If fees have been assessed pursuant to subsection 11(4) of the Act, notification of the applicant takes place according to the procedures prescribed in sub-article .2.3(d) of this Part.

All fees must be paid by the applicant before access is given.

Whenever possible, payment of any substantial sums should be made by certified cheque or money order payable to the Receiver General for Canada.

.2.7.1 *Deposits*

Government institutions may require that a deposit be paid before the search or production of the record is undertaken or the record is prepared for disclosure.

Where the required fees or deposits are not received by a government institution, the institution should terminate active processing of the request and notify the applicant accordingly (see Model Letter J in Appendix C). As the requestor has the right to complain to the Information Commissioner about the fees for one year following the date on which the request was received, government institutions should be prepared to resume processing requests, at a later date.

If the deposit paid (based on the estimated cost) exceeds the actual cost of providing access, government institutions shall refund the portion paid in excess by the applicant. Deposits are also to be refunded if the fees are waived by the government institution at a later stage in processing.

.2.7.2 *General waiver, reduction or refunds*

Subsection 11(6) provides that the head of a government institution may waive, reduce or refund any fees payable under the Act and the Regulations.

The decision to waive, reduce or refund fees should be made on a case-by-case basis by assessing:

(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;

It should be noted that the circumstances of the application and the applicant's reasons for seeking information may be taken into consideration in a fee waiver decision, even though these are not proper factors to consider in deciding whether or not to grant access.

In view of the costs involved in administering fees, *government institutions should consider waiving the requirement to pay fees, other than the application fee, if the amount payable is less than $25.00*.

In order to capture data relating to the cost of administering the Act, *government institutions shall record the amount of fees waived for each request* (where applicable).

Government institutions shall include, in their annual reports to Parliament, a description of their policies and practices relating to fee waiver (as prescribed in Part IV of this Chapter).

The fee waiver shall be signed by the person designated in writing for that purpose by the head of the institution.

.2.7.3 *Reduction of fees for producing computer records*

Regulation 7(3) prescribes the manner in which fees are to be calculated where a record is produced from a machine-readable record, pursuant to subsection 4(3) of the Act.

It is intended that an applicant not be charged a fee which is higher than the actual and direct costs of producing the record(s) requested.

Where the actual cost of producing a record through the use of a central processor and locally attached devices is less than the fee prescribed by Regulation 7(3)(a), government institutions, as a matter of policy, shall reduce any fees payable to the level which represents the actual cost to the institution.

.2.8 *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. Subsection 71(2) provides for the exclusion from any manuals that may be inspected by the public of any information for which a government institution would be authorized to claim an exemption under the Act.

The availability of manuals is intended to open up to public scrutiny the internal operations and the 'mechanics' of decision-making in government institutions.

Although the Act specifies that the above facilities must be available within two years after subsection 71(1) comes into force, government institutions should begin working toward the establishment of these 'reading rooms' as soon as possible. Government institutions with major regional offices should establish, whenever possible, facilities which would hold duplicate manuals. The reading room should also be equipped with a copy of the Access Register and bulletins used to update the Register; general information for the public on how to exercise their rights under the Access to Information Act and copies of the Access to Information Request Form. In addition, government institutions may consider including any other finding aid to the information holdings of the institution (e.g. file indexes, publication lists etc.)

Part II

.3 Excluded records

(To be distributed at a later date)

Part II

.4 Exemptions - Access to Information

.4.1 *General principles*

Sections 13 through 24 of the Access to Information Act set out a number of specific exceptions to the right of access established by this legislation. These exceptions are known as exemptions. Each exemption is intended to protect information relating to a particular public or private interest. In addition, sections 26 and 27 set out two administrative exceptions relating to the publication of information and the transitional provision which establish temporary qualifications of the right of access. These exemptions form, when added to the categories of excluded records outlined in sections 68 and 69 of the Act (see .3 above), the basis for refusing access to government information under the Access to Information Act.

The exemptions included in the Access to Information Act can be classified in two ways - according to whether the exemption is subject to an injury test or a class test and according to whether the exemption is discretionary or mandatory in nature. The distinctions between these classifications are discussed below.

Injury test/class test

(a) The injury test

Exemptions based on an injury test provide that access to information requested under the Act may be denied if disclosure 'could reasonably be expected to be injurious' to the interest specified in the exemption. Injury in this context means having a detrimental effect. Disclosure of the information must reasonably be expected to prove harmful or damaging to the specific public or private interest covered by the exemption in order for access to be refused. The fact that the disclosure could result in administrative change in a government institution is not sufficient to satisfy an injury test. It must be possible to identify an actual detrimental effect on the interest specified in the exemption.

A large number of considerations will be involved in making a judgement as to injury but three general factors should be taken into account by government institutions in making such decisions; these are the degree to which the injury is:

(a) Specific: Is it possible to identify the detrimental effect with the actual party who, or the interest which will suffer injury, rather than identifying it only with a vague general harm?

