicial review in June 2014 challenging a decision by the **Canada–Newfoundland and Labrador Offshore Petroleum Board** to disclose records that contain the names, telephone numbers and business titles of Suncor employees, as well as other information.

Suncor alleges that the responsive records contain personal information, which is protected from disclosure under section 19. It also claims that the records contain confidential information that should be withheld under sections 20 and 24 of the *Access to Information Act*, which incorporates by reference section 119 of the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act*.

The Commissioner takes the position that the Board reasonably exercised its discretion to disclose the personal information because the employees' affiliation with Suncor was publicly available. She also argues that the rest of the

information at issue is not confidential third-party information and therefore should not be withheld.

A hearing has been set for August 13, 2015, in St. John's, Newfoundland and Labrador.

In her special report on modernizing the Act, the Commissioner recommended that the definition of personal information exclude workplace contact information of non-government employees (<http://bit.ly/1f696Yi>).

Personal information of private sector employees (2)

Husky Oil Operations Limited v. Canada–Newfoundland and Labrador Offshore Petroleum Board et al. (T-1371-14)

Husky Oil filed an application for judicial review in June 2014 asking the Court to set aside a decision by the **Canada–Newfoundland and Labrador Offshore Petroleum Board** to release the names and business titles of Husky employees as well as other information that Husky alleges constitutes personal information. Husky is of the view that the information should be withheld under section 19 of the *Access to Information Act*, arguing that there is no publicly available information that links its employees to the requested records.

The Information Commissioner was added as a party to the proceeding on July 10, 2014. The case is ongoing.

Government grant and contribution programs

Bombardier Inc. v. Attorney General of Canada and Information Commissioner of Canada (T-1650-14 and T-1750-14)

Bombardier Inc. filed two applications for judicial review in July 2014 of decisions made by **Industry Canada** to release information relating to Bombardier in the context of several grant and contribution programs. Bombardier Inc. claims that the information should be withheld under section 20 (Third-party information).

Among other things, Bombardier Inc. is asking that the Court declare the decisions to be null and void, on the grounds that Industry Canada allegedly reversed or withdrew its earlier decision about disclosure.

As a result of a motion, the two applications were consolidated and the Court is holding the consolidated application in abeyance until the Commissioner completes her investigations into the matters. Those investigations are ongoing.

In her special report on modernizing the Act, the Commissioner recommended that third-party exemptions not apply to information about grants, loans and contributions given by government institutions to third parties (<http://bit.ly/1NA5Q2v>).

Breach of procedural fairness

Brewster Inc. v. The Minister of the Environment as the Minister for Parks Canada and the Attorney General of Canada and the Information Commissioner of Canada (T-5-15)

Brewster Inc. filed an application for judicial review in January 2015, asking the Court to set aside **Parks Canada's** decision to release information related to communications about the Glacier Skywalk Development in Jasper National Park.

Brewster claims that the records contain information that should be withheld under sections 19 and 20. Brewster also alleges that Parks Canada breached its duty of procedural fairness by denying Brewster's request for a time extension to provide comments on the possibility of disclosing the records and by rendering a decision to disclose the records at issue without providing its reasons for doing so.

The Commissioner was added as a party to this proceeding on March 27, 2015. The case is ongoing.

Discontinued cases

Third parties discontinued the following applications for judicial review under section 44 of the *Access to Information Act*, in which the third parties had challenged government institutions' decisions to release information.

Simon & Nolan Entreprises Inc. v. Canadian Food Inspection Agency and the Attorney General of Canada and the Information Commissioner of Canada and Corporation Sun Media (T-1382-14)

In June 2014, Simon & Nolan Entreprises Inc. filed an application for judicial review of a decision by the **Canadian Food Inspection Agency** to release information regarding inspection reports. The company claimed that the information should be withheld under section 20, since it included confidential third-party information, the disclosure of which would cause prejudice to Simon & Nolan.

The Commissioner was added as a party. Simon & Nolan discontinued the application in April 2015.

Provincial Airlines Ltd. v. the Attorney General of Canada and the Information Commissioner of Canada (T-1429-13)

Background, “*Provincial Airlines Ltd. v. Attorney General of Canada and Information Commissioner of Canada* (T-1429-13)”: <http://bit.ly/1L463x7>

Provincial Airlines filed an application for judicial review in August 2013 asking the Court to set aside a decision by **PWGSC** to disclose to a requester records relating to a contract awarded to Provincial Airlines under Fisheries and Oceans Canada’s National Fisheries Aerial Surveillance Program.

Provincial Airlines discontinued the application in October 2014.

Bayer Inc. v. The Minister of Health and The Information Commissioner of Canada (T-743-14)

In March 2014, Bayer Inc. filed an application for judicial review of **Health Canada**’s decision to disclose information contained in an Adverse Drug Reaction report. Bayer Inc. claimed that the information should be withheld under sections 19, 20, 21 and 24.

Following the filing of its affidavits, Bayer Inc. discontinued the matter in August 2014.

Eli Lilly Canada Inc. v. The Minister of Health and The Information Commissioner of Canada (T-1410-14 and T-1712-14)

In June and August 2014, Eli Lilly Canada Inc. filed applications for judicial review (later consolidated) of two decisions by **Health Canada** to disclose information found in reports filed with that institution. The Commissioner was added as a party.

Following the filing of the parties’ affidavits, Eli Lilly discontinued the proceedings in February 2015.

Decisions

The following decisions were rendered in 2014–2015 in matters related to access to information.

Commissioner-initiated proceedings

A very lengthy time extension

Information Commissioner of Canada v. Minister of National Defence, 2015 FCA 56

See “The culture of delay,” page 9.

Federal Court reference on fees

Information Commissioner of Canada v. Attorney General of Canada, 2015 FC 405

See “Removing a barrier to access: Fees and electronic records,” page 10.

The scope of personal information

Information Commissioner of Canada v. Minister of Natural Resources, 2014 FC 917

Decision: <http://bit.ly/1CebPcl>

Background, “The scope of personal information”: <http://bit.ly/1IWYqXy>

In July 2013, the Commissioner applied for judicial review of the refusal by **Natural Resources Canada** (NRCan) to disclose, citing section 19, basic professional information, such as the names, professional titles and business contact information, of individuals working for non-government entities, who may have received data about the complainant’s business from NRCan.

The Federal Court dismissed the Commissioner’s application on October 3, 2014.

The Court held that all information “about” an identifiable individual is “personal information” unless that information falls within one of the exceptions to the definition of “personal information” set out in section 3 of the *Privacy Act*. “It is hard to imagine information that could be more accurately described as “about” an individual than their name, phone number and business or professional title.” Thus, the Court held that NRCan had correctly withheld the information.

The Court went on to consider whether the information should nonetheless have been disclosed under paragraph 19(2)(b), which allows the institution to release personal information that is already publicly available. The Court concluded that, since the information was not available to NRCan prior to the application for judicial review, the information was not publicly available. Therefore, either the condition permitting disclosure under paragraph 19(2)(b) did not exist at the time NRCan refused to release the information or NRCan's refusal was reasonable, because the information only became publicly available after the judicial review began.

The Commissioner did not appeal the Federal Court's decision.

Limiting the application of solicitor-client privilege

Information Commissioner of Canada v. Minister of Health, 2015 FC 789

Decision: <http://bit.ly/1gQ7JgU>

Background, "Limits of solicitor-client privilege": <http://bit.ly/1P3W7BQ>

In November 2013, the Commissioner applied for judicial review of **Health Canada's** refusal under section 23 to release portions of documents related to a proposed new drug.

The Commissioner had concluded through an investigation that Health Canada had neither shown that the information met the criteria required to demonstrate solicitor-client privilege nor properly exercised its discretion to waive privilege. The Minister of Health rejected the Commissioner's recommendation to release the information.

