Information Commissioner of Canada

Commissaire à l'information du Canada

# ANNUAL REPORT

## 2015–2016

Respect

Excellence

Integrity Intégrité

Leadership

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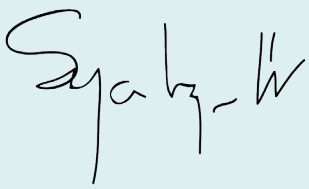
June 2016

Senator George J. Furey
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, 2015, to March 31, 2016.

Yours sincerely,



Suzanne Legault
Information Commissioner of Canada

June 2016

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

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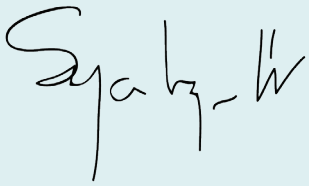

Suzanne Legault
Information Commissioner of Canada

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# Message from the Commissioner

Last year, I was ringing the warning bell, citing 2014–2015 as one of the most challenging of my mandate.

2015–2016 is showing signs that the tide is turning.

I have noticed a change overall in tone from the government. In my communications with leaders of institutions, there is a perceptible shift towards transparency, a greater willingness to cooperate with my investigations, and an increased respect for the right of access.

The recent announcement from the government to introduce amendments to the *Access to Information Act* also signals a positive change in terms of transparency from the government, as does the government's broader commitment to usher in a new era of transparency. I have long believed that one of the most important factors to effect a transformation across government into an open by default culture is meaningful amendment of the *Access to Information Act*.

The year has not all been positive, however, and difficulties remain. Complaints to my office continue to rise and, without sufficient funding, it is a challenge to close these investigations in a timely manner, while the information is still of value to the requester. The long-gun constitutional challenge remains active, although settlement negotiations aimed at resolving this litigation are ongoing.
The two-step approach to reform of the *Access to Information Act*, as proposed by the government, also gives me pause and leaves me concerned that once the first step has been completed, the second step may be lost as competing priorities emerge for the government.

However, at present, I am optimistic. A new government brings with it new possibilities and I look forward to working with the President of the Treasury Board and the ministers of Justice and Democratic Institutions as they work to revitalize the sorely outdated *Access to Information Act* to the benefit of Canadians' access to information rights.

# CHAPTER 1 - Highlights

This annual report sets out the activities of the Information Commissioner of Canada in 2015–2016. This chapter highlights noteworthy examples of the Commissioner's investigations under the *Access to Information Act* and important litigation matters.

## Signs of the change in culture

A new government was elected in October 2015. Since that time, the Commissioner has noted a positive change, towards a more open culture within government, as illustrated in the following three examples.

### PRESENTATION DECK AND SPEAKING NOTES

In the first example, a request was made in April 2015 to **Treasury Board of Canada Secretariat** (TBS) for a specific briefing note prepared by the Chief Information Office Branch of TBS for a meeting of the Clerks and Cabinet Secretaries Committee. 85 pages were identified as responsive to the request and all were exempted, using multiple exemptions, including the exemption for advice and recommendations.

A complaint was received by the Commissioner about this response in September 2015 and she quickly determined that all of the pages should have been disclosed and that the application of the exemptions was excessive. The records at issue were a presentation deck and speaking notes that gave an update on federal-provincial-territorial collaboration in service delivery, and the information that was exempted was innocuous, such as flags of provinces and names of high ranking government officials participating in the presentation. When initially processed, the Commissioner learned that TBS had recommended full disclosure; however, **Employment and Social Development Canada** had recommended that the entire document be exempted from disclosure through the consultation process.

To assist in resolving this complaint, the Commissioner reached out to the newly appointed President of the Treasury Board and the Secretary to TBS, and used this investigation as an example where a culture change was necessary within the public sector to achieve more openness and transparency. TBS reconsidered its position and disclosed the information to the requester in its entirety.

### PUBLIC OPINION RESEARCH

In another instance, several requests were made from August 2012 to July 2014 to the **Privy Council Office** (PCO) that pertained to public opinion research. In response to these requests, PCO claimed the exemption for advice and recommendations developed by or for an institution or a minister of the Crown (paragraph 21(1)(a)) and/or the exemption for accounts of consultations or deliberations (paragraph 21(1)(b)) on most of the responsive records.

The public opinion research in the responsive records represented Canadians' views on a variety of issues, such as the environment, the economy, justice, and health and safety. Not only were the views of Canadians withheld by PCO, but information regarding how these opinions were collected, including methodologies, timelines and associated costs, was also withheld under section 21.

> There are better and bigger things to do in the access business in 1991 than, for example, to argue whether the results of government commissioned public opinion polls should be released. (It is passing bizarre that there should ever be argument over whether the public is entitled to know what its own opinions are, especially opinions collected at public expense.)
>
> – Former Information Commissioner John Grace
> Annual Report 1990-1991

Complaints about PCO's responses were received by the Commissioner from September 2012 to August 2014. During her investigations, the Commissioner challenged the application of these exemptions, since neither exemption applies to factual material.

PCO continued to rely on section 21 until December 2015, when a meeting was held between PCO representatives and senior officials from the Office of the Information Commissioner. As a result of this meeting, PCO agreed to release the public opinion research information. For the future, PCO also indicated that it would no longer use section 21 to protect this type of information.

## FEES

In the third example, the Commissioner undertook two related strategies in 2015–2016 for fees, one concerning electronic records and the other related to programming fees. The Commissioner has advocated that all fees associated with access requests should be eliminated (http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_4.aspx#7).

Investigations related to fee complaints take up resources that could be better allocated to other, more substantive issues. To get a sense of the resources dedicated to investigate fee complaints, the Commissioner includes in this report the most noteworthy fee investigations from 2015–2016.

### Search and preparation fees for electronic records

At the end of March 2015, the Federal Court released its decision in response to a reference question the Commissioner had brought to the Court regarding whether institutions could charge search and preparation fees for electronic documents that were responsive to requests made under the *Access to Information Act*. In its decision, the Court accepted the ordinary meaning of "non-computerized records" to find that emails, Word documents and other records in electronic format are computerized records and therefore not subject to search and preparation fees under the Regulations (*Information Commissioner of Canada v. Attorney General of Canada*, 2015 FC 405 (http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/108985/index); background, "Removing a barrier to access: Fees and electronic records" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_2.aspx#9).

The investigation that served as the basis for the reference involved a request to **Employment and Social Development Canada** (ESDC) for records relating to the Social Insurance Number record database. ESDC identified the responsive records and issued a fee notice estimating search fees of $4,180. When a complaint was made to the Commissioner regarding the fee, ESDC opposed the Commissioner's interpretation that search and preparation fees could not be applied to electronic records.

For the duration of the reference proceedings, the Commissioner put in place a strategy to manage outstanding complaints about search and preparation fees applied to electronic records. Complainants were asked whether they preferred to put their complaints on hold or to pay the fees to institutions in order for processing to continue.

By June 2015, the Commissioner had an inventory of 48 fee complaints related to the reference question. Once the decision was released, these complaints were reactivated.

Many complaints involving only electronic records were resolved swiftly as a result of this decision, with agreement from institutions to process the requests without assessing fees or requiring payment of any fees. In the few instances where fees had been paid, complainants were reimbursed. In instances where requests involved both paper and electronic records, some complainants amended their requests to receive

only electronic records, resolving the question of whether any fees should be assessed at all.

Since June 2015, two of the forty-eight complaints put in abeyance have been discontinued and forty-four have been concluded as well-founded. Of the forty-eight complaints, four dealt with other, more complex issues, beyond the simple application of search and preparation fees to electronic records. Two of these complaints have now been concluded and two are ongoing.

### Programming fees

The Commissioner issued an advisory notice in December 2015 regarding fees for electronic records (http://www.oic-ci.gc.ca/eng/droits-pour-documents-electroniques_fees-for-electronic-records.aspx). In this notice, the Commissioner specifically reminded institutions that subsection 7(3) of the regulations, related to programming fees, could not be used to justify charging fees for searching and preparing electronic records.

As the Commissioner worked through the investigations that were put in abeyance pending the results of the Fees Reference, one appeared to show an institution using subsection 7(3) of the regulations for searching electronic records.

In 2014, the **Social Sciences and Humanities Research Council** (SSHRC) received a request where it was specifically asked to search its backup servers for responsive records. SSHRC issued a fee notice of $600, requesting a $300 deposit to proceed, on the basis of a search fee for electronic records. The requester paid the deposit so that the request could be processed, but complained to the Commissioner about the fee. SSHRC later reduced the total fee to $350. After the requester paid the outstanding balance, SSHRC issued a final response.

When this complaint was reactivated in June 2015, SSHRC agreed, given the Court's decision, that the search fee did not apply, but noted that a programming fee was applicable, per subsection 7(3) of the regulations to the Act. It explained that it had opted to prepare its fee estimate using the cost structure relevant to search fees, as this would be less costly to the complainant. While fees for searching can amount to $10/hour, the fee structure for programming can be much more costly. According to SSHRC, the final fee of $350 was based entirely on 35 hours spent programming to produce records from its backup servers.

However, upon reviewing the instructions to produce the records that SSHRC claimed were "programming," the Commissioner, in consultation with an internal IT specialist, determined that no programming was necessary to produce the records. The instructions were mostly point and click, with a very minimal amount of manual command entry.

When provided with this preliminary finding, SSHRC agreed to refund the fees paid by the complainant in order to resolve the complaint.

Demonstrating another shift towards more transparency, on May 5, 2016, the government announced that all fees associated with access to information requests, other than the $5 application fee, were to be waived. This result was achieved by an amendment to the *Directive on the Administration of the Access to Information Act* (http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=18310).

## Right to have requests processed without regard to identity

An important function of the Commissioner is ensuring that access to information requests are processed appropriately and that requesters' rights are protected during this process. In 2015–2016, the Commissioner closed an investigation where she had learned of a situation at **Indigenous and Northern Affairs Canada** (INAC) (formerly Aboriginal Affairs and Northern Development Canada) where requesters' right to have their requests processed without regard to their identity, pursuant to subsection 4(2.1) of the Act, was at risk.

The origin of this investigation was a request for records relating to the expenses of the former minister for that institution, Jim Prentice. In response, INAC claimed there were no responsive records and a complaint was made to the Commissioner.

While the Commissioner was investigating this complaint, she learned through media reports that INAC had created and circulated a list containing the names of all requesters seeking records relating to the expenses of Mr. Prentice. This list was subsequently leaked to the media. Learning of the existence of this list, the complainant in the initial complaint made a second complaint to the Commissioner. In this second complaint, the complainant also alleged that one of the employees involved in processing his request had a political affiliation with the Conservative Party.

Due to the serious nature of the allegations, the Commissioner commenced a second investigation and invoked a number of her powers under subsection 36(1) of the Act. These included issuing production orders for records and subpoenas to ensure the appearance of selected individuals to answer questions under oath.

The Commissioner's investigation revealed that the list consisted of the names of the requesters, the wording of the access requests, the date the responses to the requests were due, the responses given initially, the quantity and location of records that were deemed responsive to the request, as well as the status of the requests. At least seven individuals within INAC saw or were in possession of a copy of the list.

The Commissioner's investigation concluded that there was no information obtained that would suggest that the identities of the requesters factored into or impacted the processing of the requests. However, by the very fact that INAC created a list that contained the names of requesters, INAC failed to take appropriate measures to safeguard the identities of requesters and thus failed in its duty to assist requesters. The Commissioner concluded that this would have been the case even if the list had not been leaked to the media. That the list was leaked illustrates all the more the need to safeguard the identity of requesters to avoid such instances in the future.

By the time the Commissioner's investigation began, INAC had addressed the issue internally and removed the names of the requesters from the list. INAC officials confirmed that it was not their usual practice to create such lists and committed to ensuring that such an incident does not occur in the future. With respect to the allegation that one of the employees involved in creating the list was politically affiliated, the investigation revealed that this employee was absent from the office at the time the list was created. The Commissioner also confirmed that INAC's training and procedures manual outline the requirements to be met regarding the duty to assist and the need to protect the identities of requesters. As a result, the complaint was concluded as well-founded and resolved.

## The importance of leadership

In 2015–2016, the Commissioner completed a systemic investigation into **Parks Canada**'s approach to processing access requests. This investigation illustrates how collaborating with the Commissioner during her investigation can result in positive systemic changes for access rights.

### PARKS CANADA'S APPROVAL PROCESS

Delays in processing requests have been a longstanding issue for the access to information regime. As a result, the Commissioner pays particular attention to institutions that display ongoing issues with processing requests in a timely manner.

Prior to this systemic investigation, several standalone investigations by the Commissioner into delays at Parks Canada had identified the approval process as a contributing negative factor in responding to access requests on time. Despite undertakings from the former CEO to review Parks Canada's internal approval processes, subsequent investigations by the Commissioner revealed that the approval process continued to be an issue at Parks Canada (see, for example "Parks Canada" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_3.aspx#22).

Given the ongoing nature of this problem, the Commissioner decided to launch a systemic investigation, focusing on the time period of April 1, 2013 to September 30, 2014. Her systemic investigation focused on both the approval process

and the large number of abandoned requests.

The Commissioner's systemic investigation revealed that Parks Canada routinely ignored statutory time limits and had implemented approval processes that resulted in substantial delays in processing requests. Furthermore, individuals without delegated authority were habitually involved in the processing of requests to the detriment of timeliness in responding. For example, proposed responses to access requests routinely awaited approval within the CEO's office for an extended period of time. Non-delegated officials within the CEO's office were designated two weeks each to review release packages, but habitually exceeded this time frame.

With respect to the approval process, the Commissioner recommended that Parks Canada improve its timeliness and abide by the requirements of the Act by reviewing its approval processes to ensure that only those individuals properly delegated under the delegation order can approve the release of records and ensuring that non-delegated individuals not delay the processing of requests.

## ABANDONED REQUESTS

In addition to reviewing Parks Canada's approval process during this systemic investigation, the Commissioner also investigated Parks Canada's rate of abandoned request. Parks Canada's rate of abandoned requests was, in the Commissioner's view, generally high, with 2013–2014 marked in particular as an outlier.

During her systemic investigation, the Commissioner found that a number of inappropriate practices led to a high rate of abandoned requests. This aspect of the Commissioner's investigation focused on a requester who made 135 requests in one day.

Specifically, the Commissioner found that Parks Canada failed to calculate fees in a reasonable manner and neglected to inform the requester of his right to complain to her regarding fees. Initially, the requester was provided a total search fee estimate for all 135 requests of $71,455 (this estimate was later reduced to $49,105 after clarification was sought). The Commissioner concluded that such inflated fee calculations likely contributed to the high rate of abandoned requests experienced by Parks Canada.

In addition, the Commissioner also found that Parks Canada failed to notify the same requester that no records existed for certain of his requests. Eventually, the requester informed Parks Canada that he no longer needed the information and Parks Canada considered the 135 requests to be abandoned. To address the issues raised in Parks Canada's treatment of these 135 requests, the Commissioner recommended that Parks Canada only calculate and assess fees in accordance with the Act and its regulations and TBS's *Directive on the Administration of the Access to Information Act*.

## GENERAL RECOMMENDATIONS TO IMPROVE SERVICE DELIVERY AT PARKS CANADA

The practices at Parks Canada in processing access requests raised serious questions for the Commissioner. In particular, she was concerned about its ability to meet its duty to assist obligations under the Act. Thus, she made a number of recommendations to improve compliance with the Act, including that Parks Canada:

- include a requirement to comply with the *Access to Information Act* in the performance agreements of its executives;
- undertake a review of its internal procedures to ensure compliance with the *Access to Information Act*, its regulations and TBS policy instruments. Parks Canada's internal procedures should foster a client service culture and reflect Parks Canada's statutory duty to assist requesters under the Act; and
- develop and implement an access to information training plan for all employees, including in the Access to Information and Privacy Directorate, which focuses on client service centered culture in relation to access to information. Ongoing training should be provided as necessary.

## RESPONSE FROM PARKS CANADA

When providing representations to the Commissioner during her investigation, Parks Canada disagreed with some of the Commissioner's preliminary findings, asserting, for example, that non-delegated

individuals had been removed from the approval process or that fees were properly assessed. In other instances, Parks Canada acknowledged that there was an issue, for example, with timeliness, but indicated that improvements were already in place.

Finding these representations insufficient to address Parks Canada's access to information shortcomings, the Commissioner reached out to the new CEO of Parks Canada (a new CEO had been appointed since undertaking this systematic investigation). The new CEO recognized that Parks Canada's performance in meeting the legally mandated timelines under the Act needed to be improved.

In response to her formal investigation findings, Parks Canada accepted each of the Commissioner's recommendations (see box "Parks Canada's response to the Commissioner's recommendations").

The Commissioner attributes much of the change in tone and collaboration during this systemic investigation to the new CEO. The Commissioner is confident that with new leadership, Parks Canada's issues with processing requests will decline and respect for the right of access will improve.

## PARKS CANADA'S RESPONSE TO THE COMMISSIONER'S RECOMMENDATIONS

In its response to the Commissioner's systemic investigation, Parks Canada confirmed that it would implement, or had already implemented, the following:

- weekly meetings between the CEO and the Vice-President responsible for access to information to conduct detailed reviews of where all requests stand; where necessary, the CEO will intervene to ensure Parks Canada meets its requirements under the Act;
- ensure that all fees are assessed in accordance with the Act, its regulations and related TBS policies and directives;
- review assessed fees by the Vice-President responsible for access to information;
- a 13-month management initiative, during which time Parks Canada will achieve a zero deemed refusal rate, where no timelines are missed, in relation to access to information requests;
- ensure that only those who have properly delegated authority will have the ability to impact the disclosure process;
- provide ongoing monitoring and training to all relevant staff and senior level management to ensure compliance with the Act and the appropriate client service standard;
- include provisions relating to access to information in the performance agreements of executives, senior level management and relevant staff;
- develop mandatory access to information and privacy training to be delivered across the country in field and business units in summer 2016;
- update and expand access to information materials available on Parks Canada intranet site; and
- report back on progress within six months.

## PROPER EXERCISE OF DISCRETION: FEDERAL COURT DECISION ON DISCLOSURE OF NUMBER OF INDIVIDUALS ON CANADA'S 'NO-FLY LIST'

In April 2014, the Commissioner applied for judicial review of **Transport Canada**'s refusal to release the number of individuals named on the Specified Persons List (otherwise known as Canada's "no-fly list") each year from 2006 and 2010, and the number of Canadians on the list during the same years. The requester was added as an applicant to the proceeding.

The Federal Court released its decision on April 20, 2016. The Court determined that the Minister of Transport's delegate had correctly identified the information as falling within the exemption of the Act that allows for refusals where disclosure could reasonably be expected to cause injury to the detection, prevention or suppression of subversive or hostile activities (that is, paragraph 15(1)(c) of the Act). The Court also determined that the Minister's delegate had not exercised his discretion reasonably in deciding to apply this exemption.

> In exercising discretion: "I must reiterate that decision-makers cannot simply state that they have taken all the relevant factors into consideration; they must concretely show how the factors were considered."
>
> – *Information Commissioner of Canada v. Minister of Transport Canada*, 2016 FC 448 at para 66 (Translation)

In its decision, the Court also made clear that decision-makers must show that they carefully considered the arguments and suggestions in favour of disclosure, including those made by the Commissioner.