(b) Current: Is it possible to identify the detrimental effect at the time the exemption is claimed or in the foreseeable future? Information which has been protected from disclosure in the past should be reassessed when a new request is received to ensure that present or future injury is still a factor; and

(c) Probable: Is there a reasonable likelihood of the injury occurring?

Cases may arise where there is a mosaic effect inherent in the disclosure involved. An injury test may not be satisfied if the particular information requested is considered in isolation. However, where the effect of the disclosure of the information is considered as one in a series of requests and where this indicates that the request forms part of a crucial segment of a larger picture that could reasonably be expected to be injurious to the interest specified in an exemption, an institution can exempt the information. It must be able to demonstrate, however, that the cumulative effect of a series of disclosures, similar or complementary to the disclosure being considered, could reasonably be expected to be injurious.

When the information requested falls within a list of specific types of information included for purposes of illustration in an injury test exemption (such as, for example, in section 15, International affairs and defence) the refusal to disclose must still be based upon

the injury which would result to the interest specified in the exemption. The classes of information are included in these injury test exemptions to illustrate specific types of information to which the injury test probably will apply. However, the fact that information requested is described in the classes listed does not qualify the information for exemption.

The following are injury test exemptions: sections 14, 15, 16(1)(c), 16(1)(d), 16(2), 17, 18(b), 18(c), 18(d), 20(1)(c), 20(1)(d), and 22.

The class test

A class test objectively describes the categories of information or documents to which an exemption can be applied. While injury underlies this test as well, these exemptions describe classes of information which, in the judgement of Parliament, are sufficiently sensitive that disclosure of any information in the class could have a detrimental effect. Thus, under the class test exemptions, where a government institution is satisfied that information falls within the class specified, this is a sufficient basis for it to refuse access to the information. There is no requirement that an injury be proved.

The following are class test exemptions: sections 13, 16(1)(a), 16(1)(b), 16(3), 18(a), 19, 20(1)(a), 20(1)(b), 21, 23 and 24.

Discretionary/Mandatory Exemptions

Discretionary exemptions

Discretionary exemptions are introduced by the phrase 'the head of a government institution may refuse to disclose...' Where such exemptions apply to information requested under the Act, government institutions are legally entitled to refuse access to it. However, discretionary exemptions provide government institutions with an option to disclose the information where it feels that no injury will result

from the disclosure or where it is of the opinion that the interest in disclosing the information outweighs any injury which could result from disclosure.

The final decision as to whether to disclose information for which an exemption could be claimed is left to the government institution processing the request, although the advice of another government institution about the decision may have to be obtained with respect to certain exemptions as provided for in these directives and guidelines (see sub-articles .4.6.1, .4.6.3, .4.6.4, .4.6.5, and .4.6.8).

The majority of exemption provisions are discretionary. They are sections 14, 15, 16(1), 16(2), 17, 18, 21, 22 and 23.

Mandatory exemptions

Mandatory exemptions are introduced by the phrase 'the head of a government institution shall refuse to disclose...'. When information requested under the Act falls within a mandatory exemption, institutions normally must refuse to disclose the record. However, all the mandatory exemptions, except section 24 (statutory prohibitions), provide for circumstances which permit government institutions to release the information if certain conditions are met (e.g. consent of the party affected or if the information is publicly available). If these conditions are met, the government institution is given a discretion to release the information. However, no right of access to the information is created. These exceptions to the mandatory nature of such exemptions are discussed in detail in the article which deals with each exemption. Usually, however, information falling under a mandatory exemption must be exempted.

The following exemptions are mandatory: sections 13, 16(3), 19, 20(1) and 24.

Administration of exemption provisions

The exemptions and the categories of records excluded from the Act form the only basis for refusing access to government information requested under this legislation. Therefore, access must be given to

all government information for which a person makes application under the Access to Information Act except that which is either specifically exempt or excluded under a provision of the Act. It should be noted, when considering the possibility that a record may be exempt, that more than one exemption category may apply to particular information.

Disclosure of any information under the Access to Information Act establishes a precedent for releasing the same information to another applicant in the future.

Review

When information is exempted from access under the Act, the applicant has the right of appeal to a two-tiered system of review. The first stage is a complaint to the Information Commissioner, an individual with the power of an ombudsman, and the second is an appeal to the Federal Court-Trial Division. The nature of the remedy available at each level and the powers of the Commissioner and the Court are set out in section .5 of this Part. It should be noted, however, that the Court may undertake de novo review (i.e. the Court may examine the merits of whether or not an exemption applies) of an exemption decision for section 13, paragraphs 16(1)(a) and (b), subsections 16(2) and (3), section 18, paragraphs 18(a) to (c), and sections 19 to 24, and 26 and 27 of the Act. However, if a denial of access is based section 14 or 15 or paragraph 16(1)(c) or (d) or 18(d) of the Act, the Court is limited to a determination of whether or not the head of a government institution had 'reasonable grounds' for the decision to withhold the information.

.4.2 *Purpose and scope*

The purpose of this section is to assist in ensuring some uniformity in the application and in the interpretation of the exemption provisions of the Access to Information Act and to set out directives and guidelines which are to be applied as a matter of government policy when exemptions are considered. Within the framework provided here,

government institutions should develop their own practices and procedures which complement these provisions and policies and adapt them to their own particular circumstances.

