

## The Access to Information Act: A 1988 Review

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# RESEARCH REPORTS/ NOTES DE RECHERCHE

## The Access to Information Act:

### A 1988 Review

William Kaplan

#### *Introduction*

IN A NOTE PUBLISHED IN the September 1985 *Canadian Historical Review*,<sup>1</sup> I commented on the first two judicial interpretations of the federal Access to Information Act and I suggested that the Canadian public had, in the new freedom of information legislation, a potent tool for obtaining access to government records. I observed, however, that only time would tell what the limits, and possibilities, of the Access to Information Act would be. Simply put, more experience was required before any real assessment could be made.

Since that time thousands of requests for information have been filed. In many cases, obtaining access to information is relatively routine with material being released after a request is made.<sup>2</sup> In other cases, access to information is refused and some of those cases have resulted in complaints to the Information Commissioner. Only a handful of complaints have been

<sup>1</sup>William Kaplan, "Access to Information and the Historical Profession," *Canadian Historical Review*, 66 (1985), 378-81.

<sup>2</sup>For a detailed statistical breakdown of the disposition of Access to Information requests, see the *Access to Information Act & Privacy Act Bulletin*, No. 8, November 1987, Table 1, p. 3. This bulletin can be obtained from the Canadian Government Publishing Centre, Ottawa K1A 0S9.

William Kaplan, "The Access to Information Act: A 1988 Review," *Labour/Le Travail*, 22 (Fall 1988), 181-198.

appealed to the Federal Court, but these judicial decisions are extremely important to the research community since they are, in effect, the final say on what information can and cannot be obtained under the Access to Information Act. Moreover, they provide the standards for bureaucratic action in the day-to-day interpretation and administration of the legislation. The time is, therefore, right to review the judicial developments of the last five years.

### *Part One: The Process*

THIS IS NOT THE PLACE to precis in any detail how an Access to Information Act request is made. Suffice it to say that all that is required is a written request, addressed to the Access to Information Coordinator of the relevant government department or agency,<sup>3</sup> enclosing a cheque for five dollars payable to the Receiver General of Canada, and containing a statement that the requester is a Canadian citizen or permanent resident and asking, as specifically as possible, for information believed to be contained in government records. Once the request is received, the government has thirty days in which to reply. In its reply the government can claim a time extension and this claim, along with any other matter related to the administration of the legislation, can be the subject of a complaint to the Information Commissioner. The Information Commissioner is an officer of Parliament with ombudsman-like powers of investigation and recommendation. Unresolved complaints concerning a refusal to grant access can be appealed to the Federal Court of Canada.

### *Part Two: Judicial Interpretation of the Legislation*

#### *(1) Third Party Applications*

SOMEWHAT PARADOXICALLY, the first case to come before the Federal Court did not concern a refusal of the government to grant access to information but was instead an attempt to prevent the government from disclosing information.<sup>4</sup> Maislin Industries applied under the third party provisions of the Access to Information Act for an order restraining the Minister for Industry, Trade and Commerce from disclosing information that had been earlier supplied to the department by Maislin.

<sup>3</sup>A list of departments and agencies covered by the Access to Information Act may be found in the Access Register published each year by the Canadian Government Publishing Centre. Some public libraries maintain copies of this register which also provides a description of the activities of each government department as well as the address of the Access Coordinator.

<sup>4</sup>*Re Maislin Indus. v. Canada (Minister for Indus. Trade and Commerce)*, (1984) 10 D.L.R. (4th) 417, 80 C.P.R. (2d) 253 (F.C.T.D.).

The third party provisions of the legislation provide that government institutions must not disclose any of the following information:

- a) trade secrets of a third party;
- b) confidential information of a financial, commercial, scientific or technical nature supplied by a third party that is treated consistently in a confidential manner by the third party;
- c) information which, if released, could result in material financial loss or gain to or could prejudice the competitive position of a third party; or,
- d) information which, if released, could interfere with contractual or other negotiations of a third party.<sup>5</sup>

The intention of this exemption is to balance corporate confidentiality with the public's right to know. The Act establishes a mechanism whereby third parties are notified by government departments that those departments intend to release the third party information. They are given an opportunity to make representations demonstrating that the information falls into one of the above-noted categories and can, within a specified time period, challenge in Federal Court the government decision to release the information.

The facts of the Maislin case need not concern us here for what was important to the research community were three of the findings of the court. First, the court held that the burden of proof, at judicial review, fell on the third party objecting to the disclosure of the information. This finding complements section 48 of the Act which provides that the government bears the burden of proof when it is the party objecting to the disclosure of information. Because of this section, and as a result of the decision in Maislin, whenever access is refused it is the duty of those objecting to access to adduce evidence that the requested information was properly exempted or should, in the case of third parties, be exempted.<sup>6</sup> Second, the court held that the information must not just be labelled "confidential." It must be objectively confidential as determined by the facts of each case.

