Information Commissioner of Canada

Commissaire à l'information du Canada

ANNUAL REPORT 2013–2014

Respect

Excellence

Integrity Intégrité

Leadership

Office of the Information Commissioner of Canada
30 Victoria Street
Gatineau QC K1A 1H3

Tel. (toll free): 1 800 267-0441
Fax: 819-994-1768

Email: general@oic-ci.gc.ca
Website: www.oic-ci.gc.ca

© Minister of Public Works and Government Services Canada 2014
Cat. No. IP1-2014E-PDF
ISSN 1497-0600

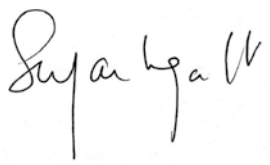
June 2014

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

Dear Mr. Speaker:

I have the honour to submit to Parliament, pursuant to section 38 of the *Access to Information Act*, the annual report of the Information Commissioner of Canada, covering the period from April 1, 2013, to March 31, 2014.

Yours sincerely,



Suzanne Legault
Information Commissioner of Canada

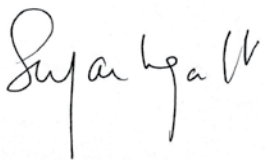
June 2014

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

Dear Mr. Speaker:

I have the honour to submit to Parliament, pursuant to section 38 of the *Access to Information Act*, the annual report of the Information Commissioner of Canada, covering the period from April 1, 2013, to March 31, 2014.

Yours sincerely,



Suzanne Legault
Information Commissioner of Canada

Contents

Message from the Commissioner

I am often asked to explain why access to information is important to Canadians. In response, I point out that federal policies, programs and laws touch so many aspects of everyday life—the regulation of health products, international travel, mail delivery, transportation and food safety, to name just a few. Being able to request and receive government information allows citizens to hold public bodies to account for the decisions they make on Canadians' behalf. As such, access to information is a fundamental pillar of a functioning democracy.

Consequently, it is of concern to me when government institutions struggle to provide timely access, take an overly broad approach to exempting information or fail in their duty to assist requesters, as is required by the *Access to Information Act*.

My office received significantly more complaints in 2013–2014 than it had the year before. This is accounted for, to some extent, by an overall increase in the number of requests to institutions in the previous year. However, only some organizations successfully absorbed this growth; others had, and are continuing to have, difficulty meeting their basic obligations under the Act. These difficulties manifested themselves in a significant increase in complaints about basic administrative matters, such as delays and extensions.

This decline in performance must be promptly addressed. Canadians should be concerned and speak out whenever their quasi-constitutional right of access is in jeopardy. As Commissioner, I call on senior institutional officials to step up their leadership of and commitment to access in their organizations and across government.

My role is to protect the right of access, using the full range of powers at my disposal. In 2013–2014, I closed the most cases I have in three years, and the number of files completed within nine months continued to grow. I thank my team for their contributions to this continuing track record of success.

Despite impacts on my budget, I am resolved to continue to strive to fulfill my mandate as an independent and non-partisan voice on access matters. I will focus on service to Canadians by implementing innovative ways to resolve complaints in a timelier manner. I will also publish an in-depth analysis in 2014–2015 of the compliance of 24 institutions with their obligations under the Act, in terms of their timeliness in responding to access requests and the amount of information they disclose to requesters.

Finally, I will continue to work with the Treasury Board of Canada Secretariat on administrative enhancements to the system, some of which are already bearing fruit. However, these efforts will only go so far. Real improvement in the access system will only come from modernizing the Act—a long-overdue step that is crucial to advancing the cause of transparency and accountability in Canada.

Highlights

Access to information is an essential tenet of democracy. By being able to request and receive government information, the public can more effectively ensure federal institutions are transparent in their dealings and accountable for the decisions they make.

The Information Commissioner strives to uphold the right of access by investigating complaints about federal institutions' handling of requests for information. The cases the Commissioner investigates each year reflect the many roles the federal government plays in Canadian society and the myriad ways federal programs and services touch individual lives.

As a result of the Commissioner's interventions, requesters in 2013–2014 received information from institutions more quickly than they otherwise would have and had administrative matters, such as the charging of fees, resolved. Another outcome of the Commissioner's investigations was that requesters received additional records from institutions. Overall, 54 percent of the 680 investigations that involved a refusal to grant access to records and that the Commissioner settled or completed with a finding resulted in institutions' disclosing more information to the requester.

The Commissioner continued to pursue strategies targeted at effectively and efficiently closing files dealing with national security, international affairs and defence matters, and complaints against the Canada Revenue Agency and the Canadian Broadcasting Corporation (CBC). Through a variety of approaches, the Commissioner closed 565 such complaints. As of March 31, 2014, these three groups of files accounted for 38 percent of the inventory of complaints, compared to 46 percent a year earlier.

In late March 2014, the Commissioner filed a notice of appeal in a case decided by the Federal Court that focused on a 1,110-day time extension National Defence had taken to respond to a request. She also pursued numerous other legal cases, including a variety dealing with the disclosure of third-party information by institutions.

The Commissioner continued her dialogue with the President of the Treasury Board on ways to improve the access to information system. In addition, during appearances before Parliament, the Commissioner provided her perspective on a private members' bill that proposed to replace the CBC's unique exclusion in the Act with an exemption, and spoke in favour of extending the coverage of the *Access to Information Act* to the administration of Parliament.

Finally, the Commissioner laid the groundwork for developing a new strategic plan. The new plan, to be launched in the fall of 2014, will guide her office to the end of her current mandate in 2017. The focus of the plan will be on achieving the highest level of performance in investigating complaints and continuing to be an effective catalyst for advancing access, and fostering openness and transparency.

1

Access to information: An essential tenet of democracy

In a free society, individuals may engage with political leaders and question the government's past and current activities. Such open and lively exchanges of information—on the hustings, through the press, and on websites, blogs and social media—are a hallmark of a thriving democracy.

But there is an information imbalance in these interactions, which access to information laws can help address. By requesting and receiving, under such legislation, information about government activities, the public can more effectively ensure federal institutions are transparent in their dealings and accountable for the decisions they make.

In this way, access to information keeps democracy on a solid footing in the present day, sheds light on the past and helps individuals in their dealings with government. Due to its importance to the functioning of a modern democratic society, the right of access in Canada has been described as quasi-constitutional.[1]

Under the auspices of Canada's freedom of information law, the *Access to Information Act*, the Information Commissioner strives to uphold the right of access by investigating complaints about federal institutions' handling of requests for information (http://www.oic-ci.gc.ca/eng/abu-ans_what-we-do_ce-que-nous-faisons.aspx). The cases the Commissioner investigates each year reflect the many roles the federal government plays in Canadian society and the myriad ways federal programs and services touch individual lives (see, "The full spectrum of access," right).

The full spectrum of access

From April 1, 2013, to March 31, 2014, the Commissioner closed complaints running the gamut of topics and concerns. Here are some examples:

- A man sought more information from Canada Post so he could understand how it had lost a number of his parcels.
- Another file involved a person who asked how much it cost to restore the word "Royal" to the names of the three branches of the Canadian Armed Forces.
- Pipelines and the energy sector were at the centre of multiple complaints, as were species at risk.
- An historian complained about the number of records Library and Archives Canada had withheld about the Estates General of French Canada, a series of three conferences held in the late 1960s to consult French-Canadian citizens on their place and political future in North America.
- An individual complained about the inordinate amount of time it was taking Foreign Affairs, Trade and Development Canada to answer a request for records about the resettlement of Palestinian refugees.

1 *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403. In certain instances, the right of access is also protected by section 2(b) of the *Canadian Charter of Rights and Freedoms*, which guarantees the right to freedom of expression.

As a result of the Commissioner's interventions, requesters may get information from institutions more quickly than they otherwise would or have other administrative matters, such as the charging of fees, resolved. The outcome of the Commissioner's investigations may also be that requesters receive more records than institutions were initially willing to release. The pages that follow highlight examples of instances when the Commissioner achieved such results for requesters in 2013–2014.

Ensuring timely access to information

When a parked freight train came loose from its moorings, rumbled downhill and crashed into the town of Lac Mégantic, Quebec, on the night of July 6, 2013, public attention was drawn to the unfolding tragedy and, soon after, to the role of Transport Canada in regulating railways. By March 31, 2014, Transport Canada had received more than 200 access requests on this subject.

Overwhelmed by this influx, Transport Canada access officials took time extensions ranging from 300 to 365 days (in one case, in combination with another 200-day extension) so that they had longer than the standard 30 days given by the *Access to Information Act* to respond to requesters. In light of the length of time they would have had to wait for their information, a number of requesters complained to the Commissioner. During the investigations of seven complaints completed in 2013–2014, it became clear that the extensions Transport Canada had taken were not valid. In some cases, the page volume was insufficient to justify extensions to search for and through records. In another, the extension was for consultations with other institutions that Transport Canada never undertook.

Consequently, the Commissioner asked Transport Canada to provide a firm date for responding to each of the seven requests, so that requesters could get the information they sought as soon as possible. Transport Canada agreed and provided dates. In all cases, the institution responded to each request on or before the deadline, resulting in requesters' receiving a response significantly earlier than Transport Canada had initially proposed.

The key to achieving these results was early and sustained intervention by investigators from the Office of the Information Commissioner with the institution. This led the Commissioner to formally request from Transport Canada a work plan to complete each file and a reasonable deadline for doing so. The institution's willingness to work with the Commissioner to resolve these complaints also contributed to the positive outcomes.

The aftermath of the Lac Mégantic incident is not the first time that an institution has found itself the subject of a surge in requests for information. Although these events in themselves are not foreseeable, many institution- or issue-specific surges in requests are. However, the Commissioner's experience is that institutions do not always have the resources to absorb a sudden increase in requests. To address this, the Commissioner has

Access performance at the RCMP

In 2012–2013, the Commissioner reported that the Royal Canadian Mounted Police (RCMP) was so understaffed that it was unable to acknowledge receipt of incoming access requests at all or as promptly as it should have, and provided requesters with an insufficient response letter (see, "Insufficient response": http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_6.aspx).

The Commissioner received 102 administrative complaints against the RCMP in 2013–2014, mainly relating to a failure to respond to requests in a timely manner. This was an increase of 46 percent over the previous year. To address these complaints, the Commissioner worked with the RCMP to address the insufficiencies in its response letters. She also negotiated commitment dates for responses in 13 cases, sending a formal letter to the institution for this purpose in 4. The RCMP met all of the dates to which it committed. In addition, senior officials met on several occasions to discuss the RCMP's action plan. Although the RCMP did not give a copy of this plan to the Commissioner, the institution has been updating her on its progress. The Commissioner will continue to monitor the performance of the RCMP.

recommended that the Treasury Board of Canada Secretariat (TBS), as the administrator of the access system, consider implementing measures that could help institutions that find themselves under-resourced in times of crisis. TBS, for its part, has begun to work with the Commissioner on developing such support for institutions.

Throughout 2013–2014, the Commissioner also received a number of similar groupings of delay complaints against Citizenship and Immigration Canada and the Canada Border Services Agency. Working with these institutions, the Commissioner resolved 161 of these complaints in a timely manner in 2013–2014. Others will be closed in 2014–2015.

Facilitating maximum disclosure of information

In February 2011, a person turned to Correctional Service Canada (CSC) for information about the death of a close family member in a federal prison. The person wanted to see the report of the investigation CSC had carried out into the death, and filed a request under the *Access to Information Act* to get it.

CSC released a copy of the 94-page report in June 2011, but with substantial portions blacked out. The requester sought legal assistance to understand why the vast majority of the report had not been disclosed. In March 2012, the lawyer complained to the Commissioner, on behalf of her client, about the response from CSC.[2] In her letter, the lawyer noted that the requester was of the view that information might have been inappropriately or unnecessarily withheld.

An investigator from the Office of the Information Commissioner analyzed the portions of the report CSC had decided not to disclose. A dialogue ensued between the investigator and a CSC representative about whether these redactions were legitimate. In response to these exchanges and a formal letter expressing the Commissioner's concerns about the institution's application of exemptions under the Act, CSC reconsidered its position on most matters and released almost all of the blacked-out information. In the end, the requester learned just that much more about what had happened at the end of the family member's life.

The Commissioner also closed a number of complaints in 2013–2014 against the Bank of Canada pertaining to Canada's new polymer bank notes, including whether they melted, the apparent use of the image of an Asian woman on the new $100 bill, and the results of focus group sessions relating to the development and implementation of the notes. The majority of the 18 investigations dealt with allegations of improper use of exemptions under the Act to withhold information.

As a result of the Commissioner's intervention, the Bank of Canada provided additional records to requesters in all seven of the refusal complaints the Commissioner closed by March 31, 2014. In some instances, the Bank issued several supplementary releases of records over the course of the investigation.

Overall, 54 percent of the 680 investigations that involved a refusal to grant access to records and that the Commissioner settled or completed with a finding in 2013–2014 resulted in institutions disclosing more information to the requester.

2 The Commissioner initiated the complaint on the person's behalf on compassionate grounds, since the 60-day deadline for submitting a complaint had passed.

2

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 2013–2014, the Commissioner's investigative work was shaped by a 30-percent increase in new complaints over 2012–2013 (see, "Summary of caseload," below).

New complaints about administrative matters, such as delays and fees, grew by 54 percent. This came on top of a 42-percent jump in this type of file in 2012–2013.[1]

As of March 31, 2014, there were 2,089 complaints in the inventory, the Commissioner having closed 1,789 files during the year. This closure rate is 10 percent higher than the previous year's; however, due to the increase in new complaints, the size of the inventory grew by 16 percent, the first increase in five years.

Summary of caseload, 2011–2012 to 2013–2014

	2011–2012	2012–2013	2013–2014
COMPLAINTS CARRIED OVER FROM THE PREVIOUS YEAR	**1,853**	**1,823**	**1,797**
New complaints received	1,460	1,579	2,069
New Commissioner-initiated complaints*	5	17	12
TOTAL NEW COMPLAINTS	**1,465**	**1,596**	**2,081**
Complaints discontinued during the year	641	400	551
Complaints settled during the year	34	171	193
Complaints completed during the year with findings	820	1,051	1,045
TOTAL COMPLAINTS CLOSED DURING THE YEAR	**1,495**	**1,622**	**1,789**
TOTAL INVENTORY AT YEAR-END	**1,823**	**1,797**	**2,089****

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

**Includes 97 complaints on hold, 96 for administrative purposes and 1 due to ongoing litigation.

1 As per the Commissioner's 2012–2013 annual report. This percentage included miscellaneous complaints, which were classified as administrative complaints at the time. As of April 1, 2013, the Commissioner counts all miscellaneous complaints as refusal complaints. Taking this into account, the jump in administrative complaints in 2012–2013 was 33 percent.