In April 2015, the Federal Court found that, with one exception, the records were subject to solicitor-client privilege and therefore that Health Canada had correctly withheld them under section 23. In its ruling, the Court said that, when analyzing whether solicitor-client privilege applies, documents should be considered in the context of "a continuum of communication" between client and counsel, and not in isolation. Thus, although not all of the records were communications exchanged between a lawyer and a client, they were part of the overall privileged communication. The Court did order Health Canada to sever a portion of one record that was not covered by the privilege and release it to the requester.

The Commissioner did not appeal the Federal Court's decision.

Complainant-initiated proceedings

Premature judicial proceeding

Lukács v. President of the Natural Sciences and Engineering Research Council of Canada, 2015 FC 267

Decision: <http://bit.ly/1JZrJY2>

In response to an access request for records about investigations of research misconduct, the **Natural Sciences and Engineering Research Council** (NSERC) informed the requester that it could neither confirm nor deny the existence of relevant records as per subsection 10(2) of the Act.

The requester complained to the Commissioner, submitting that NSERC had not, as is required by paragraph 10(1)(b), notified him of the specific provision of the Act on which a refusal could reasonably be expected to be based should the record exist.

As a result of the Commissioner's investigation, NSERC acknowledged that records exist but decided to refuse access to them based on subsection 19(1) (Personal information), paragraph 21(1)(b) (Accounts of deliberations and consultations) and section 23 (Solicitor-client privilege).

In October 2014, the requester filed an application for judicial review of NSERC's refusal to disclose the records. NSERC brought a motion to strike out the proceeding, on the grounds that the application was "so clearly improper as to be bereft of any possibility of success." The Court granted the motion, noting that NSERC was no longer refusing to confirm or deny the existence of responsive records and, therefore, there was no live issue before the Court.

The Court also noted that a judicial review is only available after the Commissioner has reported the results of her investigation to the complainant, which was not the case with respect to NSERC's decision to refuse access based on subsection 19(1), paragraph 21(1)(b) and section 23. As a result, the Court concluded that the judicial review was premature.

The requester did not appeal the Federal Court's decision.

No unreasonable delay in the Commissioner's investigations

Coderre et al. v. The Information Commissioner of Canada, 2015 FC 776

Decision: <http://bit.ly/1liH8VX> (in French only)

A complainant and others applied to the Court on September 12, 2014, under section 18 of the *Federal Courts Act*, seeking an order of *mandamus* requiring the Commissioner to provide her reports of findings to the complainants within 30 days of the requested order being issued. On June 22, 2015, the Court dismissed the application, with costs.

The 12 complaints relate to **CRA**'s refusal to give access to documents regarding reassessments made between April 2, 2014, and September 8, 2014. Both at the time the application was filed and when the Court issued its decision, June 22, 2015, the Commissioner's investigations into these complaints were not concluded.

The Court determined that the applicants had not satisfied one of the conditions required for issuing an order of *mandamus* against the Commissioner: The Commissioner had not failed to carry out a duty imposed by the Act, and no unreasonable delay had elapsed in investigating the applicants' complaints; the longest was slightly more than 14-and-a-half months from the date of the complaint. The Court held that this [translation] "cannot be a delay that exceeds what the nature of the process set out in the [Act] requires *prima facie*."

The Court added that the Commissioner had not refused to carry out the duties imposed on her by the Act and that she had also followed the procedure and the requirements set out by the Act for conducting her investigations.

The Court also agreed with the Commissioner's submissions that granting a writ of *mandamus* in the circumstances would go against Parliament's intention and the entire scheme of the Act, given that [translation] "the Act provides a process with two independent levels to review decisions from government institutions refusing access to documents: the Commissioner is the first level and this Court intervenes only afterward..." [translation].

No reasonable cause of action

Whitty v. Office of the Information Commissioner of Canada (20154/14, Hamilton Small Claims Court)

Background, "Investigation report a pre-condition of a judicial review application": <http://bit.ly/1L46ebL>

In December 2014, a plaintiff filed a statement of claim in small claims court for \$25,000 in alleged damages against the Commissioner regarding an ongoing investigation. The plaintiff had previously brought an unsuccessful application for judicial review regarding this same investigation and other completed ones before the Federal Court and Federal Court of Appeal. Both courts dismissed the application and subsequent appeal, with costs.

The Commissioner brought a motion in the small claims case to strike the plaintiff's claim for failing to disclose a reasonable cause of action and for being an abuse of the court's process. The Court heard the Commissioner's motion to strike on April 20, 2015, in Hamilton.

On June 22, 2015, the Deputy Judge granted the Commissioner's motion to strike and dismissed the claim for disclosing no reasonable cause of action, for being advanced in the wrong court and for being an abuse of the court's process. Costs were awarded to the Commissioner.

Third-party information

Contract information

Equifax Canada Co. v. Canada (Human Resources and Skills Development), 2014 FC 487

Decision: <http://bit.ly/1NZ1mmg>

Background, "*Equifax Canada Co. v. Minister of Public Works and Government Services Canada et al.* (T-1003-13) and *Equifax Canada Co. v. Minister of Human Resources and Skills Development et al.* (T-1300-13)": <http://bit.ly/1ElollV>

Equifax Canada Co. filed two applications for judicial review in June and July 2013. The first related to a decision by **PWGSC** to disclose the total price paid under a contract between Equifax and the former Human Resources and Skills Development Canada (HRSDC).

This contract was for credit and fraud protection services for individuals affected by HRSDC's loss of an electronic storage device containing the personal information of 583,000 Canada Student Loan borrowers.

The second related to **HRSDC's** decision to disclose portions of other contracts it had concluded with Equifax. These contracts generally pertained to the provision of credit reporting services to HRSDC by Equifax.

In both cases, Equifax claimed that the information at issue was exempt from disclosure based on subsection 20(1) (Third-party information). The Commissioner was granted leave to be added as a party, and the matters were heard together before the Federal Court in Toronto on May 13, 2014. The Court rendered its decision on May 21, 2014.

With respect to the first application, the Court was unconvinced that Equifax could claim the paragraph 20(1)(d) exemption. It noted that Equifax was essentially arguing that disclosing the contract price would make future negotiations more competitive, grounds insufficient to satisfy the requirements of paragraph 20(1)(d).

However, the Court did find that Equifax satisfied the requirements for the application of paragraph 20(1)(c). The Court considered that "by disclosing the Contract price, there is a real, objective risk that this information will give competitors a head start or "spring board" in developing competitive bids against the Applicant for future contracts for data protection services."

The Court dismissed the second application, deciding that Equifax's arguments did not meet the threshold for the exemption under paragraph 20(1)(c). In particular, the Court found that the information at issue was not confidential information in a business context. It also noted that Equifax had no substantial competition for government contracts and, as such, this made the potential of a reasonable expectation of probable harm, were the records disclosed, relatively remote. The Court also found that Equifax's arguments pertaining to paragraph 20(1)(d) were speculative and therefore could not serve as a basis for justifying the application of that exemption.

Safety incident reports

Husky Oil Operations Ltd. v. Canada–Newfoundland Offshore Petroleum Board and the Information Commissioner of Canada, 2014 FC 1170

Decision: <http://bit.ly/1HkuB0G>

Background, "*Husky Oil Operations Limited v. Canada–Newfoundland and Labrador Offshore Petroleum Board et al.* (T-511-13)": <http://bit.ly/1ICRrB8>

In March 2013, Husky Oil asked the Court to set aside a decision by the **Canada–Newfoundland and Labrador Offshore Petroleum Board** to release information found in safety incident notifications and safety incident investigation reports relating to an oil rig operated by Husky Oil. The company had provided this information to the Board in compliance with the *Canada–Newfoundland and Labrador Atlantic Accord Implementation Act* and Regulations.