> … where the Commissioner is a party to the proceeding, the Court must take into consideration the Commissioner's arguments and suggestions, as well as assess how the decision-maker considered and addressed those arguments and suggestions. At the decision-making stage, the decision-maker must show that he has a full understanding of the access request, that he understands the arguments in favour of disclosure and carefully considered those arguments, all while taking into account the purposes of the [the Act]"
>
> – *Information Commissioner of Canada v. Minister of Transport Canada*, 2016 FC 448 at para 105 (Translation)

In the Court's opinion, there were three reasons why discretion had been exercised unreasonably in this case: 1) in relation to the passage of time, the only consideration shown in Transport Canada's decision to maintain the exemption at the end of the Commissioner's investigation was that the type of information at issue had always been withheld from disclosure; Transport Canada gave too little consideration to the argument that as time went on, the information at issue was losing its importance; 2) Transport Canada refused to give serious consideration to the Minister's public declaration about the number of individuals included on the Specified Persons List when the list came into effect; the Court found that Transport Canada's refusal to clarify the Minister's statement was unacceptable and lacked transparency; and 3) while Transport Canada invoked negative repercussions in its international relations with the United States as a reason for refusing to disclose the information, there was a lack of evidence to support that argument.

The Court therefore returned the matter to Transport Canada, for a different decision-maker to exercise the necessary discretion to arrive at an informed decision on whether or not to disclose the information at issue. The Court expressed its desire that the new decision be arrived at within 90 days. The Court awarded costs to the access requester.

The period for appeal of the decision has not yet expired. The appeal period will end on May 20, 2016.

# CHAPTER 2 - Investigations

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

Appendix A contains detailed statistical information related to the complaints the Commissioner received and closed in 2015–2016.

## Resources intensive investigations

In 2015–2016, the Commissioner dealt with several resource intensive investigations. These investigations are highly complex and require, often for extended periods of time, the dedicated attention of teams of investigators, legal counsel and senior officials at the Office of the Information Commissioner of Canada (OIC).

For example, there was a systemic investigation into Parks Canada's approach to processing access requests (see p. 10, "The importance of leadership"), an ongoing systemic investigation in response to a complaint made by the Environmental Law Clinic (see p. 54, "Scientists and the media") and an investigation into three of the oldest complaints in the Commissioner's inventory related to records in a minister's office (see below, "The effort to access records in a ministers' office").

### THE EFFORT TO ACCESS RECORDS IN A MINISTERS' OFFICE

The Commissioner closed one of the OIC's most lengthy investigations in 2015–2016. The investigation related to complaints, made in September 2006, concerning the adequacy of responses provided by the **Treasury Board Secretariat** (TBS) to three requests relating to the release of former Information Commissioner Reid's special report to Parliament about proposed legislative amendments to the *Access to Information Act*. More particularly, the complaints alleged that, owing to an incomplete search for records, TBS failed to provide all records responsive to the underlying requests.

The legislative amendments to the Act addressed in Commissioner Reid's special report formed a small part of the bill that became the former government's *Federal Accountability Act*. The President of the Treasury Board at that time, the Honourable John Baird, was the sponsor of this bill.

The Commissioner's initial investigation into TBS's response to the three requests revealed that five Offices of Primary Interest (OPIs) had been tasked to retrieve responsive records, and that these OPIs had conducted appropriate searches and gathered responsive institutional records for processing. It also revealed that the Office of the President of the Treasury Board (OPTB) had not been tasked to retrieve responsive records because TBS took the position, based on the policy guidance in effect at the time, that records held exclusively in a minister's office were not considered to be under the control of a government institution and, therefore, were not subject to the Act.

In light of the fact that this precise issue was then before the Federal Court, the investigation was placed on hold in December 2006 pending the outcome of the judicial process. The Federal Court handed down its judgment in June 2008. It was appealed to the Federal Court of Appeal and, subsequently, to the Supreme Court of Canada (SCC), which issued its decision in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 *(PM's Agenda Case)* on May 13, 2011 (background: "Control of records" (http://www.oic-ci.gc.ca/eng/rp-pr_ar-ra_2010-2011_9.aspx#13).

Shortly after the release of the SCC's decision, the Commissioner reactivated her investigation and

determined that she needed to review the ministerial records that were held in the OPTB at the time of the requests in order to ascertain whether any of them were under the control of TBS in keeping with the two-part test set out by the SCC in the PM's Agenda Case (see "Ministers' offices" for a description of the two-part control test (http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_3.aspx#2) and, if so, whether any were responsive to any of the three requests under investigation.

In early January 2007, Mr. Baird was appointed Minister of the Environment and left the OPTB to assume these new responsibilities. Mr. Baird was responsible for four other ministerial portfolios while this investigation was ongoing: Minister of Transport (October 2008 to August 2010), Leader of the Government in the House of Commons (August 2010 to May 2011), Minister of the Environment (November 2010 to January 2011) and Minister of Foreign Affairs (May 2011 to February 2015).

Over a nearly two year period, the Commissioner made extensive efforts first to locate and, subsequently to obtain relevant ministerial records deriving from Mr. Baird's tenure as President of the Treasury Board.

In particular, the Commissioner communicated with the Chief of Staff to Mr. Baird, the Director of TBS Access to Information and Privacy (ATIP), officials from Library and Archives Canada (LAC), as well as the official who had acted as the departmental liaison between TBS and the OPTB during the relevant time period, none of whom were able to confirm the location of the relevant ministerial records.

In light of this finding, the Commissioner next contacted Mr. Baird's office–first through his then Chief of Staff and subsequently to him directly–in order to locate the ministerial records from the relevant time period. Eventually, Mr. Baird's Chief of Staff confirmed that Mr. Baird had retained the relevant ministerial records from this period through five subsequent ministerial appointments.

### ACTIONS TO RETRIEVE RECORDS FROM MINISTER BAIRD'S OFFICE

**September 2012:** The Commissioner writes to Mr. Baird's Chief of Staff to request assistance locating Mr. Baird's ministerial records from the relevant time period. The Chief of Staff informs the Commissioner that, to the best of his knowledge and after consultation with other members of Mr. Baird's ministerial staff, no such ministerial records exist from Mr. Baird's time as President of the Treasury Board.

**January 2013:** Left uncertain as to whether these records did not exist because they were never created or because they were subsequently destroyed, the Commissioner contacts Mr. Baird directly for the same information.

**March 2013:** Reversing his position, Mr. Baird's Chief of Staff confirms that ministerial records created during the relevant time period have been found in Mr. Baird's office at the Department of Foreign Affairs, Trade and Development. He indicates that some records are marked "secret" or were used to inform Cabinet deliberations. He engages PCO to provide advice as to whether any records are Cabinet confidences within the meaning of section 69 of the Act. The next day, the Chief of Staff provides the Commissioner with originals of ministerial records not marked in any way as classified.

**April 2013:** The Commissioner asks the Chief of Staff whether records marked "secret" will be provided to her.

**June 2013:** The Commissioner is advised by the Chief of Staff that PCO has identified one document, portions of which have Cabinet confidences. A severed version of this document is provided to the Commissioner. No response is given regarding the records marked "secret".

**July 2013:** The Commissioner issues a production order to Mr. Baird to ensure she has been provided all relevant records.

**August 2013:** Mr. Baird and his Chief of Staff respond to the production order and give the Commissioner those records marked "secret" that had not yet been provided.

**October 2013:** PCO confirms that 10 of 12 documents it has reviewed at the request of the Chief of Staff are Cabinet confidences in their entirety and two others contain portions of Cabinet Confidences. As the Commissioner already has a severed version of one of these records, PCO only provides the other of these two records to the Commissioner.

**November 2013:** The Commissioner requests that the Clerk of the Privy Council formally certify, pursuant to section 39 of the *Canada Evidence Act*, that the records reviewed by PCO are Cabinet confidences.

**December 2013:** The Commissioner returns to the Chief of Staff all of the records she has been provided, with a list of the ministerial records that should be given to TBS for processing as relevant to the underlying access requests.

**January 2014:** TBS confirms that it is has received documents from the Chief of Staff for processing. Later that same month, the Clerk of the Privy Council provides the requested certification.

After significant resistance to provide the Commissioner with the ministerial records deriving from this period, Mr. Baird ultimately agreed to turn some records over to her (see, "Actions to retrieve records from Minister Baird's office"). The Commissioner reviewed those records and identified those that were relevant to the underlying access requests. Mr. Baird's ministerial office then provided these to TBS for processing. As a consequence, in April 2014, **an additional 127 pages of responsive records were provided to the complainant** in relation to one of the three underlying requests.

While this investigation was ongoing, two important policy documents were issued, one by TBS and one by Library and Archives Canada (LAC), which provide guidance with respect to the management of records located in ministers' offices.

In particular, in June 2015, TBS issued a new information management protocol, entitled *Information Management in a Minister's Office*, which notes that, unless they are explicitly exempted, ministers' offices are subject to TBS policies and, therefore, that they are required to implement the TBS *Policy on Information Management* and its various supporting policy instruments, including the *Directive on Recordkeeping* and the *Standard on Email Management*. For its part, LAC issued *Guidelines on Managing Records in a Minister's Office* in October 2015, which replaced the previous guidelines from 1992. These new guidelines provide information regarding the efficient and effective storage, management, retrieval and disposal of records created or received in a minister's office and set out measures for ensuring the proper management of records located in ministers' offices, including institutional and ministerial records. They also recommend that ministers' offices implement these practices from the time ministers assume office until they either change portfolios or leave office.

In keeping with this recent policy guidance and mindful of the way in which ministerial records deriving from Mr. Baird's tenure as President of the Treasury Board were handled in the circumstances under investigation and the implications that this had for the ability of TBS to meet its obligations under the Act, the Commissioner recommended a series of measures that should be adopted by all ministers' offices going forward. These recommendations ensure that ministers, as the heads of government institutions subject to the Act, are accountable throughout their terms in office, including when they change ministerial portfolios or leave office.

The Commissioner's recommendations included:

- identifying a senior member of each minister's staff to ensure that each ministerial office implements and complies with its information management obligations;
- ensuring that ministers and their staff receive training to ensure that all categories of records are managed in accordance with applicable information management policies;
- conducting audits on a periodic basis to ensure that information practices implemented in ministers' offices are complying with such policies; and
- ensuring that ministers and their staff receive appropriate training with respect to their responsibilities under the Act, including in relation to investigations conducted by the OIC.

The current President of the Treasury Board, Mr. Brison, responded positively to the majority of the Commissioner's recommendations (see box, "Response from the President of the Treasury Board").

With respect to the Commissioner's recommendations that ministers' offices should be tasked to conduct searches for relevant records on the same basis that any other OPI is tasked and that audits of the information management practices should implemented in ministers' offices on a periodic basis, TBS has replied that these recommendations will be considered as part of the government's review of the *Access to Information Act* (see p. 55, "Upcoming legislative amendments and government review of the *Access to Information Act*").

#### RESPONSE FROM THE PRESIDENT OF THE TREASURY BOARD

The President of the Treasury Board's response to the Commissioner included the following (http://www.ci-oic.gc.ca/eng/lettre-reponse-Brison_letter-of-response-Brison.aspx):

- A commitment to ensure that a ministerial staff member would be designated responsible for information management practices in each minister's office.
- In conjunction with Library and Archives Canada, a commitment to develop new information management protocols for ministers' offices, and to organize training sessions on information management for staff in ministers' offices.
  - A further promise to report back to the Commissioner on the progress made with respect to these information management initiatives over the next three to six months was also provided.
- A strong endorsement of the Commissioner's recommendation that ministers and their staff should receive training with respect to their responsibilities under the Act.
  - While the logistical details of this last point have yet to be determined, the President indicated that the Commissioner would be invited to give a separate presentation during this training were it to occur.

In providing her recommendations, the Commissioner underscored that, with the recent change in government and the swearing in of a new Cabinet, this was an opportune moment to ensure that ministers implement robust information management practices in establishing their offices. These practices underpin the ability of government institutions to meet their obligations under the Act and, ultimately, safeguard the rights of requesters.

## Noteworthy investigations

In 2015–2016, the Commissioner's most noteworthy investigations covered a wide range of topics, from to duty to assist issues, to failures to make even basic searches for records, in addition to refusals of access.

### DUTY TO ASSIST

The duty to assist arose as a central issue in several investigations in 2015–2016.

#### Processing the request without regard to the identity of the requester

According to the duty to assist, institutions have a responsibility to process requests without regard to the identity of the requester. In 2015–2016, the Commissioner investigated a series of complaints against **Treasury Board Secretariat**'s (TBS) online access to information request tool where it was alleged that the duty to process a request without regard to the identity of the requester was being violated.

In order to complete access to information requests using the online tool, requesters had to provide identifying information, such as their date of birth and/or their title (Mr. or Ms.), when making requests to specific institutions, without an option to decline. Failure to provide this information meant requesters could not use the online tool and instead had to resort to the paper access to information request form. Requesters complained about having to provide this information.

#### The Duty to Assist

**Responsibility of government institutions**
4(2.1) The head of a government institution shall, **without regard to the identity of a person making a request** for access to a record under the control of the institution, **make every reasonable effort to assist the person** in connection with the request, **respond to the request accurately and completely** and, subject to the regulations, **provide timely access** to the record **in the format requested.**

In her investigation of these complaints, the Commissioner noted inconsistencies between the online tool and the paper form. On the paper form, there is no section that asks for date of birth or gender salutation information from requesters.

The Commissioner's investigation also revealed that different institutions asked for different identifying information, sometimes depending on the records being sought. For example, the online tool for the **Canada Border Services Agency and Immigration, Refugees and Citizenship Canada** (formerly Citizenship and Immigration Canada) required date of birth information for requests for case files or personal records, but not for corporate records and other policy documents. **The Royal Canadian Mounted Police** required date of birth information for all requests, regardless of the type of information sought.

Overall, the Commissioner found that the mandatory requirement to provide date of birth and gender salutation information in the online request tool was arbitrary and unnecessary. As a result, the Commissioner was of the opinion that TBS had breached the duty to assist requesters. Furthermore, by forcing requesters to use the paper form if they didn't wish to provide their identifying information in the online tool, TBS had effectively created two different processes for requesting the same type of information, creating a potential barrier to access for any requester who wished to use the online tool.

TBS has committed to address these issues and will make the necessary changes to the online request system by June 2016, allowing these fields to be optional except in cases where the information sought in the request is his or her own personal information, to ensure privacy rights are protected.

### Providing complete, accurate and timely information to requesters as part of the duty to assist

The Commissioner closed another investigation in 2015–2016 that highlighted the negative repercussions that can occur when an institution fails to meet its obligations under the duty to assist, including the obligation to respond to the request accurately and completely and provide timely access.

In September 2013, **National Defence** (DND) received a request for notes, memos, and any reports, including drafts, related to the crash of a Chinook helicopter in southern Afghanistan in May 2011. DND provided a partial response, exempting some information under paragraph 16(1)(c) of the Act, which exempts information the disclosure of which could harm law enforcement activities and investigations. The requester complained to the Commissioner about this response in October 2013.

DND informed the Commissioner during her investigation that a final version of the report the requester was seeking would be published in May 2014. This information was relayed to the requester and, in light of DND's commitment to publish the report, the requester decided to discontinue his complaint.

In September 2014, it came to the Commissioner's attention that DND had failed to release the report as initially discussed. DND was contacted, who advised the Commissioner that the report would be published in the next three to six months, thus extending the release date to anywhere from December 2014 to March 2015.

As a result of this delayed publication date, the Commissioner initiated a complaint. During the investigation of this complaint, she came to the conclusion that DND could not have reasonably expected to complete the report by May 2014 as it had initially proposed. When this date was suggested, integral stages of the investigation had not yet been commenced. The Commissioner was not made aware of this information during the first investigation.

DND ultimately released the records at issue 18 months after the access request was made, and ten months after the publication date initially provided to the Commissioner. The delay in releasing the records to the requester, and the second investigation in its entirety, could have been avoided if DND had met its basic obligations under the duty to assist and provided an accurate, complete and timely response at the outset.

As part of the duty to assist, the Commissioner consistently recommends to institutions that if they notify a requester that the information they are seeking is to be published, the institution should continue to monitor the publication of the information and send a follow-up response to the requester when the information is published, or notify them if publication is to be delayed. To avoid situations like the one described in this investigation, the Commissioner recommended in her report *Striking the right balance for transparency* that extensions be available when the requested information is to be made available to the public (http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_5.aspx#1_7). This ensures that requests remain open and active within institutions.

### An example of a request processed in compliance with the duty to assist

The final notable duty to assist investigation from 2015–2016 involved the **Canadian Radio-television and Telecommunications Commission** (CRTC) and was related to a request made for records concerning an individual. The individual who was the subject of the request objected to the release of this information and subsequently complained to the OIC about how the access request was processed. Amongst other concerns, the complainant alleged that the request was not processed in a fair, impartial and transparent manner and requested that the OIC review the handling of the access request.

As part of the investigation, the OIC obtained a copy of the processing file for this request, which outlined the steps taken in the search, retrieval and processing of relevant records. The OIC also reviewed the CRTC's policies and procedures for processing access requests alongside TBS requirements.

The OIC's investigation revealed that the CRTC appropriately handled the request in accordance with policies and procedures and met its duty to assist obligations – appropriate individuals were tasked to search for records to provide a complete response; exemptions and exclusions were properly applied; officials with delegated authority under the Act provided the necessary approvals for disclosure and interim releases were provided where possible to provide timely access to records. As a result, the complaint was not well founded.

## FAILING TO MAKE COMPLETE SEARCHES

When requesters feel that the response they receive from an institution is missing records, they can complain to the Commissioner. The Commissioner can then investigate a number of factors, such as the adequacy of the search for responsive records, the institution's records management practices or whether any records were in fact created that were responsive to the request.

In 2015–2016, the Commissioner closed two notable investigations that featured inadequacies in searching for responsive records.

### Searching for records when employees are co-located within an office

The first investigation involved **National Defence** (DND), where a request was made to DND about the process to submit a "Spectrum Supportability Application" to the Spectrum Management Office. This office is a part of Innovation, Science and Economic Development Canada (ISED) (formerly Industry Canada), not DND; however, DND can have employees located in this office.

The requester asked DND for records about this same process followed by ISED. DND's response to the requester was that no records existed.

The Commissioner's investigation revealed, however, that after finding no responsive records within its own institution, DND made no effort to reach out to ISED to obtain the requested information, despite ISED being named in the request. In her investigation, the Commissioner learned that DND currently had an employee co-located at the Spectrum Management Office who had not been contacted during the initial search.

As a result of the Commissioner's intervention, the DND employee co-located at the Spectrum Management Office was tasked with searching for responsive records. 54 responsive pages were found

and released in their entirety to the requester.

### RCMP officers' notebooks

The second investigation concerned the **Royal Canadian Mounted Police** (RCMP) and related to a request for specific records generated in response to an incident, including notes from the notebooks of four named RCMP officers. The RCMP's response to the requester was that no records existed. The requester believed that records should exist, and complained to the Commissioner.

