Access to Information Manual

From: Treasury Board of Canada Secretariat

Notice: Information and Privacy Policy Division is currently updating the Treasury Board Manual: Access to Information (December 1, 1993).

Chapters of the new manual will be published as they are completed.

The manual is intended as a reference tool to help government institutions interpret and administer the Access to Information Act and the Access to Information Regulations, and to meet the requirements of related policy instruments.

Renewed Chapters

Expand All | Collapse All

Foreword

Date updated: 2023-04-18

PIR Manual Cross-reference

This *Access to Information Manual* (the Manual) is produced by the Access to Information Policy team of the Treasury Board of Canada Secretariat (TBS or the Secretariat). It replaces the *Treasury Board Manual: Access to Information Volume* (December 1, 1993).

This Manual is intended as a reference tool to help Access to Information (ATI) and Privacy professionals:

- interpret and administer the provisions of the *Access to Information Act* (the Act) and the *Access to Information Regulations* (the Regulations)
- meet the corresponding requirements outlined in TBS ATI policy instruments

Part 1 of the Act provides individuals with the right of access to records under the control of government institutions. This Manual assists with the administration of access requests made under the Act.

Chapters of the Manual will be published as they are completed. This Manual is evergreen and may be amended as the subjects it covers evolve. As such, we invite you to consult the Manual regularly. Although not intended to provide an exhaustive account of approaches and situations, it is our hope that it will prove to be a valuable reference tool for the administration of the *Access to Information Act*.

When reviewing the Manual, chapters and sections that have been updated after August 2018 will be indicated by the inclusion of a “date updated” notation following a title or subtitle.

If you have any questions about the Manual, contact your institution’s ATIP Coordinator. If an interpretation of the Manual is needed, the ATIP Coordinator may email TBS at ippd-dpiprp@tbs-sct.gc.ca.

The information in this Manual provides general guidance to government institutions concerning the administration of the Act. Consult with your institution's legal services unit for any legal advice required relating to the interpretation of the Act.

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Chapter 1 – Introduction

Date updated (full chapter): 2023-04-18

PIR Manual Cross-reference

1.1 The Access to Information Act

The *Access to Information Act* (the Act) came into force on July 1, 1983. Bill C-58 – *An Act to amend the Access to Information Act and the Privacy Act and to make consequential amendments to other Acts*, received royal assent on June 21, 2019, bringing into force a number of important changes, such as legislated proactive publication requirements. This Manual does not apply to the proactive publication requirements set out in Part 2 of the Act.

The Act is legislation of general application, which means that it generally applies, unless another Act clearly says otherwise. As recognized in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, the *Access to Information Act* is of a quasi-constitutional nature. Quasi-constitutional Acts express fundamental values and generally override other inconsistent laws. The "notwithstanding" clause in subsection 4(1) of the Act means that Part 1 of the Act takes precedence over prohibitions against disclosure found in other statutes [1-1].

Subsection 2(1) states that the law's purpose is to "enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions."

Part 1 of the Act creates an enforceable right of access to records under the control of a government institution.

Part 1 of the Act is administered in accordance with the following principles:

- government information should be available to the public
- necessary exceptions to the right of access should be limited and specific
- decisions on disclosure of government information should be reviewed independently of government

In administering the Act, it is very important to bear in mind these governing principles and the purposes of the Act outlined above. Part 1 of the Act applies to government records under the control of a government institution as defined in Section 3 of the legislation. This Manual provides guidance on the elements of the Act that relate to the right to request access to government records under the control of a government institution.

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1.2 Government institutions subject to the Access to Information Act

Part 1 of the Act provides a right of access to information under the control of "government institutions."

All institutions listed in Schedule I of the *Access to Information Act*, as well as all parent Crown corporations and wholly owned subsidiaries of such corporations within the meaning of section 83 of the *Financial Administration Act*, are "government institutions" for the purpose of Part 1 of the Act.

By and large, those institutions are also subject to the *Policy on Access to Information* and the *Directive on Access to Information Requests*, with the notable exception of the Bank of Canada (subsection 70(2) of the *Access to Information Act*).

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1.3 Policy instruments

Paragraph 70(1)(c) of the *Access to Information Act* requires the President of the Treasury Board to prepare directives and guidelines concerning the operation of Part 1 of the Act and the *Access to Information Regulations* (Regulations) and distribute them to government institutions.

TBS has released two policy instruments that contain **mandatory** requirements: the *Policy on Access to Information* and the *Directive on Access to Information Requests*.

- The *Policy on Access to Information* imposes specific obligations on heads of institutions or their delegates. Its objectives are to:
  - facilitate statutory and regulatory compliance, and to enhance effective application of the Act and its regulations
  - ensure consistency in practices and procedures in administering the Act and its regulations so that applicants receive assistance throughout the request process

- The *Directive on Access to Information Requests* provides a more detailed explanation of the requirements set out in the policy. It establishes practices and procedures for processing access to information requests.

Together, the Act, Regulations and mandatory policy instruments form the minimum requirements that government institutions must meet. Implementation Notices provide guidance on the interpretation and application of the *Access to Information Act*, the *Privacy Act* and their related policy instruments. Please note that the requirements set out in the implementation reports and information notices issued before December 31, 2011, have been incorporated into this Manual.

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1.4 Objective and structure of the manual

The Manual contains administrative guidelines to help government institutions administer the legislation and meet policy requirements. It is a detailed guide that explains the requirements of the Act, the Regulations and related policy instruments. It also contains policy advice, practical interpretations, and best practices. Where appropriate, relevant case law is cited, and excerpts are sometimes reproduced.

As stated in the foreword, the Manual is designed to be amended as the subjects that it covers evolve in order to keep it up to date.

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1.5 Important Notice

The information in this manual provides general guidelines to government institutions concerning the operation of the Access to Information Act. None of the information is provided as legal advice

and should not be relied upon as such. Please consult with your legal services for any legal advice required relating to the interpretation of the Access to Information Act.

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Chapter 2 – Roles and responsibilities

This chapter provides an overview of the roles and responsibilities of the designated ministers, the Treasury Board of Canada Secretariat, the Department of Justice Canada, the Privy Council Office, the Access to Information and Privacy (ATIP (Access to Information and Privacy)) Coordinators, the Office of the Information Commissioner of Canada, the Federal Court of Canada, Federal Court of Appeal of Canada and the Supreme Court of Canada, and the Standing Committee on Access to Information, Privacy and Ethics. It also contains essential information for understanding the roles and responsibilities conferred by the Access to Information Act (the Act) and by policy instruments on heads of government institutions and their delegates, each institution's ATIP (Access to Information and Privacy) Office, and employees. Finally, Section 2.3 of this chapter addresses delegation.

Chapters 3 to 16 of this manual provide information on how heads and employees of government institutions can fulfill their responsibilities.

2.1 Key players

2.1.1 Designated ministers

Pursuant to the definition of "designated minister" in section 3 of the Act, the Governor in Council made Regulations under the Act entitled Designating the Minister of Justice and the President of the Treasury Board as Ministers for Purposes of Certain Sections of the Act. Both

designated ministers are also responsible for recommending amendments to the Act and to the Access to Information Regulations. The responsibilities of the designated ministers conferred by the Act are summarized in the following table.

Minister of Justice	President of the Treasury Board
The Minister of Justice is responsible for the application of the following provisions of the Access to Information Act: ◦ paragraph (b) of the definition of "head" in section 3 – designation of the head of a government institution by order-in-council; ◦ subsection 4(2) – extension of right of access by Order in Council; ◦ paragraph 77(1)(f) – specifying investigative bodies for the purposes of paragraph 16(1)(a); ◦ paragraph 77(1)(g) – specifying classes of investigations for the purpose of paragraph 16(4)(c); ◦ subsection 77(2) – adding organizations to Schedule I of the Act.	The President of the Treasury Board is responsible for the application of other provisions of the Access to Information Act, specifically: ◦ section 5 – publication of Info Source; ◦ subsection 70(1): a) causing to be kept under review the manner in which records are maintained and managed; b) prescribing forms; c) causing directives and guidelines to be prepared and distributed; c.1) causing statistics to be collected; d) prescribing the form of, and what information is to be included in, reports made to Parliament. ◦ subsection 70(1.1) – fixing the number of officers or employees of the Information Commissioner for the purposes of subsection 59(2); ◦ subsection 77(1) – proposing to the Governor in Council regulations related to: (a) limitations in respect of format; (a.1) limitations in respect of records that can be produced

Minister of Justice	President of the Treasury Board
	from machine readable records; (b) procedures to be followed for requests for access; (c) conditions for transfer of requests; (d) fees; (e) manner and place of access to records; (h) procedures to be followed by the Information Commissioner in examining or obtaining copies of records in respect of a refusal to disclose under paragraph 13(1)(a) or (b) or section 15; (i) criteria for adding organizations to Schedule I of the Act.

The President of the Treasury Board is responsible for overseeing the government-wide administration of the Act. To enhance the effective application of the Act and the Access to Information Regulations by government institutions and facilitate statutory and regulatory compliance, the President of the Treasury Board issued the Policy on Access to Information (the Policy) pursuant to paragraph 70(1)(c) of the Act. As stated in section 3.7 of the Policy, the President of the Treasury Board also issued the Directive on the Administration of the Access to Information Act (the Directive) to support the Policy, as well as specific directives on the duty to assist requesters, the annual report to Parliament, the creation of classes of records for Info Source, and statistical reporting. The one exception rests with the Governor of the

Bank of Canada who is, in relation to that institution, responsible for the preparation and distribution of the directives and guidelines concerning the Act and its regulations.

2.1.2 Treasury Board of Canada Secretariat

The Information and Privacy Policy Division of the Treasury Board of Canada Secretariat assists the President of the Treasury Board in carrying out his or her duties. To that end, the Division develops policy instruments, offers training and professional development opportunities, and provides advice and leadership for the ATIP (Access to Information and Privacy) community. Section 8.1 of the Policy assigns the following responsibilities to the Secretariat:

> 8.1 Treasury Board Secretariat is responsible for issuing direction and guidance to government institutions with respect to the administration of the Access to Information Act and interpretation of this policy. As such, TBS (Treasury Board of Canada Secretariat):
>
> - Publishes an annual index that describes government institutions, their responsibilities, programs and information holdings;
> - Reviews and publishes updates to government institutions' chapters in Info Source and prescribes forms to be used in the administration of the Act, as well as the format and content of reports made to Parliament;
> - Advises all members of the Access to Information and Privacy community of any updates to the policy instruments; and
> - Works closely with the Canada School of Public Service to determine the extent to which knowledge elements related to the Policy on Access to Information will be integrated into the

required training courses, programs and knowledge assessment instruments.

The monitoring and reporting requirements related to the Act are found in sections 6.3.3 and 6.3.4 of the Policy, as follows:

- 6.3.3 Treasury Board Secretariat will monitor compliance with all aspects of this policy by analyzing and reviewing public reporting documents required by the Access to Information Act and other information, such as Treasury Board submissions, Departmental Performance Reports, results of audits, evaluations and studies, to assess the government institution's administration of the Act. For those government institutions subject to the Management Accountability Framework (MAF (Management Accountability Framework)), information obtained from monitoring of compliance with this policy will be used in MAF (Management Accountability Framework) assessments.
- 6.3.4 The Treasury Board Secretariat will review the policy, its related directives, standards and guidelines, and their effectiveness, five years following the implementation of the policy. When substantiated by risk-analysis, TBS (Treasury Board of Canada Secretariat) will also ensure an evaluation is conducted.

2.1.3 Department of Justice Canada

The Department of Justice Canada supports the Minister of Justice in carrying out his or her duties under the Act. As part of its mandate under the Department of Justice Act, the Department of Justice Canada provides legal advice and services to the government and client departments and agencies and represents the Crown in judicial reviews before the Federal Court, the Federal Court of Appeal and the Supreme

Court of Canada. The Department of Justice Canada also provides legal advice on the application of section 69 of the Act, as explained in Chapter 13 of this manual.

2.1.4 Privy Council Office

The Clerk of the Privy Council and Secretary to the Cabinet is responsible for ensuring the integrity of the Cabinet process and the stewardship of the documents that support this process. As custodian of confidences of the Queen's Privy Council for Canada of the current and previous ministries, he or she is responsible for policies on the administration of these confidences and for the ultimate determination of what constitutes such confidences, and must be consulted in a manner consistent with the guidance set out in Chapter 13 of this manual.

2.1.5 Access to Information and Privacy (ATIP (Access to Information and Privacy)) Coordinators

Each institution designates an official to serve as ATIP (Access to Information and Privacy) Coordinator. This individual is responsible, on behalf of the head of the institution and the deputy head, for ensuring compliance with the Act, Access to Information Regulations and policy instruments. In many institutions, the head delegates all his or her powers, duties and functions under the Act to the Coordinator.

2.1.6 Office of the Information Commissioner of Canada

The Information Commissioner is an Officer of Parliament who receives and independently investigates complaints from requesters who believe that government institutions have not respected their rights under the Act. The Information Commissioner may also self-initiate complaints when he or she is satisfied that there are reasonable

grounds to investigate a matter relating to requesting or obtaining access to records under the Act. The Commissioner reports findings and may make recommendations. The Commissioner may also initiate or intervene in Court proceedings or appear before the Court on behalf of any person who has applied for a review under the Act.

In addition, the Information Commissioner reports to Parliament on the activities of the Office of the Information Commissioner after each financial year and may make special reports to Parliament referring to and commenting on any matter within the scope of the powers, duties and functions of the Commissioner.

2.1.7 Federal Court of Canada, Federal Court of Appeal of Canada and Supreme Court of Canada

The Federal Court examines review applications submitted by requesters, third parties or the Information Commissioner regarding the disclosure or non-disclosure of information. Any party to a review may appeal to the Federal Court of Appeal and, ultimately, seek permission to appeal to the Supreme Court of Canada.

2.1.8 Standing Committee on Access to Information, Privacy and Ethics

The House of Commons' Standing Committee on Access to Information, Privacy and Ethics (the Committee) studies and reports on matters referred to it by the House of Commons or on topics the Committee itself chooses to examine.

The Committee's mandate is defined in paragraph 108(3)(h) of the Standing Orders of the House of Commons. Its responsibilities in relation to the Access to Information Act include:

- reviewing and reporting on the effectiveness, management and operations of the Office of the Information Commissioner and its operational and expenditure plans;
- reviewing and reporting on any federal legislation, regulation or Standing Order that impacts on access to information; and
- proposing, promoting, monitoring and assessing initiatives that relate to access to information.

Powers of standing committees

Subsection 108(1) of the Standing Orders of the House of Commons authorizes standing committees to examine any matters referred to them by the House of Commons or as required in legislation. Standing committees may report to the House of Commons, send for persons or records, and delegate their powers to subcommittees. Standing committees may sit whenever they wish, whether the House of Commons is sitting or adjourned, and may sit jointly with other standing committees.

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2.2 Responsibilities of government institutions

2.2.1 Heads of government institutions

For the purposes of the Act, the head of a government institution is the minister in the case of departments and ministries of state; for other government institutions subject to the Act, the head is the person designated by Order in Council and, if no such person is designated, it is the chief executive officer of the institution, whatever their title. Examples include the President of the Treasury Board for the Treasury Board of Canada Secretariat, the Minister of Health for Health Canada, the Master of the Royal Canadian Mint (President) and the President

and Chief Executive Officer for certain Crown corporations such as the Canadian Broadcasting Corporation and Via Rail Canada Inc., to name a few. The head of every institution is responsible for enforcing the Act, the Access to Information Regulations, the Policy on Access to Information and the Directive on the Administration of the Access to Information Act within the institution and takes responsibility for decisions made in this regard.

The responsibilities of heads under the Act are as follows:

- Assisting persons making a request – subsection 4(2.1);
- Responding to requesters – section 7 and subsection 37(4);
- Transferring the request – section 8;
- Extending the time limit – section 9;
- Notifying the requester when access is refused – section 10;
- Requiring payment of fees – section 11;
- Causing records to be translated or providing access to records in alternative format – section 12;
- Applying exemptions – sections 13 to 16, 16.5, 17 to 20, 21 to 24 and 26;
- Applying certain exemptions (limited to heads specified in the exemption) – sections 16.1 to 16.4, 20.1, 20.2 and 20.4;
- Applying severances – section 25;
- Complying with requirements related to third parties – sections 27, 28, 29 and 33;
- Complying with requirements related to reviews by the Federal Court – sections 43 and 44;
- Providing a reading room – section 71; and
- Preparing an annual report to Parliament – section 72.

In addition, the head of a department or ministry of state of the Government of Canada must publish, pursuant to section 72.1 of the Act, an annual report of all expenses incurred by his or her office and paid out of the Consolidated Revenue Fund. This report is published in Volume III, Section 10 of the Public Accounts of Canada. (Additional information is available in the Policies for Ministers' Offices.)

The Access to Information Regulations explain the terms and conditions for the transfer of a request (section 6), fees (section 7), access (section 8) and format for the purposes of subsection 4(2.1) of the Act, which requires that heads of government institutions provide, subject to the regulations, access in the format requested (section 8.1).

Sections 6.1, 6.2, 6.3.1 and 6.3.2 of the Policy and sections 6 and 7 of the Directive give additional responsibilities to heads of government institutions.

The following table provides an overview of the responsibilities of the head of the institution or his or her delegate conferred by the Act, the Access to Information Regulations, the Policy and the Directive. In some cases, the related provisions of the Act or the Access to Information Regulations are included as references even if those provisions do not require that the head perform an action.

Responsibility (Head of institution or delegate)	Access to Information Act	Access to Information Regulations	Policy on Access to Information	Directive on the Administration of the Access to Information Act
Access to information awareness for employees	n/a	n/a	section 6.2.2	section 7.2
Alternative format	section 12	n/a	n/a	n/a
Cabinet confidences	(refers to section 69)	n/a	sections 6.2.7 and 6.2.8	n/a
Consultations	n/a	n/a	sections 6.2.5 and 6.2.7	section 7.7
Contracts and agreements	n/a	n/a	section 6.2.9	N/A
Delegation	(refers to section 73)	n/a	section 6.1 (head only)	section 6.1 (head only)
Discretion	n/a	n/a	section 6.2.1	section 7.1
Duty to assist the requester	subsection 4(2.1)	n/a	section 6.2.4	section 7.4

Responsibility (Head of institution or delegate)	Access to Information Act	Access to Information Regulations	Policy on Access to Information	Directive on the Administration of the Access to Information Act
Eligibility of applicants	(refers to section 4)	(refers to Access to Information Act Extension Order, No. 1)	n/a	section 7.3
Exemptions	All heads: sections 13 to 16, 16.5, 17 to 20, 21 to 24 and 26 Heads specified in the exemption: sections 16.1 to 16.4, 20.1, 20.2 and 20.4	n/a	section 6.2.5	section 7.8
Extension of time limits	section 9	n/a	n/a	section 7.6
Fees	section 11	sections 5 and 7	n/a	section 7.5

Responsibility (Head of institution or delegate)	Access to Information Act	Access to Information Regulations	Policy on Access to Information	Directive on the Administration of the Access to Information Act
Identity of applicants	n/a	n/a	section 6.2.3	section 7.4.1
Monitoring requirements	n/a	n/a	section 6.3.1	n/a
Non-relevant information	n/a	n/a	n/a	section 7.9
Obstruction of the right of access	(refers to section 67.1)	n/a	section 6.2.10	section 7.12
Procedures	n/a	sections 4 and 5	sections 6.2.5 and 6.2.6	section 7.11
Reading room	section 71	n/a	n/a	n/a
Reporting requirements	section 72 Heads of departments or ministries of state only: section 72.1	n/a	section 6.3.2	n/a

Responsibility (Head of institution or delegate)	Access to Information Act	Access to Information Regulations	Policy on Access to Information	Directive on the Administration of the Access to Information Act
Response to requester	section 7 and subsection 37(4)	sections 5, 8 and 8.1	n/a	n/a
Reviews by the Federal Court	sections 43 and 44	n/a	n/a	n/a
Right to complain	subsection 10(1)	n/a	n/a	section 7.10
Severances	section 25	n/a	n/a	n/a
Summaries of completed requests	n/a	n/a	n/a	section 7.13
Third parties	sections 27, 28, 29 and 33	n/a	n/a	n/a
Training of delegates	n/a	n/a	n/a	section 6.2 (head only)
Transfers of requests	section 8	section 6	n/a	n/a
Translation of records	section 12	n/a	n/a	n/a

Upon being named head of the institution, the head must decide whether to delegate his or her powers, duties and functions under the Act pursuant to section 73. The head or the delegate makes final decisions. As mentioned in Section 2.1.5 of this chapter, many heads of institutions delegate all their powers, duties and functions under the Act to the ATIP (Access to Information and Privacy) Coordinator. Section 2.3 of this chapter provides additional explanations on delegation.

2.2.2 ATIP (Access to Information and Privacy) Office

The main responsibilities of the ATIP (Access to Information and Privacy) Office are as follows:

1. **Processing access to information requests** – The ATIP (Access to Information and Privacy) Office responds to all requests received under the Act in accordance with the provisions of the Act and the Access to Information Regulations, jurisprudence, and the policies and directives issued by the President of the Treasury Board. This requires:
    - establishing a work method for providing accurate and swift responses to access to information requests;
    - developing and implementing institutional procedures and practices for the application of the Act, and exercising control in this regard;
    - consulting program managers, senior management, legal advisors, the Treasury Board of Canada Secretariat, the Department of Justice Canada, the Privy Council Office, third parties and other government institutions, as needed; and
    - making decisions regarding requests when this authority has been delegated to the ATIP (Access to Information and Privacy)

Coordinator or other employees of the ATIP (Access to Information and Privacy) Office.

2. **Performing related duties** – The ATIP (Access to Information and Privacy) Office performs all duties related to access to information requests, including the following:
   - responding to consultations from other government institutions;
   - ensuring compliance with the requirements of the Act, the Policy and the Directive, and any other ATIP (Access to Information and Privacy) policy instrument issued by the Treasury Board of Canada Secretariat (e.g., Standard on Privacy and Web Analytics);
   - drafting reports and other documents required by central agencies;
   - ensuring the training and development of ATIP (Access to Information and Privacy) personnel and access to information awareness of institution's employees;
   - participating in the resolution of complaints filed with the Office of the Information Commissioner and in court reviews, which requires explaining the institution's decisions concerning the application of the Act;
   - contributing, with the Treasury Board of Canada Secretariat, to the review of policy instruments related to the Act.
3. **Contributing to Info Source** – The ATIP (Access to Information and Privacy) Office must prepare and publish annually the institution's chapter of Info Source, in accordance with the guidance document Info Source: Decentralized Publishing Requirements.
4. **Providing facilities for consulting documents,** in accordance with subsection 71(1) of the Act and paragraph 8(3)(a) of the Access to Information Regulations.

5. **Preparing the annual report to Parliament** on the administration of the Act within the government institution, in accordance with section 72 and paragraph 70(1)(d) of the Act, and sending a copy to the Treasury Board of Canada Secretariat;
6. **Collecting statistics** on institutional activities related to the administration of the Act and submitting annually a statistical report to the Treasury Board of Canada Secretariat, in accordance with established requirements distributed by the Secretariat.

2.2.3 Employees

The employees of government institutions play a key role in processing requests, providing relevant records and making recommendations on their disclosure. To accomplish this, it is important that all employees manage their records effectively, in a manner consistent with information management policies and the Directive on Recordkeeping, and meet the timelines established by the ATIP (Access to Information and Privacy) Office.

Section 8 of the Directive on the Administration of the Access to Information Act assigns the following responsibilities to employees of government institutions:

8.1.1 Recommending to the head or the delegate, when appropriate, that the requested information be disclosed informally.
8.2.1 Making every reasonable effort to locate all records under the control of the government institution that are responsive to the request.
8.3.1 Providing a realistic fee estimate and the rationale for it to the head or the delegate, when required.
8.4.1 Providing valid recommendations on the disclosure of the records requested, as well as contextual information, when

appropriate.

8.5.1 Ensuring, if involved in contracting activities, that contracts and agreements do not weaken the right of public access to information.

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2.3 Delegation

The following discussion of delegation is intended to be general in nature and does not cover all eventualities.

2.3.1 Definitions

Delegation

Black's Law Dictionary, 8th edition, defines "delegation" as:

> The act of entrusting another with authority or empowering another to act as an agent or representative.

Delegate

The term "delegate" is defined in Appendix A of the Policy on Access to Information as follows:

> **Delegate**- Is an officer or employee of a government institution who has been delegated to exercise or perform the powers, duties and functions of the head of the institution under the Act.

2.3.2 Relevant legislative provisions

Section 73 of the Access to Information Act

Section 73 provides that the head of a government institution may, by order, designate one or more officers or employees of that institution to exercise or perform any of the powers, duties or functions of the head of the institution that are specified in the order.

Subsection 24(2) of the Interpretation Act

The courts have acknowledged that a minister is not expected to personally exercise all authorities conferred on that minister and that, in certain circumstances, departmental officials may act for their minister in exercising his or her statutory powers. This authority to act for a minister of the Crown has been formally codified and is reflected in subsection 24(2) of the Interpretation Act.

Paragraph 24(2)(c) of the Interpretation Act states that a deputy minister can exercise the powers of the minister. Therefore, when no other officer or employee of the institution has been designated to act on behalf of the minister, it is not necessary for a minister to delegate to his or her deputy minister.

If the minister does not sign a delegation order, paragraph 24(2)(d) of the Interpretation Act authorizes Public Service employees working within the institution to perform the duties outlined in the Access to Information Act. In order to act for a minister, a person must:

- be a public servant employed in the department or organization for which the minister is responsible; and,
- serve in a capacity within the department such that the person can reasonably be expected to exercise the power of the minister.

Note that exempt staff in a Minister's Office, more commonly known as political staff, are not authorized to exercise the powers, duties and functions of the head of the institution.

Where the head of the institution is a minister of the Crown who does not preside over the institution but is responsible for it and in the absence of a delegation order, the Minister must exercise personally the powers, duties and functions of the head of the institution.

Subsection 24(4) of the Interpretation Act applies when the head of the institution is a public officer other than a minister of the Crown. Pursuant to that provision, the powers of the public officer may be exercised by his or her successors in the office or by a deputy. A deputy is generally an officer who serves in a position immediately below the public officer in the hierarchy and whose function is chiefly to support the public officer and assist in the exercise of his or her functions. A public officer usually has one deputy but, in some institutions, there may be more than one deputy.

If there is a valid delegation order, subsections 24(2) and 24(4) of the Interpretation Act do not apply and officials cannot implicitly assume a right to act in the head's name (see the decision Leahy v. Canada (Citizenship and Immigration) 2012 FCA 227, paragraph 84). Only the head or the delegate(s), acting within the scope of the delegation order, may exercise the powers of the head of the institution.

2.3.3 Policy requirements

The Policy requires the head of an institution to consider whether delegation is appropriate. The Policy specifies that, in cases where the head decides to delegate, a delegation order must be signed, and that the delegated officers or employees must be at an appropriate level to be able to fulfill the duty. The relevant provisions of the Act describing the powers, duties or functions that may be delegated are listed in Appendix B of the Policy.

In addition, section 6.1.1 of the Directive sets out the principles that the head of an institution must respect when delegating. They are as follows:

- Heads can only designate officers and employees of their government institution in the delegation order. Consultants,

members of minister's exempt staff or employees of other government institutions or from the private sector cannot be named in the delegation order.
- Powers, duties and functions are delegated to positions identified by title, not to individuals identified by name.
- Persons with delegated authorities are to be well informed of their responsibilities.
- Powers, duties and functions that have been delegated cannot be further delegated, although employees and consultants may perform tasks in support of delegates' responsibilities.
- The delegation order is to be reviewed when circumstances surrounding the delegations have changed. A delegation order remains in force until such time as it is reviewed and revised by the head of the institution.

2.3.4 What can be delegated?

Any of the powers, duties and functions assigned to the head of the institution under the Act may be delegated. The relevant provisions of the Act describing the powers, duties or functions that may be delegated are listed in Appendix B of the Policy.

The responsibilities of the head of a federal institution include responding to requests made under the Act. While not specifically mentioned in the Act, this necessarily implies that such requests be processed. Consulting other institutions and responding to consultations received from other federal institutions are essential parts of processing requests received under the Act. Therefore, when the head delegates the duty to respond to requests received under the

Act, such delegation includes the duty to process the requests, to consult as required and to respond to consultations received from other institutions.

2.3.5 Who can delegate?

Only the head of a government institution, as defined in section 3 of the Act, is authorized to issue the delegation. For departments or ministries of state, the head is the minister. For other institutions, it is the person who has been designated to be the head of the institution by the Governor in Council or, if no such person is designated, the chief executive officer (CEO (chief executive officer)) of the institution, whatever his or her title.

In general, the head of an institution cannot delegate the power to delegate. However, where the head is a minister, the power may be exercised by his or her "deputy" pursuant to paragraph 24(2)(c) of the Interpretation Act.

2.3.6 Who can receive the delegation?

The head of the institution can delegate only to officers and employees of his or her institution. This means that consultants, ministerial staff or employees outside the institution cannot be designated in the delegation order.

The Policy requires that the officers or employees be at the appropriate level, that is, that they be appointed to serve in a capacity appropriate to fulfilling the duty, such as the ATIP (Access to Information and Privacy) Coordinator. Factors such as position and job description, hierarchical relationships and geographical location should be considered when assessing whether the person could reasonably be expected to exercise the powers within the institution.

2.3.7 Can powers, duties and functions that have been delegated be further delegated?

As mentioned in section 6.1.1 of the Directive, powers, duties and functions that have been delegated cannot be further delegated. Tasks may nevertheless be performed by employees, officials or consultants in support of the powers, duties and functions that are the responsibilities of the delegates.

2.3.8 Who can exercise the powers, duties and functions?

If there is no delegation order

Subsection 24(2) of the Interpretation Act clarifies the power to act for ministers of the Crown. Its wording is as follows:

> 24(2) Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include
>
> a. a minister acting for that minister or, if the office is vacant, a minister designated to act in the office by or under the authority of an order in council;
> b. the successors of that minister in the office;
> c. his or their deputy; and
> d. notwithstanding paragraph (c), a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.

Where the head of the institution is a minister of the Crown presiding over a department or a ministry of state and in the absence of a delegation order, officers or employees of the department are

authorized, pursuant to paragraph 24(2)(d) of the Interpretation Act, to make any decision delegated by statute to the minister, for and in the name of the minister.

Where the head of the institution is a minister of the Crown who does not preside over the institution but is responsible for it and in the absence of a delegation order, the minister must exercise personally the powers, duties and functions of the head of the institution. For example, the Minister of Public Safety and Emergency Preparedness is the head of the Canada Borders Security Agency but does not preside over the Agency.

Where the head of the institution is a public officer other than a minister of the Crown and in the absence of a delegation order, the deputy is authorized to exercise the powers of the head pursuant to subsection 24(4) of the Interpretation Act.

If there is a delegation order

After an express delegation has been made, the specified powers may only be exercised either by the head or by the delegate. When the delegate is absent or incapacitated and the delegation passes to another position, the person occupying that position may also make decisions. Similarly, a person occupying the position of the delegate on an interim basis may make decisions. No other officer or employee, from the deputy minister or deputy head to ATIP (Access to Information and Privacy) officials, has the legal authority to make decisions unless expressly stated in the delegation instrument.

Even when a delegation has been given, the head retains the power to make the decision and may do so as long as the delegate has not already decided and communicated the decision to the requester. The

head is not required to obtain input from the delegate before making a determination although it is entirely appropriate to seek input from the delegate and other officials of the institution.

Similarly, it is entirely appropriate for the authorized delegate to request input from other Public Service employees and consultants prior to making a decision. Consultation is not only legally permissible, it may also be administratively and practically necessary. The only limitation is that those consulted cannot be allowed to dictate the outcome of the exercise of statutory discretion, as that would amount to fettering of discretion. In the decision Do-Ky v. Canada (Minister of Foreign Affairs and International Trade) (T.D.) [1997] 2 F.C. 907, the federal Court stated: “First, it is not a fettering of discretion to seek advice from the government departments most knowledgeable and directly involved with the situation at hand. In fact, not to do so would be irresponsible. Provided that the individual who is responsible for exercising the discretion in fact turns his or her mind to the issues and weighs and considers all the facts, there is no fettering of discretion.”

Processing the requests

As mentioned above, the powers, duties and functions assigned to the head of the institution may only be delegated to officers and employees of the institution. Tasks may nevertheless be performed by employees or officers in support of the powers, duties and functions that are the responsibilities of the delegates.

Furthermore, nothing in the Act prevents a consultant or an employee from another institution from processing access to information requests if the following conditions are met:

- Contracts for consulting services contain confidentiality clauses to ensure that security obligations are met, as well as the

requirements of the Privacy Act regarding the collection, use and disclosure of personal information.

- When employees from other institutions are mandated to process requests,
  1. legislative or regulatory authority exists to allow one government institution to process access requests received by another institution; and
  2. the disclosure of the access requests and related personal information complies with subsection 8(2) of the Privacy Act. Such disclosure is a "consistent use". If it is not already described in the relevant personal information bank, the institution is required to notify the Privacy Commissioner and amend the personal information bank.

2.3.9 Can the head "overturn" decisions of the delegate?

The statutory power of a head that has been validly delegated to an official may be exercised either by the head of the institution or by the delegate. When a delegate is tasked with the review of documents and the preparation of the response letter and presents them to the head for his or her approval and signature, it is the head who is making the decision, and not the delegate. When the delegate approves the decision regarding the disclosure or non-disclosure of the documents and signs the response letter in his or her own name, it is the delegate who makes the decision.

Until a decision to give or refuse access to a document has been communicated to the requester, it may be revisited by the head or the delegate during the internal processing phase. If the delegate has not yet made a decision, the head of the institution can decide. However, once a delegate makes a valid determination or decision in the proper

exercise of the delegated power and has communicated the decision to the requester, the head cannot re-examine the matter or substitute his or her decision for that of the delegate.

Given the purpose of the Act, when a complaint has been made to the Information Commissioner or a request for judicial review presented to the Federal Court, decisions to give or refuse access to a document may be revisited by the head or the delegate at any point until the completion of the Information Commissioner's investigation or until the Court renders its decision. If, for example, a delegate initially refused to give access to a record during the processing of a request, the head can subsequently decide to release the document during the investigation of a complaint.

2.3.10 Who has responsibility for decisions made under the Act?

Once a delegation order is signed, delegates are accountable to the head of the institution for any decisions they make. Delegates exercise the powers in their own name because they are authorized to act. Ultimate responsibility, however, always rests with the head of the government institution.

If there is no delegation order, accountability remains with the head of the institution. An officer or employee of the department who exercises powers under subsection 24(2) or subsection 24(4) of the Interpretation Act does so "on behalf of" the head.

In both cases, Public Service employees should be clearly informed of their specific obligations with respect to the Act.

2.3.11 Validity of decisions made without proper delegation

If someone does not properly hold the authority to exercise the powers and purports to do so, the resulting decisions may be challenged through judicial review proceedings and set aside.

Decisions and statutory functions that are administrative in nature (for example, transferring a request) or that require very little discretion (for example, providing access in a particular official language or in an alternative format, requesting additional fees, providing access in a specific format) may be made by a competent person without concern about legal challenge. Where the decision requires the exercise of some discretion, such as applying or not a discretionary exemption, only the person who has the proper authority may make the decision. A court may declare the decision invalid if it is made by someone without the proper authority.

2.3.12 The delegation order

After careful consideration, the head of the institution may decide to delegate any or all his or her powers, duties or functions under the Act to one or more officers or employees of the institution. In such cases, institutions are required by policy to have in place a current delegation order signed by the head of the institution that stipulates the responsibilities delegated to particular officials.

Instructions issued pursuant to paragraph 70(1)(d) of the Act make it mandatory for institutions to include a copy of the signed delegation order in their annual report to Parliament. (If there has been no delegation, a statement to that effect must be included in the annual report.)

Signed delegation orders should be kept in a secure place ready to be produced to confirm any officer’s authority to act under the Act.

What it should contain

When the head delegates responsibilities, he or she must specify in the order what powers, duties and functions are delegated, as required by section 6.1.2 of the Policy.

In addition, the Directive requires that the head identify the delegates by position title, and not by name to allow greater flexibility. When delegation is to the position rather than the person, a new delegation is not required when a new appointee assumes the position or when someone is acting in the position. It is recommended that the delegation order also recognize another position to which delegation passes if the occupant of the original position is absent or incapacitated. For example, an order giving full delegation to the person holding the position of ATIP (Access to Information and Privacy) Coordinator could stipulate that if the ATIP (Access to Information and Privacy) Coordinator is absent or incapacitated for more than five working days, full delegation is given to the person holding the position of Director General, Assistant Deputy Minister or Deputy Minister.

It is also recommended that delegated authority be given to more than one officer or employee with responsibility for resolving issues during the investigation of a complaint or a review by the Federal Court.

The following questions should be considered when preparing a delegation order:

- Has the correct person (i.e., the head of the institution or, when the head is a minister, the deputy minister) delegated the power or duty in question?
- Has the delegated authority been correctly and clearly described or identified in the delegation order?

- Should full authority for the administration of the Act be delegated to the ATIP (Access to Information and Privacy) Coordinator?
- Should more than one person have delegation? Should Deputy Ministers and senior managers also be named in the delegation order?
- Are functions delegated as far down within the ATIP (Access to Information and Privacy) Office as possible? For example, extensions and third party notices can be delegated to ATIP (Access to Information and Privacy) Officers as well as to the Coordinator.
- Does the delegation order give authority to more than one officer or employee to resolve issues with the Information Commissioner?
- Do the delegates have sufficient knowledge of the Acts to properly exercise the delegated powers?

The Information and Privacy Policy Division's website provides a fact sheet on delegation and examples of delegation orders.

How long it remains in force

A delegation order remains in force until such time as it is reviewed and revised by the head of the institution. If the delegation order specifies an individual, departure or inability to act of that individual will render the order unusable unless another individual or position is also named. Therefore the Directive requires that the head identify the delegates by position, title, and not by name in order to avoid this outcome.

The delegation order remains in force even when a new head is appointed. The fact that a current head has not issued his or her own order is not critical since the appointment of a new head does not nullify the actions taken by his or her predecessor.

When it should be reviewed

Even though the delegation order remains in force upon the appointment of a new head, section 6.1.1 of the Directive requires that the delegation order be reviewed when circumstances surrounding the delegation have changed. It is recommended that the order be revised as soon as practicable to reflect the preferences of the new head.

The requirement to review the delegation order may arise in other circumstances, such as changes in personnel, restructuring of the organization, transfers of programs or portions of programs, merging of institutions, and changes in the mandate of the institution. (Where institutions have been merged or where programs or portions of programs have been transferred, the authority for decisions under the Act rests with the new head.)

If a new delegation order is required, it should be put in place as soon as possible in order to reduce any potential for disruption of the processing of requests.

Summary (delegation)

If there is a delegation order	If there is no delegation order
The head can delegate to one or more officers and employees of his or her government institution. Consultants, members of a Minister's exempt staff or employees of other government institutions or from the private sector cannot be named in the delegation order.	n/a

If there is a delegation order	If there is no delegation order
Subsections 24(2) and 24(4) of the Interpretation Act do not apply.	Subsection 24(2) of the Interpretation Act applies to departments and ministries of state. Subsection 24(4) of the Interpretation Act applies to other government institutions.
Only the delegate(s) and the head may exercise the powers, duties and functions of the head.	In the case of departments and ministries of state over which a minister of the Crown presides, the powers, duties and functions of the head may be performed by an officer or employee of the department or ministry of state appointed to serve in a capacity appropriate to fulfilling the duty. In cases where the head of the institution is a minister of the Crown who does not preside over the institution but is responsible for it, the minister must exercise personally the powers, duties and functions of the head of the institution. In the case of other government institutions, the deputy of the head may exercise the powers, duties and functions of the head.

If there is a delegation order	If there is no delegation order
Exempt staff in a Minister's Office are not authorized to exercise the powers, duties and functions of the head of the institution.	Exempt staff in a Minister's Office are not authorized to exercise the powers, duties and functions of the head of the institution.
Tasks may be performed by employees, officers or consultants in support of the powers, duties and functions that are the responsibilities of the delegates and the head.	Tasks may be performed by employees, officers or consultants in support of the powers, duties and functions that are the responsibilities of the head.
Delegates exercise the powers in their own name.	An officer or employee who exercises powers under subsection 24(2) or subsection 24(4) of the Interpretation Act does so "on behalf of" the head.
Once a delegate makes a decision in the proper exercise of the delegated power and has communicated the decision to the requester, the head cannot reassess the decision of the delegate. The head can revisit the decision during the investigation of a complaint or a review by the Federal Court.	Once an officer or an employee makes a decision and has communicated the decision to the requester, the head cannot reassess the decision of the officer or employee. The head can revisit the decision during the investigation of a complaint or a review by the Federal Court.

If there is a delegation order	If there is no delegation order
Delegates are accountable to the head of the institution for any decisions they make. Ultimate responsibility, however, always rests with the head of the government institution.	Accountability remains with the head of the institution.

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Chapter 3 – Definitions

This chapter contains definitions found in section 3 of the Access to Information Act (the Act), Appendix A of the Policy on Access to Information and Appendix A of the Directive on the Administration of the Access to Information Act. This chapter also contains definitions of certain terms used in this manual.

3.1 Terms defined in section 3 of the Access to Information Act

The following terms are defined in section 3 of the Act. In some cases, explanations have been added.

alternative format (support de substitution)
with respect to a record, means a format that allows a person with a sensory disability to read or listen to that record.

Court (cour)
means the Federal Court. The term “Court” also includes the Federal Court of Appeal and the Supreme Court of Canada.

designated Minister (ministre désigné)
is a member of the Queen’s Privy Council designated by the Governor in Council under subsection 3.2(1) of the Act to be the Minister for the purposes of any provision of the Act. Pursuant to the said subsection,

two ministers are designated, namely:

- the Minister of Justice for the purposes of paragraph (b) of the definition of "head" in section 3, subsection 4(2), paragraphs 77(1)(f) and (g) and subsection 77(2) of the Act; and
- the President of the Treasury Board of Canada for all other purposes of the Act.

The President of the Treasury Board of Canada is also the designated minister for the purposes of the Policy on Access to Information and the Directive on the Administration of the Access to Information Act.

foreign state (État étranger)

means any state other than Canada and includes, for example, the United States of America, Mexico and Italy, but excludes other levels of government such as the states of Ohio and Vermont.

government institution (institution fédérale)

means:

a. any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I of the Act; and
b. any parent Crown corporation, and any wholly owned subsidiary of such a corporation, within the meaning of section 83 of the Financial Administration Act.

The term "government institution" does not include ministers' offices.

head (responsable d'institution fédérale)

is the minister in the case of a department or ministry of state. In any other case, it is the person designated by the Access to Information Act Heads of Government Institutions Designation Order, or if no such person is designated, it is the chief executive officer of the institution, whatever his or her title.

Information Commissioner (Commissaire à l'information)

is an officer of Parliament appointed by the Governor in Council under section 54 of the Act to receive and investigate complaints made under the Act.

record (document)

means any documentary material, regardless of medium or form. See Section 3.3 of this manual for additional information.

sensory disability (déficience sensorielle)

means a disability that relates to sight or hearing.

third party (tiers)

in respect of a request for access to a record under the Act, means any person, group of persons or organization other than the person that made the request or a government institution.

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3.2 Other terms related to the application of the Access to Information Act

The following terms are not defined in the Act. Their definitions below are intended to bring clarity and a coherent understanding of terms commonly used in the administration of the Act.

access request (demande d’accès)

also known as a formal request, is a request made under the Act for access to a record under the control of a government institution. Fees may be charged under the Act and there are deadlines for responding. In addition, the requester has a statutory right of complaint to the Information Commissioner. See Chapter 9 of this manual for additional information on access requests.

access to information (ATI) training (formation en accès à l’information (AI))

refers to all activities that serve to increase access to information awareness, including formal training, research, discussion groups, conferences, Access to Information and Privacy (ATIP) community meetings, shared learning among colleagues, on-the-job training,

special projects, job shadowing and communications activities that promote learning in the areas outlined in Appendix B of the Directive on the Administration of the Access to Information Act.

annual report (rapport annuel)

is a report prepared by the head of a government institution for submission to Parliament regarding the administration of the Act within the institution during the financial year.

applicant or requester (auteur d'une demande ou demandeur ou requérant)

is a Canadian citizen, a permanent resident or any individual or corporation present in Canada who requests access to a record under the Act. In the context of a review by the Federal Court or the Federal Court of Appeal, the term "applicant" may also refer to a requester, a third party or the Information Commissioner who applied for a review under section 41 or 44 of the Act.

ATIP coordinator (coordonnateur de l'AIPRP)

is the officer or employee for each government institution who coordinates all activities relating to the administration of the Act, the Regulations and all related policy, directives and guidelines, within the institution.

ATIP personnel (personnel de l'AIPRP)

includes the coordinator and employees of the ATIP office who have functional responsibility for the administration of the Act.

class test (critère objectif)

is a test that objectively identifies the categories of information or documents to which certain exemption provisions of the Act can be applied. The following exemptions are based on a class test: 13(1), 16(1)(a), 16(1)(b), 16(3), 16.1, 16.2, 16.3, 16.4, 16.5, 18(a), 18.1, 19(1), 20(1)(a), 20(1)(b), 20(1)(b.1), 20.1, 20.2, 20.4, 21(1), 22.1, 23, 24 and 26.

complainant (plaignant)

is an individual who makes a complaint to the Information Commissioner on any of the grounds outlined in subsection 30(1) of the Act.

delegate (délégué)

is an officer or employee of a government institution designated by the head of the institution to exercise or perform any of the powers, duties and functions of the head under the Act. Additional information on delegation is available in Chapter 2 of this manual. The Information and Privacy Policy Division's website also provides a fact sheet on delegation and examples of delegation orders.

discretionary exemption (exception discrétionnaire)

is an exemption provision of the Act that contains the phrase "may refuse to disclose." The following exemptions are discretionary: 14, 15(1), 16(1), 16(2), 16.3, 17, 18, 18.1, 21(1), 22, 22.1, 23 and 26.

every reasonable effort (tous les efforts raisonnables)

means a level of effort that a fair and reasonable person would expect or would find acceptable.

excluded information (renseignements exclus)

is the information to which the Act does not apply as described in sections 68, 68.1, 68.2, 69 and 69.1 of the Act. Examples include published information such as procedure manuals posted on the Internet and tweets (paragraph 68(a)) and confidential documents such as Cabinet confidences (subsection 69(1)).

exemption (exception)

is a mandatory or discretionary provision under the Act that compels or authorizes the head of the government institution to refuse to disclose records in response to an access request.

implementation report (rapport de mise en oeuvre)

is a notice issued by the Treasury Board of Canada Secretariat to provide guidance on the interpretation and application of the Act, related policy, directives and guidelines, and applicable case law.

Info Source (Info Source)

is a series of annual Treasury Board of Canada Secretariat publications aimed at the public that contain clear and detailed information on government institutions, their program responsibilities and their information holdings, including classes of records, for the purpose of assisting members of the public in exercising their right of access under the Act. Info Source publications also provide contact information for government institutions as well as summaries of court cases and statistics on access requests.

informal request (demande informelle)

is a request for information made to the ATIP office of a government institution that is not made or processed under the Act. Fees cannot be charged under the Act for informal requests and there are no deadlines for responding. In addition, the requester has no statutory right of complaint to the Information Commissioner. See Section 9.1 of this manual for additional information on informal requests.

injury test (critère subjectif)

is a test of reasonable expectation of probable harm that would result from the disclosure of information that falls under certain exemption provisions of the Act. The following exemptions are based on an injury test: 14, 15(1), 16(1)(c), 16(1)(d), 16(2), 17, 18(b), 18(c), 18(d), 20(1)(c), 20(1)(d) and 22.

mandatory exemption (exception obligatoire)

is an exemption provision of the Act that contains the phrase “shall refuse to disclose.” The following exemptions are mandatory: 13(1), 16(3), 16.1, 16.2, 16.4, 16.5, 19(1), 20(1), 20.1, 20.2, 20.4 and 24.

personal information (renseignements personnels)

means information about an identifiable individual that is recorded in any form, as defined in section 3 of the Privacy Act. See Section 11.13.1 of this manual and Chapter 3 of the Privacy Manual for additional information.

publicly available information (renseignements accessibles au public)

means information available on an ongoing basis for use by the public. Information that has been disclosed by inadvertence or has been leaked does not become publicly available. See Section 11.13.3 of this manual for additional information.

published information (renseignements publiés)

means information made known and available to the public, in print or other formats, including information posted on institutional websites and via Web 2.0 tools such as YouTube and Twitter. See Section 13.1 of this manual for additional information.

requester or applicant (demandeur ou auteur d'une demande ou requérant)

is a Canadian citizen, a permanent resident or any individual or corporation present in Canada who requests access to a record under the Act. In the context of a review by the Federal Court or the Federal Court of Appeal, the term "applicant" may also refer to a requester, a third party or the Information Commissioner who applied for a review under section 41 or 44 of the Act.

severability (prélèvements)

relates to the principle under section 25 of the Act in which the protection of information from disclosure must be limited to the portions of information or material that the head of the government institution is authorized or obligated to refuse to disclose under the Act.

statistical report (rapport statistique)

is intended to provide up-to-date statistics on the administration of the legislation. The report allows the government to monitor trends and to respond to enquiries from members of Parliament, the public and the media. The report also comprises the statistical portion of government institutions' annual reports to Parliament. The forms used for preparing the report are prescribed by the designated minister, as provided under paragraphs 70(1)(b) and (d) of the Act.

structured information (information structurée)
electronic information that resides in fixed fields (rows and columns) within a repository or database.

the Act (la Loi)
in this manual, means the Access to Information Act.

tracking system (système de suivi)
is an electronic or paper-based internal case management system used in ATIP offices to track access requests and document their processing.

under the control (relever de)
See Section 3.4 of this manual.

unstructured information (information non structurée)
electronic information that has no identifiable structure and that is often created in free-form text using common desktop applications such as e-mail, word processing, presentation, and spreadsheet applications.

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3.3 Records

3.3.1 Definition of record

The term “record” is defined in section 3 of the Act. For the purposes of the Act, “record” means any documentary material, regardless of medium or form. Software is not a record; it is an item used to generate, view or edit a record, as opposed to a record itself. [3-1]

3.3.2 Electronic, computerized and non-computerized records

The terms “electronic,” “computerized” and “non-computerized” are not defined in the Act or the Regulations and should therefore be interpreted in light of the fact that the legislation was enacted by Parliament in 1983. At the time, most records were paper documents, and computers were mostly used to manage large databanks of information from which certain records, not in existence at the time of an access request, could be produced by programming the computer in one way or another. Personal computers containing individual electronic records that could be viewed on a monitor or printed on paper without the need for programming were uncommon in the workplace.

The paper-based information environment that existed in 1983 differs considerably from today’s electronic world where records exist in a variety of formats and media.

Electronic documents

Today, the great majority of records are created electronically. Electronic documents include, but are not limited to, e-mails, word processing documents, spreadsheets, presentations, information stored in databases, data produced by project management and calendar software, Web pages, Web-browser-generated history files, and information found in cellular phones, smart phones, personal digital assistants, voicemail systems, digital copiers and printers.

Electronic documents can be stored in different media, such as computer and external hard drives, servers, CDs and DVDs, backup tapes and USB memory sticks.

Computerized record and non-computerized record

The term “computer” used in subsection 4(3) of the Act relates to the production of records that would not otherwise exist. Based on the contextual approach, for the purpose of section 7 of the Regulations,

- a **computerized record** means a record that does not exist but can be produced from a machine readable record; and
- a **non-computerized record** is a record other than a record that does not exist but can be produced from a machine readable record. It includes paper records and records in electronic format, such as e-mails and Word documents, that can be produced without the need to program a computer to create the record.

Chapter 8 of this manual provides additional information on fees that may be charged for computerized and non-computerized records.

3.3.3 Electronic messages (e-mail, text and PIN-to-PIN messages)

Electronic messages include e-mail and messages transmitted through mobile or wireless devices.

Short for electronic mail, an e-mail is a message sent or received electronically over an electronic or computer channel or the Internet. An e-mail is able to attach files as text documents or images.

Wireless devices encompass all equipment that uses communication technology via an air interface, such as infrared or radio frequency, instead of closed wiring paths. They include, but are not limited to, cell phones, pagers, personal digital assistants and smart phones. Mobile

devices offer a variety of communication methods, including phone e-mail, texting and messaging using personal identification numbers (PINs).

Short Message Service (SMS) is a text messaging service component of phone, Web or mobile communication systems using standardized communication protocols that allow the exchange of short text messages between fixed-line or mobile-phone devices. The term “SMS” is used as a synonym for all types of short text messaging.

PIN-to-PIN messaging occurs when a user sends a message directly to another user’s PIN rather than to the user’s e-mail address, thereby by-passing the central server.

E-mail and messages sent, received or kept on a wireless device, including PIN-to-PIN communications, are records under the control of the government institution and are subject to the Act. They should be treated in the same manner as any other piece of information created or obtained by an institution in the carrying out of its business.

The Treasury Board’s Policy on Information Management [3-2] makes deputy heads responsible for “ensuring that decisions and decision-making processes are documented to account for and support the continuity of departmental operations, permit the reconstruction of the evolution of policies and programs, and allow for independent evaluation, audit, and review.”

Furthermore, the Directive on Recordkeeping [3-3] requires that institutions support recordkeeping requirements with respect to information resources of business value, which include “identifying, establishing, implementing and maintaining repositories in which information resources of business value are stored or preserved in a physical or electronic storage space.” The term “information resources

of business value" is defined as "published and unpublished materials, regardless of medium or form, that are created or acquired because they enable and document decision-making in support of programs, services and ongoing operations, and support departmental reporting, performance and accountability requirements."

The requirements of the Policy on Information Management and the Directive on Recordkeeping apply to electronic messages, including messages sent or received over wireless devices or via PIN-to-PIN communications. Those that relate to an institutional matter and are of business value should be saved in corporate repositories and all others deleted at the earliest opportunity.

Messages that are transitory in nature should be discarded in accordance with appropriate disposal authorities approved by the Librarian and Archivist of Canada and sound information management practices. However, if they have not been disposed of before a request is received to which they are pertinent, they fall under the Act and, according to the law, must be dealt with as part of the request. See Section 3.3.4 below.

In the context of administering access to information requests, ATIP offices should task employees of the institutions to search all records under the control of the institution, regardless of medium or form, including PIN-to-PIN messages and other records sent or received over wireless devices.

Institutional policy guidance on employees' responsibilities

Institutions may develop and adopt policy guidance along the following lines:

- **Information management:** The employee is responsible for proper recordkeeping of electronic messages, including PIN-to-PIN and SMS messages, that relate to an institutional matter and are of business value, as required by the Policy on Information Management and the Directive on Recordkeeping. Records are of business value when they are created or acquired because they enable and document decision-making in support of programs, services and ongoing operations, and support departmental reporting, performance and accountability requirements.

  All other information created, received or transmitted via a wireless device that has no business value is considered a transitory record and should be deleted as soon as it is no longer required. However, if a transitory record that has not yet been disposed of is pertinent to a request made under the Access to Information Act, it falls under the Act and must be processed as part of the request.

- **Access to information:** Electronic messages, including PIN-to-PIN and SMS messages, that relate to an institutional matter and are of business value are records subject to the Access to Information Act. It is the responsibility of each user to retrieve electronic messages that are relevant to a request made under the Act and to provide them to the Access to Information and Privacy Office of his or her institution.

3.3.4 Transitory records

In all government operations there are a variety of records that are transitory in the sense that they are required only for a short time to ensure the completion of a routine action or the preparation of a subsequent record. These short-lived records are not essential in documenting the initiation or conduct of a government institution’s

business. Examples are the telephone inquiry slip used simply to forward a message, draft documents reflecting initial thoughts before a document is shared with anyone beyond the Public Service employee creating it, or unannotated copies of documents used for information or reference purposes, the originals of which are included in departmental records. Similar situations arise with electronic documents such as early drafts and short-lived electronic mail.

The Librarian and Archivist of Canada has granted a multi-institutional disposition authority for transitory records. In the Authority for the Destruction of Transitory Records, "transitory records" are defined as follows:

> Transitory records are those records that are required only for a limited time to ensure the completion of a routine action or the preparation of a subsequent record. Transitory records do not include records required by government institutions or Ministers to control, support, or document the delivery of programs, to carry out operations, to make decisions, or to account for activities of government.

Transitory records have limited value to the institution and should be disposed of either at the discretion of the individual creating them or by automatic default in automated systems. However, if they have not been disposed of before a request is received to which they are pertinent, they fall under the Act and must be treated as any other document and processed as part of the request.

3.3.5 Draft documents

Draft documents are preliminary versions used to create a final document and may be used to solicit comment and input from others before a document is finalized. Draft documents are considered institutional records under the Policy on Information Management. Institutions must retain drafts prepared in the process of making a decision, implementing a policy, or initiating or continuing another institutional activity. Such records, including those prepared by consultants, fall within the ambit of the Act and must be treated as any other document when they are relevant to an access request.

However, some draft documents including previously “saved” versions of electronic documents need not be retained where they are working versions not communicated beyond the individual creating them or are copies used for information or reference purposes only. Such documents may be treated as transitory records and routinely destroyed. However, if they have not been disposed of before a request is received to which they are pertinent, they must be processed as part of the request.

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3.4 Notion of control

3.4.1 Definition of “under the control”

The Act gives a right of access to records “under the control” of a government institution. While this expression is not defined in the Act, it has been broadly interpreted by the courts. The notion of “under the control” applies to records as set out below.

The leading decision establishing whether records are under the control of a government institution is Canada Post Corp. v. Canada (Minister of Public Works), [1995] 2 F.C. 110 (C.A.). In that decision, the

Federal Court of Appeal ruled that all information in the hands of the Government is subject to the Act except information expressly excluded. The fact that a government institution has possession of records, whether in a legal or corporeal sense, is sufficient for such records to be subject to the Act. According to the Federal Court of Appeal, Parliament intended the Act to apply liberally and broadly with the citizen's right of access to such information being denied only in limited and specific exceptions.