Husky Oil claimed that the information is privileged under section 119 of this law, such that it may not be disclosed as per subsection 24(1) of the *Access to Information Act*, which lists statutory prohibitions against disclosure.

The Commissioner was added as a party and took the position that the information should not be withheld.

The Court rendered its decision on December 19, 2014. While acknowledging that safety is a concern of the Board, and that there is a public interest in the safe operation of offshore petroleum operations, the Court weighed the business, privacy and other interests at stake against the public interest in disclosure. The Court found that subsection 119(2) establishes a privilege against disclosure, and that disclosure in this case was not required for the Board to administer and enforce the legislation. The Court also held that the public interest alone does not justify disclosure of information generated by offshore petroleum operators.

The Court allowed the application and set aside the Board's decision to release the information.

In her special report on modernizing the Act, the Commissioner recommended that the Act include a general public interest override, applicable to all exemptions, with a requirement to consider, among other factors, environmental, health or public safety implications (<http://bit.ly/1CTWIKB>).

Promoting access

The Commissioner works to improve how the *Access to Information Act* is implemented across the federal government. The Commissioner is also active in Canada and internationally, helping develop, implement and improve access laws.

Balancing open government with access

The Commissioner has been supportive of the government's activities in the area of open government, including Canada's joining the international Open Government Partnership (OGP). At the same time, she has stressed that a strong access to information system is a crucial element of any open government plan.

In a September 2014 letter to the President of the Treasury Board, the Commissioner emphasized that the government's upcoming open government action plan should include a commitment to modernizing the *Access to Information Act* (<http://bit.ly/1NDAYOL>). In her letter, the Commissioner concurred with the independent expert who reviewed Canada's progress on implementing its OGP commitments and who noted that "open data is becoming privileged at the expense of other areas of open government and some of the other commitments that we have made in our OGP action plan to the international community and to Canadians."

In a follow-up letter, the Commissioner made 16 recommendations on the draft plan, released in October 2014. Her recommendations focused on measures to help the government effect a fundamental change in its internal culture to promote the release of information and foster transparency, accountability and citizen engagement (<http://bit.ly/1Uidpja>).

Ensuring complementary approaches

The Office of the Information Commissioner analyzed the types of datasets available through open.canada.ca and compared them to the information sought through access to information requests.

There are clear differences between the two. For example, at the end of June 2015, the top three downloaded datasets were the National Occupational Classification (NOC) 2011 (Statistics Canada), Government of Canada employee contact information (Shared Services Canada) and fuel consumption ratings (Natural Resources Canada).

In contrast, common themes of access requests from January to May 2015 included terrorism and information regarding the Islamic States, the October 22, 2014, shooting on Parliament Hill, lists of briefing notes to ministers and deputy ministers, and climate change.

The differences between the two groups of information speak strongly to the Commissioner's position that open data and access to information are both essential to optimizing government transparency.

In addition to modernizing the Act to align with the principle of “open by default” and the most progressive national and international standards, the Commissioner recommended that the government provide more guidance and training on information management to public servants; and establish in the law a comprehensive duty to document, with sanctions for non-compliance. The Commissioner also recommended implementing a legal obligation to systematically declassify government records and having institutions release information in accordance with open government principles. Finally, she recommended that the **Treasury Board of Canada Secretariat** (TBS) ensure adequate resourcing of the access to information function and that TBS take a lead role in recruiting, staffing and retaining much-needed access professionals.

The government released the 2014–2016 action plan in November 2014. It did not include a commitment to modernize the Act, nor did it take into account any of the Commissioner’s other recommendations. The government did commit to expanding the proactive release of information on government activities, programs, policies and services, and to making information easier to find, access and use. However, the Commissioner is of the view that such disclosure cannot replace a robust access to information system (see box, “Ensuring complementary approaches”) nor facilitate the necessary culture change.

Shedding light on decision-making by Cabinet

Cabinet is responsible for setting the policies and priorities of the Government of Canada. In doing so, ministers must be able to discuss issues within Cabinet privately. The need to protect these deliberations is well established under the Westminster system of Parliament and has been recognized by the Supreme Court of Canada.

Under the current law, Cabinet documents, with very few exceptions, are excluded from the Act under section 69. This means that the Commissioner is unable to review any such records as part of her investigations. In addition, and as the Commissioner noted in her 2013–2014 annual report, the process for reviewing records during the processing of access requests to determine whether they contain Cabinet confidences was changed in 2013. It is no longer carried out by an expert group at the Privy

Council Office (PCO), but by lawyers at each institution (see “Section 69”: <http://bit.ly/1Wfyzzg>).

The Commissioner is concerned about the implications of this change on the consistency of the application of section 69 and about the increased use of this provision by institutions.

Throughout 2014–2015, the Commissioner monitored the situation. For the first time, during an investigation into a complaint against Public Safety Canada, PCO refused her request to re-review the records at issue to determine whether section 69 had been properly applied. PCO argued that the institution should carry out this step first to ensure it was fully accountable for its decisions about excluding records before PCO got involved. This lengthened the investigation considerably.

Also in 2014–2015, the Commissioner was able to confirm what she had heard anecdotally, that requesters are self-censoring the information they seek through access requests by specifically asking institutions not to process records that might contain Cabinet confidences. A search of the online open data portal containing completed access to information requests from April 2013 to May 2015 found more than 1,700 such instructions from requesters (<http://bit.ly/1FYOgz4>).

Self-censoring of requests

Institutions invoked section 69 more than 3,100 times in 2013–2014. This is a 49-percent increase from 2012–2013, which followed a 15-percent jump the previous year.

To expedite the treatment of their requests, requesters asked institutions **more than 1,700 times** from April 2013 to May 2015 to not process records containing Cabinet confidences.

The Commissioner will continue to monitor the application of section 69. However, it is difficult to assess whether the provision has been properly applied without being able to review the records. The Commissioner has made several recommendations to amend the Cabinet confidences regime under the Act (see box, “Modernizing the treatment of Cabinet confidences”).

Modernizing the treatment of Cabinet confidences

The Commissioner recommended in her special report on modernizing the Act that Cabinet confidences no longer be excluded from the Act, but rather be subject to an exemption (<http://bit.ly/1f6dGWy>). This would bring Cabinet documents under the right of access and allow the Commissioner to carry out full investigations of institutions' use of the exemption, with the benefit of her being able to view the records at issue.

The Commissioner also recommended that the proposed exemption for Cabinet confidences only apply to information necessary to protect Cabinet deliberations. For example, purely factual or background information would not be allowed to be withheld, nor would analyses of problems and policy options. In addition, the Commissioner recommended that the exemption for Cabinet confidences not apply to information that is 15 or more years old. (Currently, the documents are subject to an almost absolute protection for 20 years.)

To further facilitate transparency, the Commissioner also recommended a statutory obligation for the government to declassify Cabinet and other records on a routine basis.

Updates to the *Policy on Access to Information*

In March 2014, the Commissioner wrote to the Secretary of the Treasury Board with comments on proposed changes to the Policy on Access to Information, which governs the administration of the Act (<http://bit.ly/1RoRrfb>). The Commissioner's comments focused on, among other things, how to ensure efficient and effective investigations, and to improve the performance of institutions in responding to access requests.

TBS accepted the Commissioner's recommendation that the policy acknowledge that it is important for institutions to collaborate with her office to help address complaints in a timely manner.