The third important holding in the Maislin case was that public access to information should not be frustrated by the courts except upon the clearest grounds, with any doubt resolved in favour of disclosure. This finding was, as the court noted, perfectly in accord with the purpose provision of the Act which states that the legislation is "to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government."<sup>7</sup>

<sup>5</sup> *Access to Information Act*, S.C. 1980-81-82, c. 111 (Schedule 1) s. 20.

<sup>6</sup> See also, *Intercont'l Packers Ltd. v. Canada (Minister of Agriculture)*, (1988) 14 F.T.R. 142.

<sup>7</sup> *Access to Information Act*, S.C. 1980-81-82, c. 111 (Schedule 1), s. 2.

As important as the Maislin case was, it did not resolve every question relating to third party applications, as was demonstrated in the next third party application to make its way to the Federal Court. In *Ciba-Geigy Canada Ltd. v. Canada (Minister of National Health and Welfare)*,<sup>8</sup> the court was asked to decide whether a third party could contest the release of requested information simply because the initial request had incorrectly described the formal title of the information which was being requested.

In brief, the applicant sought access to a "Notice of Compliance" containing certain drug product information. Apparently unbeknownst to him, the information formerly contained in the Notices of Compliance was now contained in a letter. The Minister of National Health and Welfare proposed to release the letter but the third party, Ciba-Geigy Canada Ltd., objected, stating that the response must comply with the request and since it did not, the letter should not be released. The Associate Chief Justice of the Federal Court, the Honourable James Jerome (who had earlier decided the Maislin case), disagreed and ordered the material released. The case, therefore, stands as authority for the proposition that where the subject of a request is clear, an imprecise description of a formal title cannot stand as a barrier to release. Indeed, this was exactly the result in another third party case wherein the court held that "there must be a degree of specificity in requests made under the Access to Information Act for documents but only to the extent that the document or record requested be reasonably identifiable."<sup>9</sup> Nonetheless, precision in identification of requested materials is preferable to proving this particular point in court.

Another case in which a third party proved unsuccessful in preventing a government department from disclosing information earlier received from that third party was *Sawridge Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*.<sup>10</sup> Numerous procedural matters had to be disposed of, but one issue can be said to be the crux of the case: the standard of judicial review of administrative action. In this case, an Access to Information Act request was made for certain rules adopted by an Indian band and subsequently approved by the Minister of Indian Affairs. Once approved these rules had the power of regulations. The Access to Information Coordinator reviewed the request and decided to grant access to the rules. He had no reason to believe that third party rights were involved.

However, it was subsequently claimed that the Indian Band which initially prepared the rules did so at great cost and, as a result, treated the rules confidentially. An argument could therefore be made that the rules were exempt from access because they were confidential third party financial

<sup>8</sup>(1986), 11 C.P.R. (3d) 98 (F.C.T.D.).

<sup>9</sup>*Horseman v. Canada (Minister of Indian Affairs and Northern Dev.)*, (30 March 1987), T-2863-86 (F.C.T.D.).

<sup>10</sup>(1987), 10 F.T.R. 48.

information and/or that disclosure of this information could lead to material financial loss. While the evidence on this point was weak, it appears that the band wished to recoup some of the cost by selling the rules to other bands as precedents and so was opposed to the rules being released under the Access to Information Act. The case was decided, however, on the basis that the Access Coordinator had proceeded properly and because he "could not then and could not now be expected to conclude that the release of the rules would or might effect any of the results described [in the third party exemption provisions]. To expect the respondent to conclude that the release of the rules would or might give rise to such results would be to expect him to engage in the height of speculation." While not determinative of the result it is interesting to observe that the presiding judge found that the preparation of the rules could have been "completed in a few hours."<sup>11</sup>

That time periods for bringing third party reviews can only be ignored at some peril is illustrated by the decision in *J.M. Schneider Inc. v. Canada*.<sup>12</sup> In that case, Schneider was refused a court order giving it permission to launch a third party review even though the twenty days set out in the legislation for initiating such a review had elapsed.

Indeed, Ontario meat companies have not fared well before the Federal Court. *Piller Sausages & Delicatessens Ltd. v. Canada (Minister of Agriculture)*<sup>13</sup> was one of fourteen applications brought by ten meat packing companies to prevent the disclosure of "meat inspection team audit reports" prepared by the federal Department of Agriculture. The meat companies argued that these reports should not be disclosed because they contained information that could result in financial loss to them, prejudice their competitive positions and interfere with contractual and other negotiations.