In determining whether a record is under the control of a government institution, some of the factors to be considered include whether:

- it is held by the institution, whether at headquarters or at a regional, satellite or other office, either within or outside Canada, or at an off-site location such as a private storage facility or a federal records centre (records storage facility administered by Library and Archives Canada containing records that remain under the control of institutions); or
- it is held elsewhere on behalf of the institution (for example, records maintained by agents, consultants or other contracted service providers); or
- the institution is authorized to grant or deny access to the record, to govern its use and, subject to the approval of the National Archivist, to dispose of it.

The Supreme Court of Canada has clarified the notion of control for records held in a minister's office in the decision Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC 25, [2011] 2 S.C.R. 306 (commonly known as the "PM agenda" case).

The office of a minister is not part of the department over which the minister presides and, generally, records held exclusively in a minister's office are not subject to the Act. However, a document held exclusively

in a minister's office could be deemed to be under the control of a government institution if the following two-step test is satisfied:

1. Do the contents of the record relate to a departmental matter?
2. If so, could a senior official of the government institution reasonably expect to obtain a copy of the record upon request?

The factors to be considered are:

- the substantive content of the record;
- the circumstances in which it was created; and
- the legal relationship between the government institution and the record holder.

The Supreme Court of Canada stressed that:

- there is no presumption of inaccessibility for records in a minister's office; and
- the "test does not lead to the wholesale hiding of records in ministerial offices."

3.4.2 Political records

Political records are subject to the Act only when they are under the control of a government institution. In the decision Canada (Information Commissioner) v. Canada (Minister of National Defence), 2011 SCC 25, [2011] 2 S.C.R. 306 the Supreme Court of Canada stated that no exemption or exclusion for political records is provided for in the Act. The conclusion that a minister's office is not subject to the Act cannot be the basis for an implied exception for political records. However, such records are unlikely to be under the control of a government institution if they do not relate to a departmental matter.

3.4.3 Published materials and materials available for purchase

Published materials in print or other formats, including information posted on institutional websites and via Web 2.0 tools such as YouTube and Twitter, and materials available for purchase are excluded from the coverage of the Act. Additional information is found in Section 13.1 of this manual.

3.4.4 Cabinet confidences and records of the Office of the Auditor General of Canada

Although Cabinet confidences are excluded from the application of the Act by virtue of section 69 of the Act, it is government policy to process such records when relevant to an access to information request. Because of their sensitivity, special security measures are applied to Cabinet confidences, such as numbering copies and limiting their availability. Additional information on Cabinet confidences is found in Chapter 13 of this manual.

Similarly, government institutions must take steps to maintain the confidentiality of the Office of the Auditor General of Canada's draft audit reports and findings before they are tabled in Parliament. [3-4] Nonetheless, records that are in the physical possession of a government institution are under the control of that institution. Should a request made under the Act be received while records of the Office of the Auditor General are in the physical possession of the institution, the institution must process the records if they are relevant to the request, unless the request is transferred to the Office of the Auditor General as the institution having a greater interest in the records sought.

3.4.5 Records held in Department of Justice legal services units

The Department of Justice provides legal services to many federal departments and agencies. Although departmental legal services units are co-located with the client departments and agencies, they remain

part of the Department of Justice. In general, records found in the offices of a legal services unit are under the control of the Department of Justice. Client departments and agencies should not retrieve records from a legal services unit to respond to requests under the Act.

That said, a legal opinion provided to a client institution by its departmental legal services unit is under the control of the client institution. It is also under the control of the Department of Justice because it retains a copy of the legal opinion. When an access request is received by the client institution or the Department of Justice, the applicability of section 23 of the Act should be considered. Additional information on section 23 is found in Section 11.21 of this manual.

3.4.6 Records of other institutions held by Shared Services Canada

Shared Services Canada was created in August 2011 and has the mandate to consolidate and standardize certain administrative services that support government institutions. The first phase consolidated information technology (IT) services. Several IT units of the Department of Public Works and Government Services were transferred to Shared Services Canada, as well as the e-mail, data centre and network services and support units of 43 other departments and agencies. These departments and agencies no longer provide these services internally. Rather, Shared Services Canada operates and services all e-mail systems, data centres and networks, including all the relevant hardware and software. Other types of services may become the responsibility of Shared Services Canada in the future.

The records of these 44 departments and agencies, which include Shared Services Canada as its own institution, remain under their respective control. Section 15 of the Shared Services Canada Act

stipulates that Shared Services Canada does not have control over other institutions' records stored on Shared Services Canada's servers. It reads as follows:

> 15. For greater certainty, for the purposes of the *Access to Information Act*, the records of other government institutions as defined in that Act or of other organizations that are, on behalf of those institutions or organizations, contained in or carried on Shared Services Canada's information technology systems are not under the control of Shared Services Canada.

3.4.7 Web 2.0 records – General

Web 2.0 is the term given to describe a second generation of the World Wide Web that is focused on the ability for people to collaborate and share information online. Examples of Web 2.0 include blogs, wikis (such as GCPEDIA and Wikipedia), social and professional networking websites (such as Facebook, MySpace, Twitter and LinkedIn), and video sharing sites (such as YouTube).

Government institutions use a variety of Web 2.0 tools. The records created may be under the control of the government institution and subject to the Act depending on a number of factors, including whether these tools are internal or external to government.

Internal use of Web 2.0

Internal use of Web 2.0 refers to Government of Canada private electronic networks that are available only to government employees for internal collaboration and information sharing. One example is GCPEDIA, which was launched in October 2008 by the Chief Information Officer Branch, Treasury Board of Canada Secretariat. GCPEDIA is used as a platform to take, publish, and distribute meeting minutes, to create

project status dashboards, to collaboratively author interdepartmental papers, to brainstorm, and to create wiki-based briefing books. Users must be registered if they wish to add or modify content, so that all contributions are attributable. Two other tools are GCconnex, a social networking tool, and GCforums, a discussion board system.

All information posted to internal blogs and wikis is subject to the provisions of the Act, except information that is published (in other words, made available to the public), Cabinet confidences and certain records of the Canadian Broadcasting Corporation and Atomic Energy Canada Limited.

As explained in Section 3.4.6 of this manual, Shared Services Canada operates and services all networks for 44 departments and agencies, including its own. Section 15 of the Shared Services Canada Act stipulates that Shared Services Canada does not have control over other institutions' records stored on Shared Services Canada's servers. Therefore, the records of these institutions remain under their respective control.

In the case of Web 2.0 tools, participating institutions can input and amend information in the system, have access to the content of the site and retrieve and print it. As a result, all participating institutions have "control" over the contents, creating an obligation on each department, when receiving an access to information request, to search and process records under its control, including records created by other institutions.

From an operational point of view, it is more efficient for institutions to process requests for matters related to their own institution. Where warranted, the request can be transferred to another institution that

has a greater interest in the records sought. This approach is simpler and in line with the spirit of the Act.

Additional information on the use of internal Web 2.0 tools is provided in the Guideline to Acceptable Use of Internal Wikis and Blogs Within the Government of Canada.

External use of Web 2.0

External use of Web 2.0 refers to tools and networks that are available to government institutions and can also be accessed by the public, such as Facebook, LinkedIn, Twitter and Wikipedia.

Many institutions participate on these external Internet sites and externally facing networks. For example, Health Canada has a presence on Twitter, Facebook and YouTube, offers the Government of Canada Recalls and Safety Alerts Widget and participates in RSS News Feeds.

The information that government institutions input on these sites is considered published and falls under section 68 of the Act. While the Act does not apply to published information, institutions are encouraged to assist requesters by providing the links to the sites of interest.

Additional information on the use of external Web 2.0 tools and services is provided in the Guidelines for External Use of Web 2.0.

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Chapter 4 – Information about Government Institutions

Date updated (full chapter): 2023-04-18

PIR Manual Cross-reference

4.1 Sources of federal government information published by institutions

All government institutions subject to the *Access to Information Act* (ATIA) and the *Privacy Act* publish an inventory of their information holdings as well as relevant details about personal information collections under their control, in accordance with subsection 5(1) of the ATIA and section 11 of the *Privacy Act*.

Subsection 5(1) of the *Access to Information Act* (the Act) requires the designated minister to publish a report annually (or more often if required) that includes:

- a description of the organization and responsibilities of each government institution, including details on the programs and functions of each division or branch
- a description of all classes of records under the control of each government institution in sufficient detail to facilitate the exercise of the right of access under the Act
- a description of all manuals used by employees of each government institution for the purpose of carrying out any of the programs or activities
- the title and address of the appropriate officer for each government institution to whom requests for access to records under Part 1 of the Act should be sent

The current designated repository, as designated by the Treasury Board of Canada Secretariat (TBS) per subsection 5.2.6 of the *Policy on Access to Information*, is known as "Information About Programs and Information Holdings." Each institution must have a chapter within the repository and update it annually, as per subsection 4.3.22 of the *Policy on Access to Information*. TBS centrally indexes these pages and publishes them online to facilitate public access. The purpose of the

publication is to assist members of the public in exercising their right of access under the Act. Members of the public may complain to the Information Commissioner concerning the publication. For that reason, descriptions must be clear, comprehensive and up to date. Institutions are not required, however, to include in such descriptions information that would itself be exempt under the Act. TBS publishes the requirements for these pages online.

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4.2 Sources of federal government information published by TBS

Subsection 5(2) of the *Access to Information Act* requires that the designated minister cause to be published, at least twice a year, a bulletin that updates the annual publication and provides other useful information about the Act. In practice the bulletin, which consists of two publications, also provides useful information on the *Privacy Act*:

- the Statistics on the Access to Information and Privacy Acts provides an annual compilation of statistical information about requests made under the *Access to Information Act* and the *Privacy Act*, as well as an historic perspective since the promulgation of both Acts
- the publication Federal Court Decision Summaries is an annual summary of Federal Court, Federal Court of Appeal and Supreme Court cases related to both Acts.

Subsection 5(4) of the *Access to Information Act* requires the designated minister to ensure that the publication and bulletin be made available throughout Canada in conformity with the principle that every person is

entitled to reasonable access to the bulletin. This is achieved in practice by publishing the bulletin as links on TBS's Access to Information and Privacy page.

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Chapter 5 – Right of Access

5.1 Introduction

Subsection 4(1) of the Access to Information Act (the Act) provides a right of access to records under the control of a government institution for Canadian citizens and permanent residents within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act. The Access to Information Act Extension Order, No. 1 extends the right of access to include all individuals and all corporations present in Canada.

The term "present" denotes a physical presence in a geographic location. While the Order does not provide for a minimum time period that a requester must be present in Canada, requesters who are not Canadian citizens or permanent residents must be physically in the country at the time that the request is filed.

The right of access applies to existing records that are under the control of a government institution. There is no obligation to create a record in response to a request under the Act, except in certain circumstances involving information maintained on a computer. Certain limitations on access to records exist in the form of exemptions and exclusions. (Chapter 3 provides information on the notion of control, and Chapters 10, 11 and 13 in this manual provide information on exemptions and exclusions. The creation of records is discussed in Chapter 9.)

The Act does not specify a minimum age, which means that minors may also make requests.

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5.2 Verification of requester's right

Section 7.3.1 of the Directive on the Administration of the Access to Information Act requires institutions to ensure that the requester has the right to make a request under the Act. An institution must satisfy itself that a requester is qualified to make a request and be able to attest to this fact. In the decision Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare), [1990] 1 F.C. 652 (T.D.); affirmed (1990), 113 N.R. 399 (F.C.A), which was brought pursuant to section 44 of the Act and upheld on appeal, the Federal Court ordered that information not be released to a requester as there was no evidence that the requester was properly qualified to apply under section 4 of the Act. Institutions should therefore exercise due diligence in the verification exercise undertaken in this regard.

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5.3 Institution's obligation to exercise due diligence

The institution can rely on the information provided by the requester unless specific facts indicate that the requester was not present in Canada at the time the request was made or that the requester is neither a Canadian citizen nor a permanent resident.

In the decision Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare) (1992), 45 C.P.R. (3d) 390, [1992] F.C.A. No. 950 (C.A.), the Court ruled that a government institution must be reasonably

satisfied of the requester's right of access and that there has to be some evidence.

The institution must have sufficient information to be satisfied that the requester meets the requirements of the Act. It must be in possession of sufficient indicators of presence in Canada at the time the request was made, residence in Canada or Canadian citizenship, or proof that the requester is a permanent resident within the meaning of the Immigration and Refugee Protection Act.

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5.4 Special rules relating to third party objections

Institutions are most likely to deal with the issue of a requester's eligibility under section 4 of the Act when a third party puts it in issue in responding to section 27 of the Act, a notice of intended disclosure of third party information. Proof that the requester was qualified under the Act was one of the questions at issue in the cases Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare) (1992), 41 C.P.R. (3d) 176 (F.C.T.D.) and Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare) (1992), 45 C.P.R. (3d) 390 (F.C.A.).

In responding to this type of objection, an institution should inform the objecting third party that it is satisfied as to the requester's entitlement to apply under section 4. The institution could indicate the reason it is satisfied, that is, the requester certified in writing either on the Access to Information Request Form or otherwise that he or she is eligible under section 4, or it could confirm that the requester provided a return address in Canada. Institutions should keep in mind that an individual requester's name cannot be disclosed to a third party, as it constitutes personal information within the meaning of paragraph 3(i) of the

Privacy Act. However, this would not apply to requesters that are corporations or to requesters who have consented to their name being released.

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5.5 Subsection 4(2.1) – The duty to assist

5.5.1 Introduction

Subsection 4(2.1) of the Act imposes three obligations. The head of an institution must, without regard to the identity of the requester, make every reasonable effort to:

- assist the person making a request;
- respond to the request accurately and completely; and
- subject to the Access to Information Regulations (the Regulations), provide timely access to the record in the format requested.

These obligations are collectively referred to as the "duty to assist."

The purpose of subsection 4(2.1) is to make explicit the responsibility of government institutions and to ensure the equal treatment of requesters. While the provision does not change the existing rights and obligations under the Act, it adds a new obligation to make every reasonable effort to assist requesters and to provide them with as much information responsive to the request as possible, as soon as possible. With this obligation comes a new ground of complaint concerning the quality and sufficiency of efforts made to assist requesters.

The duty is mandatory, as it is expressed using the word "shall." It is to be performed along with the other responsibilities that the Act places on institutions in the course of the formal access process, such as

responding within time limits and stating the specific provisions on which refusal of access is based.

It is important to note, however, that subsection 4(2.1) is to be read in conjunction with other provisions of the Act. It does not replace those provisions.

How the duty to assist will be fulfilled depends on the nature of the access request and the needs of the requester. The duty to assist is most likely to arise in the course of:

- providing the information necessary for a requester to exercise his or her rights under the Act;
- clarifying what information or records the requester is seeking;
- performing a complete search for records; and
- responding to the requester.

The components of subsection 4(2.1) are discussed below.

5.5.2 Without regard to the identity of a person making a request for access to a record under the control of the institution

Subsection 4(2.1) provides that the identity of the requester must not be considered when processing requests. This means that, although some requesters may require more assistance than others, all requesters shall receive the same standard of service throughout the entire request process.

All requests are to be processed in the same manner regardless of the applicant's identity or the source of the request (such as media, business or political parties), and regardless of whether the applicant is a frequent requester or a party to a dispute or litigation involving the institution.

The identity of the requester should not affect the application of exemptions, except in specific circumstances in which identity is a relevant consideration (for example, the records contain personal or third party information about the requester or the organization he or she represents).

Generally, the identity of the requester should not influence the institution's practices regarding fee waivers, reductions or refunds. However, in specific circumstances, identity may be a relevant factor – for example, when the requester is a charitable organization.

5.5.3 Make every reasonable effort

Since the term "reasonable" is not defined in the Act, it is given its ordinary meaning: fair and sensible, moderate, as much as is appropriate or fair, suitable under the circumstances. The expression "every reasonable effort" means efforts that a fair and rational person would expect or would find acceptable.

The head of an institution has to make every reasonable effort to understand what the requester is seeking and to satisfy the request, if practicable, but is not required to make unreasonable efforts to satisfy the request.

Depending on the context, examples of what is reasonable include:

- advising a potential requester of his or her rights under the Act;
- assisting a requester to define or focus his or her request;
- advising a requester when information is available elsewhere, if known, and explaining how to obtain such information (for example, through the institution's publications); and
- providing contextual information to assist the requester to understand the record, if the record itself contains potentially

misleading information and the access to information analyst knows that the information may be misleading.

Depending on the context, examples of what is not reasonable may include:

- providing a technical explanation (for example, explaining the principles of civil engineering to help the requester understand a report on the structural design of bridges);
- writing the request for the requester, unless in exceptional circumstances;
- conducting research (such as by identifying all litigation involving the institution where a specific result was achieved) or manually manipulating or analyzing data; and
- creating records (for example, transcriptions of handwritten documents or audiotapes), except as outlined under subsection 4(3) of the Act (records produced from machine-readable records).

Institutions should document efforts made while processing requests.

5.5.4 Assist the person making or considering making the request

General information

The duty to assist is triggered when a person makes, or indicates that he or she is considering making, a request under section 6 of the Act. It applies throughout the request process.

The duty to assist is independent of whether or not requested records are likely to be withheld from access. The institution must always make a genuine effort to assist the requester. For example, if the information requested is posted on the institution's website, it will usually be sufficient to provide the link to the web page.

How an institution fulfills its duty to assist will vary according to the circumstances of each request and requires the exercise of judgment in each case. Much of the time, complying with the institution's usual service standards will fulfill the duty to provide assistance.

Principles for assisting the requester

Section 7.4.4 of the Directive on the Administration of the Access to Information Act requires that institutions implement and communicate the 10 principles for assisting requesters listed in Appendix C of the Directive. They are:

In processing your access request under the Access to Information Act, we will:

1. Process your request without regard to your identity.
2. Offer reasonable assistance throughout the request process.
3. Provide information on the Access to Information Act, including information on the processing of your request and your right to complain to the Information Commissioner of Canada.
4. Inform you as appropriate and without undue delay when your request needs to be clarified.
5. Make every reasonable effort to locate and retrieve the requested records under the control of the government institution.
6. Apply limited and specific exemptions to the requested records.
7. Provide accurate and complete responses.
8. Provide timely access to the requested information.
9. Provide records in the format and official language requested, as appropriate.
10. Provide an appropriate location within the government institution to examine the requested information.

It is not necessary to cite the principles in all correspondence with the requester. One way to meet this requirement is to refer to the principles in the acknowledgment letter, either by providing a link to Appendix C of the Directive on the Administration of the Access to Information Act or to the institution's website or by including the principles in an attachment.

Communicating with the requester

In some cases, communicating with the requester will be necessary to establish what assistance might be appropriate and therefore reasonable.

It is important to keep a detailed record of letters, e-mails and telephone conversations with requesters in the course of providing assistance. This documentation will be part of the record of how the request was processed.

Examples of assistance include:

- providing information necessary for the exercise of rights under the Act;
- explaining access and complaint processes;
- directing requesters to other means of obtaining records, such as the list of summaries of completed access requests posted on institutional websites;
- clarifying the request; and
- helping to formulate the request.

When someone other than an access to information analyst or other delegated official wants to deal directly with the requester, the institution's ATIP Office should obtain the consent of the requester beforehand.

a) Providing information necessary for the exercise of rights under the Act

Institutions should make available to requesters or potential requesters information that explains the access and complaint processes, as well as the differences between formal requests and informal requests. For example, requesters can obtain, through informal means, records released in response to previous requests, summaries of which are posted monthly on institutional websites.

According to subsection 2(2), the Act does not replace, but rather complements, existing procedures for access to government information. If there is more than one avenue for obtaining the information sought, the institution should inform the individual about other available means of access. For example, statements of contributions to the Canada Pension Plan are available online. If a person submits a formal request for access to such a record, he or she should be advised that it can be obtained free of charge and given details on how to proceed. However, an institution is not required to conduct research to satisfy itself that the information is available elsewhere. If a formal request has already been made and the requester decides to use another means to obtain information, the institution may ask the requester if he or she wishes to discontinue the access request.

Section 6.2.4 of the Policy on Access to Information requires institutions to develop and implement written procedures and practices that will effectively assist applicants. This implies that such procedures should be made available to requesters and potential requesters. One way to achieve this is for institutions to publish on their website their procedures for dealing with requests for information. These procedures may include:

- a general description of the procedures for making and processing requests;

- principles for assisting requesters;
- the practices of the institution concerning informal access; and
- the practices of the institution on the waiver, reduction or refund of fees.

The website could also provide:

- an address or addresses, including an email address where possible, to which requesters may direct preliminary questions or obtain assistance (this may be a general inquiries address);
- a telephone number where individuals can receive assistance; and
- electronic links to the institution's ATIP Office, the Access to Information Act, the Privacy Act, the Access to Information Request Form, the institution's annual reports to Parliament and Info Source chapter, the website of the Information and Privacy Policy Division of the Treasury Board of Canada Secretariat (policy, directives, guidelines and other tools), and the website of the Office of the Information Commissioner of Canada (complaint process).

Employees who are in contact with the public should bear in mind that not everyone may be aware of the Act and that they may need to inform potential requesters about the purpose and provisions of the Act.

b) Offering assistance to someone who intends to make a request

Assistance to a person who indicates that he or she intends to make a request for information could involve explaining the types of information the institution holds, the format(s) in which it is available, the fee structure and the general charging practices of the institution.

Institutions may also consider providing general information on a proactive basis, for instance, by promoting the right of access on the institution's website.

c) Offering assistance to someone unable to frame a request in writing

When a person is unable to frame a request in writing, either because of a limited ability to read or write English or French or because of a disability or condition that impairs his or her ability to make a written request, the institution should ensure that appropriate assistance is given to enable that person to make a request for information.

Depending on the circumstances, consideration should be given to:

- advising the person that another person or organization (such as a citizen advocacy group) may be able to assist him or her with the application or make the application on his or her behalf;
- in exceptional circumstances, offering to take a note of the application over the telephone or in person and then sending the note to the requester for confirmation (in which case the written note of the telephone request, once verified by the requester and returned, would constitute a written request for information, and the statutory time limit for reply would begin when the signed, written confirmation and application fee are received).

This list is not exhaustive, and institutions should be flexible in offering advice and assistance most appropriate to the needs of the requester. While institutions can assist requesters to formulate requests, care should be taken not to appear to be negatively influencing requesters or deterring them from proceeding with the request.

d) Clarifying or amending the request

When a request does not sufficiently describe the records sought or is unclear or too broad, the institution should offer assistance to reformulate the request in order to make it as specific as possible and avoid outcomes that are not useful to the requester.

If the request remains unclear after the institution has provided all possible reasonable assistance in clarifying the request, the institution is not expected to seek further clarification. Section 6 of the Act imposes an obligation on the requester to provide sufficient details so that an experienced employee of the institution is able, with a reasonable effort, to identify the records sought. In the decision Leahy v. Canada (Citizenship and Immigration), 2012 FCA 227, which dealt with the similarly worded provisions of the Privacy Act, the Federal Court of Appeal concluded that given the requester's failure to provide more specific information on the location of the personal information he was requesting when invited to do so, Citizenship and Immigration Canada's decision to limit the scope of the request was reasonable.

Additional information on clarifying or amending the request is found in Chapter 9 of this manual.

e) Informing the requester of the progress of the request

Under the Act, the requester must be notified, in writing, of the following:

- whether or not access to the record will be provided (section 7);
- the transfer of the request to another institution (section 8);
- the extension of time limits (section 9);
- the amount of the fees the requester is required to pay (section 11); and
- the decision to disclose additional information on the recommendation of the Information Commissioner (section 29), unless a review of the decision is requested under section 44 of the Act.

Generally, these notices will be sufficient for institutions to fulfill their obligation to inform the requester of progress.

When an institution cannot meet the original or extended deadline for responding to the request, it is appropriate to inform the requester of the delay, to explain the reasons and to discuss a completion date.

Institutions should also inform the requester of serious problems or unexpected delays for reasons such as the inability to obtain the relevant records due to damage or loss, or a power outage lasting several days.

There are no requirements to inform the requester, on an ongoing basis, of consultations undertaken, the number of pages yet to be processed, the state of the approval process, or other routine activities undertaken during the processing of the request. However, institutions may choose to do so at their discretion.

f) Transferring the request

When the head of an institution considers another institution to have a greater interest in the records sought, section 8 of the Act gives the head discretion to transfer the request to the other institution within 15 days after the request is received, subject to section 6 of the Regulations. This discretionary power is distinct from, and is not subordinate to, the mandatory duty to assist a requester under subsection 4(2.1) of the Act. Therefore, the institution does not need to consult or obtain the consent of the requester when deciding whether to transfer the request to another institution. The institution should, however, consider whether the transfer would help the requester to obtain the records sought. An example is a request that captures draft reports prepared by the Office of the Auditor General of Canada and shared with a government institution to ascertain the accuracy of the

factual information. In this instance, the head of the government institution may exercise the discretion in subsection 8(1) of the Act to transfer the request to the Office of the Auditor General of Canada.

Additional information on transfers is found in Chapter 6 of this manual.

g) Fees and waivers

The duty to assist applies to fees and waivers. In this context, suggested practices to comply with the duty to assist include:

- explaining what the fees cover;
- providing as much information as possible about how fees are estimated to enable the requester to make an informed decision;
- notifying the requester if the fee estimate has been revised, as soon as the institution realizes that the estimate was incorrect; and
- giving the requester adequate opportunity to provide evidence in support of the request for waiver, being clear about the criteria used in the decision and if all or part of the fees are not waived, explaining why that decision was made.

Additional information on fees is found in Chapter 8 of this manual.

5.5.5 Respond to the request accurately and completely

Performing a complete search for relevant records

The institution must make every reasonable effort to locate and retrieve all records responsive to a formal request that are under the control of the institution, regardless of medium or form. This also includes relevant PIN-to-PIN messages and other text messages that are in existence at the time of the request. Additional information on conducting a complete search is found in Chapter 9 of this manual.

The institution should be able to explain its search procedure to the requester if asked.

Creating records

Subsection 4(2.1) does not add an obligation to create records. An institution is not required to create a record to satisfy a request except as outlined under subsection 4(3) of the Act (records produced from machine-readable records).

The Act does not require institutions to prepare a transcript of an audiotape or videotape if one does not already exist. Nonetheless, an institution may decide to create a record if, in its opinion, it would be simpler or less costly for the institution than the alternatives. The institution could first discuss with the requester whether this approach would meet his or her needs.

In general, it is not necessary to transcribe handwritten notes. A transcription would create a new record, and if the notes were hard to read, the institution would be unable to guarantee accuracy. However, it may be appropriate to transcribe illegible handwritten notes if the author is still an employee of the institution and is able to decipher the notes despite the passage of time.

Translating records

Records that fall within the scope of an access request are typically released in the language in which they exist. A requester can ask that records be translated. Subsection 12(2) sets out the requirements concerning responses to requests in a particular official language. The decision to translate rests with, and is at the discretion of, the head of the institution or that of his or her delegate if they consider it to be in the public interest to have the records translated. As mentioned in

Section 5.5.1, subsection 4(2.1) must be read in conjunction with other provisions of the Act. Generally, subsection 4(2.1) is not a consideration in the exercise of the discretion found in paragraph 12(2)(b).

Explanation of reasons for refusal

Under paragraph 10(1)(b) of the Act, notices of refusal to requesters must state the specific provision of the Act on which refusal was based. Although not a legal requirement, section 7.8.2 of the Directive on the Administration of the Access to Information Act requires institutions to identify, on the requester's copy of the records, all exemptions that were invoked, except where to do so would reveal the exempted information or cause the injury upon which the exemption is based.

Therefore, as a general practice, the exemptions applied to specific portions of a record to be disclosed in part should be indicated in the margin of the record. A covering letter listing the exemptions might be more appropriate when, for example, the notation in the margin might in itself cause injury.

Explanation of the information provided

In responding to a request for information, reasonable efforts to satisfy the request may include:

- providing general contextual information to assist the requester to understand the record, if the record itself provides misleading information and the access to information analyst knows that the information is misleading;
- explaining information that cannot be understood on the face of the record (for example, by providing an explanation of codes if information in a record is encoded); and
- providing an explanation of abbreviations or acronyms in the record when asked.

The duty to assist does not require an institution to:

- provide a technical explanation (for example, explaining the principles of civil engineering to help the requester understand a report on the structural design of bridges);
- provide medical or legal interpretations of the information in records;
- disclose the nature or content of records that are withheld from the response to an access request; or
- make a requester aware of records that may relate to the request but have not been specifically requested, unless the request is ambiguous.

A fee cannot be charged for the time spent preparing or giving the requester an explanation of a record.

5.5.6 Provide timely access

Deadlines are specified in the Act

The deadlines for processing requests are stipulated in the Act. Section 7 requires the head of a government institution to respond within 30 calendar days after the request is received, subject to sections 8, 9, and 11 of the Act. Although subsection 4(2.1) does not amend any of the Act's time limit provisions, the duty to assist requires that access be provided as early as possible within those time limits.

Interim disclosures

Providing interim disclosures may be another way to fulfill the duty to provide timely access. Institutions are encouraged to release records to requesters as soon as they become available, without waiting for all of the records to be processed. Care should be taken, however, not to prematurely disclose information, especially information about

individuals, third parties and other governments, if there is a possibility that the disclosure may be affected by or may affect the remaining records.

Internal processes related to disclosure

The disclosure of certain records, because of their sensitivity, may require senior officials to be apprised of the disclosure or media lines or other communication products to be prepared. However, the response to requests for access to information should not be unduly delayed for such internal purposes.

To that end, institutions could initiate a procedure that allows branches and sectors of the organization, as well as the office of the head of the institution, to examine the material to be disclosed in response to specific requests. The procedure would allow a certain number of days for that examination and respect the legislated timelines so as not to interfere with the timely release of the information.

In such instances, the identity of the requester should not be disclosed unless absolutely necessary (for example, if the records contain personal or third party information about the requester or the organization that he or she represents) or unless the person receiving the information has a right to know the name of the requester (for example, the head of the institution or his or her delegate).

Extending the time limit

Section 9 of the Act gives the head of the institution discretion to extend the time limit for responding to a request in certain circumstances. This discretionary power is not subordinate to the mandatory duty to assist a requester; therefore, the institution does not need to consult or

obtain the consent of the requester when deciding whether to extend the statutory deadline. Chapter 7 of this manual provides additional information on extensions.

5.5.7 Subject to the Regulations, provide access to the record in the format requested

Subsection 4(2.1) requires the head of the institution to provide access to the record in the format requested, subject to the Regulations. Section 8.1 of the Regulations clarifies the limitations on the requesters' right to the format of their choice and institutions' obligations to provide the records in the requested format.

The term "format" in subsection 4(2.1) refers to information in different media (for example, a paper copy or an electronic file) or information presented in different ways in the same media (for example, a document printed on letter-sized and legal-sized paper, or an electronic document available in more than one kind of software, such as Word and WordPerfect).

Subsection 4(2.1) of the Act and section 8.1 of the Regulations apply when the requester is to be given access by means of a copy of the record and the requester asks that the copy be provided in a particular format. Section 8.1 of the Regulations requires institutions to provide the copy in the requested format if the institution already has the record in that format and a copy of that format can be provided. (Determining whether or not a copy of an existing record will be provided is dealt with in section 8 of the Regulations, as explained in Section 9.15.3 of this manual.)

If the requested record does not exist in the format specified by the requester, the Regulations set out the factors to be used by the head of the government institution in determining whether it is reasonable to

convert the record to the requested format.

If the head of an institution determines that the conversion to the requested format is unreasonable, the Regulations require the institution to provide a copy of the record in another format, which is chosen by the requester from among formats that either exist within the institution or to which it would be reasonable to convert the record.

For information on how to determine whether to convert the record in an alternative format under subsection 12(3) of the Act, please refer to Section 9.15.4 of this manual.

Factors to be considered

Subsection 8.1(3) of the Regulations lists the factors to be taken into account when determining whether the conversion to the requested format is reasonable or unreasonable. They are as follows:

a) The costs to the government institution

The costs of conversion include:

- costs related to obtaining the conversion technology;
- time required for programming;
- time spent on actual conversion; and
- the cost of media on which the information is provided (CDs, DVDs, etc.).

In some cases, the volume of records will affect the costs of conversion. When the volume of records is the primary factor in the decision not to convert, the requester should be so informed and given an opportunity to narrow the scope of the request.

The head of an institution may decide conversion to the requested format is not reasonable if the cost of converting the information is too high. The point at which costs become prohibitive is specific to each

case and is left to the discretion of the head of the institution or his or her delegate.

Only the costs listed in section 7 of the Regulations may be recovered. The time spent on converting records is not part of the preparation time and cannot be charged to the requester.

b) The potential degradation of the record

Some records do not lend themselves well to conversion and could be damaged during the process; for example, old films and paper documents can be damaged just by being handled.

c) If the person making the request is to be given access to only a part of a record, the facility with which the record may be severed in the format requested

The ease of severing the record in the format requested is another factor to consider. Most institutions do not have the expertise or technology necessary to sever formats such as microfilms or video recordings.

d) The existence of the record within the government institution in another format that is useful to the person making the request

If the information being sought already exists in another format that is useful to the requester, the head of the institution may decide to provide the information in the existing format. The usefulness of the existing format should be determined based on comparison with the format that is being requested.

Special consideration should be given to whether the ability of the requester to exercise his or her rights under any Canadian law would be impaired by the lack of access to the record in the specified format. Institutions should also consider the requester's access to computers, software and technological aids as factors that may affect the selection of an appropriate format.

e) The possibility that the record can be converted to another format that is useful or necessary to the person making the request

Some types of information are easier or less expensive to convert into one format than another. The institution may decide to convert the information into a format other than the one requested if the converted format of the record would be useful to the requester. As with the preceding criterion, the usefulness of the converted format should be determined based on comparison with the format that is being requested.

Special consideration should be given to whether the ability of the requester to exercise his or her rights under any Canadian law would be impaired by the lack of access to the record in the specified format. Institutions should also consider the requester's access to computers, software and technological aids as factors that may affect the selection of an appropriate format.

f) The impact on the operations of the government institution

Converting the record may be considered "unreasonable" if efforts to do so interfere with the institution's operations by:

- transferring resources from operations to the ATIP Office;
- monopolizing a significant portion of the resources of the office of primary interest to the detriment of its core functions; or
- assigning such a large share of ATIP Office resources to the request that the processing of other requests would suffer.

g) The availability of the required personnel, resources, technology and equipment

The head of an institution must take into consideration whether the institution has the expertise, resources, technology and equipment needed to convert the records into the requested format. It is not

necessary to purchase software or equipment or to engage outside experts to satisfy a particular request if this would incur unreasonable costs.

Other considerations

a) Presentation of the converted information

When converting to another format, the information may be presented differently. More specifically, formatting of the information may be lost, including spacing, alignment, numbering, font size and colour, shading and bullets. These problems may be encountered when converting from certain SQL databases to Excel, WordPerfect to Word, Microsoft Works to Word, or PDF to most programs. Furthermore, some programs do not recognize certain fonts and characters (such as é).

In such cases, it is not the responsibility of the institution to reformat the information. It may be useful to discuss such difficulties with the requester before conversion. If the requester still wants the record to be converted, the institution may provide a copy of the information in the original format to help the requester understand the converted records, subject to receipt of applicable fees.

b) Disagreement on the format to be provided

If an institution is unable to accommodate the requester’s preference, it should consider whether the information can be provided in another format and should discuss the matter with the requester. For example, if a requester asks for information to be provided on a CD-ROM and the institution decides that this is too costly, alternatives should be discussed with the requester. Taking into account the criteria listed above, the institution should make an effort to supply the requested record in a format that is useful to the requester and reasonable and cost-effective for the institution. If the requester and the institution are

unable to agree on a format, the record will be provided in the format that the head of the institution considers appropriate. The requester, of course, has the right to file a complaint with the Office of the Information Commissioner.

c) Delay caused by conversion

As part of the duty to assist the requester, institutions should also consider the time required to provide the record in the requested format. If conversion is likely to take a long time, it is appropriate to present the requester with other options for receiving the information. Delay due to the time it takes to convert records to another format should not be a basis for refusing to undertake conversion, but it may be a reason for trying to find another means to respond to a request.

d) Multiple formats

If a requester asks to have records disclosed in more than one existing format (for example, on paper as well as in electronic form), the institution is not obligated to disclose the records in both formats but has the discretion to do so.

It is important to remember that only the fees described in section 7 of the Regulations may be charged. The Regulations do not address more recent formats, such as videocassettes, CDs and DVDs; therefore, no fees or amounts may be charged in relation to these formats.

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5.6 Reading rooms

Subsection 71(1) of the Act requires government institutions to provide facilities where the public may inspect manuals used by employees of the institution in administering or carrying out programs or activities of the institution that affect the public. The term “manual” includes user

guides, directives, guidelines, instructions and procedural material. The availability of such manuals allows members of the public to understand how decisions that affect them are made and opens up the decision-making process to public scrutiny.

Examples of manuals that must be made available include, among others:

- rules and procedures for administering a public program;
- formulas or eligibility criteria for grants or other benefits;
- guidelines for reviewing applications;
- guides explaining conditions affecting an individual in a program, or the obligations and liabilities on an individual under a program.

Examples of manuals used in the ATIP Office that affect the public are the institution's written procedures and practices to assist requesters (required by section 6.2.4 of the Policy on Access to Information) and its policies concerning informal access and the waiver of fees.

It is not necessary to include manuals and other materials relating only to the internal operation and administration of the institution that do not affect the public. This includes instruction manuals for operating equipment, internal personnel practices, records management guidelines and office procedures. Examples of manuals used in the ATIP Office that do not affect the public are the business rules for statistical reporting and the procedures to update and maintain the tracking system.

That said, institutions may consider including manuals described in Info Source as required by paragraph 5(1)(c) of the Act, that is, manuals used by employees in administering or carrying out any of the programs or activities of the government institution. Although some of

these manuals do not affect the public, they may inform the public about how institutions operate, enabling them to use their access rights in a more meaningful way.

In addition to manuals used by employees in administering or carrying out programs or activities of the institution that affect the public, it is suggested that the following records be placed in the reading rooms:

- a paper or electronic copy of the Access to Information Act, the Privacy Act,the Policy on Access to Information, the Directive on the Administration of the Access to Information Actand the Access to Information Manual;
- a paper or electronic copy of Info Source publications;
- Access to Information Request Forms; and
- any other reference tools to help applicants identify the information sought.

5.6.1 Exempt information may be excluded

Subsection 71(2) of the Act provides that any information exempt from disclosure under the Act can be severed from manuals that may be inspected by the public. For example,portions of a manual that deals with security precautions or protections for a building that is open to the general public (such as the Library and Archives Canada building) may be severed for many legitimate reasons.

5.6.2 Establishing reading rooms

Each institution must provide facilities where the public may inspect manuals used by employees of the institution in administering or carrying out programs or activities of the institution that affect the public, both at its headquarters and, if reasonably practicable, at other offices of the institution.

There are a number of ways to accomplish this. The term “facility” may include a location such as a reception area, a work station, an office or any other area used for the purpose of providing access to manuals. Therefore, a reading room may be part of another facility, such as the institutional library or resource centre. Another approach is to designate space in the institution’s ATIP Office and in the workplace of appropriate regional officials. Government institutions may also want to establish a virtual reading room.

The decision to establish separate, physical reading rooms should be based on what is reasonably practicable, i.e. the cost-effectiveness in relation to the actual usage made of the facility.

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Chapter 6 – Transfer of Requests

6.1 Conditions for transferring a request

There are occasions where an applicant requests information from a government institution that would be more appropriately handled by another government institution. Section 8 of the Access to Information Act (the Act) and section 6 of the Access to Information Regulations set the conditions for transferring a request.

A request may be transferred if the following four conditions are met:

1. The head of the institution considers that another institution has a greater interest in the record, as defined in subsection 8(3) of the Act:
    - the record was originally produced in or for the institution; or
    - in the case of a record not originally produced in or for a government institution, the institution was the first

government institution to receive the record or a copy thereof.
2. The transfer is made within 15 days of receipt of the request.
3. The head of the other government institution agrees to process the request within the remaining allowable time.
4. The request has not already been transferred from another institution.

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6.2 Deciding whether to transfer the request

An institution does not need to consult or obtain the consent of the requester when deciding whether to transfer the request to another institution. The institution should, however, consider whether the transfer would help the requester to obtain the records sought.

A government institution may refuse the transfer when it does not have the greater interest in the requested records, if more than 15 days have passed since the receipt of the request by the other institution, or if the applicant filed the same request with both institutions.

If the transfer is refused, the institution in receipt of the request must process the request. If the institution believes that other institutions might have records relevant to the request, the institution should inform the applicant accordingly and suggest that he or she file a separate request with the other institutions.

In cases where the same request was made to two or more institutions, it may be useful to suggest to the requester that each institution only process the records it created, in addition to records received from individuals and organizations not subject to the Act.

6.2.1 Transferring the record when transferring a request

The transfer of records may be necessary if, for example, the other institution cannot locate them. However, the best approach would be to discuss this question with the Access to Information and Privacy Coordinator of the other institution before transferring any record.

6.2.2 Extending the 15-day period allowed to transfer the request

Section 9 of the Act allows the head of the institution to extend the period of 15 days set out in subsection 8(1) under the following three circumstances:

- The request is for a large number of records or requires a search through a large number of records, **and** meeting the original time limit, under either of these circumstances, would unreasonably interfere with the operations of the institution.
- Consultation is necessary and it cannot be completed within the 30-day statutory time limit.
- Notice is given to a third party under subsection 27(1) of the Act.

When a request is transferred to another institution, the 30-day time limit is calculated from the date the request was received by the first institution. In other words, the second institution is deemed to have received the request on the date the request was received by the first institution. For this reason, it is important to transfer the request as soon as possible. If an extension of the 15-day period allowed in subsection 8(1) to transfer the request is needed before the transfer to another institution can be made, the time extension should be as short as possible. If the first institution extends the 15-day period allowed in subsection 8(1) by more than 15 days, it should also extend the 30-day time limit set in section 7 in order not to place the second institution in

a deemed-refusal situation. The two institutions concerned should determine together the necessity of extending the 30-day time limit to respond to the requester.

Chapter 7 of this manual provides additional information on extensions.

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6.3 Procedure

When a request for access is transferred, the second institution is deemed to have received the request on the date the request was received by the first institution. Therefore, the transfer of requests should be done as early as possible within the 15 days after the request is received in order to provide enough time to the second institution to process the request within the remaining time.

While the consent of the institution having the greater interest is required prior to the transfer, such consent does not have to be in writing. As mentioned above, the consent of the requester is not required. However, the head of the institution must give notice of the transfer to the requester, in accordance with subsection 8(1) of the Act.

To facilitate the administration of application fees, the institution that first received the request should indicate to the institution with greater interest whether the application fee has been received and if it has been deposited in the Consolidated Revenue Fund.

It is important to remember that a request can only be transferred once, as stipulated in subsection 6(2) of the Regulations.

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Chapter 7 – Time Limits

7. 1 Statutory deadline

Section 7 of the Access to Information Act (the Act) requires the head of a government institution to respond to a request within 30 days after the request is received, subject to sections 8, 9, and 11 of the Act. The head of a government institution must:

- give the requester written notice as to whether or not access to the record or part thereof will be granted; and
- if access is to be given, give the requester the record or appropriate part thereof.

In effect since September 2007, subsection 4(2.1) of the Act requires the head of a government institution to make every effort to provide timely access to the record requested. Although subsection 4(2.1) does not amend any of the Act's deadline provisions, it requires that timely access be provided to the record within those deadlines as soon as processing has been finished.

7.1.1 Calculation of statutory deadline

The 30 days allowed by the Act are calendar days, as provided for in subsection 27(5) of the Interpretation Act. They are counted from the first day following receipt of a complete request in the appropriate office(s) named in Info Source. If the deadline falls on a weekend or on a holiday, the deadline for response, extension or other action becomes the next work day. In such cases, the notice of extension must be sent before or on that next work day.

When an extension is taken, the deadline is recalculated from the date of receipt of the request rather than from the original deadline.

Example

A request is received on November 23. The 30th day falls on Saturday, December 23. The next day that is not a holiday is December 27, which becomes the deadline, and the institution has 34 calendar days to process the request. When a 30-day extension is taken, the new deadline is calculated from November 23 (30 + 30 days), and the 60th day falls on January 22 of the next calendar year.

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7.2 Section 8 of the Act – Transfer of request

The 30-day time limit set out in section 7 of the Act is subject to section 8 of the Act, which allows the head of a government institution to transfer a request to another government institution having a greater interest in the document sought.

Subsection 8(1) of the Act specifies that the transfer must be made within 15 days following receipt of the request by the first institution. Section 9 of the Act allows the head of the institution to extend this period of 15 days, as explained in Section 7.3 of this chapter.

When a request is transferred, the 30-day time limit is calculated from the date when the request was received by the first institution. In other words, the second institution is deemed to have received the request on the date when the request was received by the first institution. For this reason, if an extension of the 15-day period is needed before the transfer to another institution can be made, it is important to take as short a time extension as possible. If the first institution extends the 15-day period by more than 15 days, it should also extend the 30-day time limit in order not to place the second institution in a deemed-refusal

situation. (See section 7.5 of this chapter for additional information on deemed refusal.) The two institutions concerned should determine together whether or not it is necessary to extend the 30-day time limit.

Chapter 6 of this manual provides additional information on transfers.

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7.3 Section 9 of the Act – Extension of time limits

The 30-day time limit set in section 7 of the Act and the 15-day time limit set in subsection 8(1) of the Act are subject to section 9 of the Act. In particular, subsection 9(1) of the Act allows the head of a government institution to extend the initial period under the following three circumstances:

- the request is for a large number of records or requires a search through a large number of records and meeting the original time limit, under either of these circumstances, would interfere unreasonably with the institution's operations;
- consultation is necessary and it cannot be completed within the 30-day statutory deadline;
- notice is given to a third party under subsection 27(1) of the Act.

This discretionary power is not subordinate to the mandatory duty to assist a requester. Consequently, the institution is not required to consult or obtain the requester's consent when deciding whether or not to extend the statutory deadline. The institution is required to examine the circumstances and context of each request.

More than one extension may be taken, provided each extension is taken within the initial 30-day period.

Example

An institution takes an extension under paragraph 9(1)(a) on Day 7 when the office of primary interest informs the Access to Information and Privacy (ATIP) Office that the request is for a large number of records and the search will require many days. A second extension is taken on Day 15 after a first package of documents originating in other institutions is examined. A third extension is taken on Day 29 when third party information is identified.

7.3.1 Reasons for extension

a) Paragraph 9(1)(a) – Large Number of Records

Paragraph 9(1)(a) of the Act refers to a large number of records and to an unreasonable interference with the operations of the government institution. Both the words “large” and “unreasonable” are subjective terms that may be interpreted according to the circumstances and the context of each specific request.

Generally, more than 500 pages relevant to a request are considered a large number of records. A request comprising less than 500 pages may nonetheless be considered a large request because of the complexity of the records or the size of the institution.

Generally, interference with the institution’s operations may be considered unreasonable if processing the request within 30 days would require the following:

- a transfer of resources from operations to the ATIP Office;
- monopolizing a significant portion of the resources of the office of primary interest to the detriment of its core functions; or
- using such a high proportion of the resources of the ATIP Office that it would have a significant negative impact on the processing

of other requests.

Emergency situations

There is no provision in the Act that allows the statutory time limits to be extended in emergencies, such as a power outage or an ice storm. The impact of an emergency on the institution's operations cannot be used as the sole basis for taking an extension under paragraph 9(1)(a) of the Act. However, an extension may be considered if a response within the first 30 days is not possible owing to the impact of the emergency on the institution's operations **and** because the request involves a large number of records or a search through a large number of records.

b) Paragraph 9(1)(b) – Consultations Necessary

For the purposes of paragraph 9(1)(b) of the Act, "consultation" refers to consultations undertaken within a government institution, with other government institutions or other levels of government, or with other third parties when the records do not contain information that might qualify for exemption under subsection 20(1) of the Act. (The deadline may be extended under paragraph 9(1)(c) of the Act when notice is given, under subsection 27(1) of the Act, of the intended disclosure of records containing information that might qualify for exemption under subsection 20(1) of the Act.)

An extension under paragraph 9(1)(b) of the Act may also be justified when an institution must seek legal advice in order to resolve issues related to the processing of a request. However, extensions should not be taken to cover an institution's routine approval process.

It is also a best practice to obtain, where feasible, an agreed upon response time from the consulted institution, the other government institutions, the other levels of government or the third party when

taking an extension under paragraph 9(1)(b) of the Act.

c) Paragraph 9(1)(c) – Notice to Third Party

As indicated above, an extension under paragraph 9(1)(c) of the Act may be claimed when a formal written notice is sent to a third party under subsection 27(1) of the Act. An extension under paragraph 9(1)(c) of the Act cannot be claimed when a third party is consulted informally.

Subsection 27(1) of the Act requires institutions to send third party notices within 30 days after the request is received. In addition, subsection 27(4) of the Act allows institutions to send subsection 27(1) notices after the initial 30 days when the deadline has been extended under paragraphs 9(1)(a) or (b) of the Act, that is, within the extended time limit. However, subsection 27(4) of the Act does not allow for an extension of the deadline for the processing of the request, i.e., beyond the extended time limit of paragraphs 9(1)(a) or (b) of the Act.

7.3.2 Length of extension

Subsection 9(1) of the Act refers to the extension of the time limit "for a reasonable period of time, having regard to the circumstances". In each case, the head of the institution or his or her delegated representative must exercise judgment.

Extensions should be based on the amount of work required to process a request and be for as short a time as possible. If an extension under any paragraph is too long, a complaint made to the Information Commissioner may be considered justified. If the extension is not long enough and the institution does not complete the request within the extended time frame, the request is deemed to have been refused by virtue of subsection 10(3) of the Act. (Information on deemed refusals is provided in Section 7.5 of this manual.)

Consequently, the length of an extension should be assessed on a case-by-case basis wherein the volume and complexity of the information for that specific request is taken into consideration. Applicable factors to consider are provided in Section 7.3.3 of this chapter.

This approach avoids determining the length of an extension based on only such pre-determined factors as the average response time taken by an institution or third party consulted in the past.

It also supports section 7.6.2 of the Directive on the Administration of the Access to Information Act which requires heads of government institutions or their delegates to ensure "that any extension taken is as short as possible and can be justified" while also supporting the duty to assist under subsection 4(2.1) of the Act.

In the decision Information Commissioner of Canada v. Canada (Minister of National Defence, 2015 FCA 576, the Federal Court of Appeal indicated that the head of a government institution may extend the time limit if certain conditions set out in section 9 of the Act are met. Absent these circumstances, the validity of the extension may be judicially reviewed as a deemed refusal of access once a complaint has been made to the Information Commissioner and her investigation report has been completed.

The Federal Court of Appeal also indicated that "it is not enough for a government institution to simply assert the existence of a statutory justification for an extension and claim an extension time of its choice. An effort must be made to demonstrate the link between the justification advanced and the length of the extension taken. In the case of paragraph 9(1)(a), this will mean not only demonstrating that a large number of documents are involved, but that the work required to provide access within any materially lesser period of time than the one

asserted would interfere with operations. The same type of rational linkage must be made pursuant to paragraph 9(1)(b) with respect to necessary consultations."

It is important to justify any extension taken regardless of length and to properly record those decisions on file.

Prior to 2011, the Treasury Board of Canada Secretariat collected statistical data on the length of extensions for the following two categories: "30 days or under" and "31 days or over." Starting with the 2011–2012 reporting period, institutions must provide data on the length of extensions for the following categories:

- 30 days or less;
- 31 to 60 days;
- 61 to 120 days;
- 121 to 180 days;
- 181 to 365 days;
- 365 days or more.

7.3.3 Procedures

The following procedures are recommended when dealing with extensions:

1. Institutions should assess all requests as soon as possible after receiving them and, if necessary, give notice of a reasonable extension to the requester within 30 days of receipt of the request. Several factors may be considered when deciding whether an extension is needed and the length of the extension, including the following:
    - scope and complexity of the request;
    - number of records requested;

- number of files that must be searched to find the requested records;
- level of interference with the institution's operations;
- number and complexity of consultations required with employees of the institution and external organizations, such as offices of primary interest, other institutions or other levels of government;
- whether a notice was given to a third party under subsection 27(1) of the Act;
- whether additional consultations or notification may be required depending on the outcome of the consultations undertaken.

Example

An institution has records that are of interest to several institutions, such as records about a sensitive security issue that concerns Public Safety Canada, the Royal Canadian Mounted Police and the Canadian Security Intelligence Service. Based on precedents, the institution expects that two rounds of consultations will be required with some of these institutions as a result of additional information obtained during the consultation process.

In some cases, precedents may be used to determine the time required to complete the processing of the request. The institution may consider, for example, how long it normally takes to complete this type of consultation with this specific institution or for this volume of records. That said, a precedent, if used, should not be

the standalone deciding factor, but rather part of an entire assessment criteria that also takes into account the volume and complexity of the information at issue.

When extending under paragraph 9(1)(b) of the Act, it is a best practice to contact the institution, the individual or the organization being consulted to obtain an agreed upon response time from that institution, individual or organization.

2. If the original 30 days have passed and records that contain or might contain information described in subsection 20(1) of the Act are found, the institution must give notice to the third party if the intention is to disclose the records concerned.
   Similarly, if records are found that are of interest to another institution, organization or individual, the consultations should be undertaken if additional information is required to exercise discretion effectively.

   An extension cannot be taken because more than 30 days have passed since the request was received.

3. If access cannot be provided within the statutory time limit, the institution should inform the requester that the time limit cannot be met, indicate when access will be given, and advise the requester of the right to file a complaint with the Information Commissioner.

4. When the relevant records contain similar or related information, all the records should be carefully examined together to ensure consistency and the proper exercise of discretion.

5. Keep requests open until all consultations haven been received or until a reasonable effort has been made to seek the consent of the third party involved and a formal notice, as discussed in Section

7.3.4 of this chapter, has been provided to the requestor.

7.3.4 Notice to the requester

When, based on the factors identified in Section 7.3.3 of this chapter, an institution extends the time limit, section 9 of the Act requires that the institution give written notice of the extension to the requester within the original 30-day time period. This requirement is supported by section 7.6.1 of the Directive on the Administration of the Access to Information Act, which requires institutions to assess without undue delay all access requests received and, if an extension is needed for processing a request, notify the applicant of the extension within 30 days of the request's receipt.

The written notice must contain the following:

- the reason for the extension;
- the length of the extension when extending under paragraphs 9(1)(a) or (b) of the Act;
- when extending under paragraph 9(1)(c) of the Act, it is not necessary to specify the length of the extension; and a statement to the effect that the requester has the right to file a complaint about the extension to the Information Commissioner of Canada within 60 days following receipt of the extension notice (section 31 of the Act).

If more than one extension is taken, the institution may inform the requester in the same notice or under separate cover.

7.3.5 Notice to the Information Commissioner

If a time extension is greater than 30 days, the head of the institution is required under subsection 9(2) of the Act and section 7.6.3 of the Directive on the Administration of the Access to Information Act to

inform the Information Commissioner of the extension, at the same time that notice is given to the requester.

In cases where more than one extension is taken, each extension being less than 31 days but the total number of days taken exceeds 30 days, notice must be given to the Information Commissioner. For example, notice must be given to the Information Commissioner when an extension of 15 days is taken under paragraph 9(1)(a) of the Act and an extension of 30 days is taken under paragraph 9(1)(b) of the Act, for a total of 45 days.

When extending under paragraph 9(1)(c) of the Act because notice is given to a third party under subsection 27(1) of the Act, it is not necessary to specify the period of the extension. Therefore, institutions do not have to give notice to the Information Commissioner of extensions taken under paragraph 9(1)(c) of the Act. However, even if it is not required under paragraph 9(1)(c) of the Act, when an institution specifies in the notice to the requester that the deadline is extended for a period of more than 30 days, the institution must give notice to the Information Commissioner pursuant to subsection 9(2) of the Act.

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7.4 Section 11 of the Act – Fees

The 30-day time limit set out in section 7 of the Act is also subject to section 11 of the Act. Section 11 of the Act allows the head of a government institution to request that certain fees be paid before:

- any copies are made;
- the documents are converted into an alternative format or copies are made in an alternative format;

- the search for and preparation of records where more than five hours are required; or
- records from a machine readable record are produced.

When the institution gives written notice, under subsection 11(5) of the Act, to the requester of the amount required, it is not obliged to comply with the request until payment is received. In other words, the 30-day or extended period is put on hold for the number of days between the sending of the notice and the receipt of payment from the requester.

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7.5 Deemed refusal

Subsection 10(3) of the Act states that when a government institution fails to give access to a record or a part thereof within the time limits set out in the Act (30 calendar days or the length of time taken under an extension), the institution is deemed to have refused access. This situation is commonly referred to as a deemed refusal.

To clarify further, if no extension has been taken under section 9 of the Act and a response was not given, an institution is deemed to have refused access on the 31st day after a request was received (unless it falls on a weekend or a holiday). If an extension was taken, an institution is deemed to have refused access if it did not respond by the end of the extended deadline.

In such cases, the requester and the Information Commissioner are placed in the same position as if there had been a refusal within the meaning of section 7 and subsection 10(1) of the Act. The requester may then file a complaint with the Information Commissioner about the refusal of access. In addition, the Information Commissioner may initiate a complaint and notify the head of the institution.

The potential consequences of a deemed refusal were reviewed by the Federal Court of Appeal in the decision Canada (Information Commissioner) v. Canada (Minister of National Defence), Docket A-785-96. The Court found that the Information Commissioner may use his power of subpoena to require an institution to respond to a request by a date set by the Commissioner. Specifically, the Court found that once a request is deemed to have been refused, the Commissioner has the power to compel the head of the institution (or delegate) to specify the exemptions used to justify refusal of the record and to defend the applicability of those exemptions. The Court stated as follows:

> In the instant case, as soon as the institution failed to comply with the time limit, the Commissioner could have initiated his investigation as if there had been a true refusal. He does have powers to investigate, including, at the beginning of an investigation, the power to compel the institution to explain the reasons for its refusal.

In the decision Statham v. Canadian Broadcasting Corporation, 2010 FCA 315, the Federal Court of Appeal confirmed that there is no distinction between a true refusal and a deemed refusal.

In the decision Information Commissioner of Canada v. Canada (Minister of National Defence) 2015 FCA 576, the Federal Court of Appeal stated that the validity of an extension of time to respond to an access to information request may be judicially reviewed as a deemed refusal of access.