The Commissioner completed more complaints within nine months in 2013–2014 (63 percent) than she had in 2012–2013 (57 percent). This continues the trend of increasingly timely investigations since 2011–2012. However, a gap of 173 days (nearly six months) remains between when the Commissioner registers refusal complaints (her most complex files) and when she can assign them to investigators. (Appendix A contains more statistical information related to the complaints the Commissioner received and closed in 2013–2014.)

The pages that follow report on four items:

- specific targeted investigative strategies
- individual investigations in which the Commissioner encountered novel or complex issues
- the completion of a systemic investigation into the impact of instant messaging on access
- the resolution of a number of investigations into allegations of interference.

Three targeted investigative strategies

In her 2012–2013 annual report, the Commissioner identified three targeted strategies designed to better manage her increasing caseload. In particular, she focused on complaints relating to national security, international affairs and defence matters, complaints against the Canada Revenue Agency and complaints against the Canadian Broadcasting Corporation. At the end of 2013–2014, these files made up 38 percent of the Commissioner's inventory of complaints. This is down eight percentage points from the previous year, which demonstrates that the Commissioner has made progress addressing her inventory through these targeted strategies. Below are details of some specific results.

Complaints involving national security, international affairs and defence matters

The Commissioner has a substantial inventory of complaints about matters of national security, international affairs and defence. Due to their number and the public interest in accountability in this area, the Commissioner has made investigating these complaints a priority. She launched a pilot project in 2011 to target these files, which are often complex and can be time-consuming to investigate, particularly when time has passed since the original request was made. The pilot project involved grouping complaints and ensuring clear communications with and expectations of institutions (see, "Complaints related to national security, international affairs and defence": http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2011-2012_5.aspx).

Complaints in three categories in the inventory, as of March 31, 2014

	Number of complaints (% of total)
National security, international affairs and defence	357 (17%)
Canada Revenue Agency	269 (13%)
Canadian Broadcasting Corporation	175 (8%)
Overall inventory	2,089 (100%)

Using this approach, the Commissioner has closed an increasing number of these files each year. However, she received new complaints at a faster rate. In 2013–2014, she received 203 of these complaints, which was considerably more than the typical volume of 130–140 complaints per year. Together, these circumstances have caused the inventory to grow, despite the increased efficiency of investigations.

As part of her commitment to reducing this caseload in as timely a manner as possible, the Commissioner asked the President of the Treasury Board, in July 2013, to increase the number of investigators allowed to investigate these complaints from 8 to 12. (The *Access to Information Act* stipulates that these complaints may only be investigated by a specified number of employees.) In September 2013, the President agreed to this request.[2] The Commissioner now has a full complement of 12 "specially delegated" investigators to investigate these complaints.

2 The change, however, had no impact on the Commissioner's total number of investigators, since it did not increase the funding of the Office of the Information Commissioner in any regard.

When investigating this type of complaint, the Commissioner seeks to ensure that requesters are provided with the maximum disclosure permitted by the Act. In some instances, this means that the Commissioner can secure for requesters a large volume of additional information.

For example, an historian complained about the heavily redacted records the Department of Justice Canada released relating to a law Canada had passed in the late 1930s preventing Canadians from fighting in foreign wars, and the intersection of that law with the life and legacy of pioneering Canadian medic Norman Bethune. Through her investigation, the Commissioner found that the institution had applied exemptions to the records far more broadly than was necessary, particularly since much of the information was publicly available or, given its age, unlikely to harm Canada's international relations or defence, or efforts to prevent or detect subversive activities. (The input of the very knowledgeable requester during the investigation was key to identifying information that was public and should therefore be released.) The institution eventually released significantly more information to the requester.

Similarly, a requester received more information as the result of a complaint to the Commissioner about the refusal by Library and Archives Canada (LAC) to release records related to security at the 1976 Montréal and 1988 Calgary Olympics. After reviewing the records, and in light of the Federal Court decision in *Bronskill v. Minister of Canadian Heritage*, 2011 FC 983 (see, "Exercise of discretion," http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_7.aspx), the Commissioner recommended to LAC that it ask the Canadian Security Intelligence Service, with whom LAC had consulted about the request, to re-visit the use of exemptions it had recommended. In the end, LAC released a total of 711 of the original 743 pages of records, either in whole or in part (compared to the 436 pages originally released). In response to the Commissioner's investigation of a second complaint from the same requester on the same topic, LAC released an additional 250 pages of records.

Other complaints the Commissioner resolved in 2013–2014 involved archival records about important historical events, such as the demise of the constitutional amendment proposed in the Meech Lake Accord in 1990. As a result of the Commissioner's intervention in that file, the Privy Council Office released numerous additional pages to the requester in early 2014.

In contrast, sometimes the Commissioner confirms an institution's decision to withhold all or large portions of records. For example, the Commissioner reviewed all the exemptions Foreign Affairs, Trade and Development Canada (DFATD) had applied to records about the construction of the Canadian embassy and related facilities in Kabul, Afghanistan. Upon doing so, the Commissioner agreed with DFATD that the information pertained to the vulnerability of particular buildings or other structures or systems and, consequently, should be withheld.

By the end of 2013–2014, the Commissioner had closed 181 files related to national security, international affairs and defence matters—an 11-percent increase over 2012–2013 and 66 percent more than in 2011–2012. Among these files were some of the oldest in the Commissioner's inventory. In addition, the Commissioner's investigations of this type of complaint resulted in more records being released in 54 percent of cases resolved with a finding or settled in 2013–2014.

Complaints against the Canada Revenue Agency

Given the number of requests and volume of pages the Canada Revenue Agency (CRA) processes annually (3,083 requests and 1,203,253 pages in 2012–2013), it is usually among the top three institutions about which the Commissioner receives complaints each year. (There were 283 new complaints about CRA in 2013–2014; see, "Overall new complaints by institution, 2011–2012 to 2013–2014," in Appendix A.)

CRA activities have a significant impact on individuals and corporations. The Commissioner typically receives a number of complaints in any given year from taxpayers trying to obtain information relating to audits or assessments. In complex matters, these requests can involve thousands, if not tens of thousands, of records.

CRA is often the recipient of bulk requests and the subject of related complaints. Of the 269 CRA files the Commissioner had open as of March 31, 2014, 158 (59 percent) were from three requesters.

In these situations, many of the requests, and therefore the complaints, deal with common subject matters or similar types or groups of records. To increase the efficiency of investigations, similar complaints are grouped into categories and combined so that there is as little repetition as possible. The Commissioner has also assigned a small group of investigators to deal with these files to ensure that they are familiar with the context of the requests and responses. This has minimized, whenever possible, the impact of these complaints on the Office of the Information Commissioner and CRA, while still allowing the Commissioner to effectively investigate all aspects of the complaints.

For example, in 2013–2014, the Commissioner closed a complaint that involved more than 20 separate requests that all dealt with the topic of manuals, including training and procedural guides. For each item, CRA conducted, as a result of the Commissioner's intervention, further searches for records that would match these requests or reviewed records that it had previously decided to withhold to determine whether more information could be released. In many instances, CRA subsequently provided additional records to the requester.

Since many of this requester's subsequent complaints dealt with similar types of records to those found in the groupings, the Commissioner informed the complainant that all new refusal complaints would be placed on administrative hold pending the completion of the existing groupings. To date, the Commissioner has placed 93 complaints on hold. To protect the requester's rights, the Commissioner continues to investigate administrative complaints and notifies CRA of any new refusal complaints.

In a separate series of complaints—about documentation relating to CRA's Scientific Research and Experimental Development (SR&ED) tax incentive program—the Commissioner's investigations resulted in further disclosure of information that supports program administration, including a claim review manual. Although CRA had posted a redacted version of the manual online, the Commissioner concluded that the entire document should be released. In response, and in the spirit of open government and transparency, CRA posted the complete manual and committed to posting more information that is released to requesters as a result of complaints investigations related to SR&ED. (The Commissioner closed 37 files on this topic in 2013–2014; 45 remained open as of March 31, 2014.) When an investigation is complete and additional records are released, CRA will update any of the documents that it had previously posted only in part to include all the released information. The SR&ED program is the largest single source of federal support for industrial research and development, so the additional disclosure of manuals, policy documents and other records will give interested parties insight into the workings of the program and the decisions program staff have made. It will also help reduce the need for individuals to make formal access requests for this information, which is consistent with open information principles and the fact that the *Access to Information Act* was intended to supplement existing means by which Canadians could receive government information.

Overall, the Commissioner closed 284 CRA files in 2013–2014. The cooperation of CRA officials, and their willingness to work with the Commissioner, led to this positive result.

Complaints against the Canadian Broadcasting Corporation

The Canadian Broadcasting Corporation (CBC) became subject to the *Access to Information Act* in 2007, and immediately received a large number of requests, mostly from one source. In response to these requests, the CBC often refused to release records without even retrieving or reviewing them (see, "Failure to respond accurately to requests by not retrieving records": http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_6.aspx). To withhold the information, the CBC cited its exclusion under the Act (section 68.1), which protects information related to the CBC's journalistic, creative and programming activities that is not related to its general administration. This resulted in hundreds of complaints to the Commissioner—on matters ranging from requests for the salaries and expenses of television personalities and senior administrators, to costs associated with the CBC's use of satellite broadcasting trucks.

The Commissioner put many of these complaints on hold while the courts considered whether she was allowed to review the records the CBC had claimed were not subject to the Act. By the fall of 2011, when the matter, with one exception, was determined in the Commissioner's favour *(Canada Broadcasting Corporation v. Canada (Information Commissioner)* 2011 FCA 326), the Commissioner had placed approximately 120 complaints on hold, some dating back to 2007.

In assessing how to approach this accumulation of files, officials at the Office of the Information Commissioner communicated with the primary requester and established an agreed-to priority list. This list was communicated to the CBC and resulted in a sustained effort over 2013–2014 to resolve a maximum number of complaints. In the end, the Commissioner closed 100 complaints against the CBC, including some of the oldest in her inventory. The decision by all parties to take a pragmatic approach to the resolution of these complaints led to this result.

Among the 100 files closed, there were only three in which the Commissioner agreed with the CBC's use of section 68.1 to withhold information. In each case, the information at issue related to the CBC's programming activities, including a report from an historian about *Prairie Giant: The Tommy Douglas Story* and segments of an already broadcast episode of the Radio-Canada program "Enquête." None of the complaints closed this year related, in the Commissioner's view, to the CBC's journalistic activities (see "Protecting information related to the CBC's journalistic activities," right).

In most instances, when the information at issue related, in the Commissioner's view, to the general administration of the CBC—costs, or information about human resources or physical assets, for example—the CBC applied other exemptions to withhold portions of the requested records while maintaining the applicability of section 68.1. Since the Commissioner was satisfied that the information was properly withheld under other sections of the Act, the complaints were resolved.

In the years since the 2011 court decision on section 68.1, the Commissioner has received fewer and fewer complaints about the CBC's use of the exclusion, with just seven such files being registered in 2013–2014.

Protecting information related to the CBC's journalistic activities

At the time the CBC became subject to the *Access to Information Act*, corporation officials expressed considerable concern that the Act would be used to force the disclosure of information related to the CBC's journalistic activities, despite the specific exclusion that was introduced into the Act for such records.

However, this has not proven to be the case. In the subsequent seven years, the Commissioner has investigated only four complaints that focused on the CBC's use of section 68.1 to protect information related to its journalistic activities. In three cases, the Commissioner agreed with the CBC's use of the exclusion to protect the information in question. In the fourth, no records were found that fell within the scope of the request.

(See page 35, for information about the Commissioner's appearance in 2013 before a parliamentary committee studying a private member's bill to repeal section 68.1.)

Noteworthy investigations

The Commissioner closed 1,789 files in 2013–2014. What follows are summaries of investigations that presented novel or complex issues related to the application of the Act.

Administrative matters

Administrative complaints made up 38 percent of the new complaints the Commissioner received in 2013–2014, a 54 percent increase from the year before. This caseload included 411 complaints about delays in responding to requests, 347 complaints about the time extensions institutions take under the Act when circumstances are such that they will be unable to respond to requests within 30 days, as required by the Act, and 43 complaints about the fees institutions may charge to search for and prepare records for release. Below are five examples of investigations that focused on administrative matters.

Unreasonable time extension

A requester complained to the Commissioner about a 300-day time extension Natural Resources Canada (NRCan) had taken to consult with DFATD about briefing notes.

Paragraph 9(1)(b) of the Act allows institutions to extend the due date for a request for a reasonable period of time when consultations with other institutions are necessary but cannot be completed within the original 30-day time limit. During the investigation, NRCan successfully demonstrated that the consultation with DFATD was necessary and had been initiated within the first 30 days after receiving the request, as is required by the Act.

NRCan advised the requester that timelines for receiving responses to consultations are difficult to assess in advance and that, as a result, it had taken the 300-day extension as a precautionary measure to avoid having to respond to the request after its extended due date.

NRCan sent a total of seven pages to DFATD for review. Shortly afterwards, NRCan contacted DFATD to get an approximate turnaround time for a response. DFATD estimated that NRCan would receive its response within 60 days. The consultation process was ultimately completed in 51 days, and NRCan responded to the request 218 days before the extended due date.

During the investigation, NRCan explained that, in its experience, DFATD did not always meet its anticipated turnaround times. This was why NRCan decided to take a 300-day time extension. NRCan also referred to a recent matter decided by the Federal Court (*Information Commissioner of Canada v. Minister of National Defence*, 2014 FC 205*)* as supporting its decision to take the lengthy extension.

The Commissioner concluded that the extension of 300 days was well beyond what was needed to consult DFATD and complete the processing of the records. The extension was also contrary to Treasury Board of Canada Secretariat (TBS) policy instruments, which require that extensions be as short as possible, and contrary to an institution's duty to provide timely access to information, as set out in section 4(2.1) of the Act.

Institutions must take into consideration the number of pages of records responsive to a request and the number of pages being sent for consultation when determining the appropriate length for a time extension.

This is the first time the Commissioner has seen a complaint in which an institution took a lengthy extension and made reference to the Federal Court decision as support for its decision. This is of concern, and the Commissioner will be closely monitoring all incoming time extension complaints for signs that this practice is spreading to other institutions.

The Commissioner is appealing the Federal Court decision. For more information about this legal proceeding, see, "Extensions of time (under appeal)," on page 28.