During her investigation, the Commissioner learned that the four RCMP officers who had been identified in the request were not asked to provide their notebooks so that they could be reviewed by access officials for processing. She also learned that it is standard RCMP practice for these notebooks to be held by each individual officer in their private residence. The notebooks are not turned over to the RCMP for storage after they are full or after the officer has retired. This is despite the fact that the RCMP Operational Manual provides that notebooks are the property of the RCMP. The manual also makes clear that these notebooks are subject to the *Access to Information Act* and outlines how long they should be retained.

During her investigation, the RCMP initially informed the Commissioner that one of the officers had been found and had no responsive records; however, it was unable to locate three of the officers. Later it was discovered that one was still working for the RCMP, but under another name, and two had subsequently retired. The RCMP was unwilling to seek out the retired officer's current addresses so they could be tasked with searching for their notebooks. Noting that these individuals held records that were subject to the Act, the Commissioner undertook her own search for the retired individuals. The Commissioner's investigation ensured that all the officers referenced in the request were contacted either by the RCMP or by her staff and that a thorough search was conducted. As a result of the investigation, additional records from the officers' notebooks were released to the requester.

The Commissioner's investigation also shed light on an ongoing records management issue at the RCMP relating to officer's notebook. Although the RCMP Operational Manual makes clear that these notebooks are under the control of the RCMP and subject to the Act, this investigation highlighted the practical difficulties of obtaining these records when these notebooks are not returned post-employment. In a 2014 internal audit of investigator's notes, the RCMP recommended that it should assess and document the risks that its current retention and storage practices pose, specifically as they relate to members who retire or leave the RCMP. The Federal, Provincial and Territorial Heads of Prosecutions Committee has also noted retention and storage of notebooks at officers' homes post-employment as an issue for the Canadian justice system.

The Commissioner will follow up with the RCMP on the issue of retention of officer's notebooks and obtaining access to them.

### Update on the missing records certification process with CRA

In her 2014–2015 Annual Report, information management and document retrieval was identified by the Commissioner as a persistent issue at the **Canada Revenue Agency** (CRA) when it comes to identifying and retrieving records in response to access requests (background: "Missing records at the Canada Revenue Agency" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_2.aspx#8). To resolve this issue and provide assurances to requesters that all records were being appropriately searched for and retrieved, the Commissioner instituted a certification process.

The certification process has proven effective. Since it was implemented, the Commissioner has received 45 certifications. Complaints about missing records against the CRA have decreased significantly. In 2015–2016, the number of missing record complaints was reduced by nearly half (52 in 2015–2016 as compared to 93 in 2014–2015).

## Refusals of access

### SECTION 69 (CABINET CONFIDENCES)

Under the Act, Cabinet confidences are excluded from the right of access, subject to certain limited exceptions. The rationale for excluding cabinet documents from the Act is to allow ministers to discuss issues within Cabinet privately so as to arrive at decisions that are supported by all ministers publicly, regardless of their personal views.

The exclusion for Cabinet confidences was invoked by institutions 3,089 times in 2014–2015. The Commissioner registered 35 complaints regarding Cabinet confidences in 2015–2016, representing 1.7 percent of exemption complaints. The low rate of complaints regarding Cabinet confidences can be correlated, in part, to a trend in recent years of requesters specifically asking institutions not to process records containing Cabinet confidences (background: "Self-censoring of requests" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_5.aspx)).

> Requesters asked institutions about 500 times in 2015–2016 to not process records containing Cabinet confidences.

In her special report to modernize the Act, the Commissioner set out a number of problems with the protection in the Act for Cabinet confidences, first being that the use of an exclusion to protect Cabinet confidences has significant repercussions on the Commissioner's ability to provide effective oversight when investigating a complaint that concerns a government institution's refusal to disclose Cabinet confidences (see "Section 69 (Cabinet confidences)" (http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_6.aspx#10)).

In addition, the Commissioner also noted in her report that the exclusion for Cabinet confidences is unnecessarily broad, especially when compared to other jurisdictions. Section 69(1) of the Act sets out a non-exhaustive list of types of records that are to be considered Cabinet confidences. This list includes records not traditionally considered to be part of the Cabinet paper system. For instance, pursuant to section 69(1)(g) even records containing information about the content of any Cabinet record are to be excluded.

#### Dates, times and locations of Cabinet meetings

In 2015–2016, the Commissioner concluded an investigation that exemplified the over breadth of this exclusion, and the limitations of the Commissioner's oversight. In 2010, a request was made to the **Privy Council Office** (PCO) for dates, times and locations of meetings of Cabinet and committees of Cabinet from 2006 to the time of the request. In response, PCO claimed the information could not be disclosed as the requested records were Cabinet confidences. Specifically, PCO claimed the requested records were agenda of Council or records recording deliberations or decisions of Council. PCO later added that some of the records were protected because they contained information about the contents of Cabinet confidences.

The requester asked the Commissioner to investigate this response. As part of her investigation, the Commissioner received a schedule prepared by the Clerk of the Privy Council that provided tombstone information on seven types of documents that were being withheld (note that the Commissioner is unable to review Cabinet records as part of her investigation in order to consider the substance of what is claimed to be excluded). The first five described agendas for separate date ranges. The remaining were a document related to an agenda of Council and a calendar, also related to an agenda of council.

Not convinced that merely the dates, times and locations of Cabinet meetings constituted Cabinet confidences, the Commissioner sought representations from PCO, who maintained that the records had to be excluded. PCO also took the position that, since the responsive records satisfied the criteria of Cabinet confidences, it had no obligation to sever the records. The Commissioner was of the view that severance should be considered, especially in light of the factual material the requester was seeking.

At the close of her investigation, the Commissioner was still of the view that PCO had not met its burden of proof and, as such, recommended disclosure of the requested information. PCO did not heed this recommendation and, as a result, the complaint was well-founded, but not resolved. The complainant did not wish to pursue the matter further.

The records that the requester was seeking related to the Cabinet of the previous government. Under the new government, itinerary information for the Prime Minister, including time and date information for Cabinet meetings as a whole to which the Prime Minister is attending, is proactively disclosed on a daily basis.

### Inconsistent application between institutions of the Cabinet confidences exclusion

Although in the normal course the Commissioner is unable to review Cabinet confidences as part of her investigations, there are some unusual circumstances that can arise that allow the Commissioner to see unredacted versions of records over which an institution has claimed Cabinet confidences. In these instances, the Commissioner conducts an in-depth review of the records at issue.

In 2015–2016, such a circumstance arose and revealed an inconsistent application of the Cabinet confidences exclusion. In this example, a similar request was made to both **PCO** and **Global Affairs Canada** (formerly the Department of Foreign Affairs, Trade and Development). Both institutions provided to the requester a form letter from the Department of Justice Canada as responsive to the request. However, while PCO disclosed the letter in whole, Global Affairs Canada withheld one paragraph, citing section 69. Noting the similarities between the two letters (as far as the requester could tell, the body of the letters was exactly the same), and the discrepancy between PCO and Global Affairs Canada's response, the requester complained to the Commissioner and provided her with copies of both letters. As a result of the Commissioner's investigation, Global Affairs Canada consented to releasing the paragraph it had withheld as a Cabinet confidence.

### Assessing the Cabinet confidences process

In 2013, the process for reviewing records during the processing of access requests to determine whether they contain Cabinet confidences was changed. Instead of a mandatory consultation by an expert group at PCO, institutions must now consult with their departmental Legal Services, with consultations made to PCO only in certain circumstances (background "Section 69" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2013-2014_4.aspx#15)).

In her last annual report, the Commissioner cited concerns about the implications of this change, especially with respect to the consistency of the application of section 69. She committed to continue to monitor the application of section 69 in light of these concerns (see "Shedding light on decision-making by Cabinet" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_5.aspx#5)).

The Commissioner's concerns with this process remain. Since her last report, issues have arisen with regard to the consistency of representations that should be provided to the Commissioner during a complaint investigation of the Cabinet confidences exclusion.

The Commissioner has about 70 complaints related to Cabinet confidences outstanding. As she investigates these complaints over the next year, she will be in a better position to assess the extent of her concerns and any other issues with the Cabinet confidences process. The Commissioner has also asked senior officials within her office to work with TBS, the Department of Justice Canada and PCO on these changes to ensure consistency in their approach and to make certain that institutions understand the Commissioner's investigative process for Cabinet confidences.

An advisory notice setting out the Commissioner's expectations during Cabinet confidences investigations will be forthcoming in 2016–2017. In the meantime, the Commissioner will continue to monitor the use of the Cabinet confidences exclusion to ensure its consistent application, to the extent possible without the ability to review the records.

## SECTION 21 (ADVICE AND RECOMMENDATIONS TO GOVERNMENT)

The exemption for advice and recommendations to government protects information relating to policy- and decision-making.

Institutions invoked this exemption 8,878 times in 2014–2015. 38 percent of the exemption complaints the Commissioner registered in 2015–2016 (271 files) involved section 21.

In her report to modernize the *Access to Information Act*, the Commissioner highlighted the exemption for advice and recommendations as being particularly problematic (see "Advice and recommendations (section 21)" (http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_6.aspx#8)). In its current form, this exemption extends far beyond what must be withheld to protect the provision of free and open advice. In the Commissioner's view, this exemption should be narrowed so that it strikes the right balance between the protection of the effective development of policies, priorities and decisions on the one hand, and transparency in decision-making on the other. Illustrative examples of the over breadth of the exemption for advice and recommendations from 2015–2016 can be found in the Highlights chapter (see "Presentation deck and speaking notes" and "Public opinion research").

### Putting a plan into operation

Paragraph 21(1)(d) allows an institution to withhold records that contain plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation. In 2015–2016, the Commissioner had an opportunity to investigate the application of this exemption when a complaint was made about **National Defence**'s (DND) use of this exemption.

In 2013, a request was made for a copy of a briefing note relating to DND's work force adjustment situation. DND withheld the majority of the note on the basis that the work force adjustment plans would not be *fully* implemented until 2015, relying on paragraph 21(1)(d) to prevent disclosure.

During the Commissioner's investigation, DND alleged that releasing the information could cause unnecessary stress within the workforce at DND. To release the information at that time could give an inaccurate account of the final number of employees who could be subject to work force adjustment and be misleading to the employees of DND, as well as the public. DND instead suggested that once the work force adjustment is complete, final numbers could be released.

The Commissioner determined that, based on a plain reading of paragraph 21(1)(d), a plan or plans should be considered to have been put into operation once it has been formally approved, notice has been given by a final authority of the plan's existence and the implementation of that plan has begun. There is nothing in the Act to support DND's reading of the Act that the plan must be fully implemented in order for it to be considered to have been "put into operation."

As such, the Commissioner was of the view that paragraph 21(1)(d) was not applicable and found the complaint to be well-founded.

DND eventually agreed during the Commissioner's investigation to disclose the information given the passage of time, while still maintaining it had appropriately applied paragraph 21(1)(d).

## SECTION 23 (SOLICITOR-CLIENT PRIVILEGE)

The exemption for solicitor-client privilege, section 23, is a discretionary exemption that applies both to information privileged as legal advice and records that were created for the dominant purpose of contemplated, anticipated or existing litigation (commonly known as litigation privilege).

Institutions applied this exemption 2,255 in 2014–2015. The Commissioner received 178 complaints about this exemption in 2015–2016, representing 25 percent of the exemption complaints she received that year.

In her report to modernize the *Access to Information Act*, the Commissioner made two specific recommendations with regard to the exemption for solicitor-client privilege. The first was that a time

limit be applied to the exemption as it applies to legal advice privilege. While litigation privilege expires at the conclusion of litigation, legal advice privilege has no time limit. A time limit on this exemption as it applies to legal advice would take into consideration the government's public interest mandate. This mandate justifies differences in the operation of solicitor-client privilege with respect to the government. The second recommendation was that, in the interests of transparency and accountability, the solicitor-client exemption may not be applied to aggregate total amounts of legal fees (http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_6.aspx#9).

### Does litigation privilege apply to collected records?

In 2015–2016, the Commissioner investigated a complaint against the **National Research Council** (NRC) related to litigation privilege.

The investigation concerned a request made in May 2013 for specific records sent to the NRC by Marine Atlantic Inc. (Marine Atlantic is a Crown Corporation that offers ferry services between Newfoundland and Labrador and Nova Scotia.) These records were sent to the NRC so that it could conduct a study on behalf of Marine Atlantic. The subject of the study was a collision between a Marine Atlantic ferry and a wharf in Atlantic Canada.

The NRC identified records and 11 video files as responsive to the request, but refused to disclose them, citing litigation privilege, due to an upcoming hearing before a labour relations board related to the collision. The requester complained to the Commissioner about this response.

As a result of her investigation, the Commissioner was of the view that some of the records and videos, such as the ship's scheme, tidal charts, weather reports and CCTV videos, were created before there was a reasonable prospect of litigation. Moreover, these documents would have been produced regardless of the collision. The Commissioner's position was that documents produced during or as a result of the study were privileged information, but records collected for the study were not protected by litigation privilege and therefore should be released.

The NRC did not agree with the Commissioner's position, but agreed to waive its privilege in order to release the paper records that were clearly collected and not created for the study. Five videos were also released (with the identities of some individuals obscured in two of the videos). Other exemptions were applied to the remaining videos to justify their withholding.

## SECTION 15 (INTERNATIONAL AFFAIRS)

Section 15 protects information the disclosure of which could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities.

It was invoked by institutions 11,890 in 2014–2015 and made up 22 percent of the exemption complaints received by the Commissioner in 2015–2016 (158 files).

In her report to modernize the *Access to Information Act*, the Commissioner made recommendations to section 15 and 69.1 (the exclusion for information that has been certified as confidential under section 38.13 of the *Canada Evidence Act*) of the Act as they relate to national security (http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_6.aspx#4). She also made a recommendation to sections 15 as it applies to international affairs (http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_6.aspx#3). The purposes of these recommendations are to clarify and streamline the application of the exemptions in the Act and improve access to historical information.

### Obtaining graphs about the Support to Lawful Access program

In December 2012, DND received a request regarding the **Communications Security Establishment Canada**'s (CSEC) Support to Lawful Access program. Specifically, the requester wanted to know, over a certain period of time, the number of requests made to CSEC to provide technical and operational assistance to federal law enforcement and security agencies, and whether CSEC had accepted or rejected those requests. The requester asked for this information in graph form, if possible.

In April 2013, CSEC assumed control of the processing of this request. Prior to this time, DND processed all requests regarding CSEC, which was treated as an office of primary interest by DND's access to information officials.

In response to the request, CSEC disclosed four pages of graphs, but withheld specific information claiming, in part, that releasing the information could result in injury to the defence of Canada and its allies.

The requester complained to the Commissioner about the response, noting in particular that the application of exemptions was vague, arbitrary and overbroad.

Through her investigation, and particularly via face to face meetings, CSEC was able to provide the Commissioner with detailed rationale regarding the application of section 15, and the factors considered in the exercise of discretion, as it applied to specific requests under the Support for Lawful Access. This included clear examples of how releasing the specific requests for support could reasonably be expected to result in injury. However, in the Commissioner's view, CSEC was not able to justify how injury could result in disclosing aggregate information and categorical information found in the graphs. CSEC reconsidered its position and agreed to release further information, such as sub-total and total information in the graphs, to the requester.

This investigation also presented a learning opportunity for CSEC. The request was the first that CSEC had to process, and through her investigation, the Commissioner was able to provide guidance and share expertise to assist CSEC in processing future requests.

## SECTION 16 (LAW ENFORCEMENT AND INVESTIGATIONS)

Section 16 generally protects information related to law enforcement. It is used by a range of institutions, such as the RCMP, the Canadian Human Rights Commission and the CRTC.

Institutions invoked section 16 11,587 times in 2014–2015 and it was the subject of 43 percent of the exemption complaints the Commissioner registered in 2015–2016 (306 files).

The Commissioner's report to modernize the *Access to Information Act* contained recommendations to simplify the exemption for law enforcement and investigations in order to streamline the application of this exemption and reduce the concurrent application of multiple exemptions (http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report_6.aspx#5).

### Law enforcement exemption used to withhold agreement in robocalls scandal

In 2015–2016, the Commissioner closed an investigation related to the voter suppression scandal, or robocalls, of the 2011 federal election. At issue in this investigation was the **Canadian Radio-television and Telecommunications Commission**'s (CRTC) application of section 16, in addition to other exemptions, to withhold information of great public interest.

This investigation related to a request made in May 2013 for any official communication between the CRTC and RackNine Inc. The CRTC had conducted an investigation against RackNine for violations of the *Unsolicited Telecommunications Rules*. The CRTC found RackNine to be in violation of these rules and fined it $60,000.

In response to the request for official communications between the CRTC and RackNine, the CRTC decided to withhold a four page agreement between itself and RackNine, save for the title and signature block, citing simultaneously section 16 and the exemption for legal advice, section 23. This agreement addressed the CRTC's concerns that resulted from its investigation and the terms the CRTC and RackNine had come to in order to resolve those concerns.

With respect to the application of section 16, the CRTC claimed that releasing the agreement in full could jeopardize outstanding investigations related to the robocalls scandal. The Commissioner disagreed, noting that most of the information in the agreement was already in the public domain and contained some factual and generic information. Without further evidence, the Commissioner was not convinced injury to the CRTC's outstanding investigations would result if the agreement was disclosed.

As for the legal advice exemption, the CRTC alleged that since the process that led to both parties signing the agreement was subject to legal advice, the agreement itself should also be subject to legal advice privilege. The Commissioner disagreed with this as well, noting that there was no legal advice between solicitor and client in the agreement.

Ultimately, as a result of the Commissioner's intervention, the CRTC agreed to review the exemptions and released almost all the information it had previously withheld.

## Streamlining investigations at the Office of the Information Commissioner of Canada

In 2015–2016, the Commissioner focused on streamlining her investigation processes to establish clear procedures and to increase predictability for complainants and institutions. This was accomplished through two major initiatives: (1) a simplified investigation process for time extension and deemed refusal complaints; and (2) a focus on training and procedures for investigators.

### SIMPLIFIED INVESTIGATION PROCESSES FOR TIME EXTENSION AND DEEMED REFUSAL COMPLAINTS

A significant project undertaken by the Commissioner in 2015–2016 focused on improvements in investigation processes. Generally, the Commissioner receives two types of complaints: complaints about refusals of access and administrative complaints. Administrative complaints deal with matters such as time extensions and delays. These complaints represent about 35% of the Commissioner's investigative workload. Wherever possible, the Commissioner processes administrative complaints as quickly as she can because in most instances, until the complaint is resolved, the complainant has not received any records.

In March 2015, an important decision was released from the Federal Court of Appeal that promised to introduce much-needed discipline into the process of taking and justifying time extensions by institutions. In turn, this decision provided an opportunity for the Commissioner to reconsider her approach to investigating time extension and delay complaints.

The Court determined that a deemed refusal arises whenever the initial 30-day time limit has expired without access being given, in circumstances where no legally valid extension has been taken (*Information Commissioner of Canada v. Minister of National Defence*, 2015 FCA 56; background: "The culture of delay" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_2.aspx#3)). According to the Court, in order to be a valid and reasonable extension, institutions "must make a serious effort to assess the required duration [of the extension], and that the estimated calculation be sufficiently rigorous, logic[al] and supportable to pass muster under reasonableness review."

