

make policy assumptions or mind-sets explicit and corrigible.

These are excellent and, of course, radical suggestions. Treverton, though, is a pragmatic individual. 'Any effort at serious reform', he acknowledges, 'must search for points of leverage'.¹¹ And such points can be obstinately defended. Just how much resistance there is to even the simplest and most practical of steps he discovered when the CIA required that he delete from his book a story about an *unclassified* NIC project, which he wanted to publish in order to get some public recognition of good intelligence work. He had told himself, when he first joined the NIC, that 'I should stay only as long as I could continue to laugh at the peculiarities of the CIA culture, such as classifying my schedule'. The censorship of his 'unclassified' NIC project made him stop laughing.

Not long before I left the world of secret intelligence myself, I had an experience rather more telling than Treverton's. I was head of China analysis at the Defence Intelligence Organisation (DIO) and had, at my own initiative, developed an excellent rapport with Bill Overholt, then head of Asia research for Bankers' Trust, Hong Kong. Dialogue with him about Asian affairs was more enlightening than the great bulk of classified information that came across my desk. Just as the dialogue was getting places, however, my DIO division head told me that I must cease my communications with him, because he was 'not security cleared'.

That I was not sending Bill any classified information seemed to be irrelevant. That he had one of the finest iconoclastic minds in the Asia analysis world meant nothing to my benighted bureaucratic boss. When I pointed out that Bill had better access all around the Pacific rim, from Beijing and Tokyo to Washington, than anyone in the DIO, the division head merely repeated, like a mantra, that he was not security cleared. The instruction stood. Like Treverton, I stopped laughing and, not long

afterwards, left the DIO. It is not enough to laugh at the pathologies of the secret world. We need to reform it.

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Access and Privacy in Canada

Developments from September 2001 to August 2002

Introduction

This article summarises the main developments that have taken place in access to information and privacy of personal information in all Canadian jurisdictions during the period from September 2001 to August 2002.

In Canada, there are two federal (Canadian) oversight regimes — one for access and one for privacy. There are also oversight regimes within each of the country's ten provinces and three territories. Broadly speaking, the two federal regimes have access and privacy responsibilities with regard to federal government departments and public bodies. Access to and privacy of the information held by other institutions, including local governments, is generally administered through the provincial or territorial regimes.

The exception is the power granted to the federal Privacy Commissioner, who, since the passage of the *Protection of Personal Information and Electronic Documents Act (PIPEDA)*, has oversight over cross-border and interprovincial exchange of personal information, as well as personal information held by federally-regulated businesses. As of 2004, this oversight will extend to all

businesses in the private sector, except where provinces have their own legislation in place to cover privacy in this sector.

As a result, many provinces have recently passed or are starting to introduce their own private sector privacy laws. These laws have begun to interact with the access laws in each of the provinces, and have in some cases prompted provinces to pass access legislation where there was none before. While certain jurisdictional issues have yet to be tested, particularly with regard to the territories, a clear trend towards privacy is starting to be a factor in access circles across the country.

Legislative developments

Public sector

In June 2002, the 20-year review of the federal *Access to Information Act* took place. It was conducted by a special Access to Information Review Task Force, composed of appointed senior government officials and a body of outside advisers, rather than by a Standing Committee of the Parliament. After 18 months of evaluation, the Task Force released a report concluding that the Act itself is basically

'sound', but is facing some systemic challenges to its implementation.

The report contained 139 recommendations, which focused on increasing the capacity of access officials to respond to requests and building a 'culture of access' within the government and public service. These recommendations included a more user-friendly access request system, comprehensive training for access officers, routine release of documents rather than a 'reactive' access structure, and improved resources, such as a 'pool' of contract access professionals that could be used when demand for documents is high.