Unreasonable fee estimate

A requester complained to the Commissioner about a decision by the Privy Council Office (PCO) to charge high search and preparation fees in response to a request for travel and hospitality expense reports, as well as supporting documents and receipts, for all PCO ministers and their exempt staff within a period of roughly three years. PCO also told the requester that it had estimated that the fees to process the request totalled $4,250 and that it would require a deposit of $2,125 before beginning to process the request.

Under paragraph 11(2) of the Act and in accordance with the *Access to Information Regulations*, institutions are allowed to charge $10 for each hour in excess of five hours that is reasonably required to search for records or prepare any portion of them for disclosure. In this case, the program area, which held the records in question, estimated that it would take three weeks to conduct the search, for a total cost of $4,300. PCO then subtracted $50, for the five free hours allowed under the Act.

However, the Commissioner's investigation revealed that the program area had not based its estimate on the volume of records to be searched through or the hourly rate in the Regulations. Instead, PCO took the position that the $10 per hour rate would be equivalent to an annual salary of $19,566, which was "inaccurate to reality." In light of this, the program area based the fee estimate on the search being done by an employee earning $73,000 per year, including 20 percent for employee benefits.

Since the Act and Regulations do not authorize the assessment of fees on this basis, the Commissioner could not agree that PCO's estimate conformed to the requirements of the Act.

In the end, PCO provided an acceptable calculation of additional fees, based on the volume of records and a total search time of 16.98 hours. At $10 per hour, the fee was, therefore, $169.80, reduced to $119.80 once the five free hours were taken into account (a reduction of more than $4,100 from the original estimated fee). Based on the nature of the records requested, the Commissioner was of view that the new fee amount was reasonable.

While the Commissioner acknowledges that the Act is in need of modernization and that the fee structure has been overtaken by technological changes, institutions must assess fees based on the current authority set out in the Act and its accompanying Regulations (see, "Fees": http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2011-2012_6.aspx). The Commissioner is of the view that Parliament did not intend fees to be a means by which institutions recover costs associated with administering the Act nor did it intend that fees be assessed to discourage requesters from making requests.

Closing a file pending consultations

In April 2012, TBS received a request for records about the approval of the Allowance Policy for regular members of the Royal Canadian Mounted Police (RCMP). TBS claimed a 180-day time extension in order to conduct consultations about the records with the Privy Council Office–Cabinet Confidences Counsel (PCO-CCC), among other institutions. This placed the extended date for responding to the request in October 2012.

On the extended due date, TBS informed the requester by letter that PCO-CCC had yet to respond to its consultation request. Nonetheless, TBS advised that it was closing the file and would provide any releasable records at the conclusion of the consultation. The requester complained to the Commissioner about this response.

The Commissioner concluded that there is no basis in the Act for institutions to close requests prior to having received consultation responses. Nor did the letter TBS sent to the requester constitute a response in keeping with sections 7 and 10 of the Act, which define the appropriate timelines for and information to be included in a response.

TBS had no procedure in place to monitor the progress of the ongoing consultation and ensure its eventual completion after the file was closed. During the investigation, TBS officials explained that they had not followed up with PCO-CCC about the consultation after October 2012, due to their own workload and because previous similar attempts had not yielded positive results. Thus, TBS simply stopped asking PCO-CCC to provide status updates on the consultation. However, in light of the Commissioner's investigation, TBS followed up with PCO-CCC, which completed the consultation in August 2013. TBS issued a final response to the requester in September 2013.

While the bulk of the delay in responding to this request was the result of the consultation with PCO-CCC, the Commissioner found that TBS had delayed the processing of the request, failed to adequately manage the consultation process and, as a result, did not provide records in a timely manner.

The Commissioner highlighted the practice of closing requests while consultations are outstanding in her 2008–2009 report cards, noting that institutions were taking this approach in order to manage the risk of delays (http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2008-2009_4.aspx). This practice is in conflict with institutions' duty to assist requesters under subsection 4(2.1) of the Act. This provision requires institutions to make every reasonable effort to respond to requests accurately and in a timely fashion. As the institution to which the request was made in this case, TBS was responsible for responding to the request and making any necessary decisions to ensure that it met its statutory obligations.

Retrieving the records

A requester complained to the Commissioner about a decision by DFATD to withhold information contained in documents sent or received by the Canadian embassy in Mexico concerning a businessman who was killed in Acapulco in October 2010. The institution withheld the information under various exemptions, including subsection 19(1) (personal information). In addition to complaining about the application of these exemptions, the requester was of the view that additional records should exist.

The investigation revealed that DFATD routinely advises embassies not to provide consular files when responding to access requests. In its view, all information in these files would be exempt under subsection 19(1).

To advance the investigation, DFATD was asked to process the records in order to determine whether any of the three exceptions to the exemption for personal information applied. Personal information may be released when it is publicly available and with the consent of the identifiable individual. It may also be released under subsection 8(2) of the *Privacy Act*, including when the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure. In the end, and after significant delay, DFATD released an additional 195 pages of records. In doing so, DFATD withheld information under subsection 13(1) (information from a government or foreign state, obtained in confidence), subsection 15(1) (defence and international affairs) and paragraph 21(1)(b) (consultation or deliberations involving government employees or officers). It also continued to claim subsection 19(1) for some information.

A review of the records confirmed that DFATD had applied these exemptions properly. However, this review was complicated by DFATD's delay in providing the consular records.

Nonetheless, the Commissioner concluded that the complaint was well founded, since DFATD had not initially retrieved or processed all the records. When responding to requests, institutions must consider whether information that may be released can be severed from information to be withheld, as per the requirement in section 25 of the Act. The Federal Court of Appeal has confirmed that records must be reviewed to ensure proper processing (*Canadian Broadcasting Corporation v. Information Commissioner of Canada*, 2011 FCA 326). A failure to retrieve records also jeopardizes the rights conferred by the Act, since there is a risk that records that are not properly identified could be disposed of by the program area. (For an instance of this, see, "Failure to respond accurately to requests by not retrieving records," in the Commissioner's 2012–2013 annual report: http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_6.aspx.)

Intersection of access and parliamentary privilege

As noted in her 2012–2013 annual report, the Commissioner commented during a parliamentary committee appearance in 2012 that the *Access to Information Act* does not contain an exemption for information that is subject to parliamentary privilege (http://www.oic-ci.gc.ca/eng/pa-ap-appearance-apparance-2012_3.aspx).

At the hearing, the Commissioner also predicted that the absence of such an exemption would result in complaints about institutions' taking time extensions to consult Parliament about the possible application of parliamentary privilege to records that had been requested under the Act.

This is, in fact, what occurred. In April 2013, a requester complained to the Commissioner about TBS's response to a request for briefing materials related to the appearance of TBS officials before a parliamentary committee.

TBS took two time extensions to respond to this request, one of which was for 60 days, to consult with the House of Commons. However, the provision of the Act TBS used to justify this consultation (paragraph 9(1)(c)) was not intended to be used for this purpose. Rather, it was designed to accommodate consultations with third parties about records that could be considered confidential commercial information, as described in the Act. Since none of the records at issue in this complaint contained such information, the Commissioner concluded that the extension was invalid.

During the investigation, TBS noted that there is lack of clarity around the proper procedure to follow when responding to requests for records that may be covered by parliamentary privilege. The institution also stated that, when taking the time extension, it was following the common practice of other institutions in this situation.

During her 2012 parliamentary appearance, the Commissioner recommended that an exemption for parliamentary privilege be added to the Act, and that a time-limited consultation process with a clearly identified authority be implemented. The committee did not adopt the Commissioner's recommendations in its report.

Refusal investigations

Complaints about institutions' refusals to grant access to records made up 59 percent of the new complaints the Commissioner received in 2013–2014. This caseload included 493 complaints about institutions' use of the various exemptions and exclusions under the Act, 469 complaints about incomplete responses or there being no records, 203 complaints related to national security, international affairs and defence matters, and 54 miscellaneous complaints.

Among the most commonly cited exemptions in complaints were section 19 (personal information), section 20 (third-party information) and section 23 (solicitor-client privilege). The pages that follow contain summaries of notable investigations the Commissioner closed in 2013–2014 that dealt with these and other exemptions.

1. Section 19

Section 19 requires institutions to withhold personal information, subject to three exceptions: when an individual consents to the disclosure of the information, when the information is publicly available or when section 8 of the *Privacy Act* permits disclosure. Section 19 is the most often cited exemption in the Commissioner's complaints. In 2013–2014, 45 percent of the new complaints the Commissioner received involved issues relating to section 19. The following are summaries of three cases that dealt with various aspects of applying this provision.

Mandatory training is not personal information

A requester complained to the Commissioner about a decision by the RCMP to withhold in their entirety under subsection 19(1) records concerning the attendance of a newly commissioned inspector at the organization's Officer Orientation and Developmental Course. The requester had specifically asked for the dates of the inspector's attendance, the complete list of courses, and the names of all the facilitators and any others in attendance.

During the investigation, the RCMP indicated that, in its view, the information sought, in conjunction with the name, rank and employee identification number of regular members of the RCMP, constitutes personal information, as described in section 3 of the *Privacy Act*. The RCMP relied on *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)* 2003 SCC 8 to support its position.

The investigation revealed that the Officer Orientation and Developmental Course was mandatory for newly commissioned officers. Consequently, the Commissioner concluded that the fact that a member had attended this course was not personal information, since it was related to the position or functions of an individual who was an employee of a government institution. This meant that the information fell within the exception to subsection 19(1) found in paragraph 3(j) of the *Privacy Act*. The RCMP did not agree with this analysis. In the end, however, after a formal request from the Commissioner for further information to justify its position, the RCMP agreed to release the information.

When invoking subsection 19(1), institutions must consider all of the exceptions detailed in subsection 19(2) as well as those exceptions to what constitutes personal information as defined in the *Privacy Act*. Mandatory developmental training clearly falls within the exception for information relating to the position and function of an individual during the course of his or her work.

Limits of personal information

On September 24, 2007, Transport Canada received a request for an electronic copy of the entire Civil Aviation Daily Occurrence Reporting System (CADORS) database.

Transport Canada responded to the request on October 5, 2007, providing a CD-ROM containing CADORS data entries from January 1, 1993, to September 26, 2007. In its response, Transport Canada did not tell the requester that it had applied any exemptions to the information or that it had not included some details, such as aircraft registration numbers.

The requester subsequently complained to the Commissioner, alleging that information in the database was missing.

In an identical request in 2006, Transport Canada had refused to release the aircraft registration numbers, claiming they were personal information under subsection 19(1). The Commissioner challenged this decision, and Transport Canada agreed to disclose the database in its entirety and to provide access to all CADORS database fields to the requester.

The current investigation established that the CADORS database is available on Transport Canada's website; however, not all fields are available and the data cannot be downloaded.

The Commissioner's attempts to resolve the complaint informally were unsuccessful. Consequently, she formally asked Transport Canada to provide its rationale for refusing to disclose the aircraft registration numbers. In its response, Transport Canada maintained that by cross-referencing the aircraft registration numbers in the CADORS database with information on the publicly available Canadian Civil Aviation Register (CCAR) website, it is possible to discern the names and addresses of the owners of registered aircraft involved in air occurrences. As understood, Transport Canada claimed that this would result in the disclosure of "personal information" through a "mosaic effect"—that is, releasing various types of seemingly unrelated information would allow a person to put together a larger picture that would disclose specific personal information. As a result, the registration numbers had to be withheld under subsection 19(1).

The Commissioner remained of the view that Transport Canada could not establish that the disclosure of aircraft registration numbers would enable anyone to discern the identity of any individuals involved in an air occurrence. At most, the numbers, when linked with the information in the CCAR database, might enable someone to discern the identity of the owner of an aircraft, including commercial and state entities, that happened to be involved in an air occurrence. However, someone could not determine whether these owners were personally involved in the incident.

In support of the Commissioner's view was the Federal Court of Appeal's decision in *Canada (Information Commissioner) v. Canada (Canadian Transportation Accident Investigation and Safety Board)*, 2006 FCA 157. The Court rejected arguments that information in tapes and transcripts of air traffic control communications between air traffic controllers and aircraft personnel obtained by the Canadian Transportation Accident Investigation and Safety Board in the course of its investigation of air occurrences could become "personal information," even if it were possible to use this information to identify an individual. According to the Court, the possibility that the information might be cross-referenced with other sources did not render otherwise "non-personal" information "personal." Instead, it was the nature of the information, and the fact that the subject matter contained therein did not engage the privacy rights of individuals, that was key to determining whether the information was "about" a person so as to qualify for exemption under subsection 19(1).

The Commissioner also noted that even if the information had been properly exempted as personal information, of which she was not convinced, Transport Canada was obliged to consider releasing the information in the public interest under paragraph 8(2)(m) of the *Privacy Act*. With regard to the information at the centre of this investigation, there was no expectation of privacy. In addition, there is a strong public interest in ensuring air travel safety.

As a result of the Commissioner's intervention, Transport Canada released the records to the requester in full on October 18, 2013, under sub-paragraph 8(2)(m)(i) of the *Privacy Act*. This provision allows institutions to release information when they determine that the public interest in the disclosure clearly outweighs any resulting invasion of privacy. This resolved the complaint, although the Commissioner maintains that the information released to the requester is not personal information.

Issue of consent

A requester complained to the Commissioner that the RCMP had not provided proper grounds for refusing access to documents obtained during an investigation. On three occasions, the RCMP had advised the requester that it required written consent from individuals whose personal information could appear on the records that fell within the scope of the request before it would process the request.

The Commissioner concluded that it was premature for the RCMP to require consents before even reviewing the records in question to determine whether subsection 19(1) applied. Moreover, the Commissioner is of the view that institutions have an obligation to seek consent when it is reasonable to do so. Accordingly, the RCMP's refusal to process the request in the absence of consents was inappropriate.

During the investigation, the RCMP also expressed concerns to the Commissioner about the scope of the request, in addition to the potential need to seek consent from a large number of people. It is the Commissioner's view that the RCMP should have discussed these concerns with the requester, in accordance with its duty to assist.

By refusing to process the request without the relevant consents, and not communicating appropriately with the requester, the RCMP missed an opportunity to resolve these issues. This, in turn, unnecessarily delayed the processing of the file. Indeed, during the investigation, it became evident that the requester was willing to significantly reduce the scope of the request. Doing so eliminated the need to seek any consents. The complaint was resolved on this basis.

2. Section 20

Section 20 provides for the exemption of certain types of information of a commercial nature relating to third parties not subject to the Act. In 2013–2014, 25 percent of the new complaints the Commissioner received involved issues about how institutions applied this section.

Who is a proper third party?

In 2008, Canada Post disclosed to a requester portions of "contracts given to Wallding International" dating from 1997 to 2000. It withheld the signatures on the contracts as personal information (subsection 19(1)) and other details as commercial information supplied in confidence by a third party to Canada Post (paragraph 20(1)(b)).