In light of the Court of Appeal's decision, the Commissioner now expects institutions to provide detailed representations at a very early stage in the investigation process explaining, with supporting documentation, how extensions are justified and reasonable when regard is had to the circumstances. If the Commissioner finds that an extension is not reasonable, the request will be considered in deemed refusal. This will trigger the right to seek a judicial review of the extension taken by the institution.

In support of this new set of expectations, the Commissioner has revised her investigation process for time extension and deemed refusal complaints so that it is clearer, consistent and simplified. Form letters and templates seeking representations from institutions have been created that ensure a uniform experience, and give clear direction for investigators at the OIC, as well as for analysts and coordinators within institutions.

Piloting of the new process commenced with seven institutions in February 2016 with very positive feedback (see box, "Pilot of the simplified process").

The Commissioner anticipates that this new simplified process will result in administrative complaints being resolved more quickly, which will, in turn, lead to earlier disclosure of records.

## Pilot of the simplified process

- The seven institutions selected to pilot the simplified process represent approximately 80% of the administrative complaints received at the OIC.
  - National Defence
  - Royal Canadian Mounted Police
  - Privy Council Office
  - Canada Border Services Agency
  - Canada Revenue Agency
  - Health Canada
  - Immigration, Refugees and Citizenship Canada
- In 2014–2015, 42 administrative complaints were closed on average per month.
- During the initial phase of the pilot process, the average number of administrative complaints closed per month rose to 55.
  - Increase of 24% compared to 2014–2015.
- During the initial phase of the pilot process, 82 complaints were closed as resolved in less than 45 days.

## FOCUS ON TRAINING AND PROCEDURES FOR INVESTIGATORS

2015–2016 also saw a renewed focus on training and procedures for investigators, with the intent of bringing more rigour to the investigative process. The OIC hired new investigators in early 2016. This cohort of new investigators benefited from an updated, comprehensive training suite. This new training suite, developed by experienced investigators, legal counsel and senior management at the OIC, was created to ensure a consistent approach across the OIC in the conduct of its investigations.

Although mandatory for new investigators, these training sessions were also made available to other OIC employees who could benefit. (Proactive identification of training needs is in alignment with the OIC's performance management model. (See p. 50, "Performance management of investigators.")

A mediator from the Office of the Information and Privacy Commissioner of Ontario was also invited to the OIC in 2015–2016 to provide mediation training to investigators. Complaints are primarily resolved through mediation and persuasion at the OIC and the Commissioner plans to roll-out a mediation project for all investigations in the near future.

In 2016–2017, the Commissioner will be developing an investigation manual and a code of procedure to bring further predictability to the investigations process (see p. 54, "New tools for complaints and investigations").

# CHAPTER 3 - Court proceedings

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

The Act sets out two levels of independent review. The Commissioner carries out the first review through the investigation process.

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

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

The Act also provides a mechanism by which a "third party" (such as a company) may apply for judicial review of an institution's decision to disclose information that the third party maintains should be withheld from a requester under the Act. In these circumstances, the Commissioner often seeks to be added as a party to provide assistance and expertise to the Federal Court.

The following summaries review ongoing cases and court decisions rendered in 2015–2016.

## Ongoing cases

### COMMISSIONER-INITIATED PROCEEDINGS

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

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

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

*The Information Commissioner of Canada v. The Minister of Public Safety and Emergency Preparedness* (T-785-15) & *The Information Commissioner of Canada and Bill Clennett v. The Attorney General of Canada* (OSCJ-15-64739)

Background, "Access to long-gun registry information and challenge to the constitutionality of the *Ending the Long-gun Registry Act*" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_4.aspx#1)

As reported in the 2014–2015 Annual Report, on May 14, 2015, the Commissioner tabled in Parliament a special report detailing her investigation of the former **Minister of Public Safety**'s refusal to process additional long-gun registry records that she

had determined to be responsive to an access request. This special report was tabled immediately after the previous government introduced Bill C-59, the *Economic Action Plan 2015 Act, No. 1*, which included retroactive amendments to the *Ending the Long-gun Registry Act* (ELRA). These amendments to the ELRA ousted the application of the *Access to Information Act* to long-gun registry records and immunized Crown servants from any administrative, civil or criminal proceedings with respect to the destruction of such records (background: "Access to information: Freedom of expression and the rule of law" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_2.aspx)).

On the same day she tabled her special report, the Commissioner, with the consent of the complainant, also applied to the Federal Court for a judicial review of the Minister's refusal to process these additional long-gun registry records. As part of these proceedings, the Commissioner succeeded in obtaining a court order directing the Minister of Public Safety and the **Commissioner of the RCMP** to deliver the hard drive containing the remaining long-gun registry records to the Federal Court Registry. This order has been complied with.

On June 22, 2015, the Commissioner and the complainant filed an application in the Ontario Superior Court of Justice challenging the amendments to the ELRA enacted by Bill C-59, on the grounds that these amendments unjustifiably infringe the right of freedom of expression protected in section 2(b) of the *Canadian Charter of Rights* and Freedoms and that, in their retroactive effects, they contravene the rule of law.

In July 2015, the Federal Court proceedings were stayed pending the outcome of the constitutional challenge currently before the Ontario Superior Court.

The Ontario Superior Court proceedings are currently under the supervision of a case management judge and the parties have agreed to a timetable to complete essential steps in preparing this litigation. As part of this process, several parties have made motions to intervene in these proceedings. These include not only a joint motion made by the Information and Privacy Commissioners of Ontario, Alberta, British Columbia, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Quebec, Prince Edward Island, Saskatchewan, the Yukon and the Manitoba Ombudsman, but also motions by the Canadian Civil Liberties Association, the Centre for Law and Democracy and the Criminal Lawyers' Association. At the time of writing, these motions are currently before the Court.

On March 4, 2016, the current Minister of Public Safety sought the Commissioner's consent to suspend the Ontario Superior Court proceedings in order to discuss settling this litigation, as well as the associated judicial review application in Federal Court. The Commissioner and the complainant, the applicants in the proceedings before the Ontario Superior Court, consented to suspend the case management timetable pending negotiations. These negotiations are aimed at resolving all outstanding litigation related to the complainant's underlying access request for long-gun registry records.

### ACCESS TO INFORMATION: SENATORS' EXPENSES

*The Information Commissioner of Canada v. The Prime Minister of Canada,* (T-1535-15)
Background, "Disclosing only meaningless information" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_2.aspx#24)

On September 11, 2015, the Commissioner filed an application for judicial review with the consent of the requester. This litigation is in relation to an access to information request for "any records created between March 26, 2013 to present (August 22, 2013) related to Senators Mike Duffy, Mac Harb, Patrick Brazeau and/or Pamela Wallin."

The application was commenced following the completion of the Commissioner's investigation in July 2015 into the requester's complaint that the **Privy Council Office** (PCO) had improperly applied exemptions under the Act to the 27 pages of records at issue.

Over the course of the Commissioner's investigation, PCO relied on the exemptions found at subsection 19(1) ("personal information"), paragraph 21(1)(a) ("advice and recommendations"), and section 23 ("solicitor-client privilege") of the Act.

At the conclusion of her investigation, the Commissioner found that PCO had failed to satisfy its onus of establishing that these exemptions applied. As a result, the Commissioner concluded that the complaint was well-founded and recommended to the Prime Minister at that time, the Right Honourable Stephen Harper, as head of PCO, that significant additional disclosure should be provided.

The Prime Minister did not follow the Commissioner's recommendation and instead informed the Commissioner that only a small portion of the information recommended for disclosure would be released, which included the following types of information that had been previously redacted:

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

PCO continued to refuse all disclosure of the substance of the records.

The Commissioner's application challenges the Prime Minister's decision to refuse to disclose the responsive records based on the claimed exemptions for personal information, advice and recommendations and solicitor-client privilege. The Commissioner maintains that the Prime Minister erred in relying on these exemptions when refusing access to the requested information.

With respect to the section 19 exemption, the Commissioner asserts that information exempted as personal information constitutes a discretionary benefit of a financial nature, which is an exception to the definition of personal information pursuant to paragraph 3(l) of the *Privacy Act*.

The Commissioner also maintains that the alleged personal information should be disclosed as the public interest in disclosure outweighs any invasion of privacy.

In terms of the application of the exemption for advice and recommendations, the Commissioner argues that the information does not, in fact, constitute advice or recommendations.

With respect to section 23, the Commissioner maintains that some of the information exempted as solicitor-client privilege does not constitute legal advice privilege and therefore should not be exempted from disclosure under that section.

Finally, as sections 21 and 23 are discretionary exemptions, the Commissioner takes the position that the discretion to refuse access based on these exemptions was not exercised in a reasonable manner.

This case is ongoing.

### WITHHOLDING MINUTES OF A PUBLIC BOARD

*The Information Commissioner of Canada v. Toronto Port Authority* (T-1453-14) Background, "The Information Commissioner filed an application for judicial review in *Information Commissioner of Canada v. Toronto Port Authority* (http://www.oic-ci.gc.ca/eng/les-grands-titres_top-stories_9.aspx)" & "Withholding minutes of a public board" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_4.aspx#1.5)

In June 2014, the Commissioner initiated a judicial review of the **Toronto Port Authority**'s refusal to disclose large portions of the minutes of a 2008 meeting of its audit committee. The institution maintained that releasing the minutes would harm the organization and reveal confidential third-party information. As a result, sections 18 and 20 applied to withhold the minutes. The Commissioner disagreed.

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

Before the Federal Court, the institution claimed that section 21 (advice and recommendations to government) applied to the minutes. At issue, also, is whether the Toronto Port Authority can rely on an exemption claimed post the Commissioner's investigation.

The hearing took place on October 19, 2015 and the parties await a decision.

## Complainant-initiated proceedings

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

### RAISING MANDATORY EXEMPTIONS AFTER THE COMMISSIONER'S INVESTIGATION IS COMPLETE

*James Paul in his Capacity as President of Canada Defence Construction (1951) Limited and the Attorney General of Canada v. UCANU Manufacturing Corporation,* (A-414-15)

This litigation relates to an access to information request made by the President of UCANU Manufacturing Corporation (UCANU) in July 2012 for information relating to a contract between the Respondent, **Defence Construction Canada** (DCC), and a third party construction and engineering group involved in a public procurement process for construction of a maintenance hangar in Trenton, Ontario.

In September 2012, DCC provided UCANU with access to approximately 3,650 pages in response to the request. Remaining documents, however, would not be released until third party consultations were completed with the other construction and engineering group as required under sections 27 and 29 of the Act.

In November 2012, after consulting with the third party, DCC released 17 additional pages to UCANU, with information exempted under subsection 19(1) (personal information) and paragraph 20(1)(b) (confidential commercial information of a third-party).

The requester complained about the application of these exemptions to the Commissioner, who began an investigation and determined that the exemptions

were not correctly applied in some instances. As a result, DCC reconsidered its position and provided UCANU with further disclosures. In light of DCC's further releases, the Commissioner issued her investigation report in February 2014, concluding that DCC had properly applied the exemptions under sections 19 and 20.

After the conclusion of the Commissioner's investigation, UCANU filed an application for judicial review before the Federal Court.

UCANU challenged the following remaining redactions:

- **a covering letter and portions of a joint venture agreement** amongst the constituents of the third party construction and engineering group;
- **the signatures of employees** of the third party construction and engineering group who signed the Joint Venture Agreement;
- **the name and signature of a witness** to the Tender Form signed by the third party construction and engineering group and submitted in the course of DCC's tender process for the contract for construction of a maintenance hangar.

The Commissioner did not seek leave to be an added party in this review before the Federal Court.

The Federal Court issued its decision in August 2015 *(UCANU Manufacturing Corp. v. Defence Construction Canada,* 2015 FC 1001). The Court agreed with the Commissioner's finding that DCC was authorized to refuse to disclose the name and signatures at issue as personal information. The Court also found that the institution's exercise of discretion not to disclose any of the personal information was reasonable. The parties had only learned that two of the employee signatures were publicly available after the review application before the Federal Court had been filed.

Differing from the Commissioner's investigation findings, the Court found that the test for confidentiality under paragraph 20(1)(b) had not been met due to a lack of evidence. Therefore, DCC was ordered to disclose the contents of the joint venture agreement and the covering letter.

*Mandatory exemption raised by DCC post-investigation*

In addition to hearing arguments with respect to sections 19 and 20 of the Act, the Court was also asked to address a new argument that was raised by DCC five days before the hearing. DCC wanted to raise an additional exemption under section 24 of the Act that incorporates by reference section 30 of the *Defence Production Act* (DPA). Section 30 of the DPA mandates that no information with respect to an individual business that has been obtained under or by virtue of the DPA shall be disclosed without the consent of the person carrying on that business. If validly raised, the exemption would serve to withhold all the documents at issue.

Based on the current state of the jurisprudence, the Court concluded that DCC was not entitled to rely on the additional statutory exemption.

On September 23, 2015, the government filed a Notice of Appeal of the Federal Court's decision. In its appeal, the sole issue raised was that the judge erred in refusing to allow DCC to rely on the mandatory exemption before the Federal Court.

The Court of Appeal has granted the Commissioner intervener status in these proceedings.

The Commissioner's arguments before the Court of Appeal set out the broader implications of this case for requesters, the role of the Information Commissioner under the Act, and the access to information regime.

While the Commissioner recognizes that there may be instances where it is appropriate for the Court to consider an additional **mandatory** exemption raised post-investigation, this should only be allowed in exceptional circumstances.

As a general rule, the Commissioner argues that all exemptions to the right of access relied upon by institutions must be raised prior to the completion of her investigation. Permitting institutions to raise exemptions after her investigation, as a matter of

course, opens the door to abuse, denies requesters the right to know the full bases for an institution's refusal of access, obviates the intended role of the Commissioner as the first level of review as set out under the Act and denies requesters the benefit, at the discretion of the Commissioner, of the Commissioner appearing in Court in their stead or as a supporting party.

To assist the Court, the Commissioner offered the following framework to assess circumstances where an institution should be permitted to raise additional mandatory exemptions post-investigation:

1) Could the government institution have reasonably raised the mandatory exemption sooner, for example:
    a) in the notice to the requester under subsection 10(1) of the Act where access was initially refused;
    b) at any time during the Information Commissioner's investigation;
    c) at the earliest possible occasion in the court proceedings.

2) What is the underlying interest that the mandatory exemption seeks to protect and what are the consequences of disclosing the records at issue?

3) What is the prejudice to the requester and their access rights if the new exemption is considered at that stage of the proceedings?

4) Will allowing new issues to be raised at that stage of the proceedings unduly delay the hearing of the application and consequently, access to information for the requester?

5) Is it in the interests of justice to allow the exemption to be raised?

Based on this framework, the Commissioner submitted that DCC did not meet any of the criteria that would justify raising the additional exemption.

Finally, with respect to the mandatory exemption at issue, the Commissioner argued that, in any event, DCC did not provide sufficient evidence to meet its burden that the exemption applies.

The Respondent, UCANU has not participated in the appeal. The parties await a hearing date.

## Third-party-initiated proceedings

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

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

Intervening in third-party-initiated proceedings is an integral part of the Commissioner's oversight function. In a recent order from the Federal Court granting the Commissioner leave to be added as a party in a third-party initiated proceeding, Justice Russell commented on the value the Commissioner adds to these proceedings: "the Commissioner's knowledge and background of the statute [the *Access to Information Act*], its jurisprudence and the legal issue in this case will be extremely helpful to the Court in dealing with this dispute." (*Porter Airlines Inc. v. the Information Commissioner of Canada* (23 March 2016), T-1491-15).

In 2015–2016, 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.

### PERSONAL INFORMATION OF PRIVATE SECTOR EMPLOYEES

*Husky Oil Operations Limited v. Canada-Newfoundland Offshore Petroleum Board*, (T-1944-15)
On November 18, 2015 Husky Oil filed a Notice

of Application in which it opposed the **Canada–Newfoundland and Labrador Offshore Petroleum Board**'s release of requested records claiming that the records contain the personal information of its employees and should therefore be exempted under section 19 of the Act. Husky's Notice of Application however, neither reproduces the access request nor does it describe what the requested records otherwise relate to. The Commissioner was added as a party to this proceeding and the case is ongoing.

Note that this same issue is currently being appealed before the Federal Court of Appeal in *Husky Oil Operations Limited v. Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2016 FC 117 (see "Personal information of private sector employees (2)" on p. 39).

### REVERSING THE BURDEN IN THIRD PARTY APPLICATIONS

*Apotex Inc. v. Minister of Health, et al.*, (T-1511-15, T-1782-15, and T-1783-15)

On September 8, 2015 and October 22, 2015, Apotex filed a total of three applications before the Federal Court for judicial review of **Health Canada**'s decision to release records in response to three access to information requests. The records at issue all relate to a New Drug Submission by Apotex to Health Canada. Apotex objects to the release of the records on the basis that they contain confidential information and should be exempted under subsection 20(1) of the Act.

After filing its initial application, Apotex also wrote to the Court stating that it was considering bringing a motion to reverse the usual order of the presentation of evidence in a section 44 judicial review. This reversal would require the Respondent, Health Canada, to be the first party to file its affidavit materials instead of Apotex, the Applicant. Concerned that this potential reversal of order could serve to transfer the burden of proof from Apotex, the party objecting to disclosure, to the government institution, the Commissioner sought leave to be an added party to all three proceedings on February 29, 2016. Apotex opposed the Commissioner's motion.

On April 4, 2016, the Court granted the Commissioner added party status in the proceedings. Apotex is appealing the order that granted the Commissioner this status.

The case is ongoing.

### AIRLINE SAFETY MANAGEMENT SYSTEMS (1)

*Porter Airlines Inc. v. Attorney General,* (T-1491-15) Background on related Federal Court case, "*Porter Airlines Inc. v. Attorney General* (T-1768-11)" (http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2011-2012_7.aspx#11) & "Third-Party Information (2)" (http://www.oic-ci.gc.ca/eng/annual-reports-rapports-annuel_2012-2013_7.aspx#third)

On September 4, 2015, Porter Airlines filed an application challenging **Transport Canada**'s decision to release certain records concerning Porter's safety management system. Porter claims that the records should be withheld under section 20 of the Act.

These same records were the subject of a previous judicial review application commenced by Porter in 2011. In *Porter Airlines Inc. v. Canada (Attorney General)*, 2013 FC 780, the Court held that a third decision of Transport Canada relating to the release of records was void and of no effect as Transport Canada was not authorized to make that decision outside of the process established under sections 27 to 29 of the Act. The Court affirmed the principle that a government institution can only change its initial position on disclosure upon two triggering events: either on receiving the Information Commissioner's recommendation to disclose records that the institution had originally decided were exempt from disclosure or when before the Court after the commencement of a section 44 review. Following the Court's decision, Transport Canada released a severed version of the records to the requester on September 5, 2013, in accordance with the institution's original decision on disclosure.

Those records became the subject of an investigation by the Information Commissioner. On September 16, 2013, the requester complained

to the Commissioner regarding Transport Canada's release. In 2015, the Commissioner provided to Transport Canada her findings and recommendations. The decision to disclose further records that is the subject of this judicial review application was made by Transport Canada following receipt of the Information Commissioner's report.