There were also some changes proposed to the legislation itself, including:

- the introduction of a set of 'criteria' to determine what institutions should be governed by the Act;
- the routing of appealed Information Commissioner recommendations to parliamentary review rather than judicial review;
- the appointment of a retired judge to handle an access complaint against the Information Commissioner whenever one arises;
- the creation of an exemption for notes made by public servants for their own use;
- the inclusion of Cabinet confidences in the Act (with protection by a mandatory class exemption);
- a clarification that would protect third party information concerning critical public infrastructure that is provided to the government;
- the introduction of a discretion for the head of a public body to refuse to disclose information that would endanger an individual's physical or mental health, safety and/or 'human dignity';
- the addition of 'consumer protection' as a factor to consider when determining if the third party information exemption can be used;
- the introduction of a discretion to allow the disclosure of reports-in-progress to be delayed until their completion (within reasonable time limits);
- the introduction of a discretion to refuse disclosure of records that could 'damage or interfere with' cultural and heritage sites, including those sacred to aboriginal people;
- a requirement that access requests must refer to a specific subject matter or specific records;
- the introduction of a discretion to refuse to fulfill 'frivolous, vexatious or abusive' requests;
- a raise of the general fees for access requests to \$10, with the introduction of an hourly rate to be charged for non-commercial searches that exceed five hours of preparation time or 100 pages;
- the introduction of a provision allowing different departments to aggregate requests that come from the same requester or treat the same topic;
- the addition of a clause requiring institutions to make a 'reasonable effort' to assist requesters with their search and offer them an opportunity to reformulate their request if it is considered 'frivolous, vexatious or abusive';
- the addition of public and institutional education about the Act to the Information Commissioner's mandate;
- the addition of an Information Commissioner power to conduct assessments of institutional practices where they are having an effect on compliance with the Act;

the introduction of a 90-day completion period for Information Commissioner investigations;

the right of legal representation for witnesses testifying under oath;

the extension of the Information Commissioner's duty to give notice to the head of any institution under investigation;

- a long-term move towards order-making powers for the Information Commissioner (who currently holds ombudsman-like powers).

The Information Commissioner, John Reid, released an initial statement in response to the report indicating his 'disappointment' at the task force's focus on ease of access management for government departments rather than on ease of user access to the system. His statement also recommended that the task force report be turned over to a Parliamentary committee. The Information Commissioner will be issuing a detailed response to the report later in 2002.*

An ad hoc group of backbench MPs also formed their own all-party Committee to review the access to information legislation, and released a report on their findings in November 2001, after five months of study. This report recommended that:

- a parliamentary committee be established to review the task force findings;
- the Prime Minister issue a directive of effective access response to all departments;
- the Act be amended to require routine disclosure of documents after the passage of 30 years, and that this disclosure not be subject to the usual exemptions (except for an application for an exception that could be made to the Information Commissioner);
- on-line and web media be increasingly used for dissemination of documents;
- the Act be amended to include all institutions that are publicly funded or controlled, established by Parliament, or which perform a public function (with the exception of the judiciary and the offices of senators and MPs). This would expand its scope to Crown corporations and other 'emerging forms' of public enterprise, as well as the House of Commons, Senate and Library of Parliament;
- the section of the Act protecting confidentiality of Cabinet records be repealed, and replaced by an injury-based exemption that could be invoked for a 15-year period;
- the sections of the Act protecting privileged documents and those pertaining to federal-provincial relations be narrowed in scope;
- the offices of the federal Privacy Commissioner and Information Commissioner be combined;
- the Act be reviewed by Parliament every five years.

None of these recommendations were incorporated into the Task Force report, with the exception of the recommendation to include the House of Commons, Senate and Parliamentary library in the scope of the Act.

In August 2002, Prime Minister Jean Chrétien announced that he was considering extending the Act to cover Crown corporations and would probably incorporate

*Editor's Note: The Canadian Information Commissioner has now released a substantive and critical response to the Task Force Report. That response can be found at <www.infocom.gc.ca>

this proposal into the next Parliamentary session's Throne Speech or the introduction of an amendment bill.