In investigating the subsequent complaint about this response, the Commissioner disagreed that the three signatures in question could be withheld as personal information, since they were all publicly available. Indeed, one of the signatories was the Receiver General of Canada, whose signature appears on all cheques issued by the Government of Canada. In the end, Canada Post released the signatures.

The Commissioner also disagreed that the information contained in the contract was "supplied" by a third party, as is required by paragraph 20(1)(b). The terms of a contract that is negotiated between a government institution and a third party are not, in the Commissioner's opinion, "supplied" to a government institution, since they are arrived at as the result of a process of negotiation and are mutable.

In August 2012, in the course of the investigation—and more than four years after its initial response to the requester—Canada Post applied a new exemption to the records at issue: paragraph 20(1)(c). This exemption requires institutions to withhold information the disclosure of which could reasonably be expected to result in material financial loss or could reasonably be expected to prejudice the competitive position of a third party. In doing so, Canada Post asserted that the release of the content of the contracts would result in financial loss or would harm the competitive position of the former president of Wallding, the third-party corporation.

Since the records at issue related to the business of Wallding, a corporation that was dissolved in September 2008, the Commissioner was not convinced that Canada Post had properly applied paragraph 20(1)(c) to withhold the information.

As required by the Act, the Commissioner sought representations from the former president of Wallding. However, the Commissioner was not persuaded by his representations, which focused entirely on the potential damage to him in his personal capacity. The Commissioner therefore recommended to the head of Canada Post that he disclose the information. The information was finally disclosed in its entirety in 2013.

When is commercial information not confidential?

Aboriginal Affairs and Northern Development Canada (AANDC) received a request in 2012 for a list of all known storage tanks on aboriginal land in Alberta that contain petroleum products and allied petroleum products. The requester sought the capacity, location, and owner and/or operator of each tank.

In responding to the request, AANDC exempted the tank location under paragraph 20(1)(b) (information supplied by a third party in confidence). The requester complained to the Commissioner about this response.

In order for paragraph 20(1)(b) to be properly invoked to withhold information, all criteria set out in the provision must be met. That is, the information must be financial, commercial, scientific or technical information. It must have been supplied to a government institution by a third party, it must be confidential in nature by some objective standard and it must be consistently treated in a confidential manner by the third party.

Throughout the investigation, AANDC maintained that the information at issue met the criteria of paragraph 20(1)(b), including the confidentiality criteria.

The *Storage Tank Systems for Petroleum Products and Allied Petroleum Products Regulations* stipulate that "the owner or operator must display the identification number in a readily visible location on or near the storage tank system for which the number was issued."

Similarly, Environment Canada's website sets out that the identification number must be visible on or near the storage tank system. For aboveground tanks, the number may be painted on the side of a tank or posted in a visible location. For underground systems, a durable tag may be attached to the fill pipe. The only requirement is that the number be visible throughout the year and not obscured by, for example, snow.

In light of these requirements, the Commissioner concluded that the location of such tanks is capable of being discerned through observation, and could not be characterized as "confidential."

The Commissioner advised AANDC of her position, but the institution maintained that the application of paragraph 20(1)(b) was proper. Since the Commissioner had concluded that AANDC had not established that the information at issue met the criteria set out in paragraph 20(1)(b), the Commissioner formally recommended that the Minister of Aboriginal Affairs and Northern Development disclose the information. In response, AANDC agreed to release the information.

3. Section 23

Another exemption frequently relied on by government institutions to withhold records is section 23, which exempts information for which solicitor-client privilege has been claimed. In 2013–2014, 21 percent of the new complaints the Commissioner received raised issues relating to section 23.

Settlement agreements not privileged

A requester complained to the Commissioner about AANDC's decision to withhold in its entirety under section 23 settlement agreements drawn up between AANDC and seven private companies in 2008 regarding a building project for a school in Kanesatake.

The Commissioner did not agree that such documents could be withheld under this exemption. During the investigation, the institution acknowledged this to be the case and subsequently decided that it would rely on subsection 18(b) (contractual or other negotiations of a government institution) and paragraph 20(1)(d) (contractual or other negotiations with a third party) to withhold the requested records.

In justifying its use of these exemptions, AANDC argued that settlement agreements are intended to be confidential and that disclosure could result in financial loss to the federal government or that parties not involved in the settlement would financially benefit from the information the agreements contain. To be properly exempted under paragraph 20(1)(d), the information must be such that its disclosure could reasonably be expected to interfere with contractual or other negotiations of a third party. This test is similar to that set out in subsection 18(b). It is not enough to merely speculate that some harm may occur. The courts have been clear that in invoking this provision, institutions must refer to an obstruction to negotiations and not simply the heightening of competition that may flow from disclosure. The courts have also noted that the party seeking to prevent disclosure must establish the probability of harmful consequences.

In the Commissioner's view, AANDC failed to provide sufficient evidence that the harm identified in paragraph 20(1)(d) or subsection 18(b) would materialize should the records at issue be disclosed. In the end, AANDC, since it had ceased to rely on section 23 to withhold the information, disclosed all of the records to the requester.

Other exemptions and exclusions

Section 18.1

Section 18.1 of the Act allows four government institutions, including VIA Rail Canada, to refuse to disclose records that contain trade secrets or financial, commercial, scientific or technical information that belongs to them, and that the institutions have consistently treated as confidential. This provision, which has been the source of some complaints, was added to the *Access to Information Act* in 2007 as a result of the *Federal Accountability Act*, when VIA also became subject to Canada's access to information legislation.

For example, a requester complained to the Commissioner about a decision by VIA to exempt information in response to a request for "Passenger on/off numbers by station for 2011 and 2012."

In his complaint, the requester noted that VIA had provided him with national figures for the number of passengers who had gotten on and off VIA trains, as opposed to giving the figures broken down by station. VIA had withheld the latter under paragraph 18.1(1)(d) (commercial/economic information). However, the requester alleged that VIA had in the past publicly released full station-by-station data on its website. He also questioned how releasing the information would compromise any commercial or economic activity at VIA.

The Commissioner's investigation revealed that VIA had, in fact, publicly released the information in question from 2007 to 2010, indicating that VIA had not consistently treated the requested information as confidential. Since VIA did not meet all of the criteria set out in paragraph 18.1(1)(d) the Commissioner concluded that the information was not properly withheld. As a result of the Commissioner's intervention, VIA disclosed the information to the requester.

Section 26

Under this section, institutions may refuse to disclose records when they have reasonable grounds to believe that the material will be published within 90 days after the request is made.

A requester complained to the Commissioner in 2013 about the decision of the Canada Mortgage and Housing Corporation (CMHC) to withhold in its entirety a study, *Assessing the Outcomes for Habitat for Humanity, Home Buyers in Canada*, under paragraph 21(1)(b) (accounts of deliberations or consultations).

The Commissioner disagreed with CMHC's application of paragraph 21(1)(b) and asked the institution to review the records again. Instead of doing so, CMHC took the position that it would withhold the information under section 26, since the study was to be published in May or June 2013. However, section 26 requires that there be reasonable grounds to believe that the information will be published "within ninety days after the request is made." In this case, the proposed publication date was more than 90 days after CMHC received the request in December 2012. Consequently, the Commissioner found that that CMHC could not invoke section 26 to withhold the study.

During the investigation, CMHC informed the Commissioner that the report had been published on its website and provided the link to the requester.

Section 26 is unlike other exemptions in that its application is based on an event taking place within a specific time frame. As a result, even when an institution intends to publish a record, it must demonstrate that it was reasonable to believe publication would occur within 90 days after the date the institution received the request.

Subsection 68(a)

Subsection 68(a) excludes from the Act published material or material available for purchase. An investigation focused on the use of this exclusion raised interesting issues about the intersection of copyright law and the *Access to Information Act*.

A requester complained to the Commissioner when CRA withheld Internal Technical Interpretations produced for a particular period under subsection 68(a). CRA provided the Interpretations to publishers under a licensing agreement. The publishers, in turn, made them available for purchase with some modifications.

The requester argued that the publishers' changes were substantial enough to make the published versions of the Interpretations a "new" or "derivative work" under copyright law. If this were so, subsection 68(a) would not have applied, since the original versions would have been neither published nor available for purchase.

During the investigation, the Commissioner compared the original and published versions of the Interpretations, which showed that what was published was almost identical to the original version. In some cases, the publishers had added footnotes for clarity and value to subscribers. Consequently, the Commissioner agreed with CRA that the information at issue was published and available for purchase, which excluded it from the Act.

Section 69

The *Access to Information Act* does not apply to information that is considered to be Cabinet confidences. This exclusion (section 69) distinguishes the federal access law from those of all the provinces and territories.

Because Cabinet confidences are excluded from the Act, the Commissioner is unable, when investigating complaints about records that contain Cabinet confidences, to view the information institutions have refused to disclose. Instead, she receives a document that sets out basic data about the records withheld, such as the type of document, who wrote it, who received it and on what date.

The courts have determined that, in accordance with the exceptions set out in subsection 69(3), portions of documents intended to present background explanations, analyses of problems or policy options for Cabinet's consideration when making decisions are not Cabinet confidences after the decisions are made public or after four years have passed since the decisions were made. However, it is difficult for the Commissioner to determine whether portions of documents could meet this test when she is not allowed to see their contents.

Nonetheless, the Commissioner has, by seeking formal representations from institutions, managed in a number of cases to have further information released. For example, in 2013–2014, the Commissioner's intervention resulted in additional information being disclosed related to proposed changes to skydiving regulations and about Environment Canada activities associated with the Red River floodway in Manitoba.

In July 2013, the responsibility for determining whether information is excluded as a Cabinet confidence under the Act was transferred from the Privy Council Office to Department of Justice Canada lawyers embedded in institutions (see section 13.4 of the TBS *Access to Information Manual*: http://www.tbs-sct.gc.ca/atip-aiprp/tools/atim-maai01-eng.asp). The impact of this change is unclear. It may be that the new process will increase the timeliness of responses, since institutions generally identified consulting PCO as a bottleneck in the processing of requests. However, there is a real possibility that the application of section 69 will vary from institution to institution and that the Commissioner's investigative process will be complicated by a lack of standardization. The Commissioner communicated these concerns to TBS, the Department of Justice Canada and PCO.

TBS has begun to collect more detailed statistics about requests that involve Cabinet confidences, to provide a clearer picture of their volume and the time required to process them. The first of these figures will be published in 2014–2015.

In the meantime, the Commissioner notes with concern that complaints about the use of the Cabinet confidence exclusion increased by 65 percent in 2013–2014 over 2012–2013. The Commissioner will be monitoring this situation closely and will report on further developments in 2014–2015.

Systemic investigation into the impact of instant messaging on access

In November 2013, the Commissioner published a special report to Parliament on the impact of instant messaging on access to information (http://www.oic-ci.gc.ca/eng/pin-to-pin-nip-a-nip.aspx).

In this investigation, the Commissioner reviewed the practices of 11 institutions and various ministerial offices with regard to the use of instant text-based messages on wireless devices, including communications to and from BlackBerrys using their unique personal identification numbers (PINs).

The Commissioner found that the use of instant messaging on government-issued wireless devices to conduct government business is putting the right of access to information at an unacceptable risk. In addition, she found that access to instant messages sent and received by ministers' office staff is at particular risk.

In the report, the Commissioner recommended that Parliament amend the *Access to Information Act* to add a comprehensive legal duty to document decisions made by federal government institutions, with appropriate sanctions for non-compliance. The Commissioner also made three specific recommendations to the President of the Treasury Board, who declined to implement them.

Interference with access to information

The access to information process as set out in the *Access to Information Act* was designed to be objective and non-partisan. Consequently, any real or perceived interference in the process is inconsistent with the Act.

Interference at Public Works and Government Services Canada

In early April 2014, the Commissioner released a special report to Parliament that concluded that there had been improper involvement by three ministerial staff members with five access to information requests at Public Works and Government Services Canada (PWGSC) (http://www.oic-ci.gc.ca/eng/ingerence-dans-acces-a-l'information-partie-2-interference-with-access-to-information-part-2.aspx). The investigation that formed the basis of the report covered the period from July 2008 to January 2010.

Direct communications between ministerial staff members and access officials contributed to the interference. In turn, this resulted in delays in responding to requesters. In four cases, access officials did not release information when it was ready to be disclosed. Instead, they delayed responding to requesters between 6 and 30 working days, in order to obtain the approval of ministerial staff members to release the records.

The Commissioner made eight recommendations to PWGSC, on matters ranging from implementing new or improving existing policies, to providing clear and consistent training to both ministerial staff and access officials on their roles and responsibilities under the Act. The Minister agreed to implement all the recommendations but one; she declined to refer the matter of the interference to an investigative body for further examination.

The report followed an earlier finding of interference against one of the three staff members involved in this investigation, which the Commissioner reported on in March 2011 (http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2010-2011_interference-with-ati-interference-avec-ati.aspx).

Two interference complaints related to requests for information about Afghan detainees

During 2012–2013, the Commissioner closed investigations into two other complaints alleging interference. The first was against DFATD and the second against National Defence. After extensive investigations, the Commissioner found both of these complaints to be not well founded.

The first investigation was into an allegation of interference at DFATD.

On March 11, 2008, DFATD received a request for "all documentation concerning Canada's decision to stop detainee transfers in early November 2007 because of evidence of torture. Please provide any materials prepared in relation to detainee transfers for court proceedings. Timeframe is November 1, 2007 to February 29, 2008."

On March 19, 2008, DFATD informed the requester that it was taking a 290-day time extension to respond to the request, due to the anticipated extent of the search and the consultations that would be required with other government institutions. This placed the extended due date for responding to the request in late 2008.

In the end, DFATD responded to the request on December 10, 2009, exempting all records in their entirety under section 23 (solicitor-client privilege). On February 9, 2010, the requester complained to the Commissioner about DFATD's response. Among other matters, the requester complained that there had been undue interference with the handling and processing of the request, due to the time it took for DFATD to provide a response.

The Commissioner received full and prompt cooperation from all institutional officials during the course of her investigation of this complaint, reviewed all records created as a result of the request, and conducted individual interviews with all DFATD and Department of Justice Canada officials who had been involved in processing the request.

The investigation revealed that DFATD, at the time of this request, had been processing an exceptionally high volume of requests, while attempting to manage competing priorities relating to the detainee transfer issue. These priorities included litigation involving the Military Police Complaints Commission, other litigation before the Federal Court and the study being done by the House of Commons Special Committee on the Canadian Mission in Afghanistan. DFATD officials described the high volume and competing priorities during this period as creating an overwhelming workload that had a significant impact on institutional resources.