TBS also agreed that the policy should require institutions to document how they exercise their discretion when invoking exemptions that require it, to facilitate the review of refusal complaints. TBS also said it would add a specific mention in the policy that obstructing the investigation of complaints is an offence under the Act. These changes will be implemented in conjunction with TBS's policy suite renewal.

However, the Commissioner remains concerned that TBS did not specifically address the need for accountability measures related to improving institutional performance in order to emphasize the importance of the culture change required. For example, the Commissioner had recommended that the performance agreement of the senior executive responsible for access in each institution cover compliance with the Act, including the resolution of complaints. She also recommended that institutions set and report on specific targets for access to information operations in their *Report on Plan and Priorities* and *Departmental Performance Report*. These and other measures of this type have proven effective in improving performance in individual institutions and in other fields.

The state of the access system

In October 2014, the Commissioner published her observations on the health of the access system in 2012–2013, including detailed analysis of the annual statistics on access to information operations in 24 institutions (<http://bit.ly/1HfxaBc>).

Based on multiple sources of publicly available information, this analysis provides a comprehensive picture of the state of the access system and sheds light on the possible reasons for the increase in the volume of complaints the Commissioner received the following year.

Given the importance of this work to assessing the health of the access system, the Commissioner will publish her analysis of the data for 2013–2014 in 2015.

As a way to more accurately track and measure institutional performance, the Commissioner recommended in a November 2014 letter to the President of the Treasury Board that Canada's Open Government Action Plan 2.0 include a commitment to report statistics on the administration of the Act on a quarterly basis (<http://bit.ly/1Uidpja>).

Promoting access across Canada

Addressing the impact of current issues on access

Information and privacy commissioners and ombudsmen at the federal, provincial and territorial levels from across Canada confer regularly on issues of common and pressing interest, particularly as they relate to upholding the fundamental right of access to government information. In 2014–2015, the Office of the Information Commissioner co-hosted the annual meeting of commissioners and ombudsmen in Ottawa. As a result, the commissioners and ombudsmen issued two joint resolutions on current matters affecting the right of access.

In the first—released in late October 2014 in the immediate aftermath of the deaths of two Canadian servicemen on home soil—the commissioners and ombudsmen underlined the need for Canada to uphold fundamental rights and freedoms while taking steps to enhance security (<http://bit.ly/1nPACMn>). The Information Commissioner followed this statement with a letter to the House of Commons Standing Committee on Public Safety and National Security, sharing her concerns about Bill C-44, *An Act to amend the Canadian Security Intelligence Service Act and other Acts* (<http://bit.ly/1TadzxF>). In her letter, she noted that this legislation would have a negative effect on her ability to carry out her oversight role and on the amount of information that could be subject to disclosure under the *Access to Information Act*.

In the second joint resolution, issued in mid-November 2014, the commissioners and ombudsmen focused on the need for governments to modernize their information management practices to better protect and promote the rights of Canadians in the digital era (<http://bit.ly/1NDCqRe>).

In particular, the commissioners and ombudsmen urged their respective governments to review and modernize their information management frameworks by, among other things, embedding access rights in the design of public programs and systems, and creating a legislative duty for government employees to document their deliberations, actions and decisions. The commissioners and ombudsmen also recommended that governments adopt safeguards to prevent the loss or destruction of information, including digital records, so that they can easily be retrieved when needed, including to respond to access requests.

2014 Grace-Pépin Award recipient

Professor Alasdair S. Roberts, a leading researcher in the field of access to information, was the recipient of the 2014 Grace-Pépin Access to Information Award, recognizing outstanding dedication to advancing the principles of access to information (<http://bit.ly/1R9MtTv>).

Professor Roberts, a Canadian currently teaching at the Harry S. Truman School of Public Affairs at the University of Missouri, has written widely on access to information. His 2006 book, *Blacked Out: Government Secrecy in the Information Age*, offers an in-depth analysis of access issues in Canada.

“Throughout his many years of research and writing, Professor Roberts continues to raise the profile of access issues both in Canada and abroad,” the Commissioner said on presenting the award. “His body of work is at the forefront of ongoing discussions surrounding government transparency and accountability.”

Assisting with the review of Newfoundland and Labrador’s access law

In August 2014, the Commissioner appeared before a committee reviewing Newfoundland and Labrador’s *Access to Information and Protection of Privacy Act*. The Commissioner presented her perspective on freedom of information and recommended improvements to the provincial law to help balance the confidentiality required to conduct the business of government with the need to ensure citizens have access to public information such that they can hold their governments to account. The Commissioner also submitted detailed comparative legislative research.

The committee made 90 recommendations to improve and streamline the law, many of which mirrored the Commissioner’s recommendations. The provincial government amended the law accordingly, and these changes came into effect on June 1, 2015. Newfoundland and Labrador’s access law is now the top-ranked in Canada, according to the Centre for Law and Democracy’s Right to Information Rating (<http://bit.ly/1HXXGSQ>).

Sharing the Commissioner's mandate and priorities with stakeholders

Over the course of the year, the Commissioner and a number of officials from her office spoke about her mandate and priorities to a variety of stakeholders, including Federal Court and Federal Court of Appeal law clerks, members of the federal access to information and privacy community, and new public servants. Reaching out to law and public administration students was also important to raise awareness about the requirements of the *Access to Information Act*. In addition, the Commissioner spoke at access-related conferences organized by the Canadian Bar Association, the University of Alberta and the Office of the Information and Privacy Commissioner of Newfoundland and Labrador.

Making the case for access on the international stage

Canada, as a pioneer in the field of access to information, has an important role to play in sharing the benefit of its knowledge and experience with the international access community.

In 2014–2015, the Commissioner was part of two panels convened by the Organization of American States (OAS) on equitable access to public information. The first, in August 2014 in Guatemala, focused on best practices associated with the characteristics, powers and composition of oversight bodies, such as information commissioners' offices. In March 2015 in Argentina, the Commissioner and fellow panellists shared their experiences with and thoughts on adopting and implementing access laws.

This work follows on the development of the 2012 OAS Model Inter-American Law on Access to Public Information and its Implementation Guidelines, to which the Office of the Information Commissioner made a significant contribution (<http://bit.ly/1CfUVtR>). This work by the OAS was funded by Foreign Affairs, Trade and Development Canada.

As a result of the workshops, some Latin American countries, including Argentina, have either used the Model Law as the basis for their own laws or are in the process of incorporating some of the Model Law's principles into their existing laws. The Commissioner's special report on modernizing the Act was also informed by the Model Law (<http://bit.ly/1U2A3uO>).

Advising Parliament

As an agent of Parliament, the Commissioner provides advice to Parliament on important access-related matters and on the functioning of her office to ensure sufficient ongoing oversight of the access system.

Committee appearances

In May 2014, senior officials appeared on the Commissioner's behalf before the House of Commons Standing Committee on Access to Information, Privacy and Ethics to discuss the Main Estimates. The officials spoke about the Commissioner's budget and priorities, and the risks to her office that ongoing financial pressures and a growing workload presented. An appearance by the Commissioner before the same committee in December 2014 also covered the resources her office has available to carry out her mandate.

On January 28, 2015, the Commissioner and several of her fellow agents of Parliament appeared before the Standing Senate Committee on National Finance on Bill C-520, *An Act supporting non-partisan offices of agents of Parliament*. (The agents also sent a joint letter to the committee on the subject: <http://bit.ly/1LIna6z>.) This proposed law seeks to prevent conflicts that could occur or could be perceived to occur between, on the one hand, the official duties and responsibilities of employees of agents of Parliament and, on the other, their past or

Bill could affect the integrity of investigations

In her remarks to the Senate Standing Committee on National Finance on Bill C-520, the Commissioner spoke about the impact of the proposed legislation on her investigations and the right of access.