Other

Anti-Terrorism Act: This Act was proclaimed in force on 18 December 2001, and permits the Attorney General to issue confidentiality certificates to exclude records from the Access to Information Act and terminate any related investigations by the Information Commissioner. These certificates can be issued at the Attorney General's discretion if in his or her opinion, there is a matter of public security involved.

Proceeds of Crime (Money Laundering) Act: This Act was amended and the amendments were proclaimed in force on 14 June 2001. The amendments broadened the powers of police investigators to seize documents where they 'reasonable grounds' to believe that offences relating to money laundering and terrorist financing are being committed.

Significant investigations

Definition of personal information

File 3100-1469/001: A representative of an employee association asked the National Research Council of Canada for information about individuals who received performance bonuses during the year 2000. The Council refused on the grounds that this qualified as 'personal information' under the *Access to Information Act*. The Commissioner's investigation revealed that there were two types of bonuses given at the Council — one based on regular performance ratings, and another discretionary type that could be bestowed on individuals or teams by the senior managers and an internal awards committee. The Commissioner concluded that only the names of recipients of the first type of bonus constituted personal information, since their bonuses were more of an 'entitlement.' He recommended their release and the Council complied.

File 3100-13765/001: A lawyer representing a pilot's widow requested from the Transportation Safety Board both the tapes and transcripts of the mid-air collision that had killed the pilot. The Board responded that these constituted the personal information of pilots and air traffic controllers, and sought consent from other persons whose voices were on the tape for disclosure. Only one of them granted this consent, and so only the portions with this voice and that of the dead pilot on it were released. The Commissioner found that radio communications made over an open channel for the purpose of operating an aircraft did not constitute personal information, and recommended that the transcript of these communications be released. He then found that the flight tapes had been recorded with the possible purpose of disclosure in mind, for example in the event of an accident investigation, and therefore were not eligible for exemption under the federal *Privacy Act*. He recommended full disclosure, and the Board refused. The Commissioner has sought leave to appeal to the Federal Court.

Protection of commercial interests and third party confidential submissions

File 3100-13256/001: A researcher requested documents from Natural Resources Canada pertaining to a bid by Atomic Energy of Canada Limited (AECL) to sell nuclear reactors to Turkey. These documents included a

critique of an environmental assessment prepared as part of the bid, and access to it was refused on the basis that it was information supplied by a third party in confidence, and disclosure of it would prejudice AECL's competitive position. During the investigation, it came to light that Turkey had in fact already decided not to purchase the reactor from AECL, and the document was then voluntarily released.

File 3100-15106/001: A requester involved in trying to track stolen vehicles asked Statistics Canada for information on how many vehicles in Canada are registered in more than one province. Statistics Canada refused on the basis that the provincial and territorial motor vehicle registration files had been provided in confidence. The requester argued that the information he was asking for was a statistical analysis prepared in reliance on those files, not the files themselves. The Commissioner agreed with the requester, and Statistics Canada reconsidered its stance and released the specific statistics the requester was seeking. The Commissioner emphasised in his recommendation that the exemptions for materials supplied by a third party in confidence cannot be extended to cover documents prepared in reliance on those materials.

File 3100-13546/001: A corporation requested a copy of the agreement between the Canada Customs and Revenue Agency and the Canada Post Corporation concerning the processing of international mail. The Agency disclosed portions of the agreement, but withheld the rest on the basis that the requester was acting on behalf of United Parcel Service (UPS), a competitor of the Canada Post Corporation. They alleged that the information was being sought to form part of an unfair competition challenge under Chapter 11 of the North American Free Trade Agreement (NAFTA). The requester said that since the *Customs Act* does not authorize the Agency to go to competitive tender for the delivery of international mail, UPS could not be considered a competitor of the Canada Post Corporation for this service. The Commissioner found that only the portions of the agreement dealing with how the Canada Post Corporation's financial compensation is calculated could be withheld, since knowledge of this could benefit a company interested in providing other services to the Agency. The parties accepted this conclusion.