There is additional information on the effect of deemed refusals in Chapter 14 of this manual.

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Chapter 8 – Fees

8.1 Application fee

Subsection 11(1) of the *Access to Information Act* (the Act) provides that a requester shall pay an application fee at the time the request is made. No other fees may be charged pursuant to the Act.

Section 7 of the *Access to Information Regulations* (the Regulations) specifies the amount that may be charged, which is currently set at $5. This application fee must be paid by the requester at the time the request is made.

In the decision *Rubin v. Canada (Minister of Employment and Immigration)*, [1985] F.C.J. No. 903 (QL) (F.C.T.D.), T-194-85 (decision dated October 4, 1985), the Federal Court ruled that requests not accompanied by the requisite $5 are not applications within the terms of the Act and therefore not the subject of a refusal that can be reviewed by the Court. According to the Federal Court, the enforcement of the application fee is a matter that must be left to each institution. The application fee may, however, be waived at the discretion of the head of the institution per subsection 11(2) of the Act.

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8.2 Payment

Per section 4.1.16 of the *Directive on Access to Information Requests* (the Directive), institutions are required to use prescribed platforms for receiving requests online, which is the ATIP online platform. This service allows for payment of the application fee by credit card and refunding the application fee when appropriate.

In cases where requests are received outside of the prescribed platform, such as by mail, and the institution has an account with the Receiver General for Canada, cheques and money orders are payable to the Receiver General for Canada. A list of institutions with accounts with the Receiver General for Canada is available on the website of Public Services and Procurement Canada. When a request is made to an institution that does not have an account with the Receiver General for Canada, cheques or money orders are payable to the institution itself (i.e., Crown corporations such as Canada Post, VIA Rail and the CBC).

In cases when requests are received outside of the prescribed platform, institutions should indicate the methods of payment they accept in the procedure manual posted on their website.

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8.3 Exercise of discretion for the waiver or refund of the application fee

The head of a government institution has the discretion, under subsection 11(2) of the Act, to waive or refund the fee payable under the Act and the Regulations. Section 4.1.41 of the Directive requires heads of institutions or their delegate to exercise discretion in this regard after completing the steps set out in section 4.1.1 of the Directive (see section 9.11 of this manual).

The decision to waive or refund the application fee is made on a case-by-case basis by assessing factors such as:

(a) whether the information is normally made available without a charge;

(b) the degree to which a general public benefit is obtained through the release of the information;

(c) the circumstances and facts surrounding the request; and

(d) whether the requester is a person with a disability and access has been given in an alternative format that is different from the format initially requested by that person.

While the requester's circumstances and reasons for seeking information may be considered in the assessment of a fee waiver, they should not be factored into the determination of whether or not to grant access to records.

When the requester asks that the fee be waived, the head should consider the information provided by the requester in support of the request for waiver. If the fee is not waived, the head should explain why that decision was made.

Non-exhaustive examples of circumstances where it could be appropriate to waive or refund a fee are illustrated below.

8.3.1. Public interest and other specific circumstances

- The requester made a convincing argument that the request is made in the public interest.
- The request is made by a student as a requirement for a course.
- The statutory deadline for responding to the request was not met.
- The fee is waived after considering the circumstances of the requester (for example, the records sought relate to a death in the requester’s immediate family or to financial circumstances).

8.3.2. Abandoned request

The request is abandoned by the requester after little processing. This may include situations where the institution informs the requester that:

- The request could be made under the *Privacy Act* where no fees apply and the requester chooses to resubmit a request as a *Privacy*

Act request;

- The request is for a record not under the control of federal institutions (i.e., for provincial or municipal information);
- The requester is not entitled to make a request (i.e., not a resident or citizen of Canada, or not present in Canada);
- The request is for records that the ATIP office has confirmed would be withheld in their entirety (i.e. a request for the defence plans of Canada);
- The request is for a record that is publicly available;
- The request is for records contained in a response package of a previous request and which do not require further processing.

8.3.3. For the Purposes of 'Advancing Reconciliation'

To help advance Indigenous reconciliation by facilitating access to government information for Indigenous peoples, requesters can seek a fee waiver under the condition of 'advancing reconciliation'.

In the spirit of the Government of Canada's commitment to fully adopting and implementing the *United Nations Declaration on the Rights of Indigenous Peoples Act* as the framework for reconciliation, and to promote substantive equality, heads of institutions are strongly encouraged to waive the $5 application fee.

This waiver can alleviate the financial burden associated with making an access request and provide Indigenous requesters with a free, fair and equitable right of access to Indigenous information held by the Crown.

While the following are non-exhaustive examples of requests, it's important to note that less obvious requests may fall within this category:

- claims related to historical grievances;

- Aboriginal title, rights and treaty rights litigation;
- genealogical records that can help establish status under the *Indian Act*;
- records that can help enhance Indigenous community health and well-being;
- records that help inform decision-making on matters related to governance; and,
- records that can inform Indigenous economic development.

The requester will not be required to provide any proof of Indigenous identity to be eligible nor will they be required to justify the nature of their request. All requests for this particular fee waiver are to be treated in good faith.

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8.4 Where the application fee must be waived or refunded

Informal requests

An application fee cannot be charged in the absence of a request made under Part 1 of the Act. This includes instances where a requester is seeking access to previously released records from the summary of a completed request.

This also includes instances where it is decided, after discussions with the requester, that their request made under Part 1 of the Act will be processed informally. In such cases, the institution must waive or refund the application fee, in compliance with section 4.1.42 of the Directive.

Decline to Act

In cases where the Information Commissioner gave approval for the institution to decline to act on the person's request, the application fee must be refunded per section 4.1.42 of the Directive. The refund should occur when the institution notifies, in compliance with section 4.1.23.3 of the Directive, the requester of the decision to decline to act.

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8.5 Transfer of requests

As explained in Chapter 6 of this manual, a request can be transferred to another institution when the other institution clearly has a greater interest in the records sought.

To facilitate the administration of application fees when a request is transferred, the institution that first received the request should indicate to the institution with greater interest whether the application fee has been received and if it has been deposited into the Consolidated Revenue Fund (CRF). If it has been deposited, it should remain there. If the fee has not been received nor deposited into the CRF, it is incumbent on the second institution to complete the formalities related to the application fee. The second institution cannot require the requester to pay a second application fee.

Note: Unlike those in the core public administration, institutions outside of the core administration keep the $5 application fee within their institution, rather than the CRF. In these cases, the second institution still cannot require the requester to pay a second application fee.

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8.6 Right of complaint

Where an institution requires that the application fee be paid, a requester can complain to the Information Commissioner under paragraph 30(1)(b) of the Act. Under that paragraph, the Information Commissioner receives and investigates complaints from persons who have been required to pay an amount under section 11 of the Act that they consider to be unreasonable. With the elimination of all fees other than the application fee in 2019, this provision now only applies to the application fee.

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Chapter 11 – Specific Exemptions and Section 35 of the Access to Information Act

This chapter covers the mandatory and discretionary exceptions to the right of access found in sections 13 to 24 and section 26 of the Access to Information Act (the Act). It also explains other grounds for refusing access to records found in section 35 of the Act. Where appropriate, the most recent and relevant case law is cited, and excerpts are sometimes reproduced. When reviewing jurisprudence, institutions must keep in mind that decisions of higher courts take precedence.

11.1 Section 13 of the Act – Information obtained in confidence

Subsection 13(1) of the Access to Information Act (the Act) provides that the head of a government institution shall refuse to disclose any record that contains information obtained in confidence from:

> (a) the government of a foreign state or an institution thereof;

Examples include the United States (a foreign state) and the Internal Revenue Service (an institution of the United States). The exemption does not include constituent parts of foreign states — for example, the state of New York or the state of Ohio.

> (b) an international organization of states or an institution thereof;

An “international organization of states” means any organization with members representing and acting under the authority of the governments of two or more countries. Examples include the United Nations, NATO and the International Monetary Fund. Examples of institutions of an international organization of states include UNICEF and the World Health Organization, which are agencies of the United Nations.

> (c) the government of a province or an institution thereof;

This includes the governments of the ten provinces and the three territories and their ministries, departments and agencies.

> (d) a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such a government; or

This includes the governments of municipalities created by legislation and by regulations.

> (e) an aboriginal government.

This includes only the aboriginal governments and councils listed in subsection 13(3) of the Act.

Subsection 13(1) is a mandatory class exemption that is intended to protect the federal government's ability to obtain information from other governments. It gives some assurance to other levels of government that they will retain some control over the disclosure of information that they provide to the federal government on a confidential basis.

Application

Three requirements must be met for subsection 13(1) to apply:

1. The information must have been obtained "in confidence."

The term "in confidence" is usually applied to information obtained on an understanding that it must remain confidential — that is, the information is not available for dissemination beyond the government institutions that have a need to know the information. Information may be obtained in confidence explicitly or implicitly.

Information is "explicitly" provided in confidence when the government or governmental agency or organization providing the information expressly requests or indicates that the information must be kept confidential. The intention to provide information in confidence can be stated in the record, an agreement or a verbal request. It is advisable to keep a written record of a verbal request.

Information is "implicitly" provided in confidence when an intention that the information be treated as confidential can be implied from the circumstances in which it was provided – for example, from past practices followed with respect to such information, policies, etc.

Copies of information received in confidence by a government institution are often in the files of several other government institutions. Because of the mandatory nature of this exemption, it is important that all copies of such information be protected from disclosure. To ensure such protection, government institutions receiving information in confidence from other governments or international organizations should ensure that the information is marked as having been obtained in confidence and that the source is indicated before distributing copies to other government institutions.

The following are examples of information supplied in confidence:

- information obtained by the Canadian Security Intelligence Service from municipal police forces and marked confidential;
- transcripts of a confidential meeting of the G8; and
- correspondence imparted in confidence from a provincial premier about a federal-provincial undertaking.

2. The information must have been obtained "from" another government or an international organization of states or an institution thereof.

It does not matter whether the record originates from the Canadian government or from a body described in subsection 13(1), as long as the information it contains was supplied by a body described in subsection 13(1). Therefore, the exemption may be invoked when the disclosure of information in a record originating from the Canadian government would reveal information received from a body described in subsection 13(1).

Statistics generated by a government institution from confidential information received from several countries are not covered by the exemption unless their disclosure would reveal the contents of the confidential information itself.

3. The information must have been obtained from "another government or an international organization of states or an institution thereof."

Time limitation

There is no time limit for the application of subsection 13(1). In other words, the exemption applies irrespective of the age of the records.

Permissible disclosure

Subsection 13(2) of the Act provides that the head of a government institution may disclose information described in subsection 13(1) if the government, organization or institution from which the information was obtained:

> (a) consents to the disclosure; or
> (b) makes the information public.

This subsection gives some flexibility to government institutions in dealing with requests for access to information given in confidence. In applying section 13, government institutions must consider the exercise of this discretion to disclose. In Ruby v. Canada (Solicitor General) (CA), [2000] 3 F.C. 589, reviewed on other grounds 2002 SCC 75, the Federal Court of Appeal interpreted section 19 of the Privacy Act, which is equivalent to section 13 of the Access to Information Act. The Court stated that to properly apply the exemption, the head of a government institution must make a reasonable effort to seek the consent of the foreign government that provided the information. That said, the Court added that it is not necessary for a government institution to seek consent if it is acting according to an established protocol that respects the spirit and the letter of the legislation and the exemption.

The disclosure permitted by subsection 13(12) is discretionary. Even if the conditions set out in subsection 13(2) are met, an institution can withhold information given in confidence by another government or an international organization. This was confirmed in Do-Ky v. Canada (Minister of Foreign Affairs and External Trade) (T.D.), [1997] 2 FC 907, reviewed on other grounds, [1999] F.C.J. No. 673 (QL) (FCA) Docket A-200-97, where the Federal Court stated that subsection 13(2) does not require the release of records containing information that has been made public. Subsection 13(2) simply offers the possibility of disclosing documents that might otherwise be exempted by subsection 13(1). The Court cautioned: "In the general structure of the scheme however, if those documents are not to be released, the head of the government institution must be able to give reasons justifying the decision not to release."

The Court also made the following statements:

> The second-party government asked for confidentiality and Canada cannot breach the trust placed in it without suffering considerable harm to its reputation in the international community and ipso facto [11-1] to its international relations....
>
> ...Once a state requests that diplomatic correspondence remain confidential there is no need for the Canadian government to assess the reasons of that country. It is sufficient if they have made the request of the Canadian government. Indeed, it would be a diplomatic lapse were the Canadian government to sit in judgement of the rationale of the foreign state except in the most extreme circumstances.

Consultation

Institutions should examine whether subsection 15(1) of the Act also applies to information that is exempt under paragraphs 13(1)(a) and (b), and whether section 14 of the Act also applies to information that is exempt under paragraph 13(1)(c). Sections 11.2 and 11.3 of this manual provide information on consultations on records that deal with federal-provincial affairs or foreign governments and international organizations.

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11.2 Section 14 of the Act – Federal-provincial affairs

Section 14 of the Access to Information Act (the Act) is a discretionary exemption based on an injury test that aims to protect the role of the federal government in its conduct of federal-provincial affairs. To invoke this exemption, a government institution should be convinced that disclosure of specific information could reasonably be expected to be injurious to the conduct, by the federal government, of federal-provincial affairs.

Paragraphs 14(a) and (b) of the Act provide the following examples of the types of information that might be covered by this provision:

> (a) [information] on federal-provincial consultations or deliberations; or
> (b) [information] on strategy or tactics adopted or to be adopted by the Government of Canada relating to the conduct of federal-provincial affairs.

The list is not exhaustive, and other types of records pertaining to the activities of the federal government in federal-provincial affairs may also qualify for exemption. It is equally important to note that these

categories of information are illustrative only, and the reasonable likelihood of injury must be present before any information may be exempted under this provision.

Generally, injury in regard to federal-provincial affairs is most likely when the federal government is either about to commence or is in the midst of conducting specific negotiations, deliberations or consultations. There are, however, types of information, such as negotiating positions, tactics and strategies, the disclosure of which could continue to jeopardize the position of the federal government in conducting federal-provincial affairs in the future or seriously affect its relations with one or more provincial governments. Information that continues to be sensitive should be protected until there is no probability of injury.

In Information Commissioner v. Prime Minister of Canada, [1993] 1 F.C. 427, the Federal Court ruled that to invoke this exemption, the government institution had to meet the "reasonable expectation of probable harm" test and, as such, must be satisfied that releasing the specific information could be damaging or prejudicial to the conduct of, or the federal government's role in, federal-provincial affairs. The Court held that the alleged harm must be more than speculative, more than possible — the head of the government institution must be able to show that probable or actual harm would flow from the disclosure. In fact, to successfully invoke a section 14 exemption, the head of the government institution must establish a clear and direct linkage between the disclosure of specific information and the alleged harm.

Both paragraph 13(1)(c) of the Act and section 14 concern provincial-related information. Although paragraph 13(1)(c) protects as a class all types of information that a province has supplied in confidence to the federal government, the use of section 14 is restricted to specific

information, the release of which could be harmful to the conduct, by the federal government, of federal-provincial affairs. Section 14 may apply to information created by the federal government or obtained from other sources — for example, from an agent or a consulting firm.

Consultation

Institutions should consult with the Access to Information and Privacy (ATIP) Office of the Privy Council Office before disclosing information pertaining to federal-provincial affairs if they require more information for the proper exercise of discretion or if they intend to disclose sensitive information.

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11.3 Section 15 of the Act – International affairs, defence and national security

Subsection 15(1) of the Access to Information Act (the Act) is a discretionary exemption based on an injury test that is intended to protect three general public interest areas. Access to information requested may be denied if disclosure could reasonably be expected to be injurious to the following:

1. **The conduct of international affairs:** This includes not only state-to-state affairs but also commercial, cultural or scientific links established by citizens with counterparts in other countries.
2. **The defence of Canada or any state allied or associated with Canada:** An “allied state” is one with which Canada has concluded formal alliances or treaties. An “associated state” is a state with which Canada may be linked for trade or other purposes outside the scope of a formal alliance.

3. **The detection, prevention or suppression of subversive or hostile activities:** This exemption protects specific types of information pertaining to the security of Canada.

These three general areas of public interest can be considered independently even though they are closely and intimately interrelated and frequently overlap.

Definitions

Subsection 15(2) of the Act defines the terms “defence of Canada or any state allied or associated with Canada” and “subversive or hostile activities.”

“Defence of Canada or any state allied or associated with Canada” includes, but is not limited to, the efforts of Canada and of foreign states toward the detection, prevention or suppression of activities of any foreign state directed toward actual or potential attack or other acts of aggression against Canada or any state allied or associated with Canada.

“Subversive or hostile activities” means:

(a) espionage against Canada or any state allied with or associated with Canada,
(b) sabotage,
(c) activities directed toward the commission of terrorist acts, including hijacking, in or against Canada or foreign states,
(d) activities directed toward accomplishing government change within Canada or foreign states by the use of or encouragement of the use of force, violence or any criminal means,
(e) activities directed toward gathering information used for intelligence purposes that relates to Canada or any state allied or associated with Canada, and
(f) activities directed toward threatening the safety of Canadians, employees of the Government of Canada or property of the Government of Canada outside Canada.

Two of the three public interests mentioned in the introductory paragraph of subsection 15(1) are defined in subsection 15(2). It is important to note that “defence of Canada or any state allied or associated with Canada” is defined non-exhaustively (because of the use of the word “includes”). The definition, therefore, does not limit the exemption to the listed types of information. On the other hand, the phrase “subversive or hostile activities” is defined exhaustively (because of the use of the word “means”). The exemption may be invoked only for the specific activities listed in the definition. Information pertaining to other security or intelligence activities, such as security screening, immigration and citizenship vetting, domestic vital points and security inspections, cannot be exempted under this

provision unless the information relates to one of the activities outlined in paragraphs 15(2)(a) to (f) of the Act or it is captured in the introductory paragraph of subsection 15(1).

Types of information

Paragraphs 15(1)(a) through (i) of the Act list specific types of information that are likely to be covered by the exemption. This list of examples is only illustrative of the types of information that could give rise to an injury to one of the three specified public interests.

Paragraphs 15(1)(a) to (i) list the types of information as follows:

> (a) [any information] relating to military tactics or strategy, or relating to military exercises or operations undertaken in preparation for hostilities or in connection with the detection, prevention or suppression of subversive or hostile activities;

This paragraph deals with a range of military plans encompassing both strategy and tactics and with the implementation of those plans in exercises or real operations. The paragraph also deals with military exercises or operations undertaken for national security purposes — that is, in connection with the detection, prevention or suppression of subversive or hostile activities.

> (b) [any information] relating to the quantity, characteristics, capabilities or deployment of weapons or other defence equipment or of anything being designed, developed, produced or considered for use as weapons or other defence equipment;

This paragraph deals with information pertaining to weapons, both those in existence and those being designed, as well as other defence equipment. The latter may include a wide variety of articles, such as equipment used for communications, surveillance or explosive detection.

> (c) [any information] relating to the characteristics, capabilities, performance, potential, deployment, functions or role of any defence establishment, of any military force, unit or personnel or of any organization or person responsible for the detection, prevention or suppression of subversive or hostile activities;

This paragraph deals with defence establishments, military and national security personnel.

"Defence establishment," as defined in the National Defence Act, means "any area or structure under the control of the Minister [of National Defence], and the materiel and other things situated in or on any such area or structure."

> (d) [any information] obtained or prepared for the purpose of intelligence relating to
>
> (i) the defence of Canada or any state allied or associated with Canada, or
> (ii) the detection, prevention or suppression of subversive or hostile activities;

This paragraph deals with intelligence concerning defence and national security. Information "obtained or prepared for the purpose of intelligence" encompasses both the raw data collected and the refined

product or analysis.

> (e) [any information] obtained or prepared for the purpose of intelligence respecting foreign states, international organizations of states or citizens of foreign states used by the Government of Canada in the process of deliberation and consultation or in the conduct of international affairs;

This paragraph deals with intelligence concerning international relations. Again, information obtained or prepared for the purpose of intelligence encompasses both the raw data collected and the refined product or analysis.

> (f) [any information] on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (d) or (e) or on sources of such information;

This paragraph deals with the collection, assessment and treatment of information obtained or prepared for the purpose of intelligence and matters incidental to intelligence.

The combined effect of paragraphs (d), (e) and (f) is to be as all-encompassing as possible when it comes to protecting information and records pertaining to national or international intelligence.

> (g) [any information] on the positions adopted or to be adopted by the Government of Canada, governments of foreign states or international organizations of states for the purpose of present or future international negotiations;

This paragraph deals with information pertaining to international negotiations. The exemption is restricted to present or future negotiations and does not encompass international negotiations that are past and completed (see also the discussion on negotiations in respect of paragraph 21(1)(c) of the Act, found in Section 11.18.5 of this chapter).

> (h) [any information] that constitutes diplomatic correspondence exchanged with foreign states or international organizations of states or official correspondence exchanged with Canadian diplomatic missions or consular posts abroad; or

This paragraph covers correspondence between states or governments or official exchanges between Canadian diplomatic and consular posts and Ottawa. The latter category is intended to cover political, military or economic reporting not directly associated with the production of intelligence if injury could reasonably be expected to result from disclosure. The exemption does not apply to all correspondence since an injury test is involved. For example, most correspondence on internal administration of posts and cultural and public information programs will likely not qualify for exemption.

> (i) [any information] relating to the communications or cryptographic systems of Canada or foreign states used
>
> (i) for the conduct of international affairs,
> (ii) for the defence of Canada or any state allied or associated with Canada, or
> (iii) in relation to the detection, prevention or suppression of subversive or hostile activities.

Application

It is essential to remember that the types of information listed in subsection 15(1) will not automatically be exempted. For the exemption to apply to any category of information described in the provision, the head of a government institution must be able to demonstrate that there is a reasonable expectation of probable harm to one of the three specified public interests flowing from disclosure.

When invoking subsection 15(1), it is not necessary to refer to the specific descriptive paragraph. In the decision Canada (Information Commissioner) v. Canada (Minister of National Defence), [1990] 3 F.C. 22, the Federal Court stated that "what is required, in the context of section 15, is that the requester be given notice as to whether the reason for refusal is because a disclosure would be (1) injurious to the conduct of international affairs or (2) injurious to the defence of Canada or any state allied or associated with Canada, or (3) injurious to the detection, prevention or suppression of subversive or hostile activities."

In the decision Al Yamani v. Canada (Minister of Citizenship and Immigration), [2000] 3 F.C. 433 (T.D.), the Federal Court characterized "subversive or hostile activities" as activities that "may or may not involve violence and that target Canada or any state allied or associated with Canada. It [the definition] does not distinguish between activities which would be considered subversive as opposed to hostile; rather it lumps together a broad mix of activities ranging from intelligence-gathering to terrorism."

In cases where a foreign state has expressed concern and wishes diplomatic notes or correspondence not to be released, this opposition alone is likely sufficient to justify the non-disclosure even when or if parts of the sought information have already been accessed by the

requester. In the decision Do-Ky v. Canada (Minister of Foreign Affairs and External Trade), [1997] 2 F.C. 907 (T.D.), the Federal Court made the following statements:

> ...In assessing the injury to be expected on release of the notes it was proper for the Respondent to consider normal diplomatic practice as this would be the best standard by which to judge probable harm....
>
> ...There is no evidentiary burden on the Canadian government to establish that the diplomatic note sent to Canada is not public. The government is not, in these circumstances, asked to prove a negative premise.
>
> ...The second-party government asked for confidentiality and Canada cannot breach the trust placed in it without suffering considerable harm to its reputation in the international community and ipso facto to its international relations....
>
> ...Once a state requests that diplomatic correspondence remain confidential there is no need for the Canadian government to assess the reasons of that country. It is sufficient if they have made the request of the Canadian government. Indeed, it would be a diplomatic lapse were the Canadian government to sit in judgement of the rationale of the foreign state except in the most extreme circumstances.

That said, it is important to note that in the decision X v. Canada (Minister of National Defence), [1992] 58 F.T.R. 93 (F.C.T.D.), the Federal Court was of the view that it would be unreasonable to conclude that documents dated 1941 and 1942 and related to a time when Canada

was engaged in a world war could reveal anything pertinent and injurious to the conduct of Canada's international relations and its national defence 50 years after the fact.

In the decision Bronskill v. Canada (Canadian Heritage), 2011 FC 983 [11-2], the Federal Court indicated that a government institution should not rely largely on an "umbrella rationale" to justify the application of section 15 – that is, a rationale that does not indicate the specific relation between disclosure of precise documents and the alleged injury. The Court also indicated that the assessment of the reasonable expectation of probable harm is one that must be applied consistently. Inconsistent redactions and assessments of the injury resulting from disclosure may constitute grounds for additional disclosure ordered by the Court.

In the decision Attaran v. Canada (Foreign Affairs), 2011 FCA 182, the issue before the Court was whether the discretion under subsection 15(1) of the Access to Information Act was exercised and, if so, whether the discretion was exercised reasonably. The Federal Court of Appeal held that the evidence before the Court must demonstrate that the decision maker exercised the discretion conferred under subsection 15(1). The burden of proof may fall to the government institution to establish that discretion was exercised in a reasonable manner, particularly in cases where the requester does not have access to the full records and part of the proceedings are in camera. [11-3] The Court examined what evidence would be needed to demonstrate that the decision-maker exercised his or her discretion conferred under subsection 15(1). The Court made the following statement:

> ...Just as the absence of express evidence about the exercise of discretion is not determinative, the existence of a statement in a record that a discretion was exercised will not necessarily be determinative....In every case involving the discretionary aspect of section 15 of the Act, the reviewing court must examine the totality of the evidence to determine whether it is satisfied, on a balance of probabilities, that the decision-maker understood that there was a discretion to disclose and then exercised that discretion.

The prior public disclosure of the information was identified as a relevant factor to be considered in the exercise of the discretion. Although this may not be true in all cases, the prior public disclosure of information provided an incentive for the exercise of discretion to release the information to the requester.

Consultation

Since January 2012, it is no longer mandatory to consult the federal institution most concerned before deciding whether to disclose or exempt information under section 15. In fact, Section 7.7.1 of the Directive on the Administration of the Access to Information Act instructs institutions to carry out inter-institutional consultations with respect to section 15 only when the processing institution requires more information for the proper exercise of discretion to withhold or only when it intends to disclose sensitive information. When necessary, institutions should consult:

- Foreign Affairs and International Trade Canada when determining whether to exempt or disclose any information that could

reasonably be expected to be injurious to the conduct of international affairs;
- National Defence when determining whether to exempt or disclose any information that could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada; or
- the government institution having the primary interest that is, the Canadian Security Intelligence Service, Foreign Affairs and International Trade Canada, National Defence, Public Safety Canada, or the Royal Canadian Mounted Police when determining whether to exempt or disclose any information that could reasonably be expected to be injurious to the detection, prevention, or suppression of subversive or hostile activities.

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11.4 Section 16 of the Act – Law enforcement, investigations, and security of penal institutions

Section 16 of the Access to Information Act (the Act) contains a series of discretionary and mandatory exemptions and class-based and injury-based exemptions that aim to protect:

- effective law enforcement, including criminal law enforcement;
- the integrity and effectiveness of other types of investigative activities [11-4] — for example, ordinary administrative investigations under an Act of Parliament, investigations in regulatory areas, and air accident investigations; and
- the security of penal institutions.

Each of its first three subsections constitutes, in and of itself, an exemption to be considered independently of other subsections. Subsection 16(4) of the Act defines the term “investigation” for the

purpose of paragraphs 16(1)(b) and (c).

11.4.1 Paragraph 16(1)(a)

Paragraph 16(1)(a) of the Act is a discretionary class test exemption that protects the integrity of investigations and, more specifically, information obtained or prepared in the course of a lawful investigation conducted by an investigative body specified in section 9 of the Access to Information Regulations. This information is protected with a class test because of the difficulty in applying an injury test exemption to law enforcement records when virtually all information is of a sensitive nature.

Before the exemption can be claimed, the following three conditions must be met:

1. The information was obtained or prepared by an investigative body listed in Schedule I of the Access to Information Regulations.

   This does not mean that only those investigative bodies may invoke the exemption. Other institutions may claim the exemption provided that the record meets the three conditions.

2. The information was obtained or prepared in the course of a lawful investigation. [11-5]

   This means that the investigation itself must be sanctioned or not forbidden by law. It does not, however, address the issue of the legality of techniques used in the course of a lawful investigation or the issue of whether evidence has been illegally obtained.

3. The investigation pertains to:

   i. the detection, prevention or suppression of crime,
   ii. the enforcement of any law of Canada or a province, or

iii. activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act.

Paragraph 16(1)(a) and its subparagraphs apply to information obtained in the course of investigations conducted under the Criminal Code or investigations of any other illicit activities prohibited under federal or provincial law, including municipal laws.

Subparagraph 16(1)(a)(i) refers to crime and would apply to investigations undertaken for the purposes of enforcing the Criminal Code. It should be noted, however, that not all offences based on the criminal law power are included in the Criminal Code and not all offences in the Criminal Code are based on the criminal law power. Subparagraph 16(1)(a)(ii) refers to investigations of activities prohibited under federal or provincial laws. These activities can include crimes; thus there is some overlap between subparagraphs 16(1)(a)(i) and (ii). The activities referred to in subparagraph 16(1)(a)(ii) are primarily those punishable as offences under federal or provincial law. The term “law of a province” includes municipal laws.

Subparagraph 16(1)(a)(iii) focuses on activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act. The exemption is not limited on its face to information collected by the Canadian Security Intelligence Service, but can be claimed by one of the other investigative bodies listed in Schedule I of the Access to Information Regulations provided that the other criteria set out in paragraph 16(1)(a) are met.

Time limitation

Paragraph 16(1)(a)applies only to records that came into existence less than twenty years ago. This does not mean that records covered by this exemption must automatically be disclosed pursuant to an access to information request once they are twenty years old. Although records that are more than twenty years old automatically fall outside the protection of paragraph 16(1)(a), paragraph 16(1)(c) can be applied if there is still a need to protect them.

In the decision Fontaine v. Royal Canadian Mounted Police, 2009 FCA 150, the Federal Court of Appeal indicated that the 20-year time limit under paragraph 16(1)(a)of the Act is calculated from the date on which the access request is made and not from the date of the subsequent final decision.

Use of discretion

It should be remembered that despite its class nature, paragraph 16(1)(a) is a discretionary exemption. This flexibility is meant to temper the broad nature of the class test, and the head of the institution must exercise discretion in determining whether records that fall within the provision may nevertheless be disclosed. If, after balancing the reasons for release and the reasons against release in good faith and using only factors relevant to the Act, the head has reasonable cause to believe that the records should not be disclosed, he or she has the discretion to exempt this information.

Consultation on paragraph 16(1)(a)

It is important to note that the exemption under paragraph 16(1)(a)follows the record. In other words, the exemption can be applied by an institution that is not an investigative body listed in the Access to Information Regulations provided that the record was prepared by, or at one point came into the hands of, such an investigative body in the

course of an investigation of an activity described in paragraph 16(1)(a). For example, Health Canada can claim an exemption under paragraph 16(1)(a) for a report that it holds and that was originally prepared by the Royal Canadian Mounted Police (RCMP) in the course of a narcotics investigation.

Since January 2012, it is no longer mandatory to consult the federal institution most concerned before deciding whether to disclose or exempt information under section 16. In fact, Section 7.7.1 of the Directive on the Administration of the Access to Information Act instructs institutions to carry out inter-institutional consultations on section 16 when the processing institution requires more information for the proper exercise of discretion to withhold or when it intends to disclose sensitive information.

When necessary, institutions should consult the investigative body that originally obtained or prepared the information.

11.4.2 Paragraph 16(1)(b)

Paragraph 16(1)(b) of the Act is a discretionary exemption based on a class test with no time limit restricting its application. It provides that a government institution may refuse to disclose information about investigative techniques or plans for specific lawful investigations. The aim of this exemption is to protect the essence of effective law enforcement and the conduct of effective investigations so that the latter can be carried out in private, without those being investigated knowing or understanding how the investigation is being conducted.

Any information about an investigative technique can be protected under this exemption. Plans, however, must relate to a specific lawful investigation. The term “lawful” means that the investigation itself must not be contrary to law.

Under subsection 16(4) of the Act, plans can be exempted only for an investigation that:

> (a) pertains to the administration or enforcement of an Act of Parliament;
> (b) is authorized by or pursuant to an Act of Parliament; or
> (c) is within a class of investigations specified in the [Access to Information] regulations.

"Investigation" is more fully defined in Section 11.4.7 of this chapter.

Consultation on paragraph 16(1)(b)

Since January 2012, it is no longer mandatory to consult the federal institution most concerned before deciding whether to disclose or exempt information under section 16. In fact, Section 7.7.1 of the Directive on the Administration of the Access to Information Act instructs institutions to carry out inter-institutional consultations on section 16 only when the processing institution requires more information for the proper exercise of discretion to withhold or when it intends to disclose sensitive information.

When necessary, institutions should consult the investigative body or other government institution with primary interest in the investigative technique or the specific investigation.

11.4.3 Paragraph 16(1)(c)

Paragraph 16(1)(c) of the Act is a discretionary exemption based on an injury test that aims to protect law enforcement and investigations. The paragraph provides that a government institution may refuse to disclose a record that contains information, the disclosure of which could reasonably be expected to be injurious to the enforcement of any

law of Canada or a province or to the conduct of lawful investigations. Subparagraphs (i), (ii) and (iii) provide examples of the types of information to which this exemption may apply. The examples specify information:

> (i) relating to the existence or nature of a particular investigation,
> (ii) that would reveal the identity of a confidential source of information, or
> (iii) that was obtained or prepared in the course of an investigation.

The types of information cited in this provision are illustrative only, and other types of information can qualify for the exemption.

The discretionary injury test exemptions in paragraph 16(1)(c) are of two kinds:

1. Injury to the enforcement of any law of Canada or a province: This injury test exemption supplements the class test exemption for law enforcement information found in paragraph 16(1)(a). The exemption can apply to:
   - the enforcement of federal and provincial regulatory legislation prohibiting certain types of activities or behaviour, such as the enforcement of the Hazardous Products Act;
   - other types of investigations, such as taxation audits conducted by the Canada Revenue Agency;
   - the enforcement of civil law remedies for prohibited activities or behaviour, such as those under the Canadian Human Rights Act;

- information that was obtained or prepared outside the investigative process — for example, information on detecting tax frauds or on computer programs used in law enforcement;
- information that would qualify under paragraph 16(1)(a), except that it came into existence twenty or more years before the request.

2. Injury to the conduct of lawful investigations: This exemption protects the integrity and effectiveness of those investigations that are not directed to the enforcement of law. Examples are:
   - investigations undertaken to determine the cause of an accident, but not to lay charges or assess blame for the purposes of a civil remedy;
   - investigations into whether a person with a criminal record should be granted a pardon; and
   - investigations of unacceptable use of electronic networks, harassment complaints or grievances.

Paragraph 16(1)(c) may also be claimed to protect the identity of persons providing confidential information to investigators, as well as information from which their identity could be determined, if the disclosure could impair their candour and adversely affect investigative processes.

The type of investigation to which this exemption can be applied is limited in two ways:

1. The investigation must be lawful. This means that it must not be forbidden by or contrary to law.
2. The investigation must come within the definition of the term in subsection 16(4) of the Act. Therefore, it must be an investigation that:

> (a) pertains to the administration or enforcement of an Act of Parliament;
> (b) is authorized by or pursuant to an Act of Parliament; or
> (c) is within a class of investigations specified in the [Access to Information] regulations.

"Investigation" is more fully defined in Section 11.4.7 of this chapter. It should be noted that other more general types of investigative activities not specifically authorized by federal law or undertaken for the purposes of administering or enforcing federal law, such as program evaluations, internal audits and other such studies and analyses, would not qualify as investigations under subsection 16(4) and, therefore, could not be exempted under this provision.

In the decision Lavigne v. Canada (Office of the Commissioner of Official Languages), 2002 SCC 53, [2002] 2 S.C.R. 773, the Supreme Court of Canada held that paragraph 22(1)(b) of the Privacy Act (which is identical to paragraph 16(1)(c) of the Access to Information Act) should not be interpreted more narrowly than permitted by the language chosen by Parliament. The Court ruled the exemption to mean that the reasonable expectation of injury to future investigations is a ground for exempting information. The Court also emphasized that "there must be a clear and direct connection between the disclosure of specific information and the injury that is alleged." The Court stated that "the sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure."

Consultation on paragraph 16(1)(c)

Since January 2012, it is no longer mandatory to consult the federal institution most concerned before deciding whether to disclose or exempt information under section 16. In fact, Section 7.7.1 of the Directive on the Administration of the Access to Information Act instructs institutions to carry out inter-institutional consultations on section 16 only when the processing institution requires more information for the proper exercise of discretion to withhold or when it intends to disclose sensitive information.

Where necessary, government institutions should consult with the investigative body or other government institution having primary interest in the law being enforced or the investigation being undertaken.

11.4.4 Paragraph 16(1)(d)

Paragraph 16(1)(d) of the Act is a discretionary exemption based on an injury test designed to protect information about the security of penal institutions. Examples are:

- plans of penitentiaries that could be useful in an escape attempt;
- information that could be used to instigate a riot; and
- information about the location of arms storage facilities within the penitentiary

Consultation on paragraph 16(1)(d)

Since January 2012, it is no longer mandatory to consult the federal institution most concerned before deciding whether to disclose or exempt information under section 16. In fact, Section 7.7.1 of the Directive on the Administration of the Access to Information Act instructs institutions to carry out inter-institutional consultations on

section 16 only when the processing institution requires more information for the proper exercise of discretion to withhold or when it intends to disclose sensitive information.

When necessary, government institutions should consult with Correctional Service Canada.

11.4.5 Subsection 16(2) – Facilitating the commission of an offence

Subsection 16(2) of the Act is a discretionary injury test exemption providing protection for information that could reasonably be expected to facilitate the commission of an offence.

Paragraphs (a), (b) and (c) provide examples of the types of information to which this exemption may apply. The examples specify information:

> (a) on criminal methods or techniques;
> (b) that is technical information relating to weapons or potential weapons; or
> (c) on the vulnerability of particular buildings or other structures or systems, including computer or communication systems, or methods employed to protect such buildings or other structures or systems.

The list of information cited in the subsection is for illustrative purposes only and is not exhaustive. A government institution must have a reasonable expectation that the release of the requested information would facilitate the commission of an offence. Included in the exemption is information on criminal methods and techniques (that is, the modus operandi of the criminal world). Included as well is information on weapons technology (for example, how to make a bomb) and information about the vulnerability of both public and

private sector buildings, structures or systems, including computer and communication systems, and methods employed to protect such buildings, structures and systems. A government institution may, for example, refuse to disclose the security plans or other information about the vulnerable aspects of federal government buildings and other installations that would be of strategic importance in civil emergencies or time of war.

Most of this information could most likely be protected under subsection 16(1), but subsection 16(2) is intended to make it easier to process specific requests for information of this nature.

11.4.6 Subsection 16(3) – RCMP provincial and municipal policing information

Subsection 16(3) of the Act provides that a government institution shall refuse to disclose any record containing information that was obtained or prepared by the Royal Canadian Mounted Police while performing policing services for a province or a municipality pursuant to an arrangement made under section 20 of the Royal Canadian Mounted Police Act, where the Government of Canada has, on the request of the province or municipality, agreed not to disclose the information.

This is a mandatory class exemption that protects information obtained or prepared by the RCMP when performing its provincial or municipal policing role. In order for the exemption to be invoked, it is necessary that (1) the province or municipality request that the exemption be applied, and (2) the federal government agree to the request.

It should be noted that the exemption applies not only when such information is held by the RCMP for provincial and municipal policing purposes but also when such information is used by the RCMP for some other purpose or is given to another government institution for another

use or purpose. When information has been obtained or prepared by the RCMP while performing a provincial or municipal policing function and the federal government has, on the request of the province, agreed to not disclose the information, the RCMP should, when sharing this information with another government institution, clearly indicate the origin of the record and the fact that this exemption applies.

11.4.7 Subsection 16(4) – Definition of "investigation"

Subsection 16(4) of the Act provides that for purposes of paragraphs 16(1)(b) and (c) "investigation" means an investigation that:

> (a) pertains to the administration or enforcement of an Act of Parliament;
> (b) is authorized by or pursuant to an Act of Parliament; or
> (c) is within a class of investigations specified in the [Access to Information] regulations.

The definition limits the types of investigations for which the exemptions in paragraphs 16(1)(b) and (c) can be claimed to those specifically authorized by federal law or undertaken for the purposes of administering or enforcing federal law. The following are examples of the types of investigations described in paragraphs 16(4)(a) and (b):

- 16(4)(a): investigation by the Parole Board of Canada to determine whether an individual should be granted a pardon under the Criminal Records Act;
- 16(4)(b): investigation of an appointment conducted by the Public Service Commission of Canada;
- 16(4)(a) and (b): investigation by safety officers under Part II of the Canada Labour Code.

Residual classes of investigations are provided for in paragraph 16(4)(c) and are listed in section 10 of the Access to Information Regulations. An example of this class of investigations is an ad hoc investigation conducted by air traffic controllers into the loss of separation between aircraft.

In the decision Sherman v. Canada (Minister of National Revenue), 2004 FC 1423, reviewed on other grounds 2005 FCA 375, the Federal Court stated that "investigation" should be read in its ordinary and grammatical sense to mean "the action of investigating; the making of a search or inquiry; systematic examination, careful or minute search," undertaken with some guiding principle or aim in mind.

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11.5 Section 16.1 of the Act – Records relating to investigations, examinations and audits

Section 16.1 of the Access to Information Act (the Act) is a mandatory class exemption that is intended to protect records containing information obtained or created by the Auditor General of Canada, the Commissioner of Official Languages, the Information Commissioner and the Privacy Commissioner or on their behalf in the course of an investigation, examination or audit conducted by them or under their authority.

This exemption can be claimed only by the four heads listed in subsection 16.1(1). It cannot be invoked by other institutions. However, other institutions may claim any other exemption that applies to the information.

The provision recognizes that it is inappropriate for the four listed heads to disclose records or information that they obtain from institutions under examination, audit or investigation. The provision

also recognizes that access requests received by the four heads for such information are best dealt with by the government institutions that generated the requested records. The provision also protects information created by or on behalf of the four heads during their investigations, examinations or audits, to prevent interference with their statutory duties, powers and functions.

Limitation on exemption

There is no time or other limitation restricting the application of subsection 16.1(1) for records created or obtained by or for the Auditor General or the Commissioner of Official Languages in the course of an investigation, examination or audit.

However, subsection 16.1(2) of the Act imposes a limitation for such records created by or for the Information Commissioner and the Privacy Commissioner. As a result, the Information Commissioner and the Privacy Commissioner cannot refuse to disclose, under subsection 16.1(1), information **created** by them or on their behalf once the investigation or audit and all related proceedings, if any, are concluded. Records created may include the notes of the investigators, internal emails, investigation reports, and letters of findings. The term “related proceedings” normally refers to reviews by the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada.

This does not mean that records covered by this exemption must automatically be disclosed by the Office of the Information Commissioner or the Office of the Privacy Commissioner pursuant to a request under the Access to Information Act once all proceedings are concluded. Rather, such records automatically fall outside the class test

protection of paragraphs 16.1(1)(c) and (d) of the Act. If there are still grounds to protect them, other exemptions contained in the Act would continue to apply to all or parts of the information in the records.

There is an important distinction to be made between "information created" and "information obtained." Records **obtained** by or on behalf of the Information Commissioner and the Privacy Commissioner in the course of their investigation or audit continue to be protected under subsection 16.1(1), even after all proceedings related to the investigation or audit have been concluded. The records obtained are all the records collected or received by the Commissioners for their investigations or audits, including the parties' representations and related documents. The records can also include records from outside government – for example, from the public – sent to the Offices of the Information Commissioner or Privacy Commissioner during the investigation or audit – for example, testimonies, records and emails.

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11.6 Section 16.2 of the Act – Records relating to investigations conducted by or under the authority of the Commissioner of Lobbying

Section 16.2 of the Access to Information Act (the Act) is a mandatory class exemption that is intended to protect records containing information obtained or created by the Commissioner of Lobbying or on the Commissioner's behalf in the course of an investigation conducted by or under the authority of the Commissioner.

Subsection 16.2(1) may be claimed only by the Commissioner of Lobbying. It cannot be invoked by other institutions. However, other institutions may claim any other exemption that applies to the information.

Limitation on exemption

Subsection 16.2(2) of the Act provides that the Commissioner of Lobbying can no longer exempt, under subsection 16.2(1), information created in the course of an investigation once the investigation and all related proceedings, if any, have been completed.

This does not mean that records covered by this exemption must automatically be disclosed pursuant to a request made under the Access to Information Act once all proceedings are concluded. Rather, such records automatically fall outside the class test protection of subsection 16.2(1). Other exemptions contained in the Act may be invoked if there are still grounds to protect the records.

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11.7 Section 16.3 of the Act – Records relating to investigations, examinations and reviews under the Canada Elections Act

Section 16.3 of the Access to Information Act is a discretionary class exemption that is intended to protect records containing information obtained or created by or on behalf of a person who conducts an investigation, an examination or a review in the performance of his or her functions under the Canada Elections Act.

Section 16.3 may be claimed only by the Chief Electoral Officer. It cannot be invoked by other institutions. However, other institutions may claim any other exemption that applies to the information.

There are no time or other limitations restricting the application of this exemption.

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11.8 Section 16.4 of the Act – Exemption for the Public Sector Integrity Commissioner

Section 16.4 of the Access to Information Act (the Act) is a mandatory class exemption that can be used only by the Public Sector Integrity Commissioner (Integrity Commissioner).

Paragraph 16.4(1)(a) requires the Integrity Commissioner to refuse to disclose any record obtained or created by him or her or on his or her behalf in the course of:

- an investigation into a disclosure of wrongdoing made by a public servant under the Public Servants Disclosure Protection Act (PSDPA); or
- an investigation initiated by the Integrity Commissioner under section 33 of the PSDPA as a result of information:
  - obtained in the course of another investigation of alleged wrongdoing; or
  - provided by a person who is not a public servant.

This includes records obtained by the Integrity Commissioner from the public servant making the disclosure and information provided by a person under section 33 of the PSDPA.

Paragraph 16.4(1)(b) of the Act protects the confidentiality of information received by a conciliator in the course of attempting to achieve the settlement of a reprisal complaint filed with the Integrity Commissioner under subsection 19.1(1) of the PSDPA. Other information relating to complaints about reprisals is not exempt under section 16.4 of the Access to Information Act, although other exemptions contained in the Act may apply.

Information obtained or created by the Integrity Commissioner, or on his or her behalf, related to an investigation of a disclosure of alleged wrongdoing or an investigation made under section 33 of the PSDPA must be protected by the Integrity Commissioner under section 16.4 of the Access to Information Act in response to an access request, even in cases where it was previously disclosed during the investigation process, reported publicly under the PSDPA, published in the Integrity Commissioner's reports to Parliament, or otherwise disclosed.

Since subsection 16.4(1) is a mandatory exemption, it must be applied to all information that falls within the class of records. If, for example, personal information falls within the description of subsection 16.4(1), the exercise of discretion in subsection 19(2) of the Act, which permits the disclosure of personal information in certain circumstances, cannot negate the statutory obligation to refuse disclosure. In other words, subsection 19(2) does not apply and cannot be used to justify disclosing the personal information.

Limitation on exemption

Subsection 16.4(2) of the Act provides that paragraph 16.4(1)(b) does not apply if the person who **provided** the information to the conciliator consents to its disclosure. This does not preclude the application of other exemptions to records prepared under such circumstances, where warranted.

There is no time limit restricting the application of section 16.4, and the exemption applies even after the completion of the investigation.

In summary, no information related to a disclosure of wrongdoing can be disclosed in response to a request made under the Act, with the exception of information received by a conciliator in attempting to

reach a settlement of a reprisal complaint **if** the person who provided the information to the conciliator has consented to its disclosure **and** no other exemptions apply.

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11.9 Section 16.5 of the Act – Public Servants Disclosure Protection Act

Section 16.5 of the Access to Information Act (the Act) is a mandatory class exemption that must be invoked by all government institutions. It requires the head of a government institution to refuse to disclose any record that contains information created for the purpose of making a disclosure under the Public Servants Disclosure Protection Act (PSDPA) or in the course of an investigation into a disclosure under the PSDPA.

For this exemption to apply, the following conditions must be met:

1. A disclosure of wrongdoing was made or is being prepared. The PSDPA defines “protected disclosure” as a disclosure that is made in good faith by a public servant
    - in accordance with the PSDPA;
    - in the course of a parliamentary proceeding;
    - in the course of a procedure established under any other Act of Parliament; or
    - when lawfully required to do so.
2. The disclosure was made or is being prepared by a public servant. “Public servant” is defined in the PSDPA as every person employed in the public sector, every member of the Royal Canadian Mounted Police and every chief executive.

3. The alleged wrongdoing is in or relates to the public sector. “Public sector” is defined as the departments and bodies named in Schedules I to V of the Financial Administration Act, and the Crown corporations and the other public bodies listed in Schedule 1 of the PSPDA. The public sector does not include the Canadian Forces, the Canadian Security Intelligence Service or Communications Security Establishment Canada.

4. The alleged wrongdoing relates to one of the following wrongdoings in or in relation to the public sector, as defined in section 8 of the PSDPA:

> (a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of the PSDPA;
> (b) a misuse of public funds or a public asset;
> (c) a gross mismanagement in the public sector;
> (d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;
> (e) a serious breach of a code of conduct established under section 5 or 6 of the PSDPA; and
> (f) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).

5. The information was created for the purpose of making the disclosure or in the course of an investigation into a disclosure.

As mentioned above, the exemption must be claimed by all government institutions if the conditions described in the provision are met. Although the Canadian Forces, the Canadian Security Intelligence Service or Communications Security Establishment Canada are not subject to the PSPDA, they must invoke section 16.5 of the Access to Information Act to exempt records originating from other government institutions that contain information created for the purpose of making a disclosure under the PSDPA, or in the course of an investigation into a disclosure under the PSDPA.

Section 54.3 of the PSDPA provides that disclosures made under the Treasury Board Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace that were being dealt with at the time the PSDPA came into force are considered to be a disclosure under the PSDPA. (The policy was rescinded when the PSDPA came into force on April 15, 2007.) Therefore the exemption applies to disclosures made before April 15, 2007, which were still under review at that time.

Furthermore, the disclosure does not have to have been made to the Integrity Commissioner for the exemption to apply. The exemption applies to disclosures made to a public servant's supervisor or senior officer designated under the PSDPA. In addition, the exemption applies even if the PSDPA was not invoked or mentioned at the time of the disclosure.

When there is uncertainty whether the disclosure was made under the PSDPA, institutions should consult the senior officer responsible for receiving and dealing with disclosures of wrongdoings made by public servants employed in the institution.

Information that falls under section 16.5 is permanently protected and cannot be released in response to an access to information request. In such circumstances, institutions must exempt all information related to a disclosure of alleged wrongdoing or an investigation made under the PSDPA, even in cases where the information was previously disclosed during the investigation process, reported publicly by the chief executive of the institution under paragraph 11(1)(c) of the PSDPA, published in the Integrity Commissioner's reports to Parliament, or otherwise disclosed.

Since section 16.5 is a mandatory exemption, it must be applied to all information that falls within the class of records. If, for example, personal information falls within the description of section 16.5, the exercise of discretion in subsection 19(2) of the Act, which permits the disclosure of personal information in certain circumstances, cannot negate the statutory obligation to refuse disclosure. In other words, subsection 19(2) does not apply and cannot be used to justify disclosing the personal information.

It should be noted that information relating to reprisal complaints filed under subsection 19.1(1) of the PSDPA is not covered by this exemption and can be released by institutions unless other exemptions apply.

There is no time limit or other constraint restricting the application of section 16.5.

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11.10 Section 17 of the Act – Safety of individuals

Section 17 of the Access to Information Act (the Act) is a discretionary exemption based on an injury test. A government institution may refuse access to information if it has reasonable grounds to expect that the

disclosure of the information could threaten the safety of an individual.

The phrase “threaten the safety of individuals” in section 17 is not defined in the Act and has not yet received judicial interpretation. Therefore, the terms are given their ordinary dictionary meaning:

“Threaten”
in the context of section 17, means to expose to risk or harm; to be a menace or source of danger.

“Safety”
means freedom from danger or hazard; exemption from hurt, injury or loss.

“Individual”
means a human being.

The types of individual safety interests that could be threatened are relatively broad, covering an individual’s life and bodily integrity, and may also include psychological injury.

Psychological injury is more than the causing of distress. It implies that disclosure might lead to or exacerbate an existing mental illness or psychological disorder or cause a person to become suicidal. For example, the disclosure of police photographs of a particularly gruesome murder scene may threaten the mental health of the deceased’s widow or widower who is already suffering from depression, even if the murder happened more than 20 years ago.

Depending on the nature of the information requested, the fact that the person making the request suffers from a mental illness, such as post-traumatic stress disorder or depression, may have an impact on the assessment of risk to the safety of that individual.

Section 17 does not protect economic security.

Application

This exemption applies to any cases where there have been, or there appear to be, threats to an individual's safety. Depending on the context, examples may include:

- names and other information identifying government employees or officers associated with dangerous or highly controversial issues, such as organized crime, money laundering, gun control, child support obligations, garnishments and abortion;
- the location of a transition house;
- information supplied by or about informers in criminal, quasi-criminal and security areas;
- the identity of an individual who provided information to the Canadian government about the activities of a country that has a repressive regime;
- information about persons providing information about prisoners;
- floor plans of selected government buildings;
- security arrangements at energy facilities;
- testimony of co-workers concerning an individual who has been harassing and threatening them with harm; and
- information concerning the dismissal of the person making the request, such as the testimony of previous co-workers, where the requester has threatened or assaulted previous co-workers in the past.

The type of information protected under this exemption covers not only the name of the individual but any identifier or other kind of information that would by its release tend, either by itself or by a mosaic effect, to reasonably be expected to threaten the safety of individuals. This could be information that either directly or indirectly reveals the identity, home address or other identifier of such an

individual. For an employee of a government institution, the exemption could cover information that is not normally protected information, such as the name of the individual's employer, place of employment, address of employment, or job title. The exemption may also apply to publicly available information that can be matched with other data to reveal information that could threaten the security of an individual.

The Applicable Injury Test

The injury test to be met in section 17 is one of "reasonable expectation of probable harm." The expectation of injury has to be more than speculative, and institutions must demonstrate that there is a reasonable basis for believing that disclosing the information will endanger an individual's safety.

The injury test might be satisfied with evidence such as the basis for the belief that the safety of individuals is threatened (physically or psychologically), incidents where aggressive behavior was directed at a specific person or persons, the nature of their employment, and details of actual threats.

Consultation

Before disclosing information supplied by another institution that could affect the safety of individuals, government institutions should consult with the supplying institution to ensure that the disclosure will not endanger the safety of the individuals involved.

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11.11 Section 18 – Economic interests of the Government of Canada

Section 18 of the Access to Information Act (the Act) sets out a series of discretionary exemptions aimed at protecting trade secrets; financial, commercial, scientific and technical information belonging to the government; priority of publication of government researchers; the financial interests of the Government of Canada; and the government's ability to manage the economy of Canada. Each of these exemptions is discussed below.

11.11.1 Paragraph 18(a)

Paragraph 18(a) of the Act is a discretionary exemption based on a class test that aims to protect proprietary information of the Government of Canada. The exemption may include information that is patentable or that the government may want to license.

In order for this exemption to apply, the record must contain:

- trade secrets; or
- financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and that has substantial value or is reasonably likely to have substantial value.

After determining that all or a part of the record meets these conditions, the head of a government institution must exercise his or her discretion on whether to disclose the information.

Trade secret

In the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, the Supreme Court of Canada confirmed that the term "trade secret" is to be given its traditional legal meaning. A trade secret is aplan or

process, tool, mechanism or compound that possesses the following characteristics:

1. The information must be secret in an absolute or relative sense (known only by one or a relatively small number of persons).
2. The possessor of the information must demonstrate that he or she has acted with the intention to treat the information as secret.
3. The information must be capable of industrial or commercial application.
4. The possessor must have an interest (for example, an economic interest) worthy of legal protection.

According to the Supreme Court, the party claiming the exemption has to establish on the balance of probabilities that the record falls within the definition.

The type of information that could potentially fall into this class includes the chemical composition of a product — for example, the meningitis vaccine developed by the National Research Council Canada — and the manufacturing processes used. However, not every process or test would fall into this class, particularly when such process or test is common in a particular industry.

Research data, abstract ideas or personal data not capable of being used industrially or commercially, at least in the near future, are not normally considered trade secrets. Whether such information constitutes a trade secret must be decided on a case-by-case basis.

Financial, commercial, scientific or technical information

In addition to trade secrets, paragraph 18(a) protects financial, commercial, scientific or technical information belonging to the Government of Canada or a government institution subject to the Act.

Information belonging to other government bodies and offices not covered by the Act, such as the Canada Pension Plan Investment Board, is considered as third party information under the Act (see Section 11.14 of this chapter). However, “Government of Canada,” used in paragraph 18(a), has a broader meaning than “government institutions,” used elsewhere in the Act. Sensitive information belonging to federal government bodies that are not subject to the Act can also be exempt under paragraph 18(a) or paragraph 18(d) when the information meets the criteria set out in those exemptions. Therefore, both paragraphs 18(a) and 18(d) and section 20 can be invoked to protect information belonging to federal bodies not subject to the Act.

In the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, the Supreme Court of Canada agreed with the well-established jurisprudence of the Federal Court that the terms “financial, commercial, scientific or technical” should be given their ordinary dictionary meanings. The Supreme Court of Canada recognized that the information at issue need not have an inherent value; [11-6] and that administrative details such as page and volume numbering, dates, and location of information within the records do not constitute financial, commercial, scientific or technical information.

To qualify for exemption, a record must contain financial or commercial information. It is not enough that the record was created in the context of a proceeding having financial or commercial implications. [11-7]

Furthermore, a record does not have a financial connotation simply because it refers to land, even if land is an asset. Similarly, a record containing information collected by a third party as a service for a fee cannot be characterized as commercial information.

Substantial value

The information must currently have “substantial” as opposed to “nominal” value, or must be reasonably likely to have such value in the future. In this paragraph, value means market value.