The case is a long one and it bears reading in full for not only are the positions of all the parties analyzed in detail, so too is American law, and a relevant New Brunswick case which interprets a comparable provision of the New Brunswick Right to Information Act.<sup>14</sup> At the end of the day Associate Chief Justice Jerome ordered the reports released and in so doing he established a test which will undoubtedly be adopted in future cases: "The evidence must not require pure *speculation*, but must at least establish a *likelihood* of substantial injury .... The expectation must be reasonable, but it need not be a certainty." As a result of this decision, third parties contesting the disclosure of information will have to come to court armed with some significant evidence in support of their position.<sup>15</sup> Absent such evidence, the

<sup>11</sup>*Ibid.*

<sup>12</sup>(8 August 1986), 86-T-608 (F.C.T.D.).

<sup>13</sup>(1988), 14 F.T.R. 118.

<sup>14</sup>S.N.B. 1978, c. R-10-3; *Re Daigle*, (1980), 30 N.B.R. (2d) 209, 70 A.P.R. 209.

<sup>15</sup>For a case where these requirements were not met see *Merck Frosst Canada Inc. v. Canada (Minister of Health and Welfare)*, (11 March 1988), T-128-86 (F.C.T.D.).

information requested will likely be disclosed.<sup>16</sup> These cases have, however, been appealed.

Some of the principles adopted in the meat packing cases were subsequently referred to in a series of cases involving a number of Indian bands which were attempting to prevent the disclosure of audits and financial statements provided by them to the government. In these cases the court found that the information met the tests of the third party exemption provision. The court noted that it was only the result of a "complex series of historical and constitutional developments" that the funds to which the audits and statements related came to be held in trust by the federal government. While all band members had access to the information this did not reduce its confidentiality given that the information was never made available to the general public. In addition, the audits and financial statements contained little information about public monies, and that information was, in any event, available from government records.<sup>17</sup>

With this one exception, third parties have not been successful in their challenges before the Federal Court. But while researchers have benefited from the seemingly restrictive interpretations the Federal Court has given to third party information, overall the Act has not been interpreted in their favour for the judicial interpretation of exemption provisions in regard to government records has restricted Canadian's access to information.

## (2) *Exemption Cases*

ONE CASE IN PARTICULAR stands out: *The Information Commissioner of Canada v. The Chairman of the Canadian Radio-Television and Telecommunications Commission (CRTC)*.<sup>18</sup> This case was brought to trial by the Information Commissioner on behalf of an unsuccessful applicant for the records of meetings of the CRTC Executive Committee in regard to a particular CRTC decision. The CRTC claimed that the records requested were "an account of consultations or deliberations involving officials or employees of a government institution, a Minister of the Crown or the staff of a Minister of the Crown," which, as one of the exemptions in the Act, could be withheld from disclosure.

There are two types of exemption provisions in the Access to Information

<sup>16</sup>It is worthwhile to observe that the Associate Chief Justice went on to add: "Even if I am wrong in that conclusion, the public interest in disclosure in this case clearly outweighs any risk of harm to the applicant and the reports should be released under Section 20(6) of the Act." Section 20(6) of the Act gives the head of a government institution the discretion to disclose third party information where such disclosure would be in the public interest as it relates to public health, public safety or the protection of the environment.

<sup>17</sup>*Montana Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, (15 April 1988), T-1622-86 (F.C.T.D.).

<sup>18</sup>(1986), 1 F.T.R. 317.

Act. There are the mandatory exemptions which require that the information not be disclosed and there are discretionary exemptions which leave it to the particular department to decide whether or not to grant access to the requested information. In the case of a mandatory exemption, such as for "personal information," the government institution has no choice but to deny access. Most of the exemptions in the legislation are, however, discretionary, leaving it up to the head of the government institution, or someone designated by the head, (for routine applications, the Access to Information Coordinator), to decide whether or not to disclose the requested material. It is arguable that the purpose provision of the legislation, along with the holding in the Maislin case that public access to information should not be frustrated by the courts except upon the clearest grounds, with any doubt resolved in favour of disclosure, requires a reviewing court not only to determine whether material fits within the broad words of a particular exemption, but whether the placing of that information within that exempt class was in accord with the general intention of the legislation.

Whatever the merits of this approach may be, it was not adopted in the CRTC case. Associate Chief Justice Jerome held that "once it is determined that a record falls within the class of records ... [that may be exempted] ... the applicant's right to disclosure becomes subject to the head of the government institution's discretion to disclose it." And that discretion, according to the decision in this case, is not subject to judicial review.

The implications of this decision were quickly realized by the Information Commissioner. Not long after the CRTC case was decided, Ken Rubin, an Ottawa researcher, freedom of information activist and tireless litigant before the Federal Court, filed a complaint about the refusal of the Central Mortgage and Housing Corporation (CMHC) to grant him access to certain records. The refusal was based on the same exemption provision relied on by the CRTC. Mr. Rubin complained to the Information Commissioner who investigated and found that the CMHC refusal to grant access was "not justifiable" on the basis that some of the requested information could have been severed and disclosed. However, as a result of the decision in the CRTC case the Information Commissioner decided against seeking judicial review, and believing there to be no prospect of success closed the file. Mr. Rubin, however, persevered and *Ken Rubin v. President of CMHC*<sup>19</sup> came before the Honourable Mr. Justice Bud Cullen.