Law enforcement exemptions

File 3100-15873/001: A television producer requested the records of the Royal Canadian Mounted Police (RCMP) about a 1985 visit by former American President Ronald Reagan to Québec City. The RCMP withheld the information on the basis that it related to lawful investigations and/or was information that could be used to facilitate the commission of an offence. The Commissioner's investigation revealed that the records had in actuality been transferred to the National Archives several years previously, and the RCMP had not reviewed them, as required by the *Access to Information Act*, before making its decision concerning disclosure. The Commissioner concluded that the records were now in the custody of the Archives and the request should be re-directed there. The RCMP refunded the requester's fee.

File 3100-14856/001: A request was made for copies of the policies and procedures manual used by officials of the Canada Customs and Revenue Agency to make a

determination of non-resident and deemed-resident status for income tax calculations. The Agency disclosed portions of the manual, but withheld the rest on the grounds that it would interfere with enforcement of the *Income Tax Act*. The requester said that he could not adequately arrange his tax affairs if the actual procedures used by the Agency to evaluate his return were kept secret, and expressed concern that the 'rules' were being left too much to the Agency's discretion. The Commissioner recommended that most of the manual be released, but allowed the exemption of the portions relating to income thresholds that guide the Agency's enforcement actions to stand.

Cabinet confidences

File 3100-13828/001: The federal government's deputy ministers are entitled to a benefit known as the Special Retirement Allowance, which doubles ordinary pension entitlements for years of service to a maximum of ten years. A retired deputy minister who did not receive this allowance requested access to the Privy Council Office's entitlement requirements to find out why he had not qualified. The Office provided some general background information, but refused to disclose the exact guidelines for the allowance that the Treasury Board had approved several years previously, on the grounds that it was a Cabinet confidence. The Office's position is that its Clerk is the sole arbiter of what constitutes a Cabinet confidence, and any materials the Clerk certifies as such are exempt. The Commissioner found that in this case, the withheld document related to a publicly-announced Cabinet decision, and had even been shown to other individuals who were beneficiaries of the allowance upon request, and therefore it did not qualify as a Cabinet confidence. He added that even if it did, the previous sharing of this document had effectively waived any privilege attached to it, and he recommended that the Privy Council Office keep in mind its powers to waive Cabinet privilege for matters that concern the public interest. The Prime Minister refused to accept the Commissioner's recommendations or release the document. The Commissioner has sought leave to appeal to the Federal Court.

Fee charges

File 3100-16210/001: A requester asked for copies of all classification and staffing requests processed by the Immigration and Refugee Board's human resources department between the beginning of 1998 and the middle of 2001. The Board informed the requester that the fee for processing this request would total \$6530, with \$3265 of it to be paid in advance as a deposit. The requester opined that fulfillment of the request would not take the projected 658 hours of search time because of the Board's electronic database. The Commissioner's investigation helped to clarify more precisely which documents the requester was seeking, and this led to a re-evaluation of the request search time that reduced it to 11 hours and a \$60 fee.

File 3100-16426/001: An access researcher made a request to Human Resources Development Canada for certain data elements from its ATIPflow system, a database program used by many departments to track access requests. The software did not have the capacity to generate a report of the elements requested by the researcher, and therefore a manual search fee of \$1250 was assessed. The researcher telephoned the president

of the company that produces ATIPflow, and negotiated an informal deal whereby the company would develop this capacity for the software and the requester would himself donate the \$3000 the implementation would cost out of his own pocket. However, the company later withdrew from the deal under what the requester alleged was pressure by Human Resources Development Canada, which argued that this software capacity was not needed for their day-to-day operational requirements and therefore there was no obligation for them to install it. Upon inquiry, the Commissioner found that there was a more convenient way to generate the information requested with the existing software, and this re-assessment reduced the request fee to \$60, which the requester paid.