"In reviewing the bill many times, Mr. Chair, the only conclusion I can come to is that past political or partisan activity could be used to assert the existence of a possible bias in the conduct of our investigations or audits. If the reason for the collection and publication of this personal information is to assert bias, then that raises very serious issues. It could affect the integrity of our investigations; it would politicize our investigations; and it would definitely undermine our effectiveness as agents of Parliament."

future partisan activities. During her appearance, the Commissioner shared her and her employees' concerns about the bill and how it could affect the work of her office (see box, "Bill could affect integrity of investigations").

Reporting to Parliament

Each year, the Commissioner issues reports to Parliament (<http://bit.ly/1K3UJeI>) to provide perspective on her oversight role within the access to information system and on her work to uphold the principles of access at the federal level.

Early in 2014–2015, the Commissioner published her second report into instances of interference with access to information requests at Public Works and Government Services Canada (<http://bit.ly/1FYrQxM>). (See "Interference at Public Works and Government Services Canada" in the Commissioner's 2013–2014 annual report for more information: <http://bit.ly/1WfuOtG>).

A highlight for 2014–2015 was the Commissioner's special report on modernizing the *Access to Information Act*, released on March 31, 2015. Called *Striking the Right Balance for Transparency*, the report contains 85 recommendations that propose fundamental changes to the Act to resolve recurring problems (<http://bit.ly/1Ce7y8W>). The Commissioner's

recommendations are also designed to help ensure that the Act is effective in both protecting information that legitimately needs to be protected and allowing requesters to gain access to information to help them hold the government to account.

Some of the report's key points are aimed at creating a culture of openness by extending coverage of the Act to all branches of government; setting tighter timelines for the processing of requests; maximizing disclosure by ensuring that exemptions protect only what is strictly necessary; and strengthening the oversight of the access to information regime.

The Commissioner also issued a special report in May 2015 on her investigation into the treatment by the Royal Canadian Mounted Police of an access to information request for the data in the national long-gun registry (<http://bit.ly/1FmLSs5>; see also "Access to information: Freedom of expression and the rule of law" on page 4). In early June 2015, the Commissioner appeared before both a House of Commons and a Senate committee to present her concerns about the government's bill to remove the national long-gun registry data from the coverage of the *Access to Information Act* (See box, "On the record," for an excerpt of her remarks before the Senate committee.)

On the record

On May 7, 2015, Bill C-59 was tabled in Parliament. As you know, I have serious concerns with Division 18 of this Bill.

First, this division will effectively make the *Access to Information Act* non-applicable, retroactive to October 25, 2011, even before the coming into force of ELRA [the *Ending the Long-gun Registry Act*]. You must ask yourself why?

Second, Division 18 shields from the application of the *Access to Information Act* a broader scope of records than ELRA ever did. It covers not just the records in the Long-gun Registry as ELRA did, but any records with respect to the destruction of those records.

This probably means that no one will be able to request information about whether the RCMP has really deleted his or her information from the Registry or about how much the destruction of the Registry cost Canadian taxpayers. Indeed, no one will be able to find out what transpired in relation to the destruction of the records at issue in my investigation. This is above and beyond what was ever considered by Parliament in 2012. You must ask yourself why?

Third, if Division 18 is adopted, it would potentially

- nullify the request at issue in my investigation;
- nullify the complaint made to my Office;
- nullify my entire investigation, including production orders—some 30,000 records—and examinations of witnesses under oath;

- nullify my recommendations to the Minister of Public Safety and my referral to the Attorney General;
- nullify my application to the Federal Court;
- nullify the police investigation referred to the OPP;
- nullify all potential administrative, civil or criminal liability of any of the actors involved; and
- essentially nullify the requester's right in this case.

You must ask yourself why?

These proposed changes, Mr. Chair, would retroactively quash Canadians' right of access and the government's obligations under the *Access to Information Act*. It will effectively erase history.

Mr. Chair, Division 18 of Bill C-59 is not an attempt to close a loophole; but rather it is an attempt to create a black hole.

Given the fundamental importance of the right of access and the rule of law in Canadian democracy, I would urge this committee to remove Division 18 (clauses 230 and 231) from this bill.

—Information Commissioner Suzanne Legault,
remarks to the Standing Senate Committee
on National Finance, June 3, 2015

Corporate services

The Commissioner continued in 2014–2015 to ensure efficient operations and exemplary service to Canadians.

Shared services

Pursuing opportunities to share services with other organizations is an important priority for the Commissioner. Sharing services allows the Office of the Information Commissioner to take advantage of expertise it does not have in-house, reduce risk, make efficient use of resources and provide better services.

Three IT-related shared services projects are ongoing: migrating to a new human resources information system (MyGCHR); implementing the pay modernization project; and adopting a new financial system that will be shared with the Office of the Privacy Commissioner and hosted by the Canadian Human Rights Tribunal.

In 2014–2015, the Office of the Information Commissioner entered into a memorandum of understanding with Elections Canada and three other organizations to establish a shared approach to internal training and set up a common training calendar.

In 2015–2016, the Commissioner will pursue shared services opportunities related to information technology security.

Talent management

Talent management is a key priority for the Commissioner to help ensure employees are working to their maximum potential. In 2014–2015, she adapted her talent management program to meet the requirements of the Treasury Board of Canada Secretariat's *Directive on Performance Management* (<http://bit.ly/1HSUMNp>). The Commissioner will continue to enhance this program in 2015–2016.

Case management system

Early in 2014–2015, the information technology group launched the legal component of the Office of the Information Commissioner's case management system. The legal component interfaces with its investigative counterpart to facilitate reporting and sharing of information between lawyers and investigators.

Access to information and privacy

For information on the Commissioner's access to information (<http://bit.ly/1f8NZE0>) and privacy (<http://bit.ly/1KBkUNx>) activities in 2014–2015, consult her annual reports to Parliament on these topics on her website.

Appendix B (page 56) contains the annual report of the Information Commissioner *ad hoc*, who investigates complaints about the Office of the Information Commissioner's handling of access requests.

Audit and Evaluation

As a follow-up to last year's annual report, a threat and risk assessment of the Office's new Workplace 2.0 offices was not conducted in 2014–2015. A similar assessment was completed by another Agent of Parliament located in the same facility as the OIC. As such, the Office will analyze the conclusions of the assessment and consider implementation where necessary. Also, the Office recommended to the Audit and Evaluation Committee, and its members agreed, to postpone the audit of the information technology infrastructure to 2015–2016.

Looking ahead

Access to information: Freedom of expression and the rule of law

The upcoming year, 2015–2016, will see the next developments in the Commissioner’s application before the Ontario Superior Court challenging the constitutionality of the amendments to the *Ending the Long-gun Registry Act* brought about by the enactment of Bill C-59.

As amended, the *Ending the Long-gun Registry Act* retroactively ousts the application of the *Access to Information Act* to long-gun registry records, including the Commissioner’s power to make recommendations and report on the findings of investigations relating to these records and the right to seek judicial review in Federal Court of government decisions not to disclose these records. The legislation also retroactively immunizes Crown servants from any administrative, civil or criminal proceedings with respect to the destruction of long-gun registry records or for any act or omission done in purported compliance with the *Access to Information Act*.

The Commissioner’s application seeks to invalidate these amendments on the grounds that they unjustifiably infringe the constitutional right of freedom of expression and that they contravene the rule of law by interfering with vested rights of access to this information.

Scientists and the media

On February 20, 2013, the Environmental Law Clinic at the University of Victoria and Democracy Watch made a complaint to the Commissioner alleging that federal government communications and media relations policies and practices have undergone significant changes in recent years. These organizations also alleged that current policies and practices prevent the media and, through it, the wider public, from obtaining timely access to government scientists to speak with them about publicly funded scientific research of significant national concern.