On March 23, 2016, the Commissioner was added as a party to the current judicial review proceeding. In granting the Commissioner's motion to be added as a party, the Court noted that there are no time-limits under paragraph 42(1)(c), therefore granting the Commissioner party status at that stage in the proceedings could not be said to be contrary to the Act.

The case is ongoing.

### AIRLINE SAFETY MANAGEMENT SYSTEMS (2)

*Porter Airlines Inc. v. Attorney General*, (T-1296-15) Background on related Federal Court case, "Airline safety management systems (1)" & *Porter Airlines Inc. v. Attorney General of Canada et al.*, 2013 FC 780 (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2013-2014.aspx)

Porter Airlines filed an application for judicial review in August 4, 2015, asking the Federal Court to set aside a decision by **Transport Canada** to release information relating to its safety management systems.

Porter is taking the position that some portions of these records must not be disclosed pursuant to section 20 of the Act. Porter further proposes that portions of the records can be severed from the exempted records and released, pursuant to section 25 of the Act.

On February 24, 2016, the Commissioner received notice from Transport Canada that it had notified the requester of a change in its position on disclosure. Where Transport Canada had previously believed some portions of the records could be disclosed, the institution now intends to take a new position before the Court that those portions should not be disclosed pursuant to section 20 of the Act. This change of position was taken pursuant to the procedure set out by the Court in *Porter Airlines Inc. v. Canada (Attorney General)*, 2013 FC 780.

On March 11, 2016, the Commissioner brought a motion to be added as a party to the proceedings. The Federal Court granted the Commissioner's motion, which was unopposed, on April 4, 2016.

The case is ongoing.

## Intervention before the Supreme Court of Canada

The Commissioner closely monitors all cases with potential ramifications on the right of access to information and may seek leave to intervene in proceedings with potential impact on that right.

### APPEAL BEFORE THE SUPREME COURT OF CANADA TO DECIDE IF ALBERTA'S INFORMATION AND PRIVACY COMMISSIONER CAN REVIEW RECORDS TO WHICH SOLICITOR-CLIENT PRIVILEGE APPLIES

*Information and Privacy Commissioner of Alberta v. The Board of Governors of the University of Calgary,* (SCC 36460)

The Commissioner intervened in 2015–2016 in an appeal before the Supreme Court of Canada that is of great importance for access to information across Canada. The appeal is of a decision of the Alberta Court of Appeal which found that the Alberta Information and Privacy Commissioner could not review records in which solicitor-client privilege was claimed.

The litigation relates to a request made under Alberta's *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the University of Calgary for records concerning the requester. The University disclosed some records, but refused to disclose other records on the basis of solicitor-client privilege. The individual then filed a complaint to the Information and Privacy Commissioner of Alberta.

During the investigation of the complaint, the Alberta Commissioner's delegate noted that the

University had not yet provided sufficient evidence to allow him to make a determination on the applicability of the claim of privilege. Under Alberta's FOIP Act, the Alberta Commissioner may, when investigating complaints, require public bodies to produce records "[d]espite any other enactment or any privilege under the law of evidence." The delegate therefore issued a notice to the University to produce the records at issue. The University refused to comply with the notice and contested the Alberta Commissioner's authority to issue such a notice in the Alberta Court of Queen's Bench.

While the lower court upheld the Commissioner's order, the Alberta Court of Appeal thereafter found that the Commissioner's empowering provision was not sufficiently explicit to include records over which solicitor-client privilege was claimed, and therefore quashed the notice to produce.

On October 29, 2015, the Alberta Commissioner was granted leave to appeal this decision to the Supreme Court of Canada.

Information and privacy commissioners throughout Canada successfully sought to intervene in this appeal. The Information Commissioner of Canada and the Privacy Commissioner of Canada led a group of information and privacy commissioners as joint interveners before the Supreme Court of Canada in this case. All of these commissioners' statutes contain substantially similar provisions that set out their investigative powers to require production of records during their investigations in order to verify claims of exemptions. The information and privacy commissioners argued that the Court should consider these similar provisions, and that regardless of the approach to statutory interpretation that is applied, the phrases in the commissioners' statutes are sufficiently explicit to enable them to require production of records over which solicitor-client privilege is claimed as a basis for refusing disclosure to requesters.

The hearing took place on April 1, 2016 and the parties await a decision.

# Decisions

The following decisions were rendered in 2015–2016 in matters related to access to information.

## COMMISSIONER-INITIATED PROCEEDINGS

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

*Information Commissioner of Canada v. Minister of Transport Canada,* 2016 FC 448
Background, "Injury to international affairs"(http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2013-2014_5.aspx#20) & "Number of individuals on Canada's "no-fly list" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_4.aspx#no-fly)

See p. 13, "Federal Court decision on disclosure of number of individuals on Canada's 'no-fly list."

### Limiting the application of solicitor-client privilege

*Information Commissioner of Canada v. Minister of Employment and Social Development*, 2016 FC 36

In November 2015, the Commissioner applied for judicial review of **Employment and Social Development Canada**'s (ESDC) refusal under section 23 to release portions of a discussion Paper dating from some 25 years ago that responded to a request about the application rate by former spouses for a Division of Unadjusted Pensionable Earnings (DUPE) under the Canada Pension Plan. The record was titled "Erroneous Advice Discussion Paper" and it reviewed the development of DUPE and possible governmental actions including numerous options.

ESDC initially refused to disclose the discussion paper, claiming that the entire record was subject to solicitor-client privilege. During the course of the Commissioner's investigation, ESDC agreed to sever and disclose parts of the record.

The Commissioner was of the view that ESDC was still withholding information which did not fall within the scope of solicitor-client privilege, and therefore recommended that ESDC release further

parts of the discussion paper. ESDC accepted the recommendation in part, but maintained the claim of privilege over other parts of the record that the Commissioner had recommended be disclosed.

As a result, the Commissioner made an application for review to the Federal Court. The Court was asked to review the applicability of solicitor-client privilege to specific parts of the discussion paper.

The Federal Court released its public reasons for judgment in January 2016. It found that the implications of one of the options discussed constituted policy advice stemming from legal opinions received by ESDC. As the court was of the view that disclosing this portion of the record would provide clues about privileged communications, it determined that this part of the paper was subject to solicitor-client privilege. In relation to the summary section, the Court found that disclosing this part of the record would not reveal any privileged information or give any clues on such information and ordered that it be disclosed. For various other segments, the Court found that four of the five segments at issue were not subject to privilege and ordered that they be disclosed.

The Court also found that the evidence was sufficient to satisfy it that ESDC had exercised its discretion in a reasonable manner in refusing to disclose the parts which were privileged.

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

## THIRD-PARTY-INITIATED PROCEEDINGS

### Personal information of private sector employees (1)

*Suncor Energy Inc. v. Canada–Newfoundland and Labrador Offshore Petroleum Board et al.*, 2016 FC 168
Background, "Personal information of private sector employees (1)"(http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_4.aspx#26)

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

On July 10, 2014, the Court granted the Commissioner added party status in the proceedings. The Commissioner took the position that the Board reasonably exercised its discretion under paragraph 19(2)(b) of the Act in disclosing the names and business contact information of employees whose affiliation with Suncor was publicly available on the Internet.

A hearing took place before the Federal Court on August 13, 2015 in St. John's, Newfoundland and Labrador. On February 9, 2016 the Federal Court issued its confidential reasons for decision (*Suncor I*). Public reasons were released on April 5, 2016.

The Court found that the Board had reasonably exercised its discretion in deciding to disclose the names of three Suncor's employees, their phone numbers and business titles under subsection 19(2) of the Act because their association with Suncor was in the public domain at the time that the access request was made through their profiles posted on LinkedIn, a social media network targeting professionals. Therefore, there was no basis to withhold the business contact information of those three employees under subsection 19(1). However, the Court ordered that the name, telephone number and fax number of other Suncor employees, whose affiliation with the company were not in the public domain, be redacted under subsection 19(1) because they constituted "personal information" and were protected from disclosure.

The Court also found that Suncor had not demonstrated that the records should be withheld under paragraph 20(1)(b) of the Act because they contained confidential financial, commercial, scientific, or technical information. Nor had Suncor established, under paragraph 20(1)(d), that the records should be withheld because they contained information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations.

The Court also confirmed that the Act is paramount to the *Canada-Newfoundland Atlantic Accord*

*Implementation Act* (the *Accord Act*), finding that the *Accord Act* takes precedence only over other legislation that applies to offshore areas of the province of Newfoundland and Labrador and the regulation of those offshore areas. The Court went on to determine that Suncor could not claim the limited privilege provided by subsection 119(2) of the *Accord Act* against the disclosure of geological and geophysical reports that were responsive to the access request. The Court found that Suncor had not shown that it had met the statutory criteria set out under subsection 119(2) for entitlement to the privilege against disclosure of the requested information.

On March 10, 2016, Suncor appealed the decision to the Federal Court of Appeal. The Commissioner remains an added party to the appeal proceeding.

Suncor has filed two additional Notices of Application for judicial review of decisions of the Board to release personal information of Suncor employees in response to other access to information requests (T-1257-15 and T-562-16). The Commissioner has not yet sought party status to either of these proceedings. The Court granted a stay in both of these proceedings until a final determination in *Suncor Energy Inc. v. Canada–Newfoundland and Labrador Offshore Petroleum Board*.

### Personal information of private sector employees (2)

*Husky Oil Operations Limited v. Canada-Newfoundland and Labrador Offshore Petroleum Board,* 2016 FC 117
Background, "Personal information of private sector employees (2)" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_4.aspx#27)

In June 2014, Husky Oil filed an application for judicial review asking the Federal Court to set aside a decision by the **Canada–Newfoundland and Labrador Offshore Petroleum Board** ("the Board") to release the names and business titles of two Husky employees because those names and titles were publicly available on the Internet. Husky claimed that subsection 19(1) of the Act applied to withhold disclosure of those names and titles. The requested records related to Husky's request for geophysical reports and related correspondence between the Board and Husky employees.

The Commissioner was added as a party to the proceeding on July 10, 2014. The case was heard on November 10, 2015 before the Federal Court in St. John's, Newfoundland and Labrador.

The Federal Court issued its decision on February 2, 2016.

The parties agreed that Husky's employees' names and position at Husky were publicly available in Zoominfo, an Internet database of business contacts, at the time that the access request was made. The Court determined that Husky had not advanced any evidence or analysis as to why the Board should not release the information. Accordingly, the Court found that the Board had the discretion to disclose the records under subsection 19(2) of the Act. The Court dismissed the judicial review with costs.

On March 03, 2016, Husky appealed the decision to the Federal Court of Appeal. The Commissioner remains an added party to the appeal proceedings.

### Contract and tender information

*Recall Total Information Management Inc. v. Minister of National Revenue*, 2015 FC 848
Background, "Contract and tender information" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_4.aspx#28)

On September 29, 2015, the Federal Court issued its decision in this application, brought by the third party, Recall Total Information Management, Inc. ("Recall") to challenge the **Canada Revenue Agency**'s (CRA) decision to disclose information in a contract amendment related to Recall and the storage of CRA's tax files, which Recall considered ought to be exempt from disclosure under section 20 of the Act. The Commissioner was an added party to this proceeding.

Recall had successfully tendered for a contract relating to records management services for CRA, but it then became apparent that CRA had needs which were not addressed in the initial contract. The parties therefore agreed to a contract amendment. The information at issue in the proceeding included

the new price in the contract amendment and the amended statement of work, which included a step-by-step process to scan 2D barcodes into Recall's computer base.

In relation to the step-by-step 2D scanning process, the Court found that Recall had not shown that the information was a trade secret or that it was confidential business information to which the exemption provided by paragraph 20(1)(b) of the Act applied. However, the Court found that Recall had made out its case that disclosure of the information could reasonably be expected to prejudice its competitive position, so that the paragraph 20(1)(c) exemption applied to the information. The Court stated: "Release of certain parts of the Records would undermine Recall's position in future negotiations with CRA and others because of the advantage competitors would gain from disclosure of how Recall addressed CRA's problems. Further, release of information on the process would allow competitors (of which there is a small number – 1 or 2) to recreate the technology developed by Recall's R&D work."

In relation to the price of the contract amendment, the Court found that Recall had not shown that an exemption properly applied.

### Personnel rates for government contracts

*Calian Ltd. v. Attorney General of Canada and the Information Commissioner of Canada*, 2015 FC 1392
Background, "Personnel rates for government contracts" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_4.aspx#29)

On December 18, 2015, the Federal Court released its public reasons granting the third party, Calian Ltd.'s, application for judicial review and finding that paragraphs 20(1)(c) and (d) of the Act required that **Public Services and Procurement Canada** (PSCP) (formerly Public Works and Government Services Canada) exempt Calian's personnel rates from disclosure.

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

The Attorney General argued that the disclosure-of-information clause in the contract meant that the information must be disclosed to the requester. The Commissioner agreed with the Attorney General, arguing that the claims of harm set out in paragraphs 20(1)(c) and (d) were not sufficiently substantiated.

The Federal Court found that Calian met the requirements of the exemptions found at paragraphs 20(1)(c) and (d) of the Act. The Court noted that the personnel rates were "the most significant factor" in Calian's successful bid and crucial to its competitive position. Emphasis was also placed on what the Court characterized as the history of dealings between Calian and the government. In the past, the relevant government institution had refused to disclose information analogous to the personnel rates at issue.

Ultimately, the Court was not persuaded that the disclosure clause relied on by PSCP and the Attorney General provided consent to disclose the personnel rates. The Court arrived at this conclusion based on what it found to be uncontradicted evidence by Calian's Vice President that Calian had no reason to believe the disclosure clause gave consent to release its personnel rates. Furthermore, given the history of dealings wherein previous analogous disclosure clauses were not relied on to release similar rate information, the Court concluded that Calian's evidence was credible and reliable.

The Court ordered that the decision to disclose be remitted to PSCP for re-determination in light of subsection 20(5) of the Act, which states that the government institution may disclose any information falling under subsection 20(1) with the consent of the third party.

The Attorney General and the Commissioner have appealed the Federal Court decision to the Federal Court of Appeal. The case is proceeding and a hearing date for this matter has not yet been set.

### Commercial correspondence not warranting third party protection

*Brewster Inc. v. The Minister of the Environment as the Minister for Parks Canada and the Attorney General of Canada and the Information Commissioner of Canada*, 2016 FC 339

Background, "Breach of procedural fairness" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_4.aspx#30)

On March 21, 2016, the Federal Court issued its decision in this application, brought by the third party, Brewster Inc., for a review of the decision by **Parks Canada** to disclose certain communications related to the proposal and approval process for Brewster's Glacier Discovery Walk in Jasper National Park.

Brewster claimed in its application that the communications should be exempted under paragraphs 20(1)(b), (c), and (d) of the Act. The Commissioner, who was an added party to these proceedings, opposed the application of these sections.

The Federal Court agreed that the third party exemption should not be applied to the records at issue. With respect to paragraph 20(1)(b), the Court expressed that it was "too broad an argument" to characterize the records, which were primarily correspondence, as commercial just because the third party was engaged in a proposed commercial enterprise with Parks Canada. Administrative details, in the Courts view, were not the type of information contemplated by paragraph 20(1)(b). Nor had Brewster demonstrated that the information was treated as confidential, a key factor to establishing protection under paragraph 20(1)(b).

Under paragraph 20(1)(c), the Court found that Brewster was unable to demonstrate that there was a reasonable expectation of probable harm if the information were to be released. The information at issue dealt primarily with scheduling meetings and other related logistics.

Lastly, under paragraph 20(1)(d), the Court found that Brewster had provided no evidence of actual contract negotiations that could be harmed by disclosure, and noted that "mere assertions of fears [were] insufficient" to establish such harm. As such, 20(1)(d) could not be applied.

In the end, the Court was of the view that only section 19, the exemption for personal information, could be applied to protect names and email addresses in the responsive records. The Commissioner had identified this information as potentially requiring protection.

# CHAPTER 4 - Advising Parliament

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

## Special report to Parliament: Investigation into an access to information request for the Long-gun Registry

On May 7, 2015, Bill C-59, the Economic Action Plan 2015 Act, No. 1 was introduced in Parliament. Included in this bill were retroactive amendments to the *Ending the Long-gun Registry Act* (ELRA). (Background: "Access to information: Freedom of expression and the rule of law" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_2.aspx)).

On May 14, 2015, the Commissioner tabled in Parliament her special report on her investigation into the treatment by the Royal Canadian Mounted Police (RCMP) of an access to information request for the data in the national long-gun registry.

On June 2, 2015, the Commissioner appeared before the House of Commons Standing Committee on Finance as part of its study of Bill C-59 to discuss the division of the bill that amended the ELRA.

The following day, June 3, 2015, the Commissioner appeared before the Standing Senate Committee on National Finance to discuss the same division of Bill C-59. Representatives from the RCMP also appeared on the same issue.

At both of these appearances, the Commissioner voiced her serious concerns with the division of Bill C-59 that amended the ELRA. She advised the committees about the implications of passing this legislation without amendment, warning that, if passed, this legislation would retroactively quash Canadians' right of access and the government's obligations under the *Access to Information Act*.

Bill C-59 was passed on June 23, 2015 without amendment (for more details, see p. 29, "Access to long-gun registry information and challenge to the constitutionality of the *Ending the Long-gun Registry Act*").

## Main Estimates

On May 25, 2015, the Commissioner appeared before the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI) to discuss the Main Estimates for the Office of the Information Commissioner of Canada for 2015–2016. The Main Estimates are a summary of the estimated financial requirements for a federal department or agency in a particular expenditure category.

During this appearance, the Commissioner discussed her budget and priorities, and expressed concern that, in the face of a growing workload, her current funding level was having an impact on her ability to carry out her mandate and to face contingencies. She had voiced similar concerns before this same committee in May and December 2014.

The Committee's vote for the program expenditure of the Office of the Information Commissioner of Canada was agreed to on division.

## Access to Information, Privacy and Ethics committee: Setting priorities

In February 23, 2016, the Commissioner was invited to appear at a briefing session before the newly constituted ETHI committee, alongside three of her fellow agents of Parliament that report to

this same committee (the Privacy, Lobbying, and Conflict of Interest and Ethics commissioners). Each commissioner was asked to identify priorities for the Committee to study going forward.

The Information Commissioner's recommendation to the Committee was to give priority to the modernization of the *Access to Information Act*. She advocated that the Act needs to be amended so that it strikes the right balance between the public's right to know and the government's need to protect limited and specific information.

The Committee decided to undertake a study of the *Access to Information Act*.

## Parliamentary study of the *Access to Information Act*

On February 25, 2016, the ETHI committee commenced its study of the *Access to Information Act*. The Information Commissioner was the first witness to appear as part of the Committee's study. During this appearance the Commissioner discussed her special report *Striking the Right Balance for Transparency: Recommendations to modernize the Access to Information Act* (http://www.oic-ci.gc.ca/eng/rapport-de-modernisation-modernization-report.aspx).

On March 22, 2016, the Commissioner also made a further written submission to the Committee, at their request, to elaborate on her recommendation that the Act include criteria for determining which institutions should be subject to the Act (http://www.oic-ci.gc.ca/eng/suivi-comparution-devant-ETHI-2016-02-25-ETHI-appearance-follow-up_6.aspx).

As part of its study, the Committee has subsequently met with some provincial commissioners, representatives from government and other stakeholders. The Commissioner has also been invited to appear before the Committee for a second time on May 19, 2016.