Court decisions

Deference to the Commissioner's findings/ministerial discretion to refuse disclosure

Canada (Information Commissioner) and TeleZone Inc v Canada (Minister of Industry) 2001 FCA 254, Court File Nos. A-824-99 and A-832-99: TeleZone requested information about Industry Canada's decision-making process in granting a license to provide wireless telephone services. The request was refused on the grounds that such information constituted 'advice and recommendations' under the *Access to Information Act*. The Commissioner investigated and recommended disclosure of the majority of the information requested. Industry Canada released some of the information, but continued to withhold a document outlining how selection criteria were weighted. The Commissioner and TeleZone applied for a judicial review of the continuing refusal to disclose, but the application was dismissed by the Federal Court. They appealed that decision to the Federal Court of Appeal, which again dismissed the application, saying that Industry Canada's refusal to disclose the document was not an unlawful exercise of discretion.

The Court upheld the ministerial discretion granted by statute, but found that the Commissioner is not owed deference by the courts. It opined that the courts can differ from the Commissioner on questions of both law and mixed law and fact, without having to find the Commissioner's conclusions unreasonable in order to do so. This judgment was given on 29 August 2001, and the Commissioner has since sought leave to appeal to the Supreme Court of Canada.

Canada (Information Commissioner) v Canada (Industry Canada) 2001 FCA 253, Court File No. A-43-00: This was a companion suit to the one outlined above, involving some of the same requested documents. It established that the *Access to Information Act* requirement for a public body to provide reverse onus proof that it qualifies for an exemption from disclosing information does not apply to a Minister exercising his or her discretion to refuse disclosure. This decision was also handed down on 29 August 2001, and the Commissioner has again sought leave to appeal to the Supreme Court of Canada.

Deemed refusals/extension of response time limits

Attorney General of Canada and Janice Cochrane v Canada (Information Commissioner of Canada) 2002 FCT 136, Court File Nos. T-2276-00 and T-2358-00: A requester sought access to records related to the Immigrant Investor Program administered by Citizenship and Immigration Canada. Citizenship and Immigration Canada

used a provision governing exceptionally large requests under the Access to Information Act in s.9(1)(a) to extend the time limit for response to three years instead of the usual 30 days. In order to do this, all the requester's separate requests were grouped together and considered as one. Upon investigation, the Commissioner interpreted this invocation of s.9(1)(a) as a deemed refusal to produce the records. He began a new investigation based on this interpretation, during which he issued an investigation-based order for production of the records. Citizenship and Immigration Canada challenged the Commissioner's interpretation in the Federal Court and won, with the court finding that even if s. 9(1)(a) had been improperly invoked, the Commissioner could not treat it as a deemed refusal. The court concluded that the Commissioner therefore had no jurisdiction to begin a new investigation or order disclosure of the related documents. The Commissioner has appealed this decision to the Federal Court of Appeal.

Definition of personal information

Canada (Information Commissioner) v Canada (Canadian Cultural Property Export Review Board) 2001 FCT 1054, Court File No. T-785-00: A requester asked for records of a tax credit request made to the Canadian Cultural Property Export Review Board in connection with a donation of archives and memorabilia by Mel Lastman, the current mayor of Toronto. Although Mr Lastman had already publicly disclosed the information in the records, the Board refused to provide the documents on the grounds that they contained personal information. The Commissioner recommended disclosure on the basis of the exception to the personal information exemption in the *Access to Information Act* for information related to a discretionary benefit of a financial nature. The matter proceeded to the Federal Court, which upheld the Commissioner's finding. The Board appealed to the Federal Court of Appeal in October 2001 and also filed a motion for the stay of the previous court decision. The Federal Court of Appeal turned down the motion, and the Board released the records. The Commissioner has filed a motion requesting the dismissal of the appeal on the basis that it is now moot.

The Information Commissioner of Canada v The Minister of Citizenship and Immigration and P. Pirie A-326-01, FCA: Mr Pirie requested access to the names of individuals who expressed opinions about him during a workplace administrative review under the section of the *Privacy Act* that states all opinions given about a person are part of that person's personal information, to which they have a right of access. The Commissioner takes the position that this personal information includes the names of the people giving the opinions. In May 2001, the Federal Court took the view that only the names of those who had a specific job responsibility to give opinions about Mr Pirie may be released, and not the rest of the names. The Information Commissioner is currently appealing this decision, and the Privacy Commissioner, who has been granted intervenor status, has filed a memorandum supporting his position.