On March 27, 2013, the Commissioner began a systemic investigation to determine whether government communications and media relations policies are impeding the right of access to information under the Act by restricting government scientists from publicly communicating about their research.

In 2015–2016, the Commissioner intends to complete and report on this systemic investigation.

Lean process for investigations

The Commissioner will pilot test a “lean process” for investigating complaints in 2015–2016. The objective is to establish clear procedures and to increase predictability for complainants and institutions.

The future of transparency

Modernizing the *Access to Information Act* remains a priority for the Commissioner. She will continue to speak out on the need to bring Canada's law up to date so it is a relevant and effective tool. She will also stand ready to assist parliamentarians should they decide to modernize the Act once Parliament reconvenes after the fall 2015 election.

Canada's commitment to open government

The government's current action plan under the international Open Government Partnership comes to an end in 2016. The Commissioner will continue to provide recommendations to the government on the Open Government action plan in order to ensure an integrated vision that recognizes access to information as an important foundation of open government.

Employer of choice

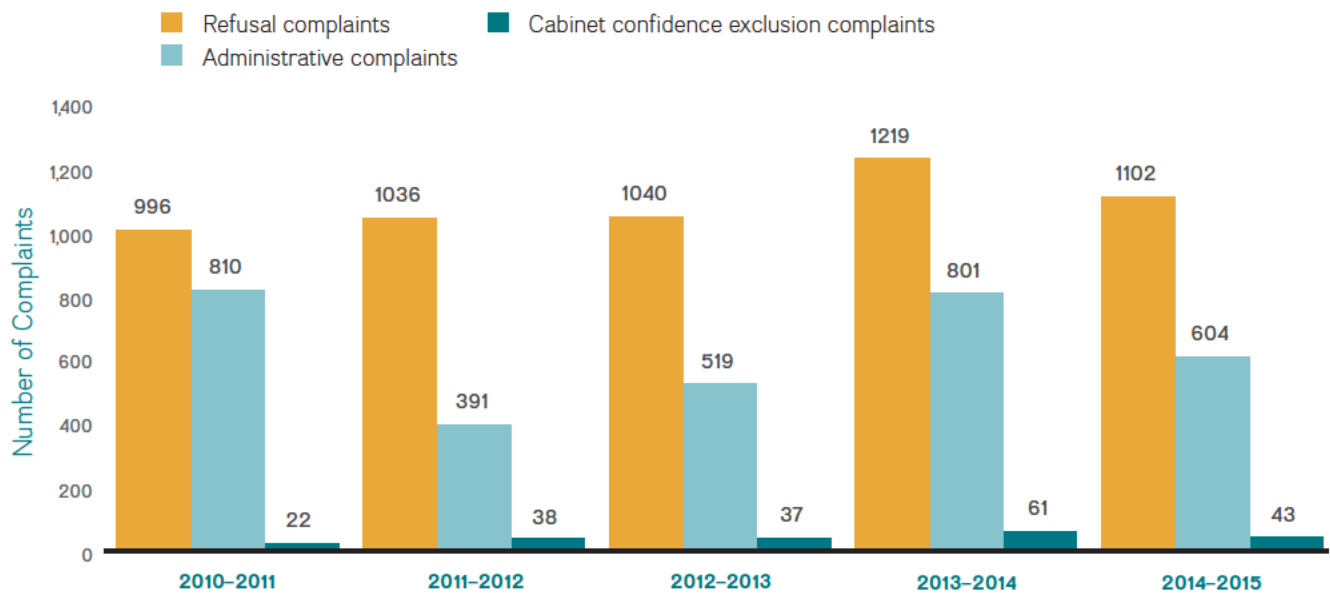
Talent management will continue to be a top-of-mind concern in 2015–2016. The Commissioner will continue to develop the tools and training needed by employees to foster a culture of excellence among her staff.

Digital strategy

Under her new strategic plan that will be published in 2015–2016, the Commissioner will launch a digital strategy aimed at increasing the use of blogging and social media in an effort to further engage access stakeholders and Canadians. To be a leader in the area of transparency and an agent of change, the Commissioner will also develop targeted approaches to interact with a broader group of stakeholders and develop more sustained interest in access to information.

Facts and figures

Complaints registered, 2010–2011 to 2014–2015



NOTE: As of April 1, 2013, the Commissioner counts all miscellaneous complaints as refusal complaints. Previously, they had been classified as administrative complaints.

In 2014–2015 the Commissioner received 604 administrative complaints (about delays, time extensions and fees), 43 Cabinet confidence refusal complaints and 1,102 refusal complaints (about the application of exemptions).

The ratio of administrative complaints to refusal complaints registered was 35:65.

New complaints by institution, 2010-2011 to 2014-2015*

	2010–2011	2011–2012	2012–2013	2013–2014	2014–2015
Citizenship and Immigration Canada	84	66	109	305	246
Canada Revenue Agency	502	324	336	283	221
Royal Canadian Mounted Police	69	68	125	185	178
National Defence	68	74	72	119	118
Transport Canada	77	30	72	83	87
Foreign Affairs, Trade and Development Canada	31	56	83	120	83
Canada Border Services Agency	29	36	63	106	78
Health Canada	81	49	37	48	65
Privy Council Office	57	36	52	48	54
VIA Rail Canada Inc.	2	7	7	2	54
Department of Justice Canada	30	47	24	51	44
Canadian Broadcasting Corporation	183	71	45	61	37
Natural Resources Canada	5	12	21	38	35
Correctional Service Canada	82	65	57	56	33
Employment and Social Development Canada	26	25	20	37	33
Canada Post Corporation	41	46	8	10	30
Canadian Security Intelligence Service	22	8	15	20	27
Environment Canada	15	17	26	29	26
Public Works and Government Services Canada	88	45	35	28	26
Public Safety Canada	21	6	5	14	25

* Institutions are listed by the number of complaints the Commissioner registered about them in 2014-2015. The figures for each year include any complaints initiated by the Commissioner under subsection 30(3) of the *Access to Information Act* (11 in 2014-2015).

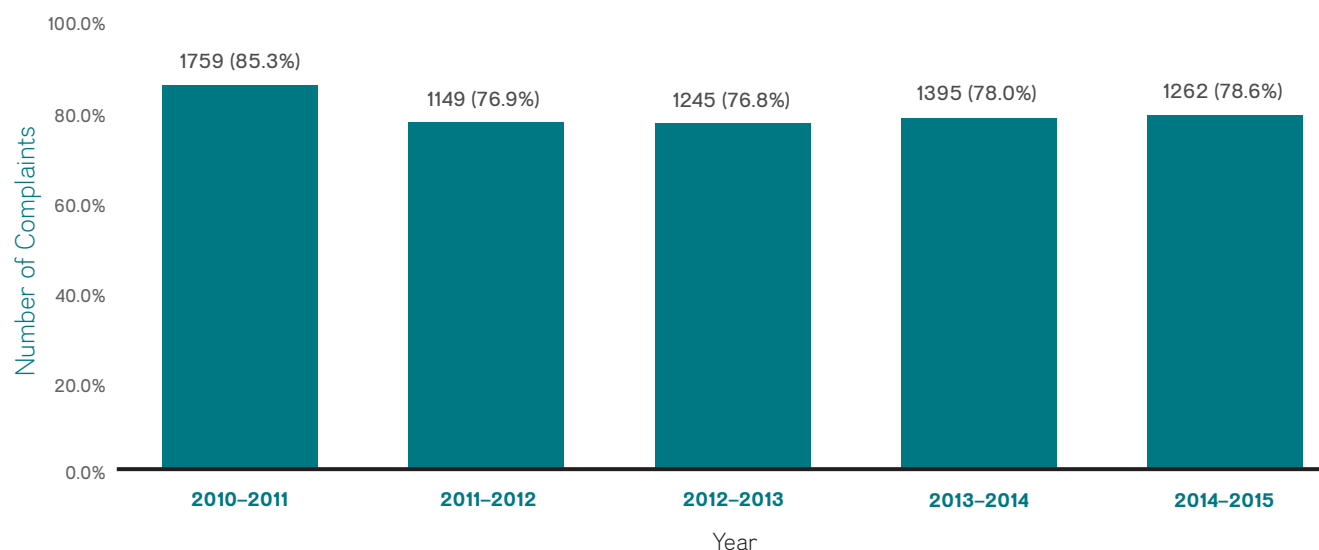
* This chart contains real numbers only and does not reflect the proportion of complaints as compared to the number of requests.