The Commissioner's investigation established that DFATD officials in the program areas had made a conscious decision to address these other priorities before the access requests, including the request at the centre of this complaint. Consequently, there were significant delays in identifying records that might fall within the scope of the request, in conducting and completing internal consultations, and in undertaking consultations with the Department of Justice Canada about the applicability of section 23 to the records. For their part, Department of Justice Canada officials responded promptly to DFATD's consultation request once they received it.

In addition, the Commissioner examined DFATD's ministerial communications alert process to determine whether this procedure resulted in any interference in or additional delay to the request. The Commissioner's review found no evidence that this had been the case.

Ultimately, however, DFATD responded to the request 11 months after the extended due date had passed. In so doing, the institution failed in its duty to provide a timely response to the requester, as set out in subsection 4(2.1) of the Act. Workload is not a justification for entering a state of deemed refusal.

Despite the significant delay in responding to this request, the Commissioner found no evidence of interference with the handling and processing of the request. Accordingly, the Commissioner determined the complaint was not well founded.

The Commissioner also investigated allegations of interference at National Defence.

On May 8, 2007, National Defence received a request for "copies of all e-mails sent or received by the Assistant Deputy Minister (Policy) from 29 April 2007 to 7 May 2007." This was revised a week later to "copies of all e-mails sent or received by the Assistant Deputy Minister (Policy) from 29 April 2007 to 7 May 2007 that include or mention the word 'detainee'."

On June 12, 2007, National Defence informed the requester that it was taking a time extension of 180 days to respond to the request, due to the volume of records involved and the consultations with other institutions that would be required. This made the new deadline for responding to the request December 11, 2007.

On January 29, 2010, 25 months after the extension had expired, National Defence provided 160 pages of records to the requester but withheld some records in whole or in part under one or more of several exemptions. The requester complained to the Commissioner about this response, alleging that, due to the length of time involved, there might have been undue interference with the handling and processing of his request.

National Defence cooperated fully with the Commissioner's investigation. In investigating the complaint, the Commissioner reviewed all the records created as a result of the processing of the request and conducted individual interviews with all National Defence and other government institution officials who had been involved in the processing of this request.

The investigation revealed that there was a significant delay in National Defence's response to the request because of the following factors. First, National Defence had been processing a large volume of access requests while dealing with this one. Second, in addition to carrying out internal consultations with subject-matter

experts, National Defence had to conduct a number of consultations with other government institutions.

Most institutions National Defence consulted responded in a timely manner. However, two consultations were required with DFATD, which had significant workload issues at that time. As noted above, DFATD was managing its access and consultation requests alongside other competing priorities relating to the Afghan detainee transfer issue.

Compounding these conditions was the fact that the access offices at both National Defence and DFATD had experienced significant staffing issues during the processing of the request, resulting in responsibility for the file changing hands several times. In addition, the request was processed during a period of exceptionally heavy workload as a result of requests related to Afghanistan and Afghan detainees. Consequently, access officials experienced considerable administrative delays in conducting their respective internal consultations in order to obtain the advice necessary to complete the processing of this request.

The Commissioner also examined National Defence's ministerial communications alert process. Although this procedure is conducted under strict protocols, she nonetheless investigated whether this procedure resulted in any interference or additional delay with the request. The review found no evidence that this had been the case.

Ultimately, National Defence responded to the request 25 months after the extended deadline had passed. In so doing, the institution failed in its duty to provide a timely response to the request, as set out in subsection 4(2.1) of the Act. However, the information and evidence obtained during this investigation led the Commissioner to conclude that there had been no interference with the handling and processing of the request.

Ongoing systemic interference investigation

Finally, the Commissioner's ongoing systemic investigations into delay and interference in eight institutions will be concluded in 2014–2015.

3

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 first review is carried out by the Commissioner 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 2013–2014.

Ongoing cases

1. 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.

The scope of personal information

Information Commissioner of Canada v. Minister of Natural Resources (T-1257-13)

As reported in her 2012–2013 annual report, the Commissioner investigated a complaint from a business owner about Natural Resources Canada's (NRCan) refusal to release the names, professional titles and basic professional contact information of individuals working for non-government entities, who may have received data about the complainant's business from NRCan (see, "Basic business information of third parties": http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_6.aspx).

NRCan had refused access to this information based on the exemption in the Act for "personal information" (subsection 19(1)). The Commissioner found that NRCan had not shown that the exemption properly applied. On February 26, 2013, she sent a letter to the Minister of Natural Resources recommending that the information in question be disclosed. However, the Minister declined to implement this recommendation.

On March 28, 2013, the Commissioner reported the results of her investigation to the complainant and indicated that she would, with his consent, apply to the Federal Court for a review of the Minister's refusal.

The complainant only provided his consent on June 10, 2013, which was beyond the 45-day time limit within which an application for judicial review ought normally to be commenced by the Commissioner under the Act. The Commissioner brought a motion for leave to initiate the proceeding beyond the 45-day time limit, which the Court granted on July 18, 2013.

The Commissioner's application on the merits was heard on March 27, 2014, and the matter is now under reserve.

Limits of solicitor-client privilege

Information Commissioner of Canada v. Minister of Health (T-1904-13)

Health Canada received a request in 2010 for documents pertaining to the Abbreviated New Drug Submission by Apotex Inc. for its proposed drug Apo-Pantoprazole.

Health Canada responded to the request on May 20, 2011. Of the records disclosed, information had been withheld on eight pages, based on a claim that this information is subject to solicitor-client privilege (section 23). The requester subsequently complained to the Commissioner about Health Canada's refusal to disclose these portions of the records.

During the course of her investigation, the Commissioner applied the three-part test established by the Supreme Court of Canada in *Solosky v The Queen* [1980] 1 S.C.R. 821 at 84 for determining whether information falls within the scope of solicitor-client privilege. This test requires that the information be (i) a communication between a solicitor and a client, (ii) which involves the seeking or giving of legal advice, and (iii) which is intended to be confidential.

The Commissioner concluded that Health Canada had not shown that the exempted information met this test. Accordingly, she wrote to the Minister of Health to formally recommend that Health Canada disclose the information. The Commissioner also noted that even if solicitor-client privilege could apply (of which she was not convinced), the evidence did not establish that the discretion to waive the privilege and disclose the information had been properly exercised. The Minister rejected the recommendation and declined to exercise the discretion to waive the privilege.

In light of this response, and with the consent of the complainant, the Commissioner filed an application for judicial review in November 2013. The Commissioner's written legal arguments were filed on April 9, 2014.

Injury to international affairs: "no-fly list"

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

Transport Canada received two requests in March 2010 for the number of individuals who were named on the Specified Persons List (otherwise known as Canada's "no-fly list") between 2006 and 2010, and for the number of Canadians on the list during the same period.

In its response to the requests, Transport Canada withheld these numbers, being of the view that releasing them could reasonably be expected to injure international affairs and the detection, prevention or suppression of subversive or hostile activities (as per subsection 15(1)).

Through her investigation, the Commissioner determined that the information Transport Canada had withheld did not fit the criteria of subsection 15(1). On May 10, 2013, the Commissioner wrote to the Minister to recommend that he release the withheld information to the complainant. The Minister declined to follow the Commissioner's recommendation.

In light of this, the Commissioner obtained the consent of the complainants and filed two applications for judicial review of the Minister's decision on April 15, 2014.

Reference: Fees and electronic records

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

Under section 18.3 of the *Federal Courts Act*, federal tribunals may refer certain questions to the Federal Court for determination.

On February 27, 2013, the Commissioner made such a reference for the first time, seeking a determination on whether institutions may charge search and preparation fees for electronic records when the Regulations under the Act specify that institutions are allowed to charge such fees when records are non-computerized (see, "Fees and electronic records," in the Commissioner's 2012–2013 annual report: http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_7.aspx).

In March 2013, the Attorney General of Canada brought a preliminary motion to strike the Commissioner's reference, arguing that one of the conditions for the Court to hear the reference had not been met: that the issue must be one for which the solution could put an end to the dispute before the Commissioner. The Attorney General took the position that this condition had not been met because the "proceeding" before the Commissioner (an investigation about a complaint against Human Resources and Skills Development Canada) was essentially at an end, since the Commissioner had made a recommendation to the Minister about the complaint. The Attorney General also argued that, in any event, the nature of the Commissioner's function is not to determine or resolve disputes, and that the reference can therefore not put an end to "a dispute" that is before her.

The Court found that the Attorney General's argument did not take into account the final step of the Commissioner's statutory duty—that is, to report to the complainant, which the Commissioner has yet to do. In addition, the Court noted that if it were to accept that the Commissioner's role is not to resolve disputes, the Commissioner would never be able to bring a reference. The Court concluded that it was certainly arguable that Parliament had intended for advisory bodies such as the Commissioner to have the right to refer issues of law that arise in the course of the performance of their duties to the Court for determination. On February 6, 2014, the Court dismissed the Attorney General's motion to have the reference struck.

On April 17, 2014, VIA Rail Canada, the Canadian Air Transport Security Authority and the Business Development Bank of Canada were granted intervener status in the proceeding.

The parties have filed a proposed schedule with the Court in which it is requested that a hearing date be set for January 2015.

2. Complainant-initiated proceedings

After the Commissioner reports the results of her investigation concerning 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.

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

Between September 2011 and February 2013, the Canada Revenue Agency (CRA) responded to a series of requests under the Act for records pertaining to seven numbered companies' various taxation years. CRA refused to disclose portions of the requested records. These companies complained to the Commissioner about CRA's access refusals.

As a result of the Commissioner's investigations, CRA disclosed additional information. Thereafter, the Commissioner concluded that the complaints were well founded but had been resolved.

The numbered companies were not satisfied that they had received all of the information to which they were entitled. As a result, six judicial review proceedings were initiated between May 21, 2013 and August 5, 2013, against CRA. These judicial review proceedings were later consolidated by orders of the Court into a single proceeding.

The Commissioner sought and obtained leave to be added as a party after the Applicants indicated that CRA had identified additional records responsive to the access requests following the completion of the Commissioner's investigations and the commencement of the judicial review proceedings.

The Applicants served an additional affidavit in support of their case on April 7, 2014. As of April 30, 2014, CRA had yet to file its affidavit material.

3. 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 from a requester 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 2013–2014, 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.

Husky Oil Operations Limited v. Canada–Newfoundland and Labrador Offshore Petroleum Board et al. (T-511-13)

Husky Oil filed an application for judicial review in March 2013, asking the Court to set aside a decision by the Canada–Newfoundland and Labrador Offshore Petroleum Board to release information to a requester that relates to Husky Oil.

The information at issue is found in safety incident notifications and safety incident investigation reports relating to an oilrig operated by Husky Oil. The company had provided these notifications and reports to the petroleum board in compliance with the *Canada–Newfoundland Atlantic Accord Implementation Act* and the Regulations under that Act.

Husky Oil claims that the information is privileged under section 119 of the *Canada–Newfoundland Atlantic Accord Implementation Act*, such that it may not be disclosed under subsection 24(1) of the *Access to Information Act* (which deals with statutory prohibitions against disclosure).

The Commissioner has been added as a party and has taken the position in this matter that the information at issue should not be withheld under subsection 24(1) or any of the Act's other exemption provisions. Written representations have been filed with the Court, and the case was heard before the Federal Court on May 8, 2014, in St. John's.

Provincial Airlines Ltd. v. Attorney General of Canada et al. (T-1429-13)

Provincial Airlines filed an application for judicial review in August 2013, asking the Court to set aside a decision by Public Works and Government Services Canada 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.

The Information Commissioner was added as a party to this proceeding in October 2013. As of April 30, 2014, Provincial Airlines had yet to file its written representations.

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)

Equifax Canada Co. filed two applications for judicial review in 2013.

One was in respect of a decision by the Minister of Public Works and Government Services Canada to disclose the total price paid under a contract between Equifax and 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 was in respect of a decision by HRSDC to disclose certain portions of contracts between Equifax and that institution. These contracts generally pertain to the provision of credit reporting services to HRSDC by Equifax.

In both cases, Equifax claims that the information at issue is exempt from disclosure based on subsection 20(1) of the Act (third-party information).

The Commissioner was granted leave to be added as a party to both these proceedings on September 3, 2013. The matters were heard together before the Federal Court in Toronto on May 13, 2014.

Decisions

The following decisions were rendered in 2013–2014 by the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada in matters related to access to information.

An issue of protocol and solicitor-client privilege

Minister of Public Safety and Emergency Preparedness and Minister of Justice v. Information Commissioner of Canada, 2013 FCA 104 (A-375-12)

The Federal Court of Appeal's decision in this case was rendered on April 17, 2013 (http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/37768/index.do) and reported in the Commissioner's 2012–2013 annual report (see, "An issue of protocol": http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_7.aspx). Since then, no application for leave to appeal the decision to the Supreme Court of Canada was initiated. The Federal Court of Appeal's decision therefore stands.

Extensions of time (under appeal)

Information Commissioner of Canada v. Minister of National Defence, 2014 FC 205 (T-92-13)

As reported in her 2012–2013 annual report, the Commissioner filed an application for judicial review of a 1,110-day extension National Defence had taken to respond to a 2010 access request (see, "A very lengthy time extension": http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_7.aspx). The request was for all records pertaining to a specific contract, and communications relating to a company, an individual and the sale of surplus military assets to Uruguay. The extension meant that National Defence would have had to have responded to the request by March 29, 2014.

In the application for judicial review, the Commissioner asked the Court to declare that the Minister of Defence had failed to respond to the request within the time limits set out in the Act and was therefore deemed to have refused to give access to the requested documents. The Commissioner asked the Court to order the Minister to respond to the request within 30 days of the Court's judgment.

On September 11, 2013, less than a month before the hearing of the application, National Defence responded to the request. It then brought a motion to strike the Commissioner's application, on the grounds that it was now moot. The Court refused to do so, however, because it determined that a resolution of the issues raised would have some practical effect.

The application for judicial review was heard on October 8, 2013. On March 3, 2014, the Court dismissed the Commissioner's application (http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/67139/index.do?r=AAAAAQAIVC05Mi0xMyAAAAAAAQ). The Court concluded that even when the Commissioner determines that an extension of time is unreasonable that extension of time does not constitute a refusal of access. It further concluded that when there has been no access refusal, the Court does not have jurisdiction under the Act to review the matter.

The Court noted that "where the Information Commissioner investigates a complaint about a claimed extension of time, all that can be done, if the extension is found to be unreasonable, is to make recommendations to the head of the Government institution and to rely on the Annual Reports, and where appropriate, a Special Report to focus attention on the issue and encourage better compliance in future cases" (para. 109).