The Information Commissioner of Canada v The Executive Director of the Canadian Transportation Accident Investigation and Safety Board T-465-01, Federal Court Trial Division: The Information Commissioner has asked the Federal Court to order the Canadian Transportation Accident Investigation and Safety Board to disclose audiotapes and transcripts of an air crash to a journalist.

The Board has taken the position that these tapes and transcript constitute personal information and is therefore withholding them from release. Nav Canada sought an order to be added to the case as a party affected, which was granted by the Federal Court. The Commissioner appealed this order, but the appeal was dismissed. The case is currently underway.

Privacy exemptions

The Information Commissioner of Canada v The Commissioner of the Royal Canadian Mounted Police and Privacy Commissioner of Canada SCC 28601: The Royal Canadian Mounted Police (RCMP) invoked the privacy exemption in the *Access to Information Act* to refuse disclosure of a list of previous postings of RCMP officers to a requester. The Federal Court of Appeal upheld this decision, and the Commissioner sought leave to appeal to the Supreme Court of Canada. Leave was granted on 13 September 2001, and the case will be heard in the fall of 2002.

Cabinet confidences

The Minister of Environment Canada v The Information Commissioner of Canada and Ethyl Canada Inc. A-233-01, FCA: The Minister of Environment had withheld certain information relating to a NAFTA unfair competition tribunal case from a requester on the grounds that it constituted a Cabinet confidence. The matter proceeded to Federal Court, where it was found that the refusal to disclose was an effort to circumvent the parliamentary intention behind the *Access to Information Act* that background information used in a Cabinet decision be released once the decision is made. The Minister appealed this decision in April 2001.

Confidentiality and Commissioner powers

The Information Commissioner of Canada v Canada Post Corporation and Minister of Public Works and Government Services Canada and Peter Howard A-489-01, FCA: A requester sought access to a report provided to Public Works and Government Services Canada by the Canada Post Corporation. The request was denied on the basis that the report was a Cabinet confidence. When the Commissioner began to investigate, the Minister of Public Works changed his stance and said some of the information would be disclosed, following the issuing of a notice to the Canada Post Corporation. The Corporation, upon receipt of the notice, filed with the Federal Court seeking to block disclosure, and a confidentiality order was issued covering the proceedings. This order was used as grounds to withhold some documents from the Commissioner during the course of his continuing investigation. The Commissioner issued a subpoena in response, and the Minister of Public Works filed a motion for variance of the confidentiality order to allow for compliance with the subpoena. The Commissioner argued against this, saying that the confidentiality order was not in conflict with a subpoena issued through his investigative powers under the *Access to Information Act*. In August 2001 the court agreed, but nonetheless issued a variance of the order to ensure compliance with the subpoena. The Commissioner is currently appealing this decision.

The Information Commissioner of Canada v The Attorney General of Canada and Brigadier General Ross T-656-01, T-814-01 and T-1714-01, Federal Court Trial Division: The Attorney General's office sought to refuse to

provide certain information to the Commissioner in the course of an investigation on the grounds that it would be injurious to national defence and security. The office issued certificates protecting the information on this basis under powers granted by the *Canada Evidence Act*, which have since been altered by the passage and coming into force of the *Anti-Terrorism Act* in December 2001. While the Attorney General has powers to issue a new, similar type of certificate under the new Act, he has not done so thus far. In the meantime, the Commissioner has filed an application with the Federal Court for judicial review of the issuing of the original certificates, seeking to quash them. A hearing date has not yet been set for these proceedings.