At trial, Mr. Rubin apparently argued that CRTC had been incorrectly decided and that it should, in any event, be distinguished from his case. Mr. Rubin also argued that the exemption provision should be read alongside the purpose provision, and Justice Cullen expressed some sympathy for this approach. Justice Cullen declared that he was "somewhat surprised" by the

<sup>19</sup>(1987), 8 F.T.R. 230.



refusal of CMHC to grant access to the requested records. Nevertheless, he was satisfied that the documents requested were ones for which an exemption could be claimed and he adopted the test put forward by Associate Chief Justice Jerome in the CRTC case: once a document falls within an exemptible class the court has no jurisdiction to intervene. And this result was reached even though the Information Commissioner had found that the exemption was not justified. Mr. Rubin has appealed this decision to the Federal Court of Appeal.

That the approach adopted in the CHMC case leads to a diminishing rather than a promoting of Canadians' access to information is made apparent by *Ken Rubin v. Canada (Solicitor General)*,<sup>20</sup> decided just prior to the release of the decision in CRTC. This case concerned the refusal of the RCMP to disclose certain information because it fell within the discretionary exemption for "information relating to investigative techniques or plans for specific lawful investigations." Mr. Rubin took the case to court and again argued that this exemption section had to be read alongside the purpose provision which declares that exemptions to the Act must be "necessary, limited and specific." Associate Chief Justice Jerome conceded that the purpose provision and this exemption provision had to be read together, however, he found that this exemption provision was necessary, limited and specific. He then went on to examine the material in question, which had been submitted to the court under seal, to determine whether it would disclose investigative techniques, as the RCMP claimed. He found that it would. Since the exemption provision gave the Solicitor General the discretion to refuse to disclose information in records that fell within this category, and since the information was found to fall within this category, Associate Chief Justice Jerome determined that there had been no violation of the Act and Mr. Rubin's case was dismissed.

That there are problems with this approach is self-evident. First of all, the intention of the Act is to give Canadians access to government information, with only limited and specific exemptions. If a test is to be developed it should be one in which this fundamental principle is given effect. A simple determination whether or not information falls within a discretionary exemption absent inquiry about whether or not exempting that information is in accordance with the intention of the legislation falls short of the overall legislative scheme.

What if, for example, the investigative technique in question in *Ken Rubin v. Canada (Solicitor General)* was not lawful? Could the court uphold the exemption simply because it was within the class of "investigative techniques?" It seems fair to suggest that at trial the judicial inquiry should not just be whether or not the material fell within the exempt class, but whether that exemption was in accord with the purpose provision of the

<sup>20</sup>(1986), 1 F.T.R. 157.

legislation. Some information might technically fall within an exempt class, but to uphold the exemption on that basis alone could be directly contrary to the purpose of the Act, not to mention public policy. At the very least, in *Ken Rubin v. Canada (Solicitor General)* the provision should have been interpreted to mean investigative techniques authorized by law.

### (3) *Personal Information Cases*

THERE HAVE BEEN A NUMBER of small victories at the Federal Court. In *Information Commissioner of Canada v. Canada (Minister of Employment and Immigration)*<sup>21</sup> Associate Chief Justice Jerome held that the word "may" can mean "shall." The case concerned an application for access to certain immigration records relating to a prospective immigrant to Canada. The prospective immigrant could not apply herself because, unlike for example, the Freedom of Information Act in the United States,<sup>22</sup> only citizens and landed immigrants are entitled to apply for information under the Canadian legislation. Accordingly, a Vancouver lawyer applied and included with his application a document from the prospective immigrant consenting to release to the lawyer of "personal information."

The Access to Information Act provides that government institutions must refuse to disclose "personal information." However, the exemption is not as matter of fact as this statement suggests. "Personal information" may be disclosed if the individual to whom it relates consents to the disclosure, if the information is publicly available or if the disclosure is in accordance with section 8 of the Privacy Act. The Privacy Act is the companion legislation to the Access to Information Act and it has as its legislative goal the protection of individual privacy. Not only does the Privacy Act define what constitutes personal information it also sets out some circumstances in which it can be disclosed. For example, government institutions are given the discretion to disclose personal information where "the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure." As a general matter, however, whenever personal information relating, for instance, to the education, medical, criminal, or employment history of an individual is contained in government records, it is severed prior to disclosure of those records. Section 25 of the Access to Information Act imposes an obligation on government departments to sever, usually by blacking out, the exempt information from the non-exempt information and to release the latter.