Market value of information can be directly established when a market already exists for such information, or it is anticipated that it will exist in the future. An example of information that may technically qualify for an exemption under paragraph 18 (a) is research carried out by the National Research Council Canada, to be further developed by the private sector under various licensing arrangements.

It is not the expense that went into producing or preparing the information that is relevant, but the value of the information itself. Large sums might have been expended to produce information that has no value in and of itself; in those circumstances the exemption would not apply. The government bears the onus of demonstrating that the information has not only value, but substantial value. This is more difficult when the information will have value in the future.

Other types of similar information can also be determined to have substantial value in the market context — for example, software packages — even if the information has not been developed with any immediate idea of developing a product on a commercial basis.

11.11.2 Paragraph 18(b)

Paragraph 18(b) is a discretionary exemption based on an injury test, and seeks to protect two areas of concern:

1. the competitive position of a government institution; and
2. contractual or other negotiations of a government institution.

1. Competitive position of a government institution

The exemption is intended to protect information, the disclosure of which would weaken the competitive position of those government institutions that are in competition with the private sector or with the public sector of another government.

In this context, “prejudice” means that disclosure of the information would harm or injure the competitive position of a government institution. There can be prejudice to a competitive position of a government institution even if there is no immediate loss. However, for this exception to apply, the institution must have a reasonable expectation that disclosure of the information is capable of being used by an existing or a potential competitor and that it has a probability (not just a possibility) of weakening the competitive position of a government institution.

In the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, the Supreme Court of Canada considered the test to establish the degree of likelihood that harm will result from the disclosure of information. The Court said that the proper test is to show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur.

The exception may be claimed irrespective of whether there is currently a competitor in the marketplace.

Example

The Royal Canadian Mint, a commercial Crown corporation subject to the Access to Information Act, operates globally and competes with other mints and private companies. Disclosing records that contain information about a new product not yet on the market and its costs of

production or a report that describe expected difficulties in the supply of silver and other metals could reasonably be expected to prejudice the competitive position of the Mint.

2. Contractual or other negotiations of a government institution

This exemption is intended to protect a government institution's ability to negotiate effectively with other parties. It provides similar protection for the business and commercial activities of a government institution, as is provided for third parties under paragraph 20(1)(d).

The exemption aims to shield the contractual or other negotiations of a government institution from interference. Although paragraph 21(1)(c) of the Act contains a corresponding exemption, based on a class test, for positions or plans developed for the purpose of negotiations carried on, or to be carried on, by or on behalf of the Government of Canada, the test specified in paragraph 18(b) is more onerous than the test set out in paragraph 21(1)(c). The government institution claiming paragraph 18(b) has to demonstrate a reasonable expectation that interference in the negotiations would result from the disclosure of the requested records.

Paragraph 18(b) covers negotiations either conducted directly by employees or officers of a government institution or conducted by a third party acting as an agent of the government institution. It does not cover information relating to negotiations to which a government institution is not a party.

In this context, "negotiations" means discussions and communications where the intent is to arrive at a settlement or an agreement. Negotiations can include contractual negotiations or negotiations relating to the settlement of a lawsuit.

An institution may refuse to disclose positions, plans, procedures, criteria or instructions that relate to any negotiations carried on, or to be carried on, by or on behalf of an institution. It extends to options, fall-back positions and tactics developed as part of the negotiating process.

The exemption normally applies to ongoing or future negotiations. It may be applied even though negotiations have not yet started at the time of the request for access to information, including when there has not been any direct contact with the other party or their agent. However, a “vague possibility” of future negotiations is not sufficient. There must be a reasonable fact-based expectation that the future negotiations will take place.

Information from completed negotiations is not covered unless, for example, the same strategy will be used again and it has not been publicly disclosed.

The phrase “interfere with contractual or other negotiations” means to obstruct, hinder or make much more difficult the negotiation of a contract or other sort of agreement between the government institution and a third party. The expectation of interference with negotiations resulting from disclosure must be reasonable, and the negotiations have to be specific, not possible future negotiations of a general kind.

To claim the exception, the institution must establish that:

- the record contains positions, plans, procedures, criteria or instructions;
- the information in the record relates to negotiations;
- the negotiations are currently underway or will be conducted in the future;

- the negotiations are being conducted by, or on behalf of, an institution; and
- there is a reasonable expectation of probable harm to the negotiations should the record be disclosed.

Examples

- A negotiation plan for a trade deal that has not been completed.
- A strategy for ongoing collective bargaining negotiations with employee unions.
- Instructions related to land expropriation negotiations carried out by an arbitrator appointed by the government institution and acting on the authority of the institution.
- Handwritten notes on a draft agreement involving an institution and a private firm, setting out the institution's position on the various terms of the agreement.
- A discussion paper created to support specific negotiations being undertaken between the institution and a third party.

Paragraph 18(b) is available only to government institutions subject to the Access to Information Act. It cannot be applied to protect the interests of the Government of Canada as a whole.

Federal bodies that are not captured by the definition of "government institution" in section 3 of the Act cannot claim protection under paragraph 18(b). For example, the exemption cannot be invoked to protect information about subsidiaries of parent Crown corporations that are not wholly owned as defined in section 83 of the Financial Administration Act, because they are not "government institutions" as defined by the Access to Information Act. They are, however, "third parties" under the Act, and their competitive position and negotiations may be protected under paragraphs 20(1)(c) and (d) respectively.

11.11.3 Paragraph 18(c)

Paragraph 18(c) of the Act provides that a government institution may refuse to disclose any record that contains scientific or technical information obtained through research by an officer or employee of a government institution, the disclosure of which could reasonably be expected to deprive the officer or employee of priority of publication. Its objective is to maintain the government's ability to hire scientific and technical experts.

This exemption is discretionary and is based on an injury test. The paragraph recognizes the exclusive rights of officers or employees of a government institution to publish works based on scientific or technical research done by them while employed by the government institution. These rights are temporary because, upon publication, the background data are no longer covered by this exemption.

For this exemption to be invoked, the officer or employee must be actively engaged in the research with a reasonable expectation of publication.

This exemption does not extend to scientific or technical information produced from research done by an outside firm that is under a contract for services with a government institution.

Example

During a study to determine whether a certain type of drink causes cancer in rats, government scientists conduct many tests and record the results carefully. They analyze those results and draw conclusions that are eventually published in a scientific journal. If the results of the tests were disclosed before the study is published, another scientist might be able to analyze them and publish the conclusions, thereby depriving the officer or employee of priority of publication.

11.11.4 Paragraph 18(d)

Paragraph 18(d) is a discretionary exemption based on an injury test that serves three purposes:

1. to protect the financial interests of a government institution;
2. to protect the government's ability to manage the economy; or
3. to avoid the result of an undue benefit accruing to any person through disclosure of information.

1. Protect the financial interests of a government institution

"Financial interests" relate to a government institution's financial position and its management of money. Financial interests include matters such as the management of assets and liabilities; the ability of the institution to protect its own interests in transactions with third parties, other government institutions and other governments, and in public-private partnership agreements; and its ability to collect fees and generate revenues.

Because the provision specifically uses the phrase "financial interests of a government institution," the exemption cannot be applied to protect the financial interests of the Government of Canada as a whole.

In most cases, the institution whose economic interests are involved will be the institution with custody or control of the records requested. In some instances, however, an institution may hold information about another institution whose economic interests may be affected by disclosure. In such instances, consultation should be carried out if the institution processing the request does not have sufficient information to properly exercise its discretion or if it intends to disclose sensitive information.

2. Protect the ability of the Government of Canada to manage the economy of Canada

"Government of Canada," used in paragraph 18(d), has a broader meaning than "government institutions," used elsewhere in the Act. This recognizes that institutions, individually or collectively, may hold significant amounts of financial and economic information critical to the management of the country's economy. Sensitive information about federal government bodies not subject to the Act can also be exempt under paragraph 18(d) if it can be shown that disclosure could reasonably be expected to be injurious to the ability of the Government of Canada to manage the economy of the country. For example, the Canada Pension Plan Investment Board manages the Canada Pension Plan (CPP) Fund, which was worth more than $152 billion at December 31, 2011, and will sustain the future pensions of 18 million Canadians. Disclosure of information that could result in a substantial loss to the CPP Fund could in turn interfere with the ability of the government to manage the economy. Such information would also be protected under paragraph 20(1)(c) of the Act.

The phrase "ability to manage the economy of Canada" refers to the responsibility of the Government of Canada to manage its economic activities by ensuring that an appropriate economic infrastructure is in place. This depends on a range of activities, including monetary, fiscal and economic policies, taxation, and economic and business development initiatives. It may include, for example, activities to combat inflation or unemployment, regional development, credit, balance of payments, fixing the bank rate, or the price of commodities or resources.

Injury to these interests includes damage or detriment to the economic policies or activities for which a single institution is responsible, as well as harm to policies and programs that affect the overall economy of Canada.

Where disclosure of records may be injurious to the ability of the government to manage the economy of Canada, the institution processing the request should consult with the Department of Finance Canada when it does not have sufficient information to properly exercise its discretion or when it intends to disclose sensitive information.

3. Avoid the result of an undue benefit accruing to any person through disclosure of information

This provision can also be invoked when there are objective grounds for believing that releasing the information would likely result in an undue benefit measured in monetary or monetary-equivalent terms — for example, an increase of revenue, an improvement of corporate reputation or a gain of goodwill. “Undue” means more than necessary, improper or unwarranted.

The term “person” is not limited to a human being but can also include a corporation. The person who could reasonably be expected to benefit does not need to be the requester in order for this paragraph to be invoked.

Examples

- The disclosure of confidential information about the government’s intention to buy a certain property might result in third parties buying the property in anticipation of profits from the government’s acquisition.
- Premature disclosure of information about a change in revenue sources, such as taxes, duties or tariff rates, could result in undue benefit to a third party.
- Disclosure of the specifications of special testing equipment or software developed by an institution that have been kept secret or

confidential could reasonably be expected to result in improper benefit.

Paragraph 18(d) ends with a list of examples of information the disclosure of which could reasonably be expected to affect one of the three areas of concern. The list includes information regarding:

i. the currency, coinage or legal tender of Canada,
ii. a contemplated change in the rate of bank interest or in government borrowing,
iii. a contemplated change in tariff rates, taxes, duties or any other revenue source,
iv. a contemplated change in the conditions of operation of financial institutions,
v. a contemplated sale or purchase of securities or of foreign or Canadian currency, or
vi. a contemplated sale or acquisition of land or property.

This list is not exhaustive. It is provided for illustrative purposes only, and other types of similar records may also qualify for exemption, including the above examples as well as the following:

- information on a institution’s investment strategies that could affect its interests or future financial position;
- information in budget preparation documents that could result in segments of the private sector taking actions affecting the ability of the government or a federal institution to meet economic goals; and
- draft plans to discontinue a small business development grants program.

Paragraph 18(d) is not a class exemption. Government institutions must demonstrate the reasonable probability (not just the possibility) of injury before information can be exempted under this paragraph.

Because the subparagraphs provide examples only, it is not necessary to specify which subparagraph is being claimed.

Finally, paragraph 18(d) cannot be used to prevent the release of information revealing a liability that might lead to a lawsuit against a government institution for alleged wrongdoing. In addition, the belief that the institution may be sued if the information is released is not sufficient to satisfy this exemption.

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11.12 Section 18.1 – Economic interests of certain Crown corporations

Subsection 18.1(1) of the Access to Information Act (the Act) is a discretionary class exemption that is intended to protect the confidential business information of the Crown corporations specified in the provision. Unlike section 18, the evidence does not have to demonstrate that the information has substantial value or is likely to have substantial value, or to demonstrate a probability of injury from disclosure. However, when exercising discretion, the impact of disclosure is a relevant factor to be considered in the exercise of discretion.

The following three elements must be satisfied before this exemption applies:

1. The information involved must be a trade secret or financial, commercial, scientific or technical information.
   In the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, the Supreme Court of Canada confirmed that the term "trade secret" is to be given its traditional legal meaning. A trade secret aplan or process, tool, mechanism or compound that possesses the following characteristics:

1. The information must be secret in an absolute or relative sense (it is known only by one or a relatively small number of persons).
2. The possessor of the information must demonstrate that he has acted with the intention to treat the information as secret.
3. The information must be capable of industrial or commercial application.
4. The possessor must have an interest (for example, an economic interest) worthy of legal protection.

According to the Supreme Court, the party claiming the exemption has to establish that, on the balance of probabilities, the record falls within the definition.

The type of information that could potentially fall into this class includes the chemical composition of a product and the manufacturing processes used. However, not every process or test would fall into this class, particularly when such process or test is common in a particular industry.

Research data, abstract ideas or personal data not capable of being used industrially or commercially, at least in the near future, are not normally considered trade secrets. Whether such information constitutes a trade secret must be decided on a case-by-case basis.

In the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, the Supreme Court of Canada agreed with the well-established jurisprudence of the Federal Court that the terms “financial, commercial, scientific or technical” should be given their ordinary dictionary meanings. The Supreme Court of Canada recognized that the information at issue need not have an inherent value; [11-8] and that administrative details such as page and volume

numbering, dates, and location of information within the records do not constitute financial, commercial, scientific or technical information.

2. The information belongs to the Canada Post Corporation, Export Development Canada, the Public Sector Pension Investment Board or VIA Rail Canada Inc., or to their wholly owned subsidiaries, within the meaning of section 83 of the Financial Administration Act.
3. The Crown corporation named in subsection 18.1(1), or its wholly owned subsidiary, owning the information has consistently treated the information as confidential.

   A designation of confidentiality does not of itself ensure that the information is exempt from access; the information will still have to be examined on a case-by-case basis to ensure that it is consistently treated in a confidential manner by the Crown corporation or by the wholly owned subsidiary. To be confidential, the information must not be available from sources otherwise accessible by the public, or obtainable by observation or independent study by a member of the public acting on his or her own.

It should be remembered that despite its class nature, section 18.1 is a discretionary exemption. This flexibility is meant to temper the broad nature of the class test, and the head of the institution must exercise discretion in determining whether records that fall within the provision may nevertheless be disclosed. If, after balancing the reasons for release and the reasons against release in good faith and using only factors relevant to the Act, the head has reasonable motives to believe that the records should not be disclosed, the head has the discretion to exempt this information.

11.12.1 Limitations on exemption

There are two restrictions limiting the application of subsection 18.1(1).

1. Paragraph 18.1(2)(a) provides that subsection 18.1(1) does not apply to a part of a record that contains information about the general administration of the Canada Post Corporation, Export Development Canada, the Public Sector Pension Investment Board and VIA Rail Canada Inc., or to their wholly-owned subsidiaries.

   Section 3.1 of the Act specifies that, for the purposes of the Act, information that relates to the general administration of a government institution includes information that relates to expenses paid by the institution for travel, including lodging and hospitality. Since the term "general administration" is not further defined in the Act, it takes its ordinary meaning: the management functions associated with administering an organization.

   Therefore, information that relates to the general administration of the four Crown corporations and their wholly owned subsidiaries includes information related to
   financial activities (including travel, lodging and hospitality), human resources, training and development, information management and technology, management activities (including strategic planning and performance management, audits and evaluations), management of assets, security and any other information related to the management of the institution.

2. Paragraph 18.1(2)(b) provides that subsection 18.1(1) does not apply to any activity of the Canada Post Corporation that is fully funded out of moneys appropriated by Parliament – that is, from the Consolidated Revenue Fund.

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11.13 Section 19 – Personal information

The purpose of section 19 of the Access to Information Act (the Act) is to strike a balance between the right of the public to access information in records under the control of a government institution and the right of each individual to his or her privacy. Section 19 incorporates by reference sections 3 and 8 of the Privacy Act, which are essential for the interpretation and application of this exemption.

11.13.1 Definition of personal information

Subsection 19(1) is a mandatory exemption based on a class testthat provides that, subject to the three exceptions in subsection 19(2), the head of a government institution shall refuse to disclose any record requested under the Access to Information Act containing personal information as defined in section 3 of the Privacy Act.

The Privacy Act defines “personal information” as “information about an identifiable individual that is recorded in any form”. This definition is broad and contains examples of personal information. Information not specifically mentioned in the list but clearly covered by the broad definition, such as information relating to an identifiable individual’s income, DNA, body sample, sexual preference or political inclination, is to be considered personal information.

The leading case from the Supreme Court of Canada is the 1997 decision Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403. The Supreme Court of Canada ruled as follows:

> Once it is determined that a record falls within the opening words of the definition of “personal information” in s. 3 of the Privacy Act, it is not necessary to consider whether it is also encompassed by one of the specific, non-exhaustive examples set out in paras. (a) to (i).

Therefore, it is sufficient that the information is captured by the opening words of the definition of personal information in section 3 of the Privacy Act. In some cases, it is necessary to refer to paragraphs (a) to (i) of the definition to determine to whom the personal information belongs – for example, views and opinions of individuals, which are discussed in paragraphs (e), (g) and (h) of the definition.

The definition of personal information says only that information recorded in any form is relevant if it is **about** an identifiable individual. In Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board), 2006 FCA 157, the Federal Court of Appeal focused on the terms “about” and “personal information”. The Federal Court of Appeal stated the following:

> Information recorded in any form is relevant if it is "about" an individual and if it permits or leads to the possible identification of the individual. There is judicial authority holding that an "identifiable" individual is considered to be someone whom it is reasonable to expect can be identified from the information in issue when combined with information from sources otherwise available.
>
> ..."Personal information" must however be understood as equivalent to information falling within the individual's right of privacy.
>
> ...Privacy thus connotes concepts of intimacy, identity, dignity and integrity of the individual.

In Gordon v. Canada (Health), 2008 FC 258, the Federal Court accepted the following test:

> Information will be about an identifiable individual where there is a serious possibility that an individual could be identified through the use of that information, alone or in combination with other available information.

A "serious possibility" means something more than a frivolous chance, but less than a balance of probabilities. "Other available information" can include information that is publicly available – for example, on the Internet or in other publicly accessible media. The Gordon decision is discussed in greater detail in Section 11.13.4 of this chapter.

The information must be about an identifiable individual for section 19 to apply. An “identifiable individual” means an individual human being, not a corporate entity. A corporation would therefore not qualify as an identifiable individual, and section 19 could not be applied to exempt information about the corporation itself. However, in Canada (Health) v. Janssen-Ortho Inc.,2007 FCA 252, the Federal Court of Appeal ruled that the names of employees of a corporation (who are identifiable individuals) qualified as personal information. The exemption applied because none of the employees consented to the release of their names or to the disclosure that they were employed by the corporation. The views or opinions of employees while acting as representatives of a corporation also qualify as personal information. In SNC Lavalin Inc. v. Canada (Canadian International Development Agency.), 2007 FCA 397, the Federal Court of Appeal held that four statements found in the minutes of a meeting between SNC employees and Canadian International Development Agency officials constituted personal information. (However, the Court held that section 19 of the Access to Information Act did not apply because the information fell within the service contract exclusion created by paragraph 3(k) of the definition of personal information found in the Privacy Act.)

In the 1987 decision Robertson v. Canada (Minister of Employment and Immigration) (1987), 13 F.T.R. 120, 42 D.L.R. (4th) 552 (Fed. T.D.), the Federal Court found that the name and title of employees in the private sector arenot personal information as defined under section 3 of the Privacy Act. This decision was overturned by the Supreme Court of Canada’s interpretation of section 3 of the Privacy Act in Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403 and Canada

(Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), 2003 SCC 8. Therefore, the Robertson decision should not be followed on this point.

In Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration), 2002 FCA 270, the Federal Court of Appeal ruled that the same information can be "personal" to more than one individual. In this case, employees had made statements about their manager during interviews in the context of a workplace assessment. The Court said that the names of persons interviewed were the personal information of both the interviewees and the manager. After balancing the private interests of the interviewees, the private interests of the manager and the public interest in disclosure and non-disclosure, the Court determined that the manager's interest in the information should prevail. Moreover, the Court ruled that the manager had a right to know under his Access to Information Act request both what was said about him and who said it.

Finally, H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), 2006 SCC 13, [2006] 1 S.C.R. 441, the Supreme Court of Canada ruled that a third party can raise section 19 in the context of an application for judicial review on the application of section 20 (third party information). Therefore, a third party may raise section 19 to protect personal information found in a document of interest to the third party, such as the names of its employees.

The definition of "personal information" is discussed in greater detail in Chapter 3 of the Privacy Manual.

11.13.2 Limitations on the definition of personal information

In the Privacy Act, paragraphs 3(j), (k), (l) and (m) of the definition of personal information exclude specific types of information, normally considered as personal information, from the meaning of the term when a request is made under the Access to Information Act. Thus, section 19 of the Access to Information Act cannot be claimed for information about:

- the current or past positions or functions of a government employee or officer (paragraph (j));
- services performed by an individual contracted by a government institution (paragraph (k));
- a discretionary benefit of a financial nature conferred on an individual (paragraph (l)); or
- an individual who has been dead for more than twenty years (paragraph (m)).

The exclusions in paragraphs (j), (k) and (l) reflect the fact that there is certain information about government employees, persons performing services under contract for a government institution, and discretionary benefits which, barring other considerations, the public has a right to know.

The exclusions in paragraphs (j), (k) and (l) should however be interpreted narrowly because they are exceptions to the general principle of mandatory protection of personal information recognized under both the Privacy Act and under subsection 19(1) of the Access to Information Act. For example, paragraphs (j) and (k) should be interpreted as applying to work or function-related information of a factual nature only. On the other hand, personnel assessments – for example, a job appraisal – and other assessments of personal competence or characteristics of an individual, conflict of interest

declarations, or reports of disciplinary action taken against an employee or a person under contract are to be included in the definition of personal information.

It should be noted that paragraph 3(j) of the Privacy Act is limited to information about:

1. an individual who is or was an officer or employee of a government institution. A minister and exempt staff are not officers or employees of the institution. The term “government institution” is defined in section 3 of the Privacy Act and in section 3 of the Access to Information Act; and
2. the position or functions of the individual. Generally speaking, information relating to the position will consist of the type of information disclosed in a job description, such as the terms and conditions associated with a particular position, including qualifications, duties, responsibilities, hours of work, and salary range.

In Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police), 2003 SCC 8, [2003] 1 S.C.R. 66, the Supreme Court of Canada held the following:

- The purpose of paragraph 3(j) is to ensure that the state and its agents are held accountable to the general public.
- The examples given in this section are not exhaustive and do not reduce the general scope of the introductory phrase (i.e., the definition of “personal information”).
- There is no reason to impose a time restriction on the scope of paragraph 3(j).
- The word “position” as it appears in paragraph 3(j) should be read as applicable to multiple positions. Information that would have been available at the time that the individual held a certain position

or exercised certain functions remains available subsequent to that individual's promotion or retirement
- Only information relating to the position or functions of the concerned federal government employee or falling within one of the examples given is excluded from the definition of "personal information".

A considerable amount of information that qualifies as employment history remains inaccessible, such as the evaluations and performance reviews of a federal government employee and notes taken during an interview. Indeed, those evaluations are not information relating the position or functions of the employee, but are linked instead to his or her competence to fulfil the tasks of the position.

The signature of an officer or employee of a government institution is personal information. Whether it falls within the exception in paragraph 3(j) of the Privacy Act is a determination that has to be made on a case-by-case basis.

The signature of an officer or employee is excluded from the definition of personal information by virtue of paragraph 3(j) of the Privacy Act if, for example, the signature of the officer or employee was required to demonstrate the validity of the document or to attest the approval of an expenditure. The signature of an officer or employee of a government institution on a document prepared in the course of employment constitutes personal information as per section 3 of the Privacy Act if the person's name is also typed or printed on the document. In such a case, the signature could nonetheless be disclosed at the discretion of the head of the institution in accordance with subsection 19(2) of the Access to Information Act.

Paragraph 3(k) of the Privacy Act creates an exception to the definition of personal information for the purposes of sections 7, 8 and 26 of the Privacy Act and section 19 of the Access to Information Act. As mentioned above, section 19 of the Access to Information Act cannot be claimed for information about an individual who is or was performing services under contract for a government institution that relates to the services performed. In examining paragraph 3(k), the Federal Court, in Canada (Information Commissioner) v. Canada (Secretary of State for External Affairs), [1990] 1 F.C. 395 (T.D.), ruled that the security classification on a call-up form relates to the position and not to the individual who filled the position.

For the purposes of sections 7, 8 and 26 of the Privacy Act and section 19 of the Access to Information Act, paragraph 3(l) of the Privacy Act creates an exception to the definition of personal information for information relating to any discretionary benefit of a financial nature conferred on an individual. In examining that particular paragraph, the Federal Court noted in Sutherland v. Canada (Minister of Indian and Northern Affairs), (T.D.), [1994] 3 F.C. 527, that the phrase “discretionary benefit of a financial nature” is not defined in the Privacy Act. Its meaning must be ascertained from the words used, the context in which they appear, and the object and purpose of the Privacy Act. The word “benefit” is defined in The Shorter Oxford English Dictionary as a “favour”, “gift”, “advantage” or “profit.” The word “discretionary” suggests that the benefit contemplated in paragraph 3(l) is one that the donor of the benefit may confer at his or her discretion.

11.13.3 Permissive disclosure: subsection 19(2)

Subsection 19(2) of the Act provides that the head of a government institution may disclose any record that contains personal information if:

a. the individual to whom it relates consents to the disclosure;
b. the information is publicly available; or
c. the disclosure is in accordance with section 8 of the Privacy Act.

Subsection 19(2) gives heads of institutions the discretion to release personal information in the above three circumstances. The subsection was interpreted by the Supreme Court of Canada in Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403, as discretionary because of the particular use of the word "may."

With respect to paragraph 19(2)(b), the Federal Court said in Yeager v. Canada (National Parole Board), 2008 FC 113, that even if some of the personal information would have been publicly available, the head of the government institution has the discretion to refuse to disclose the personal information. This principle also applies to paragraphs 19(2)(a) and (c).

Paragraph 19(2)(a)

In Fontaine v. Royal Canadian Mounted Police, 2009 FCA 150, the Federal Court of Appeal commented that the obligation under paragraph 19(2)(a) is, at most, to make reasonable efforts to seek consent of the individuals concerned and that what is reasonable must take into account the practical difficulties that may exist to find and locate the individuals. The Court added that there may be circumstances when, even if individuals have consented to the disclosure of their information to the requester, government institutions may exercise their discretion to invoke subsection 19(1) to

refuse to disclose the information, and that to exercise their discretion in the interest of justice and the suppression of crime would not be, in appropriate circumstances, an illegal exercise of discretion.

It is up to each institution to determine whether it is appropriate to seek consent. For example, it may be superfluous to seek consent from an individual being sued by the requester or from an individual suffering from a mental disorder. Some of the factors that could be considered before seeking consent are:

- In the case of a public servant, is the individual still working for the federal government?
- Can the individual be easily located? Has the individual simply been transferred to another department or is he or she now working for a private sector organization?
- Is the contact information publicly available?
- Would efforts to locate the individual constitute an unreasonable invasion of privacy?
- Is it reasonable in terms of the time and resources required to locate and seek consent from the individual?

Any consent obtained would usually apply only to records being processed for a particular file, and not to future requests.

Paragraph 19(2)(b)

The term “publicly available” is not defined in the Access to Information Act or the Privacy Act. However, the term was interpreted by the Federal Court in Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board), 2005 FC 384. The Federal Court held that for information to be in the public domain, it must be available on an ongoing basis for use by the public. In addition, the Court noted the use of the present tense in subsection

19(2): "…the provision allows the head of a government institution to disclose information if the information 'is' publicly available…." In other words, paragraph 19(2)(b) applies to personal information that is currently publicly available, and not to information that may have been publicly available at some point in time in the past and that is no longer publicly available.

Other court cases on paragraph 19(2)(b) of the Act have held the following:

- Personal information is publicly available if it could have been gleaned from public records. Information found in a directory available at the Library of Parliament is publicly available. The fact that permission is needed to use the Library of Parliament does not detract from the public availability of the information. 11-10
- Information that has been disclosed by inadvertence does not become publicly available. 11-11

Therefore, personal information is "publicly available" when:

- it has been published in some form currently available to the public (e.g., in a newspaper, magazine, television or radio program, or on an Internet website) or when it is available in a publicly accessible record such as a court file (for example, Federal Court Registry) or a publicly accessible databank;
- it is reasonably accessible to the public, not just a select class of persons;
- it could have been compiled, with little effort**,** from a number of distinct public records or through a comparison of source documents obtained through a computer search engine;
- it is evident that the individual has made his or her personal information available in a public forum – for example, personal

information that is verified as having been provided in a media interview or a “letter to the editor” by the individual concerned; or
- it has been made public by design, that is by law or with the individual’s consent, and not by accident.

Institutions must make a reasonable effort to ascertain whether the personal information is publicly available. There is no requirement “to search all publications, journals, etc., to verify if the information was released in any shape or form to the public.” 11-12

An assessment should always be done of how public the information really is before disclosing personal information. For example, when considering whether to disclose a court record, one must establish that there is no type of confidentiality or sealing or other order that restricts access to the record.

When considering disclosing personal information that is in the public domain, one must ensure that:

- the personal information to be disclosed is identical to the information that is in the public domain;
- the public continues to have access to the information; and
- the information has been obtained legitimately (and not by inadvertence or by means of a leak).

Furthermore, paragraph 19(2)(b) is discretionary, and one must consider whether or not the disclosure would be a further violation of the individual’s privacy. Section 6.3.13 of the Privacy Manual provides guidance on three interrelated factors that should be taken into account in any invasion-of-privacy test. They are:

- the expectations of the individual;
- the sensitivity of the information; and
- the probability of injury.

Paragraph 19(2)(c)

As previously indicated, paragraph 19(2)(c) stipulates that a government institution may disclose personal information in accordance with section 8 of the Privacy Act. Subsection 8(1) of the Privacy Act prescribes that a government institution may not disclose personal information of an individual without the individual's consent unless one of the fourteen exceptions listed in subsection 8(2) applies. Section 6.3 of the Privacy Manual provides detailed guidance on subsection 8(2) of the Privacy Act.

11.13.4 Application of section 19

The application of section 19 of the Access to Information Act requires a three-step process:

1. Establish that the information falls within the definition of personal information found in section 3 of the Privacy Act.
2. Ensure that paragraphs 3(j), (k), (l) and (m) of the definition of personal information do not apply to permit the disclosure of the personal information.
3. Exercise discretion as to whether the information may nonetheless be disclosed under subsection 19(2) of the Access to Information Act.

Government institutions must make a reasonable effort to determine whether any of the three exceptions found in subsection 19(2) apply. In X v. Canada (Minister of National Defence), [1992] 1 F.C. 77 (T.D.), the Federal Court said that it is not sufficient for the heads of government institutions to simply state that they are unaware or that they do not know whether the exceptions apply. Rather, they should be in a position to state what activities and initiatives were undertaken in this regard.

Sections 9.9.1, 10.4 and 10.5 of this manual provide detailed guidance on the exercise of discretion.

Section 10.8 of this manual contains information on the application of section 25 of the Act to records containing personal information, which is reproduced below for ease of reference.

- In a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information. [11-13]
- Information recorded in any form is personal information if it is "about" an individual and if it permits or leads to the possible identification of the individual. An "identifiable" individual is considered to be someone who, it is reasonable to expect, can be identified from the information at issue when that information is combined with information from sources otherwise available (including sources publicly available). [11-14]
- In some cases, where the record contains personal information, the record may be depersonalized so that no information about an identifiable individual remains. This will be the case when the record contains personal information that could apply to a large number of individuals. If required, the institution should get specialized services from Statistics Canada or others who will advise if the information the institution proposes to disclose could be used to identify the individuals and is therefore personal information.
- In cases where the information relates specifically to an individual, such as a grievance, it will be difficult to depersonalize the record because there may always be someone who is aware of the details of the grievance and could know or guess the identity of the individual.

- Depersonalization is accomplished by removing identifiers such as a person's name, date of birth and other personal data that can be linked to the individual, as well as any other information that could identify the individual. Re-identification should be rendered impossible, that is, the remaining data, even when combined with other sources (public or other), should not permit any link to the individuals. The risk of re-identification is higher in situations relating to a particular subject or group, such as a small set of individuals (for example, information concerning ten middle managers of a division within an institution), a small or specific geographical location (for example, the province of Newfoundland, the town of Goderich), precise dates, or rare or unusual scenarios (for example, a rare disease). When assessing the possibility of re-identification, it is important to consider technologies that facilitate the collection of personal information through activities such as data matching and data mining. Institutions should obtain expert advice where required.
- Care should also be taken to ensure that the release of a partial record would not reveal personal information about the individual or disclose information that could be linked to an identifiable individual. For example, disclosing a depersonalized record in response to a request to obtain information about complaints filed against John Smith would automatically reveal that complaints were made about Mr. Smith.
- Similarly, the name of a place or thing may qualify for exemption, in which case only that discrete piece of information should be deleted. For example, the sentence "John Doe, an expert in environmental research at the University of Toronto, endorsed the representations of several environmental groups" can be depersonalized by removing the name "John Doe" and his

university affiliation, provided it is reasonable to believe the rest of sentence does not provide a key to the individual's identity.

The case Gordon v. Canada (Health), 2008 FC 258, illustrates the need to be careful when severing records containing personal information.

Mike Gordon, a reporter for the CBC, made an access request at Health Canada for "a copy of the database of adverse drug reactions" (called CADRIS). CADRIS is a database of information collected by Health Canada relating to domestic suspected adverse reactions to health products, including pharmaceuticals, biologics, natural health products and radial pharmaceuticals marketed in Canada.

Information regarding such reactions is collected on a voluntary basis through reports provided by health professionals and consumers (about 38 per cent) and on a mandatory basis from drug manufacturers (about 62 per cent). On or about July 5, 2006, CADRIS had roughly 125 data fields which contained information derived from over 180,000 suspected adverse reaction reports received since 1965. All fields had been released under the Access to Information Act, except direct identifiers and the "province" field. "Province" refers to the province from which the report in question was received, which could be different than the province of residence of the individual who suffered the adverse drug reaction.

One issue before the Federal Court was as follows: Does the disclosure of the field 'province' constitute the release of personal information? More specifically, does disclosing the field 'province' allow for the identification of an individual, thus rendering other information personal information as defined in section 3 of the Privacy Act?

The Federal Court concluded that “information recorded in any form is information ’about’ a particular individual if it ’permits’ or ’leads’ to the possible identification of the individual, whether alone or when combined with information from sources ’otherwise available’ including sources publicly available”. Three affidavits were filed by Health Canada demonstrating the level of risk of identification of the individuals having suffered an adverse reaction. The Court stated that it was satisfied that Health Canada, on the evidence before the Court, was required to refuse to disclose the content of the field of “province” under subsection 19(1) because the release of this field would significantly increase the risk of identifying the individuals who suffered from an adverse drug reaction because of the possibility of data-matching the province field, the other fields already released from CADRIS and publicly available information – for example, obituaries for given dates in a given city in a given province. The Court concluded that the “province” field, “in all of the circumstances of this matter, constitutes ’personal information’ as defined in section 3 of the Privacy Act.”

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11.14 Section 20 – Third Party Information

Section 20 of the Access to Information Act (the Act) deals with third party information, including but not limited to, trade secrets, confidential financial, commercial, scientific or technical information, and information used for emergency management plans. As defined in section 3 of the Act, “third party” means “any person, group of persons or organization other than the person that made the request or a government institution.” The definition of third party encompasses

government bodies and offices to which the Act does not apply — for example, the Canada Pension Plan Investment Board. Foreign governments also qualify as third parties under section 20. [11-15]

11.14.1 Subsection 20(1) – Exemption for third party information

Subsection 20(1) contains mandatory class test exemptions in paragraphs (a), (b) and (b.1) and mandatory injury test exemptions in paragraphs (c) and (d).

Once a decision is made that the information qualifies for exemption under subsection 20(1)(a), (b), (b.1), (c) or (d), disclosure must be refused unless the exemption is overridden by subsection 20(5) or (6), as explained in Sections 11.14.10 and 11.14.11 of this chapter.

Requirement for notification

Under subsection 27(1) of the Act, when the head of a government institution intends to disclose a record that might contain information described in subsection 20(1), written notice of the request and of the head's intention to disclose the record must be provided to the third party. If there is no intention to disclose, the exemptions can be applied without providing notice.

Requirements and procedures for notifying third parties are discussed in Chapter 12 of this manual.

Onus

The onus to demonstrate the applicability of section 20 rests with the head of the institution, even through the notification process, but the third party is expected to cooperate fully during this process. The onus shifts to the third party when the third party seeks judicial review, under section 44 of the Act, of the institution's decision to disclose the information.

Impact of subsections 20(2), (5) and (6)

In some cases, subsections 20(2), (5) or (6) of the Act may affect the application of the exemptions contained in subsection 20(1). Subsection 20(2) provides that the results of product and environment testing carried out by or on behalf of a government institution cannot be exempted pursuant to subsection 20(1) unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee. Subsection 20(5) provides that third party information may be disclosed with the consent of the third party. Subsection 20(6) permits the disclosure of third party information when the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment. The head of the institution must consider these provisions before deciding whether to disclose information that qualifies for exemption under subsection 20(1).

Subsections 20(2), (5) and (6) of the Act are discussed in greater detail in Sections 11.14.7, 11.14.10 and 11.14.11 respectively.

11.14.2 Paragraph 20(1)(a) – Trade secrets

Under paragraph 20(1)(a), the head of a government institution must refuse to disclose any record containing trade secrets of a third party. This is a mandatory exemption based on a class test. Records qualifying for exemption under subsection 20(1) are the only records that cannot be released in the public interest under subsection 20(6) of the Act.

In the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, the Supreme Court of Canada confirmed that the term “trade secret” must be given its traditional legal meaning. For the purposes of paragraph 20(1)(a) of theAct, a trade secret is aplan or process, tool, mechanism or compound possessing the following characteristics:

1. The information must be secret in an absolute or relative sense (known only by one or a relatively small number of persons).
2. The possessor of the information must demonstrate that he or she has acted with the intention to treat the information as secret.
3. The information must be capable of industrial or commercial application.
4. The possessor must have an interest (for example, an economic interest) worthy of legal protection.

The Supreme Court of Canada held that the party claiming the exemption must establish that on the balance of probabilities, the record falls within the above definition.

The types of information that could potentially fall into this class include the chemical composition of a product and the manufacturing processes used. However, not every process or test would fall into this class, particularly when such process or test is common in a particular industry.

Research data, abstract ideas or personal data not capable of being used industrially or commercially, at least in the near future, are not normally considered trade secrets. Whether such information constitutes a trade secret must be decided on a case-by-case basis.

It is important to note that this exemption does not require evidence of harm that could be caused by disclosure. The only requirement is that the information is a trade secret of the third party.

11.14.3 Paragraph 20(1)(b) – Confidential financial, commercial, scientific or technical information

Paragraph 20(1)(b) of the Act provides a mandatory class exemption for any record containing financial, commercial, scientific or technical information that is confidential information supplied by a third party

and is treated consistently in a confidential manner by the third party. This exemption applies irrespective of whether the confidential information was legally required to be provided to the government institution or was provided voluntarily.

For the exemption to apply, four conditions must be met. The records must contain information that is:

1. financial, commercial, scientific or technical information;
2. “confidential” by some objective standard;
3. supplied to a government institution by a third party; and
4. treated consistently in a confidential manner by the third party.

These conditions are further described below.

1. The information must be financial, commercial, scientific or technical information.

In the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, the Supreme Court of Canada agreed with the well-established jurisprudence of the Federal Court that the terms “financial, commercial, scientific or technical” should be given their ordinary dictionary meanings. The Supreme Court of Canada recognized that the information at issue need not have an inherent value; [11-16] and that administrative details such as page and volume numbering, dates, and location of information within the records do not constitute financial, commercial, scientific or technical information.

To qualify for exemption, a record must contain financial or commercial information. It is not enough that the record was created in the context of a proceeding having financial or commercial implications. [11-17]

Furthermore, a record does not have a financial connotation simply because it refers to land, even if land is an asset. Similarly, a record containing information collected by a third party as a service for a fee

cannot be characterized as “commercial” information.

2. The information must be “confidential information.”

In the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, the Supreme Court of Canada held that the test provided in the decision Air Atonabee Limited v. Canada (Minister of Transport), (1989) 27 F.T.R. 194, is appropriate for determining whether information is confidential within the meaning of paragraph 20(1)(b).

The Federal Court declared in Air Atonabee that a determination of confidentiality must be based on the content, the purpose, and the circumstances in which the information was compiled and communicated. The Federal Court identified three indicators of confidentiality:

- the information contained in the record is not available from other sources in the public domain or obtainable by observation or independent study by a member of the public acting on his or her own;
- the circumstances in which the information originates and is communicated give rise to a reasonable expectation that it will not be disclosed; and
- the information, whether provided by law or supplied voluntarily, is communicated to the government within a relationship that is either fiduciary or not contrary to the public interest and that will be fostered for the public benefit by confidential communication.

Regarding the first indicator of confidentiality, the Supreme Court of Canada said the following:

> ...It follows that information that has been published is not confidential. Moreover, information which merely reveals the existence of publicly available information cannot generally be confidential: knowledge of the existence of the information can be obtained through independent study by a member of the public.

It is not enough for the third party to treat the information confidentially. There must also be evidence of how or why the information is confidential. In addition, the information must in fact be confidential by an objective standard rather than a subjective standard.

The standard established by the courts for such a determination by an institution is one of having done a reasonable (not an extraordinary) search. That is, there is no obligation on the part of a government institution to search, for example, all publications and journals, to verify whether the information was released in any form to the public.

In addition, nothing in the Access to Information Act specifies how or how many times a third party must assert confidentiality in order for it to be maintained. Failure to reassert confidentiality does not mean that a record has not been treated consistently as confidential.

Finally, the number of people to whom the information is available is not determinative of its confidentiality if only those who have a beneficial interest or a legal right in the information are given access to it.

There are many court decisions on confidentiality and paragraph 20(1)(b). Their findings include the following:

- Information that is readily available to companies in the same business cannot objectively be confidential, nor is information that

can be obtained by observation, even where some degree of effort is required. 11-18

- By taking publicly available information and “repackaging” it, a third party cannot create confidentiality. 11-19
- Once the information is in the public domain, it cannot be said to be confidential, even if in a different form. The most important thing is the substance of this information, not the form it takes. 11-20
- When individuals, associations or corporations approach the government for special action in their favour, it is not enough to state that their submission is confidential to make it so in an objective sense. 11-21
- Not only must the third party information be confidential, the third party must also demonstrate that it has a reasonable expectation that the information would not be disclosed later. 11-22
- A third party cannot reasonably expect that the amounts to be paid out of public funds to the third party under a government contract would remain confidential. The public’s right to know how government spends public funds, as a means of holding government accountable for its expenditures, is a fundamental notion of responsible government that is known to all. 11-23
- Although contract proposals or tenders may be submitted confidentially, once the contract is either granted or withheld there is no need, except in special cases, to keep tenders secret. That is, when would-be contractors set out to win a government contract, they should not expect that the terms on which they are prepared to contract, including the capacities their firms bring to the task, are to be fully insulated from the disclosure obligations of the Government of Canada as part of its accountability. 11-24

- In the decision Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs), [1989] 1 F.C. 143 (T.D.), the Federal Court agreed that records on the financial holdings of a group of private individuals fell within the scope of paragraph 20(1)(b). This conclusion was not affected by (1) the reporting requirements because of the fiduciary relationship between the Band and Indian and Northern Affairs Canada; (2) the disclosure of information therein to Band members because the funds belonged to the Band; or (3) the requirement that these statements be posted on the reserve because the reserves are private property and posting on a reserve would not make the information available to the public at large.
- Unsolicited information sent to the government in response to a need that the third party perceived the government might have is covered under paragraph 20(1)(b). The information was communicated in a relationship that is not contrary to the public interest and that is fostered for public benefit by confidential communication. 11-25
- That the requested documents were produced because of the third party's request for drug approval by Health Canada is not a factor determining whether paragraph 20(1)(b) could apply. 11-26

Institutions that receive confidential information should designate and label it as such when the information is received. However, the fact that a record is designated as confidential does not in itself ensure that the information is exempt from access; each record must be reviewed to determine which portions, if any, may be exempt.

3. The information must have been supplied to the government institution by a "third party."

Paragraph 20(1)(b) applies only to confidential information that was "supplied to a government institution by a third party."

In the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, the Supreme Court of Canada held that whether information was supplied to a government institution by a third party is a question of fact and that the content of the information rather than its form must be considered. The mere fact that a document has been prepared by a government official is not sufficient to refuse its exemption under paragraph 20(1)(b). Specifically, if the information in the document was based on the observations of government officials or obtained from other sources, the exemption would not apply. However, if confidential information were obtained from a third party and incorporated into a document prepared by a government official, the exemption would apply.

The following are examples of information not supplied by a third party:

- information that reflects the viewpoints, opinions or comments of government officials;
- reports resulting from factual observations made by government inspectors; and
- the terms of a lease negotiated between a third party and a government institution. [11-27]

4. The information must be treated consistently in a confidential manner by the third party

The third party must have consistently kept the information confidential. The information must also have been kept confidential by the government, and must not have been otherwise disclosed or available from other sources in the public domain.

The mere assertion, without direct, convincing evidence of how the third party treated the information in a confidential manner, does not establish that the exemption ought to apply. To objectively determine whether information is confidential, one must take into account the content of the information, its purpose and the circumstances in which it was compiled and communicated.

Inadvertent disclosure

The decision Occam Marine Technologies Ltd. v. Canada (National Research Council) [11-28] confirmed that inadvertent disclosure does not constitute disclosure under the Act and does not adversely impact the confidential nature of the information.

The director and owner of Occam filed an access request with the National Research Council for minutes of a meeting at which two other companies' proposals for funding were considered. The National Research Council provided a copy of the minutes with exempted third party information severed by blacking out portions of the document. The requester was able to read the entire document by holding it up to light. He asked to examine the original document, claiming that the information had already been released.

The Federal Court held that the fact that the requester was able to read the blacked out portions of a document, which were intended to be exempted but were inadequately obliterated, did not relieve the National Research Council from its obligations under the Act to refuse to disclose confidential third party information because the excised information was not released by intent. The Court concluded that since the third parties had treated the exempted information consistently in a

confidential manner and had provided the information on the understanding it would be maintained in confidence, the information was exempt from disclosure under paragraph 20(1)(b).

Assurances of confidentiality

Assurances of confidentiality by federal public servants cannot guarantee that the information will be exempted under the Act. Confidentiality agreements or clauses are generally considered as evidence of a stated intention among the parties of their desire to keep information confidential. However, although these agreements may be taken into account when assessing the status of information claimed to be confidential, it is important to remember that they do not take precedence over the Act. In other words, if information subject to a confidentiality agreement is not confidential by an objective standard, the subsection 20(1)(b) exemption does not apply, irrespective of the confidentiality agreement. [11-29]

Evidence that third party information was consistently kept confidential

The decision PricewaterhouseCoopers [11-30] (PwC) provides examples of evidence demonstrating that third party information was consistently kept confidential. The Federal Court concluded that information contained in two reports was exempt under paragraphs 20(1)(a), (b), (c) and (d) because of the following evidence:

- The agreement between the parties contained requirements respecting the activities of the third party, including the statement, “We understand that all work will be conducted with full confidentiality in a safe and secure environment….”
- Other documents contained the following statements:

> The Proprietary Methodologies and Analysis were developed by PwC over a period of time of more than five years, and are held in the strictest of confidence.
>
> …At all times, when PwC uses the Proprietary Methodologies and Analysis in its other assignments, PwC ensures that the documents derived therefrom are confidential, maintained in confidence, and not disclosed to any one other than the client.

- PwC's letters of employment demand confidentiality, and all partners and staff annually sign declarations to ensure confidentiality of PwC's proprietary products and secrets.

It is important to note that there is no requirement to provide evidence of harm resulting from disclosure for the exemption under paragraph 20(1)(b) to apply. The only requirement is that the information meets the four conditions outlined above.

11.14.4 Paragraph 20(1)(b.1) – Information used by a government institution for emergency management plans

Paragraph 20(1)(b.1) of the Act is a mandatory class exemption protecting information that was supplied in confidence by a third party to a government institution for the preparation, maintenance, testing or implementation by the government institutions of emergency management plans. The purpose of this paragraph is to facilitate the exchange, between the Government of Canada and third parties, of sensitive information concerning emergency management at the national level.

Unlike paragraphs 20(1)(c) and (d), the evidence does not need to demonstrate a probability of harm from disclosure.

The following five conditions must be met for the exemption to apply:

1. The information is provided to a government institution.
   The information must be supplied to a government institution subject to the Access to Information Act.

2. The information is supplied by a third party.
   The exemption applies to information supplied by a third party, including information supplied by a third party that is contained in a document prepared by a government official.

3. The information concerns critical infrastructure information – that is, the vulnerability of the third party's buildings or other structures; its networks or systems, including its computer or communication networks or systems; or the methods used to protect those buildings, structures, networks or systems.
   Examples of critical infrastructure information that may qualify for exemption include:

   - techniques and protocols to protect systems;
   - methods and measures to prevent, mitigate, respond to, and recover from, failures or disruptions;
   - maps and plans of, for example, critical assets, facilities, installations, communications nodes and computer networks;
   - vulnerability or risk assessments of critical cyber and physical infrastructure systems and networks;
   - key elements of service continuity or business resumption plans;
   - alternate locations for essential services;
   - locations of stockpiles of vaccines and other emergency supplies; and

- information that can be used to hinder an organization's recovery from a critical infrastructure's failure, attack or disruption.

4. The information is provided in confidence.
   The term "in confidence" is usually applied to information obtained on an understanding that it will remain confidential – that is, the information is not available for dissemination beyond the government institutions that have a need to know the information. Information may be obtained in confidence explicitly or implicitly.

5. The information is provided for the preparation, maintenance, testing or implementation, by the government institution, of emergency management plans within the meaning of section 2 of the Emergency Management Act.
   Section 2 of the Emergency Management Act defines "emergency management plan" as "a program, arrangement or other measure (a) for dealing with an emergency by the civil population; or (b) for dealing with a civil emergency by the Canadian Forces in accordance with the National Defence Act."

11.14.5 Paragraph 20(1)(c) – Financial loss or gain or prejudice to the competitive position of a third party

Under paragraph 20(1)(c) of the Act, government institutions must refuse to disclose any record containing information that, if disclosed, could reasonably be expected to:

- result in material financial loss to a third party;
- result in material financial gain to a third party; or
- prejudice the competitive position of a third party.

This is a mandatory exemption, based on an injury test. This exemption applies irrespective of whether the information was provided to the government by a third party or generated by a government institution. The term “material” is not defined in the Act but has the meaning of “substantial” or “important.” [11-31]

The meaning of “could reasonably be expected”

The phrase “could reasonably be expected” has been defined by the courts to mean a “reasonable expectation of probable harm.” [11-32]

This definition was confirmed by the Supreme Court of Canada in the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3. The Supreme Court of Canada held that the proper test is to show that the risk of harm is considerably above a mere possibility, although there is no need to establish on the balance of probabilities that the harm will in fact occur.

Evidence of harm

As mentioned above, the expectation of probable harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- show how the disclosure of the information would cause harm;
- indicate the extent of harm that would result; and
- provide facts to support the assertions made.

Regarding the type of harm that must be demonstrated, the Supreme Court of Canada [11-33] enunciated the following general principles:

1. Disclosure of general information such as dates, numbering and location of information within records or the manner of its presentation generally does not give rise to the necessary reasonable expectation of harm or competitive prejudice.

2. Paragraph 20(1)(c) is not designed to protect knowledge that may be gleaned from the records about how the regulatory process works; doing so would be contrary to the purpose of the Access to Information Act, which is to make the workings of government more transparent.
3. Disclosure of information, not already public, that is shown to give competitors a head start in developing competing products or to give them a competitive advantage in future transactions may, in principle, meet the requirements of paragraph 20(1)(c). The evidence would have to convince the reviewing court that there is a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure.

The Supreme Court of Canada also said that disclosing information that could give an inaccurate perception of a product's safety cannot, except in an unusual case, give rise to the necessary reasonable expectation of harm. A refusal to disclose for fear of public misunderstanding would undermine the fundamental purpose of the Act.

On the question of whether the disclosure of publicly available information can cause harm, the Supreme Court of Canada stated the following:

> As to whether it is possible that disclosing information already in the public domain can cause harm, publicly available information is generally not exempt information under the harm test. It may, however, be possible in some cases to show that the way in which publicly available information has been compiled for a particular purpose is not, itself, publicly known, giving rise to the risk of harm by disclosure.

When applying paragraphs 20(1)(a) and 21(1)(b), a government institution cannot speculate whether the information is a trade secret or confidential financial, commercial, scientific or technical information supplied by a third party. However, in the decisions Astrazeneca Canada Inc. v. Canada (Minister of Health), 2005 FC 189 and AstraZeneca Canada Inc. v. Health Canada, 2005 FC 1451, the Federal Court stated that proof of harm for paragraphs 20(1)(c) and (d) requires reasonable speculation because "in many circumstances a party cannot rely on harm from past disclosures as evidence of reasonably expected harm because past disclosure of that type of evidence may never have occurred." Nonetheless, the party seeking to exempt the information must put forward something more than internally held beliefs and fears. Forecasting evidence, expert evidence, and evidence of treatment of similar elements of proof or similar situations are frequently accepted as a logical basis for the expectation of harm and as evidence of the class of documents being considered.

Furthermore, although the requester's motive or occupation is not relevant for paragraphs 20(1)(a) or (b), motive is a relevant factor in establishing a "reasonable expectation of harm" to third parties under paragraphs (c) and (d). Pressures from third parties to match sponsorship funds and pressures from competitors can also be relevant to the proof required under paragraph 20(1)(c).

The standard is "could reasonably be expected," and the institution needs to show that the risk of harm is considerably above a mere possibility, although there is no need to establish on the balance of probabilities that the harm will in fact occur. Each case must be decided on the evidence presented. It cannot be assumed that a certain type of document will be exempt from disclosure merely because a similar document was exempt in another case.

The decision Coopérative fédérée du Québec v. Canada (Agriculture et Agroalimentaire), [11-34] providesan example of insufficient evidence. The Federal Court ruled that paragraph 20(1)(c) did not apply because:

- the evidence was of such a general nature that it could have applied to any situation in which an inspection report contained negative information on a company;
- there was no evidence of the extent of the harmanticipated;
- the plaintiff gave no indication of the link between the information and the harm described;
- the plaintiff did not appear to take into account the fact that the report also contained several positive conclusions about the plaintiff; and
- the plaintiff could not assume, as it did, that the public could not properly interpret the information contained in the reports without supporting its arguments by concrete evidence.

An example of the successful application of paragraph 20(1)(c) and the type of evidence required to qualify for protection under this exemption can be found in the decision Culver v. Canada (Minister of Public Works and Government Services), [1999] F.C.J. No. 1641 (T.D.)(QL). This case involved information that would have allowed competitors to determine the actual profit made by Standard Aero Ltd. and its costs in completing the contracts. There was more than a reasonable expectation that the company's competitors would have used such information to undercut its position in bidding for government contracts. There was also evidence showing that the requester was employed by a subsidiary of one of Standard Aero's competitors, and had access to other government information that would allow for calculation of Standard Aero's actual profit margin.

Other court decisions on paragraph 20(1)(c)

There are many court decisions on paragraph 20(1)(c) that provide the following guidance:

- That a competing third party, through its own efforts and for a purpose prejudicial to another third party, brought information into existence is irrelevant, as is a pending lawsuit and its discovery process. [11-35]
- That records contain “negative information” is not sufficient to exempt such records from disclosure under paragraph 20(1)(c). [11-36]
- A clause of confidentiality in an agreement does not take priority over the Act. [11-37]
- A more competitive environment does not amount to a reasonable expectation of a material loss or a prejudice to a third party’s competitive position. [11-38]
- The proportion of positive to negative information in the requested documents, the presence of explanatory notes, the age of the documents, the corrective actions taken, and the likelihood of the harm that would follow release of the documents are additional factors that the Federal Court will examine for paragraph 20(1)(c) to apply. [11-39]

Examples

The following are examples of types of information that might qualify for an exemption under paragraph 20(1)(c), provided that the injuries specified in the exemption could reasonably be expected to result in harm:

- information about the resource potential of a particular corporation;
- confidential economic evaluations of a corporation, such as those filed with regulatory bodies; and

- reports required to be filed with the government by manufacturers — for example, reports on design problems leading to recalls.

11.14.6 Paragraph 20(1)(d) – Interference with negotiations

Under paragraph 20(1)(d) of the Act, a government institution must refuse to disclose any record that contains information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

Paragraph 20(1)(d) is a mandatory exemption based on an injury test that applies to contractual situations not covered by paragraph 20(1)(c). [11-40] Paragraph 20(1)(d) alsoapplies to information obtained or compiled by a government institution.

In applying the injury test, government institutions must determine whether disclosure of the records could reasonably be expected to impair the ability of a third party to negotiate in a non-prejudicial environment, irrespective of whether the third party submitted the information. Here, the same comments on the probability of harm as those discussed for paragraph 20(1)(c) apply.

Three conditions must be met for paragraph 20(1)(d) to apply:

1. There must be contractual or other negotiations conducted by a third party.
2. There must be fear of interference with these negotiations resulting from the disclosure of the requested information.
3. Suchinterference must be considerably above a mere possibility, although there is no need to establish on the balance of probabilities that the harm will in fact occur. In other words, there must be a “reasonable expectation of probable harm.”

The meaning of the word “interference”

"Interference" has been interpreted to mean obstruction and not a mere heightening of competition. Pressures from third parties to match sponsorship funds and pressures from competitors cannot be seen as interference or obstruction with contractual negotiations. When interference is temporary, information must be exempt from disclosure only for the period of time required for the interference to cease. [11-41]

The courts will look at the age of the documents at issue and the seriousness of any negative information they contain in evaluating the potential for interference with contractual or other negotiations of a third party.

The meaning of "contractual or other negotiations of a third party"

The term "negotiation" is not defined in the Act and takes its ordinary dictionary meaning: a discussion between two or more parties to reach an agreement.

The expression "contractual negotiations" refers to the process of reaching an agreement on the terms of a contract with one or more other parties. "Contractual negotiations" does not include daily business activities or other contracts in general.

The expression "other negotiations" following "contractual" indicates that those parties must be in a commercial or business context.