The Committee intends to table its report before the House of Commons recesses for the summer.

## Other parliamentary activities

### LIBRARY OF PARLIAMENT SEMINAR

On May 29, 2015, the Commissioner gave a seminar at the Library of Parliament on her special report *Striking the Right Balance for Transparency: Recommendations to modernize the Access to Information Act*. Parliamentarians and their employees were invited to attend, as were employees of the Senate and the House of Commons and the Library of Parliament.

The Commissioner's presentation documented the multiple challenges and deficiencies with the *Access to Information Act*. She gave a high level summary of the 85 recommendations she made in her report to modernize the Act.

### ORIENTATION FOR NEW MEMBERS OF PARLIAMENT ON THE AGENTS OF PARLIAMENT

As a result of the October 19, 2015 election, approximately 200 individuals were elected to the House of Commons who had never served as members of Parliament (MPs) before. In light of this large cohort of new MPs, the Commissioner proposed to the Library of Parliament that it consider providing the new MPs a seminar focused on the agents of Parliament during their orientation. The Library agreed and invited the Commissioner and her fellow agents of Parliament to give a panel discussion to the new MPs on February 19, 2016.

### LUNCHEON WITH THE SPEAKER OF THE HOUSE OF COMMONS

On February 25, 2016, the Commissioner had the pleasure to attend a luncheon with the Speaker of the House of Commons, the Honourable Geoff Regan, alongside her fellow agents of Parliament.

# CHAPTER 5 - Protecting and promoting access

The Commissioner works to protect and promote access to information rights. In addition to investigations, she does so through a number of other activities.

## Collaborating with federal, provincial and territorial commissioners

Information and privacy commissioners at the federal, provincial and territorial levels from across Canada regularly discuss common and pressing issues, particularly as they relate to upholding the fundamental right of access to government information.

In October 2015, the commissioners convened in Edmonton for their annual federal, provincial and territorial conference. Topics of discussion this year included legislative reform, collaborative community initiatives, and investigation challenges.

The conference allows the commissioners to share best practices, exchange information and prepare joint resolutions on information rights of particular importance for Canadians.

### 2015 Grace-Pépin award recipients

The Grace-Pépin award was granted to two recipients in 2015: Ken Rubin and the Truth and Reconciliation Commission of Canada (TRC).

Ken Rubin is a longstanding advocate for openness and transparency in government. Over the past several decades, his work in access to information has brought to light numerous issues of significance to Canadians.

The Truth and Reconciliation Commission released its final report on the tragedy of indigenous residential schools in Canada in December 2015. The TRC's persistence and determination to access historical data and document the stories of survivors has laid the groundwork for a frank and open discussion about a sad chapter in the nation's history.

In announcing the award winners, the Commissioner highlighted that "[w]e received a number of very strong nominations this year, all of whom are deserving of recognition. Canada's access community is vibrant and strong, and this strength is reflected in the work of both of this year's recipients."

### JOINT RESOLUTIONS TO ADDRESS CURRENT ACCESS TO INFORMATION ISSUES

In 2015-2016, the federal, provincial and territorial commissioners released joint resolutions that addressed two areas of particular concern.

#### Repeating the call for a duty to document

The first joint resolution issued by the commissioners called on their respective governments to create a legislated duty requiring public entities to document matters related to their deliberations, actions and decisions. The commissioners further stated that this duty must be accompanied by effective oversight and enforcement provisions to ensure that Canadians'

right of access to public records remains meaningful and effective (see "Statement of the Information and Privacy Commissioners of Canada on the Duty to Document" (http://www.oic-ci.gc.ca/eng/resolution-obligation-de-documenter_resolution-duty-to-document.aspx) and "Backgrounder on A Duty to Document" (http://www.oic-ci.gc.ca/eng/resolution-obligation-de-documenter_resolution-duty-to-document.aspx)).

The commissioners underscored in their resolution that the lack of a legislated duty to document continues to produce an accountability gap in Canada's access to information and records management legislation. By not creating and retaining records, public entities can effectively avoid disclosure of documents and public scrutiny. This is because when public entities fail to document key decisions and activities, Canadians' right of access, and the accountability inherent in such access, is denied.

This is the third time the commissioners have jointly called on their respective governments to establish such a duty (see "Protect and Promote Canadians' Access and Privacy Rights in the Era of Digital Government: Resolution of Canada's Information and Privacy Ombudspersons and Commissioners" (http://www.oic-ci.gc.ca/eng/resolution-fpt-ere-du-gouvernement-numerique_fpt-resolution-era-of-digital-government.aspx) (November 14, 2014) and "Modernizing Access and Privacy Laws for the 21st Century: Resolution of Canada's Information and Privacy Commissioners and Ombudspersons" (https://www.priv.gc.ca/media/nr-c/2013/res_131009_e.asp) (October 9, 2013)).

### Respecting rights in information sharing initiatives

A second joint resolution was also issued by the commissioners calling on all levels of government to protect and promote privacy and access to information rights when embarking on information sharing initiatives aimed at improving government services (http://www.oic-ci.gc.ca/eng/resolution-echange-dinformation_information-sharing-resolution.aspx).

In the resolution, the commissioners recognized that although information sharing initiatives are intended to more easily facilitate the sharing of personal information to better serve citizens in the delivery of social programs, community safety, research, health and education, there are significant privacy and access to information implications for these initiatives.

As such, governments should be open and transparent about how information sharing initiatives will be implemented; proactively undertake assessments to help identify possible privacy risks at the outset; and implement information sharing initiatives that will share the least amount of information needed to satisfy the goals of the initiative and implement all reasonable and necessary safeguards.

## Analysis of the health of the access to information regime

In December 2015, the Commissioner published her observations on the health of the access system in 2013–2014 (http://www.oic-ci.gc.ca/eng/observations-sur-la-sante-du-systeme-d-acces-2013-2014_observations-on-the-health-of-the-access-system-2013-2014.aspx), including detailed analysis of the annual statistics on access to information operations in 27 institutions. This analysis is based on multiple sources of publicly available information.

The Commissioner undertakes this analysis for a number of reasons. First, it provides a comprehensive picture of the state of the access system. This is beneficial for the Commissioner, institutions and the Treasury Board Secretariat (TBS), which is

responsible for the administration of the Act, as it indicates how the system is performing across a representative sample of institutions. Second, this analysis allows the Commissioner to proactively identify issues. For example, she can identify if one particular institution needs to manage a surge of requests. She is in a better position to evaluate the performance of this institution, as well as being able to develop strategies to prepare for a complaint fluctuation to her office.

The Commissioner's observations for 2013–2014 found that performance among the selected institutions was volatile and varied significantly from one institution to another during this time period.

In terms of the two primary indicators the Commissioner uses to assess the overall health of the access to information system - the percentage of requests completed within 30 days and the percentage of requests for which all information was disclosed - the Commissioner found that across government, 61.0% of requests were processed within 30 days, and all information was disclosed for 26.8% of requests. However, of the 27 institutions reviewed, only three outperformed these rates (the Canadian Border Services Agency (CBSA), Library and Archives Canada and Immigration, Refugees, and Citizenship (IRCC) (formerly Citizenship and Immigration Canada)). Over half of the other institutions reviewed had below average results for the two key performance indicators.

These results indicate a gap in many instances between overall performance across government and the individual results of institutions, where overall performance was influenced by the performance of two institutions: CBSA and IRCC. These two institutions have a strong statistical impact because they account for more than half (53.8%) of completed requests.

The Commissioner also observed that most institutions that had underperformed in terms of timeliness in 2012–2013 had worsened in 2013–2014 (such as the Canadian Food Inspection Agency, Global Affairs (formerly Foreign Affairs, Trade and Development Canada), Transport Canada and the Royal Canadian Mounted Police), which further widened the gap between high and low performing institutions.

The TBS statistical report for 2014–2015 has been published. The Commissioner is currently analyzing this information, as well as institution-specific data. The results of this analysis will be published in 2016. A preliminary review indicates that the overall performance across the government has improved in terms of timeliness, while remaining at similar levels for disclosure.

## Ensuring compliance with the Commissioner's recommendations

In 2014–2015, the Commissioner completed a systemic investigation into the use, duration and volume of time extensions for consultations and the delays to respond to access requests that may have resulted (see "Delays stemming from consultations on records related to access requests" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_3.aspx#5)).

As part of that investigation, the Commissioner learned that a number of institutions had established processing standards for interdepartmental consultations, based solely on the volume of pages to review, that resulted in extensions of standard lengths being taken.

In light of this practice, the Commissioner made recommendations to the President of the Treasury Board in 2014 in his capacity as the minister responsible for the proper functioning of the access to information system. Many of these recommendations were agreed to and changes were made to the *Manual on Access to Information*.

By late 2015, the Commissioner found evidence that extensions of standard lengths were still being taken by institutions.

This practice is, on its face, contrary to the Federal Court of Appeal's decision in *Information Commissioner of Canada v. Minister of National Defence*, where it was determined that institutions "must make a serious effort to assess the required duration" of an extension and that "an effort must be made to demonstrate the link between the justification advanced and the length of the extension taken."

In order to address this on-going issue, officials of the Office of the Information Commissioner of Canada (OIC) and representatives from TBS collaborated on a solution. In the end, an email was sent to the ATIP community by TBS reminding institutions of the need to assess time extensions and time required for consultations on a case-by-case basis, taking the volume and complexity of information in relation to a specific request into account.

The Commissioner will continue to monitor complaints about this practice and will follow up with TBS and other central agencies if necessary.

## The Commissioner launches her blog

The Commissioner launched her blog, www.suzannelegault.ca, in 2015–2016 to engage directly with Canadians.

### A TIME FOR OPENNESS

> "A new year brings with it new possibilities. This year, the stars are aligning. This is the year for a renewed commitment to transparency in government. This is the year for access to information."
>
> – Information Commissioner Suzanne Legault, "A Time for Openness," February 2016

In February 2016, the Commissioner published her first blog post, "A Time for Openness" (https://suzannelegault.ca/2016/02/04/a-time-for-openness). This post traces many promising developments, both in Canada and internationally, for access to information that have occurred in the past year. These include the newly-elected Canadian government's promise to "set a higher bar for openness and transparency" and review of the *Access to Information Act*; UNESCO's vote to declare September 28, already recognised internationally as Right to Know Day, as "International Day for the Universal Access to Information"; and the designation of 2016's theme for World Press Freedom Day, which occurs on May 3, as "Access to Information and Fundamental Freedoms: This is your right!"

In light of these promising developments, the Commissioner advocates in her blog post for comprehensive reform of the *Access to Information Act* and, in so doing, calls on Canadians to become engaged and involved in Canada's democracy.

### AN OPPORTUNITY TO LEAD: DUTY TO DOCUMENT

A second blog post, "An Opportunity to Lead: Duty to Document" (https://suzannelegault.ca/2016/03/31/duty-to-document/), posted in March 2016, discusses the need for a legislated duty to document. This post reviews the technical challenges faced by governments in the "new world order of information" and how the ever-accelerating information landscape has become a real issue for creating and preserving government records.

> Recently, we've seen some high-profile examples of failure in the duty to document, whether it be the so-called "triple delete" scandal in British Columbia or the criminal charges related to gas-plants in Ontario. With ever greater frequency, I'm asked to investigate complaints about requests for records that should exist, but for some reason, do not.
>
> – Information Commissioner Suzanne Legault, "An Opportunity to Lead: Duty to Document," March 2016

The post lists how a duty to document will protect access rights, by creating official records; facilitating better governance; increasing accountability; and ensuring a historical legacy of government decisions.

In closing her post, the Commissioner notes that the technical challenges faced by the government also presents a real opportunity for government to lead by example as open and accountable.

### A NEW (OLD) WAVE OF TRANSPARENCY?

The Commissioner's third blog post, "A New (Old) Wave of Transparency?"(https://suzannelegault.ca/2016/04/29/a-new-old-wave-of-transparency/), was posted in April 2016. This blog post notes that although a "transparency wave" is currently being witnessed within the new government, this concept, and others like it, are not entirely new. Transparency and openness are foundational principles of democracy.

In her post, the Commissioner encourages all Canadians to take part in ensuring that a transformation within government occurs towards more openness.

The blog post features videos of Sweden's ambassador to Canada, Per Sjögren, and Don Lenihan, a Senior Associate at Canada 2020.

> For me, the current transparency wave that we are seeing is not something entirely new – rather, it is an attempt to restore principles that were foundational to our democracy. This new wave is part of an older wave that began a long time ago. In fact, when the Act was first drafted in 1982, there was already a presumption of openness underlying it.
>
> – Information Commissioner Suzanne Legault, "A New (Old) Wave of Transparency?", April 2016

## Other activities to protect and promote access rights

The Commissioner, as well as her senior officials, were involved in several other activities in 2015–2016 that protected and promoted access rights.

### SPEAKING EVENTS

- April 21-23, 2015: The Commissioner attended the 9th International Conference of Information Commissioners in Chile. While in Chile, she gave a presentation on her experiences balancing the right of access against the need for confidentiality. She also took part in a series of meetings with government officials and Cabinet members, and had an interview with a national newspaper.
- May 8, 2015: The Commissioner gave a speech at the Canadian Journalists for Free Expression's conference, *Flying Blind: The right to know, government obstruction, and fixing access in Canada*.
- May 12, 2015: A senior official of the OIC was part of a panel discussion on issues in access to information and privacy law for law enforcement agencies, as well as civilian oversight, at the annual Canadian Association for Civilian Oversight of Law Enforcement conference.
- May 13, 2015: The A/Assistant Commissioner gave two presentations at the Forum of Canadian Ombudsman and the Association of Canadian College and University Ombudspersons: a first on evaluations and a second on the role of the ombudsperson in a social media world.
- May 29, 2015: The Commissioner gave a seminar at the Library of Parliament on her special report *Striking the Right Balance for Transparency: Recommendations to modernize the Access to Information Act* (see p. 43 for more information).
- June 5, 2015: The Director of Legal Services and General Counsel gave a presentation at the Canadian Libraries Association Conference 2015 on modernizing the *Access to Information Act*.
- June 11-12, 2015: The Commissioner attended the Access and Privacy Conference hosted by the Information Access and Protection of Privacy program at the Faculty of Extension, University of Alberta. The theme for this year's conference was *A Bird's Eye View: An Integrated Look at Information Access and Privacy Protection* and the Commissioner gave the plenary address.
- September 29, 2015: The Commissioner gave an update on recent court cases and access to information issues at a staff retreat for the Central Agencies Portfolio of the federal government.
- October 1, 2015: The Commissioner and her Director of Legal Services and General Counsel attended the executive committee meeting of the Privacy and Access Law Section of the Canadian Bar Association and gave a presentation on the long-gun constitutional challenge.
- November 17, 2015: The Director of Legal Services and General Counsel presented a Freedom of Information webinar for Osgoode's Professional Development program at Osgoode Hall Law School, York University.
- November 23, 2015: The Commissioner met with members of the Fédération des francophones de la Colombie-Britannique and gave a presentation. The meeting was attended by representatives from organisations that are dedicated to promoting a welcoming and inclusive Francophone community in British Columbia.
- November 24, 2015: The Commissioner was a guest speaker at the Allard School of Law of the

University of British Columbia. She spoke about the role of access to information in a democratic society.

- November 26, 2015: The Commissioner and one of her legal counsel were guest speakers at a political law class at the Faculty of Law at the McGill University. The theme of the class was *Public Information: The Life-Blood of Democracy*.
- November 30, 2015: The Commissioner gave a speech at the Annual Canadian Access and Privacy Association Conference entitled *2016: The Year of Access to Information*?
- December 9, 2015: The Commissioner gave a presentation at the ATIP Community Meeting.
- February 19, 2016: The Commissioner participated in a panel with other agents of Parliament as part of the orientation for new members of Parliament (see p. 43 for more information).
- February 26, 2016: The Commissioner took part in judging the 2016 Canadian Association of Programs in Public Administration/Institute of Public Administration of Canada Case Competition.
- April 17, 2016: The Commissioner participated in a *Policy Options* podcast on *Reviewing the Federal Accountability Act*.
- April 22, 2016: The Commissioner attended a moderated Q&A, known as Freedom of Information (FOI) Friday, where she discussed the current state of the access to information regime. The Q&A was in person and online, via Google Hangouts livestream and Twitter.

## PUBLICATIONS

- July 31, 2015: The Commissioner published a discussion paper with Don Lenihan, a Senior Associate at Canada 2020, entitled *Open Government: Toward a Pan-Canadian Vision*? (http://www.ci-oic.gc.ca/eng/gouvernement-ouvert-vers-une-vision-pancanadienne_open-government-toward-a-pan-canadian-vision.aspx)
- April 21, 2016: The Commissioner published an article for *Policy Options*' special feature "The *Federal Accountability Act,* Ten Years Later" (http://policyoptions.irpp.org/magazines/april-2016/the-federal-accountability-act-and-the-access-to-information-act-long-on-promises-short-on-results/) .

## VISITS FROM INTERNATIONAL DIGNITARIES

- June 30, 215: The Commissioner met with a delegation from Nepal's National Information Commission, including Nepal's Chief Information Commissioner. Nepal was in the process of promulgating a new permanent Constitution at the time that would recognize the right of access to information. The delegation wanted to learn from Canada's experience in formulating and implementing national policies for increasing access to information and improving the right to information. In addition to giving the delegation an overview of her own work, the Commissioner also facilitated introductions with other stakeholders across Canada that the delegation could learn from.
- March 1, 2016: The Commissioner met with the Ukrainian Minister of Justice and the Head of the Coordinating Centre for Legal Aid Provision in the Ukraine. The officials from Ukraine wished to learn about Canada's legal framework surrounding freedom of information. Freedom of information legislation serves an important role in facilitating the effective provision of legal aid in the Ukraine, in particular as it relates to the protection of human rights and the legal empowerment of vulnerable and marginalized groups.

## INTERACTION WITH THE MEDIA

The Office of the Information Commissioner received 127 calls from the media in 2015–2016. Two peaks in media calls occurred during this time. The first occurred in May and June 2015. This can be attributed to activities related to the Commissioner's special report to Parliament on an investigation into an access to information request for the Long-gun Registry and subsequent constitutional challenge.

The second peak, occurring in September through November correlates to a general increased interest in access to information, beginning during the 2015 election period and into the mandate of the new government.

In addition to media calls, the Commissioner gave 23 interviews to the media in 2015–2016.

# CHAPTER 6 - Corporate services

Corporate services at the Office of the Information Commissioner of Canada (OIC) provides strategic and corporate leadership for planning and reporting, human resources and financial management, security and administrative services, internal audit and evaluation, and information management and technology.

Corporate services are essential to supporting program delivery at the OIC. The Commissioner and her corporate services team continued in 2015–2016 to ensure efficient operations and exemplary service to Canadians.

## Obtaining and promoting talent

The Commissioner has implemented, or continued to implement, several initiatives in 2015–2106 in order to obtain and promote talent within the OIC. In implementing these initiatives, the Commissioner ensures she is attracting high performing recruits to the OIC, developing leaders within the organization and providing opportunities for employees to apply specific skills.

These measures are driven in part by the changing demographics of the OIC's workforce, and the differing expectations that younger, millennial employees have within the workplace.