There was no dispute that the requested information in *Information Commissioner v. Canada (Minister of Employment and Immigration)* case was "personal information," and that permission had been obtained from the person to whom the information related. The case ended up in court because

<sup>21</sup>(2 May 1986), T-276-85 (F.C.T.D.).

<sup>22</sup>5 U.S.C. s. 552, (1982).

the government did not wish to disclose the contents of the prospective immigrant's file which apparently contained a great deal of information. The department argued that the legislation did not require it to release personal information but only gave it the discretion to do so, and on this basis rejected the request. The Information Commissioner took the case to court on behalf of the complainant.

Associate Chief Justice Jerome held that the permission was a condition and once that condition was met the information must be released. The decision can be used to argue in favour of release of personal information, whenever an applicant is able to obtain the permission of the person to whom that information relates, provided, of course, that some other exemption does not come into play. Put another way, if the party for whose protection the exemption exists consents to the disclosure the exemption, arguably, should not be applied. A provincial government may, for example, consent to the disclosure of information supplied to it to the federal government. And if it did this case would be a good precedent in favour of any argument that the word "may" in the provincial government information exemption should be read as "shall." Needless to say, the information in question could still be exempted if another exemption provision was found to apply.

While defined at some length in the Privacy Act, what exactly constitutes personal information can be subject to dispute for at some level everything can be related to a person. There have been four cases on point. The first one held that the signature to a letter commenting on a public grant was not personal information, but that a comment in that letter beginning, "personally" was.<sup>23</sup> The second case involved an application for access by Jacques Noel, a former president and member of the Federation of the St. Lawrence River and Great Lakes Pilots, for the names of masters and deck watch officers who were not subject to compulsory pilotage on the Great Lakes.<sup>24</sup> The request was denied by the Great Lakes Pilotage Authority on the basis that these names were "personal information." After the Information Commissioner dismissed the complaint the applicant sought judicial review.

At the Federal Court the case came before the Honourable Mr. Justice Dubé. Both the Pilotage Authority and the Dominion Marine Association (which appeared as a third party), were opposed to the release of the names and all sorts of reasons were given in support of this position. However, Mr. Justice Dubé was satisfied that release of the names by themselves would not reveal anything other than that the individuals met the pilotage requirements. While this finding accords, at a superficial level, with the disclosure of the name in the previous case, it is not at all clear that the names of the individuals in this case were not in fact exempt personal information. They had not

<sup>23</sup>*Robertson v. Canada (Minister of Emp. and Imm.)*, (1987), 13 F.T.R. 120.

<sup>24</sup>*Noel v. Great Lakes Pilotage Authority Ltd.*, (29 October 1987), T-2273-86 (F.C.T.D.).

written to the government in an official capacity, and there is every reason to believe that giving out their names in this case would result in the revelation of details of their employment history. The case is a puzzling one and there is little reason to believe that requests seeking lists of names will enjoy much future success.

A completely different result, suggesting a much stricter approach, was reached in *Information Commissioner of Canada v. Canada (Minister of Fisheries and Oceans)*.<sup>25</sup> In this third case an application was made for copies of "all applications requesting permission under the Seal Protection Regulations to access the seal hunt 1975-1983." The government refused the request and the Information Commissioner took the case to court. While there is a general presumption against disclosure of personal information, a number of exceptions exist in the Act. One of these states that personal information does not include "information relating to any discretionary benefit of a financial nature, including the granting of a license or permit ...." Focussing on the words "granting of a license or permit," the applicant argued that the information should be released. At trial, however, the Honourable Mr. Justice Denault found that only information relating to permits that granted a benefit of a financial nature were included in this section. Thus permits allowing individuals to observe the seal hunt were not included.

In the last case to date considering release of personal information,<sup>26</sup> the Federal Court held that some comments in a report were properly characterized as "the views or opinions of another individual about the individual" and so were exempt from disclosure under the Access to Information Act. The Information Commissioner had argued that the information was in fact not included in the exemption because it was information about an individual who is or was an employee of a government institution and that it was information that related to the position and functions of that individual. Information of this kind is not considered personal information and is subject to application under the Act.

Associate Chief Justice Jerome considered the interplay between the Access to Information and Privacy Acts and stressed the broad definition given to personal information. In this case it appears that some of the information may have been in the nature of an appraisal and disclosure of such information, the Associate Chief Justice said, would be "most unjust." What is and will continue to be most interesting about these personal information cases is the interaction of the Privacy and Access to Information Acts and the balancing of interests which must then take place.

#### (4) *Procedural Cases*

<sup>25</sup>(22 March 1988), T-2687-85 (F.C.T.D.).

<sup>26</sup>*Info. Comm'r of Canada v. Canada (Sol. Gen.)*, (4 May 1988), T-2783-86 (F.C.T.D.).