- "Other negotiations" does not refer to the process of obtaining government approval. Obtaining approval for provincial formularies generally occurs in a regulatory context.
- "Other negotiations" does include settlement negotiations [11-42] where, for example, disclosure would result in losing control of the settlement efforts by opening up the process to outside intervention.

Reasonable expectation of probable harm

Paragraph 20(1)(d) requires a reasonable expectation that contractual or other negotiations of a third party will be obstructed by disclosure. The standard is "a reasonable expectation of probable harm." Accordingly, the institution needs to show that the risk of harm is considerably above a mere possibility, although there is no need to establish on the balance of probabilities that the harm will in fact occur. 11-43

When applying paragraphs 20(1)(a) and 21(1)(b), a government institution cannot speculate whether the information is a trade secret or confidential financial, commercial, scientific or technical information supplied by a third party. However, in the decisions Astrazeneca Canada Inc. v. Canada (Minister of Health), 2005 FC 189 and AstraZeneca Canada Inc. v. Health Canada, 2005 FC 1451, the Federal Court stated that proof of harm for paragraphs 20(1)(c) and (d) requires reasonable speculation because "in many circumstances a party cannot rely on harm from past disclosures as evidence of reasonably expected harm because past disclosure of that type of evidence may never have occurred." Nonetheless, the party seeking to exempt the information must put forward something more than internally held beliefs and fears. Forecasting evidence, expert evidence, and evidence of treatment of similar elements of proof or similar situations are frequently accepted as a logical basis for the expectation of harm and as evidence of the class of documents being considered.

Furthermore, although the requester's motive or occupation is not relevant for paragraphs 20(1)(a) or (b), motive is a relevant factor in establishing a "reasonable expectation of harm" to third parties under paragraphs (c) and (d). Examples of motives for making an access

request include obtaining records to prepare for negotiations or litigation, to acquire information on competitors' products and services, and to bid for government contracts.

As mentioned above, paragraph 20(1)(d) does not refer to the daily business operations of the third party or to a heightening of competition that might flow from disclosure. Evidence of the possible effect of disclosure both on other contracts generally and on hypothetical problems is insufficient to qualify for this exemption. It is also insufficient to simply affirm by affidavit that disclosure would "undoubtedly interfere with contractual and other negotiations in future business dealings."

11.14.7 Subsection 20(2) - Environmental and product testing

Subsection 20(2) of the Act is a mandatory provision that forces the disclosure of information about public health and safety. The paramount consideration is the public interest in disclosure. [11-44] Pursuant to that provision, even if a record would be exempt from disclosure under subsection 20(1), a government institution cannot claim that exemption for any part of the record containing the results of product testing or environmental testing carried out by or on behalf of a government institution.

There are two exceptions to the mandatory disclosure under subsection 20(2). This provision does not apply when:

- the testing was done as a service to a person, a group of persons, or an organization other than a government institution and for a fee. This means that the third party must have paid a government institution to conduct the testing, and the institution is conducting the testing as a commercial venture (for example, product testing

done by the National Research Council Canada on a commercial basis); or

- the testing was done by a third party and submitted to a government institution, either on a voluntary or mandatory basis. This means that the testing was done either by or for a third party and not on behalf of a government institution and was paid for by that third party and provided to the government.

Disclosure of information that falls within the two exceptions above is not mandatory and subsection 20(1) remains available to withhold this information when appropriate.

The extent to which product testing actually occurred will be determined on a case-by-case basis. The term “product testing” is not defined in the Act. Therefore the words “product” and “testing” are given their ordinary dictionary meanings. The ordinary meaning of “product” includes any good, animal or vegetable. In addition, subsection 20(2) provides for “product testing” as a generic item. Consequently, the term “product testing” is broad enough to include any kind of product testing. The fact that an inspection and related product testing occur in a mandatory or unexpected manner does not prevent them from being product testing.

A notice of intended disclosure under subsection 20(2) must be sent to the third parties concerned. Third party representations are limited to whether the information constitutes test results carried out by or on behalf of a government institution, which was not done as a service to a person, a group of persons, or an organization other than a government institution and for a fee.

11.14.8 Subsection 20(3) – Methods used in testing

When an institution discloses the results of product testing and environmental testing pursuant to subsection 20(2), it is required, under subsection 20(3), to provide the requester with a written explanation of the methods used in conducting the tests. The requirement to create a new record ensures that test results, which could be misleading if released on their own, are understood.

11.14.9 Subsection 20(4) – Preliminary testing

Subsection 20(4) of the Act provides that the results of product testing or environmental testing do not include the results of preliminary testing conducted for the purpose of developing test methods.

11.14.10 Subsection 20(5) – Disclosure with consent

Subsection 20(5) of the Act is a discretionaryprovision that authorizes heads of institutions to disclose information described in subsection 20(1) with the consent of the third party concerned. This provision is intended to prevent situations where the institution would be under an obligation to withhold a record when the third party agreed to disclosure.

When it is determined that one of the paragraphs of subsection 20(1) does or could apply, the head of the institution should make a reasonable effort to seek the consent of the third party to disclose the requested information.

By providing its consent to disclosure when the request is received or during informal consultation, the third party waives its right to receive notice under subsection 27(1). Otherwise, the institution should include a paragraph seeking consent in the notice under subsection 27(1).

Consent should be obtained in writing to ensure that the file is well documented in the event of a complaint or any legal proceedings against the institution where obtaining consent may be at issue.

11.14.11 Subsection 20(6) – Disclosure in the public interest

Subsection 20(6) of the Act provides that the head of a government institution may disclose all or part of a record that contains information described in paragraph (1)(b), (b.1), (c) or (d) if:

- such disclosure would be in the public interest as it relates to public health, public safety or protection of the environment; and
- the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party; any prejudice to the security of its structures, networks or systems; any prejudice to its competitive position; or any interference with its contractual or other negotiations.

This discretionary provision permits a government institution to disclose information otherwise protected under section 20 when the public interest test is met. It puts the onus on heads of institutions to consider whether disclosure in the public interest clearly outweighs in importance the harm involved when third party information that might otherwise be exempt involves public health, public safety, or protection of the environment.

Subsection 20(6) does not apply to paragraph 20(1)(a) (trade secrets).

Application of subsection 20(6)

Decisions on the applicability of subsection 20(6) should be fully and objectively documented in preparation for any review that may take place. It is important to show that the head of the institution decided to disclose:

- after considering all relevant factors;
- without considering any irrelevant factors;
- in a fair and unbiased manner;
- after individual consideration of the various records and the information provided by the third party; and
- after conducting all necessary notifications and consultations.

To properly apply the provision, the institution must do the following:

1. Determine whether the information qualifies or might qualify for exemption under paragraph 20(1)(b), (b.1), (c) or (d).
   The public interest “override” comes into play only when all or part of a record falls within one or more of the classes of records described in paragraphs 20(1)(b), (b.1), (c) or (d).

2. Determine whether the record is related to public health, public safety or protection of the environment.
   When undertaking the initial review of records, consider immediately whether a public interest override may come into play.

3. Consider whether the disclosure of a record related to public health, public safety, or protection of the environment may be in the public interest.
   Institutions have a responsibility during the initial processing of a request to weigh the merit of arguments both for and against disclosure in the public interest. Information about the public interest test is found below.

4. Send a notice to the third parties pursuant to subsection 27(1) of the Act.
   If the records are related to public health, public safety, or protection of the environment, institutions should ask third parties to provide not only representations as to why they consider the

information should be exempted but also reasons why disclosure in the public interest should not outweigh in importance the injury involved. The institution should be very clear about the type of information needed from the third parties, to make a decision.

If the institution is already convinced, without consulting the third parties involved, that the information qualifies for exemption under any one of paragraphs 20(1)(b), (b.1), (c) or (d), the institution should notify the third parties and ask them to provide representations as to why the record should not be disclosed in the public interest.

5. Analyze the representations of the third parties.
   Once the representations have been received, government institutions should thoroughly analyze the arguments presented by third parties to justify subsection 20(1) exemptions.

   If the third party fails to make representations, or their arguments for exemption under paragraph 20(1)(b), (b.1), (c) or (d) do not meet the test for exemption in the opinion of the head of the institution, the head must base his decision on other relevant factors. In both cases, the notification procedures set out in section 28 of the Act should be followed.

   If the institution accepts a third party's representations as substantiating an exemption under paragraph 20(1)(b), (b.1), (c) or (d), it must then consider the representations made against disclosure in the public interest.

   In some cases, the possibility of release in the public interest will come to the attention of the institution only after third party representations on exemptions have been made. In such cases, it is important to give the third party an opportunity to present written

arguments as to why release in the public interest should not apply. The same is true if the head of an institution accepts the Information Commissioner's recommendation to consider a public interest "override" during the investigation of a complaint. The third party must be notified and given the opportunity to make representations.

Additional information on the exercise of discretion is found in Chapter 9 of this manual.

6. Obtain legal advice if required.
   When there is doubt involving the validity of third party exemptions and the possibility of disclosure in the public interest, institutions should seek advice from their legal counsel before proceeding with the request.

Public interest test

The public interest related to public health, public safety, or protection of the environment must "clearly outweigh" in importance the prejudice or harm to third parties. Black's Law Dictionary, (Revised Fourth Edition), defines "clearly" as "visible, unmistakable, in words of no uncertain meaning." Thus, the test is rigorous, limiting the applicability of the public interest "override" set out in subsection 20(6).

a) Application of subsection 20(6) to paragraphs 20(1)(b) and (b.1)

In paragraphs 20(1)(b) and 20(1)(b.1), the records remain proprietary information of the third party that supplied them with an understanding of confidence. For a government institution to break that confidence is a serious matter. The specific public interest involved has to clearly outweigh any financial gain or loss to a third party or any prejudice to the security of its structures, networks or systems resulting from the disclosure.

When considering disclosure in the public interest, the conduct of the third party must be taken into account. Is there evidence of illegality, breach of a statutory authority or wilful misconduct? (For example, has the third party falsified the results of studies on a new medication?) Is there a legal compulsion outside the Access to Information Act that leans toward disclosure? Such evidence greatly reduces the weight of harm that could result to the third party and may favour disclosure under subsection 20(6). What is the responsibility and mandate of the government institution controlling the information toward regulating threats to public health, public safety, or protection of the environment? These are only some of the more general questions that should be considered.

b) Application of subsection 20(6) to paragraph 20(1)(c)

Documentation often considered for exemption under paragraph 20(1)(c) includes inspection reports and audits on various aspects of health and safety and regulatory and research reports on the approval of drugs, pesticides and other such substances. Such information is often not created by a third party. Rather, it is compiled by a government institution when carrying out a regulatory or enforcement activity related to public health, public safety, or protection of the environment.

Institutions need to assess the public interests involved and whether they clearly outweigh any harm to the third party that would result from the disclosure — for example, material financial gain or loss or prejudice to its competitive position.

The question is whether the public interest in the proper administration of government programs directly related to the public interests specified in subsection 20(6) clearly overcomes the obligation to protect the third party or its information. In such cases, the issues of

magnitude and continuity come into play. Are the difficulties or infractions minor irritants found in most similar operations or cases or are they specific major difficulties that pose a specific threat to public health, public safety or the environment? Have the difficulties or infractions been corrected in an efficient and forthright manner? Has a product been withdrawn willingly as a result of research or inspection? Or has the third party not acted on the regulatory or enforcement notice, allowing the danger to continue?

The answers to these questions must be carefully balanced against the third party's arguments for protection. Obviously, if the irritants are minor and have been corrected, or even if they are major and have been corrected or a product has been withdrawn, then the public interest in disclosure is much less persuasive than if there are substantive and continuing problems or dangers.

In some cases, in regard to information qualifying for exemption under paragraph 20(1)(c), there will be a public interest in disclosure that is serious but does not quite meet the criteria set out above. Institutions mandated to protect public health, public safety or the environment may control information about a specific health hazard or safety problem related either to a group of individuals or to the public as a whole (for example the long-term effects of a product that has been withdrawn) for which their regulatory obligation or the need to maintain public confidence in that system takes precedence over any injury or prejudice to a third party. In such instances, the mandate of the institution may dictate disclosure in the public interest under subsection 20(6). Once again, in such cases, it is not enough that the information simply is "of interest to the public" but rather that a specific, identifiable and substantial danger exists that the continued protection of the information will directly result in some harmful short-

or long-term effect on public health, public safety or the environment. When such conditions exist, the head of an institution has an obligation to consider a disclosure in the public interest under subsection 20(6).

c) Application of subsection 20(6) to paragraph 20(1)(d)

Institutions have to assess the public interests involved and whether they clearly outweigh any interference with contractual or other negotiations of the third party that would result from the disclosure.

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11.15 Section 20.1 – Exemption for the Public Sector Pension Investment Board

Section 20.1 of the Access to Information Act (the Act) is a mandatory exemption based on a class test that can be invoked only by the Public Sector Pension Investment Board and its wholly owned subsidiaries, within the meaning of section 83 of the Financial Administration Act. This exemption is intended to protect certain information obtained from third parties that has been consistently treated as confidential by the Public Sector Pension Investment Board.

The following four conditions must be met before this exemption applies:

1. The record contains advice or information relating to investment. Since the term “investment” is not defined in the Act, it takes its ordinary meaning: the investing of money or capital for profitable returns. “Invest” is defined as “to put (money) to use, by purchase or expenditure, in something offering potential profitable returns.”
2. The advice or information was supplied by a third party.

This exemption applies only to information or advice provided to the Public Sector Pension Investment Board and its wholly owned subsidiaries by a third party. This includes information provided on behalf of a third party – for example, by the third party's legal counsel or accountant. It also includes information prepared by the Public Sector Pension Investment Board on the basis of information supplied by a third party.

3. The advice or information was obtained in confidence.
   The term "in confidence" means that the third party furnished the information on an understanding that it remain confidential. In other words, the information is not available for dissemination beyond the government institutions that have a need to know the information (such as the Public Sector Pension Investment Board and the Treasury Board of Canada Secretariat).

   Information is "explicitly" provided in confidence when the third party providing the information expressly requests or indicates that the information is to be kept confidential. The intention to provide information in confidence can be stated in the record, in an agreement or verbally. It is advisable to keep a written record of a verbal request.

   Information is "implicitly" provided in confidence when an intention that the information be treated as confidential can be implied from the circumstances in which it was provided – for example, from past practices followed with respect to such information, policies, etc.

   The only requirement is that the information was obtained in confidence. Unlike paragraph 20(1)(b) of the Act, section 20.1 does not contain the phrase "and is treated consistently in a confidential

manner by the third party." Therefore it is not necessary that the third party keep the information confidential.

4. The Public Sector Pension Investment Board has consistently treated the advice or information as confidential.

A designation of confidentiality does not of itself ensure that the information is exempt from access; it will still have to be examined on a case-by-case basis to determine whether the Public Sector Pension Investment Board treated the information consistently in a confidential manner.

Unlike certain mandatory exemptions, there are no provisions that permit disclosure under certain circumstances. If the conditions above have been met, disclosure must be refused.

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11.16 Section 20.2 – Exemption for the Canada Pension Plan Investment Board

Section 20.2 of the Access to Information Act is a mandatory exemption based on a class test that can be invoked only by the Canada Pension Plan Investment Board and its wholly owned subsidiaries, within the meaning of section 83 of the Financial Administration Act. This exemption is intended to protect certain information obtained from third parties that has been consistently treated as confidential by the Canada Pension Plan Investment Board.

As of February 28, 2013, the Canada Pension Plan Investment Board had not been added to the coverage of the Access to Information Act. As provided by subsection 228(2) of the Federal Accountability Act, the Boardwill become subject to the Access to Information Act with consent of at least two thirds of the included provinces, within the meaning of

subsection 114(1) of the Canada Pension Plan, having in the aggregate not less than two thirds of the population of all of the included provinces.

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11.17 Section 20.4 – Exemption for the National Arts Centre Corporation

Section 20.4 of the Access to Information Act (the Act) is a mandatory exemption based on a class test that can be invoked only by the National Arts Centre Corporation and its wholly owned subsidiaries, within the meaning of section 83 of the Financial Administration Act. This exemption is intended to protect certain information obtained from or about third parties that have been consistently treated as confidential by the National Arts Centre Corporation.

The following two conditions must be met before this exemption applies:

1. The disclosure of the information would reveal
    - the terms of a contract for the services of a performing artist; or
    - the identity of a donor who has made a donation in confidence.

    Section 20.4 applies only to information that reveals the terms of the contract or the identity of the donor. This provision cannot be used to exempt other information related to the contract or the donation that does not reveal the terms of the contract or the identity of the donor, such as exchanges concerning the administration of the contract or certain details of the donation (for example, the amount and the purpose).

The word “term” is given its ordinary meaning and is defined in this context as the provisions that determine the nature and scope of an agreement. The terms of a contract include any provision forming part of the contract, such as a description of the work to be carried out by the performing artist; the time, price, and conditions for payment; indemnity and liability.

For donations, section 20.4 protects only the identity of a donor who has made a donation in confidence. The term “in confidence” means that the donor has stipulated, verbally or in writing, that the information is not available for dissemination beyond the government institutions that need to know the information (such as the National Arts Centre Corporation and the Canada Revenue Agency).

The only requirement is that the information was obtained in confidence. Unlike paragraph 20(1)(b) of the Act, section 20.4 does not contain the phrase “and is treated consistently in a confidential manner by the third party.” Therefore, it is not necessary that the third party keep the information confidential.

2. The National Arts Centre Corporation or its wholly owned subsidiary has consistently treated the information as confidential.

A designation of confidentiality does not of itself ensure that the information is exempt from access. The information will still have to be examined on a case-by-case basis to see if the National Arts Centre Corporation or its wholly owned subsidiary treated the information consistently in a confidential manner.

Unlike certain mandatory exemptions, there are no provisions that permit disclosure under certain circumstances. If the conditions above have been met, disclosure must be refused.

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11.18 Section 21 of the Act – Operations of Government

11.18.1 Introduction

Subsection 21(1) of the Access to Information Act (the Act) is a discretionary class test exemption. It protects certain classes of information about the internal decision-making processes of government, the disclosure of which could interfere with the operations of government institutions. The rationale behind this exemption is that disclosure can, at times, have a chilling effect on the candidness of the advice, recommendations, consultations and deliberations given or received by the federal public service and can lead to a reluctance to deal frankly with difficult questions.

Paragraphs 21(1)(a) and (b) are not solely intended to protect the role of providing advice and recommendations of employees of government institutions. They are also intended to protect the constitutional convention of individual ministerial accountability for the actions of their institutions and its corollary of public service anonymity.

The exemption can only be invoked if a record came into existence less than twenty years before the request for the information. In other words, if the records were created more than twenty years before the date on which the request was made, subsection 21(1) cannot be claimed.

11.18.2 Exercise of discretion

As a class exemption, section 21 of the Act may be applied when a record falls within one of the classes of documents referred to in this provision. However, section 21 is also a discretionary exemption. Such

discretion is meant to temper the broad nature of the class test and to recognize the principle that the public has a right of access to government records, even those that may technically be exempted.

There is no statutory duty to apply an injury test for this exemption or to prove the existence of an injury (as confirmed by the Federal Court in the Telezone case, which is discussed in Section 11.18.3 of this chapter). However, the exercise of discretion requires that the head of the institution consider the consequences of releasing the information. In exercising discretion the head must weigh arguments in favour of release against arguments in favour of non-release.

The following non-exhaustive guidelines may be helpful in evaluating whether information can be released.

a. Type of advice, recommendations, consultation or deliberation:

   Does the decision-making process involve policy or administrative, technical or routine matters? There is considerable difference between advice, recommendation, consultation or deliberation about a major new government initiative and the purchase of office equipment. It may be appropriate, for example, to disclose records that relate to routine matters.

b. Circumstances in which advice, recommendations, consultations or deliberations take place:

   Is there a strong, traditional expectation of, or reliance on, confidentiality in the process? Sometimes much of the information is already publicly known. Such processes differ in context and nature of confidentiality.

c. Impact of disclosure:

Could disclosure make advice or recommendations less candid and comprehensive; make consultations or deliberations less frank; hamper the ability of the government to develop and maintain strategies and tactics for present or future negotiations; or affect the institution's ability to undertake personnel or administrative planning?

Would disclosure weaken the convention of ministerial accountability or its corollary of public service anonymity? Would disclosure impair an institution's ability to operate or develop a program or activity? Would disclosure distort the decision-making process of government regarding issues of continuing significance or fail to fairly set out reasons for a decision or lead to the release of inaccurate information?

d. Sensitivity:

Has the information immediate prospect of causing injury to the decision-making process or does it relate to an issue that is more routine or technical and has little possibility of causing injury? It may be appropriate to disclose records that relate to routine or technical matters and are unlikely to cause injury to the decision-making process. The age of the record is another factor to consider. Usually, the greater its age, the more likely that the release of information will cause less damage to a decision-making process. There is no set formula for this evaluation, since the disclosure of non-current records can still have a very significant effect.

Additional information on the exercise of discretion is found in Sections 9.6.1 and 10.4 of this manual.

11.18.3 Paragraph 21(1)(a) – Advice and recommendations

The exemption provided by paragraph 21(1)(a) of the Act relates to advice or recommendations developed by or for a government institution or a minister of the Crown.

This provision has three key components: advice, recommendations and identify of individuals involved.

1. Advice

In the absence of a statutory definition of "advice" in the Act, its everyday meaning applies: an opinion, view or judgment based on the knowledge, training and experience of an individual or individuals expressed to assist the recipient in deciding whether to act and, if so, how.

2. Recommendations

This term "recommendations" is also not defined in the Act. Among various definitions of the term in the Shorter Oxford Dictionary, the following describes its meaning: "the action of recommending a person or thing as worthy or desirable."

3. Identity of individuals involved

The exemption provided by paragraph 21(1)(a) applies to advice and recommendations developed:

- **by** a government institution (that is, by officials);
- **by** a minister of the Crown;
- **for** a government institution (that is, from outside sources); The words "or for a government institution" in paragraph 21(1)(a) include advice or recommendations given by outside sources, such as individuals, organizations and corporations, on the conditions that

- the advice or recommendations are not contained in a report prepared by a consultant or adviser; and
- such input was solicited by the government institution or it is understood by previous practice that such input is expected.

An example of advice developed for a government institution is a document sent to a federal institution by an association expressing its views and perceived implications of regulatory proposals initiated by the institution.

- **for** a minister (that is, by his staff, officials or outside sources).

The exemption does not apply to purely factual statements. However, the exemption may be applied when the factual statement is inextricably linked to the advice given to preclude severance or comprises a subjective element that would allow someone to deduce the nature of the advice, either by the organization of the facts presented or by the manner in which they are effectively presented.

Case law on paragraph 21(1)(a)

Two cases are of note with respect to this exemption:

1. Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] 4 F.C. 245

The Federal Court ruled as follows:

> To permit or require the disclosure of advice given by officials and the disclosure of confidential deliberation within the public service on policy options, would erode the government's ability to formulate and to justify its policies. On the other hand, democratic principles require that the public be enabled to participate as widely as possible in influencing policy development. Most internal documents that analyse a problem, starting with an initial identification of a problem, then canvassing a range of solutions, and ending with specific recommendations for change, are likely to be caught within paragraph 21(1)(a) or (b). The Act thus leaves to the heads of government institutions...the discretion to decide which of the broad range of documents that fall within these paragraphs can be disclosed without damage to the effectiveness of government.

The Federal Court concluded that "the combined effect of paragraphs 21(1)(a) and (b) is to exempt from disclosure under the Act a very wide range of documents generated in the internal policy processes of a government institution."

2. 3430901 Canada Inc. v. Canada (Minister of Industry), [1999] F.C.J. No. 1859 (Q.L.) (F.C.T.D.), T-648-98, and its appeal at 2001 FCA 254 (Telezone)

In 1995, the Minister of Industry invited licence applications from parties interested in providing personal communication services in the 2 GHz frequency range. The applications were reviewed in detail by an 18-member committee called the "working group," that analyzed the applications against certain evaluation criteria and made its findings known to another committee called the "selection panel". The function of the selection panel was to rank the applications in accordance with the selection criteria and to provide recommendations to the Minister

as to which applications should be awarded a licence. In 1996, 3430901 Canada Inc. and its predecessor, Telezone Inc. (collectively, Telezone), requested records about the Minister's decision to issue four licences. The request was in large part refused, on the ground that the material sought was exempt under subsection 21(1) of the Act.

Federal Court ruling

The Federal Court upheld Industry Canada's decision. The Federal Court found that the exemptions outlined in paragraphs 21(1)(a) and (b) are intended to preserve the integrity of the government decision-making process. The underlying policy consideration is that too much public disclosure could inhibit open and frank communication between government advisers and decision-makers.

Paragraphs 21(1)(a) and (b) do not require evidence of harm.

Advice does not necessarily have to propose a particular course of action in order to be more than factual in nature.

> ...A discussion of policy options that concludes with a recommendation is a "recommendation" within the meaning of paragraph 21(1)(a), but "advice" is a much broader concept. In its ordinary sense, "advice" could include the discussion of policy matters or policy options even if there is no suggested conclusion as to the resolution of the policy debate.

The term "advice" includes an expression of opinion on policy-related matters but excludes information of a largely factual nature, unless such information is so closely linked to the advice that it cannot be separated from it.

It is not always possible to put “facts”, “advice” and “recommendations” in airtight, distinct compartments. Many documents have more than one aspect. Factual information that is inextricably tied to the advice given can be exempt pursuant to paragraph 21(1)(a).

The Federal Court also held that the following information was exempt pursuant to paragraph 21(1)(a):

- a written record in which an official advises the Minister that a particular criterion ought to be given a particular weighting for a certain policy reason, or recommends that an application with a certain characteristic ought to be awarded a specified number of points;
- documents that refer to weighting percentages and related policy discussions;
- the introductory paragraph informing the Minister that there is a policy decision to be made, which is inextricably tied to the advice that follows;
- information informing the Minister that there is a policy decision to be made, discussing the options and recommending a course of action;
- a presentation of overhead projection slides summarizing the policy arguments relating to the decision to be made by the Minister;
- an e-mail from a member of the working group to other members setting out a preliminary analysis of some of the policy issues to be discussed in formulating the recommendations to the selection panel and thus to the Minister.

Federal Court of Appeal ruling

The Federal Court of Appeal upheld the Federal Court's decision. It stated that statutory exemptions need to be interpreted in light of both the purpose of the Act and the countervailing values that underlie the exemptions relied on, especially, in regard to paragraph 21(1)(a), the preservation of a full and frank flow of interchanges among public officials participating in the decision-making process.

Other statements of note made by the Federal Court of Appeal include:

- By exempting "advice and recommendations" from disclosure, Parliament must have intended the former to have a broader meaning than the latter, otherwise it would be redundant.
- Information that is predominantly normative rather than factual falls under the rationale underlying paragraph 21(1)(a).
- A record otherwise falling within the category of "advice" continues to qualify under paragraph 21(1)(a) even though it was not communicated beyond the advice givers as long as it was intended to assist them in the decision-making process to formulate the advice they would give to the decision-maker.
- A document to the Minister stating that something needs to be decided, identifying the most salient aspects of an application, containing policy options, implicitly contains the writer's view of what the Minister should do or how the Minister should view a matter. All are normative in nature and are an integral part of an institutional decision-making process and, as a result, paragraph 21(1)(a) could be available.

11.18.4 Paragraph 21(1)(b) – Account of consultations or deliberations

The exemption provided by paragraph 21(1)(b) of the Act relates to an account of consultations or deliberations involving officials or employees of government institutions, a minister of the Crown or the staff of a minister of the Crown.

This provision has four key components: account, consultation, deliberation and identity of individuals involved.

1. **Account**

   Because the term “account” is not defined in the Act, Parliament intended it to have an ordinary dictionary definition: a particular statement or narrative of an event or thing; a relation, report or description.

   Written exchanges of views qualify as an account. Examples include exchanges of memoranda setting out the views of their authors; and a memorandum that has been returned to its author with the views of the recipient handwritten on it.

   What about unsolicited views? An unsolicited memorandum to an official or a minister setting out the views of another official on a particular subject can also be considered an account of consultation.

   The purpose of paragraph 21(1)(b) is to protect the views expressed during consultations or deliberations in order that these continue to be expressed frankly and candidly. Paragraph 21(1)(b) does not apply to factual information or subject headings of records, unless the disclosure of the factual information or the heading would reveal the views expressed.

The account must be either of a consultation or a deliberation. These terms are not defined in the Act and take their ordinary meaning as follows.

2. **Consultation**

   Consultation means:

   - the action of consulting or taking counsel together: deliberation, conference;
   - a conference in which the parties (for example, lawyers or medical practitioners) consult and deliberate.

3. **Deliberation**

   Deliberation means:

   - the action of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision;
   - the consideration and discussions of the reasons for and against a measure by a number of councillors.

4. **Identity of individuals involved**

   The final component of paragraph 21(1)(b) concerns the identity of the individuals who must be involved in the consultations or deliberations if the exemption is to apply. It is sufficient that **one** of the following individuals be involved for paragraph 21(1)(b) to apply:

   a. directors, officers or employees of a government institution;
   b. a minister; or
   c. the staff of a minister.

On the basis of these definitions, only that information describing the advice provided, the consultations undertaken, or the exchange of views leading to a particular decision would qualify as an account

exemptible under paragraph 21(1)(b).

Caselaw on paragraph 21(1)(b)

1. Canadian Council of Christian Charities v. Canada (Minister of Finance), [1999] 4 F.C. 245

The Federal Court ruled as follows:

> To permit or require the disclosure of advice given by officials and the disclosure of confidential deliberation within the public service on policy options, would erode the government's ability to formulate and to justify its policies. On the other hand, democratic principles require that the public be enabled to participate as widely as possible in influencing policy development. Most internal documents that analyse a problem, starting with an initial identification of a problem, then canvassing a range of solutions, and ending with specific recommendations for change, are likely to be caught within paragraph 21(1)(a) or (b). The Act thus leaves to the heads of government institutions...the discretion to decide which of the broad range of documents that fall within these paragraphs can be disclosed without damage to the effectiveness of government.

The Federal Court concluded that "the combined effect of paragraphs 21(1)(a) and (b) is to exempt from disclosure under the Act a very wide range of documents generated in the internal policy processes of a government institution."

2. Canada (Information Commissioner) v. Canadian Radio-television and Telecommunications Commission, [1986] 3 FC 413 (T.D.)

The Federal Court upheld the use of paragraph 21(1)(b) by the Canadian Radio-television and Telecommunications Commission (CRTC) to refuse to disclose excerpts from certain meetings of the Executive Committee of the CRTC. The Federal Court noted that confidentiality in the communication between Committee members in the preparation of a decision is absolutely essential, and paragraph 21(1)(b) clearly sets out an entirely proper and specific exemption in that respect.

3. Newfoundland Power Inc. v. Minister National Revenue, [2002] FCT 692

The Court found that internal memorandums signed by two departmental officials that analyzed the various strategic or legal options, and any recommendation made by officers regarding the position that the Minister National Revenue should adopt with respect to a taxpayer's notice of objection, were clearly covered by paragraph 21(1)(b) of the Act.

> I consider that the analysis of various strategic or legal alternatives, and any recommendation made by managers or employees of the defendant regarding the position the latter should take on a taxpayer's notice of objection, are clearly covered by paragraph 21(1)(b) of the Act. Having reviewed the content of the memorandum, I conclude that it contains "deliberations" and that the defendant may legally refuse to disclose it under paragraph 21(1)(b) of the Act.

4. Rubin v. Canada (Canada Mortgage and Housing Corporation), [1989] 1 F.C. 265

The Federal Court ruled that a government institution could apply paragraph 21(1)(b) to protect agendas of meetings of the Board of Directors of the Canada Mortgage and Housing Corporation, but rejected the blanket application of this exemption to indiscriminately

protect an entire document. Paragraph 21(1)(b) must be applied after a careful examination of whether the information falls within the exemption, followed by the exercise of discretion regarding whether the exemption should be invoked and a consideration of the severance provision under section 25 of the Act.

11.18.5 Paragraph 21(1)(c) – Positions or plans

Paragraph 21(1)(c) of the Act provides that a government institution may refuse to disclose any record that contains positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto.

This paragraph protects as a class the strategies and tactics employed or contemplated by government institutions for the purpose of negotiations. Such information can be protected from disclosure even after the particular negotiations have been completed.

The terms “position”, “plan” and “consideration” are not defined in the Act and take their ordinary meaning. In the context of subsection 21(1)(c), positions and plans refer to information that may be used in the course of negotiations.

“**Position**” is defined as an “attitude or opinion, stand; a way of regarding situations or topics; an opinion that is held in opposition to another in an argument or dispute.” “**Plan**” is defined as “a formulated and especially detailed method by which a thing is to be done; a scheme or method of acting or proceeding developed in advance; an intention or proposed proceeding; an outline, drawing or diagram.”

Paragraph 21(1)(c) extends its protection beyond positions and plans to "considerations relating thereto". "**Consideration**" is defined as "the act of considering; careful thought; a fact or a thing taken into account in deciding or judging something". Thus, a record identifying the facts and circumstances connected to plans and positions could also fall within the scope of this provision.

The exemption covers only negotiations with parties outside the federal government and does not apply to such activities when carried on among government institutions.

Examples of the type of information that could be covered by this exemption are the mandate and fall-back positions developed by government negotiators for the purposes of bargaining in relation to labour, financial and commercial contracts.

11.18.6 Paragraph 21(1)(d) – Personnel and administration plans

Paragraph 21(1)(d) of the Act protects as a class of records plans relating to the internal management of government institutions that have not yet been put into full operation, for example, plans about the relocation or reorganization of government institutions or the management of personnel, and plans to abolish positions or programs.

The word "plan" has the same meaning as in paragraph 21(1)(c), namely, "a formulated and especially detailed method by which a thing is to be done; a scheme or method of acting or proceeding developed in advance; an intention or proposed proceeding; an outline, drawing or diagram."

The availability of this exemption is temporary. Once a plan is put into operation, the information relating to it can no longer be protected under this exemption. It should be noted, however, that although the

final plan must be released, the options that were considered before deciding on the plan need not be disclosed.

Plans that are never implemented can be protected for the twenty-year period provided for in subsection 21(1).

11.18.7 Limitations on exemption

Time limitation

Subsection 21(1) of the Act can be invoked only if a record came into existence less than twenty years prior to the request for the information. In other words, subsection 21(1) cannot be invoked to withhold records that are twenty years old or older.

Paragraph 21(2)(a): Exercise of a discretionary power or an adjudicative function

Paragraph 21(2)(a) of the Act states that the exemption at subsection 21(1) does not apply to information that affects the rights of a person and that falls within one of the following categories:

- decisions made in the exercise of a discretionary power (for example, the awarding of a grant or the funding of a project by the government);
- decisions made in the exercise of an adjudicative function (for example, tax and employment insurance appeals or a personnel grievance).

The purpose of paragraph 21(2)(a) is to ensure that the text of certain decisions and the reasons for those decisions are not withheld from those affected. However, the exception to subsection 21(1) applies only to the actual decision itself and the statement or account of reasons supporting it but not to information relating to the process or to the considerations that formed the basis of the reasons supporting the decision. This was confirmed in the CRTC decision mentioned in Section

11.8.4 of this chapter, where the Federal Court held that preparatory notes and communications leading to a final decision are unaffected by paragraph 21(2)(a) and can be exempted pursuant to subsection 21(1).

In addition, in the decision Canada (Information Commissioner of Canada) v. Canada (Minister of Industry), 2001 FCA 254, the Federal Court of Appeal held that paragraph 21(2)(a) applies only when "legal rights" of a person are at play. In other words, to apply this subsection, a person must have a right enforceable under a contract or statute, rather than a mere possibility to obtain certain discretionary benefits. Rights are considered enforceable when the decision-maker must honour the right if and when all prerequisites, as provided under a contract or statute, have been met. If the receipt of a benefit is in the decision-maker's discretion, this subsection does not apply and the exemption at subsection 21(1) is therefore still applicable.

Paragraph 21(2)(b): Report by a consultant or an adviser

Paragraph 21(2)(b) of the Act provides that the exemption at subsection 21(1) does not apply to a record that contains a report prepared by a consultant or adviser who was not, at the time the report was prepared, a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown. In other words, reports prepared by external consultants and advisers cannot be withheld from disclosure under subsection 21(1).

Paragraph 21(2)(b) requires only that the record in question be a report and that it be prepared by an outside consultant or advisor. Of course, other exemptions may apply, such as paragraph 16(1)(c) of the Act for the report of an investigation of a harassment complaint prepared by an independent consultant or section 23 of the Act for a report prepared by a legal agent.

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11.19 Section 22 of the Act – Testing procedures

Section 22 of the Access to Information Act (the Act) is a discretionary exemption based on an injury test. It provides protection for procedures and techniques involved in testing and auditing, and for details relating to specific tests about to be given and audits about to be conducted, if such disclosure would prejudice the use or results of particular tests or audits. In other words, the exemption applies if the disclosure of the information would:

- invalidate the results of a specific test to be given or of an audit to be conducted, or one that is currently in progress; or
- jeopardize the future use of the tests or audits, or of the testing or auditing procedures.

The terms “test” and “audit” cover a wide variety of activities undertaken by the federal government in regard both to its own institutions and in the private sector. Examples include environmental testing, language testing, personnel audits, financial audits and staffing examinations. The exemption applies to testing and auditing carried out by federal institutions, consultants and contractors.

Section 22 does not apply to information about previous tests or audits unless the same procedures are being used or will be used in the future and disclosure would consequently cause the injury described in section 22.

In the decision Bombardier v. Canada (Public Service Commission), (1990) 44 F.T.R. 39 (F.C.T.D), the Federal Court affirmed that section 22 permitted government institutions to protect the confidentiality of a test taken by the applicant, as well as the correction grid. The Court

decided that if the test and correction grid had been disclosed to the applicant, certain future candidates could have an unfair advantage. The applicant argued that the test and correction grid were the "support" documents for personal information about him, which was held by the institution. However, the judge found that such an interpretation would go against the intention of the legislator as stated in section 22 of the Act and this intention "would not only be contravened but defeated and this section would become inoperative, since anyone who takes a test or examination would have an absolute right to have it fully communicated to him under the provisions of the Privacy Act."

That said, however, section 22 does not provide an exemption for the results of tests or audits.

Additional guidance on the release of the results of environmental and product testing is provided in Section 11.14 of this manual. Additional guidance on internal audits is found in Section 11.20 of this manual.

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11.20 Section 22.1 of the Act – Internal audits

Section 22.1 of the Access to Information Act (the Act) is a discretionary class exemption that is intended to protect internal audit working papers and draft internal audit reports. It is also intended to afford a time-limited protection for information provided to internal auditors in order to encourage free and frank disclosure of potential issues of concern that may arise during an audit, and in order to protect the integrity of the audit process.

11.20.1 Definitions

The terms “internal audit”, “report of an internal audit” and “working paper” are not defined either in the Act or by the Courts. To ensure consistent interpretation of section 22.1 , the following definitions are to be used.

Internal audit

The Treasury Board of Canada’s Policy on Internal Audit [11-45] provides the following definition:

> 3.1 Internal auditing in the Government of Canada is a professional, independent and objective appraisal function that uses a disciplined, evidence-based approach to assess and improve the effectiveness of risk management, control and governance processes.

This definition is consistent with the definition of the Institute of Internal Auditors, which is accepted by the international auditing community.

Internal auditing focuses on all management systems, processes and practices, including the integrity of financial and non-financial information.

An internal audit adds value by assessing and making recommendations on the effectiveness of mechanisms in place to ensure that the organization achieves its objectives and in a way that demonstrates informed, accountable decision-making with regard to ethics, compliance, risk, economy and efficiency.

Internal auditing, also called “internal audit engagement” or “assurance engagement,” is undertaken under the authority of the chief audit executive of the institution, is part of the institution’s

internal audit plan and conforms to the Internal Auditing Standards for the Government of Canada. If an activity meets these criteria, it is an internal audit for the purposes of section 22.1, regardless of what it is called.

Not every activity undertaken by an institution's internal audit unit or on its behalf is considered to be an internal audit. Generally, only those engagements providing assurance may be considered an internal audit. ("Assurance" is the technical term used by auditors to describe the confidence that they have in the accuracy of the conclusions and opinions expressed in their reports.) For example, activities that are not internal audits may, depending on the facts, include:

- evaluations;
- risk assessments;
- security investigations;
- performance reports;
- external audits, such as those conducted by the Office of the Auditor General; and
- consulting engagements.

The Office of the Comptroller General of the Treasury Board of Canada Secretariat may conduct internal audits on behalf of small departments, as defined in the Treasury Board's Policy on Internal Audit. [11-46]

Start and completion of an internal audit: An internal audit is deemed to have started when two conditions have been met: (1) the chief audit executive (or his or her delegate) approves the audit objectives, scope, criteria and approach; and (2) management of the area being audited has been advised that the audit is beginning. The internal audit is considered to be completed when the internal audit report has been finalized and approved by the deputy head of the institution.

Internal audit report

An internal audit report is a written report prepared by the auditors that contains the results of the audit. Generally, the internal audit report:

- is prepared by the internal audit unit of the institution or on its behalf (i.e. by a private sector auditor under contract);
- is part of the institution's internal audit plan of engagements;
- states the engagement's objective(s), scope and context by describing the area that has been examined, how it fits into the organization, its importance, and the relevant laws, policies and standards;
- identifies risks and recommendations for improvement to be addressed by management;
- identifies the criteria used in the engagement;
- states a conclusion against the objective;
- includes a statement of conformance; and
- includes a management response to recommendations. A management response would generally include a brief summary of the management actions, including key or significant elements of the management action plan where appropriate.

While the plan of engagements can be an important reference point to help determine whether records are related to an internal audit, it cannot be relied on completely since it is subject to change. The deputy head may ask that an internal audit not identified in the plan be conducted. Similarly, it is possible that an internal audit identified in the plan is not conducted.

An internal audit report is considered final when it has been approved by the deputy head of the institution.

Draft internal audit report

A draft internal audit report is a preliminary version used to create the final internal audit report. The draft internal audit report may be exempt under subsection 22.1(1) regardless of its degree of completion, subject to subsection 22.1(2) as explained in Section 11.20.2 below.

Working paper

Internal audit working papers comprise all the information used to document and communicate audit decisions and work. They constitute a record of information obtained and analysis conducted and provide the basis of observations and recommendations reported.

Among other things, working papers may include:

- planning documents and audit programs;
- control questionnaires, flowcharts, checklists and narratives;
- notes and memoranda resulting from interviews;
- organizational data, such as organizational charts and job descriptions;
- copies of contracts and agreements;
- information about operating and financial policies;
- results of control evaluations;
- letters of confirmation and representation;
- briefing notes or correspondence exchanges between officials related to the audit report;
- analysis of tests of transactions, processes and account balances;
- results of analytic auditing procedures; and
- engagement correspondence.

Documentation used to develop the draft internal audit report is considered to be “work-in-progress” and is part of the working papers.

11.20.2 Application of section 22.1

Section 22.1 is a discretionary exemption based on a class test that is intended to protect internal audit working papers and draft internal audit reports. Both aspects need to be taken into consideration when applying this provision.

Class exemption

As a class exemption, section 22.1 may be applied to any record that falls within one of the classes of documents described in the provision, that is, draft internal audit reports and internal audit working papers.

The exemption cannot be invoked for final audit reports. Moreover, it cannot be used to exempt all records produced or collected by the chief audit executive or the internal audit unit of an institution. Please refer to the definition of “internal audit” provided above. It will be useful to obtain the institution’s internal audit plan of engagements to assist in determining whether the records fall within the classes of documents described in the provision.

Discretionary exemption

It should be remembered that despite its class nature, section 22.1 is a discretionary exemption. This flexibility is meant to temper the broad nature of the class test. Therefore, the head of the institution must exercise discretion in determining whether records that fall within the provision may nevertheless be disclosed. If, after balancing the reasons for and against release, the head has reasonable grounds to believe that the release of the records would discourage free and frank disclosure of potential issues of concern during the audit or would cause other such prejudice, the head has the discretion to exempt this information. Conversely, the head may disclose working papers (such as organizational charts, job descriptions, standard clauses of contracts, agreements, and information about operating and financial policies)

where the disclosure would not prejudice the internal audit or cause other prejudices to the institution. Although prejudice does not have to be shown, the possibility that disclosure may cause a prejudice is one of the factors to consider when exercising discretion.

Unlike section 22, which requires that the evidence demonstrate a probability of injury from disclosure, section 22.1 does not require that an injury be demonstrated. However, when exercising discretion, the impact of disclosure is a factor to be considered in the exercise of discretion.

Institutions that may invoke section 22.1

Only records of government institutions subject to the Act can be exempted under section 22.1. If an institution has under its control a draft report of an internal audit or related working papers concerning a federal body that is not subject to the Act – for example, a subsidiary of a Crown corporation that is not wholly owned – the institution cannot exempt those records under section 22.1.

Lastly, the fact that the Treasury Board's Policy on Internal Audit does not apply to all government institutions subject to the Act is not a factor to consider when invoking section 22.1.

Limitations

Subsections 22.1(1) and 22.1(2) put limits on the protection of records related to internal audits. Therefore, the exemption **may not be invoked** to protect:

- internal audit working papers that are more than fifteen years old at the time the request is made (i.e. at the date of the request); and
- draft internal audit reports if
  - the final internal audit report has been published, **or**

- more than two years have passed since the internal audit was started and the final report has not been delivered to the institution.

This does not mean that records covered by section 22.1 must automatically be disclosed pursuant to a request under the Act once the above conditions are met. Other exemptions, such as subsection 19(1) [personal information], subsection 20(1) [third party information] and section 22 [testing procedures, tests and audits], may apply.

Records of the departmental audit committee

The departmental audit committee (DAC) is an independent advisory body that reports to the deputy head and is mostly composed of external members who did not occupy a position within the federal public administration at the time of appointment. External DAC (departmental audit committee) members are appointed by the Treasury Board of Canada to serve for a fixed term and are deemed to be part of the government institution during that term. The records they hold are therefore under the control of the institution and are subject to the Act.

Records of the Office of the Auditor General of Canada

As mentioned in Section 11.20.1 of this chapter, internal audits do not include audits conducted by the Office of the Auditor General of Canada. Consequently, section 22.1 does not apply to records related to audits conducted by the Office of the Auditor General, including draft audit reports.

Government institutions must take steps to maintain the confidentiality of the Office of the Auditor General's draft audit reports and findings before they are tabled in Parliament. [11-47] These are covered by parliamentary privilege. [11-48] Nonetheless, records that are in the

physical possession of a government institution are under the control of that institution. Should a request made under the Act be received while records of the Office of the Auditor General are in the physical possession of the institution, the institution must process the records if they are relevant to the request, unless the request is transferred to another institution having a greater interest in the records sought. The head of the institution may exercise the discretion in subsection 8(1) of the Act to transfer the request to the Office of the Auditor General.

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11.21 Section 23 of the Act – Solicitor-client privilege

Section 23 of the Access to Information Act (the Act) is a discretionary exemption based on a class-test that protects the solicitor-client privilege. This provision incorporates the protection that exists at common law and in Quebec's civil law for information to which the solicitor-client privilege attaches. It ensures that communications between a government institution and its solicitors including litigation-related communications are protected to the same extent as they are in the private sector.

In the decision Canadian Jewish Congress v. Canada (Minister of Employment and Immigration), (T.D.), [1996] 1 F.C. 268, the Federal Court of Canada recognized that there is a "continuum of communications" in the process of legal counselling, and emphasized that "all communications between a client and a legal advisor directly related to the seeking, formulating or giving of legal advice or legal assistance fall under the protection of solicitor-client privilege."

The phrase "solicitor-client privilege" in this exemption refers to two kinds of privileges: the legal advice privilege and the litigation privilege.

11.21.1 Legal advice privilege

Legal requirements

The courts have identified three criteria that must be satisfied for a communication to be covered by the legal advice privilege. The communication must:

1. be between a lawyer and a client;
2. entail the seeking or giving of legal advice; and
3. be intended to be kept confidential by the parties.

1. The communication must be between a lawyer and a client.

Legal officers of the Department of Justice are clearly legal advisors for the purposes of the solicitor-client privilege, as well as private sector law practitioners appointed as legal agents of the Minister of Justice and Attorney General of Canada.

Other lawyers who represent government institutions are also legal advisors for the purpose of section 23 of the Act. They include lawyers working solely for one institution (for example, the Office of the Judge Advocate General for the Canadian Forces or lawyers working for Officers of Parliament) and private sector lawyers retained by a government institution (for example, a law firm retained by a Crown corporation to give a legal opinion).

The client in its broadest sense is the executive branch of the Government of Canada. Although the federal Crown is the ultimate client, for operational purposes the client may often be an individual department or agency.

2. The communication must entail the seeking or giving of legal advice.

Legal communications are privileged only when the lawyer is acting as a legal advisor and not when giving political, administrative, managerial or general policy advice.

Information provided by the client to their legal advisor for the purpose of receiving legal advice is also protected by this privilege.

3. The communication must be intended to be kept confidential by the parties.

As a general rule, the client (usually a federal government institution) must not have disclosed the legal opinion (either verbally or in writing) to parties who are outside of the federal government. For exceptions to this rule, please consult with your legal services.

If just one of the three elements is lacking (for example, the communication is not between a solicitor and his or her client; the communication is prepared by a lawyer but provides only policy advice; the lawyer is acting as a manager or advising on administrative matters; or the communication has not been treated by both solicitor and client in a confidential manner), then the legal advice privilege cannot be applied.

Rationale for the legal advice privilege

The interest protected by this privilege is the interest of all persons to have full and ready access to legal advice without concern of disclosure. If an individual cannot confide in a lawyer knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper legal advice based on candid discussion within the solicitor-client relationship.

Duration

The legal advice privilege is not limited by the passage of time or the end of the issue that required the legal advice.

Examples of legal advice privilege

The legal advice privilege applies to any document that:

- passes between solicitor and client and contains information necessary for the giving or seeking of legal advice;
- sets out the law and contains information about what the client should prudently and sensibly do in a particular legal context;
- does not make specific reference to legal advice but falls within the normal exchange of communications between a client and lawyer within which legal advice is sought; and
- on its face, makes reference to legal advice.

Limits to the scope of legal advice privilege

In the decision Blank v. Canada (Minister of the Environment), 2001 FCA 374, the Federal Court of Appeal ruled that the legal advice privilege does not apply to "general identifying information" that appears in a legal opinion, unless it can be shown that it would reveal the nature of the confidential legal communication.

"General identifying information" includes:

- the description of the document (e.g. the "memorandum" heading and internal file identification);
- the name, title and address of the person to whom the communication was directed;
- the subject line;
- generally innocuous opening and closing words of the communication; and
- the signature block.

11.21.2 Litigation privilege/lawyer's brief privilege

All communications made in preparation for litigation or for deciding whether to litigate, and the communications made to the solicitor for these purposes, are protected under the litigation privilege (also called the lawyer's brief privilege).

It is not necessary that communications be confidential for the litigation privilege to apply. Examples of documents protected under this privilege include:

- communications with third parties (e.g. experts);
- copies of documents that are not otherwise protected or are public, including copies of court decisions and legal articles;
- counsel's handwritten notes on the case;
- lists of potential witnesses; and
- notes taken by the litigator during the proceedings.

Legal requirements

There are two legal requirements for the litigation privilege to apply:

1. Dominant purpose test

   The dominant purpose of creating or obtaining the record must be to decide whether to initiate, or to prepare for, litigation. It cannot be standard operational procedure to prepare such records for various reasons, only one of which is to prepare for litigation. However, if a record was created, obtained or compiled for the dominant purpose of litigation, the fact that it may also be used for other purposes does not affect the solicitor-client privilege.

2. Ongoing or anticipated litigation

   Litigation must be ongoing, or there must be a reasonable expectation of litigation (e.g. the litigator has been notified that he or she will be served with notification of litigation). The litigation

cannot be a mere vague anticipation or possibility.

Rationale for the litigation privilege

The litigation privilege provides a zone of privacy for the litigator in which he or she can prepare the client's case without fear of disclosure before making his or her case in court.

Duration

In general, in the absence of closely related proceedings (e.g. an appeal of the decision), the litigation privilege comes to an end upon termination of the litigation that gave rise to the privilege.

In the decision Blank v. Canada (Minister of Justice), 2006 SCC 39, [2006] 2 S.C.R. 319 (at paragraph 39), the Supreme Court of Canada gave an enlarged definition of the word "litigation" for the purpose of determining when litigation ends. The meaning of "litigation" includes:

- separate proceedings that involve the same or related parties and arise from the same or a related cause of action; or
- proceedings that raise issues common to the initial action and share its essential purpose.

The lawyer's brief may contain legal opinions. Upon termination of the litigation, the solicitor-client privilege still applies to these legal opinions.

Examples of litigation privilege records

- correspondence between counsel and the client(s);
- documents relevant to the issues pleaded in the lawsuit that were produced by the parties;
- witness statements;
- letters retaining experts or commenting on their reports;
- research memoranda and legal authorities;

- annotations on records written by the litigator; and
- miscellaneous public documents such as newspaper clippings, press releases and investigator's reports.

11.21.3 Exercise of discretion

Section 23 gives the head of a government institution who receives an access request the discretion to invoke the solicitor-client privilege or not.

There are two types of decisions to be made in relation to section 23:

1. A factual decision: Is the requested information subject to solicitor-client privilege? In other words, have the legal requirements explained above been met?
2. A discretionary decision: Should the information nevertheless be disclosed?

This requires a balancing of the reasons for non-release of privileged information against reasonable factors in favour of release, followed by an exercise of discretion one way or the other.

In the decision Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23, the Supreme Court of Canada ruled on the existence of an implicit public interest override test embedded in discretionary exemptions in access to information legislation. The Court concluded that the exercise of discretion must take into account public interest in open government, public debate and the proper functioning of government institutions. This public interest test means that in the exercise of discretion to invoke a discretionary exemption, the head of the institution or his or her delegate must take into account the public interest in the disclosure of the requested information. In respect of the

exemption protecting the solicitor-client privilege, the Court emphasized that it would be exceptional that such an exercise of discretion would require disclosure of the requested information.

For section 23 to apply, heads of institutions do not have to demonstrate prejudice, nor give reasons for the refusal to disclose. In the decision Canada (Justice) v. Blank, 2007 FCA 87, the Federal Court of Appeal indicated that the permissive nature of section 23 reflects the fact that the solicitor-client privilege may be waived by or on behalf of the client. It can be assumed that, by asserting the solicitor-client privilege, the client or a party acting on the client's behalf has decided that waiver would not be in the public interest. There is no legal duty on the minister to expressly explain why the privilege is not being waived.

11.21.4 Waiver of the privilege

Section 23 does not apply if the solicitor-client privilege has been lost. This may occur when there has been waiver of the privilege, in whole or in part. Waiver occurs when the possessor of the privilege knows of the existence of the privilege and voluntarily discloses the privileged information to a party that is outside the solicitor-client relationship.

When a head or his or her delegate, in the exercise of his or her discretionary authority, decides to disclose information that is subject to section 23 of the Act, privilege is waived with regard to that information. However, this does not entail a waiver with regard to related information, unless the partial release of confidential information is an attempt to cause unfairness between parties or to mislead a petitioner or a court. In the decision Stevens v. Canada (Prime Minister) (C.A.), [1998] 4 F.C. 89, the Federal Court of Appeal ruled that section 25 of the Act does allow disclosure of portions of privileged information. To find that the application of section 25 amounts to

waiving privilege would abrogate the discretionary power given to the head of the institution under section 23. Such a finding would distort the desired results, i.e. to attempt to balance the rights of individuals to access to information, on the one hand, while maintaining the confidentiality to which other people are entitled, on the other.

Disclosure that is required by law is not considered a waiver of the privilege and neither is inadvertent disclosure. Disclosing privileged documents that are part of the subject matter of an access request to the Office of the Information Commissioner during the investigation of a complaint made under the Act does not amount to waiver.

There are instances however where privileged information should not be communicated to the Information Commissioner. Legal advice that is not in itself the subject of the request but was obtained during the processing of the request or during the investigation of a complaint concerning the request are not normally included with the information provided to the Information Commissioner for examination. In the decision Canada (Attorney General) v. Canada (Information Commissioner), 2005 FCA 199 (Mel Cappe), the Federal Court of Appeal ruled that legal advice prepared to advise a government institution as to how it should respond to a request for access to information cannot be examined by the Information Commissioner unless absolutely necessary for the Commissioner to complete his or her investigation with respect to that same request.

Communication, between departments, of information protected by the solicitor-client privilege does not normally amount to waiver, since the communication occurs within the government, which is the ultimate beneficiary of the privilege. Similarly, it is not a waiver of the solicitor-client privilege when privileged information is shared between parties who have a “common interest.” For example, the privilege would not be

lost in the event that information was shared between the governments of Canada and British Columbia if they were both named in a lawsuit and had decided on a joint defense or strategy. In Canada, common interest privilege extends to both litigation and commercial transactions.

11.21.5 Consultation

The solicitor-client privilege belongs to the client. Though a case may be of greater interest to one or more institutions, the government at large is the ultimate beneficiary of the privilege, and the disclosure of privileged information by one institution may have an impact on other institutions.

This is why institutions should consult their legal advisor when they do not have sufficient information to determine whether:

- the information is privileged, and
- the disclosure
  - could injure the government's legal positions or actual or pending litigation;
  - impede the ability of government institutions to communicate fully and frankly with their legal advisors; or
  - lead to waiver of the solicitor-client privilege with regard to other related documents.

Institutions whose legal counsel report to the Department of Justice should consult the Access to Information and Privacy Office at the Department of Justice if they require more information for the proper exercise of discretion to withhold or if they intend to disclose records containing privileged information. However, it is not necessary for

institutions to consult the Department of Justice if they have sufficient information to effectively exercise their discretion and apply the solicitor-client privilege exemption.

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11.22 Section 24 of the Act – Statutory prohibitions

Subsection 24(1) of the Access to Information Act (the Act) is a mandatory exemption that incorporates within the Act certain specific prohibitions against disclosure included in other statutes. It provides that a government institution must refuse to disclose any record that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II of the Act. For example, Schedule II lists subsection 104.01 (1) of the Canada Pension Plan and section 17 of the Statistics Act, which protect information with respect to an individual and identifiable individual returns respectively.