The Court also found that because it had no jurisdiction to consider the application, it did not need to consider whether the extension claimed in this case had been reasonable. Nonetheless, it noted that "assessments of what is reasonable generally require consideration of the circumstances" (para. 124) and that "the Information Commissioner may not always be well-placed to determine whether an extension is reasonable" (para. 124), while "the Court should not second guess whether an extension is reasonable" (para. 125).

On March 26, 2014, the Commissioner filed a Notice of Appeal of the decision, on the grounds, among others, that the Federal Court had made an error in holding that extensions of time that do not comply with the statutory requirements for extensions do not constitute deemed refusals of access.

Investigation report a pre-condition of a judicial review application

Whitty v. Minister of the Environment, [2013] F.C.J. No. 469 (T-1423-12) and *Whitty v. Minister of the Environment,* [2014] F.C.J. No. 114 (A-229-13) (Both decisions were rendered in 2013–2014.)

An individual made a request for information from Environment Canada regarding himself and his companies. The institution took a 200-day time extension to respond to this request. The individual complained to the Commissioner about the length of the extension of time. The Commissioner investigated the complaint and concluded that the extension of time was valid and reasonable.

However, Environment Canada did not respond to the request within the 200-day time extension. As a result, the requester again complained to the Commissioner.

The Commissioner investigated this second complaint and concluded that as a result of Environment Canada's failure to respond within the extension of time claimed it was deemed to have refused access to information within the meaning of subsection 10(3) of the Act. However, because Environment Canada ended up responding to the access request prior to the completion of the Commissioner's investigation, the complaint was determined to be well founded but resolved.

In or around this same period of time, the requester made another complaint to the Commissioner concerning Environment Canada's refusal to disclose portions of the requested records and other information responsive to a previous request under the Act based on the Act's exemption provisions.

Shortly thereafter, and while the Commissioner was still investigating the requester's complaint concerning Environment Canada's application of exemptions, the requester filed an application for judicial review of Environment Canada's decision to refuse access to requested information based on exemptions under the Act.

On June 4, 2013, the Federal Court determined that the application did not meet the statutory pre-conditions for bringing an application to Court (https://decisia.lexum.com/fc-cf/decisions/en/item/62295/index.do?r=AAAAAQALMjAxMyBGQyA1OTUAAAAAAQ). A "judicial review cannot be sought without a report outlining the investigation of [the Office of the Information Commission; OIC] of the relevant subject matter" and "in the absence of a report from the OIC detailing its investigation of the Third Complaint, the court is precluded from granting—or even considering—this application for judicial review."

The Federal Court of Appeal agreed with the Federal Court's decision in its ruling of February 3, 2014 (http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/66662/index.do?r=AAAAAQALMjAxNCBGQ0EgMzAAAAAAAQ).

Solicitor-client privilege

Dufour v. Attorney General of Canada et al. (T-1298-10)

On November 28, 2008, an individual made a request to the Department of Justice Canada for records listing the costs associated with various legal proceedings. The institution refused to provide the majority of the information requested, claiming it was exempted under section 23 of the Act (solicitor-client privilege). The requester complained to the Commissioner, who found as a result of her investigation that the Minister's refusal was justified.

The requester initially filed an application for judicial review of whether the institution had properly applied section 23, naming only the Attorney General. In January 2010, after the first judicial review application had been filed, the Attorney General disclosed an additional record. The requester then filed a second application adding the Information Commissioner as a respondent. On March 14, 2013, the Attorney General disclosed still more records.

The Court dismissed the judicial review application on January 14, 2014 (https://decisia.lexum.com/fc-cf/decisions/en/item/67244/index.do?r=AAAAAQAJVC0xMjk4LTEwAAAAAAE).

Third-party information

Porter Airlines Inc. v. Attorney General of Canada et al., 2013 FC 780

Porter Airlines filed an application for judicial review on October 31, 2011, challenging Transport Canada's revised decision concerning the disclosure of information pertaining to an audit of Porter Airlines that was requested under the Act (see "Third-party information (2)": http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_7.aspx). The Information Commissioner was added as party to the proceeding, at her request.

Prior to making the revised decision that was the subject of the judicial review, Transport Canada had rendered two other decisions about what portions of the records at issue it intended to disclose. In the proceeding, Porter argued that the Act did not permit Transport Canada to revise its decision concerning the information it intended to release and argued that Transport Canada's revised decision concerning the information's disclosure was void and of no effect.

On July 11, 2013, the Court granted Porter's application for judicial review, quashing Transport Canada's revised decision. When doing so, the Court found that a government institution is not allowed, on its own initiative, to reverse itself on decisions about disclosure of third-party information and start the process anew, except on recommendation of the Commissioner or in the context of the Court's judicial review (https://decisia.lexum.com/fc-cf/decisions/en/item/62456/index.do?r=AAAAAQAJVC0xNzY4LTExAAAAAAE).

As a result of the Court's decision, Transport Canada had to disclose the records in conformity with its first decision, and inform the requester that he had the right to complain to the Commissioner should he not be satisfied with this response.

Exceldor Coopérative v. Canadian Food Inspection Agency et al. (T-493-13)

Exceldor Coopérative filed a judicial review application on March 22, 2013, challenging a decision by the Canadian Food Inspection Agency (CFIA) to disclose certain information in Corrective Action Requests issued under the *Meat Inspection Regulations*. Exceldor alleged that the information should not be disclosed because exemptions about personal information (section 19) and third-party information (section 20) applied to it.

At the Commissioner's request, the Court added the Commissioner as a party to the application on May 23, 2013. Exceldor withdrew its application for judicial review on July 19, 2013, and the records were subsequently released to the requester.

Volailles Mirabel Ltd. v. Canadian Food Inspection Agency et al. (T-464-13)

Volailles Mirabel filed a judicial review application on March 15, 2013, challenging CFIA's decision to disclose certain information in Corrective Action Requests issued under the *Meat Inspection Regulations*. Volailles Mirabel claimed that the information in its entirety should not be disclosed because exemptions about third-party information (section 20) applied.

At the Commissioner's request, the Court added the Commissioner as a party to the application. CFIA subsequently decided that the records it had originally intended to disclose did not actually fall within the scope of the access request. CFIA, therefore, asked the Court to quash the decision in which it had advised Volailles Mirabel of its intention to disclose the records.

The Commissioner neither objected nor consented to CFIA's motion, explaining that she could not take a position on whether the records fell within the scope of the request when that very question could later become the subject of a complaint she would be required to investigate.

On October 9, 2013, the Court allowed CFIA's motion to quash its own decision, granted Volailles Mirabel's application for judicial review, and returned the matter to CFIA to make a new decision in response to the access request.

PriceWaterhouseCoopers LLP v. Minister of Public Works and Government Services Canada et al. (T-1818-13)

PriceWaterhouseCoopers LLP filed an application for judicial review on November 5, 2013, about Public Works and Government Services Canada's decision to disclose to a requester information pertaining to an audit the firm had conducted. PriceWaterhouseCoopers was of the view that the information in question should be withheld under several of the Act's exemption provisions: subsection 19(1) (personal information), paragraphs 20(1)(b) and (c) (third-party information), section 23 (solicitor-client privilege) and subsection 24(1) (statutory prohibitions against disclosure). The firm also took the position that some of the information fell outside of the scope of the access to information request.

The Commissioner was added as a party to this proceeding on February 26, 2014. However, PriceWaterhouseCoopers filed a discontinuance of its application on March 26, 2014.

Canon Canada Inc. v. Infrastructure Canada et al. (T-1987-13)

Canon Canada Inc. filed an application for judicial review in December 2013, asking the Federal Court to quash a decision by Infrastructure Canada to release to a requester records containing information said to be about Canon Canada Inc.'s organization. Canon asserted that these records contain information that is exempt from disclosure based on subsections 19(1) (personal information) and 20(1) (third-party information).

The Commissioner was added as a party on February 28, 2014. On April 9, 2014, the Court granted an Order, on consent by the parties, dismissing Canon's application.

Supreme Court of Canada intervention: Information in the Ontario Sex Offender Registry

Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31

The Ontario Ministry of Community Safety and Correctional Services received a request under the province's *Freedom of Information and Protection of Privacy Act* for disclosure of a record containing a list of the first three characters of Ontario's postal codes in one column with a second corresponding column of figures representing the number of individuals residing in each area who are listed in the Ontario Sex Offender Registry.

The Ministry exempted the requested information from disclosure, arguing that releasing it might lead to the identification of the whereabouts of registered offenders. Information concerning the identities and whereabouts of individuals in the registry is only available to law enforcement officials, not the general public.

Ontario's Information and Privacy Commissioner ordered the information to be disclosed. The Ministry then sought a judicial review of this decision. The Ontario Divisional Court dismissed the application for judicial review as did the Court of Appeal. The Ministry then sought leave to appeal to the Supreme Court of Canada, which was granted.

The Information Commissioner of Canada successfully sought leave to intervene in this proceeding and made three main arguments before the Supreme Court:

- The legal threshold for a harm-based exemption (such as the one claimed by the Ministry when refusing to disclose the information) is a "reasonable expectation of probable harm," in accordance with the principles set down in a 2012 Supreme Court decision (*Merck Frosst Ltd v. Canada (Health)*, 2012 SCC 3), and not the lower threshold proposed by the Ministry.
- The evidence required for a harm-based exemption must be clear, direct and convincing evidence of harm proven on a balance of probabilities.
- The confidentiality requirements of the law governing the Ontario Sex Offender Registry do not supersede the quasi-constitutional and comprehensive legislative scheme of the *Freedom of Information and Protection of Privacy Act*.

The Supreme Court heard the parties' arguments on December 5, 2013. On April 24, 2014, the Court dismissed the appeal (http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13613/index.do).

In doing so, the Court held that Ontario's Information and Privacy Commissioner had made no reviewable error in ordering disclosure of the information in question. The applicable standard of review is reasonableness. The Ontario Commissioner reasonably concluded that the Ministry did not provide sufficient evidence that disclosure could lead to the identification of offenders or to the risk of the harm that the exemption seeks to prevent.

The Supreme Court also held that the Ontario Commissioner made no reviewable error with respect to the applicable standard of proof. The Court held that there is no difference in substance between "a reasonable expectation of probable harm" and a "reasonable basis for believing" that harm will occur. The "reasonable expectation of probable harm" formulation simply captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will, in fact, result in such harm. The Court held that the formulation used in *Merck*, "reasonable expectation of probable harm," should be used wherever the phrase "could reasonably be expected to" is used in access to information statutes.

The Supreme Court concluded with these words: "As an expert in privacy rights, as well as in access to information requests, the Commissioner's decisions deserve deference, short of an unreasonable conclusion falling outside the range of possible and acceptable outcomes."

4

Promoting access

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

Right to Know

As part of the 2013 celebration of Right to Know Week, the Office of the Information Commissioner hosted, in conjunction with the University of Ottawa's Faculty of Civil Law, a conference on access to information. The event—held on Right to Know Day, September 28—brought together more than 130 people for panel discussions featuring access to information practitioners, government representatives, journalists, academics and lawyers. The panels addressed current issues in the world of access, including building a model Canadian access law and developing international standards for transparency. (The panels were recorded for broadcast by CPAC and have been archived for viewing on the channel's website: http://www.cpac.ca/en/digital-archives/?search=Right+to+know+day+2013.) The conference also marked the university's annual Germain Brière Day, established in 2008 to honour the memory of a professor in the Faculty of Civil Law who had an abiding interest in transparency and accountability.

The Commissioner gave the keynote address at the conference. She also presented the annual Grace-Pépin Access to Information Award (http://www.oic-ci.gc.ca/rtk-dai-eng/historique-grace-pepin-history.aspx). The 2013 recipient was the Canadian Access and Privacy Association. The association promotes professional development among its members and engages in public education about information rights.

Inger Hansen

Canada's first Information Commissioner, Inger Hansen, died on Right to Know Day, September 28, 2013, at the age of 83. Born in Denmark in 1929, Ms. Hansen immigrated to Canada in 1950 and subsequently practised law in British Columbia. She was appointed Canada's first Privacy Commissioner in 1977 and became Information Commissioner in 1983. She held the latter post until 1990.

Dialogue with stakeholders

The Commissioner continued her series of semi-annual meetings with institutional access to information coordinators, with a second session in the fall of 2013. These meetings, in which the Commissioner, Assistant Commissioner and other senior officials participate, have been received positively by the access community as a forum for discussing priorities, sharing information about the Commissioner's investigation process and expectations, and getting feedback from institutions on possible improvements. Another session is scheduled to take place in the late spring of 2014.

To extend the dialogue to complainants and other stakeholders, the Commissioner will post a survey on her website in 2014 asking for feedback from Canadians on how to improve service to complainants.

The Commissioner also takes opportunities to share her views with the government on various access-related issues. In September 2013, for example, she wrote to the President of the Treasury Board, the Honourable Tony Clement, to reinforce the need for the government to modernize the *Access to Information Act* as part of Canada's commitments under the international Open Government Partnership (http://www.oic-ci.gc.ca/eng/open-government-consultation-gouvernement-ouvert.aspx).

At an October 2013 meeting, the Commissioner and Mr. Clement discussed ways to improve the performance of the federal access to information system. The topics discussed included the performance of the 20 institutions that account for roughly 90 percent of the access requests received each year, the ongoing shortage of access to information professionals, and the need for institutional leadership to ensure maximum compliance with the Act. The Commissioner wrote to Mr. Clement in April 2014 to provide further insights on these and other issues (http://www.oic-ci.gc.ca/eng/rr-sl-odi-adi.aspx).

The Commissioner was also a signatory to a joint resolution from Canada's access and privacy commissioners urging the government to modernize the respective laws in the face of dramatic technological change and the demands of engaged citizens (http://www.oic-ci.gc.ca/eng/media-room-salle-media_news-releases-communiques-de-presse_2013_6.aspx).

Finally, the Commissioner published, on her website, a summary of the submissions she received as a result of her consultations on modernizing the *Access to Information Act* (http://www.oic-ci.gc.ca/eng/summary-submissions-sommaire-soumission.aspx). This input has informed the Commissioner's report on legislative reform, which will be published in the fall of 2014.