The Attorney General of Canada et al v The Information Commissioner of Canada T-582-01, T-606-01, T-684-01, T-763-01, T-792-01, T-801-01, T-877-01, T-878-01, T-880-01, T-883-01, T-887-01, T-891-01, T-892-01, T-895-01, T-896-01, T-924-01, T-1047-01, T-1049-01, T-1083-01, T-1448-01, T-1909-01, T-1910-01, T-1254-01, T-1255-01, T-1640-00, T-1641-00, T-2070-01, Federal Court Trial Division: This case concerns the attempted consolidation of 27 applications for judicial review dealing with five separate legal issues. The applications were made by a range of parties, including the Attorney General and various witnesses who appeared before the Commissioner during investigations about records held in the office of the Prime Minister and several of his ministers. The applications seek declarations that:

1. the documents in question are not under the control of a government institution;
2. the Commissioner does not have the jurisdiction to issue certain confidentiality orders;
3. the Commissioner does not have the jurisdiction to photocopy certain subpoenaed documents;
4. the Commissioner may not require the production of records deemed to qualify for solicitor-client privilege;
5. the Commissioner may not ask certain questions during the course of his investigations.

The Commissioner opposed the motion to consolidate these various applications into one file, as well as the court's request that he produce transcripts of evidence confidentially given before him in private proceedings. In response, the court ordered the applications be split into seven groups, to be heard serially, and ordered the Commissioner to provide the confidential transcripts related to four of the seven groups in full (even though the applicants had identified only certain portions of the transcripts as relevant).

The Commissioner also concurrently brought a motion to (i) have the counsel of record removed from the case owing to a perceived conflict from their representing both the Crown and the witnesses at the same time and (ii) to have the Attorney General removed as an applicant on the grounds that she is a representative of the Crown rather than an 'affected' or 'necessary' party that has standing with regard to the applications. These motions were denied by the Court. The Court also found that the Attorney General could view the confidential transcripts in question, but only in accordance with the Commissioner's orders of confidentiality.

Powers and procedures

The Commissioner announced in his 2001–2002 annual report that he will be publishing procedural guidelines for his Office's investigative process in the coming year. The guidelines will contain information on approaches usually taken with different types of complaints; the reasons for them and for any potential deviations from them; the roles, rights and obligations of witnesses and counsel involved in an investigation; and the nature and extent of the Commissioner's powers and at what points in the investigative process they may be used.

In his annual report, the Commissioner also focused on funding issues that are affecting the Office's efficiency. A backlog of 729 cases existed at the end of the 2001–2002 fiscal year, and the average time for completion of an investigation has risen to 7.8 months. The Commissioner wrote:

Every conceivable productivity improvement has been introduced: conversion of management, policy, public affairs positions to investigator positions; introduction of a rigorous time-management system for investigations; improved training and work tools for investigators and greater reliance on computerized approaches to case management, precedents and report preparation. Independent consultants and officials of Treasury Board Secretariat have reviewed the office's utilization of its resources.

There is agreement on this point: 25 investigators cannot handle expeditiously some 1,200 to 1,500 complaints per annum of increasing complexity, against in excess of 150 government institutions with offices spread across Canada and the world. Without additional investigators and without more rapid responses by departments to investigators' questions and requests, turnaround times and backlogs will not improve to an acceptable level. Parliament has been alerted to the difficulties being experienced by the Information Commissioner in obtaining the level of funding required from Treasury Board to meet his statutory workload.¹

There were also changes in the management of non-investigative functions. The offices of the federal Information and Privacy Commissioners have traditionally operated using a shared corporate services structure to avoid duplication and save costs on finance, human resources, information technology and general administration. However, the Privacy Commissioner put an end to this arrangement during 2001–2002 and assembled a separate staff that reports to him, thus requiring the Information Commissioner to do likewise.

External factors

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The passage of the Anti-Terrorism Act and in particular the powers it gives the Attorney General to both remove various classes of records from coverage of the Access to Information Act and to terminate related investigations have been a source of great concern to the Commissioner's office during the 2001–2002 year. The Commissioner was vocal in his opposition to the passage of the new legislation, and devoted five pages of his annual report to an analysis of its provisions. As part of this analysis, he cited the findings of a recent government-commissioned study that the Access to Information Act poses no risk of the disclosure of sensitive intelligence information and that there have been no incidents of such disclosure during the life of the Act. He also stated that the powers to halt investigations will effectively result in a situation where the federal government may legally stop any independent review of denials of access at will, since

the language around this provision did not explicitly tie these powers to the issuance of secrecy certificates.