The chart above shows the 20 institutions that received the most complaints in 2014–2015. Many institutions appear on this list from year to year. For example, 2014–2015's top three (Citizenship and Immigration Canada, Canada Revenue Agency and Royal Canadian Mounted Police) were the same as in 2013–2014, although all three institutions received fewer complaints.

Two institutions made their first appearance on the list in five years: VIA Rail Canada Inc. (due to its receiving a large number of complaints from one individual) and Public Safety Canada.

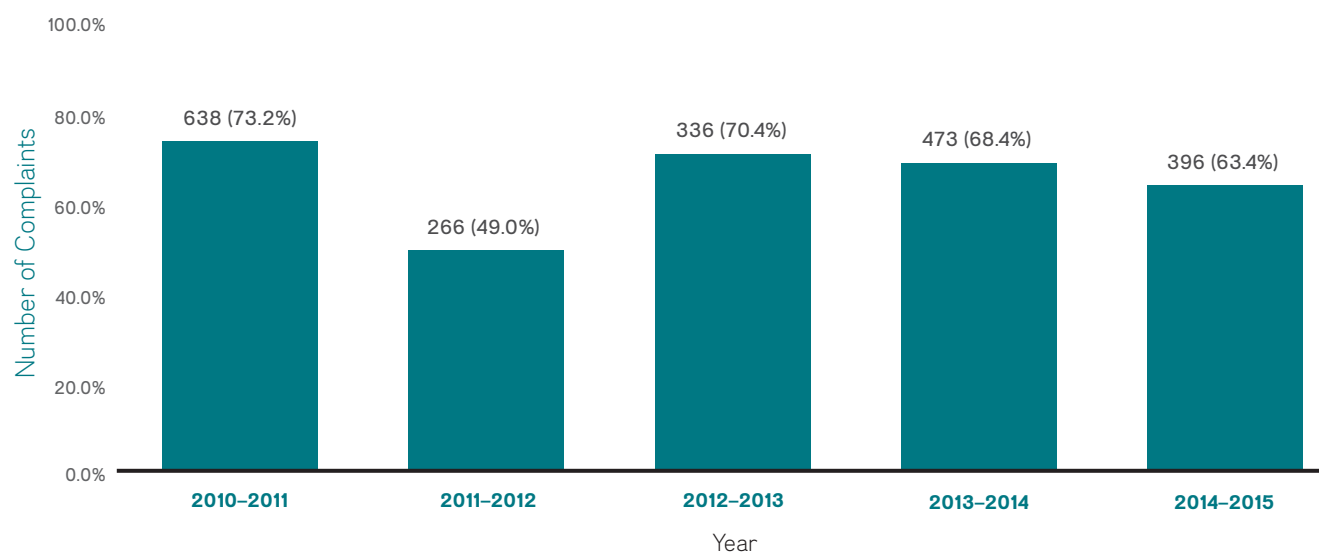
Turnaround times for complaint investigations, 2010–2011 to 2014–2015

Complaints closed within nine months from date of assignment



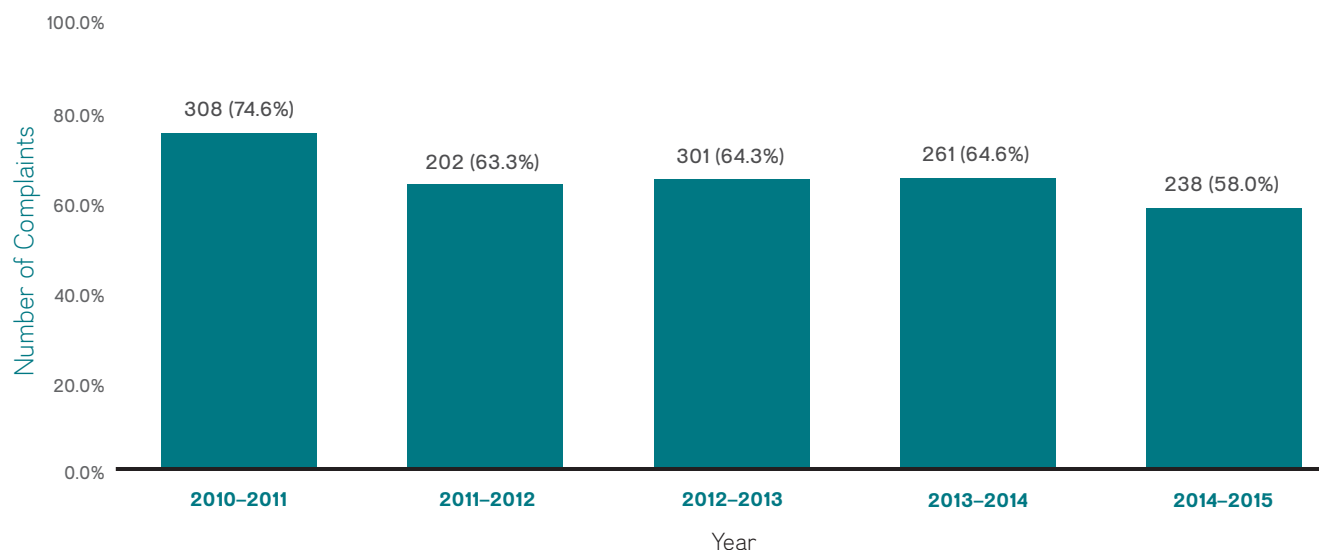
In 2014–2015, the Commissioner closed more than three-quarters (79 percent) of complaints within nine months of being assigned to an investigator. However, given a shortage of staff, there is a gap of about five months (142 days) before a file can be assigned.

Administrative complaints closed within 90 days from date of assignment



The Commissioner's performance objective is to close 85 percent of administrative complaints within 90 days of their being assigned to an investigator. This rate is not always achievable in part because of the difficulty in obtaining commitment dates and work plans from some institutions. In light of the Federal Court of Appeal's March 2015 decision in *Information Commissioner of Canada v. Minister of National Defence*, the Commissioner will be taking a more stringent approach to the use of extensions. The Commissioner will issue an advisory notice in 2015–2016 on how she will implement the Court of Appeal's decision in conducting investigations.

Priority and early resolution complaints closed within six months from date of assignment



The Commissioner's performance objective is to close 75 percent of her priority and early resolution cases (refusal investigations) within six months from the date they are assigned to an investigator. In 2014–2015, she closed 58 percent of these files in this time frame. This difference from the previous year was due, in part, to a number of more complex investigations (as described in Chapter 1) that required the dedicated attention of a number of investigators.