Parliamentary activities

In 2013–2014, the Commissioner issued five reports to Parliament:

- access to information activities for 2012–2013 (http://www.oic-ci.gc.ca/eng/annual-report-administration-access-to-information-act-rapport-annuel-administration-loi-acces-a-information-2012-2013.aspx)
- privacy activities for 2012–2013 (http://www.oic-ci.gc.ca/eng/annual-report-privacy-act-rapport-annuel-rapport_annuel-loi-protection-renseignements-personnels-2012-2013.aspx)
- 2012–2013 annual report (http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013.aspx)
- special report, *Access to information at risk from instant messaging* (http://www.oic-ci.gc.ca/eng/pin-to-pin-nip-a-nip.aspx)

Process improvements

The Commissioner welcomes improvements that facilitate access to information, including the advent of electronic request submission forms. Currently, 21 institutions are taking part in a Treasury Board of Canada Secretariat (TBS) pilot project to accept access requests online. However, these developments must not go against the spirit or letter of the law, in the name of efficiency.

In April 2013, a requester made a request to TBS using the online request form. In order to submit the form, the requester had to choose an option for "category of requester" (e.g. media, member of the public). There was no option to leave the field blank or insert "no answer." The requester complained to the Commissioner about this situation.

While institutions are required to provide TBS with statistics about the categories of requesters, the Act does not require requesters to identify whether they fall within a specified category. In fact, the duty to assist set out in the Act stipulates that institutions must process requests "without regard to the applicant's identity."

In response to the Commissioner's investigation, TBS committed to modifying its online form by adding a "decline to answer" option. It will also amend the paper version of the form accordingly.

- special report, *Interference with access to information: Part 2* (http://www.oic-ci.gc.ca/eng/ingerence-dans-acces-a-l%E2%80%99information-partie-2-interference-with-access-to-information-part-2.aspx) (April 10, 2014).

These reports provided perspective to Parliament on the Commissioner's oversight role in the access to information system, her work to uphold the principles and right of access at the federal level, and various aspects of the operations of her office. The Commissioner's website contains a table of other Parliamentary activities—namely, bills, motions and other business—that had or may have an impact on access to information in general and the *Access to Information Act* in particular (http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx).

Appearances before parliamentary committees

The Commissioner made four appearances before parliamentary committees in 2013–2014.

In April 2013, she presented two annual reports (2010–2011 and 2011–2012) to the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI).

During an appearance before ETHI in May 2013, as part of the Main Estimates process, the Commissioner spoke about her recent achievements, priorities for the coming year and some of the challenges her office faces.

Later that same month, the committee invited the Commissioner to appear on Bill C-461. This private member's bill proposed to repeal section 68.1 of the *Access to Information Act*. This provision excludes information relating to the Canadian Broadcasting Corporation's (CBC) journalistic, creative and programming activities. The bill proposed to replace that exclusion with an exemption that would allow the CBC to withhold records that could reasonably be expected to prejudice the "journalistic, creative or programming independence" of the CBC. In her remarks, the Commissioner noted that the proposed amendments reflected what she had suggested when she appeared before the committee in October 2011, during its study of the Commissioner's access to information dispute with and resulting court actions concerning the CBC.

The bill was removed from the order of precedence in the House in March 2014. (See page 10 for information about the Commissioner's work closing complaints against the CBC, including the three instances in 2013–2014 when she agreed with the institution's application of section 68.1.)

Finally, in November 2013, the Commissioner appeared before the House of Commons Standing Committee on Procedure and House Affairs as part of its review of the Board of Internal Economy, the governing body of the House of Commons (http://www.oic-ci.gc.ca/eng/pa-ap-appearance-apparance-2013_3.aspx). In her remarks, the

Bringing Parliament under the *Access to Information Act*

"During the hearings thus far, there has been a lot of discussion on proactive disclosure and whether or not the new rules set out by the Board of Internal Economy are sufficient.

In my view, proactive disclosure of expenses is a necessary step to making detailed information available to the public. Consistent proactive disclosure can be done in a detailed way, in an open, accessible and reusable format, on a regular cycle, and in a timeframe that preserves the relevance of the information.

So proactive disclosure is a good thing. However, it isn't enough.

In order to promote trust in public institutions, there is not only a need to increase the availability and the quality of information, but also to ensure access to that information.

Citizens want to be able to validate the information that is provided to them, or to obtain more details about an issue of interest or simply know that the right is there for them to exercise when needed.

Bringing Parliament under the *Access to Information Act*, with appropriate safeguards, would guarantee that right."

—Information Commissioner Suzanne Legault before the House of Commons Standing Committee on Procedure and House Affairs, November 2013

Commissioner spoke in favour of extending the coverage of the *Access to Information Act* to the administration of Parliament, rather than simply relying on proactive disclosure rules to increase that institution's accountability and transparency, particularly with regard to parliamentarians' expenses (see, "Bringing Parliament under the Access to Information Act," previous page, for a excerpt of the Commissioner's remarks). The committee issued its report in December 2013, declining to recommend that the Act be amended to cover Parliament. Instead, the committee noted that the "level of proactive disclosure already available is sufficient for the transparency and accountability of the House and its Members."

Joint letter on Bill C-520, the Supporting Non-Partisan Agents of Parliament Act

In February 2014, the Commissioner was a signatory, along with six of her fellow agents of Parliament, on a letter to the chair of the ETHI committee on Bill C-520, a private member's bill that seeks to avoid conflicts that may arise or could be perceived to arise between partisan activities and the official duties and responsibilities of an Agent of Parliament or one of its employees (http://www.oic-ci.gc.ca/eng/activites-parlementaires-autres-documents-2014-other-parliamentary-documents_1.aspx). The letter set out several matters the agents of Parliament wished to bring to the committee's attention about the bill. The Commissioner provided further written information to the committee on May 7, 2014, prior to the clause-by-clause consideration of the bill (http://www.oic-ci.gc.ca/eng/bill_c-520_letter_submission_to_ethi_committee_soumission_de_la_lettre_sur_le_projet_de_loi_c-520.aspx).

5

Corporate services

Strategic plan

This year brought the Commissioner and her office to the conclusion of her 2011–2014 strategic plan (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor-stategic-planning-plan-strategique_2011-2014.aspx). The plan has guided the organization's activities in three key areas since 2011.

Exemplary service to Canadians: The Commissioner closed more than 4,900 complaints over three years. The same period also saw improvements in how quickly investigators respond to complainants. In addition, the Commissioner secured more information for requesters whenever possible. New business tools and a strategic approach to managing the caseload were instrumental in making these achievements possible.

A leading access to information regime: The Commissioner completed a diagnostic of the causes of delays in the access system. Through subsequent projects, including systemic investigations, she contributed to the improvement of policy instruments governing access. Due to the Commissioner's attention to these issues, some institutional practices have also improved.

An exceptional workplace: Targeted recruitment strategies have succeeded in reducing turnover among investigators. In addition, a number of new and talented employees have been recruited. Managers are exploring various creative and cost-effective training and staff development opportunities. With the relocation of her office in January 2014, the Commissioner is also considering collaborating with co-tenants (fellow agents of Parliament) on training and professional development activities.

Stewardship of limited resources

The Commissioner's budget has been impacted by 9 percent since 2009, due to various cuts and other measures. In addition, the office move, including the fit-up of the new space, will require the Commissioner to divert 2.5 percent of her budget from the program to cover ongoing costs, including repaying the loan secured to finance the move, starting in 2014–2015. Under the operational spending freeze announced in the 2013 Speech from the Throne, salary increases will have to be absorbed in the overall budget. This will likely have a further impact on the resources available for investigating complaints.

In this context, the 30-percent increase in new complaints in 2013–2014 is of particular concern. The Commissioner's investigative capacity is stretched at a time when she has no funding available to augment it. This means she is unable to immediately assign files. Ultimately, this will jeopardize her ability to safeguard the rights conferred by the *Access to Information Act*. In light of these circumstances, the Commissioner continues to be vigilant about monitoring the use of her limited resources.

The Commissioner introduced an internal evaluation function in 2013–2014 to complement the existing internal audit capacity. To that end, the Commissioner updated the charter for her office's Audit and Evaluation Committee, and the audit policy, and introduced a policy on evaluations. A new and comprehensive plan sets out a series of risk-based audits and evaluations that will take

place between 2014 and 2018 (http://www.oic-ci.gc.ca/eng/plan-integre-de-vérification-et-d'évaluation-axé-sur-les-risques-2014-2018-integrated-risk-based-internal-audit-and-evaluation-plan.aspx). To ensure the objectivity and independence of the audit and evaluation function, an external member of the Audit and Evaluation Committee acts as Chief Audit Executive.

The Office of the Information Commissioner received another clean audit from the Office of the Auditor General for 2012–2013. The future-oriented financial statements are available on the Commissioner's website (http://www.oic-ci.gc.ca/eng/abu-ans_cor-inf-inf-cor_fofs-evif.aspx).

Exceptional workplace

The Commissioner filled the position of General Counsel in July 2013. This has brought stability to the Commissioner's senior management group, since all the positions reporting directly to her are now staffed on a permanent basis.

The Commissioner launched a new integrated human resources plan in 2013. The plan reviews demographics and other factors affecting the workforce, and sets out human resources priorities and staffing plans. As of March 31, 2014, the Commissioner had a full staff complement. The plan sets out clear priorities for future recruitment in order to attract the best people to help the Commissioner meet her objectives.

In 2013–2014, the Commissioner and her managers worked to ensure that the organization's performance management program aligns with the new Treasury Board Secretariat Directive on Performance Management. To reflect the unique work of investigators, the program supplements the government-wide approach with specific performance targets, and knowledge and skills requirements. These measures were implemented in 2013 as a pilot project and are being adjusted based on the first year's experience.

The performance management program dovetails with the Commissioner's talent management program, which provides developmental opportunities to high-performing employees. Performance management and talent management are key components of how the Commissioner will meet her goal of achieving excellence in all aspects of her work—the cornerstone of the integrated human resources plan.

The new Values and Ethics Code for the Office of the Information Commissioner sets out the values and behaviours everyone who works at the organization must demonstrate. Living up to the Code, which also aligns with the values of the public service (http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049), helps strengthen the ethical culture of the Commissioner's office, contributes to the public's confidence in its integrity and helps the Commissioner deliver her mandate by providing guidance for employees in their day-to-day dealings with co-workers, complainants and other stakeholders.

Information management/ information technology

Over the past five years, the organization has sought to update its information management/information technology (IM/IT) infrastructure. Under a five-year IM/IT strategy, which came to an end in 2013–2014, investigators now have tools to help them do their jobs more efficiently and effectively.

In 2013–2014, the IT group put the finishing touches on the legal component of the organization's case management system, in anticipation of launching it in 2014. By interfacing with the investigation component,

this new tool will facilitate reporting and the sharing of information about investigations across the Office of the Information Commissioner.

The office's relocation provided opportunities to update and standardize IT infrastructure. This has significantly decreased the amount of equipment necessary to provide the required IT capacity, and also led to improvements in how well the systems function, as evidenced by the 30-percent reduction in IT service desk requests in 2013–2014.

Renewal of the IM program continued in 2013–2014, with ongoing updating of the electronic document and information management system, and work to ensure compliance with various directives and policies on document management and retention.

Access to information and privacy

For information on the Commissioner's access to information and privacy activities in 2013–2014, consult her annual reports to Parliament on these topics (http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra.aspx). Appendix B 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.

6

Looking ahead

A leading access regime

The Commissioner will publish her special report to Parliament on modernizing the *Access to Information Act* in the fall of 2014. The report will be based on Canada's experience with the Act over 30 years, the Commissioner's unique investigative perspective, and analysis of modern access laws from across Canada and around the world. In this connection, the Commissioner sought and received input from a variety of interested individuals and groups during consultations during 2012–2013. (The Commissioner's website contains a summary of these submissions: http://www.oic-ci.gc.ca/eng/summary-submissions-sommaire-soumission.aspx.)

In late October 2014, the Commissioner will host, in conjunction with the Office of the Privacy Commissioner, the annual meeting of federal-provincial-territorial access to information and privacy commissioners. The two-day event will offer an opportunity for the commissioners to exchange ideas and best practices.

Exemplary service to Canadians

The Commissioner will improve her existing investigative procedure, particularly for complex refusal cases. Under the more streamlined procedure, the Commissioner will clearly communicate her expectations about how investigations will unfold by providing turnaround times and deadlines for various steps.

The Commissioner will also evaluate the complaints resolution process, to enhance the efficiency of the investigative function and continue to improve service to complainants.

An exceptional workplace

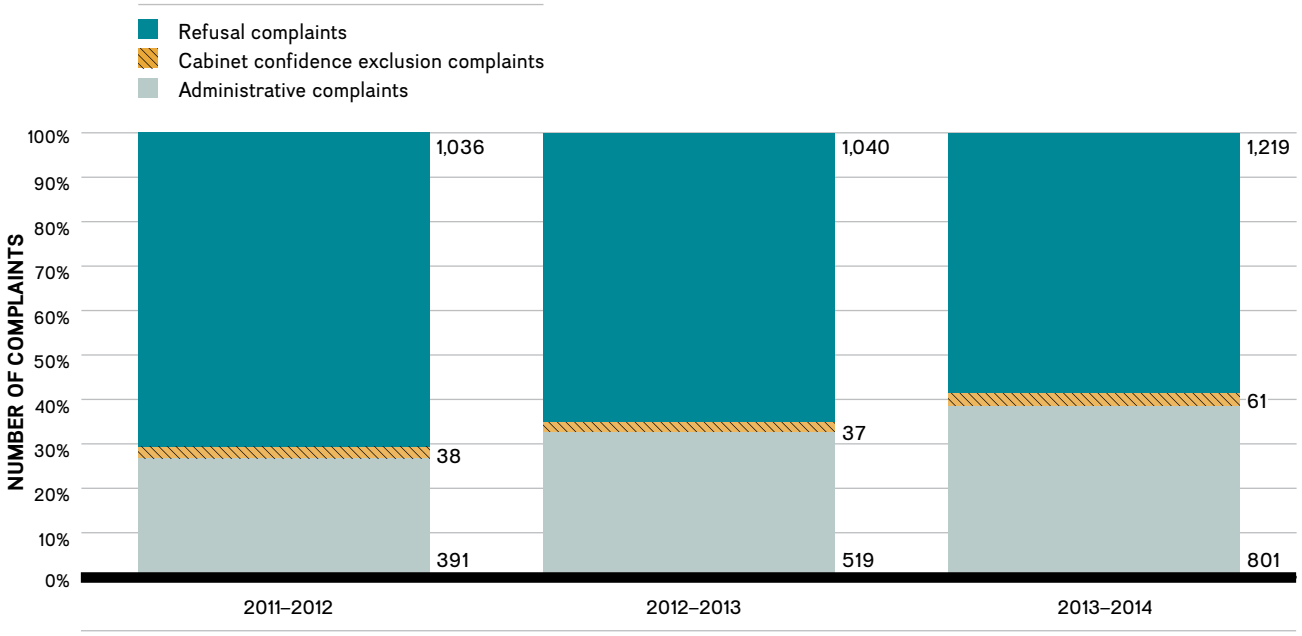
The groundwork for developing a new strategic plan was laid in the early months of 2014. The new plan will take the Office of the Information Commissioner from 2014 to 2017, the end of the Commissioner's current mandate. The focus of the plan will be on achieving the highest level of performance in investigating complaints and continuing to be an effective catalyst for advancing access, and fostering openness and transparency. The plan will include input from employees and stakeholders to ensure it is grounded in current realities and anticipated opportunities. Consultations will take place in the spring and summer of 2014, with the new plan to be launched in the fall.