11.22.1 If the statute enacting the restriction provides an alternative method for accessing the information

Most provisions listed in Schedule II of the Act identify a person authorized to disclose the information in specific circumstances outside the access to information regime. For example, subsection 17(2) of the Statistics Act authorizes the Chief Statistician to disclose information relating to a person or organization with the written consent of the person or organization concerned. In such cases, once a government institution has determined that the information being requested is the same information protected by a statutory provision listed in Schedule II of the Act, the institution must invoke subsection 24 .

It remains open for an individual to request the record, outside the Act, pursuant to the applicable statutory regime. To assist the requester, the institution should inform the requester that he or she may ask the

authorized person to consider disclosing the records that are exempt under subsection 24. If the request is granted, the disclosure is made under the relevant legislation and not under the Access to Information Act.

In the decision Canada (Industry) v. Canada (Information Commissioner), 2007 FCA 212, the Federal Court of Appeal indicated that section 24 imposes an unqualified duty on the head of a government institution to refuse to disclose any record requested under the Act that contains information the disclosure of which is "restricted" by a provision listed in Schedule II. The Federal Court of Appeal concluded that "section 24 prohibits the disclosure under the Access Act of records governed by the statutory provisions listed in Schedule II, even if their disclosure is only restricted, but not prohibited, by a statute listed in Schedule II."

11.22.2 If the statute enacting the restriction does not provide an alternative method for accessing the information

In the decision Top Aces Consulting Inc. v. Canada (National Defence), 2012 FCA 75 [11-49], the Federal Court of Appeal ruled that where the enacting statute does not provide an alternative method for accessing the information that is protected by subsection 24(1) of the Access to Information Act but contains a provision allowing the disclosure of specified information with the consent of the interested party, such a consent relieves the head of the institution from his or her duty to refuse to disclose the specified information under subsection 24(1) of the Act.

Therefore, when the enacting statute does not provide an alternative method for accessing the information but contains a provision allowing disclosure of specified information if certain conditions are met, these

conditions must be considered before invoking section 24.

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11.23 Section 26 of the Act – Information to be published

Section 26 of the Access to Information Act (the Act) provides that a government institution may refuse to disclose any record or any part thereof if the head of the institution believes on reasonable grounds that the material in the record or part thereof will be published by a government institution, an agent of the Government of Canada or a minister of the Crown within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

Purpose

This is a discretionary exemption that permits government institutions to retain some control over manuscripts and other materials that are to be published, and to ensure that the public or Parliament are treated fairly in being accorded an opportunity to view the material at the same point in time. The exemption is also intended to deal with those types of government documents that are required to be published and tabled in Parliament. It protects Parliament's right to be made aware of certain matters first and ensures that information that must be published in the public interest will be made available to all at the same time and in both official languages.

Publication

Reasonable grounds would normally be a legal requirement to publish the record or a publication plan with target dates prepared prior to the receipt of the relevant access request. Publication must be by a

government institution or by an agent acting on behalf of the government under a contract, or by a minister of the Crown.

Time limits

In order to apply section 26 to a record, the final version of the record must be prepared in at least one official language within 90 days of receipt of the request; in other words, only translation and printing of the record remain to be done. The record's release may then be delayed for as many days as are normally required for it to be translated and printed.

Section 26 is intended only to provide protection on a short-term basis and is based on normal and reasonable time limits for the publication process. The provision simply defers release of the information until publication occurs. If there is no certainty that the material will be published within a reasonable time beyond the 90 day limit, institutions must make the information available to the requester, subject to other exemptions that apply. If the information has not been published within the stated time limits, it is eligible for release, subject to other exemptions that apply.

Severability

In addition, section 25 must be applied since the refusal can bear only on part(s) of the record(s) containing the information that will be published.

Draft records

When considering whether section 26 should be invoked, it is not the fact that the relevant records are drafts or final versions that matters, but whether the information found in those drafts or final versions will be published within 90 days of the receipt of the access request. Section

26 may be claimed only for portions of the drafts that are to be published and the rest of the drafts must be disclosed if no other exemption applies.

If the final report is not expected in the foreseeable future, it would be difficult to claim that the final report will be published within 90 days of the receipt of the request. In such a case, the drafts must be examined to determine if they can be disclosed or if other exemptions apply.

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11.24 Other grounds for refusing access: Section 35 of the Act – Protection of representations made to the Information Commissioner in the context of an investigation

According to a decision of the Federal Court of Appeal, Rubin v. Canada (Clerk of the Privy Council) (C.A.), [1994] 2 F.C. 707, which was confirmed on appeal to the Supreme Court of Canada in Rubin v. Canada (Clerk of the Privy Council), [1996] 1 S.C.R. 6, section 35 of the Access to Information Act (the Act) serves two purposes:

1. It ensures that the complainant and the government institution that is the subject of a complaint (and an interested third party) have a reasonable opportunity to make representations to the Information Commissioner; and
2. It denies a right of access to such representations.

The Federal Court of Appeal and the Supreme Court of Canada concluded that representations made by a government institution to the Information Commissioner in the course of an investigation and the responses from the Commissioner to the institution must be excluded from disclosure pursuant to an access to information request under section 35. Such protection from disclosure exists not only for

representations made in an ongoing investigation of the Commissioner, but also for representations made in respect of an investigation that has been completed.

The following is a list of examples of information that can be protected from disclosure under section 35 of the Act:

- representations made by a government institution to the Commissioner, including documents attached to such representations;
- responses from the Commissioner's office; and
- references, in other documents, to representations provided to the Commissioner or references to responses received from the Commissioner during an investigation.

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Chapter 12 – Third Party Process

12.1 Initial decision-making stage (sections 27 and 28)

As explained in Chapter 11 of this manual, subsection 20(1) of the Access to Information Act (the Act) aims to protect third party information. When the head of a government institution proposes to disclose information that he or she has reason to believe contains or might contain information described in subsection 20(1) of the Act, the head must advise the third party concerned and give the third party an opportunity to make representations, in accordance with sections 27 and 28 of the Access to Information Act. It should be noted, however, that the requirements regarding third party notification apply only when a preliminary decision has been made by the government institution to disclose the information. If the institution intends to claim

an exemption for third party information under subsection 20(1) of the Act, the requirements for third party notification under sections 27 and 28 of the Act will not apply.

In the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, Merck Frosst argued that Health Canada had not conducted a genuine and thorough analysis of the requested records before deciding to issue a notice and that such a review was required under the Act. The Supreme Court of Canada rejected that argument and concluded that the federal government's 1993 Access to Information Policy [12-1] provided the correct description of the nature of the review required before the decision is made to give notice to the third party: institutions must review each individual record to determine which portions, if any, may be excluded or exempted. The Court further emphasized that the institution must make a serious attempt to apply the exemptions and that the third party should be as helpful as it can be in identifying precisely why disclosure is not permitted. The Supreme Court of Canada added that a constructive and cooperative approach is necessary in order for the system to work.

Institutions should continue to process the remainder of the records covered by the request while the notification process is ongoing or if the third party makes an application for review to the Federal Court under section 44 of the Access to Information Act. Institutions are encouraged to release records to requesters as soon as they become available, without waiting for all of the records to be processed. Care should be taken, however, not to prematurely disclose information if there is a possibility that the disclosure to be made may be affected by, or may affect, the remaining records.

12.1.1 Requirements for notification

Under subsection 27(1) of the Act, when a government institution intends to disclose a record that might contain information described in subsection 20(1) of the Act, the institution must notify a third party that owns the information, supplied it to a government institution or could be affected by the disclosure in a way described in paragraphs 20(1)(c) or (d) of the Act. The notice must be in writing and sent within 30 days after the access request is received if the third party can reasonably be located.

The notice should be sent to the last known mailing address of the third party. If unknown, the institution should make a reasonable effort to locate the third party. Institutions may use the delivery confirmation option offered by courier and postal services to confirm the exact dates on which notices were sent and delivered in case of judicial review.

It is suggested that institutions include a sentence in notices to third parties asking them to inform the institution when they make an application to the Federal Court under section 44 of the Act. This would reduce the risk of inadvertently disclosing information after the deadline.

In all cases when a response is not received from the third party, the institution should obtain confirmation that no application has been filed before disclosing records that might contain information described in subsection 20(1) of the Act. When receiving a notice of a section 44 application, the institution should immediately inform its legal counsel and provide them with information concerning the request.

In all cases where a response is not received from a third party consulted within the statutory timeframe, it is a best practice, where feasible, for the institution to issue a decision letter to the third party

and, if no application for judicial review under section 44 of the Act is initiated by the third party, issue a subsequent release.

When the record to be disclosed may contain trade secrets of a third party (paragraph 20(1)(a) of the Act) or confidential information supplied by a third party (paragraphs 20(1)(b) and (b.1) of the Act), generally only one third party will be involved and the third party will be easily identifiable. However, when the disclosure of the record could reasonably be expected to affect a third party in a way described in paragraphs 20(1)(c) or (d) of the Act, third parties other than the submitter of the information can be involved. Subsection 27(1) of the Act requires that all such third parties be notified of the intended disclosure.

Threshold for giving third parties notice before disclosing their information

In the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, the Supreme Court of Canada recognized that the grammatical and ordinary sense of subsection 27(1) of the Act makes it plain that notice is required only if certain conditions are met in the particular circumstances. The Court stated that the head of an institution must give notice to a third party:

- when in doubt about whether the information is exempt (there is no doubt when there is no reason to believe that the information is exempt or when the information is clearly exempt);
- when considering disclosure of exempted material to serve the public interest under subsection 20(6) of the Act; or
- when considering disclosure of severed material under section 25 of the Act

The Supreme Court of Canada stated that observing a low threshold for third party notice ensures procedural fairness and reduces the risk that exempted information might be disclosed by mistake.

12.1.2 Waiver of notification rights

Under subsection 27(2) of the Act, a third party may waive the right to be notified of an intended disclosure under subsection 27(1) of the Act, either at the time the information was obtained by the institution or subsequently. Subsection 20(5) of the Act authorizes the head of a government institution to disclose any record that contains information described in subsection 20(1) of the Act with the consent of the third party to which the information relates. A third party that has consented to disclosure is deemed to have waived the right to be notified under subsection 27(1) of the Act. Government institutions must obtain waivers and consent to disclosure from a third party in writing.

12.1.3 Contents of the notice

Subsection 27(3) of the Act provides that the notice to the third party shall contain the following:

- a statement that the government institution intends to release a record, or part thereof, that may contain information described in subsection 20(1) of the Act;
- a description of the contents of the record, or part thereof, that belong to, were supplied by or relate to the third party (this can be done by providing a copy of the record, or part thereof); and
- a statement that the third party may, within 20 days after the notice is given, make representations to the government institution as to why the record, or part thereof, in question should not be disclosed.

12.1.4 Extension of time limits for notice to third party

Subsection 27(1) of the Act requires institutions to send third party notices within 30 days after the request is received. Nonetheless, subsection 27(4) of the Act allows institutions to send notices pursuant to section 27 after the initial 30 days when the deadline has been extended under paragraphs 9(1)(a) or (b) of the Act, that is, within the extended time limit. However, subsection 27(4) of the Act does not allow institutions to extend the time limits for the processing of the request.

12.1.5 Late notices

If, after the 30-day period or the extended time limit, it is discovered that some of the records proposed for disclosure may contain information described in subsection 20(1) of the Act, the third party must be notified as soon as possible. In the decision Cyanamid Canada Inc. v. Canada (Minister of National Health and Welfare) (1992), 45 C.P.R. (3d) 390 (F.C.A.), the Federal Court of Appeal held that the late notices had no impact on the decisions to disclose the information.

12.1.6 Representations by a third party

Paragraph 28(1)(a) of the Act requires that a government institution provide a third party that has been notified of an intended disclosure under sections 27 and 28 of the Act with an opportunity to make representations within 20 days after notice has been given as to why the record, or part thereof, should not be disclosed. These representations are to be made in writing unless the government institution waives this requirement (subsection 28(2) of the Act).

If no response to the notification is received from the third party within the specified time limits, the government institution should make a reasonable attempt to establish contact with the third party to

determine if it has submitted, or intends to submit, representations.

In all cases where a response is not received from a third party consulted under section 27 of the Act or where a third party does not indicate that it will make representations under paragraph 28(1)(a) of the Act within the specified time limits, institution should as a best practice, where feasible, issue a decision letter to the third party as well as issue a subsequent release if no application for judicial review under section 44 of the Act is initiated by the third party. For additional information, refer to Section 12.1.7 of this chapter.

Burden of proof

In the decision Canada (Health) v. Merck Frosst Canada Ltd., 2009 FCA 166, the Federal Court of Appeal stated the following regarding the burden of proof:

- The burden of proving that a government institution should refuse to disclose a record is on the party that is objecting to the disclosure. (The onus to demonstrate the applicability of section 20 of the Act falls on the head of the institution during the processing of the request, including the notification process. The onus shifts to the third party when the third party objects to the disclosure and seeks judicial review of the institution's decision under section 44 of the Access to Information Act.).
- Affidavit evidence that is vague or speculative in nature cannot be relied upon to justify an exemption under subsection 20(1) of the Act.
- Regarding paragraphs 20(1)(c) and (d) of the Act, it must be established that there is a probability of harm, not a mere possibility thereof, and evidence of the likelihood of such harm must be submitted.

In his reasons for judgment, the trial judge concluded that although this procedure unquestionably creates an onus and a considerable amount of work for a third party, this burden is not out of proportion if we consider the greater expertise of the third party and the importance that party is likely to attach to the protection of information about itself. In short, the purpose of this procedure is to require the head of the institution to consult the third party after a fairly cursory examination of the records, to take the third party's recommendations into account and, if it decides not to follow those recommendations, to explain why. If the third party is dissatisfied with the head's decision, it may apply to the Federal Court under section 44 of the Act for a review of the head's decision. The Federal Court of Appeal held that the trial judge's finding was consistent with the Act.

In the decision Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3, the Supreme Court of Canada confirmed well-established case law that the third party bears the burden, in a judicial application under section 44 of the Act, of showing that disclosure should not be made. The Supreme Court of Canada also confirmed that the standard is proof on the balance of probabilities.

Representations of third party not limited to section 20

A third party may, when making representations under section 28 of the Act in a section 44 review, raise other exemptions, such as section 19 of the Act and section 24 of the Act.

In the case H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), 2006 SCC 13, [2006] 1 S.C.R. 441, Heinz brought a section 44 review proceeding, under the section 20 of the Act exemption, and sought to raise subsections 19(1) and 20(1) of the Act. The Supreme Court of Canada held as follows:

- When a third party becomes aware that a government institution intends to disclose a record containing personal information, nothing in the plain language of sections 28, 44 and 51 prevents the third party from raising this concern by applying for judicial review.
- A narrow interpretation of section 44 would weaken the protection of personal information and dilute the right to privacy.
- The right to notice accorded to third parties follows logically from the specific nature of the confidential business information exemption and does not limit the right of review provided for in section 44.

Relevance and scope of request

A third party cannot prevent disclosure by raising objections based on the relevance and scope of the access request.

A number of decisions touch on these issues, including AstraZeneca Canada Inc. v. Canada (Minister of Health), 2005 FC 189; Canadian Pacific Hotels Corp. v. Canada (Attorney General), 2004 FC 444; Canadian Tobacco Manufacturers' Council v. Canada (Minister of National Revenue), 2003 FC 1037; and Bristol-Myers Squibb Canada Co. v. Canada (Attorney General), 2005 FC 235.

The only case when relevance and scope may come into play relates to the access request process and section 6 of the Act. The request must provide sufficient detail to enable an employee of the institution to identify the record in question and respond to the request adequately. The language of section 6 does not in any way prohibit the disclosure of records that are not relevant to the request. Any other interpretation would be inconsistent with the purpose of the Act stated in subsection

2(1) of the Act and with the fundamental right to access set out at section 4 of the Act and would add a new exception not provided for in the Act.

12.1.7 Decision following third party representations

The final decision of a government institution as to whether or not to disclose the record, or part thereof, following receipt of third party representations is to be made within 30 days of the notice being given to a third party (paragraph 28(1)(b) of the Act). Parallel time frames and procedures should be followed when representations are not forthcoming. As third party representations are to be received within 20 days of notification, a government institution will normally have 10 days to decide whether or not to disclose the record. The third party must be notified of this decision within the 30-day time limit.

Review by Access to Information and Privacy (ATIP) Coordinator

In the decision AstraZeneca Canada Inc. v. Canada (Minister of Health), 2005 FC 189, the Federal Court confirmed that under the Access to Information Act, the ATIP Coordinator is not required to personally review each document and reach a conclusion on its disclosure. Any other interpretation would paralyze the operation of the Act. The fact that the decision to disclose was significantly influenced by the recommendations of the office of primary interest does not in any way impugn the decision. The Act could not operate, particularly in scientific and technical fields, unless those administering the Act on behalf of a particular department were able to obtain expert advice and recommendations. In other words, the ATIP Coordinator does not fetter her or his discretion by relying reasonably on input provided by subject matter experts.

Procedural fairness

The decision Les viandes du Breton Inc. v. Canada (Canadian Food Inspection Agency), 2006 FC 335, addresses procedural fairness.

In support of its application for judicial review, applicant Les Viandes du Breton Inc. submitted that the Canadian Food Inspection Agency (CFIA) had breached its duty of procedural fairness by not giving it a copy of the access request. According to the applicant, the CFIA had given insufficient reasons for its decision because it had not described its reasoning in greater detail on each of the arguments raised by the applicant in its response to the notice under subsection 27(1) of the Act.

The Court held that the duty of procedural fairness applicable in that case did not require that a copy of the access request be provided to Les Viandes du Breton Inc. The Court noted, however, that the CFIA was required to describe the subject of the access request accurately and in sufficient detail. The Court was satisfied with the description of the request provided. The Court added in obiter (i.e. a remark or observation that is not legally binding) that it would be wise, in future, for the CFIA to quote the description in the access request verbatim and confirm that the requirements of section 4 of the Act (right to access) had in fact been met. The Court was also satisfied that the CFIA had carried out its duty to provide reasons for the decision.

Decision to disclose the record (subsections 28(3) and (4))

When a government institution decides to disclose a record, or part thereof, following receipt and consideration of third party representations, or in the absence of such representations, a notice of the decision must be sent to the third party in accordance with section 28 of the Act and must contain a statement that:

- the third party is entitled to apply to the Federal Court for a review of this decision under section 44 of the Act; and

- access to the record, or part thereof, will be provided to the requester immediately once 20 days after that notice is given have elapsed unless the third party applies to the Federal Court for a review of the decision (subsection 28(3) of the Act).

In such a situation, a government institution must not disclose the record until the 20-day time period for application to the Federal Court has expired. However, if the third party does not make such an application, the person who has requested the record must be given access to it at the end of the 20-day time period (subsection 28(4) of the Act). The institution should obtain confirmation that no application under section 44 of the Act has been filed by contacting its legal counsel or the Federal Court.

Decision to exempt the record (paragraphs 7(a) and 28(1)(b))

When the government institution decides to claim an exemption for the record, or part thereof, following receipt of third party representations, notice of the decision must be given within 30 days to both the third party (paragraph 28(1)(b) of the Act) and the requester (paragraph 7(a) of the Act).

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12.2 Proceedings before the Information Commissioner of Canada (section 33 and paragraph 35(2)(c))

12.2.1 Notice by the government institution to the Information Commissioner of Canada

When a government institution claims an exemption under subsection 20(1) of the Act for a record requested under the Act and the requester complains to the Information Commissioner about the refusal to disclose the record, the government institution is required to advise the

Information Commissioner of any third party that it notified under subsection 27(1) of the Act or would have notified if it had intended to disclose the record (section 33 of the Act).

12.2.2 Notice by the Information Commissioner to a third party

It is possible that, as a result of an investigation made under the Act, the Information Commissioner will recommend to a government institution that it disclose a record, or part thereof, that might contain information described in subsection 20(1) of the Act. In those instances, the Commissioner is required to notify the third party concerned and, if the third party can reasonably be located, is required to provide the third party with a reasonable opportunity to make representations to the Commissioner (paragraph 35(2)(c) of the Act).

12.2.3 Following a recommendation of the Information Commissioner (section 29)

When, after reviewing the Information Commissioner's recommendation, a government institution decides to disclose a record, or part thereof, and the record may contain information described in subsection 20(1) of the Act, the government institution is required, under section 29 of the Act, to:

- notify any third party that has been notified under subsection 27(1) of the Act or would have been notified under subsection 27(1) at the time of the request if the institution had intended to disclose the record (i.e. any third party to which the information belongs, that submitted the information to a government institution or that could reasonably be expected to be affected by the disclosure in a way described in paragraph 20(1)(c) or (d) of the Act) of the decision to disclose (the notice must contain a statement that the third party is entitled under section 44 of the Act to apply to the

Federal Court of Canada for a review of the decision within 20 days after notice has been given); and

- notify the requester of the decision to disclose the record (the notice must contain a statement that unless the third party applies to the Federal Court for a review of the decision within 20 days after notice has been given, the requester will be given access to it).

The government institution cannot disclose the information before the 20-day period for filing an application with the Federal Court has expired. If the third party does not apply to the Federal Court for review within that time period, the government institution must give access to the requester at the end of the 20-day period. Government institutions are notified of applications to the Federal Court by the Federal Court. To ensure that such notification has not been delayed, government institutions should obtain confirmation that no application has been filed before disclosing the records.

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12.3 Proceedings before the Federal Court (sections 43 and 44)

12.3.1 Notification requirements

Notification requirements can arise in relation to proceedings before the Federal Court in the following circumstances:

(i) Proceedings initiated by the requester or the Information Commissioner (section 43 of the Act)

When a government institution has refused to disclose a record on the grounds that it is exempt under subsection 20(1) of the Act and the requester or the Information Commissioner brings proceedings against the government institution in the Federal Court under sections 41 or 42 of the Act, the government institution is required

under subsection 43(1) to give written notice of the proceedings to any third party that has been notified of the request under subsection27(1) of the Act or any third party that would have been notified under subsection 27(1) of the Act if the government institution had intended to disclose the record. Under subsection 43(2) of the Act, the third party has the right to appear as a party to the proceedings.

(ii) Proceedings initiated by the third party (section 44 of the Act)

A third party that has been notified by a government institution of an intended disclosure under paragraph 28(1)(b) of the Act or subsection 29(1) of the Act may, within 20 days after the government institution has given the third party such notice, apply to the Federal Court of Canada for a review of the matter.

When a government institution receives notice that a third party has brought proceedings under section 44 of the Act, the government institution is required under subsection 44(2) of the Act to notify forthwith the requester in writing of the fact that the proceedings have been initiated. The requester has the right to appear as a party to such proceedings (subsection 44(3) of the Act).

12.3.2 Orders of the Court (sections 49 and 51)

Under section 49 of the Act, when the status of third party information is being considered by the Federal Court in proceedings brought under the Act, the Court will order that the information be disclosed if it determines that the information is not exempt under section 20 of the Act. Under section 51 of the Act, if the Federal Court determines that the record contains information described in subsection 20(1) of the Act and that subsections 20(2), (5) and (6) of the Act do not apply in the

circumstances to set aside the mandatory nature of the exemption in subsection 20(1) of the Act, it will order the government institution not to disclose the record.

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12.4 Charts of notification requirements

12.4.1 Notification requirements and time limits when processing requests

Provision	Measure	Time limits
27(1)	The institution informs the third party of its intention to disclose.	30 days after receipt of the request or in accordance with section 27(4), i.e. within the deadline extended under section 9(1)(a) or (b)
28(1)(a)	The third party makes representations to the institution.	20 days after the notice has been sent pursuant to section 27(1)
28(1)(b) and 28(3)	After reviewing the representations, the institution informs the third party of its decision and of the third party's right to request a review.	30 days after the notice has been sent pursuant to section 27(1)
44(1)	The third party applies to the Federal Court for review.	20 days after the notice has been sent pursuant to section 28(1)(b)

Notification and time limits during the complaint process and review by the Federal Court

Provision	Measure	Time limits
33	The institution advises the Information Commissioner of the existence of any third party that was notified or that would have been notified if the institution had intended to disclose the record, or part thereof.	Upon receipt of a notice of complaint
35(2)(c)	The Information Commissioner gives the third party the opportunity to make representations.	Time frame prescribed by the Information Commissioner
29(1)(b)	On the Information Commissioner's recommendation, the institution advises the third party of its intention to disclose and of the third party's right to apply to the Federal Court for a review.	Within the time frames set out by the Information Commissioner in the investigative report prepared pursuant to section 37(1)
37(2)	The Information Commissioner presents his or her findings and recommendations to the complainant and the third party.	After expiration of the deadline for the institution to respond to the Information Commissioner's subsection 37(1) notice
44(1)	The third party applies to the Federal Court for a review of the institution's decision.	20 days after the institution sends the notice under section 29(1)(b) to the third party

Provision	Measure	Time limits
43	The institution notifies the third party that the complainant or the Information Commissioner has applied for review.	Upon receipt of a notice of application for review under section 41 or 42

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Chapter 13 – Exclusions

13.1 Section 68 of the Act – Published material, material available for purchase, and library and museum material

Section 68 of the Access to Information Act (the Act) reads as follows:

> This Act does not apply to
>
> (a) published material or material available for purchase by the public;
> (b) library or museum material preserved solely for public reference or exhibition purposes; or
> (c) material placed in the Library and Archives of Canada, the National Gallery of Canada, the Canadian Museum of Civilization, the Canadian Museum of Nature, the National Museum of Science and Technology, the Canadian Museum for Human Rights or the Canadian Museum of Immigration at Pier 21 by or on behalf of persons or organizations other than government institutions.

The Act does not define the word “published”. It must therefore be read and understood in its entire context and in its grammatical and ordinary sense harmoniously with the scheme and the object of the Act.

A convenient starting point is to consider dictionary definitions. The Oxford English Dictionary defines “published” as follows: “that has been prepared and issued for public sale, distribution or readership; (of information) made generally known, publicly announced.” This definition is consistent with the decision Tolmie v. Canada (Attorney General) (T.D.) [1997] 3 F.C. 893, where the Federal Court ruled that an electronic version of the Revised Statutes of Canada was exempt from disclosure under paragraph 68(a) of the Act on the basis that it was available to the public in a CD-ROM format or on the Internet.

Tweets and other information inputted on externally facing Web 2.0 sites are published materials within the meaning of paragraph 68(a) of the Act. Additional information on Web 2.0 records is found in Chapter 3 of this manual.

Information that was leaked or disclosed by inadvertence is not considered to have been published.

Paragraph 68(b) excludes library or museum material preserved solely for public reference or exhibition purposes from the coverage of the Act. In addition, material that has been placed in the Library and Archives of Canada and the six museums listed in paragraph 68(c) by or for a person or organization other than a government institution is not subject to the Act. This includes both private and public collections of papers and records placed in those institutions by individuals, corporations and other groups.

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13.2 Section 68.1 of the Act – Certain records of the Canadian Broadcasting Corporation

Section 68.1 of the Act removes information relating to journalistic, creative and programming activities held by the Canadian Broadcasting Corporation (CBC) from the coverage of the Act. It protects information about journalistic sources, as well as the creative and programming independence of the CBC (Canadian Broadcasting Corporation).

The exclusion is only available to the CBC (Canadian Broadcasting Corporation) and its wholly owned subsidiaries, within the meaning of section 83 of the Financial Administration Act. As of February 2013, the CBC (Canadian Broadcasting Corporation) did not have any wholly owned subsidiaries.

However, the exclusion does not apply to information that relates to the CBC (Canadian Broadcasting Corporation)'s general administration. Section 3.1 of the Act specifies that for the purposes of the Act, information that relates to the general administration of a government institution includes information that relates to expenses paid by the institution for travel, including lodging and hospitality. The term "includes" used in section 3.1 indicates that the list of examples is illustrative rather than exhaustive. Since the expression "general administration" is not further defined in the Act, it takes its ordinary meaning: the management functions and expenditures associated with administering an organization.

Therefore, information that relates to the general administration of the CBC (Canadian Broadcasting Corporation) and its wholly owned subsidiaries includes information related to financial activities, human resources, training and development, information management and technology, management activities (including strategic planning and

performance management, audits and evaluations), management of assets, security, and any information related to the management of the institution.

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13.3 Section 68.2 of the Act – Certain records of Atomic Energy of Canada Limited

Section 68.2 of the Act creates an exclusion for any information that is under the control of Atomic Energy of Canada Limited, other than information that relates to:

> (a) its general administration; or
> (b) its operation of any nuclear facility within the meaning of section 2 of the Nuclear Safety and Control Act that is subject to regulation by the Canadian Nuclear Safety Commission established under section 8 of that Act.

The purpose of this exclusion is to ensure protection of information related to research and commercial activities of Atomic Energy of Canada Limited. Information that relates to the general administration of this institution is subject to the Act and is distinct from information relating to research and commercial activities.

The exclusion is only available to Atomic Energy of Canada Limited and its wholly owned subsidiaries, within the meaning of section 83 of the Financial Administration Act (collectively referred to as AECL (Atomic Energy of Canada Limited)). As of February 2013, there was one wholly owned subsidiary: AECL (Atomic Energy of Canada Limited) Technologies Inc.

General administration

The right of access applies to information that relates to the general administration of AECL (Atomic Energy of Canada Limited). Section 3.1 of the Act specifies that for the purposes of the Act, information that relates to the general administration of a government institution includes information that relates to expenses paid by the institution for travel, including lodging and hospitality. The term “includes” used in section 3.1 indicates that the list of examples is illustrative rather than exhaustive. Since the expression “general administration” is not further defined in the Act, it takes its ordinary meaning: the management functions and expenditures associated with administering an organization.

Therefore, information that relates to the general administration of AECL (Atomic Energy of Canada Limited) and its wholly owned subsidiaries includes information related to its governance structure and organization, financial activities, human resources, training and development, information management and technology, management activities (including strategic planning and performance management, audits and evaluations, management of assets and security), and any information related to the management of the institution.

Operation of any nuclear facility

Furthermore, the exclusion does not apply to information that relates to the operation, by AECL (Atomic Energy of Canada Limited) or its wholly owned subsidiaries, of a nuclear facility as defined in section 2 of the Nuclear Safety and Control Act that is subject to regulation by the Canadian Nuclear Safety Commission. As of February 2013, there was only one such nuclear facility, in Chalk River, Ontario.

The term “operation” is not defined in the Act and must be given an ordinary dictionary meaning harmonious with the context in which it is found in section 68.2. The term “operation” means “the action or process of making something (in this case, the nuclear facility) carry out its function, or controlling or managing the way it works.” “Operation of a nuclear facility” includes the following activities:

- operation and maintenance of nuclear reactors;
- manufacture of nuclear isotopes;
- manufacture, storage or disposal of nuclear materials; or
- systems, equipment and buildings used for these activities.

Information relating to research conducted at a nuclear facility is not information that relates to the operation of the facility or its general administration and is therefore excluded pursuant to section 68.2 of the Act.

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13.4 Section 69 of the Act – Confidences of the Queen’s Privy Council for Canada (Cabinet confidences)

13.4.1 Principles

The Canadian government is based on a Cabinet system. Consisting of ministers acting in the name of the Queen’s Privy Council for Canada, Cabinet establishes the federal government’s policies and priorities for the country. Cabinet ministers are collectively responsible for all actions taken by the Cabinet and must publicly support all Cabinet decisions. In order to reach final decisions, ministers must be able to express their views freely during the discussions held in Cabinet. To allow the exchange of views to be disclosed publicly would result in the erosion of the collective responsibility of ministers. As a result, the collective decision-making process has traditionally been protected by the rule of

confidentiality, which upholds the principle of collective responsibility and enables ministers to engage in full and frank discussions necessary for the effective functioning of a Cabinet system. [13-1]

The Supreme Court of Canada has recognized that Cabinet confidentiality is essential to good government. In the decision Babcock v. Canada (Attorney General), 2002 SCC 57 at paragraph 18, the Court explained the reasons for this: “The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly.”

To preserve this rule of confidentiality, subsection 69(1) of the Act provides that the Act does not apply to confidences of the Queen’s Privy Council for Canada. For convenience, in the following material “confidences” will be used to refer to “confidences of the Queen’s Privy Council for Canada.”

Subsection 69(1) sets out a definition of confidences (see section 13.4.3 below). In addition, access to confidences is restricted to authorized individuals, particularly ministerial and departmental personnel (for more specifics see the Policy on the Security of Cabinet Confidences of the Privy Council, and related FAQ on Cabinet Confidences). Cabinet confidentiality cannot be claimed if it is knowingly given to an unauthorized person (see Babcock at paragraph 45-47 and Canada (Privy Council) v. Pelletier, 2005 FCA 118 at paragraphs 25-26).

The Clerk of the Privy Council is responsible for policies on the administration of Confidences of the Queen’s Privy Council for Canada and for the ultimate determination of what constitutes such confidences, and must be consulted in a manner consistent with the guidance set out in this chapter.

13.4.2 Meaning of "Council"

Subsection 69(2) of the Act states that "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet. Committees of Cabinet include standing committees, ad hoc committees and any other committee of ministers. In addition, meetings or discussions between ministers can result in the creation of records that are Cabinet confidences, providing that the discussions concern the making of government decisions or the formulation of government policy.

13.4.3 Types of documents

Cabinet confidences are defined in the Act by way of a list of seven types of documents in paragraphs 69(1)(a) through 69(1)(g). The list is not exhaustive but provides a series of examples of records that are considered Cabinet confidences. The seven types of records are described below.

(a) Memoranda

Paragraph 69(1)(a) of the Act excludes from the application of the Act records the purpose of which is to present proposals or recommendations to Cabinet. This group of records includes but is not restricted to documents entitled "Memorandum to Cabinet". For example, submissions to the Treasury Board of Canada are records that present proposals or recommendations to Cabinet. The determining features are the purpose for which a record was prepared and its contents, not the title of the document.

Generally, a memorandum presenting proposals to Cabinet will be signed by the minister recommending the action proposed. However, this is not always so. Memoranda may be signed by the Secretary to the

Cabinet or by a Secretary to a committee of Cabinet and still be a confidence.

Drafts of memoranda are also confidences. For instance, a draft memorandum that was created for the purpose of presenting proposals and recommendations to Cabinet but that was never actually presented to Cabinet remains a confidence. Equally, a memorandum in final form is a confidence even if it has not been presented to Cabinet.

A record that has been appended to a memorandum to Cabinet is not necessarily a confidence. The purpose of the record and where it is found are factors to consider when determining whether a record is a confidence, as explained in the following examples:

- A record was prepared to present recommendations or proposals to Cabinet and was appended to a memorandum to Cabinet. The original record and all copies, including the actual appendix to the memorandum, are Cabinet confidences.
- Newspaper clippings, tables of statistics and reports prepared for use within a department were appended to a memorandum to Cabinet. The originals of these records are not confidences since they were not prepared for the purpose of presenting recommendations or proposals to Cabinet. They do not become confidences simply because they are attached to a memorandum to Cabinet. However, the copies of these records appended to the memorandum are Cabinet confidences. In addition, the fact that the records were attached to a memorandum to Cabinet is in itself a Cabinet confidence and should not be revealed.

(b) Discussion papers

Paragraph 69(1)(b) of the Act excludes from the application of the Act discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Cabinet for consideration by Cabinet in making decisions. In 1984, the Cabinet Papers System was changed and discussion papers ceased to be produced. The discussion paper provisions were no longer applied to Cabinet papers produced after that date. In the case Canada (Minister of Environment) v. Canada (Information Commissioner), 2003 FCA 68 (often referred to as the Ethyl case), the Federal Court of Appeal concluded that those parts of memoranda to Cabinet, or records used to brief ministers, which are the equivalent of what used to be found in discussion papers (e.g., background explanations, analysis of problems, policy options), whether they are found within or appended to a document, must be identified and treated in the same manner as if they appeared in a discussion paper. As a result, those parts of a document forming an organized body or corpus of words which, when considered on its own, comes under the definition of a discussion paper and falls within the exception found in paragraph 69(3)(b) of the Act must be severed from the documents pursuant to section 25 of the Act and disclosed, subject to any applicable exemptions. (Additional information on paragraph 69(3)(b) is found in Section 13.4.4.)

Documents may also be mislabelled as discussion papers. When dealing with such documents, it is important to note that the title of the document is not determinative of the character of the document. For example, a document entitled “discussion paper,” but containing recommendations or proposals to be presented to Cabinet, is not a discussion paper for the purposes of section 69 of the Act, but rather a memorandum.

(c) Agenda and records of Cabinet deliberations or decisions

Paragraph 69(1)(c) of the Act excludes from the application of the Act agendas of Cabinet and records recording the deliberations or decisions of Cabinet. This type of record relates to Cabinet and Cabinet committees meetings and includes agendas, minutes and records of decisions (e.g. decision letters of the Treasury Board of Canada). It should be noted that these records include drafts of these documents and informal notes taken by officials during Cabinet or Cabinet committee meetings.

A distinction must be made between the text of the formal Record of Decision and the substance of the Cabinet decision. The formal text of the Record of Decision always remains a confidence and is excluded from the application of the Act for a period of twenty years. The substance of a decision reached by Cabinet may be disclosed to the public as deemed appropriate by Cabinet or by a minister with the approval of Cabinet. For example, the Treasury Board of Canada may wish to reflect its decision in circulars and manuals. Making the substance of the decision public makes any related discussion papers subject to the application of the Act pursuant to paragraph 69(3)(b), as explained in Section 13.4.4 below.

(d) Records of communications between ministers

Paragraph 69(1)(d) of the Act excludes from the application of the Act records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy.

Such a record may take the form of a letter from one minister to another setting out the minister’s opinions or decisions. Also, a record that contains notes taken during informal discussions between

ministers would be excluded from the application of the Act as would any record prepared for the use of the minister in discussion with another minister or ministers.

Records of communications between ministers that were not used for or do not reflect discussions relating to the making of government decisions or the formulation of government policy do not fall under this category.

(e) Records to brief ministers

Paragraph 69(1)(e) of the Act excludes from the application of the Act records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Cabinet. This paragraph also excludes records the purpose of which is to brief ministers in relation to matters that are the subject of communications or discussions between ministers concerning the making of government decisions or the formulation of government policy.

Care must be taken to distinguish these records from those described in paragraph 21(1)(a) of the Act concerning advice or recommendations developed by or for a government institution or a minister of the Crown. Policy recommendations can appear in a record created independently of the Cabinet process or in a record not prepared for the purpose of briefing a minister in relation to matters before Cabinet or for use in a discussion with other ministers.

The purpose of creating a record and its use are factors to consider in determining whether the record is excluded pursuant to paragraph 69(1)(e). For example, a formal Record of Decision directs a government department to develop policy recommendations for its minister on a particular subject. Departmental officials attend meetings for which

agendas are prepared, notes are made of the proceedings and reports are developed to be the basis of subsequent discussions on the same subject. Although the ultimate purpose of the meetings and reports is to develop policy recommendations for the minister's use in his or her presentation to Cabinet, the records themselves are not confidences. In this instance, the records were created for the use of officials while developing policy, not for the minister's use, and they are subject to the Act. However, if any of the information in these records provides a link to Cabinet, that information is excluded under paragraph 69(1)(g) of the Act. In the same view, the end product – the record used by the minister to make a presentation to Cabinet – is a Cabinet confidence.

(f) Draft legislation

Paragraph 69(1)(f) of the Act excludes draft legislation from the application of the Act. This provision relates to any drafts of legislation proposed by the Government. It is not relevant whether the legislation was ever introduced into the House of Commons or the Senate or indeed seen by Cabinet, it still remains a Cabinet confidence.

Draft legislation includes draft Bills, draft regulations and draft Orders-in-Council. Draft legislation remains a confidence even after the final version is introduced in the House of Commons or the Senate. In the decision Quinn v. Canada (Prime Minister), 2011 FC 379, the Federal Court concluded that draft regulations examined by the Clerk of the Privy Council Office are excluded from the Act as such an examination is part of the regulatory process. Draft regulations and draft Orders-in-Council remain confidences even after receiving approval by the Governor in Council and having been published.

(g) Records containing information about confidences

Paragraph 69(1)(g) of the Act excludes from the application of the Act records that contain information about the contents of any record specifically listed in paragraphs 69(1)(a) through 69(1)(f). This paragraph does not exclude from the application of the Act records that simply contain information that is also in a record listed in paragraphs 69(1)(a) through 69(1)(f). In order for the paragraph to apply, the record must connect the information provided with the collective decision-making and policy formulation processes of ministers.

For example, the fact that a record refers to certain statistics that are also found in a memorandum to Cabinet does not convert the first record into a confidence. However, if the first record refers to the fact that a memorandum to Cabinet contained the statistics, then that first record itself becomes a confidence. The most frequent example of this type of record is likely to be a document that refers to a Record of Decision.

Only portions of the record that contain Cabinet confidences are excluded from the Act. As a matter of policy, the principle of severability found in section 25 of the Act applies to portions of the record that are not confidences.

13.4.4 Time limits

The operation of subsection 69(1) is subject to certain time limits set out in subsection 69(3) of the Act.

Pursuant to paragraph 69(3)(a), a Cabinet confidence that has been in existence for more than 20 years cannot be excluded under subsection 69 (1) of the Act. After that time, the record becomes subject to the Act and may be released subject to any applicable exemptions.

Pursuant to paragraph 69(3)(b), discussion papers (as per the Ethyl decision, portions of a document equivalent to discussion papers) are no longer excluded from the application of the Act if the decisions to which they relate have been made public or, if the decisions have not been made public, four years have passed since the decisions were made. As a result, the Act will apply to these records, and unless an exemption applies, they will be disclosed in the event of a request under the Act. When no decision has been made, paragraph 69(3)(b) does not apply.

13.4.5 Procedures to be followed in the review of records subject to subsection 69(1)

Although the Act does not apply to Cabinet confidences, an individual's request for such a record must be answered. The response must make reference to section 69 of the Act and advise the requester of the right to complain to the Information Commissioner.

Review by departmental access officials and officials with expertise in the subject area

Once the relevant records have been identified as being responsive to the access request, either officials in the Access to Information and Privacy Office or officials with subject area expertise, or both, review the records. If they consider that records or portions of records contain confidences, they should indicate which records or portion of records are involved and which paragraph under section 69 applies. For example, if a portion of a record reveals that the contents record decisions of Council, the officer should flag that portion with the following notation: SEVER – 69(1)(g) re 69(1)(c).

Consultations required

a) Consultations with legal services

Access to Information and Privacy (ATIP) offices within government institutions are required to consult with their legal services in all instances where information that may qualify as a Cabinet confidence has been identified in response to a request under the Act.

Once the initial review process by the government institution has been completed, all records that may be confidences or that may contain portions revealing the contents of confidences must be sent to legal services for review. When sending the records to legal services, an explanation should be given by the ATIP (Access to Information and Privacy) office indicating why the record or portion of the record should be excluded under section 69. This is particularly important for documents falling outside the formal Cabinet Papers System, but subject to paragraph 69(1)(g) (for example, overhead slides prepared for presentations to Cabinet, without reference to the presentation appearing on the paper copies of the slides).

All documents are returned to ATIP (Access to Information and Privacy) offices after the review is done. If further questions arise at a later date, the documents will have to be sent back to legal services.

Legal services, in their role as legal advisor, will advise their clients whether, in their opinion, the Act's Cabinet confidence exclusion is applicable. Legal services are also required to keep a list of all documents to which they have recommended that the Cabinet confidence exclusion should apply. Legal services which form part of the Department of Justice must render this list accessible to both, the Office of the Council to the Clerk of the Privy Council Office and the Centre for Information and Privacy Law at the Department of Justice Headquarters, upon request.

b) Consultations with the Center for Information and Privacy Law at the Department of Justice (CIPL) and with the Privy Council Office – For legal services

which form part of the Department of Justice

If there is any doubt as to whether a record is a Cabinet confidence in cases involving complex fact situations or when there is a disagreement between legal services and the ATIP (Access to Information and Privacy) Office about the nature of the information, Justice legal counsel must first consult CIPL at the Department of Justice Headquarters. If the matter cannot be resolved following this consultation, legal counsel of the CIPL must consult with the Office of the Counsel to the Clerk of the Privy Council Office.

In addition, consultations with the Privy Council Office are mandatory if documents contain discussion papers, as per the Ethyl decision described in Section 13.4.3 (b). Departmental legal services which form part of the Department of Justice must first consult with CIPL at the Department of Justice Headquarters.

Legal services which do not form part of the Department of Justice should consult the Privy Council Office for advice when needed.

Review and consultation for discussion papers

Before consulting their legal services and if they have concluded that there is, within or appended to a Cabinet document, the equivalent of a discussion paper ("corpus of words"), the purpose of which was to present background explanations, analyses of problems or policy options to Council for considerations by Council in making decisions (see paragraph 69(1)(b)), ATIP (Access to Information and Privacy) offices must follow these steps:

1. If the discussion paper contains recommendations or references to other confidences (e.g., records of decision or draft legislation), bring this to the attention of legal counsel.

2. If a discussion paper is found within or appended to a memorandum to Cabinet or a record used to brief ministers, check to see if a decision has been made by Cabinet in relation to that Cabinet document by verifying the related record of decision.
3. Confirm that the decision relates to the discussion paper in question (you may have to consult several records of decision) and refer to the relevant record of decision.
4. If a decision has been made, determine if subparagraphs 69(3)(b)(i) or 69(3)(b)(ii) apply and if it applies to all of the matters presented to Council in the discussion paper or only to some of them.
    a. Subparagraph 69(3)(b)(i): Decision has been made public.
        i. Check to see if the decision has been made public; for example:
            - Did the Minister make an announcement in the House of Commons? (Check Hansard.)
            - Is there a news release that provides evidence of the decision having been made public?
        ii. Provide a copy of the news release or any other material that provides evidence of the decision having been made public.
    b. Subparagraph 69(3)(b)(ii): Decision was made more than four years ago.
        i. Check to see if four years have passed since the decision was made (not four years since the date of the discussion paper).

Upon being consulted by their clients, legal counsel must:

1. Consider whether the records selected are discussion papers subject to paragraph 69(3)(*b*), and whether they meet the criteria of subparagraphs 69(3)(b)(i) or 69(3)(b)(ii);

2. Apply severance where required;
3. Seek confirmation from the Office of the Counsel to the Clerk of the Privy Council whether or not such records constitute discussion papers, providing the information and documentation as per above, as well as any severance proposed; and
4. Inform their clients of the result of their consultation with the Privy Council Office.

Upon being informed of the result of the consultation with the Privy Council Office, ATIP (Access to Information and Privacy) offices must:

a. Exclude the record if paragraph 69(1)(b) applies and the criteria set out in subparagraphs 69(3)(b)(i) or 69(3)(b)(ii) have not been met; or
b. If the criteria set out in subparagraphs 69(3)(b)(i) or 69(3)(b)(ii) have been met, check to see if any exemption provisions apply to the record or to the portions of the record that are not a confidence.

Severance

Whenever possible and after consulting with institutional legal counsel, the principle of severability should be adopted for documents that fall under paragraph 69(1)(g). If the reference to a confidence can reasonably be severed from the record in which it is found, this should be done to allow the rest of the document to become subject to the Act. The Act does not provide for severing of information from records that fall under paragraph 69(1)(g), but such a practice is require as a matter of government policy.

No discretionary power

There is no discretionary power provided to an individual minister or government institution to make a Cabinet confidence accessible to the public.

13.4.6 Investigation of a complaint

In the event that a requester complains about the refusal of access to records, an investigator for the Office of the Information Commissioner of Canada may ask to see all records to which the applicant was refused access. The investigator cannot, however, have access to the records or portions of records for which an exclusion under subsection 69(1) was claimed. In 2011, the Office of the Information Commissioner argued before the Federal Court of Appeal that it had a right, during an investigation, to review Cabinet confidences excluded by section 69, unless a certificate under section 39 of the Canada Evidence Act is issued. [13-2] The Federal Court of Appeal dismissed that argument. [13-3] Only records from which Cabinet confidences have already been severed can thus be made available to the Office of the Information Commissioner. The Office of the Information Commissioner may, however, request confirmation that records or parts of records are Cabinet confidences.

When a government institution receives a request for confirmation from the Information Commissioner, it must refer the request immediately to the ATIP Coordinator of the institution, who will consult legal services to prepare the response. If there is any doubt concerning the preparation of the response, legal services may consult with the Office of the Counsel to the Clerk of the Privy Council or, for departmental legal services which form part of the Department of Justice, with the Center for Information and Privacy Law at the Department of Justice headquarters.

The ATIP Coordinator must prepare and sign a confirmation letter using the model letter in Section 13.4.7, attaching a list that describes the contents of the records as indicated in the model list found in Section 13.4.8. The confirmation letter must be sent within the time frame set in the Information Commissioner's request. If more time is needed, the ATIP Coordinator should seek an extension from the Information Commissioner's office.

A copy of the signed confirmation letter must be sent to legal services, at the same time as the letter is sent to the Information Commissioner.

13.4.7 Letter of confirmation

Our file: [insert file number]

[insert date]

The Information Commissioner of Canada
30 Victoria Street
Gatineau, Québec K1A 1H3

Dear [insert salutation]:

On [insert date of notice of complaint], [insert name of institution] was notified that a complaint concerning the application of section 69 of the Access to Information Act (the Act) had been filed in respect of access request [insert request number]. I confirm that the document(s) or portion(s) thereof that is (are) the subject of access request [insert request number] and is (are) described in the attached list is a (are) confidence(s) of the Queen's Privy Council within the meaning of subsection 69(1) of the Act.

The attached list provides a detailed description of the document(s), without divulging confidences of the Queen's Privy Council, and sets out our conclusion(s) for the document (each of the documents).

Sincerely,

[insert Coordinator's name and title]

Enclosures

c.c. Institutional Legal Counsel

13.4.8 Model list prepared by the institution to be attached to the letter of confirmation

List of Documents Attached to
Letter from [insert Coordinator's name]
Dated [insert date of letter]
File [insert file number]

Document #	Description and Conclusion
1. (pp. 22 – 240)	Submission the purpose of which is to present proposals and recommendations to Council To: Treasury Board From: The Minister of Public Safety Date: January 17, 2013 Conclusion: Exclude ◦ Pages 22 to 240 entirely 69(1)(a)

Document #	Description and Conclusion
2. (pp. 1-30)	Memorandum containing information the purpose of which is to present proposals and recommendations to Council To: Cabinet From: The Minister of Justice Date: February 15, 2013 Conclusion: Sever ◦ Page 1 to 25 entirely 69(1)(a)
3. (pp. 20-21)	E-mail containing information about the contents of proposals and recommendations to Council To: Director, Policy Sector From: Deputy Director, Policy Sector Re: Executive Summary Date: March 23, 2013 Conclusion: Sever ◦ Page 20, paragraph 4, 1st sentence entirely 69(1)(g) re (a) ◦ Page 21 entirely 69(1)(g) re (a)
4. (pp. 589)	Treasury Board letter recording a decision of Council To: The Deputy Minister of Industry From: The Secretary of the Treasury Board Date: April 29, 2013 Conclusion: Exclude ◦ Page 589 entirely 69(1)(c)
5. (pp. 291-293)	Handwritten notes containing information about the contents of an agenda of Council From: The Deputy Secretary to Cabinet Date: May 4, 2013 Conclusion: Sever ◦ Pages 293 entirely 69(1)(g) re (c)

Document #	Description and Conclusion
6. (pp. 12-21)	Letter reflecting communications between ministers of the Crown on a matter relating to the making of government decisions To: The Minister of Industry From: The President of the Treasury Board Date: June 15, 2013 Conclusion: Exclude ◦ Pages 12 to 21 entirely 69(1)(d)
7. (pp. 21-25)	Memorandum containing information about the contents of a letter reflecting communications between ministers of the Crown on a matter relating to the making of government decisions To: The Clerk of the Privy Council From: The Deputy Minister, Natural Resources Re: Green Project Date: July 15, 2013 Conclusion: Sever ◦ Page 22, paragraph 3, 4th and 5th sentences entirely 69(1)(g) re (d)
8. (pp. 213-216)	Briefing note and attachments the purpose of which is to brief ministers of the Crown in relation to matters that are proposed to be brought before Council To: The Minister of Justice From: The Deputy Minister of Justice Date: August 6, 2013 Conclusion: Exclude ◦ Pages 213 to 216 entirely 69(1)(e)

Document #	Description and Conclusion
9. (pp. 1-2)	E-mail containing information about the contents of a record the purpose of which is to brief Ministers of the Crown in relations to matters that are the subject of communications between ministers on the formulation of government policy To: The Deputy Director, Policy Sector From: Senior Analyst, Policy Sector Re: Green Project Date: September 10, 2013 Conclusion: Sever ◦ Page 1, Subject and 1st bullet entirely 69(1)(g) re (e)
10. (pp. 1 – 27)	Draft Bill (or draft regulation) Date: October 10, 2013 Conclusion: Exclude ◦ Pages 1 to 27 entirely 69(1)(f)
11. (pp. 721-728)	Memorandum containing information about the contents of draft legislation To: The Prime Minister From: The Clerk of the Privy Council Date: November 30, 2013 Conclusion: Exclude ◦ Pages 721 to 728 entirely 69(1)(g) re (f)
12. (pp. 126-153)	Letter and attachment To: The Minister From: The Deputy Minister Date: December 30, 2013 Conclusion: Not a Confidence

13.4.9 Review by the Federal Court

Once the Information Commissioner has completed his or her investigation and issued his or her report in respect of a complaint relating to the application of section 69 of the Act, either the requester or the Information Commissioner, with the consent of the requester, may apply to the Federal Court for a review of the decision to exclude the record in question. Both the Federal Court and the Federal Court of Appeal have agreed in separate judgments that decisions to exclude records requested under the Act based on section 69 could be judicially reviewed and that the proper standard of review was the correctness standard. [13-4] In both instances, however, the Courts concluded that to conduct a judicial review, they cannot have access to the documents that are the object of the dispute and that the government institution claims are Cabinet confidences. The Court stated that it could, however, use extrinsic evidence to determine if section 69 of the Act had been correctly applied.

Also, in Quinn v. Canada (Prime Minister), the Federal Court held that the authority to refuse the disclosure of a Cabinet confidence requested under the Act flows directly from the requirements of the Act. The Court also held that there is no need for a separate certification process under section 39 of the Canada Evidence Act in proceedings where the application of section 69 of the Act is challenged. [13-5]

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13.5 Section 69.1 of the Act – Certificate under the Canada Evidence Act

Subsection 69.1(1) of the Act excludes from the application of the Act information in records that are the object of a certificate under section 38.13 of the Canada Evidence Act when the certificate is issued before a complaint is filed with the Office of the Information Commissioner.

Section 38.13 of the Canada Evidence Act authorizes the Attorney General of Canada to issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting:

- information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the Security of Information Act; or
- national defence or national security.

If a complaint was filed prior to the issuance of a certificate under section 38.13 of the Canada Evidence Act, subsection 69.1(2) provides that all proceedings under the Act in respect of the complaint, including an investigation, appeal or judicial review, are discontinued. It also prohibits the Information Commissioner from disclosing the information; requires the Information Commissioner to take all necessary precautions to prevent its disclosure; and requires the Information Commissioner to return the information to the institution within 10 days after the certificate is published in the Canada Gazette.

It is recommended that institutions consult their legal counsel in all situations involving the issuance of a certificate under section 38.13 of the Canada Evidence Act.

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Chapter 14 – Investigations and Reviews

Date updated (full chapter): 2023-04-18

The *Access to Information Act* (the Act) provides for a two-stage system of review of decisions made by the head of a government institution.

The first review stage is a complaint to the Information Commissioner of Canada, an agent of Parliament who reports directly to the House of Commons and the Senate. The Information Commissioner investigates complaints submitted by individuals or organizations that believe federal institutions have not respected their rights under the Act, as defined in section 30 of the Act. Under Part 1 of the Act, the Information Commissioner has the power to make binding orders to government institutions following an investigation of complaints. The Information Commissioner may also initiate complaint investigations but is not authorized to make orders in response to these investigations.

The Information Commissioner reports to Parliament on the activities of the Office of the Information Commissioner of Canada after each financial year and may make special reports to Parliament referring to and commenting on any matter within the scope of the powers, duties and functions of the Commissioner, which includes reports to parliament on investigations and orders.

The second review stage is an application to the Federal Court of Canada for a review of the matter that is the subject of the complaint.

14.1 Complaints to the Information Commissioner (sections 30 to 40)

Subsection 30(1) of the Act provides that the following matters may be the subject of a complaint to the Information Commissioner:

- refusal of access to a record, or a part thereof, requested under Part 1 of the Act;
- unreasonableness of the application fee charged under section 11
- unreasonableness of the extension of time limits under section 9 for responding to a request

- failure to provide access or inappropriateness of the length of time taken to provide access to a record or a part thereof in the official language preferred by the requester under subsection 12(2)
- failure to provide access or inappropriateness of the length of time taken to provide access to a record or a part thereof in an alternative format under subsection 12(3)
- any publications or bulletins referred to in section 5
- any other matter related to requesting or obtaining access to records under Part 1 of the Act.

Complaints regarding any of these matters may be brought by a requester or their authorized representative. Complaints regarding a publication or bulletin mentioned in section 5 of the Act (for example, Information about programs and information holdings) or any other matter related to requesting or obtaining access to records under the Act may be brought by any person regardless of whether a request for access has been made under the Act. Institutions can attempt to reach a resolution with the individual both before and after a formal complaint has been submitted. If an attempt is made after a complaint is submitted, the institution should inform the Office of the Information Commissioner.

Under section 31 of the Act, a complaint to the Information Commissioner must be made in writing, unless the Commissioner authorizes otherwise.

The Information Commissioner may also initiate, under subsection 30(3) of the act, a complaint into any matter related to requesting or obtaining access to records under Part 1 of the Act if they are satisfied that there are reasonable grounds for doing so. This means that the Information Commissioner is free to act without a complaint being submitted by a requester if the Commissioner has

reasonable grounds to believe that an investigation should be carried out. However, the Information Commissioner is not authorized to make an order after investigating a complaint that they initiate under subsection 30(3).

14.1.1 Notification to requester

The Act requires the head of a government institution to notify a requester about their right to make a complaint to the Information Commissioner in two circumstances:

- the time limits are extended under subsection 9(1)
- access is refused under subsection 10(1)

In addition, the *Directive on Access to Information Requests* requires institutions to notify requesters of their right to make a complaint in respect of matters relating to requesting and obtaining access to records under Part 1 of the act. The *Directive on Access to Information Requests* requires that notification of the right to complain is provided when:

- acknowledging requests (4.1.7.5)
- notifying requester of time limit extensions (4.1.26)
- notifying requesters whether access is being granted (4.1.40)

14.1.2 Timeline for filing a complaint relating to access to a record

The time frame for filing a complaint relating to access to a record is set out in section 31 of the act. The complaint must be made within 60 days after the day the requester "receives a notice of a refusal under section 7, is given access to all or part of the record or, in any other case, becomes aware that grounds for the complaint exist."