One of the benefits of obtaining and promoting talented employees is that the OIC will be staffed with a fully engaged, expertly trained workforce that is able to achieve investigative excellence.

### PERFORMANCE MANAGEMENT OF INVESTIGATORS

2015–2016 saw the continued implementation of a performance management model for investigators that is focused on open dialogue, with investigators proactively identifying needs for training and tools. This framework emphasizes continuous feedback in order to achieve set goals. Formal performance management processes are also put in place, with early work objectives determined, and with regular assessments built into the process. Training plans are also developed as part of the formal performance management process.

### NEW ORIENTATION GUIDE

The OIC hired new investigators in early 2016. This cohort of new investigators benefited from a new orientation guide, completed in December 2015. The purpose of this guide is to integrate new employees into the organizational culture of the OIC.

The new orientation guides provides a comprehensive overview of the OIC's structure, its organizational priorities and its code of values and ethics. It also provides information on employees' professional development, human resources information, as well as practical administrative and logistical information.

### IDENTIFYING TRAINING NEEDS

As described on p. 28, "Focus on training and procedures for investigators", several new training sessions were introduced in 2015–2016 for investigators. This is in addition to the training needs that investigators are encouraged to self-identify as part of the OIC's performance management strategy for investigators (see above, "Performance management of investigators").

Although new training initiatives focused on investigators in 2015–2016, employees in other groups at the OIC were encouraged to attend these sessions. Professional development opportunities were also made available for employees in legal services, corporate services and public affairs, in order to meet their professional designation requirements or, through an agreement with the Canada School of Public Service, to attend mandatory management training and functional expertise training.

## Shared services

Taking advantage of shared services with other organizations is an important tool for the Commissioner. It allows the OIC to rely on expertise it does not have in-house while also reducing risk and efficiently managing limited resources.

Where possible, when the OIC undertakes shared service agreements, these are developed with other agents of Parliament, whose needs are often similar.

In 2015–2016, there were several on-going projects at the OIC that took advantage of shared services. These included: the implementation of a new financial system shared with the Office of the Privacy Commissioner and hosted by the Canadian Human Rights Tribunal; a new human resources information system (MyGCHR); the adoption of the pay modernization system (Phoenix), which is administered by Public Services and Procurement Canada (PSPC); and compensation and classification services from PSCP.

The OIC has also entered into a number of shared service agreements with co-tenants. These include shared security, mailroom and library service agreements.

In addition to sharing services, the OIC has also shared its corporate expertise with other organisations. For example, in 2014–2015, the OIC finished the implementation of a new case management system. After its implementation, several organisations from the federal government and from provincial commissioners' offices came to the OIC for a demonstration of the new system and learn about its effectiveness, security and the cost-benefits it can provide.

## Security awareness and cyber security

In 2015–2016, the OIC put a renewed focus on security awareness. In November 2015, the Privy Council Office Departmental Security Officer Centre for Development gave a security awareness training session to OIC employees. To mark Security Awareness Week
(February 8 to 12, 2016), the security teams from all the tenants in the building came together to offer presentations, security exercises and workstation demonstrations. Lastly, in March 2016 the OIC security team launched a Cyber Security Awareness Resource Centre on the OIC's intranet.

### AUDIT OF THE INFORMATION TECHNOLOGY SECURITY INFRASTRUCTURE

An audit of the OIC's information technology security infrastructure was commenced in 2015–2016 and is expected to be completed in 2016. The purpose of this audit is to assess the OIC's information technology security posture.
The need for this audit was identified in the OIC's 2014–2018 Integrated Risk-Based Internal Audit and Evaluation Plan (http://www.oic-ci.gc.ca/eng/plan-integre-de-v%C3%A9rification-et-d%E2%80%99%C3%A9valuation-ax%C3%A9-sur-les-risques-2014-2018-integrated-risk-based-internal-audit-and-evaluation-plan.aspx) as part of the OIC's internal audit function. The purpose of the OIC's internal audit function is to assess and improve the effectiveness of risk management, control and governance processes at the OIC.

## Audit and evaluation

The OIC's Audit and Evaluation Committee (AEC) meets four times a year to discuss subjects such as the OIC's finances, caseload, litigation before the court, and human resources. The AEC provides the Commissioner with independent and objective

advice, guidance and recommendations on the adequacy of the OIC's control and accountability processes, as well as the use of evaluation within the OIC, in order to support management practices, decision-making and program performance.

In 2015–2016, the AEC closely monitored the financial situation of the OIC. They also held discussions on targeted efforts to foster an exceptional workplace at the OIC. Training for investigators was also broadly discussed with AEC members.

## The Office of the Information Commissioner's Open Government Implementation Plan

In 2015–2016, the Commissioner has developed the Office of the Information Commissioner's Open Government Implementation Plan (OGIP). The OGIP describes the activities and deliverables the OIC will achieve to meet the requirements of the *Directive on Open Government*. This Directive establishes an open by default position across the Government of Canada and requires institutions to maximize the release of data and information, with a goal to effect a fundamental change in government culture.

In order to maximize its impact, the OIC's OGIP was developed in an integrated manner, with input from various stakeholders across the office, including information management, information technology, access to information and privacy, and communications. The working group tasked with delivering on the activities of the OGIP will be co-chaired by representatives from information management and access to information and privacy.

The creation of the OGIP presented an opportunity for the OIC to build on its existing open government initiatives while creating new, innovative methods and activities that will benefit both the access community and Canadians.

### Proactive disclosure at the OIC

Even before the implementation of an OGIP, the OIC already proactively posted the following data and information:

- Monthly complaints data;
- Data about extension notices (section 9(2) of the Act);
- Observations on the health of the access to information regime;
- Correspondence with designated officials; and
- Submissions to parliamentary committees.

## New disposition authority with Library and Archives Canada

In November 2015, Library and Archives Canada informed the Commissioner it had issued a new disposition authorisation for her office, as well as the offices of the Lobbying, Official Languages, Privacy and Public Sector Integrity commissioners. This disposition authorisation replaced all existing institution-specific and multi-institutional disposition authorisations that were in place at the OIC at that time, with some exceptions.

The new disposition authorisation identifies records of archival value or activities that generate archival records and includes validation requirements.

The Commissioner is in compliance with her obligations under this new disposition authorisation.

## Representation on the heads of federal agencies steering committee

In 2015–2016, the Commissioner became the agents of Parliament's representative on the heads of federal agencies steering committee.

The purpose of this committee is to champion small department and agency issues with central agencies and other branches of the federal public service. The steering committee meets on a monthly basis from September to June to exchange ideas and concerns, and develop strategies to advocate for and influence on behalf of small departments and agencies concerning the development and application of government policies, standards and practices.

## Access to information and privacy

For information on the Commissioner's access to information and privacy activities in 2015–2016, consult her annual reports to Parliament on these topics on her website.

Appendix B (page 63) 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.

# CHAPTER 7 - Looking ahead

## On the horizon for investigations

### NEW TOOLS FOR COMPLAINTS AND INVESTIGATIONS

The Commissioner plans to introduce an online complaint form in 2016–2017. This will make it easier for complainants to submit material and save time at the beginning of the investigation process.

The Commissioner is also developing an investigation manual and a code of procedure to help investigators, complainants and institutions understand their and the Commissioner's roles and responsibilities during the investigation process.

### SCIENTISTS AND THE MEDIA

In March 2013, the Commissioner commenced a systemic investigation in response to a complaint made by the Environmental Law Clinic at the University of Victoria and Democracy Watch (background: "Scientists and the media" (http://www.oic-ci.gc.ca/eng/rapport-annuel-annual-report_2014-2015_7.aspx#1)). This investigation sought to determine whether government communications and media relations policies were impeding the right of access under the *Access to Information Act* by restricting government scientists from publicly communicating about their research.

This investigation is in its final phase and the Commissioner intends to report the results of this systemic investigation to Parliament 2016–2017.

### TARGETED INVESTIGATION STRATEGIES

When necessary, the Commissioner groups investigations together so she can create targeted strategies for these complaints and better manage her caseload. Next year, in addition to her ongoing targeted strategies that focus on complaints relating to national security, international affairs and defence matters, and complaints against the Canada Revenue Agency, the Commissioner will also focus on complaints against Canada Post and its use of the exemption for the economic interests of certain government institutions (section 18.1). She will also focus on the application of the exemption for personal information (section 19) relied upon by institutions in compassionate disclosure situations.

## Exceptional workplace

The Commissioner and her staff strive for investigative excellence. In 2016–2017, the Commissioner will continue to provide ongoing investigative and legal training as part of her exceptional workplace initiatives.

### DIGITAL STRATEGY

In addition to her blog, the Commissioner will continue to implement a digital strategy to further engage access stakeholders and Canadians through the use of social media and other online tools.

## Right to Know Day and celebration of 250 years of freedom of information

2016 is a milestone year for freedom of information. This year's World Press Freedom Day, which occurred on May 3, 2016, focused on freedom of information as a fundamental freedom and as a human right. September 28, 2016, which has traditionally been recognised as international Right to Know Day, has further been recognised by UNESCO as

"International Day for the Universal Access to Information." 2016 also marks the 250th anniversary of the world's first freedom of information law, which was passed in Sweden and Finland in 1766.

The Commissioner is preparing to mark the occasion. Plans are in development and will be released closer to the celebration date in the fall.

## Upcoming legislative amendments and government review of the *Access to Information Act*

On March 31, 2016, the President of the Treasury Board made two significant announcements at the Canadian Open Dialogue Forum with respects to the *Access to Information Act*.

The first was that the government plans to introduce legislation to amend the Act in the fall of 2016 or early 2017, based on the commitments in their election platform, which were further reiterated in the ministerial mandate letters. These amendments include empowering the Commissioner with the ability to order government information to be released, and that the Act applies appropriately to the Prime Minister's and ministers' offices, as well as administrative institutions that support Parliament and the courts. Other significant improvements to the Act, identified during consultations with the public and in collaboration with parliamentarians, could also be included in the legislation.

The second announcement was that the government plans on undertaking a comprehensive review of the Act in 2018.

On May 19, 2016, the Commissioner proposed to parliamentarians and the government possible amendments to include in the first phase of the modernization of the Act, to be adopted in the short term (http://www.oic-ci.gc.ca/eng/media-room-salle-media_speeches-discours_2016_6.aspx). The Commissioner looks forward to working with the government and Parliament on improving the Act.

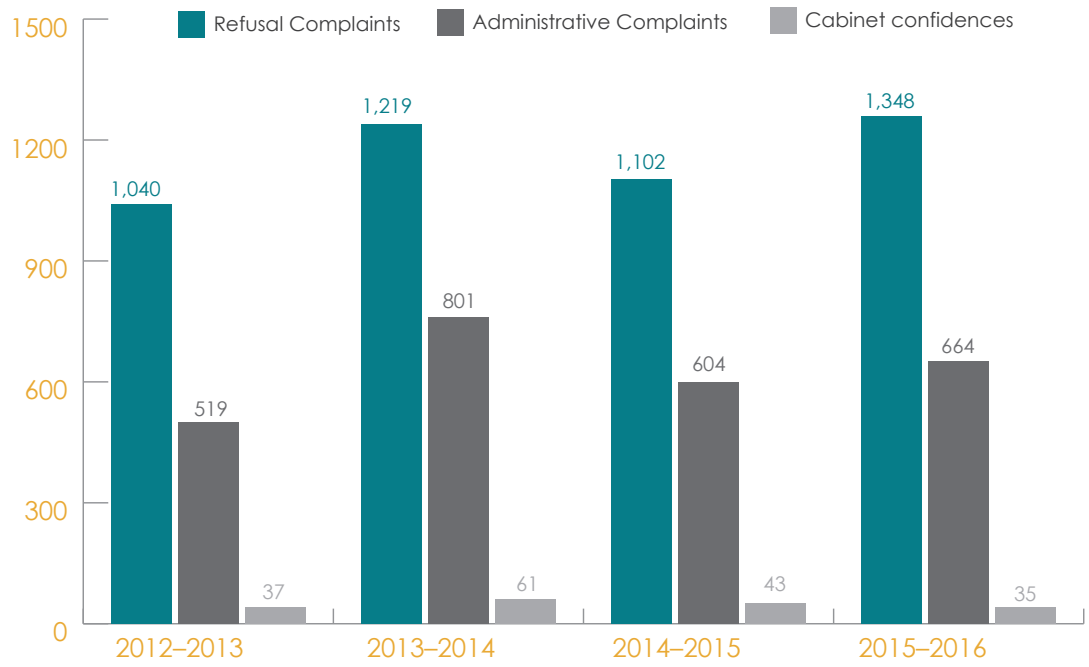
# APPENDIX A - Facts and figures

## SUMMARY OF CASELOAD, 2011–2012 TO 2015–2016

| | 2011–2012 | 2012–2013 | 2013–2014 | 2014–2015 | 2015–2016 |
|---|---|---|---|---|---|
| **Complaints carried over from previous year** | 1,853 | 1,823 | 1,798 | 2,090 | 2,234 |
| New complaints received | 1,460 | 1,579 | 2,069 | 1,738 | 2,036 |
| New Commissioner-initiated complaints* | 5 | 17 | 12 | 11 | 11 |
| **Total new complaints** | 1,465 | 1,596 | 2,081 | 1,749 | 2,047 |
| Complaints discontinued during the year | 641 | 399 | 551 | 416 | 353 |
| Complaints settled during the year | 34 | 172 | 193 | 276 | 71 |
| Complaints resolved during the year** | - | - | - | - | - |
| Complaints completed during the year with finding | 820 | 1,050 | 1,045 | 913 | 790 |
| **Total complaints closed during the year** | 1,495 | 1,621 | 1,789 | 1,605 | 1,281 |
| **Total inventory of complaints at year-end** | 1,823 | 1,798 | 2,090 | 2,234 | 3,000 |
| | | | | | |
| **Total new written inquiries** | 208 | 258 | 248 | 431 | 448 |
| **Total written inquiries closed during the year** | 186 | 263 | 236 | 235 | 633 |

*The Commissioner may launch a complaint under subsection 30(3) of the *Access to Information Act*.
** A new resolved finding was introduced in March 2016. Resolved findings are for cases of deemed refusal (delay) and extension complaints where the final response to the requester has been sent during the initial stages of the investigation. There is no need for the Commissioner to make a finding.
*** Written inquiries are correspondence received by the Office of the Information Commissioner (OIC) that may be a new complaint under the *Access to Information Act*, but require further scrutiny by the OIC's registrars to determine if they are so. For example, sometimes it must be determined if the complaint falls within the Commissioner's jurisdiction to investigate. Even when ap. written inquiry would not eventually become a complaint, a response must still be sent.

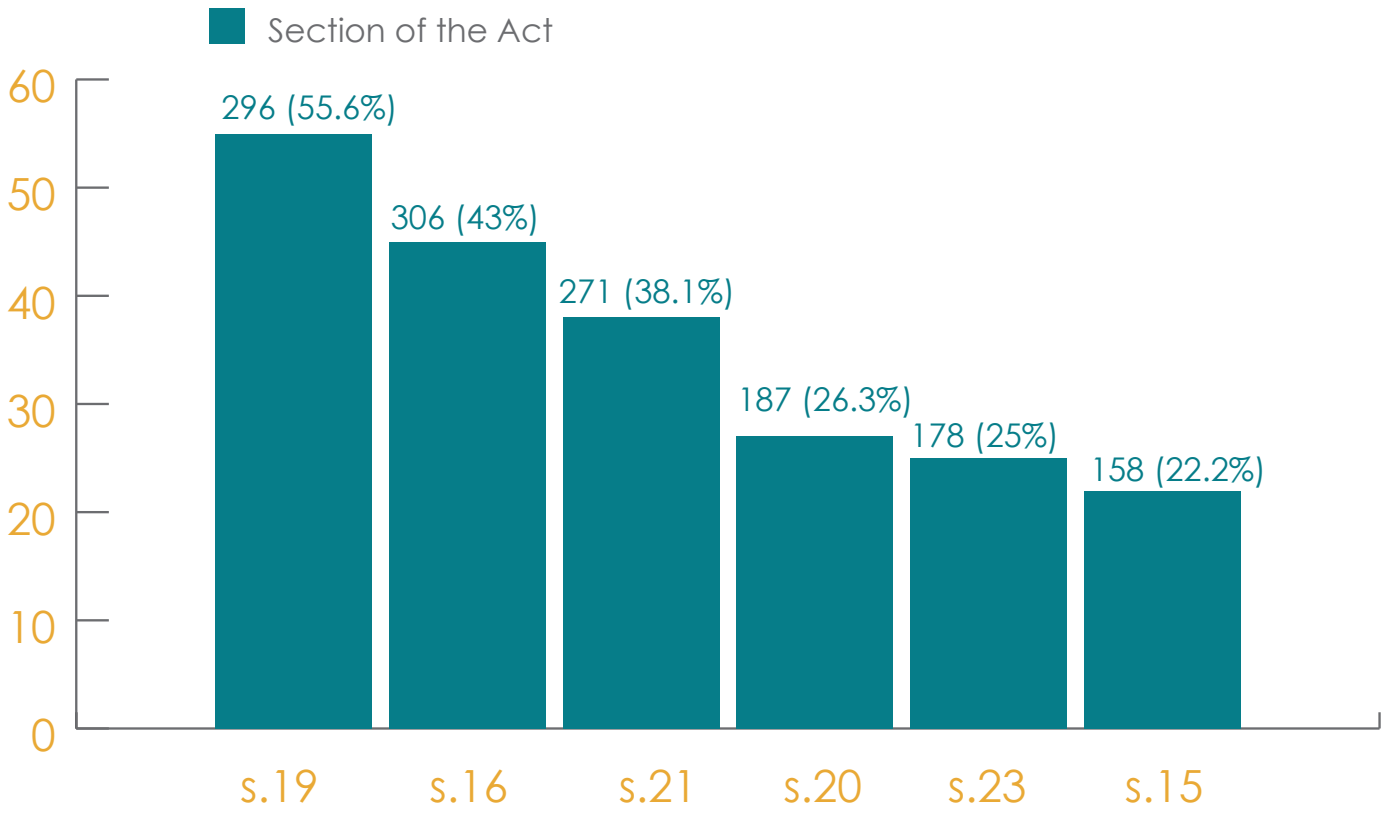
## COMPLAINTS REGISTERED, 2012–2013 TO 2015–2016



In 2015–2016 the Commissioner received 664 administrative complaints (about delays, time extensions and fees), 35 Cabinet confidence refusal complaints and 1,348 refusal complaints (commonly about the application of exemptions).

The ratio of administrative complaints to refusal complaints registered was 32:68.

**COMMONLY CITED EXEMPTIONS IN EXEMPTION COMPLAINTS REGISTERED, 2015–2016**




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

The most commonly cited exemption in exemption complaints to the Commissioner in 2015–2016 was section 19 (personal information), followed by sections 16 (law enforcement and investigations), 21 (advice and recommendations to government), 20 (third party information), 23 (solicitor-client privilege), and lastly 15 (international affairs and defence).