A NUMBER OF PROCEDURAL issues have also been resolved. Undoubtedly the most important procedural matter to come before the Federal Court was brought by the editor of this journal and by a Toronto reporter named David Vienneau. In *Vienneau v. Canada (Solicitor General)* and *Kealey v. Canada (Solicitor General)*,<sup>27</sup> the Federal Court was asked to decide whether or not government departments severing exempt information prior to disclosure were required to indicate the particular exemption applied for each severed section. Both Mr. Vienneau and Professor Kealey had applied for access to Canadian Security Intelligence Service records. Both had received some records, accompanied by a covering letter setting out a number of exemption provisions which had been applied. However, there was no way of determining which exemption had been applied to which severed section. Both Mr. Vienneau and Professor Kealey complained.

Following her investigation the Information Commissioner issued a report indicating that the complaints were well founded. Section 10 (1) (b) of the Access to Information Act provides that when a government department refuses to give access to a record, or to a part of a record, it must state the specific provision of the Act on which the refusal is based. Moreover, section 7(a) of the Act requires the government department to give applicants written notice whether or not their requests will be granted. The Information Commissioner interpreted these two sections of the legislation to mean that the specific authority or authorities for exempting and severing all or part of a document must be indicated to the applicant at the relevant portion of the document. According to the Information Commissioner, each severance was an individual refusal to grant access. Since the legislation requires notice on which provision of the Act the refusal was based, reasons must be cited for each refusal. Arguably, unless the specific grounds for the refusal are indicated, applicants will be unable to decide whether or not to challenge the exemption(s) in court. One cannot help wondering, when several exemption provisions are cited, whether the government department or agency is appropriately applying exemptions or merely covering all the possible bases.

In any event, the Solicitor General rejected the Information Commissioner's recommendation and report. The Solicitor General argued that there was no specific provision in the legislation requiring a government department to indicate specific deletions and government departments were, therefore, under no legal requirement to do so. The fact that some government departments routinely indicate the specific exemption applied to specific severed sections was irrelevant for CSIS, based on its interpretation of the Act, had decided against doing so. The security service may have been concerned that by indicating the specific exemption, researchers would get clues as to the content of the severed material and therefore defeat the very purpose of the exemption. The answer to this concern, assuming that is what

<sup>27</sup>(3 March 1988), T-842-87, T-1106-87 (F.C.T.D.).

was behind the position CSIS took, is that in these circumstances the particular government agency could argue the special facts involved. In such a case, the Information Commissioner would be unlikely to support the complaint and if judicial review were sought the government department would undoubtedly not be required to provide the specific exemptions for each deletion.

These conflicting interpretations were argued before Associate Chief Justice Jerome. After reviewing the two positions, he decided that the applications should be dismissed. Under his interpretation of practice and procedure under the Act, government departments make an initial decision: to grant access or to refuse to grant access. If they refuse to grant access they are then required to consider whether any of the material could be severed and the remainder released to an applicant. This severance process, in which some material is released and other material is exempted was not a further refusal. It was, instead, Associate Chief Justice Jerome said, "further compliance." Accordingly, "if there is only one refusal, only one notice of exempting provisions should be required." In describing practice under the Act, Associate Chief Justice Jerome was reading the provisions in the order in which they appeared. One might ask, however, why he did not begin with the purpose provision and then go on to consider the exemption and severance provisions. One answer perhaps is the legal principle that specific provisions take precedence over general ones. Nevertheless, there was no reason not to begin his analysis of the legislation with an examination of the purpose provision.

The Associate Chief Justice had a basis for making the finding that he did, namely the absence of a direct requirement for the indication of individual exemptions. And he had a basis for finding compliance when exemptions were listed in a covering letter.<sup>28</sup> Arguably, however, the overall

<sup>28</sup>In another case, Associate Chief Justice Jerome discussed the concept of the severance provision and said: "One of the considerations which influences me is that these statutes do not, in my view, mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. There are two problems with this kind of procedure. First, the resulting document may be meaningless or misleading as the information it contains is taken totally out of context. Second, even if not technically exempt, the remaining information may provide clues to the content of the deleted portions. Especially when dealing with personal information, in my opinion, it is preferable to delete an entire passage in order to protect the privacy of the individual rather than disclosing certain non-exempt words or phrases." See *Information Comm'r of Canada v. Canada (Solicitor General)*, (4 May 1988), T-2783-86 (F.C.T.D.).

As a matter of principle this view is arguably incorrect. If the whole point of the Access to Information Act is to provide the public with access to information, then *all* non-exempt information should be released. It is far better to provide incomplete information than provide no information, particularly when the Act requires that all non-exempt information be severed and released. The approach suggested in this case is seemingly contrary to the purpose provision of the Act, embraced over and over again by the Federal Court.

legislative scheme would have been best advanced by imposing on government departments and agencies the requirement of listing each specific exemption claimed when severing the exempt from the non-exempt as is the practice for example, under the Freedom of Information Act in the United States.