14.1.3 Admissibility of a complaint

The Information Commissioner has the authority to determine, on a case-by-case basis, whether a complaint meets the conditions stipulated in section 30 and section 31 of the act and is therefore admissible.

If institutions are unsure if the complaint is admissible, the following factors, among others, should be considered when calculate the 60-day time period:

- Subsection 27(2) of the *Interpretation Act* states, "Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating that number of days the day on which the first event happens is excluded and the day on which the second event happens is included." Therefore, day 1 of the 60-day time period to complain is the day after the requester receives the notice, is given access, or becomes aware that grounds exist.
- In many situations, it will be difficult to ascertain with precision when the requester became aware of a ground for complaint. Factors to consider may be the timing of communications to the requester and when the requester could reasonably be expected to have become aware of grounds for a complaint.

14.1.4 Information Commissioner may refuse to investigate or cease to investigate a complaint

The Information Commissioner may refuse or cease to investigate a complaint when, in their opinion, the complaint is trivial, vexatious or is made in bad faith, or when an investigation or further investigation is unnecessary. Paragraph 30(4)(b) of the Act includes that investigations may be considered unnecessary in various circumstances, including when the subject of the complaint has already been investigated. In this situation the Information Commissioner is required, or may be required, to provide notice of their refusal to investigate or the

cessation of an investigation to the complainant, the head of the government institution, any third parties, and the Privacy Commissioner. The specific requirements to notify are stipulated in subsection 30(5) of the act.

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14.2 Investigations

14.2.1 Procedures

Section 34 of the act gives the Information Commissioner broad discretion to determine the procedure to be followed in the performance of any of their duties or functions under Part 1 of the act. The Act imposes the following procedural requirements on the Information Commissioner when receiving and investigating a complaint:

- give notice to the head of the government institution concerned of the Information Commissioner's intention to carry out an investigation and the substance of the complaint (section 32)
- conduct investigations in private (subsection 35(1) and sections 61 to 65)
- provide the affected parties with a reasonable opportunity to make representations (subsection 35(2))
- notify third parties when the Information Commissioner intends to order the disclosure of a record which may contain information as described in section 36.3(1)
- make a report at the conclusion of an investigation (section 37)

Section 35 and section 37 of the Act are discussed in greater detail below.

Notice of intention to investigate

Section 32 of the Act requires that before commencing an investigation of a complaint under this act, the Information Commissioner shall notify the head of the government institution concerned of the intention to carry out the investigation and shall inform the head of the institution of the substance of the complaint. In practice, notice is given generally to the head of the institution's delegate.

Investigations in private

Under section 35 of the act, all investigations by the Information Commissioner must be conducted in private and no party is entitled to be present during, to have access to, or to comment on representations made by another party involved in a complaint. The private and confidential nature of investigations encourages complainants, witnesses and government institutions to participate in investigations and is an important part of the statutory scheme.

In *Blank v. Canada (Minister of Justice)*, 2005 FCA 405, the Federal Court of Appeal stated that the equivalent obligation of confidentiality imposed on the Information Commissioner encourages government institutions to provide full disclosure in the course of an investigation by the Information Commissioner. However, section 35 of the act does not preclude a government institution from making exchanges with the Information Commissioner public should it wish to do so. The institution may file material in court, which implies that the material will be public, or it may choose to file confidentially, either in whole or in part.

Confidentiality orders

Section 35 of the act, which specifies that complaint investigations are undertaken in private, gives the Information Commissioner discretion to issue confidentiality orders to witnesses during the investigation of a

complaint. In practice, this can include requiring that testimony and evidence provided during the complaint investigation be kept confidential. However, confidentiality orders may not be overly broad and must impair the witnesses' freedom of expression as little as possible.

In the decision *Canada (Attorney General) v. Canada (Information Commissioner)*, 2004 FC 431, the Federal Court concluded that the Information Commissioner does have the authority to issue confidentiality orders, but noted:

> "any blanket regime which precludes a person from communicating **for all time any** information touching upon their testimony and appearance before the Commissioner would infringe that person's right to free expression guaranteed by subsection 2(b) of the Charter in a fashion that could not be justified under section 1."

The Federal Court also stated the following:

> "To the extent confidentiality orders restricted communication in circumstances where there was no reasonable concern that such communication would impair the investigation or would result in the improper disclosure of confidential information, the orders were, in my view, an impermissible restriction on the witnesses' freedom of expression."

In the decision *Canada (Attorney General) v. Canada (Information Commissioner of Canada)*, 2007 FC 1024, affirmed 2008 FCA 321, the Federal Court examined the appropriateness of confidentiality orders issued by the Office of the Information Commissioner of Canada to

witnesses and counsel representing witnesses. The first set of orders directed witnesses not to disclose the questions asked, answers given and exhibits used by the witness "until the taking of evidence by the Deputy Information Commissioner from other employees of Indian and Northern Affairs Canada is complete, except to his/her counsel." The second set of orders directed counsel for these witnesses not to disclose "the questions asked, answers given and exhibits used…during [the witness] testimony…except on the lawful instruction of [the witness]." The Federal Court dismissed the application for judicial review, stating that the confidentiality orders went no further than required to:

1. enhance the truth finding function of the Commissioner's investigation, which investigation is conducted in furtherance of the quasi-constitutional right of access
2. maintain the integrity of the investigation
3. ensure that a witness's testimony would not be tainted by knowledge of the evidence given by another witness
4. maintain the *ex parte* nature of the investigation, which investigation has to be independent of government pursuant to Parliament's specific intent prescribed in the act
5. address the uniqueness of the multiple representations by counsel from the Department of Justice
6. maintain the private nature of the investigation and ensure the protection of any specific confidential information

Opportunity to make representations

Subsection 35(2) of the act states that government institutions will be given a reasonable opportunity to make representations to the Information Commissioner in the course of an investigation, as will the person who lodged the complaint and, where applicable, the Privacy

Commissioner and any third party who is involved in the complaint action. The authority to make formal representations under section 35(2) can be delegated to employees of the institution, or employees of another institution if a service-sharing agreement is in place. It is important that all representations are made during the investigative process, as further representations are not possible following the Initial Report. Heads of institutions or their delegates should inform the appropriate officials, including leadership, of their right to make representations as early as possible during the investigative process. Representations are gathered during the investigation using forms and processes determined by the Information Commissioner and their representatives.

Third-party representation and notification procedures relating to an investigation by the Information Commissioner are discussed in detail in Chapter 12 of this manual. This includes the specific conditions where third parties are notified of a complaint investigation and provided a reasonable opportunity to make representations to the Information Commissioner.

Security and confidentiality requirements

Section 61 of the act provides that the Information Commissioner and persons acting on their behalf who receive or obtain information relating to an investigation must, with respect to that information, satisfy the security requirements and take any oath of secrecy required of persons who normally have access to that information.

Section 62 of the act prohibits the Information Commissioner and those acting on their behalf from disclosing any information that comes to their knowledge in the performance of their duties. In addition, pursuant to section 64 of the act, they must take every reasonable

precaution to avoid the disclosure of, and shall not disclose, information that the head of a government institution would be authorized to refuse to disclose, or any information as to whether a record exists where the head of a government institution has not indicated whether it exists.

However, section 63 of the Act provides that the Information Commissioner may disclose, or may authorize any person acting on their behalf to disclose, information:

- that, in the opinion of the Commissioner, is necessary to carry out an investigation under Part 1 of the Act
- that, in the opinion of the Commissioner, is necessary to establish the grounds for findings and recommendations contained in any report under Part 1 of the Act
- in the course of a prosecution for an offence under the act, a prosecution for an offence under section 131 of the *Criminal Code* (perjury) in respect of a statement made under Part 1 of the Act, a review before the Court under Part 1 of the Act, or an appeal therefrom

Section 65 of the Act provides that the Information Commissioner and those acting on their behalf are not competent or compellable witnesses in respect of a matter coming to their knowledge as a result of performing duties or functions under Part 1 of the Act, except in cases of prosecutions for offences under Part 1 of the Act or for perjury, and except with respect to judicial review proceedings in Federal Court under Part 1 of the Act, and appeals resulting from these reviews.

14.2.2 Powers of the Information Commissioner

Subsection 36(1) of the act provides that the Information Commissioner has the following powers when carrying out investigations:

- summoning persons and compelling them to give evidence
- compelling the production of documents
- administering oaths
- receiving evidence
- entering premises occupied by the government institution
- conversing in private with any person in such premises
- examining or obtaining copies of any records related to an investigation

Subsection 36(1.1) of the Act provides that the Information Commissioner may, during the investigation of any complaint under Part 1 of the act, consult the Privacy Commissioner and may, in the course of the consultation, disclose to them personal information.

Employees of a government institution or any other persons must not impede an investigation by the Information Commissioner. Section 67 of the Act provides that obstruction of the Commissioner or their delegates in the performance of duties and functions under Part 1 of the Act is an offence and subject, upon summary conviction, to a fine not to exceed $1,000. For further information on the consequences of obstruction of the Information Commissioner, please see Chapter 15 of this manual.

14.2.3 Access to records

Under subsection 36(2) of the Act, government institutions must provide to the Information Commissioner for examination any record requested by the Commissioner to which Part 1 of the Act applies that is under the control of the government institution. The Information Commissioner's access to records subject to solicitor-client privilege or the professional secrecy of advocates and notaries, excluded records, and records held in a minister's office is discussed below.

Records subject to solicitor-client privilege or the professional secrecy of advocates and notaries

To preserve solicitor-client privilege and the professional secrecy of advocates and notaries, legal advice that is not in itself the subject of the request would not normally be included with the information provided to the Information Commissioner for examination. In the decision *Canada (Attorney General) v. Canada (Information Commissioner)*, 2005 FCA 199, the Federal Court of Appeal ruled that legal advice prepared to advise a government institution on how it should respond to a request for access to information cannot be examined by the Information Commissioner unless the examination is absolutely necessary for the Commissioner to complete their investigation. In the Court's view, Parliament did not intend that a government institution be without the benefit of legal advice, provided in confidence, in deciding how to properly respond to an information request. The Court held that subsection 36(2) of the Act must be interpreted restrictively in order to allow access to privileged information only where absolutely necessary to the statutory power exercised.

On rare occasions, the Information Commissioner, or persons working on behalf or under the direction of the Commissioner (usually an investigator), may request to examine such legal advice. Before providing this information to the Information Commissioner, it is essential that the institution's legal advisors be consulted to determine if the Commissioner's request falls within the "absolutely necessary" test set out by the Federal Court of Appeal in the above-mentioned decision and, if it does, to take measures to prevent the disclosure to the Commissioner from resulting in a waiver of solicitor-client privilege.

Subsection 36(2.1) of the Act states that the Information Commissioner may examine a record that contains information that is subject to solicitor-client privilege, or the professional secrecy of advocates and notaries, or to litigation privilege, only if the institution refuses to disclose the record under section 23. Furthermore, subsection 36(2.2) states that the disclosure by an institution to the Commissioner of such a record does not constitute a waiver of those privileges or that professional secrecy.

Records excluded under section 68.1 and 68.2

The decision *Canadian Broadcasting Corporation v. Canada (Information Commissioner)*, 2011 FCA 326, clarified the issue of access by the Office of the Information Commissioner of Canada to records excluded by section 68.1 of the Act. The Court recognized that section 68.1 of the Act gives the power to the Information Commissioner to compel all records excluded by the Canadian Broadcasting Corporation under this section, except those where on the face of the request the exception to the exclusion cannot reasonably apply.

The *Access to Information Act* also does not apply to information under the control of Atomic Energy of Canada Limited, other than information that relates to its general administration or its operation of a nuclear facility (section 68.2 of the Act) and information subject to a certificate under section 38.13 of the *Canada Evidence Act* (section 69.1 of the *Access to Information Act*).

Records excluded under subsection 69(1)

The question of whether the Information Commissioner can review records to which access has been refused on the basis of section 69 of the Act has never been directly judicially considered. In 2011, however, the Information Commissioner argued, in the Canadian Broadcasting

Corporation case cited above, that she had a right to review all excluded records, including Cabinet confidences, unless a certificate under section 39 of the *Canada Evidence Act* was issued. The Federal Court of Appeal rejected that argument, stating that because the *Access to Information Act*'s right to access to information did not apply to Cabinet confidences, there was no need to rely on section 39 of the *Canada Evidence Act* in the context of the *Access to Information Act*.

Records in a minister's office

In the decision *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 (commonly known as the Prime Minister's Agenda Case), the Supreme Court of Canada clarified the notion of control for records held in a minister's office. This decision also applies to the *Privacy Act*. The Supreme Court of Canada confirmed that the office of a minister is not part of the department over which the minister presides and that records held exclusively in a minister's office are generally not subject to the Act. However, a document held exclusively in a minister's office could be deemed to be under the control of a government institution if the following two-step test is satisfied:

- Do the contents of the record relate to a departmental matter?
- If so, could a senior official of the government institution reasonably expect to obtain a copy of the record upon request?

The factors to be considered are:

- the substantive content of the record
- the circumstances in which it was created
- the legal relationship between the government institution and the record holder

The Supreme Court of Canada stressed that:

- “there is no presumption of inaccessibility for records in a minister’s office”
- the “test does not lead to the wholesale hiding of records in ministerial offices”

The Information Commissioner does not have the power to enter a minister’s office. However, if the two-step test is met, then the Commissioner’s powers under section 36 of the Act apply. The Information Commissioner does have significant powers of investigation for those records that fall under the control of the institution pursuant to the two-step test set out above. Those powers include the authority to:

- summon the appearance of witnesses, including ministers and exempt staff
- compel those persons to give evidence under oath
- compel them to produce such documents and things as the Information Commissioner deems requisite to the full investigation of the complaint

The Office of the Information Commissioner of Canada may, in the course of an investigation, ask to see the records in a minister’s office to determine whether the records are under the control of the government institution. Should an Access to Information and Privacy (ATIP) Office receive such a request, it should advise the Office of the Information Commissioner of Canada to communicate directly with the minister’s office.

14.2.4 Use of evidence in other proceedings

Under subsection 36(3) of the Act, evidence given by a person in proceedings under Part 1 of the Act and evidence of the existence of the proceedings is not admissible as evidence against that person in a

court or any other proceeding except in a prosecution for an offence under section 131 of the *Criminal Code*section 131 of the *Criminal Code* (perjury) in respect of a statement made under Part 1 of the Act, in a prosecution for an offence under section 67 of the act, in a review before the Federal Court under Part 1 of the Act, or in an appeal resulting from such review.

14.2.5 Return of documents

Under subsection 36(5) of the act, the Information Commissioner has 10 days in which to return any documents produced by a government institution for examination, if the institution requests their return. The Commissioner can, however, compel the production of any document again if it is deemed necessary to an investigation.

In Canada (Attorney General) v. Canada (Information Commissioner), 2004 FC 431 (rev'd 2005 FCA 199 on other grounds), the Federal Court confirmed that this provision did not preclude the Office of the Information Commissioner from making copies of the documents it obtained during its investigation. Furthermore, the obligation to return documents did not apply to copies made, but only to the actual versions produced to the Office of the Information Commissioner.

14.2.6 Specific cases: investigation of deemed refusals and extended time limits

Deemed refusals are discussed in detail in section 7.4 of this manual.

Before an application to the Federal Court may be made for a review under section 41, all deemed refusals must be investigated by the Information Commissioner and a report completed.

In the decision *Statham v. Canadian Broadcasting Corporation*, 2010 FCA 315, the Federal Court of Appeal examined the investigation by the Information Commissioner of 389 complaints of deemed refusal. The Federal Court of Appeal held the following:

- Regarding the issue of whether the Information Commissioner may limit their investigation to establishing a time frame in which a government institution is to respond to the access request, the Court found that the Commissioner was entitled in their discretion to limit their investigation. The court noted that the Act does not require the Information Commissioner to investigate and assess the institution's exemptions or exclusions before reporting that the government institution is in deemed refusal. Further investigation of exemptions and exclusions would be possible following the notification to the requester that access will or will not be granted.
- The Act confers no authority on the Information Commissioner to "cure" a deemed refusal of access by granting an extension of time to a government institution to respond to an access request. The discretion to determine the procedure to be followed in an investigation is a distinct and separate issue from the powers granted to the Information Commissioner when investigating a complaint. Neither section 36 of the Act nor any other provision of the Act confers power on the Commissioner to extend the time frames set out in the Act. It is inconsistent with the role and mandate of the Commissioner to provide them with authority to grant to a government institution a binding extension of time for the purpose of responding to an access request.
- Where there is a complaint of a deemed refusal to provide access, the complainant may apply for judicial review within 30 business days after the day on which the head of the government institution

receives the Commissioner's Final Report made under subsection 37(2) of the Act. The relevance of the procedure chosen by the Information Commissioner is that in an application under section 41 of the Act, the Court cannot rule on the application of any exemption or exclusion claimed under the Act if the Commissioner has not investigated and reported on the claim to the exemption or exclusion.

The head of a government institution may extend the time limit if certain conditions set out in section 9 of the Act are met. In the decision *Canada (Office of the Information Commissioner) v. Canada (National Defence)*, 2015 FCA 56, the Federal Court of Appeal indicated that if the extension of time taken under this provision is considered unreasonable by the requester, the Federal Court has jurisdiction to review the length of the extension once a complaint has been made to the Information Commissioner and their investigation report has been completed.

The Federal Court of Appeal also stated the following:

> It is not enough for a government institution to simply assert the existence of a statutory justification for an extension and claim an extension time of its choice. An effort must be made to demonstrate the link between the justification advanced and the length of the extension taken. In the case of paragraph 9(1)(a), this will mean not only demonstrating that a large number of documents are involved, but that the work required to provide access within any materially lesser period of time than the one asserted would interfere with operations. The same type of rational linkage must be made pursuant to paragraph 9(1)(b) with respect to necessary consultations.

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14.3 The Information Commissioner's order-making power

The Information Commissioner has the power to make binding orders to government institutions following an investigation of complaints made on or after June 21, 2019, regarding:

- the release of records, or information therein (s. 30(1)(a))
- fees (s. 30(1)(b))
- time extensions (s. 30(1)(c))
- access in the official language requested (s. 30(1)(d))
- format of release for accessibility purposes (s. 30(1)(d.1))
- section 5 requirements to publish information about federal government institutions and information holdings (s. 30(1)(e))

Orders issued by the Information Commissioner will take effect on the 31st business day after the day on which the head of the government institution is deemed to have received the Commissioner's report made under subsection 37(2) of the Act (final report).

However, in cases where a third party or the Privacy Commissioner is also provided with the Information Commissioner's final report, there are an additional 10 business days before the order takes effect to provide these parties with the opportunity to exercise their right to seek a review by the Federal Court under subsection 41(3) or (4) of the act. A complainant can also seek a judicial review under subsection 41(1) of the Act within 30 business days after the head of the government institution is deemed to have received the Information Commissioner's final report.

A government institution that has reasons not to comply with an order should seek review by the Federal Court under subsection 41(2) of the Act within 30 business days after the day on which they receive the Commissioner's final report. The Act clarifies that, for the purposes of the timelines to seek review by the Federal Court, the head of the government institution is deemed to have received the report on the fifth business day after the date of the report (section 41(6)). The government institution will have the burden of demonstrating that the order should be set aside (that is, that the institution is authorized under the Act to refuse to disclose the information, or take the decision or action that is the subject of the proceeding).

Pursuant to subsection 36.1(2), the Information Commissioner is not authorized to make an order related to a self-initiated complaint (subsection 30(3)).

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14.4 Findings and recommendations

Findings and recommendations resulting from investigations by the Information Commissioner are communicated to government institutions through two reports.

Initial report

Subsection 37(1) of the Act provides that when the Information Commissioner has investigated a complaint made by an individual or organization and finds that it has merit and intends to make an order and/or recommendation, the Commissioner must report the findings of the investigation and any recommendations resulting from it to the head of the government institution concerned. The Information Commissioner must also include any order that they intend to make.

As per paragraph 37(1), the initial report also sets out the period within which the institution must give notice to the Commissioner of:

- any action taken, or proposed to be taken, to implement the recommendations or order made in the report, or
- if no action is to be taken by the institution, the reasons for the lack of action

Institutions are not able to make further representations to the Information Commissioner following the receipt of the initial report.

Notification to Treasury Board of Canada Secretariat

Per section 4.3.13 of the *Policy on Access to Information*, when an institution is notified through the initial report that the Information Commissioner is intending to make an order, the institution is required to notify the Treasury Board of Canada Secretariat (TBS). This notification can be provided to the of the Access to Information Policy and Performance Division at TBS.

Notifying TBS should not delay the institution's response to the Information Commissioner's initial report.

Final report

Subsection 37(2) of the Act requires that the Information Commissioner provide a final report that sets out the results of the investigation and any order or recommendation that they make to:

a. the complainant
b. the head of the implicated government institution
c. any third party that was entitled under paragraph 35(2)(c) to make and that made representations to the Information Commissioner in respect of the complaint

d. the Privacy Commissioner, if they were entitled under paragraph 35(2)(d) to make representations and they made representations to the Information Commissioner in respect of the complaint; however, no report is to be made under this subsection and no order is to be made until the expiry of the time within which the notice referred to in paragraph (1)(c) is to be given to the Information Commissioner

The Information Commissioner may include in the final report any comments that they see fit on the matter under consideration, as stipulated in subsection 37(3) of the act. In this report, the Information Commissioner must include:

a. a summary of any notice that they receive under paragraph 37(1)(c)
b. a statement that any person to whom the report is provided has the right to apply for a review under section 41, within the period specified for exercising that right, and that the person must comply with section 43 if they exercise that right
c. a statement that if no person applies for a review within the period specified for doing so, any order set out in the report takes effect in accordance with subsection 36.1(4)
d. a statement, if applicable, that the Information Commissioner will provide a third party or the Privacy Commissioner with the report

Under subsection 37(4) of the Act, if an institution notifies the Information Commissioner under paragraph 37(1)(c) that access to a record or a part of it will be given to a complainant, the institution must give the complainant access to the record:

a. on receiving the Information Commissioner's final report or within any period specified in the Commissioner's order, if only the complainant and the head of the institution are provided with the report, or

b. on the expiry of the 40th business day after the day on which the head of the government institution receives the Information Commissioner's final report or within any period specified in the Commissioner's order that begins on the expiry of that 40th business day, if a third party or the Privacy Commissioner are also provided with the report, unless a review is applied for under section 41

Similarly, if an institution notifies the Information Commissioner that it will implement remedial actions regarding any other matter of complaint (for example, fees, time extensions, language), those actions must be carried out in the time period specified in the Commissioner's order. When notifying the Information Commissioner that they will take remedial action, institutions should set out the specific actions to be taken and the dates they will be completed. Those dates should respect the timelines set out in the order, if any.

The Information Commissioner may publish the final report per section 37(3.1) following the expiry of the periods to apply for review by the Federal Court.

Under section 39 of the Act, the Information Commissioner can also report to Parliament when the head of a government institution does not comply with their recommendations, for example. This may be done either in an annual report or in a special report, when the Information Commissioner considers that the matter involved is of such urgency or importance that a report should not be deferred until the time provided for transmission of the next annual report of the Commissioner under section 38 of the Act.

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14.5 Review by the Federal Court (sections 41 to 53)

The Act clarifies that, for the purposes of the timelines to seek review by the Federal Court, the head of the government institution is deemed to have received the report on the fifth business day after the date of the report (section 41(6)). The complainant, the government institution, the Privacy Commissioner, or a third party may apply for a review by the Federal Court of a final report by the Information Commissioner as follows:

- **Complainants (subsection 41(1))**: A person who makes a complaint and receives a final report by the Information Commissioner (made under subsection 37(2)) may apply for a review by the Federal Court of the **matter that is the subject of their complaint** within 30 business days after the day on which the head of the government institutions receives the Commissioner's final report.
- **Government institutions (subsection 41(2)):** A government institution that receives the Information Commissioner's final report may, within 30 business days after the day on which they receive it, apply to the Federal Court for a review of **any matter that is the subject of an order** set out in the final report.
- **Third party (subsection 41(3)):** If neither the complainant nor the government institution apply for a review by the Federal Court within the allotted time, **a third party who receives the Information Commissioner's final report** may apply for a review by the Federal Court within 10 business days after the expiration of the 30-business-day period referred to in subsection 41(1).
- **Privacy Commissioner (subsection 41(4)):** If neither the complainant nor the government institution apply for a judicial review by the Federal Court within the allotted time, the Privacy

Commissioner, **if they receive the Information Commissioner's final report**, may apply for a review by the Federal Court within 10 business days after the expiration of the 30-business-day period referred to in subsection 41(1).

Reviews by the Federal Court are conducted *de novo*, meaning the response to the request or matter of the complaint is examined wholly anew. However, Federal Court has ruled that a requester cannot seek review by the Federal Court before the Office of the Information Commissioner of Canada (OIC) issues its report on the relevant subject matter. Although the wording of section 41 of the Act has since changed, the report of the OIC is a prerequisite to an application for review by the Federal Court.

14.5.1 Notification of application to the Federal Court

If a government institution makes an application to the Federal Court under section 41 of the Act, the head of a government institution must, under subsection 43(2) of the Act, immediately serve a copy of the originating document on the persons who are entitled to be provided a final report under subsection 37(2) and on the Information Commissioner.

If it is the complainant, third party or the Privacy Commissioner who makes an application for a review under section 41, they must immediately serve a copy of the originating document on the head of the government institution who received the final report under subsection 37(2). The head of the government institution served with a copy of the originating document must also give written notice of the application to those persons and to the Information Commissioner unless any of those persons or the Commissioner has already been served with a copy of the document.

If a government institution is represented before the Federal Court by someone other than the Department of Justice Canada, the institution should inform the Department of Justice Canada.

14.5.2 Right to appear as a party

The Information Commissioner may appear before the Court on behalf of a complainant, or appear as a party to any review applied for under section 41 of the Act or, with leave of the Court, appear as a party to any review applied for under section 44 of the Act.

If a review by the Federal Court is applied for under section 41 of the Act by any person who received the final report under subsection 37(2), any other person who received the Information Commissioner's final report has the right to appear as a party to the review.

14.5.3 Court process

Sections 44.1 to 53 of the Act describe the process before the Federal Court. Institutions should consult their legal counsel concerning any questions related to the court process.

14.5.4 Appeal

A decision by the Federal Court of Canada may be appealed to the Federal Court of Appeal and, ultimately, to the Supreme Court of Canada if leave to appeal is obtained.

14.5.5 Importance of orders

A government institution must comply with the Information Commissioner's order or, under subsection 41(2) of the Act, apply to the Court for a review of any matter that is the subject of an order set out in the report. Similar to ones issued by a Court, orders from the Information Commissioner are legally binding. The Commissioner's

order does not need to be certified in Federal Court for it to have legal force. Government institutions should not ignore orders as doing so would be contrary to the Act and could result in serious consequences for the head of an institution.

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Chapter 15 – Offences and Protection from Civil Proceedings or Prosecution

There are two kinds of offences under the Access to Information Act (the Act): obstructing the Information Commissioner and obstructing the right of access. In addition to discussing these offences, this chapter explains the protection from civil proceedings or prosecutions and the inadmissibility of evidence given during the complaint process.

15.1 Section 67 of the Act – Obstructing the Information Commissioner

Under section 67 of the Act, any person who obstructs the Information Commissioner or any person acting on behalf or under the direction of the Commissioner in the performance of the Commissioner's duties and functions under the Act is guilty of an offence and liable, upon summary conviction, to a fine not to exceed $1,000.

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15.2 Section 67.1 of the Act – Obstructing the right of access

15.2.1 Offence and punishment

Subsection 67.1(1) makes it a criminal offence, with intent to deny a right of access under the Act, to:

> (a) destroy, mutilate or alter a record;
> (b) falsify a record or make a false record;
> (c) conceal a record; or
> (d) direct, propose, counsel or cause any person in any manner to do anything mentioned in any of paragraphs (a) to (c).

A person who contravenes subsection 67.1(1) is guilty of the following:

> (a) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding $10,000, or to both; or
> (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding $5,000, or to both.

15.2.2 Policy requirements

Section 6.2.10 of the Policy on Access to Information requires heads of government institutions or their delegates to ensure that appropriate procedures are in place to address cases of alleged obstruction of the right of access under the Act. These procedures must align with the Public Servants Disclosure Protection Act.

Furthermore, section 7.12.1 of the Directive on the Administration of the Access to Information Act requires that heads or their delegates establish internal procedures to address suspected obstructions of the right of access. These procedures will outline measures for the following:

- investigating any allegation of falsification, concealment, mutilation or improper destruction of records (destruction is improper when it is not made in accordance with section 12 of the Library and

Archives of Canada Act, section 6 of the Privacy Act and sections 4 and 7 of the Privacy Regulations);

- reporting any suspected falsification, concealment, mutilation or improper destruction of records immediately to the head of the government institution; and
- reporting a suspected contravention to law enforcement agencies for investigation.

The Treasury Board of Canada's Policy on Information Management [15-1] and the Directive on Recordkeeping [15-2] provide general direction on the retention and disposition of records, including the following requirements:

- The Policy on Information Management makes deputy heads responsible for "ensuring that decisions and decision-making processes are documented to account for and support the continuity of departmental operations, permit the reconstruction of the evolution of policies and programs, and allow for independent evaluation, audit, and review." In addition, the Policy on Information Management makes deputy heads responsible for "ensuring departmental participation in setting government-wide direction for information and recordkeeping."
- The Directive on Recordkeeping requires that institutions support recordkeeping requirements of information resources of business value, including "identifying, establishing, implementing and maintaining repositories in which information resources of business value are stored or preserved in a physical or electronic storage space." The term "information resources of business value" is defined as "published and unpublished materials, regardless of medium or form, that are created or acquired because they enable and document decision-making in support of

programs, services and ongoing operations, and support departmental reporting, performance and accountability requirements." The Directive on Recordkeeping also requires that institutions develop and implement a documented disposition process for all information resources and perform regular disposition activities for all information resources.

15.2.3 Procedures of institutions

Government institutions must therefore develop, implement and communicate procedures to follow in case of suspected violations of section 67.1 . Government institutions must ensure that these procedures provide for appropriate investigation of any allegation, rapid response to stop any destruction or alteration activity, and clear guidelines for employees who believe they may have been asked to commit this offence.

Institutional procedures should provide that a suspected contravention of this section of the Act is treated in a similar fashion to a suspected theft, destruction of property or other security breach that may involve criminal activity. The procedures should include:

- a requirement for the designated official to immediately report any suspected falsification, concealment or improper destruction of records to the deputy head;
- procedures for reporting a suspected contravention to law enforcement for investigation. These procedures would normally be the same as procedures for reporting a suspected theft of property;
- procedures for a rapid response to halt any destruction or alteration activity;

- the designation of an official responsible for investigating any allegation of falsification, concealment or improper destruction of records (this official should be given authority to halt any activity until the Access to Information Coordinator or other authority can verify that the activity does not contravene the Act);
- a requirement that any investigation be documented; and
- the opportunity for employees to consult the Access to Information and Privacy (ATIP (Access to Information and Privacy)) Office regarding any questions or concerns they have about this issue.

As required by section 6.2.10 of the Policy on Access to Information, institutional procedures must align with the Public Servants Disclosure Protection Act. This means that institutional procedures for addressing allegations of obstruction of the right of access should be similar to the process followed when there is an allegation of wrongdoing. In particular, the procedures should:

- protect the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to have obstructed the right of access, subject to the principles of procedural fairness and natural justice and any other Act of Parliament; and
- ensure the confidentiality of the information collected.

Additional information about the Public Servants Disclosure Protection Act is available on the Web site of the Office of the Chief Human Resources Officer.

ATIP (Access to Information and Privacy) and Security personnel should work together, in consultation with their legal services, to establish the required procedures, which may stand on their own or may be integrated with another institutional policy, such as a policy on security or on access to information.

15.2.4 Transitory records

Section 3 of the Access to Information Act defines the term “record” as “any documentary material, regardless of medium or form.” Similarly, section 2 of the Library and Archives of Canada Act defines “record” as “any documentary material other than a publication, regardless of medium or form.”

To provide for the identification and preservation of archival and historical records, the Library and Archives of Canada Act prohibits the destruction of government records without the consent of the Librarian and Archivist of Canada. Institutions obtain consent for the disposition of their records through agreements developed with Library and Archives Canada. There are two types of records disposition authorities:

- Multi-Institutional Disposition Authorities (MIDA (Multi-Institutional Disposition Authorities)) relate to records managed by all or a multiple number of government institutions, and allow the institutions to dispose of records under certain terms and conditions.
- Institution Specific Disposition Authorities (ISDA (Institution Specific Disposition Authorities)s) relate to records managed by a single government institution, and allow the institution to dispose of its records under certain terms and conditions.

The Librarian and Archivist has granted a multi-institutional Authority for the Destruction of Transitory Records. In this authority, transitory records are defined as follows:

> Transitory records are those records that are required only for a limited time to ensure the completion of a routine action or the preparation of a subsequent record. Transitory records do not include records required by government institutions or Ministers to control,

support, or document the delivery of programs, to carry out operations, to make decisions, or to account for activities of government.

Transitory records may include the following:

- information in a form used for casual communication;
- versions that were not communicated beyond the person who created the document;
- copies used for information, reference or convenience only;
- annotated drafts where the additional information is found in subsequent versions (except when retention is necessary as evidence of approval or evolution of the document);
- source records used for updating electronic records;
- electronic versions of records where a hard copy is maintained in hard copy files; and
- poor quality photographs that do not contribute to the purpose of the photography.

Transitory records can be created via various means: e-mail, texts, PIN to PIN communications, etc. All information of business value created or received on Government of Canada–issued mobile or stationary devices must be transferred to and stored on corporate repositories.

In all circumstances, section 67.1 prohibits the destruction of records in anticipation of a request for access under the Act or during the processing of such a request. There can be contravention of section 67.1 even when no formal access request has been received by the institution if there is a clear intent to obstruct the right of access. In addition, institutions cannot destroy any records, whether or not they are transitory records or they qualify for destruction under a disposal schedule, if they are aware that a request for access relating to the records has been received or is expected.

Consider the following examples:

Scenario A

An employee drafts a report from research notes. The employee makes ten copies of the first draft and circulates them to various colleagues for comment. After the employee receives their comments, the employee makes changes to the report and submits a second draft to his or her supervisor. After the supervisor's changes are incorporated, the report is given to the Branch head as a final document.

Once the report is final, the employee may destroy his or her research notes. The employee may also destroy any of the returned first draft copies if the employee kept a master version to indicate any significant changes. The same is true of the supervisor's comments if they are editorial in nature. However, changes in policy, approach or recommendations should be documented.

Scenario B

An employee receives an e-mail message inviting him or her to a meeting on Thursday. The employee should delete that e-mail as soon as it is no longer required in accordance with the Authority for the Destruction of Transitory Records, unless the employee is aware that a request for access has been received.

Scenario C

An employee receives an e-mail message containing significant, substantive information. Once the employee either prints a hard copy of the message and puts it on file or copies the content of the e-mail into the relevant electronic file, the original message may be deleted.

Scenario D

In preparation for moving offices, an employee comes across a file related to a project that was completed two years ago. The employee should send that file to the Records Office where the content will be sorted and proper disposition of the file ensured (ultimately retention for a specific period, destruction or transfer to Library and Archives Canada).

In any of these scenarios, destroying records that should have been kept may be in violation of the Policy on Information Management or the Library and Archives of Canada Act, but it will not constitute a violation of section 67.1 unless:

- the individual destroyed the records in order to ensure that they could not be released under the Access to Information Act; or
- the individual destroyed the records in full knowledge that a request for access had already been made under the Access to Information Act.

Institutions should remind employees to consult their information management officials for advice concerning the management of institutional records, including how long records must be retained, and which records must be transferred to Library and Archives Canada and under what conditions. Employees should also seek guidance on which records may be destroyed and under what conditions.

15.2.5 Referral of allegations

Institutions do not have to notify the Office of the Information Commissioner about allegations of a contravention of section 67.1 of the Act. Institutions should treat such allegations the same way they treat any other allegation of criminal activity. Once the deputy head or

other senior executive of the institution has been made aware of the allegation, he or she will make a decision about notifying the appropriate law enforcement agency.

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15.3 Protection from civil proceedings or prosecution

Notwithstanding any other Act of Parliament, under section 74 of the Access to Information Act, the head of a government institution and any person acting on behalf or under the direction of the head are provided with protection from civil or criminal proceedings and the Crown or any government institution are provided with protection from any proceeding in relation to the following:

- disclosure in good faith of any record or any part of a record pursuant to the Act;
- any consequences that flow from that disclosure; or
- failure to give any notice required under the Act if reasonable care is taken to give the required notice.

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15.4 Inadmissibility of evidence given during the complaint process

Subsection 36(3) of the Act provides that evidence given in the course of an investigation by an employee of a government institution or by any other person involved in the complaint is not admissible as evidence against the employee or person in a court or any other proceeding except in the following circumstances:

- in a prosecution for an offence under section 132 of the Criminal Code (perjury) in respect of a statement made under the Act;

- in a prosecution for an offence under section 67 or section 67.1 of the Act;
- in a review before the Court under the Act; or
- in an appeal resulting from such review.

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Chapter 16 – Annual Reports

Date updated (full chapter): 2023-04-18

PIR Manual Cross-reference

16.1 Annual reports

Section 94 of the *Access to Information Act* (the Act) requires the head of every government institution to prepare an annual report on the administration of the Act within their institution during the period beginning on April 1 of the preceding year and ending on March 31 of the current year. The report must be tabled before the Senate and the House of Commons on any of the first 15 days on which that House is sitting after September 1 of the year in which the report is prepared.

Institutions must prepare **separate and distinct** annual reports for the *Access to Information Act* and for the *Privacy Act* in accordance with the instructions issued annually by the Access to Information Policy and Performance Division of the Treasury Board of Canada Secretariat (TBS) as per section 4.3.19 of the *Policy on Access to Information* (the policy). In practice, the reports may be combined into separate sections under a single overall cover and filed together.

Annual reports are intended to ensure accountability for the actions and decisions of the institutions in their administration of the Act. All annual reports are referred to the permanent committee designated by

Parliament to review the administration of the Act. Institutions may be invited to appear before the committee to explain their performance in responding to access to information requests.

Institutions must provide an electronic copy of their annual report in both official languages to TBS and the Information Commissioner, as required by section 4.3.20 of the policy.

The information contained in the reports is included in an aggregate report prepared by TBS that provides a government-wide perspective on the administration of the ct.

Under Sections 38 and 39 of the Act, the Office of the Information Commissioner of Canada also prepares an annual report to Parliament on the activities of the office during that financial year and may make special reports to Parliament.

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16.2 Statistical reports

In addition, government institutions submit annual statistical reports on the administration of the Act and its supporting regulations to TBS. Completed copies of the statistical reports (Form for the Statistical Report on the *Access to Information Act* (TBS/SCT 350-62) and (Form for the Statistical Report on the *Privacy Act* (TBS/SCT 350-63)) **must** be included in each institution's annual reports and include a copy of the statistical report when providing their annual report to TBS as required by section 4.3.21 of the policy.

TBS establishes definitions and issues specific directions annually to institutions on how to compile the annual and statistical reports. Because of the unique experiences of institutions, no single format can serve the needs of all government institutions. Therefore, while the

reporting requirements identified by TBS must be addressed, institutions may structure their annual and statistical reports as they see appropriate and add information to reflect their particular accomplishments and challenges.

To promote accessibility and transparency, institutions must publish their annual reports on their websites.

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16.3 Monitoring policy compliance

Heads of institutions or their delegates are responsible for monitoring the institution's compliance with the policy and its supporting instruments, as per 4.3.16 of the policy and 4.1.49 of the directive. Should they determine that there is a policy compliance issue, they must take appropriate remedial action to address the issue, as per 4.3.17 of the policy, and advise TBS of any significant issues on a timely basis, as per 4.3.18 of the policy.

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Appendix A – Model Letters

The following model letters are provided to assist government institutions in corresponding with requesters, other government institutions, third parties and others in the processing of access requests. The model letters are intended to provide general guidance and can be modified to suit the circumstances of each request. Square brackets have been used to show where information should be inserted.

The letters are as follows:

Acknowledgement and clarification

Section 7.4.4 of the Directive on the Administration of the Access to Information Act requires institutions to implement and communicate principles for assisting applicants. The principles are included in the Information Sheets annexed to letters 1, 2 and 3. Instead of providing this information in their acknowledgement letters, institutions may choose to publish the principles on their website and provide requesters with the address.

Model letter 1 – Acknowledgment of request

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This is to acknowledge that your request of [date of request] and application fee were received in this Office on [date received]. We note that, pursuant to the Access to Information Act, you wish to obtain the following information:

> [full text of request]

We are undertaking the necessary search of our records and will inform you of the status of your request within 30 days of its receipt.

Please find enclosed a receipt for your application fee and an Information Sheet listing the principles that we will follow in processing your request. This Information Sheet also explains additional fees that may be required and the circumstances under which the time limit may be extended. We will notify you should additional fees or a time extension be required.

Should you have any questions or concerns, please do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days after the day that you become aware that grounds for a complaint exist. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

> The Information Commissioner of Canada
> 30 Victoria Street, 7th Floor
> Gatineau, Quebec K1A 1H3
>
> Telephone: (613) 995-2410 (National Capital Region)
> 1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Enclosures

Information Sheet

Principles for assisting applicants

In processing your request under the Access to Information Act, we will:

1. Process your request without regard to your identity.
2. Offer reasonable assistance throughout the request process.
3. Provide information on the Access to Information Act, including information on the processing of your request and your right to complain to the Information Commissioner of Canada.
4. Inform you as appropriate and without undue delay when your request needs to be clarified.
5. Make every reasonable effort to locate and retrieve the requested records under the control of the government institution.
6. Apply limited and specific exemptions to the requested records.
7. Provide accurate and complete responses.
8. Provide timely access to the requested information.
9. Provide records in the format and official language requested, as appropriate.
10. Provide an appropriate location within the government institution to examine the requested information.

Fees

Please be aware that you may be required to pay other fees in addition to the application fee. Pursuant to section 11 of the Access to Information Act and section 7 of the Access to Information Regulations, payment may be required for the following:

- the time taken to search for a record or prepare any part of it for disclosure where the time exceeds 5 hours;
- the production of a record from a machine readable record, including the cost of programming;
- the costs of reproducing a record; and
- the medium used for an alternative format.

Extension of time limits

In addition, an extension of time may be required. Subsection 9(1) of the Access to Information Act allows the head of a government institution, or his or her delegate, to extend the initial period under the following three circumstances:

- the request is for a large number of records or requires a search through a large number of records and meeting the original time limit, under either of these circumstances, would interfere unreasonably with the institution’s operations;
- consultation is necessary and it cannot be completed within the 30-day statutory deadline;
- notice is given to a third party under subsection 27(1) of the Access to Information Act.

Model letter 2 – Acknowledgement of request – missing application fee

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This is to acknowledge that your request of [date of request] was received in this Office on [date received]. We note that, pursuant to the Access to Information Act, you wish to obtain the following information:

[full text of request]

In order to process your request, an application fee of $5.00 is required, as prescribed by paragraph 11(1)(a) of the Access to Information Act and paragraph 7(1)(a) of the Access to Information Regulations. I would therefore ask you to forward a cheque or money order in the amount of $5.00 payable to [the Receiver General for Canada or name of institution] to cover the application fee. Upon receipt of this amount, we will be pleased to process your request.

You will find enclosed an Information Sheet listing the principles that we will follow in processing your request. This Information Sheet also explains additional fees that may be required and the circumstances under which the time limit may be extended. We will notify you should additional fees or a time extension be required.

Please note that your request is temporarily on hold and will be considered abandoned if we do not receive your application fee by [date the response is due]. Should you have any questions or concerns, do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days after the day that you become aware that grounds for a complaint

exist. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Enclosure

Information Sheet

Principles for assisting applicants

In processing your request under the Access to Information Act, we will:

1. Process your request without regard to your identity.
2. Offer reasonable assistance throughout the request process.
3. Provide information on the Access to Information Act, including information on the processing of your request and your right to complain to the Information Commissioner of Canada.
4. Inform you as appropriate and without undue delay when your request needs to be clarified.
5. Make every reasonable effort to locate and retrieve the requested records under the control of the government institution.
6. Apply limited and specific exemptions to the requested records.

7. Provide accurate and complete responses.
8. Provide timely access to the requested information.
9. Provide records in the format and official language requested, as appropriate.
10. Provide an appropriate location within the government institution to examine the requested information.

Fees

Please be aware that you may be required to pay other fees in addition to the application fee. Pursuant to section 11 of the Access to Information Act and section 7 of the Access to Information Regulations, payment may be required for the following:

- the time taken to search for a record or prepare any part of it for disclosure where the time exceeds 5 hours;
- the production of a record from a machine readable record, including the cost of programming;
- the costs of reproducing a record; and
- the medium used for an alternative format.

Extension of time limits

In addition, an extension of time may be required. Subsection 9(1) of the Access to Information Act allows the head of a government institution, or his or her delegate, to extend the initial period under the following three circumstances:

- the request is for a large number of records or requires a search through a large number of records and meeting the original time limit, under either of these circumstances, would interfere unreasonably with the institution’s operations;
- consultation is necessary and it cannot be completed within the 30-day statutory deadline;

- notice is given to a third party under subsection 27(1) of the Access to Information Act.

Model letter 3 – Acknowledgement of request – clarification required

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This is to acknowledge that your request of [date of request] and application fee were received in this Office on [date received]. We note that, pursuant to the Access to Information Act, you wish to obtain the following information:

[full text of request]

The purpose of this letter is to seek clarifications so that we may process your request.

[choose relevant paragraphs:

- Before conducting a search of our records, we require clarification from you concerning the information you are seeking. Please explain what you mean by…
- I would ask you to provide additional information on the kind of records you believe [name of institution] might have on…
- It is not clear from the wording of your request what information you are seeking. In addition, your request is not sufficiently detailed to enable an experienced employee of the institution to identify the relevant records with a reasonable effort.

- The Access to Information Act creates the right of access to information in existing records. Although your letter includes several questions, it is not necessary for an institution to create a record in order to respond to a request. Furthermore, section 6 of the Act states that a request for access must provide sufficient detail to enable an experienced employee of the Department with a reasonable effort to identify the relevant records. Generally, it is more difficult to identify records responding to a series of questions.
- Your request is worded very broadly and would encompass a large number of records. Our departmental officials have advised that the search and preparation activities related to your request would be time-consuming. To expedite the processing of your request, you may wish to further define the subject of your request, the specific types of records of interest and the time period for which records are being requested. Narrowing the scope of your request may also reduce fees that may be charged.
- I would appreciate it if you could clarify or rephrase your request and specify which documents are being sought.]

Should you wish to discuss the scope of your request or if you have any questions, do not hesitate to contact [ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

I am enclosing a receipt for your application fee and an Information Sheet listing the principles that we will follow in processing your request. This Information Sheet also explains additional fees that may be required and the circumstances under which the time limit may be extended. We will notify you should additional fees or a time extension be required.

Your request is on hold until we receive additional information from you. If we have not received your reply by [date the response is due], we will consider the request abandoned and close our file accordingly.

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days of the receipt of this notice or within 60 days after the day that you become aware that grounds for a complaint exist. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Enclosures

Information Sheet

Principles for assisting applicants

In processing your request under the Access to Information Act, we will:

1. Process your request without regard to your identity.
2. Offer reasonable assistance throughout the request process.

3. Provide information on the Access to Information Act, including information on the processing of your request and your right to complain to the Information Commissioner of Canada.
4. Inform you as appropriate and without undue delay when your request needs to be clarified.
5. Make every reasonable effort to locate and retrieve the requested records under the control of the government institution.
6. Apply limited and specific exemptions to the requested records.
7. Provide accurate and complete responses.
8. Provide timely access to the requested information.
9. Provide records in the format and official language requested, as appropriate.
10. Provide an appropriate location within the government institution to examine the requested information.

Fees

Please be aware that you may be required to pay other fees in addition to the application fee. Pursuant to section 11 of the Access to Information Act and section 7 of the Access to Information Regulations, payment may be required for the following:

- the time taken to search for a record or prepare any part of it for disclosure where the time exceeds 5 hours;
- the production of a record from a machine readable record, including the cost of programming;
- the costs of reproducing a record; and
- the medium used for an alternative format.

Extension of time limits

In addition, an extension of time may be required. Subsection 9(1) of the Access to Information Act allows the head of a government institution, or his or her delegate, to extend the initial period under the

following three circumstances:

- the request is for a large number of records or requires a search through a large number of records and meeting the original time limit, under either of these circumstances, would interfere unreasonably with the institution's operations;
- consultation is necessary and it cannot be completed within the 30-day statutory deadline;
- notice is given to a third party under subsection 27(1) of the Access to Information Act.

Model letter 4 – Confirmation of revised request

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This is to confirm receipt of your letter of [date of clarification letter] providing clarification of the information you are seeking. Your request has been amended as follows:
OR
This is to confirm that, further to your telephone conversation with [name of ATIP Officer] on [date], your request has been amended as follows:

[text of amended request]

Consequently, your request is now complete and is deemed to have been received on [date of receipt of clarification letter or of telephone conversation]. We are undertaking the necessary search of our records and will inform you of the status of your request within 30 days of that

date. Should you have any questions, do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days after the day that you become aware that grounds for a complaint exist. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

> The Information Commissioner of Canada
> 30 Victoria Street, 7th Floor
> Gatineau, Quebec K1A 1H3
>
> Telephone: (613) 995-2410 (National Capital Region)
> 1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Top

Transfer of request

Model letter 5 – Notice of transfer

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This is to acknowledge that your request of [date of request] and application fee were received in this Office on [date received]. We note that, pursuant to the Access to Information Act, you wish to obtain the following information:

[full text of request]

The [name of other institution] has a greater interest in the records sought. We consulted with the Access to Information and Privacy Office of that institution and the Coordinator agrees that a transfer of your request is appropriate. I am therefore advising you that, pursuant to subsection 8(1) of the Access to Information Act, I am transferring your request and application fee to the ATIP Office of the [name of other institution] for processing. They may be reached at the following address:

[contact information of other institution]

You should hear directly from them in due course.

Should you have any questions, do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days of the receipt of this notice or within 60 days after the day that you become aware that grounds for a complaint exist. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

c.c. [Coordinator of other institution]

Top

Retrieval of responsive records

Model letter 6 - Retrieval

Subject: Access to information request [number of request]

We have received a request under the Access to Information Act to obtain records that contain the following information:

[full text of request]

To process this request within the 30-calendar day legislated time frame, we require your office to locate and provide us with a copy of all relevant records within your office, as well as your recommendations concerning their disclosure. Your response must be received in the ATIP Office by[due date].

Clarification

If you require clarification about the request or you cannot meet the deadline, please contact [name of ATIP officer] within 24 hours.

Search of relevant records

You must retrieve and forward all relevant records in your possession, not only the records that you created. Please confirm in writing if you do not have records relevant to this request. In addition, please inform me immediately if this request for relevant records should be sent to another office of the institution.

If you anticipate that your search for the responsive records will require more than five hours, do not conduct the search and contact [name of ATIP Office] immediately.

Recommendations concerning disclosure of records

Please keep the original records and send copies to the ATIP Office. You may write on the copies themselves with a yellow highlighter only.

Include a memorandum providing your recommendations concerning their disclosure and any background information that will assist the ATIP Office in its review of the records. For example, please indicate if the records are:

- in the public domain;
- information provided in confidence by a municipal, provincial or foreign government;
- advice to the Minister;
- related to negotiations;
- related to litigation or any other legal matter;
- Cabinet confidences;
- subject to a publication ban;
- about an identifiable individual and constitute personal information;
- third party confidential information;
- to be published within 90 days.

Please forward your response to:

[name of ATIP Officer and address of ATIP office]

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Extension of time limit

Model letter 7 – Notice of extension under paragraph 9(1)(a) (volume and interference) and/or paragraph 9(1)(b) (consultations)

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This letter is further to your request of [date of request], to obtain [summary of request].

[Choose appropriate paragraph:

Extension under paragraph 9(1)(a):

Pursuant to paragraph 9(1)(a) of the Access to Information Act, we wish to notify you that an additional [number of days of extension] days are required to comply with your request. The extended period of time is required because the request [specify: is for a large number of records OR necessitates a search through a large number of records] and meeting the original time limit would unreasonably interfere with the operations of the Department. It may be possible, however, to reply sooner should we complete the processing of your request prior to that time.

Extension under paragraph 9(1)(b):

Pursuant to paragraph 9(1)(b) of the Access to Information Act, we wish to notify you that an additional [number of days of extension] days are required to comply with your request. The extended period of time is required because consultations necessary to comply with the request cannot reasonably be completed within the original time limit. It may be possible, however, to reply sooner should we complete the processing of your request prior to that time.

Extension under paragraphs 9(1)(a) and (b):

Pursuant to paragraphs 9(1)(a) and 9(1)(b) of the Access to Information Act, we wish to notify you that an additional [number of days of extensions] days are required to comply with your request because [specify: the request is a for a large number of records OR necessitates a search through a large number of records] and meeting the original time limit would unreasonably interfere with the operations of the Department. In addition, consultations that cannot reasonably be completed within the original time limit are necessary. It may be possible, however, to reply sooner should we complete the processing of your request prior to that time.]

An Information Sheet on section 9 is enclosed for your convenience. Should you have any questions, do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the extension of time limits within 60 days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Information Sheet

Section 9 of the Access to Information Act

9. (1) The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Act for a reasonable period of time, having regard to the circumstances, if

a. the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution,
b. consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or
c. notice of the request is given pursuant to subsection 27(1)

by giving notice of the extension and, in the circumstances set out in paragraph (a) or (b), the length of the extension, to the person who made the request within thirty days after the request is received, which

notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

(2) Where the head of a government institution extends a time limit under subsection (1) for more than thirty days, the head of the institution shall give notice of the extension to the Information Commissioner at the same time as notice is given under subsection (1).

Model letter 8 – Notice of extension under paragraph 9(1)(c) – notice to third party

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This letter is further to your request of [date of request], to obtain [summary of request].

Pursuant to paragraph 9(1)(c) of the Access to Information Act, we wish to notify you that a time extension is required to comply with your request because notice to a third party was given pursuant to subsection 27(1) of the Act. An Information Sheet on section 9 and subsection 27(1) is enclosed for your convenience.

We will inform you when the notification process has been completed. Should you have any questions or concerns, do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the extension of time limits within 60 days of the receipt of this notice. In the event you decide to avail yourself of this

right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Information Sheet

Section 9 of the Access to Information Act

9. (1) The head of a government institution may extend the time limit set out in section 7 or subsection 8(1) in respect of a request under this Act for a reasonable period of time, having regard to the circumstances, if

a. the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution,
b. consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or
c. notice of the request is given pursuant to subsection 27(1)

by giving notice of the extension and, in the circumstances set out in paragraph (a) or (b), the length of the extension, to the person who made the request within thirty days after the request is received, which

notice shall contain a statement that the person has a right to make a complaint to the Information Commissioner about the extension.

(2) Where the head of a government institution extends a time limit under subsection (1) for more than thirty days, the head of the institution shall give notice of the extension to the Information Commissioner at the same time as notice is given under subsection (1).

Section 27 of the Access to Information Act

27. (1) If the head of a government institution intends to disclose a record requested under this Act that contains or that the head has reason to believe might contain trade secrets of a third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by a third party, or information the disclosure of which the head can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party, the head shall make every reasonable effort to give the third party written notice of the request and of the head's intention to disclose within 30 days after the request is received.

Top

Fees

Model letter 9 – Search fees

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This letter is further to your request of [date of request], to obtain [summary of request].

We have conducted a preliminary search of our records and estimate that [number of hours of search time] hours will be required to locate the records relevant to your request. Charges for search activities have been assessed at [search amount] as authorized under subsection 11(2) of the Access to Information Act and subsection 7(2) of the Access to Information Regulations. Should the time required for search activities exceed [number of hours of search time] hours or other fees be required, we will contact you again to inform you of the additional amount.

Please note that the cost of searching for the first five hours was borne by this institution and has already been deducted from the total cost. An Information Sheet on section 11 of the Act and section 7 of the Regulations is enclosed for your convenience.

If you wish us to continue processing your request, please forward to this office a cheque or money order in the amount of [fee deposit requested] payable to [specify: the Receiver General for Canada OR name of institution], within [number of days] of this notice. If we have not received a reply by [date], we will close this file.

We have suspended the processing of the request pending further instructions from you. Should you decide to restrict the scope of your request by identifying specific items of interest or by limiting the time period covered by the request, it may be possible to reduce the search fees and the time required to process the records.

Should you have any questions or concerns, do not hesitate to contact [name of ATIP Officer] at [Officer’s telephone number] or by e-mail at [Officer’s e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the fees requested within 60 days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Enclosure

Information Sheet

Section 11 of the Access to Information Act

11. (1) Subject to this section, a person who makes a request for access to a record under this Act may be required to pay

a. at the time the request is made, such application fee, not exceeding twenty-five dollars, as may be prescribed by regulation;
b. before any copies are made, such fee as may be prescribed by regulation reflecting the cost of reproduction calculated in the manner prescribed by regulation; and
c. before the record is converted into an alternative format or any copies are made in that format, such fee as may be prescribed by

regulation reflecting the cost of the medium in which the alternative format is produced.

(2) The head of a government institution to which a request for access to a record is made under this Act may require, in addition to the fee payable under paragraph (1)(a), payment of an amount, calculated in the manner prescribed by regulation, for every hour in excess of five hours that is reasonably required to search for the record or prepare any part of it for disclosure, and may require that the payment be made before access to the record is given.

(3) Where a record requested under this Act is produced as a result of the request from a machine readable record under the control of a government institution, the head of the institution may require payment of an amount calculated in the manner prescribed by regulation.

(4) Where the head of a government institution requires payment of an amount under subsection (2) or (3) in respect of a request for a record, the head of the institution may require that a reasonable proportion of that amount be paid as a deposit before the search or production of the record is undertaken or the part of the record is prepared for disclosure.