**NEW COMPLAINTS BY INSTITUTION, 2011–2012 TO 2015–2016***

| | 2011–2012 | 2012–2013 | 2013–2014 | 2014–2015 | 2015–2016 |
|---|---|---|---|---|---|
| Canada Revenue Agency | 324 | 336 | 283 | 221 | 271 |
| Royal Canadian Mounted Police | 68 | 125 | 185 | 178 | 235 |
| Immigration, Refugees and Citizenship Canada | 66 | 109 | 305 | 246 | 181 |
| Canada Border Services Agency | 36 | 63 | 106 | 78 | 161 |
| Public Service Commission of Canada | 8 | 7 | 3 | 1 | 115 |
| National Defence | 74 | 72 | 119 | 117 | 93 |
| Global Affairs Canada | 56 | 83 | 120 | 83 | 86 |
| Public Services and Procurement Canada | 45 | 35 | 28 | 26 | 78 |
| Correctional Service Canada | 65 | 57 | 56 | 33 | 59 |
| Transport Canada | 30 | 72 | 83 | 87 | 57 |
| Privy Council Office | 36 | 52 | 48 | 54 | 50 |
| Justice Canada | 47 | 24 | 51 | 44 | 44 |
| Natural Resources Canada | 12 | 21 | 38 | 35 | 41 |
| Employment and Social Development Canada | 25 | 20 | 37 | 33 | 38 |
| Sustainable Development Technology Canada | 0 | 0 | 0 | 0 | 38 |
| Environment and Climate Change Canada | 17 | 26 | 29 | 26 | 35 |
| Canadian Security Intelligence Service | 8 | 15 | 20 | 27 | 34 |
| Health Canada | 49 | 37 | 48 | 65 | 32 |
| Canada Post Corporation | 46 | 8 | 10 | 30 | 31 |
| Indigenous and Northern Affairs Canada | 47 | 45 | 60 | 23 | 31 |
| Others | 406 | 389 | 452 | 342 | 337 |
| Total | 1,465 | 1,596 | 2,081 | 1,749 | 2,047 |

*Institutions are listed by the number of complaints the Commissioner received about them in 2015–2016. The figures for each year include any complaints initiated by the Commissioner under subsection 30(3) of the *Access to Information Act* (18 in 2015–2016).

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

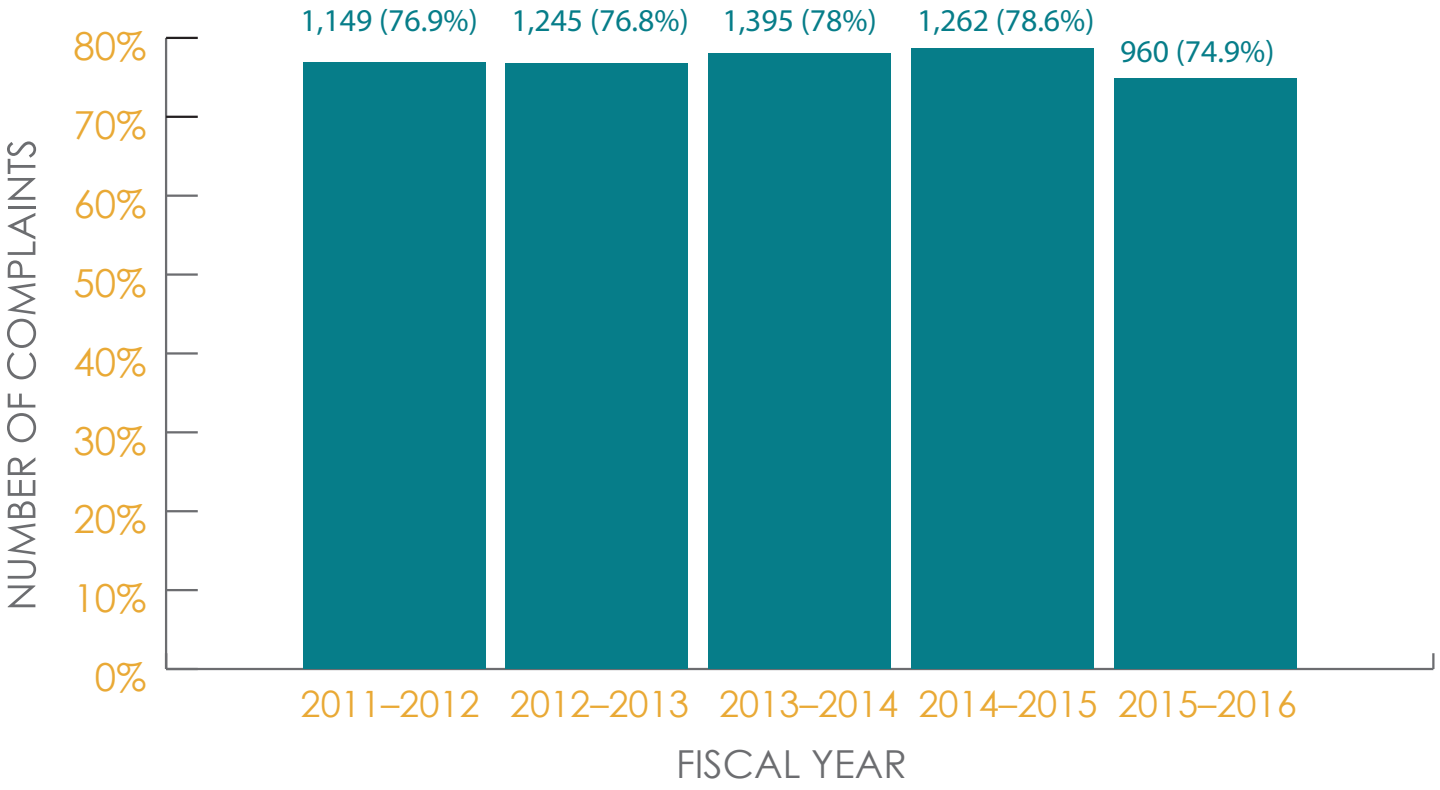
The chart above shows the 20 institutions that received the most complaints in 2015–2016. Many institutions appear on this list from year to year. For example, the top three institutions–Canada Revenue Agency, Royal Canadian Mounted Police and Immigration, Refugees and Citizenship Canada (formerly Citizenship and Immigration Canada) – were in the top three positions in 2014–2015.

Of note are significant increases in complaints against the Public Service Commission of Canada and Sustainable Development Technology Canada. In fact, this is the first year that the Sustainable Development Technology Canada has received complaints since becoming subject to the Act in 2007. In both cases, these increases in complaints can be attributed to a single complainant to each institution.

Health Canada has also seen a significant decrease in complaints (less than half as compared to 2014– 2015). While no single source is known for this decrease, the OIC has noted an increased level of cooperation with its investigations with Health Canada in the past year.

**TURNAROUND TIMES FOR COMPLAINT INVESTIGATIONS, 2011–2012 TO 2015–2016**

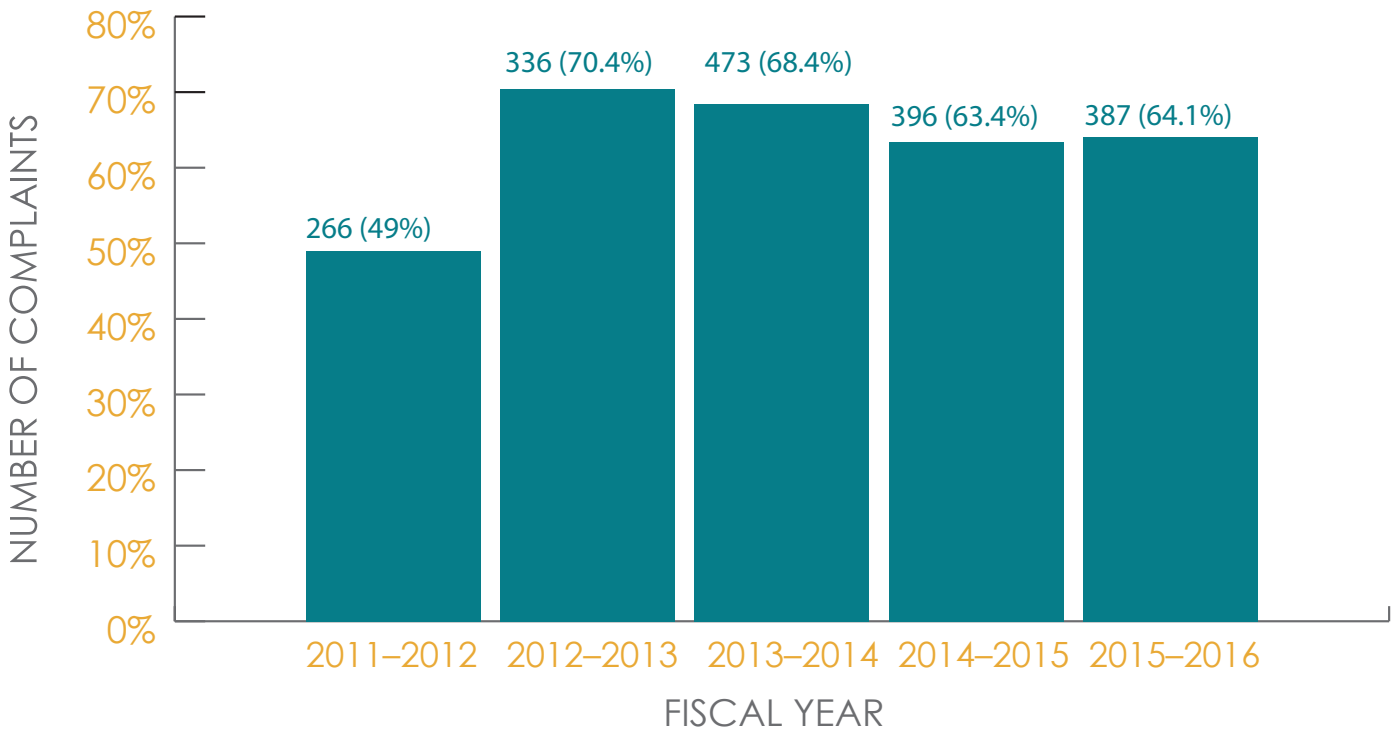
**COMPLAINTS CLOSED WITHIN NINE MONTHS FROM DATE OF ASSIGNMENT**




In 2015–2016, the Commissioner closed 74.9 percent of complaints within nine months of their being assigned to an investigator. The overall median turnaround time from the date a file was assigned to an investigator to completion was 84 days (166 days for refusal complaints). The overall median turnaround time increased by one day from 2014–2015.

However, there is a delay before a file can be assigned to an investigator. The median delay was 127 days (230 days for refusal complaints).

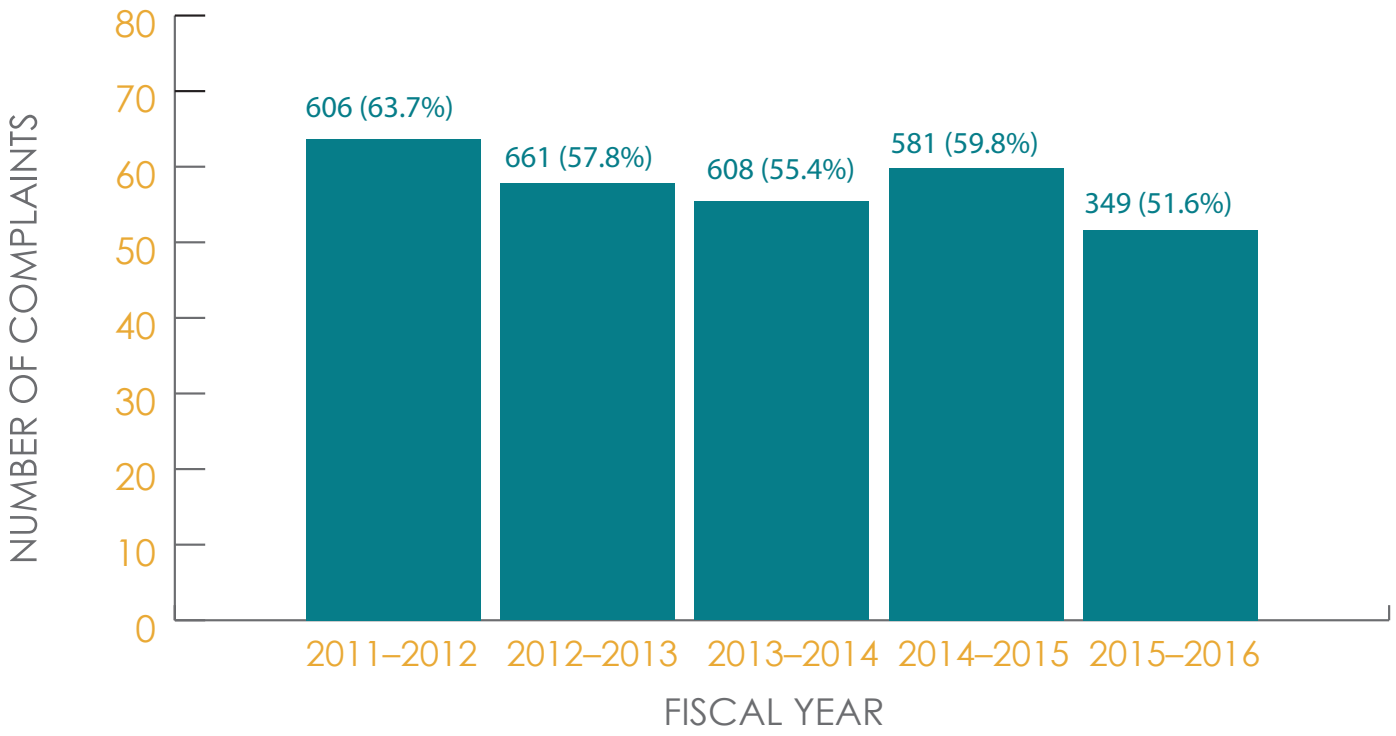
## ADMINISTRATIVE COMPLAINTS CLOSED WITHIN 90 DAYS FROM DATE OF ASSIGNMENT




The overall median turnaround time for closing administrative complaints in 2015–2016 from the date files are assigned was 48 days.

The median delay before an administrative complaint could be assigned was 83 days.

**REFUSAL COMPLAINTS CLOSED WITHIN 180 DAYS FROM DATE OF ASSIGNMENT**




The Commissioner's performance objective is to have a median turnaround time of 180 days for refusal complaints. The overall median turnaround time for closing refusal complaints in 2015–2016 from the date files are assigned was 166 days.

The median delay before a refusal complaint could be assigned was 230 days.

## COMPLAINTS CLOSED IN 2015–2016

| | Overall | Well founded | Not well founded | Resolved | Settled | Discontinued |
|---|---|---|---|---|---|---|
| Canada Revenue Agency | 178 | 98 | 38 | 8 | 1 | 33 |
| Royal Canadian Mounted Police | 139 | 62 | 20 | 9 | 14 | 34 |
| Immigration, Refugees and Citizenship Canada | 116 | 58 | 21 | 3 | 4 | 30 |
| National Defence | 83 | 33 | 18 | 2 | 1 | 29 |
| Canada Border Services Agency | 67 | 29 | 12 | 14 | 1 | 11 |
| Canadian Broadcasting Corporation | 58 | 35 | 5 | 0 | 4 | 14 |
| Transport Canada | 48 | 11 | 1 | 2 | 1 | 33 |
| Health Canada | 46 | 23 | 3 | 6 | 0 | 14 |
| Global Affairs Canada | 45 | 23 | 2 | 9 | 1 | 10 |
| Employment and Social Development Canada | 40 | 25 | 2 | 0 | 4 | 9 |
| Privy Council Office | 40 | 17 | 6 | 0 | 1 | 16 |
| Justice Canada | 33 | 20 | 3 | 1 | 1 | 8 |
| Correctional Service Canada | 32 | 14 | 4 | 3 | 3 | 8 |
| Indigenous and Northern Affairs Canada | 28 | 12 | 2 | 4 | 2 | 8 |
| Environment and Climate Change Canada | 26 | 19 | 0 | 0 | 0 | 7 |
| Public Service Commission of Canada | 22 | 14 | 5 | 0 | 0 | 3 |
| Fisheries and Oceans Canada | 21 | 13 | 1 | 0 | 1 | 6 |
| Innovation, Science and Economic Development Canada | 19 | 3 | 2 | 0 | 1 | 13 |
| Public Safety Canada | 18 | 6 | 7 | 0 | 0 | 5 |
| Public Services and Procurement Canada | 16 | 5 | 2 | 2 | 0 | 7 |
| Via Rail Canada Inc. | 16 | 0 | 0 | 0 | 16 | 0 |
| Others (66 institutions) | 190 | 75 | 41 | 4 | 15 | 55 |
| Total: | 1,281 | 595 | 195 | 67 | 71 | 353 |

*The total number of complaints closed includes any that had been initiated by the Commissioner under subsection 30(3) of the *Access to Information Act* (18 in 2015–2016).

This chart lists the 20 institutions about which the Commissioner completed the most complaints in 2015–2016.

### *Erratum*

In the Information Commissioner of Canada's 2014–2015 Annual Report, it was stated on p. 14 that "the Commissioner amalgamated 25 files against the Canada Revenue Agency and was able to settle them all at once." This information is incorrect. The sentence should have read "the Commissioner amalgamated 27 files against National Defence and was able to settle them all at once."

# APPENDIX B - Annual Report Of The Information Commissioner Ad Hoc

## Report of the Information Commissioner, Ad Hoc, for 2015–16

It is my pleasure to report here 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* (http://laws.justice.gc.ca/eng/A-1/index.html) (Act). This means that an access to information request can be made to the OIC as an institution to which the right of access to information applies.

The law that brought this about did not, however, create a mechanism separate from the OIC, which oversees government compliance with access requests, to investigate any complaints that access requests to the OIC have not been handled as the Act requires. 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 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 investigating 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.

### OUTSTANDING COMPLAINTS FROM PREVIOUS YEAR

Our Office had no outstanding complaints from the previous year.

### NEW COMPLAINTS THIS YEAR

Eleven new complaints were received this year, all of them from the same person. Eight complaints were investigated and disposed of by the end of fiscal year and the remaining three will be part of next year's annual report.

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

In each case, our investigation revealed that the disputed documents had been obtained during the course of the OIC's own investigations. I therefore found that the OIC had properly applied the mandatory exemption in refusing to disclose the requested documents.

In two of these cases, the OIC had also applied the exemption for personal information and solicitor-client privilege. My investigation confirmed that these exemptions, too, had been properly invoked.

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

In addition to these nine complaints, this Office also received correspondence from a number of individuals who were dissatisfied with how the OIC

had investigated their complaints. They also raised concerns about what they described as the OIC's delay in issuing findings regarding their complaints. This Office does not have jurisdiction to investigate concerns about how the OIC has investigated complaints made to it as the oversight body under the Act. Nor can my Office investigate concerns about any delay by the OIC in processing such complaints. My mandate is limited to receiving and investigating complaints that an access request for a record under the control of the OIC itself may not have been handled in accordance with the legislation.

## CONCLUSION

The existence of an independent Commissioner, *Ad Hoc*, helps to ensure the integrity of the OIC's handling of access requests made to it, as an institution, and therefore contributes to the overall system of access to information at the federal level. My Office looks forward to continuing to play this part in access to information.

May 31, 2016

David Loukidelis QC
Information Commissioner, Ad Hoc for the Office of Information Commissioner of Canada