The court readily dismissed the applicants' concerns that a listing of individual exemption provisions would prejudice them and their ability to decide whether or not to appeal the refusal. The prejudice to applicants, however, is real. If material arrives in a severed form with specific exemption provisions indicated in the margin, applicants will be able to determine, in at least some minimal respect, whether or not the exemption claimed appears justifiable. But if a whole series of exemptions is claimed in a covering letter, that exercise will be virtually impossible, especially considering that the exemptions are quite broad to begin with. Although the decision concludes with the view that the practice of providing individual exemptions is "a highly commendable one" and is "entirely keeping with the basic purpose of the Access to Information Act" the decision itself weakens significantly Canadians' access to information. It does, however, assist Access to Information Coordinators by simplifying their duties in processing requests made under the Act.<sup>29</sup>

#### *(4) Fees, Deemed Refusals and Other Issues*

FEEs HAVE PROVED to be a contentious issue, at the time of making a request, at the complaint stage and before the Federal Court. As a matter of practice there is nothing to be lost and a great deal to be gained by requesting a fee waiver when payment or a deposit is demanded by a government department. Reasons, such as that the materials requested are for scholarly research rather than profit making activity, should be addressed to the Access Coordinator of the particular government department or agency to which the request relates. Some researchers have also had some success in making a direct appeal to government ministers. In either case, when waivers are requested, one is advised to stress the public benefit that will result from disclosure. If these requests fail, (and some departments are more inclined than others to view positively requests of this kind), a complaint can always be made to the Information Commissioner. She has proved willing, and in some cases, able, to negotiate reduced fees, for photocopying for example, where the applicant makes out a compelling case. Ultimately, however, applying for a fee waiver may accomplish nothing other than delaying access to the requested

<sup>29</sup>The Solicitor General, and possibly the court, may have been concerned by the decision in a Privacy Act case in which it was held that "the respondent is bound by the grounds for refusal to disclose asserted by the head of the government institution in his notice of refusal." See *Davidson v. Canada (Solicitor General)*, (1987), 9 F.T.R. 295; see also *Ternette v. The Solicitor General of Canada*, (1984), 2 F.C. 486.

information.

There is a statutory right in the Act and the Regulations to collect fees, a filing fee, a processing fee, and photocopying charges. And if the government department is intent on charging full fees there is nothing in the Act, not even the purpose provision, which stands in the way. This was shown to be the result in *Ken Rubin v. Canada* (Minister of Employment and Immigration Canada, Minister of the Environment, Minister of National Health and Welfare).<sup>30</sup> In this case, the court held that government departments were entitled to require the five dollar application fee, provided for in the Access to Information Act Regulations, with each and every Access to Information request filed even if the applications were, as they appeared to be in Mr. Rubin's case, related and part of "a very comprehensive research project requiring a great deal of information from a number of government departments." In many cases, however, fees are waived and in most cases the cost of processing the request is far less than that charged to the applicant.<sup>31</sup> Requesters can avoid some fees by making narrow requests and thereby limiting search time to the five free hours each request is entitled to under the legislation. Conversely, where a requester has reason to believe that the information requested can be easily identified and retrieved there is every reason to attempt to make more than one request in the context of a single request.

In yet another case brought by Ken Rubin,<sup>32</sup> the Ottawa activist proved unsuccessful in challenging the government practice of requiring deposits prior to processing large requests. Mr. Rubin had applied for access to "all cabinet discussion papers" prepared by the departments of finance, regional industrial expansion and transport since 1977. The Act provides that applicants are entitled to five hours of search time after which search fees, as set out in the Regulations, may be charged. Applicants can also be charged for photocopies, in an amount established according to the Regulations. Government departments are entitled to request a deposit for both search time and photocopy fees before conducting a search and photocopying documents for release. After receiving the request this is what all three departments decided to do.

Mr. Rubin complained to the Information Commissioner who concluded that the request for the deposits was lawful and that the actual deposits requested were reasonable. Mr. Rubin then appealed the case to the Federal Court.

<sup>30</sup>(4 October 1985), T-194-85 (F.C.T.D.).

<sup>31</sup>In the 1986-1987 fiscal year, it cost the government more than four million dollars to administer the legislation, while it collected less than sixty thousand dollars in fees. The average request cost \$770 to process. See note 2 *supra*.

<sup>32</sup>*Rubin v. Canada (Minister of Finance)*, (1987), 9 F.T.R. 317, 35 D.L.R. (4th) 517.



It was determined at trial that while some of the documents that Mr. Rubin requested were not subject to the Access to Information Act, notably confidences of the Privy Council, others were subject to the legislation. What was questionable was whether or not the issue of fees was a proper one for judicial review. Section 41 of the Act grants applicants refused access to information a right of Federal Court appeal. Mr. Rubin claimed that in being charged deposit fees he was being refused access and so was entitled to judicial review.