Other

Traditionally, requesters under the Act have been able to obtain records about travel expenses incurred by prime ministers, ministerial staff, office holders and public servants. During 2001–2002, the government changed its policy and announced that it would no longer release this information in order to protect the privacy of the individuals involved. The government cited a 1997 Supreme Court of Canada decision (*Dagg v Canada (Minister of Finance)* [1997] 2 SCR 403) in support of its stance, but no attempt to introduce a policy in line with that decision was made at the time that decision was released.

The new policy was triggered by requests for access to the Prime Minister's agenda books. All the ministers were asked by the Privy Council Office to cease routine disclosure of their agendas. Then all departments were informed that if the Commissioner sought access to any records held in ministers' offices, it was to be refused and the Privy Council Office was to be notified. Pressure was then successfully applied to the Treasury Board to reverse both its longstanding policy requiring disclosure of the expenses of ministers and their staffs and its policy on access to records held in ministers' offices.

In response, a handful of ministers said they would 'consent' to the disclosure of these records in their departments nonetheless, although most refused. The resulting public controversy eventually caused a directive to be issued from the Prime Minister's office that all ministers give this newly-required 'consent' for the release of expense records only. In the meantime, the Commissioner is proceeding with investigations into complaints from the original requesters seeking access to agendas and travel records.

In his annual report, the Commissioner also commented on what he felt was a general climate of increasing secrecy and hostility to access requests within the federal government. He cited two examples:

The first concerned a case originally dating from 1997, where a requester who made access requests to the Privy Council Office and the federal department of Fisheries and Oceans received an 'intimidating' letter from the Fisheries Minister in response, demanding to know if the requester was compiling a file on him and asking for copies of everything the requester had collected so far. The access requester complained to the Commissioner that someone had disclosed his identity to the Minister. When the Minister refused to disclose to the Commissioner who his source was, he was cited for contempt.

The Minister tried to have the Commissioner's attempt to cite him declared unconstitutional, but the Federal Court upheld the Commissioner's right to proceed with the charges. The Minister in question then declared that he was willing to give information about his source, which turned out to be that the source was a media contact whose name he had forgotten. This assertion was contrary to the Commission investigation finding that senior sources in the Privy Council Office and the Fisheries department had disclosed the requester's identity. The Federal Court awarded punitive costs against the Minister in response. His legal costs were paid by the Privy Council Office.

The second incident concerned a possible conflict of interest involving the former Finance Minister. Allegations were made in Parliament that the Minister's participation in Cabinet deliberations related to compensation for recipients of tainted blood in transfusions was improper, since he had been on the Board of Directors of a Crown corporation that owned a supplier of blood products and had potentially discussed with them how to react to the tainted blood controversy at Board meetings prior to his election to public office. In response, the Minister asked his department to search his records to find the Board of Directors' meeting minutes and release them publicly.

The Parliamentary Ethics Counsellor also began an investigation and both he and several access requesters with various interests connected to the tainted blood scandal requested these same documents. The requesters were told that the records could not be located, but it later surfaced that the Minister's staff had indeed obtained copies from the Crown corporation and given them to the Ethics Counsellor only. Further copies were distributed amongst senior staff at the Ministry just after the date that most of the access requests had been made, although several subterfuges had been employed to avoid having to acknowledge their presence in the department to the access requesters.

The Commissioner, whose investigation had brought much of this information to light, concluded that the Minister had not been involved in his staff's attempts to hide the records from the access requesters. He made recommendations for better training and procedures for handling access requests within the Ministry, as well as advising the Minister to initiate an independent audit of the Ministry's information management practices. The Minister accepted all of the Commissioner's recommendations.

KEN ANDERSON

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