Complaints closed in 2014–2015

	Overall	Well-founded	Not well-founded	Settled	Discontinued
Citizenship and Immigration Canada	285	156	39	60	30
Royal Canadian Mounted Police	148	54	32	12	50
Canada Border Services Agency	110	34	10	52	14
National Defence	110	32	20	35	23
Canada Revenue Agency	104	65	8	6	25
Foreign Affairs, Trade and Development Canada	71	20	1	24	26
Transport Canada	61	30	16	0	15
Correctional Service Canada	53	16	11	2	24
Privy Council Office	52	17	2	9	24
Canadian Broadcasting Corporation	41	14	15	9	3
VIA Rail Canada Inc.	40	1	36	3	0
Health Canada	38	20	7	4	7
Employment and Social Development Canada	37	21	2	3	11
Aboriginal Affairs and Northern Development Canada	33	19	1	5	8
Department of Justice Canada	33	4	4	13	12
Industry Canada	32	7	1	2	22
Natural Resources Canada	30	19	3	1	7
Environment Canada	30	10	3	9	8
Public Works and Government Services Canada	26	10	8	2	6
Public Safety Canada	20	6	7	1	6
Others (61 institutions)	251	88	44	24	95
Total*	1,605	643	270	276	416

*The total number of complaints closed includes any that had been initiated by the Commissioner under subsection 30(3) of the *Access to Information Act* (15 in 2014–2015).

This chart lists the 20 institutions about which the Commissioner completed the most complaints in 2014–2015.

Annual Report of the Information Commissioner *Ad Hoc*

This is the fourth year that it has been my pleasure to report on the activities of the Office of the Information Commissioner, *Ad Hoc*. On April 1, 2007, the Office of the Information Commissioner (OIC) became subject to the *Access to Information Act* (the “ATI Act”; <http://bit.ly/1IVS5qQ>). The law that brought this about did not create at the same time a separate mechanism to investigate any complaints that an access request to the OIC has been improperly handled.

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

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

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

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

The following reviews all the complaints my office investigated and closed from April 1, 2014, to the end of my term on May 30, 2015.

Outstanding complaints from previous year

Three complaints from last year were still outstanding as this year began, all filed by the same person.

The central issue in these complaints concerned the proper application of paragraph 16.1(1)(c) of the ATI Act. This provision exempts from production information *obtained* or *created* in the course of an investigation by the OIC. Once the investigation and all related proceedings are finally concluded, however, the exemption is partially lifted. At that point, the exemption no longer applies to documents *created* during the investigation.

In each case, our investigation revealed that the disputed documents had been obtained during the course of the OIC’s own investigations. The OIC was therefore right to apply the mandatory exemption and to refuse to disclose these documents.

In two of these cases, the OIC had also applied the exemption for personal information under section 19 of the Act. Our investigation confirmed that this exemption, too, was correctly invoked.

An interesting issue arose in one of these complaints. The OIC had made two separate responses to the ATI applicant. In the first, which it called its formal response, the OIC applied section 16.1(1)(c) strictly, refusing disclosure of all information obtained by it during its investigation, including the personal information that the requester himself had provided to the OIC. In the second, which the OIC called its informal response, it had given the applicant back his own personal information.

The OIC no longer makes such informal releases. Taking into account comments by this Office about paragraph 16.1(1)(c) in another matter, the OIC has changed its practice. In section 6 of its Annual Report on the Administration of the *Access to Information Act* from April 1, 2013, to March 31, 2014, the OIC explained why it had first adopted this practice, and why it had changed its procedures:

The ATIP Secretariat no longer issues informal releases to individuals seeking access to records pertaining to investigations of their own complaints. It had introduced this practice in the interests of transparency, since otherwise it would be unable, due to the requirements of paragraph 16.1(1)(c) of the Act, to release to requesters information they themselves had provided to the OIC in the context of investigations. The decision to cease this practice was made in light of observations by the Information Commissioner *ad hoc* in the context of an investigation about the OIC's application of paragraph 16.1(1)(c). The Commissioner will address this matter in her upcoming special report on modernizing the Act.

Given this change of procedure, and the fact that the informal release had actually resulted in more information being given to the applicant, not less, this Office concluded that all three complaints were **not well-founded**.

New complaints this year

Twelve new complaints were received this year, 10 of them from the same person who had filed the three complaints discussed in the section immediately above. All 12 were investigated and disposed of before the end of my term.

The main issue in the 10 new complaints lodged by the same person, as well as in one complaint filed by another individual, again concerned the proper application of paragraph 16.1(1)(c) of the ATI Act. One also involved an exemption for personal information.

The results of these 11 investigations were the same as for the three similar cases from last year. We found that sections 16.1 and 19 of the ATI Act had been properly applied throughout, and in the one instance in which the OIC had made both a formal and an informal response, that request had been processed before OIC had stopped issuing informal releases.

In the upshot, all 11 of these complaints were held to be **not well-founded**.

The last new complaint dealt with paragraph 19(2)(a) of the ATI Act, which allows the head of a government institution to disclose personal information if the individual to whom the personal information relates consents to the disclosure. This complaint raised two related issues: first, had the OIC properly sought the consent of the affected individuals and, second, if consent was given, did the OIC retain any residual discretion to refuse to disclose the records?

This last complaint arose out of an access to information request for a list of all access and privacy requests submitted to the OIC in a certain period. With respect to the *Privacy Act* requests, the OIC severed the names of requesters and other personal information, and then disclosed the rest of the information. But the OIC did not ask the *Privacy Act* requesters if they would consent to the disclosure of their personal information. It is longstanding policy of the Treasury Board Secretariat to protect the name of all requesters under both the *Access to Information Act* and the *Privacy Act*. The OIC said that it felt that for it to go against such established policy and to seek consent to the disclosure of personal names would cause distress to the people involved, and be perceived as insensitive to privacy values fundamental to the ATIP regime that the OIC is dedicated to preserving. Since it could see no public interest in releasing such details, it exercised its discretion not to seek consent. This Office agrees with this decision.

As for the *ATI Act* requests, many of them related to the same subject matter. The OIC realized that, because of the context and the interconnectedness of these records, if they were released even with the names severed it would be possible to figure out the identity or identities of other individuals associated with these documents. This is due to the so-called mosaic effect. This is the idea that when bits of seemingly innocuous information are joined with other bits of equally innocuous information, they sometimes combine to tell a story that the individual pieces by themselves do not. It is similar to what happens when a jigsaw puzzle is assembled from many separate pieces, none of which, by itself, looks like the finished picture. In this case, because these requests overlapped, there was a strong mosaic effect, so the other information was withheld. For this and other reasons, the OIC did not ask the requesters for their consent to the disclosure, direct or indirect, of their personal information.

This Office agreed with this decision, too, except in one instance in which it seemed more information might be safely disclosed. Following discussions with this Office, the OIC contacted the individual to whom the personal information related in that ATI request and sought her consent to its disclosure. This individual consented to the release of the entire document containing her personal information.

Despite the individual's consent to the release of the whole document, the OIC nevertheless continued to exempt portions of the record. The OIC did so because

it said it still believed that, through the mosaic effect, disclosing the entire record would reveal personal information about other people, too. The OIC therefore exercised its discretion under paragraph 19(2)(a) not to disclose the full record, an approach supported by recent Federal Court case law. This Office agreed with the OIC's handling of this request.

This complaint was therefore **resolved**.

In addition to these 12 complaints, this Office also received two letters about matters that were outside our mandate. One, for example, was from an individual who was dissatisfied with how the OIC had investigated his complaint about how another government department had dealt with his access request. This Office does not have jurisdiction to investigate such cases. Our mandate is limited to receiving and investigating complaints that an access request for a record under the control of the OIC itself may have been improperly handled.

Conclusion

The existence of an independent Commissioner, *Ad Hoc*, ensures the integrity of the complaints process at the OIC. It has been a privilege to serve as Information Commissioner, *Ad Hoc*, these past four years.

Respectfully submitted,

John H. Sims, Q.C.