After noting that the Information Commissioner had prepared careful and detailed reports concluding that the deposits being requested were reasonable, Associate Chief Justice Jerome was "not persuaded that the fee mechanism has been misused in such a way as to constitute a constructive refusal of access to this applicant." While this holding disposed of the case, the argument that government action can, in some circumstances, constitute a constructive refusal to grant access remains.

Also available in the arsenal of legal action is the argument that the time period claimed to process a request was a "deemed refusal" to grant access and therefore subject to judicial review. Complaints about the length of time the government is taking to process requests are matters for the Information Commissioner, not the Federal Court. However, in one case a court was persuaded to take jurisdiction over this "deemed refusal." Complicating this particular application was the fact that the relevant documents had, in the meantime, been released.<sup>33</sup>

That some cases are better subjects of judicial review than others was illustrated to Harvey Berkal when he went to the Federal Court and asked it to order the Information Commissioner to hurry up and release her report about a complaint Mr. Berkal had earlier made. The Information Commissioner's report is a non-binding document containing the Information Commissioner's findings and recommendations about the appropriate disposition of a particular complaint. Issue of this report is a statutory pre-condition to a Federal Court appeal. However, while the court will entertain an application to review the activities of the Information Commissioner's office, the decisions and activities of that office are not, unlike the refusal of a government department to grant access, matters which can be appealed.<sup>34</sup>

A few smaller points from the *pot pourri* of cases which have so far made their way to the Federal Court are worth mentioning. Government departments cannot exempt themselves from the operation of the Act. When the Immigration Appeal Board held hearings *in camera* and later claimed that the records generated in the *in camera* proceedings were exempt, the Federal

<sup>33</sup>*Info. Comm'r of Canada v. Canada (Minister of External Affairs)*, (15 April 1988), T-1042-86, T-1090-86, T-1200-86 (F.C.T.D.).

<sup>34</sup>*Berkal v. Info. Comm'r of Canada*, (15 February 1985), T-2629-84 (F.C.T.D.).

Court decided otherwise. The Access to Information Act is an act of general application and it prevails over other statutes, unless there is a statutory provision to the contrary.<sup>35</sup>

Who can make Access to Information Act decisions was the subject of another case. The Act is clear that only the minister or someone designated by her can make decisions about granting access and claiming exemptions. Thus where an employee of the Ministry of the Environment located at a regional office in Montreal, who had not been designated by the Minister, purported to decide to grant access to some requested third party information, the Federal Court overturned his "decision" and referred the matter to the Minister, or someone properly designated by her.<sup>36</sup> In another case, the Federal Court rejected the argument that persons designated by ministers to administer the Act must be re-designated upon the appointment of a new minister.<sup>37</sup>

In addition, there is jurisprudence to the effect that a third party will not be successful in obtaining the assistance of the Federal Court to examine, before trial, government officials responsible for deciding to release third party information.<sup>38</sup> There is no reason to believe that an ordinary applicant, in contrast to a third party, would succeed either in compelling government officials to give pre-trial evidence about the reasons for their actions.

### *Conclusion*

ALL THE CASES BROUGHT to court pay lip service to the purpose provision of the legislation. But by and large, they have failed to give that purpose provision much meaning. The CRTC decision and the Vienneau and Kealey cases stand as examples of missed judicial opportunity to give the Act some teeth although it need not have been at the expense of exempting government information which deserves special protection. While there have been some positive developments (the generally restrictive approach taken to third party rights being among them), the record of jurisprudence interpreting the legislation in its first five years has failed to give full effect to the legislative intention. When this record is combined with the failure of the government to adopt any of the recommendations of the Standing Committee on Justice and the Solicitor General which thoroughly examined the Access to

<sup>35</sup>*Info. Comm'r of Canada v. Imm. Appeal Bd.*, (8 April 1988), T-1051-87, T-1169-87, T-1355-87 (F.C.T.D.).

<sup>36</sup>*Soc. de Transport de la C.U.M. v. Canada (Minister of Env't)*, (1987), 9 F.T.R. 152, (1987) 1 F.C. 610.

<sup>37</sup>*Omeascoo v. Canada (Minister of Indian Affairs and Northern Dev.)*, (15 April 1988), T-1636-86 (F.C.T.D.).

<sup>38</sup>*Ermineskin Band of Indians v. Canada (Minister of Indian and Northern Affairs)*, (1987), 15 F.T.R. 42.

Information Act and which produced a very well regarded report recommending substantial amendment to the legislation,<sup>39</sup> the future prospect of giving full effect to the purpose provision looks extremely bleak.

<sup>39</sup>*Open and Shut: Enhancing the Right to Know and the Right to Privacy* (Ottawa: Queen's Printer 1987). The government reply is titled *Access and Privacy: The Steps Ahead* (Ottawa: Minister of Supply and Services 1987).

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