The Office of the Information Commissioner will carry out a threat and risk assessment of its new offices in 2014–2015, having been early adopters of the Workplace 2.0 standard for office design. An audit of information technology infrastructure will assess the effectiveness of management practices and controls to ensure security in the new space.

APPENDIX A

Facts and figures

Trend in complaints registered, 2011–2012 to 2013–2014



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

The number of complaints the Commissioner received in 2013–2014 increased in all three main categories from 2012–2013: administrative complaints (about delays, time extensions and fees) grew by 54 percent, Cabinet confidence refusal complaints by 65 percent and refusal complaints (about the application of exemptions) by 17 percent. The ratio of administrative complaints to refusal complaints is up from last year at 39:61.

Overall new complaints by institution, 2011–2012 to 2013–2014*

	2011–2012	2012–2013	2013–2014
Citizenship and Immigration Canada	66	109	305
Canada Revenue Agency	324	336	283
Royal Canadian Mounted Police	68	125	185
Foreign Affairs, Trade and Development Canada	56	83	120
National Defence	74	72	120
Canada Border Services Agency	36	63	106
Transport Canada	30	72	83
Canadian Broadcasting Corporation	71	45	61
Aboriginal Affairs and Northern Development Canada	47	45	60
Correctional Service Canada	65	57	56
Department of Justice Canada	47	24	51
Health Canada	49	37	48
Privy Council Office	36	52	48
Industry Canada	34	36	42
Natural Resources Canada	12	21	38
Employment and Social Development Canada	25	20	37
Environment Canada	17	26	29
Public Works and Government Services Canada	45	35	28
Canada–Newfoundland and Labrador Offshore Petroleum Board	1	7	22
Fisheries and Oceans Canada	23	18	21

*Institutions are listed according to the number of complaints the Commissioner received about them in 2013–2014. The number of complaints for each year includes any complaints initiated by the Commissioner under subsection 30(3) of the *Access to Information Act*.

As part of the overall 30-percent increase in complaints in 2013–2014, 16 of the 20 institutions about which the Commissioner received the most complaints were the subject of more complaints in 2013–2014 than they had been the year before.

New administrative complaints by institution, 2011–2012 to 2013–2014*

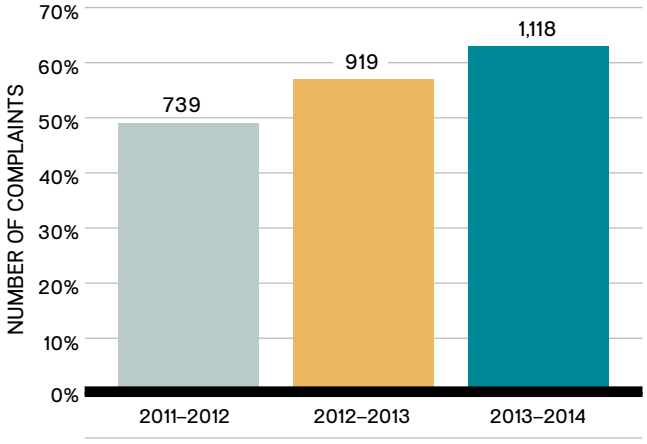
	2011–2012	2012–2013	2013–2014
Citizenship and Immigration Canada	34	27	179
Royal Canadian Mounted Police	19	70	102
Canada Revenue Agency	43	96	96
Canada Border Services Agency	10	22	49
National Defence	19	26	41
Transport Canada	14	31	38
Health Canada	17	23	26
Correctional Service Canada	17	17	24
Employment and Social Development Canada	6	9	23
Foreign Affairs, Trade and Development Canada	20	33	21
Natural Resources Canada	4	1	19
Privy Council Office	2	12	15
Fisheries and Oceans Canada	5	9	13
Treasury Board of Canada Secretariat	2	5	12
Aboriginal Affairs and Northern Development Canada	20	6	12
Public Works and Government Services Canada	18	19	11
Environment Canada	7	13	10
Public Health Agency of Canada	1	5	9
Canada–Newfoundland and Labrador Offshore Petroleum Board	0	1	8
Canadian Food Inspection Agency	6	18	7

*Institutions are listed according to the number of complaints the Commissioner received about them in 2013–2014.

Overall, the Commissioner received 54 percent more administrative complaints in 2013–2014 than she did the year before. While a few institutions, including Foreign Affairs, Trade and Development Canada, saw decreases in this type of complaint, most were the subject of more, and in a few cases significantly more: Citizenship and Immigration Canada (563 percent), Canada Border Services Agency (123 percent) and the Royal Canadian Mounted Police (46 percent).

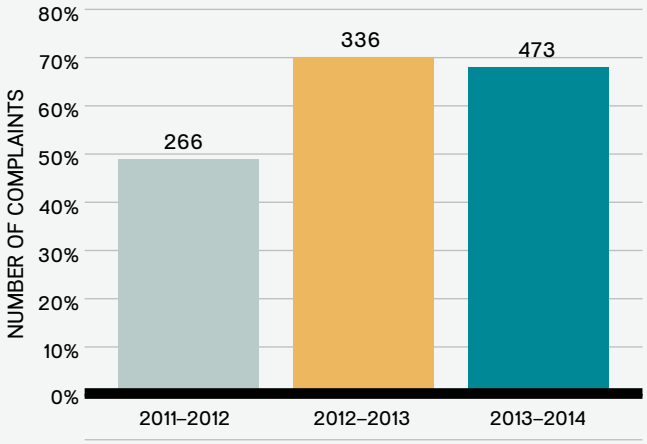
Turnaround times for complaint investigations, 2011–2012 to 2013–2014

COMPLAINTS CLOSED WITHIN NINE MONTHS



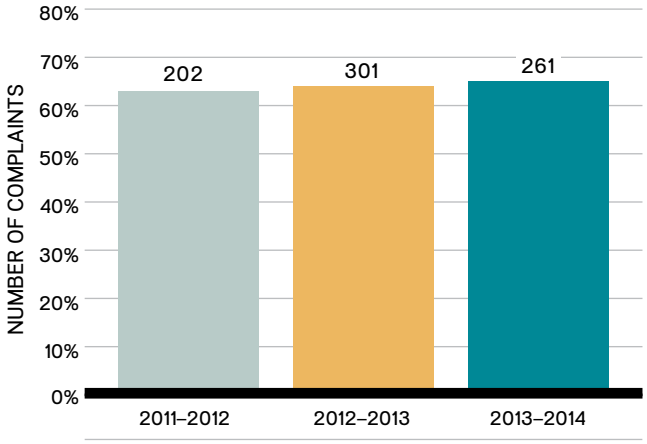
In 2013–2014, the Commissioner closed more complaints within nine months of their being registered (63 percent) than she did in 2012–2013 (57 percent). This continues the trend of increasingly timely investigations since 2011–2012. The overall median time for closing a complaint was 194 days from the date it was registered (down 21 days from 2012–2013). However, there remains a gap of 173 days (roughly six months) between the median closure time for refusal complaints when measuring from the date the file is registered and from when it is assigned to an investigator. The Commissioner does not have enough staff to immediately assign these files upon receiving them.

ADMINISTRATIVE COMPLAINTS CLOSED WITHIN 90 DAYS



The Commissioner's goal is to close 85 percent of administrative complaints within 90 days of their being assigned to an investigator. In 2013–2014, the closure rate slipped slightly to 68 percent from 70 percent the year before. However, the Commissioner closed 137 more of these files (41 percent) than in 2012–2013.

PRIORITY AND EARLY RESOLUTION COMPLAINTS CLOSED WITHIN SIX MONTHS



The Commissioner also has a goal to close 75 percent of her priority and early resolution cases within six months. In 2013–2014, she closed 65 percent of these files in this time frame, up slightly from the previous year.

Complaints completed with finding in 2013–2014*

	Overall	With merit	Not well founded
Citizenship and Immigration Canada	148	127	21
Canada Revenue Agency	146	105	41
Royal Canadian Mounted Police	100	92	8
Transport Canada	61	59	2
Canada Border Services Agency	56	47	9
National Defence	53	44	9
Correctional Service Canada	44	33	11
Aboriginal Affairs and Northern Development Canada	34	26	8
Foreign Affairs, Trade and Development Canada	32	26	6
Canadian Broadcasting Corporation	27	22	5
Privy Council Office	27	22	5
Health Canada	27	13	14
Public Works and Government Services Canada	24	16	8
Fisheries and Oceans Canada	19	12	7
Department of Justice Canada	18	11	7
Library and Archives Canada	12	11	1
Public Health Agency of Canada	12	11	1
Treasury Board of Canada Secretariat	12	10	2
Bank of Canada	11	11	0
Canadian Food Inspection Agency	11	10	1
Industry Canada	11	8	3
Others (52 institutions)	160	97	63
TOTAL	1,045	813	232

*The number of complaints includes any complaints initiated by the Commissioner under subsection 30(3) of the *Access to Information Act*.

This chart lists the 20 institutions about which the Commissioner completed the most complaints with a finding in 2013–2014 (that is, the complaint was found to have merit or to be not well founded).

APPENDIX B

Report of the Information Commissioner *ad hoc*

This is the third 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://laws.justice.gc.ca/eng/A-1/index.html). 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.

Outstanding complaints from previous year

Two complaints from last year were still outstanding as this year began. In the first, the complainant had said that the OIC had failed in its statutory duty to assist him by burdening him with too many documents when it responded to his request. When this concern was investigated, however, it was found to be **not well-founded**.

The second outstanding complaint raised an unusual and surprisingly difficult issue. It concerned the scope and meaning of section 16.1 of the ATI Act, a provision that exempts from production information *obtained* or *created* in the course of an investigation by the OIC. That exemption is partially lifted, however, "once the investigation and all related proceedings, if any, are finally concluded". At that point, the exemption no longer applies to documents *created* during the investigation.

The question in this complaint was whether the OIC had applied section 16.1 properly. I concluded, for reasons that are summarized briefly below, that the OIC had not done so, and that the complaint was **well-founded**. The OIC did not agree with my interpretation of section 16.1 and indicated that it did not intend to implement the recommendation that I proposed.

The dispute arose out of an access to information request made by the complainant to another government department. He alleged that that department was improperly levying fees on the processing of his request. The Information Commissioner investigated the matter and agreed with the complainant. The Minister, however, did not accept the Commissioner's conclusions and

refused to implement her recommendations. Although he waived the fees in that instance, the Minister said he would levy them again in the future.

The complainant made an access request to the OIC for all documents relating to its investigation of this matter. He then launched an Application to Federal Court, seeking a declaration that the department was unlawfully levying fees. The OIC was not a party to that litigation.

There was a significant connection between the Federal Court Application and the OIC's investigation. Reading the words of the ATI Act in their ordinary, grammatical sense, the OIC took the view that the Application was therefore a "related proceeding" within the plain meaning of section 16.1. Since the Application proceeding was not yet "finally concluded", the OIC believed that it was required to exempt from production all of its investigative records.

Statutory words, however, must not only be read in their ordinary, grammatical sense, but also in their entire context, harmoniously with the scheme and object of the Act, as well as with the intention of Parliament. Could Parliament have intended the plain meaning of section 16.1 to apply in the novel circumstances of this case?

Section 16.1 creates only a temporary exemption for information created by the OIC. The protection ends when the investigation ends. Considering the scheme and legislative history of the provision, it is evident that Parliament believed that forcing the OIC to disclose certain investigative records during, but not after, an active investigation might prejudice the effectiveness or integrity of OIC investigations.

In this case, the disclosure to the complainant of the records he was seeking would neither jeopardize the OIC's completed investigation into the department's fee-levying practices nor its investigative processes more generally.

Accordingly, this Office sought to construe section 16.1 in a way that was more harmonious with the scheme and object of the Act than a literal reading offered. In our view, "related proceedings" must be read as applying only to those proceedings that connect to an OIC investigation in a way that potentially interferes with the effectiveness or integrity of that investigation. This reading is also consistent with the principle that exemptions to the obligation to disclose under the ATI Act are to be narrowly construed.

Applying this interpretation to section 16.1, this Office concluded that the OIC had erred in not disclosing the information it had created during the investigation, when initially asked by the complainant. (The OIC later released that information when the complainant withdrew his Federal Court Application.)

The Information Commissioner raised a number of serious objections to this interpretation of the ATI Act. In particular, she argued that it amounted to reading an injury test into section 16.1, something Parliament had specifically avoided doing when adopting the provision. She also asserted that the approach advocated by this Office was not logically consistent.

We believe that there are satisfactory answers to these and other arguments made by the OIC but, clearly, the language of section 16.1 is problematic. It is not entirely unexpected, therefore, to see a divergence of views on how it should be read. In this instance, neither the Commissioner's interpretation nor that proposed by this Office is wholly free from difficulty. In each case, some parts of the analysis are more compelling than others. It is respectfully submitted, however, that the interpretation adopted by this Office is, on balance, the better view. It is both more faithful to the precepts of statutory interpretation in Canada (*reading the text contextually and purposively*), and more respectful of the values that underpin access to information (*providing more access, construing exemptions narrowly*) than the approach offered by the Commissioner.

New complaints this year

Four new complaints were received and investigated this year. In each, the central issue concerned the proper application of section 16.1 of the ATI Act. One case has been disposed of as of the date of writing this report. The other three are still pending.

In the first investigation, we concluded that the OIC had correctly applied section 16.1 and that the complaint was **not well-founded.**

This case reveals another problematic aspect of section 16.1. The prohibition on disclosing information "obtained" by the OIC is so strict that the OIC cannot even return to an access requester the personal information that he or she provided to the OIC in the first place.

The remaining three complaints were all filed by the same individual. Although nearing completion, these investigations are still outstanding.

This Office was also asked to look into two matters this year over which it did not have jurisdiction. In one, the complaint was filed approximately 18 months after the statutory deadline.

In the second, an individual was dissatisfied with how the OIC had investigated another government department's handling of his access request. This Office does not have jurisdiction to deal with 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. We remain ready to investigate any future complaints against the OIC thoroughly and independently.

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

Respectfully submitted,

John H. Sims, Q.C.