(5) Where the head of a government institution requires a person to pay an amount under this section, the head of the institution shall

a. (a) give written notice to the person of the amount required; and
b. (b) state in the notice that the person has a right to make a complaint to the Information Commissioner about the amount required.

(6) The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section.

Section 7 of the Access to Information Regulations

7. (1) Subject to subsection 11(6) of the Act, a person who makes a request for access to a record shall pay

a. an application fee of $5 at the time the request is made;
b. where applicable, a fee for reproduction of the record or part thereof to be calculated in the following manner:
    i. for photocopying a page with dimensions of not more than 21.5 cm by 35.5 cm, $0.20 per page,
    ii. for microfiche duplication, non-silver, $0.40 per fiche,
    iii. for 16 mm microfilm duplication, non-silver, $12 per 30.5 m roll,
    iv. for 35 mm microfilm duplication, non-silver, $14 per 30.5 m roll,
    v. for microform to paper duplication, $0.25 per page, and
    vi. for magnetic tape-to-tape duplication, $25 per 731.5 m reel; and
c. where the record or part thereof is produced in an alternative format, a fee, not to exceed the amount that would be charged for the record under paragraph (b),
    i. of $.05 per page of braille, on paper with dimensions of not more than 21.5 cm by 35.5 cm,
    ii. of $.05 per page of large print, on paper with dimensions of not more than 21.5 cm by 35.5 cm,
    iii. of $2.50 per audiocassette, or
    iv. of $2 per microcomputer diskette.

(2) Where the record requested pursuant to subsection (1) is a non-computerized record, the head of the government institution may, in addition to the fee prescribed by paragraph (1)(a), require payment in the amount of $2.50 per person per quarter hour for every hour in excess of five hours that is spent by any person on search and preparation.

(3) Where the record requested pursuant to subsection (1) is produced from a machine readable record, the head of the government institution may, in addition to any other fees, require payment for the cost of production and programming calculated in the following manner:

a. $16.50 per minute for the cost of the central processor and all locally attached devices; and
b. $5 per person per quarter hour for time spent on programming a computer.

Model letter 10 – Preparation fees

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This letter is further to your request of [date of request], to obtain [summary of request].

In order to process your request, charges for preparation have been assessed at [amount], as authorized under subsection 11(2) of the Access to Information Act and subsection 7(2) of the Access to Information Regulations. We estimate that it will take [number of hours

of preparation] hours to sever the records. Should the time required for preparation exceed [number of hours of preparation] hours or other fees be required, we will contact you again to inform you of the additional amount.

Please note that the first five hours of search and preparation activities were borne by this institution and have already been deducted from the total cost. An Information Sheet on section 11 of the Act and section 7 of the Regulations is enclosed for your convenience.

If you wish us to continue processing your request, please forward to this office a cheque or money order in the amount of [fee deposit requested] payable to [specify: the Receiver General for Canada OR name of institution], within [number of days] of this notice. If we have not received a reply by [date], we will close this file.

We have suspended the processing of the request pending further instructions from you. Should you decide to restrict the scope of your request by identifying specific items of interest or by limiting the time period covered by the request, it may be possible to reduce the preparation fees.

Should you have any questions or concerns, do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the fees requested within 60 days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Enclosure

Information Sheet

Section 11 of the Access to Information Act

11. (1) Subject to this section, a person who makes a request for access to a record under this Act may be required to pay

a. at the time the request is made, such application fee, not exceeding twenty-five dollars, as may be prescribed by regulation;
b. before any copies are made, such fee as may be prescribed by regulation reflecting the cost of reproduction calculated in the manner prescribed by regulation; and
c. before the record is converted into an alternative format or any copies are made in that format, such fee as may be prescribed by regulation reflecting the cost of the medium in which the alternative format is produced.

(2) The head of a government institution to which a request for access to a record is made under this Act may require, in addition to the fee payable under paragraph (1)(a), payment of an amount, calculated in the manner prescribed by regulation, for every hour in excess of five

hours that is reasonably required to search for the record or prepare any part of it for disclosure, and may require that the payment be made before access to the record is given.

(3) Where a record requested under this Act is produced as a result of the request from a machine readable record under the control of a government institution, the head of the institution may require payment of an amount calculated in the manner prescribed by regulation.

(4) Where the head of a government institution requires payment of an amount under subsection (2) or (3) in respect of a request for a record, the head of the institution may require that a reasonable proportion of that amount be paid as a deposit before the search or production of the record is undertaken or the part of the record is prepared for disclosure.

(5) Where the head of a government institution requires a person to pay an amount under this section, the head of the institution shall

a. (a) give written notice to the person of the amount required; and
b. (b) state in the notice that the person has a right to make a complaint to the Information Commissioner about the amount required.

(6) The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section.

Section 7 of the Access to Information Regulations

7. (1) Subject to subsection 11(6) of the Act, a person who makes a request for access to a record shall pay

a. an application fee of $5 at the time the request is made;
b. where applicable, a fee for reproduction of the record or part thereof to be calculated in the following manner:
    i. for photocopying a page with dimensions of not more than 21.5 cm by 35.5 cm, $0.20 per page,
    ii. for microfiche duplication, non-silver, $0.40 per fiche,
    iii. for 16 mm microfilm duplication, non-silver, $12 per 30.5 m roll,
    iv. for 35 mm microfilm duplication, non-silver, $14 per 30.5 m roll,
    v. for microform to paper duplication, $0.25 per page, and
    vi. for magnetic tape-to-tape duplication, $25 per 731.5 m reel; and
c. where the record or part thereof is produced in an alternative format, a fee, not to exceed the amount that would be charged for the record under paragraph (b),
    i. of $.05 per page of braille, on paper with dimensions of not more than 21.5 cm by 35.5 cm,
    ii. of $.05 per page of large print, on paper with dimensions of not more than 21.5 cm by 35.5 cm,
    iii. of $2.50 per audiocassette, or
    iv. of $2 per microcomputer diskette.

(2) Where the record requested pursuant to subsection (1) is a non-computerized record, the head of the government institution may, in addition to the fee prescribed by paragraph (1)(a), require payment in the amount of $2.50 per person per quarter hour for every hour in excess of five hours that is spent by any person on search and preparation.

(3) Where the record requested pursuant to subsection (1) is produced from a machine readable record, the head of the government institution may, in addition to any other fees, require payment for the

cost of production and programming calculated in the following manner:

a. $16.50 per minute for the cost of the central processor and all locally attached devices; and
b. $5 per person per quarter hour for time spent on programming a computer.

Model letter 11 – Reproduction fees

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This letter is further to your request of [date of request], to obtain [summary of request].

During the processing of your request, we have identified [number of releasable pages] pages that may be disclosed [specify: in their entirety, in whole or in part, in part]. Certain information is exempt from release pursuant to [applicable sections] of the Access to Information Act.

Charges for photocopying these pages amount to [amount], as authorized under paragraph 11(1)(b) of the Act and paragraph 7(1)(b) of the Access to Information Regulations. If you wish to obtain photocopies, please forward a cheque or money order in the amount of [amount] payable to [specify: the Receiver General for Canada OR name of institution] to this office within [number of days] days of this notice.

Alternatively, you may choose to examine the records in person rather than receiving your own photocopies or to obtain a copy of the releasable documents on CD-ROM free of charge. An Information Sheet

on section 11 of the Act and section 7 of the Regulations is enclosed for your convenience.

Should you have any questions or concerns, do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address]. If we have not received a reply by [date], we will close this file.

Please be advised that you are entitled to complain to the Information Commissioner concerning the fees requested within 60 days of the receipt of this notice. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Information Sheet

Section 11 of the Access to Information Act

11. (1) Subject to this section, a person who makes a request for access to a record under this Act may be required to pay

a. at the time the request is made, such application fee, not exceeding twenty-five dollars, as may be prescribed by regulation;

b. before any copies are made, such fee as may be prescribed by regulation reflecting the cost of reproduction calculated in the manner prescribed by regulation; and

c. before the record is converted into an alternative format or any copies are made in that format, such fee as may be prescribed by regulation reflecting the cost of the medium in which the alternative format is produced.

(2) The head of a government institution to which a request for access to a record is made under this Act may require, in addition to the fee payable under paragraph (1)(a), payment of an amount, calculated in the manner prescribed by regulation, for every hour in excess of five hours that is reasonably required to search for the record or prepare any part of it for disclosure, and may require that the payment be made before access to the record is given.

(3) Where a record requested under this Act is produced as a result of the request from a machine readable record under the control of a government institution, the head of the institution may require payment of an amount calculated in the manner prescribed by regulation.

(4) Where the head of a government institution requires payment of an amount under subsection (2) or (3) in respect of a request for a record, the head of the institution may require that a reasonable proportion of that amount be paid as a deposit before the search or production of the record is undertaken or the part of the record is prepared for disclosure.

(5) Where the head of a government institution requires a person to pay an amount under this section, the head of the institution shall

a. (a) give written notice to the person of the amount required; and

b. (b) state in the notice that the person has a right to make a complaint to the Information Commissioner about the amount required.

(6) The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section.

Section 7 of the Access to Information Regulations

7. (1) Subject to subsection 11(6) of the Act, a person who makes a request for access to a record shall pay

a. an application fee of $5 at the time the request is made;
b. where applicable, a fee for reproduction of the record or part thereof to be calculated in the following manner:
    i. for photocopying a page with dimensions of not more than 21.5 cm by 35.5 cm, $0.20 per page,
    ii. for microfiche duplication, non-silver, $0.40 per fiche,
    iii. for 16 mm microfilm duplication, non-silver, $12 per 30.5 m roll,
    iv. for 35 mm microfilm duplication, non-silver, $14 per 30.5 m roll,
    v. for microform to paper duplication, $0.25 per page, and
    vi. for magnetic tape-to-tape duplication, $25 per 731.5 m reel; and
c. where the record or part thereof is produced in an alternative format, a fee, not to exceed the amount that would be charged for the record under paragraph (b),
    i. of $.05 per page of braille, on paper with dimensions of not more than 21.5 cm by 35.5 cm,
    ii. of $.05 per page of large print, on paper with dimensions of not more than 21.5 cm by 35.5 cm,
    iii. of $2.50 per audiocassette, or

iv. of $2 per microcomputer diskette.

(2) Where the record requested pursuant to subsection (1) is a non-computerized record, the head of the government institution may, in addition to the fee prescribed by paragraph (1)(a), require payment in the amount of $2.50 per person per quarter hour for every hour in excess of five hours that is spent by any person on search and preparation.

(3) Where the record requested pursuant to subsection (1) is produced from a machine readable record, the head of the government institution may, in addition to any other fees, require payment for the cost of production and programming calculated in the following manner:

a. $16.50 per minute for the cost of the central processor and all locally attached devices; and
b. $5 per person per quarter hour for time spent on programming a computer.

Top

Consultations

Model letter 12 – Internal consultation

We have received a request under the Access to Information Act to obtain [summary of request].

Enclosed you will find copies of records relevant to the request. I believe that the following pages may be released to the applicant: [list page numbers]. However, pages [list page numbers] should be exempted in whole or in part pursuant to sections [provisions that apply] of the Act, as shown on the enclosed copies.

I would appreciate it if you would review the documents and give me your recommendations regarding their disclosure. If you do not agree with my assessment, please explain why, citing any exemption that you feel may apply under the Act.

[If appropriate: In addition, please inform us whether a note for Question Period or media lines have been or will be prepared by your office to assist the Minister in responding to any questions that may be raised pursuant to the disclosure of the records. If a note or media lines are required, please send a copy to the ATIP Office.]

In order to meet our statutory obligation, a reply is needed by [date response is due]. Should you have any questions, do not hesitate to contact me at [telephone number] or by e-mail at [e-mail address].

[Officer's name and title]

Model letter 13 – Consultation with another government institution

Our file: [file number]

[date]

[Coordinator's name and address of other institution]

Dear [Coordinator's name]:

We have received a request under the Access to Information Act to obtain [summary of request].

The enclosed records are relevant to the request and are of interest to your institution. I believe that the following pages may be released to the applicant: [page numbers]. However, pages [page numbers] are exempted in whole or in part pursuant to [applicable provisions] of the Act, as shown on the enclosed copies.

I would appreciate it if you would review the documents and give me your recommendations regarding their disclosure. If you do not agree with my assessment, please explain why, citing any exemption that you feel may apply under the Act.

In order to meet our statutory obligation, a reply is needed by [due date]. If you wish to discuss this matter, do not hesitate to contact me at [telephone number] or by e-mail at [e-mail address].

Thank you for your attention to this matter.

Sincerely,

[Officer's name and title]

Enclosures

Model letter 14 – Consultation with another government concerning the application of subsection 13(1)

Our file: [file number]

[date]

[Coordinator's name and address of other government]

Dear [Coordinator's name]:

We have received a request under the Access to Information Act to obtain [summary of request].

In processing the request we have located the enclosed records [specify: originating from OR of interest to] [name of department or ministry].

Section 13 of the Access to Information Act provides that records that contain information obtained in confidence from another government will only be released with clear consent. Section 13 states the following:

13(1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained in confidence from

a. the government of a foreign state or an institution thereof;
b. an international organization of states of an institution thereof;
c. the government of a province or an institution thereof; or
d. a municipal or regional government established by or pursuant to an Act of the legislature of a province or an institution of such government; or
e. an aboriginal government.

(2) The head of a government institution may disclose any record requested under this Act that contains information described in subsection (1) if the government, organization or institution from which the information was obtained

a. consents to disclosure; or
b. makes the information public.

We would be grateful if you could review the enclosed and inform us of whether or not you consent to the disclosure.

A response by [date] would be greatly appreciated. Should you have any questions, do not hesitate to contact me at [telephone number] or by e-mail at [e-mail address].

Sincerely,

[Officer's name and title]

Enclosures

Model letter 15 – Consultation with individuals or organizations where section 20 does not apply

Our file: [file number]

[date]

[name and address of individual or organization]

Dear [name of individual or organization]:

We have received a request under the Access to Information Act to obtain [summary of request].

The enclosed records are relevant to the request and are of interest to [specify: you OR your organization]. I believe that the following pages may be released to the applicant: [page numbers]. However, pages [page numbers] are exempted in whole or in part pursuant to [applicable provisions] of the Act, as shown on the enclosed copies.

I would appreciate if you would review the documents and let me know if you agree with my assessment. If you do not agree, please explain why.

In order to meet our statutory obligation, a reply is needed by [due date]. If you wish to discuss this matter, do not hesitate to contact me at [telephone number] or by e-mail at [e-mail address].

Thank you for your attention to this matter.

Sincerely,

[Officer's name and title]

Enclosures

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Notices to third parties concerning the application of section 20

Model letter 16 – Notice to third party of intention to disclose

Our file: [file number]

[date]

[name and address of third party]

Dear [name]:

We have received a request under the Access to Information Act to obtain [summary of request].

The enclosed records are relevant to the request and are of interest to [specify: you, your organization]. Although they might contain information described under subsection 20(1) of the Act, we do not have sufficient information in our files to substantiate an exemption under that provision. We have therefore made a preliminary decision to disclose the records to the requester as required by the Act.

Pursuant to subsection 28(1) of the Act, you have 20 days after this notice was given to respond. You may either consent to the disclosure of the information or make written representations explaining why the information should not be disclosed. A copy of sections 20, 27 and 28 of the Act is enclosed to assist you, as well as an Information Sheet listing the criteria for the application of subsection 20(1).

We will consider your representations in deciding whether to disclose all or part of the records and inform you of our decision. Should you have any questions or concerns, do not hesitate to contact [Officer's name] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please let us know if you are not the appropriate party to receive this notice, or if another third party may also have an interest in the information or be affected by the disclosure of the information.

Sincerely,

[Coordinator's name and title]

Enclosures

Access to Information Act

Section 20

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;
(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
(b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the Emergency Management Act and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;
(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

(3) Where the head of a government institution discloses a record requested under this Act, or a part thereof, that contains the results of product or environmental testing, the head of the institution shall at the same time as the record or part thereof is disclosed provide the person who requested the record with a written explanation of the methods used in conducting the tests.

(4) For the purposes of this section, the results of product or environmental testing do not include the results of preliminary testing conducted for the purpose of developing methods of testing.

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

(6) The head of a government institution may disclose all or part of a record requested under this Act that contains information described in any of paragraphs (1)(b) to (d) if

> (a) the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment; and
> (b) the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party, any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations.

Section 27

27. (1) If the head of a government institution intends to disclose a record requested under this Act that contains or that the head has reason to believe might contain trade secrets of a third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by a third party, or information the disclosure of which the head can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party, the head shall make every reasonable effort to give the third party written notice of the request and of the head's intention to disclose within 30 days after the request is received.

(2) Any third party to whom a notice is required to be given under subsection (1) in respect of an intended disclosure may waive the requirement, and where the third party has consented to the disclosure the third party shall be deemed to have waived the requirement.

(3) A notice given under subsection (1) shall include

(a) a statement that the head of the government institution giving the notice intends to release a record or a part thereof that might contain material or information described in subsection (1);
(b) a description of the contents of the record or part thereof that, as the case may be, belong to, were supplied by or relate to the third party to whom the notice is given; and
(c) a statement that the third party may, within twenty days after the notice is given, make representations to the head of the government institution that has control of the record as to why the record or part thereof should not be disclosed.

(4) The head of a government institution may extend the time limit set out in subsection (1) in respect of a request under this Act where the time limit set out in section 7 is extended under paragraph 9(1)(a) or (b)

in respect of the same request, but any extension under this subsection shall be for a period no longer than the period of the extension under section 9.

Section 28

28. (1) Where a notice is given by the head of a government institution under subsection 27(1) to a third party in respect of a record or a part thereof,

(a) the third party shall, within twenty days after the notice is given, be given the opportunity to make representations to the head of the institution as to why the record or the part thereof should not be disclosed; and

(b) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (a), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.

(2) Representations made by a third party under paragraph (1)(a) shall be made in writing unless the head of the government institution concerned waives that requirement, in which case they may be made orally.

(3) A notice given under paragraph (1)(b) of a decision to disclose a record requested under this Act or a part thereof shall include

(a) a statement that the third party to whom the notice is given is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

(b) a statement that the person who requested access to the record will be given access thereto or to the part thereof unless, within

twenty days after the notice is given, a review of the decision is requested under section 44.

(4) Where, pursuant to paragraph (1)(b), the head of a government institution decides to disclose a record requested under this Act or a part thereof, the head of the institution shall give the person who made the request access to the record or the part thereof forthwith on completion of twenty days after a notice is given under that paragraph, unless a review of the decision is requested under section 44.

Information Sheet

Criteria for the application of section 20

The Access to Information Act provides a right of access to records under the control of government institutions, subject to specific and limited exemptions. To be withheld from disclosure under subsection 20(1) of the Act, third party information must meet the conditions outlined in the provision. The following questions may assist you in preparing your representations.

Paragraph 20(1)(a) – Trade secrets

1. Is any information considered to be a trade secret? A trade secret is aplan or process, tool, mechanism or compound that possesses all the following characteristics:
    - The information must be secret in an absolute or relative sense (known only by one or a relatively small number of persons).
    - The possessor of the information must demonstrate that he or she has acted with the intention to treat the information as secret.
    - The information must be capable of industrial or commercial application.

- The possessor must have an interest (for example, an economic interest) worthy of legal protection.

2. Please explain how the information qualifies as a trade secret.

Paragraph 20(1)(b) – Confidential financial, commercial, scientific or technical information

1. Does the record contain financial, commercial, scientific or technical information?
2. Who supplied the information to the government institution?
3. Is the information confidential?
4. Has the information been consistently treated as confidential?
5. What measures have been taken to consistently treat the information as confidential?
6. Is any information in the records publicly known or readily available on request from the third party itself or from another source?

Paragraph 20(1)(b.1) – Information used by a government institution for emergency management plans

Please explain how the following five conditions for the exemption to apply are met:

1. The information was supplied to a government institution subject to the Access to Information Act.
2. The information was supplied by a third party.
3. The information concerns critical infrastructure information – that is, the vulnerability of a third party's buildings or other structures; its networks or systems, including its computer or communication networks or systems; or the methods used to protect those buildings, structures, networks or systems.
4. The information was provided in confidence.
5. The information was provided for the preparation, maintenance, testing or implementation, by the government institution, of

emergency management plans within the meaning of section 2 of the Emergency Management Act.

Section 2 of the Emergency Management Act defines “emergency management plan” as “a program, arrangement or other measure (a) for dealing with an emergency by the civil population; or (b) for dealing with a civil emergency by the Canadian Forces in accordance with the National Defence Act.”

Paragraph 20(1)(c) – Financial loss or gain or prejudice to the competitive position of a third party

1. Could the disclosure of information reasonably be expected to result in material financial gain or loss to you or to someone else?
2. Describe how disclosure of the information could result in a material loss or gain.
3. Could the disclosure of information prejudice your competitive position?
4. Describe in what way there could be prejudice to your competitive position by the disclosure of information.

NOTE:A simple statement to the effect that the disclosure of the information could reasonably be expected to be injurious will not be sufficient. The questions above are intended to elicit from you a precise indication of how the disclosure of particular information would be injurious.

Paragraph 20(1)(d)– Interference with negotiations

1. Could the disclosure of the information reasonably be expected to interfere with your contractual or other negotiations?
2. If so, in what way?
3. Are such contractual or other negotiations now underway or are they clearly expected in the near future? If so, please provide anticipated timelines.

Model letter 17 – Notice to third party of intention to disclose testing results under subsection 20(2)

Our file: [file number]

[date]

[name and address of third party]

Dear [name]:

We have received a request under the Access to Information Act to obtain [summary of request].

The enclosed records are relevant to the request and are of interest to [specify: you, your organization]. The information contained in the records falls within paragraph 20(1)[specify: (b), (b.1), (c), (d)] of the Act. However, we believe that the records contain the results of [specify: product, environmental] testing carried out by or on behalf of this institution. Therefore, under subsection 20(2) of the Act we cannot refuse to disclose them to the requester.

Pursuant to subsection 28(1) of the Act, you have 20 days to respond to this notice. You may either consent to the disclosure of the information or make written representations explaining why the information should not be disclosed. Your representations must be confined to the following:

1. that the records do not contain the results of product or environmental testing carried out on behalf of a government institution, or
2. that the testing was done as a service to a person, group of persons or an organization other than a government institution and for a fee.

Please let us know if you are not the appropriate party to receive this notice, or if another third party may also have an interest in the information or be affected by the disclosure of the information.

The enclosed Information Sheet provides a copy of sections 20, 27 and 28 of the Act for your convenience.

We will consider your representations and inform you of our final decision regarding the disclosure of the records. Should you have any questions or concerns, do not hesitate to contact [Officer's name] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Sincerely,

[Coordinator's name and title]

Enclosures

Access to Information Act

Section 20 of the Access to Information Act

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;
(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
(b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the Emergency Management Act and that concerns the vulnerability of the third party's buildings or other structures, its networks or

systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

(3) Where the head of a government institution discloses a record requested under this Act, or a part thereof, that contains the results of product or environmental testing, the head of the institution shall at the same time as the record or part thereof is disclosed provide the person who requested the record with a written explanation of the methods used in conducting the tests.

(4) For the purposes of this section, the results of product or environmental testing do not include the results of preliminary testing conducted for the purpose of developing methods of testing.

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

(6) The head of a government institution may disclose all or part of a record requested under this Act that contains information described in any of paragraphs (1)(b) to (d) if

(a) the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment; and
(b) the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party, any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations.

Section 27 of the Access to Information Act

27. (1) If the head of a government institution intends to disclose a record requested under this Act that contains or that the head has reason to believe might contain trade secrets of a third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by a third party, or information the disclosure of which the head can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party, the head shall make every reasonable effort to give the third party written notice of the request and of the head's intention to disclose within 30 days after the request is received.

(2) Any third party to whom a notice is required to be given under subsection (1) in respect of an intended disclosure may waive the requirement, and where the third party has consented to the disclosure the third party shall be deemed to have waived the requirement.

(3) A notice given under subsection (1) shall include

(a) a statement that the head of the government institution giving the notice intends to release a record or a part thereof that might contain material or information described in subsection (1);

(b) a description of the contents of the record or part thereof that, as the case may be, belong to, were supplied by or relate to the third party to whom the notice is given; and

(c) a statement that the third party may, within twenty days after the notice is given, make representations to the head of the government institution that has control of the record as to why the record or part thereof should not be disclosed.

(4) The head of a government institution may extend the time limit set out in subsection (1) in respect of a request under this Act where the time limit set out in section 7 is extended under paragraph 9(1)(a) or (b) in respect of the same request, but any extension under this subsection shall be for a period no longer than the period of the extension under section 9.

Section 28 of the Access to Information Act

28. (1) Where a notice is given by the head of a government institution under subsection 27(1) to a third party in respect of a record or a part thereof,

(a) the third party shall, within twenty days after the notice is given, be given the opportunity to make representations to the head of the institution as to why the record or the part thereof should not be disclosed; and

(b) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (a), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.

(2) Representations made by a third party under paragraph (1)(a) shall be made in writing unless the head of the government institution concerned waives that requirement, in which case they may be made

orally.

(3) A notice given under paragraph (1)(b) of a decision to disclose a record requested under this Act or a part thereof shall include

(a) a statement that the third party to whom the notice is given is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and
(b) a statement that the person who requested access to the record will be given access thereto or to the part thereof unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

(4) Where, pursuant to paragraph (1)(b), the head of a government institution decides to disclose a record requested under this Act or a part thereof, the head of the institution shall give the person who made the request access to the record or the part thereof forthwith on completion of twenty days after a notice is given under that paragraph, unless a review of the decision is requested under section 44.

Model letter 18 – Notice to third party of intention to disclose in the public interest

Our file: [file number]

[date]

[name and address of third party]

Dear [name]:

We have received a request under the Access to Information Act to obtain [summary of request].

The enclosed records are relevant to the request and are of interest to [specify: you, your organization]. The information contained in the records falls within paragraph 20(1) [specify: (b), (b.1), (c), (d)] of the

Act. However, we believe that its disclosure may be in the public interest as it relates to [specify: public health, public safety, the protection of the environment] and that this public interest outweighs in importance any [specify: financial loss to; financial gain to; prejudice to the security of the structures, networks or systems of; prejudice to the competitive position of; interference with the contractual or other negotiations of] [name of third party]. If this is the case, we will be obliged to comply with subsection 20(6) of the Act and disclose the information.

Pursuant to subsection 28(1) of the Act, you have 20 days to respond to this notice. You may either consent to the disclosure of the information or make written representations explaining why the information should not be disclosed. It is important that you demonstrate that the public interest does not outweigh in importance the prejudice that would result from disclosure. The enclosed Information Sheet provides a copy of sections 20, 27 and 28 of the Act for your convenience.

We will consider your representations and inform you of our final decision regarding the disclosure of the records. Should you have any questions or concerns, do not hesitate to contact [Officer's name] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Sincerely,

[Coordinator's name and title]

Enclosures

Access to Information Act

Section 20 of the Access to Information Act

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the Emergency Management Act and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

(3) Where the head of a government institution discloses a record requested under this Act, or a part thereof, that contains the results of product or environmental testing, the head of the institution shall at the

same time as the record or part thereof is disclosed provide the person who requested the record with a written explanation of the methods used in conducting the tests.

(4) For the purposes of this section, the results of product or environmental testing do not include the results of preliminary testing conducted for the purpose of developing methods of testing.

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

(6) The head of a government institution may disclose all or part of a record requested under this Act that contains information described in any of paragraphs (1)(b) to (d) if

(a) the disclosure would be in the public interest as it relates to public health, public safety or protection of the environment; and
(b) the public interest in disclosure clearly outweighs in importance any financial loss or gain to a third party, any prejudice to the security of its structures, networks or systems, any prejudice to its competitive position or any interference with its contractual or other negotiations.

Section 27 of the Access to Information Act

27. (1) If the head of a government institution intends to disclose a record requested under this Act that contains or that the head has reason to believe might contain trade secrets of a third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by a third party, or information the disclosure of which the head can reasonably foresee might effect a result described in paragraph 20(1)(c)

or (d) in respect of a third party, the head shall make every reasonable effort to give the third party written notice of the request and of the head's intention to disclose within 30 days after the request is received.

(2) Any third party to whom a notice is required to be given under subsection (1) in respect of an intended disclosure may waive the requirement, and where the third party has consented to the disclosure the third party shall be deemed to have waived the requirement.

(3) A notice given under subsection (1) shall include

(a) a statement that the head of the government institution giving the notice intends to release a record or a part thereof that might contain material or information described in subsection (1);
(b) a description of the contents of the record or part thereof that, as the case may be, belong to, were supplied by or relate to the third party to whom the notice is given; and
(c) a statement that the third party may, within twenty days after the notice is given, make representations to the head of the government institution that has control of the record as to why the record or part thereof should not be disclosed.

(4) The head of a government institution may extend the time limit set out in subsection (1) in respect of a request under this Act where the time limit set out in section 7 is extended under paragraph 9(1)(a) or (b) in respect of the same request, but any extension under this subsection shall be for a period no longer than the period of the extension under section 9.

Section 28 of the Access to Information Act

28. (1) Where a notice is given by the head of a government institution under subsection 27(1) to a third party in respect of a record or a part thereof,

(a) the third party shall, within twenty days after the notice is given, be given the opportunity to make representations to the head of the institution as to why the record or the part thereof should not be disclosed; and

(b) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (a), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.

(2) Representations made by a third party under paragraph (1)(a) shall be made in writing unless the head of the government institution concerned waives that requirement, in which case they may be made orally.

(3) A notice given under paragraph (1)(b) of a decision to disclose a record requested under this Act or a part thereof shall include

(a) a statement that the third party to whom the notice is given is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

(b) a statement that the person who requested access to the record will be given access thereto or to the part thereof unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

(4) Where, pursuant to paragraph (1)(b), the head of a government institution decides to disclose a record requested under this Act or a part thereof, the head of the institution shall give the person who made the request access to the record or the part thereof forthwith on completion of twenty days after a notice is given under that paragraph, unless a review of the decision is requested under section 44.

Model letter 19 – Notice to third party of decision to disclose following representations by third party (or in the absence of representations)

Our file: [file number]

[date]

[name and address of third party]

Dear [name]:

[If representations were received:

We have received your representations in response to our notice dated [date of notice]. We considered your views and have decided that the records requested are not exempt from disclosure under subsection 20(1) of the Access to Information Act.]

[In the absence of representations:

In the absence of the representations requested in our notice of [date of notice], we have decided that the records requested are not exempt from disclosure under subsection 20(1) of the Access to Information Act.]

[If the records will be disclosed in part:

We have decided to give the applicant access to the records requested, subject to exceptions permitted or required under the Access to Information Act, namely [provisions of the Act and short description]. A copy of the records that will be disclosed is enclosed for your reference.]

Pursuant to section 44 of the Act, you are entitled to request a review of this decision by the Federal Court of Canada within 20 days of the mailing date of this notice. If you do not request a review of this matter, the records in question will be disclosed on [date].

A copy of section 44 of the Act is enclosed for your convenience. We would greatly appreciate being informed should you choose to apply to the Federal Court for a review of our decision.

Do not hesitate to contact [Officer's name] at [Officer's Telephone number] or by e-mail at [Officer's e-mail] if you have any questions or concerns concerning the above.

Sincerely,

[Coordinator's name and title]

Enclosures

Section 44 of the Access to Information Act

44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

(2) The head of a government institution who has given notice under paragraph 28(1)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.

(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

Model letter 20 – Notice to third party of decision to disclose testing results following representations by third party (or in the absence of representations)

Our file: [file number]

[date]

[name and address of third party]

Dear [name]:

[If representations were received:

We have received your representations in response to our notice dated [date of notice]. We considered your views and confirm our position that the information requested falls under subsection 20(2) of the Access to Information Act and should be disclosed.]

[In the absence of representations:

In the absence of the representations requested in our notice of [date of notice], we have confirmed our position that the information requested falls under subsection 20(2) of the Access to Information Act and should be disclosed.]

Pursuant to section 44 of the Act, you are entitled to request a review of this decision by the Federal Court of Canada within 20 days of the mailing date of this notice. If you do not request a review of this matter, the records in question will be disclosed on [date].

A copy of section 44 of the Act is enclosed for your convenience. We would greatly appreciate being informed should you choose to apply to the Federal Court for a review of our decision.

Do not hesitate to contact [Officer's name] at [Officer's Telephone number] or by e-mail at [Officer's e-mail] if you have any questions or concerns concerning the above.

Sincerely,

[Coordinator's name and title]

Enclosures

Section 44 of the Access to Information Act

44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

(2) The head of a government institution who has given notice under paragraph 28(1)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.

(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

Model letter 21 – Notice to third party of decision to disclose in the public interest following representations by third party (or in the absence of representations)

Our file: [file number]

[date]

[name and address of third party]

Dear [name]:

[If representations were received:

We have received your representations in response to our notice dated [date of notice]. We considered your views and have decided that the records for which access have been requested should be disclosed in accordance with subsection 20(6) of the Access to Information Act.]

[In the absence of representations:

In the absence of representations requested in our notice of [date] we have decided that the records requested should be disclosed in accordance with subsection 20(6) of the Access to Information Act.]

Pursuant to section 44 of the Act, you are entitled to request a review of this decision by the Federal Court of Canada within 20 days of the mailing date of this notice. If you do not request a review of this matter, the records in question will be disclosed to the requester on [date].

A copy of section 44 of the Act is enclosed for your convenience. We would greatly appreciate being informed should you choose to apply to the Federal Court for a review of our decision.

Do not hesitate to contact [Officer's name] at [Officer's Telephone number] or by e-mail at [Officer's e-mail] if you have any questions or concerns concerning the above.

Sincerely,

[Coordinator's name and title]

Enclosures

Section 44 of the Access to Information Act

44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

(2) The head of a government institution who has given notice under paragraph 28(1)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given

notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.

(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

Model letter 22 – Notice to third party of decision not to disclose following representations by third party (or in the absence of representations)

Our file: [file number]

[date]

[name and address of third party]

Dear [name]:

[If representations were received:

We have received your representations in response to our notice dated [date of notice]. We considered your views and have decided that the records are exempt under paragraph 20(1)[specify paragraph] of the Access to Information Act. Therefore, the records will not be disclosed.]

[In the absence of representations:

We have not received your reply to our letter of [date of third party notice], which requested your views on the disclosure of records of interest to [you, your organization]. We have decided that the records are exempt under paragraph 20(1)[specify paragraph] of the Access to Information Act. Therefore, the record(s) will not be disclosed.]

The requester has been informed of this decision and has sixty days from the time of our notice to complain to the Information Commissioner concerning our refusal to disclose. If that happens, the

Commissioner may contact you as an interested party. We will inform you if there are further developments in this matter.

Should you have any questions or concerns, do not hesitate to contact [Officer's name] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Sincerely,

[Coordinator's name and title]

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Response to requester

Model letter 23 – Partial response to requester

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This letter is further to your request of [date of request], to obtain [summary of request].

I am pleased to enclose a preliminary package of [number of pages disclosed] pages relevant to your request, which are disclosed under the authority of the Access to Information Act. You will note that certain records or portions thereof have been withheld under [provisions of the Act and short description] of the Act. In addition, information is excluded pursuant to subsection 69(1) [confidences of the Queen's Privy Council of Canada] of the Act. A list of pages is attached for your reference.

I have made all decisions concerning the disclosure of the enclosed records, having received delegation to do so from the head of the institution. Furthermore, I decided both the issue of the applicability of exemptions and the issue of whether the information should, as a matter of discretion, nevertheless be released. In deciding this matter, I have taken the following criteria into account:

[List criteria]

[Explain whether those criteria were or were not met and why.]

We are consulting with [specify: other government institutions, third parties] concerning the disclosure of additional records and we will contact you again as soon as possible. In the meantime, should you have any questions or concerns about your request, do not hesitate to contact [ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days after the day that you become aware that grounds for a complaint exist. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator’s name and title]

Enclosures

Model letter 24 – Response to requester – records all disclosed

Our file: [file number]

[date]

[requester’s name and address]

Dear [requester’s name]:

This letter is further to your request of [date of request], to obtain [summary of request].

[If records are enclosed:

I am pleased to enclose all the documents relevant to your request, which are disclosed in their entirety under the authority of the Access to Information Act.]

[If requester asked to view the records:

I am pleased to provide access to the documents relevant to your request, which are disclosed in their entirety under the authority of the Access to Information Act. You requested an opportunity to examine the records rather than receive copies. I invite you to examine the records at [place and address] on [date] at [time]. If you are unable to examine the records at that time, please contact [name and telephone number] to make alternate arrangements.]

[If the records cannot be copied:

I am pleased to provide access to the documents relevant to your request, which are disclosed in their entirety under the authority of the Access to Information Act. Unfortunately, the records cannot be copied because [provide reason]. I invite you to examine the original records at [place and address] on [date] at [time]. If you are unable to examine the record(s) at that time, please contact [name and telephone number] to make alternate arrangements.]

This completes our processing of your request. Should you have any questions or concerns about your request, do not hesitate to contact [ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days after the day that you become aware that grounds for a complaint exist. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

> The Information Commissioner of Canada
> 30 Victoria Street, 7th Floor
> Gatineau, Quebec K1A 1H3
>
> Telephone: (613) 995-2410 (National Capital Region)
> 1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Enclosures

Model letter 25 – Response to requester – records disclosed in part

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This letter is further to your request of [date of request], to obtain [summary of request].

I am pleased to enclose the releasable documents relevant to your request, which are disclosed under the authority of the Access to Information Act. You will note that certain records or portions thereof have been withheld under [provisions of the Act and short description] of the Act. In addition, information is excluded pursuant to subsection 69(1) [confidences of the Queen's Privy Council of Canada] of the Act. A list of pages is attached for your information.

I have made all decisions concerning the disclosure of records relevant to your request, having received delegation to do so from the head of the institution. Furthermore, I decided both the issue of the applicability of exemptions and the issue of whether the information should, as a matter of discretion, nevertheless be released. In deciding this matter, I have taken the following criteria into account:

[List criteria]

[Explain whether those criteria were or were not met and why.]

This completes our processing of your request. Should you have any questions or concerns, do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days after the day that you become aware that grounds for a complaint exist. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Enclosures

Model letter 26 – Response to requester – no records found

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This letter is further to your request of [date of request], to obtain [summary of request].

I regret to inform you that a search of the records under the control of [name of the institution] has revealed none relating to the subject of your request. [If the records have been destroyed, provide information, if possible, as to when and under what authority this was done.]

This completes our processing of your request Should you have any questions or concerns, do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days after the day that you become aware that grounds for a complaint exist. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

> The Information Commissioner of Canada
> 30 Victoria Street, 7th Floor
> Gatineau, Quebec K1A 1H3
>
> Telephone: (613) 995-2410 (National Capital Region)
> 1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Model letter 27 – Response to requester – records exempted and excluded entirely

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This letter is further to your request of [date of request], to obtain [summary of request].

We have conducted a search of our records and located [number of pages] pages relevant to your request. Unfortunately, all documents have been withheld under [provisions of the Act and short description] of the Act. In addition, information is excluded pursuant to subsection 69(1) [confidences of the Queen's Privy Council of Canada] of the Act.

I have made all decisions concerning the disclosure of records relevant to your request, having received delegation to do so from the head of the institution. Furthermore, I decided both the issue of the applicability of exemptions and the issue of whether the information should, as a matter of discretion, nevertheless be released. In deciding this matter, I have taken the following criteria into account:

[List criteria]

[Explain whether those criteria were or were not met and why.]

This completes our processing of your request. Should you have any questions or concerns, do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days after the day that you become aware that grounds for a complaint exist. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Model letter 28 – Response to requester – refusal to acknowledge existence of records

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This letter is further to your request of [date of request], to obtain [summary of request].

Pursuant to subsection 10(2) of the Access to Information Act, I do not confirm or deny the existence of records relevant to your request. If such records did exist, they would qualify for exemption under [section of the Act] of the Act, which permits the head of a government institution to refuse to disclose [brief description].

This completes our processing of your request. Should you have any questions or concerns with respect to the above, do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-

mail at [Officer's e-mail address].

Please be advised that you are entitled to complain to the Information Commissioner concerning the processing of your request within 60 days after the day that you become aware that grounds for a complaint exist. In the event you decide to avail yourself of this right, your notice of complaint should be addressed to:

The Information Commissioner of Canada
30 Victoria Street, 7th Floor
Gatineau, Quebec K1A 1H3

Telephone: (613) 995-2410 (National Capital Region)
1-800-267-0441 (Toll-free)

You may obtain additional information on the complaint process by visiting the website of the Office of the Information Commissioner at www.oic-ci.gc.ca.

Sincerely,

[Coordinator's name and title]

Top

Complaints

Model letter 29 – Additional records disclosed to requester further to a complaint

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

As a result of the complaint you filed with the Office of the Information Commissioner, we have reconsidered the exemptions applied to the records relevant to your request. We have decided that the following information may be disclosed:

- Pages [page numbers] are disclosed in their entirety.
- Pages [page numbers] are disclosed in part, portions being exempted under [exemption provision(s)] of the Access to Information Act.

We are maintaining the exemptions invoked for the remainder of the records.

Should you have any questions or concerns with respect to the above, do not hesitate to contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Sincerely,

[Coordinator's name and title]

Enclosures

Model letter 30 – Notice to third party of complaint filed with the Information Commissioner

Our file: [file number]

[date]

[name and address of third party]

Dear [name]:

We have received a request under the Access to Information Act to obtain [summary of request].

The enclosed records are relevant to the request and are of interest to [specify: you, your organization]. We decided that the records are exempt from disclosure under paragraph 20(1)[paragraph] of the Act. However, the requester has complained to the Information Commissioner about the exemptions claimed. The Office of the Information Commissioner will investigate the matter and is likely to contact you if they make a preliminary decision to recommend that the records be disclosed. In that case, you will be given an opportunity to make representations as to why the records should not be disclosed.

We will inform you of further developments in this matter. Should you have any questions or concerns, do not hesitate to contact [Officer's name] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Sincerely,

[Coordinator's name and title]

Enclosures

Model letter 31 – Notice to third party of decision to disclose on the recommendation of the Information Commissioner

Our file: [file number]

[date]

[name and address of third party]

Dear [name]:

[If a notice of the complaint was given:

This is further to our notice dated [date of notice of the complaint].]

[If a notice of the complaint was not given:

We have received a request under the Access to Information Act to obtain [summary of request].

The enclosed records are relevant to the request and are of interest to [specify: you, your organization]. We decided that the records are exempt from disclosure under paragraph 20(1)[paragraph] of the Act. However, the requester has complained to the Information Commissioner about the exemptions claimed.]

The Office of the Information Commissioner has recommended that the records be disclosed. As a result, we have reconsidered our earlier decision to exempt the records requested and we have decided to disclose them.

Pursuant to section 44 of the Act, you are entitled to request a review of this decision by the Federal Court of Canada within 20 days of the mailing date of this notice. If you do not request a review of this matter, the records in question will be disclosed on [date].

A copy of section 44 of the Act is enclosed for your convenience. We would greatly appreciate being informed should you choose to apply to the Federal Court for a review of our decision.

Do not hesitate to contact [Officer's name] at [Officer's Telephone number] or by e-mail at [Officer's e-mail] if you have any questions or concerns with regard to the above.

Sincerely,

[Coordinator's name and title]

Enclosures

Section 44 of the Access to Information Act

44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

(2) The head of a government institution who has given notice under paragraph 28(1)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.

(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

Model letter 32 – Notice to requester of decision to disclose records containing third party information on the recommendation of the Information Commissioner

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

As a result of the complaint you filed with the Office of the Information Commissioner, we have reconsidered the exemptions applied to the records relevant to your request. We have decided that the following information may be disclosed:

- Pages [page numbers] may be disclosed in their entirety.
- Pages [page numbers] may be disclosed in part, portions being exempted under [exemption provision(s)] of the Access to

Information Act.

Third parties that may be affected by the disclosure of the records have been notified of the decision to disclose and have 20 days to apply to the Federal Court of Canada for a review of that decision. Unless such an application is made, the records will be disclosed to you on [date].

Should you have any questions or concerns, do not hesitate to contact [Officer's name] at [Officer's Telephone number] or by e-mail at [Officer's e-mail].

Sincerely,

[Coordinator's name and title]

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Review by the Federal Court

Model letter 33 – Notice to requester of third party's application for review to the Federal Court

Our file: [file number]

[date]

[requester's name and address]

Dear [requester's name]:

This letter is further to our notice of [date of notice of decision to disclose.

Please be advised that [name of third party] that may be affected by the disclosure of the records you have requested has applied to the Federal Court of Canada under section 44 of the Access to Information Act for a review of our decision to disclose. As a result, the records cannot be

disclosed at this time. We will inform you of the final decision concerning the disclosure of the records when the court proceedings have been completed.

Subsection 44(3) of the Act gives you the right to appear as an intervenor in the review. A copy of section 44 of the Act is enclosed for your convenience.

Sincerely,

[Coordinator's name and title]

Section 44 of the Access to Information Act

44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

(2) The head of a government institution who has given notice under paragraph 28(1)(b) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.

(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

Model letter 34 – Notice to third party of application for review to the Federal Court by the requester or the Information Commissioner

Our file: [file number]

[date]

[third party's name and address]

Dear [third party's name]:

This letter is further to our notice of [date of notice of decision not to disclose].

Following a complaint by the requester to the Information Commissioner and an investigation by the Commissioner, we decided to abide by our earlier decision that the records requested are exempt from disclosure under paragraph 20(1) [paragraph] of the Access to Information Act.

Please be advised that [specify: name of requester, the Information Commissioner] has applied to the Federal Court of Canada under section [specify: 41, 42] of the Act for a review of our decision to withhold the records. Subsection 43(2) of the Act gives you the right to appear as a party to the review.

Sincerely,

[Coordinator's name and title]

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Response to consultations from other government institutions

Model letter 35 – Response to consultation request from another institution

Your file: [request number of other institution]
Our file: [file number]

[date]

[name of coordinator or ATIP Officer and address of other institution]

Dear [name]:

This letter is in response to your consultation of [date], concerning the disclosure of records that are the subject of your access request [request number of other institution].

[Choose relevant paragraph(s):

- I have no objections to the disclosure of pages [page numbers] of your file.
- I recommend that the following information be exempt under [provision(s)] of the Access to Information Act: [page numbers or portions of pages]. [provide rationale]
- Please note that we review only information originating from or of interest to [name of institution]. Exemptions or exclusions may apply to other information.
- If you decide not to follow our recommendations, we would appreciate being notified prior to the release of the information.]

Should you wish to discuss this matter further, please contact [name of ATIP Officer] at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Sincerely,

[Coordinator's name and title]

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Informal requests

Model letter 36 – Response to informal request

Our file: [file number]

[date]

[informal requester's name and address]

Dear [name]:

[Choose relevant paragraphs:

- This is further to your informal request that was received by this institution on [date], to obtain a copy of the records disclosed in response to request [request number]. I am pleased to enclose the records previously disclosed.
- This is further to your informal request that was received by this institution on [date], to obtain [summary of request].
- I am pleased to enclose the records relevant to your request that may be disclosed.
- I regret to inform you that a search of the records under the control of [name of the institution] has revealed none relating to the subject of your request.
- I regret to inform you that the records relevant to your request may not be disclosed.]

This completes our processing of your request. Should you have any questions, do not hesitate to contact me at [Officer's telephone number] or by e-mail at [Officer's e-mail address].

Sincerely,

[name and title of Officer]

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Footnotes

1-1 Canada Post Corp. v. Canada (Minister of Public Works), [1995] 2 F.C. 110 (F.C.A.); Canada (Information Commissioner) v. Canada (Immigration Appeal Board), [1988] 3 F.C. 477 (Fed. T.D.)

There are, however, a few exceptions in the case of Acts of particular application that contain a "notwithstanding the Access to Information Act" clause, that are not listed in Schedule II of the Act and that came into force after the Access to Information Act. The provisions of such statutes take precedence over those of the Access to Information Act. They include subsection 46(1) of the Hazardous Materials Information Review Act, subsections 20(3) and 22(3) of the Hazardous Products Act, and subsection 144(4) of the Canada Labour Code. Such exceptions are extremely rare.

3-1 Yeager v. Canada (Correctional Service), 2003 FCA 30.

3-2 The Policy on Information Management applies to departments as defined in section 2 of the Financial Administration Act, unless excluded by specific acts, regulations, or Orders in Council.

3-3 The Directive on Recordkeeping applies to departments as defined in section 2 of the Financial Administration Act, unless excluded by specific acts, regulations, or orders in council.

3-4 The requirements for handling such records are found in Security Policy Implementation Notice (SPIN) 2007-04.

11-1 "Ipso facto" means by the fact itself.

11-2 This decision is being appealed.

11-3 "In camera" describes court cases (or portions thereof) conducted in private, where the public and the press are not admitted.

11-4 The administrative investigation must come within the definition of “investigation” found in subsection 16(4) of the Access to Information Act ? that is, it must pertain to the administration or enforcement of an Act of Parliament, be authorized by or pursuant to an Act of Parliament, or be an investigation specified in the Access to Information Regulations.

11-5 In the decision Canada (Minister of Public Safety and Emergency Preparedness) v. Maydak, 2005 FCA 186, the Federal Court of Appeal held that the term “investigation” as it is used in subsection 22(1)(a) of the Privacy Act, the provision equivalent to subsection 16(1)(a) of the Access to Information Act, must be given a broad meaning. “Investigation” should be read in its ordinary sense and includes “the action of investigating; the making of a search or inquiry; systematic examination, careful or minute research.”

11-6 The Supreme Court said, at paragraph 140: “The case law also holds that in order to constitute financial, commercial, scientific or technical information, the information at issue need not have an inherent value, such as a client list might have, for example. The value of information ultimately ’depends upon the use that may be made of it, and its market value will depend upon the market place, who may want it, and for what purposes, a value that may fluctuate widely over time’ (Air Atonabee, at p. 267).”

11-7 Appleton & Associates v. Canada (Privy Council Office), 2007 FC 640.

11-8 The Supreme Court said, at paragraph 140: “The case law also holds that in order to constitute financial, commercial, scientific or technical information, the information at issue need not have an inherent value, such as a client list might have, for example. The value of information ultimately ’depends upon the use that may be made of it, and its market value will depend upon the market place, who may want it, and for what purposes, a value that may fluctuate widely over time’ (Air Atonabee, at p. 267).”

11-10 Canada (Information Commissioner) v. Canada (Minister of Public Works and Government Services) (T.D.), [1997] 1 F.C. 164.

11-11 Terry v. Canada (Minister of National Defence),30 Admin L.R. (2d) 122.

11-12 Rubin v. Canada (Minister of Health), 2001 FCT 929.

11-13 Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403; H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), 2006 SCC 13, [2006] 1 S.C.R. 441.

11-14 Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board), 2005 FC 384; Gordon v. Canada (Health), 2008 FC 258.

11-15 Rubin v. Canada (Minister of Health), 2003 FCA 37.

11-16 The Supreme Court said, at paragraph 140: “The case law also holds that in order to constitute financial, commercial, scientific or technical information, the information at issue need not have an inherent value, such as a client list might have, for example. The value of information ultimately ’depends upon the use that may be made of it, and its market value will depend upon the market place, who may want it, and for what purposes, a value that may fluctuate widely over time’ (Air Atonabee, at p. 267).”

11-17 Appleton & Associates v. Canada (Privy Council Office), 2007 FC 640.

11-18 Cistel Technology Inc. v. Canada (Correctional Service), 2002 FC 328; Air Atonabee Limited v. Canada (Minister of Transport) (1989), 27 F.T.R. 194.

11-19 Astrazeneca Canada Inc. v. Canada (Minister of Health), 2005 FC 645.

11-20 Canada (Minister of Health) v. Merck Frosst Canada & Co., 2005 FCA 215; Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3.

11-21 Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports), [1989] 2 F.C. 480 (T.D.).

11-22 Canada Post Corporation v. Canada (Minister of Public Works and Government Services), 2004 FC 270.

11-23 High-Rise Group Inc. v. Canada (Minister of Public Works and Government Services), 2003 FCT 430.

11-24 Société Gamma Inc. v. Canada (Secretary of State) (1994), 56 C.P.R. (3d) 58; 79 F.T.R. 42 (F.C.T.D.).

11-25 Jacques Whitford Environment Ltd. v. Canada (Minister of National Defence), 2001 FCT 556.

11-26 Canada (Minister of Health) v. Merck Frosst Canada & Co., 2005 FCA 215.

11-27 Halifax Developments Ltd. v. Minister of Public Works (1994), F.C.J. No. 2035 (QL) (F.C.T.D.).

11-28 Occam Marine Technologies Ltd. v. Canada (National Research Council), [1998] F.C.J. No. 1502 (QL) (F.C.T.D.), T-146-98, order dated October 19, 1998.

11-29 St Joseph Corp. v. Canada (Public Works and Government Services), 2002 FCT 274; Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services), 2003 FCT 254; Société Gamma Inc. v. Department of the Secretary of State of Canada (1994), 56 C.P.R. 58; Canadian Broadcasting Corp. v. National Capital Commission (1998), 147 F.T.R. 264; Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports), [1989] 2 F.C. 480 (T.D.); Canada (Information Commissioner) v. Canada (Atlantic Canada Opportunities Agency) (1999), 250 N.R. 314 (F.C.A.).

11-30 Pricewaterhousecoopers LLP v. Canada (Minister of Canadian Heritage), 2001 FCT 1040 (confirmed 2002 FCA 406).

11-31 In the decision Burns Meats Ltd. v. Canada (Minister of Agriculture), (1987), 14 F.T.R. 137 (F.C.T.D.), the Federal Court held that Burns had not established a case for paragraph 20(1)(c). Burns presented evidence that as a result of misleading publicity based on inspection reports, it had suffered a loss of a fraction of 1 per cent of its annual sales over a period of about three months in a limited geographical area. The cost to Burns was between $200,000 and $300,000. This amount was not a sufficiently large loss to meet the requirement of “material.”

11-32 Canada Packers Inc. v. Canada (Minister of Agriculture), [1989] 1 F.C. 47 (C.A.).

11-33 Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3.

11-34 Coopérative fédérée du Québec v. Canada (Agriculture et Agroalimentaire), (2002) F.C. Docket T-1798-98.

11-35 Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare) (1992), 41 C.P.R. (3d) 176 (F.C.T.D.).

11-36 Matol Botanical International Inc. v. Canada (Minister of National Health & Welfare) (1994), 84 F.T.R. 168 (F.C.T.D.).

11-37 Canadian Broadcasting Corporation v. National Capital Commission, T-1273-94, decision dated May 3, 1996 (F.C.T.D.), not reported.

11-38 Canadian Pacific Hotels Corp. v. Canada (Attorney General), 2004 FC 444.

11-39 Gainers Inc. v. Minister of Agriculture Gainers Inc. v. Canada (Minister of Agriculture) (1987), 14 F.T.R. 133 (F.C.T.D.); Les Viandes du Breton Inc. v. Canada (Department of Agriculture) (2000) T-1819-98.

11-40 Canada Packers Inc. v. Canada (Minister of Agriculture), [1989] 1 F.C. 47 (C.A.).

11-41 Canadian Pacific Hotels Corp. v. Canada (Attorney General), 2004 FC 444.

11-42 Blood Band v. Canada (Minister of Indian Affairs and Northern Development), 2003 FC 1397.

11-43 Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3.

11-44 Dekalb Canada Inc. v. Agriculture and Agri-Food, [1999] F.C.J. No. 1690 (T.D.).

11-45 The Policy on Internal Audit applies to departments as defined in section 2 of the Financial Administration Act, unless otherwise excluded by specific acts, regulations or Orders in Council. However, paragraphs 6.2.2.2 and 6.2.2.2.1 of the policy apply to departments in the core public administration as defined in section 11 of the Financial Administration Act. Other departments or separate agencies not subject to these provisions are encouraged to meet these requirements as good practice.

11-46 For the purposes of the Policy on Internal Audit, any department with an operating budget of less than $300 million per year is designated as a small department, with the exception of the offices of the agents of Parliament.

11-47 The requirements for handling such records are found in Security Policy Implementation Notice (SPIN) 2007-04.

11-48 Generally speaking, the House of Commons and its Members enjoy certain constitutional rights and immunities that are collectively referred to as parliamentary privilege. Additional information on parliamentary privilege is available on the Privy Council Office's website.

11-49 In this case, the Court ruled that a waiver by Top Aces Consulting Inc. allowing the Minister of National Defence to disclose specified information gathered pursuant to the Defence Production Act constituted a consent under section 30 of the Defence Production Act. This consent relieved the Minister from his duty to refuse to disclose the specified information under subsection 24(1) of the Act.

12-1 The 1993 Access to Information Policy was superseded by the 2008 Policy on Access to Information, which contains a requirement similar to the one mentioned by the Supreme Court of Canada. Section 6.2.6 of the Policy on Access to Information requires institutions to establish procedures to ensure that the requested records are reviewed to determine whether they are subject to the Act. If the requested records are subject to the Act, the institution must then determine whether any exemptions apply.

13-1 Additional information on Cabinet is available on the website of the Privy Council Office.

13-2 Canadian Broadcasting Corporation v. Canada (Information Commissioner), 2011 FCA 326. This case involves section 68.1, an exclusion under the Act relating to journalistic, creative or programming activities of the Canadian Broadcasting Corporation.

13-3 At paragraph 49 of the case Canadian Broadcasting Corporation v. Canada (Information Commissioner), 2011 FCA 326.

13-4 Quinn v. Canada (Prime Minister), 2011 FC 379 at paragraph 28; Canada (Information Commissioner) v. Canada (Minister of the Environment) (T.D.) [2001] 3 F.C. 514, confirmed on appeal Canada (Minister of the Environment) v. Canada (Information Commissioner),2003 FCA 68 (Ethyl decision).

13-5 In Quinn, ibid., the subject of the review was the decision of the Privy Council Office Access to Information Privacy director to invoke section 69 of the Act. See also Canadian Broadcasting Corporation v. Canada (Information Commissioner), 2011 FCA 326, which spoke in approval of the Quinn decision on this point.

15-1 The Policy on Information Management applies to departments as defined in section 2 of the Financial Administration Act, unless excluded by specific acts, regulations, or Orders in Council.

15-2 The Directive on Recordkeeping applies to departments as defined in section 2 of the Financial Administration Act, unless excluded by specific acts, regulations, or Orders in Council.

Date modified:
2024-02-22