.4.3 *Authorization*

Government institutions should delegate the authority to approve exemptions according to the nature and volume of information requested. In order to avoid unnecessary complaints, reversals or defence of exemptions by the head of the institution and to adequately protect information from improper disclosure, only senior officials should be authorized under section 73 of the Act to act on behalf of the head in making exemption decisions. This limiting of delegation applies especially to exemptions that are potentially pervasive in scope, such as those relating to federal-provincial affairs and financial interests.

In this respect, government institutions should be aware that requests for information under the Access to Information Act must be considered on their own merits and that existing procedures and sanctions for protecting government information do not apply where a request is made under the Act. The fact that the information has been classified under the government security classification system does not provide a basis for refusal under the Act. In addition, a duly authorized government official who discloses information in good faith pursuant to the Access to Information Act will not be subject to prosecution under the Official Secrets Act. This is based both on the exoneration clause in section 74 of the Act and the fact that disclosure under the Access to Information Act will be considered to be authorized disclosure (the Official Secrets Act only applies to unauthorized disclosures of information).

.4.4 *Severability*

Section 25 of the Access to Information Act provides that a government institution shall disclose any part of a record that does not contain information which may be exempt if it can be reasonably severed from any part that does contain exempt information.

This provision establishes the principle of reasonable severability. This means that a record containing information which may be exempt should not be exempted from access as a whole if the exempted information can be severed from it. Government institutions are obliged to disclose as much information as can reasonably be severed from the record. Reasonable severability should not be established by the amount of review, preparation and production time needed to extract the exempt information, but rather by the intelligibility of the document or segment of the document once the information for which an exemption is to be claimed has been removed. Although the original purpose of the document may be lost when the exempt information is removed, an exemption cannot be claimed for the entire record as long as there remains some information that is itself intelligible, comprehensible and relevant to the request. For example, a document written for the purpose of providing advice, yet containing background information should, after the advice portion is removed, be disclosed as long as the factual content does not fall within one of the other exemption provisions. Normally, the smallest severable unit should be a sentence. Quite often, however, the only exempt information involved will be the name of an individual, which appears in a such a context that it would qualify as personal information. When this type of problem arises, only the name itself should be deleted. Similarly, the name of a place or thing may qualify for exemption and only that discrete piece of information should be deleted. By way of example, if a sentence reads 'John Doe, an expert in environmental research at the University of Toronto, told the department that it should disregard the representation from this environmental group' and the request was for information relating to the fate of the particular representation, the portion 'John Doe' could be severed and the rest of the sentence released as being intelligible and relevant to the request. Of course the examples given here are neither complicated nor exhaustive in nature and institutions should develop other examples which will aid their staff in applying the principles of severability to particular records under their control.

In cases where it has been determined that a great amount of information will be severed and the interests of the applicant might be better served by an alternative such as page by page severability or an explanation of the information, institutions may approach the applicant to seek his or her agreement to such an arrangement.

(All doubts about the intelligibility of remaining non-exempt information should be resolved in favour of release to the applicant.)

.4.5 *Transfer and Consultation*

Similar information is often in the possession of several government institutions and hence may be requested from any one of these institutions. In accordance with regulations pursuant to subsection 8(1) of the Access to Information Act, a request for information may be transferred to the institution with the greater interest in the information. In subsection 8(3) of the Act, an institution is defined as having greater interest in a record if 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 to receive the record or a copy of it. Requirements governing the transfer of requests are dealt within section 6 of the Access to Information Regulations (see Appendix B) and sub-article .2.2.5 of this Part. Such transfers are, however, not mandatory. In most cases they will not be practical, especially when a request is for large a number of records under the control of one institution but originating from several other government institutions. Thus the government institution receiving a request will, most often, be the institution responding to it.

The interpretations, directives and guidelines in this section are intended to assist government institutions in arriving at a consistent application of the exemptions. (To ensure greater consistency in the application of certain exemptions, government institutions should consult with the government institution with particular expertise in an area.) *Further, this consultation process is mandatory when information has been received from or relates to the activities of another government institution from that processing the request in the case of*:

(a) section 13; information obtained 'in confidence' from other governments and international organizations;

(b) section 15; defence of Canada or any state allied or associated with Canada; international affairs and the detection, prevention and suppression of subversive of hostile activities;

(c) section 16; law enforcement and investigations;

(d) section 17; the physical safety of individuals; and

(e) paragraph 20(1)(b); confidential third party financial, commercial, scientific or technical information.

Specific directives concerning the consultation process are given in the appropriate articles in this chapter dealing with these sections (see sub-articles .4.6.1, .4.6.3, .4.6.4, .4.6.5 and .4.6.8).

In all cases where consultation occurs, the point of consultation shall either be the Access Coordinator of the government institution being consulted or the official in that institution with the delegated authority to make a determination to exempt or disclose the particular information involved.

When consultation is undertaken with a foreign government, international organization or institution thereof involving any part of article .4.6 of this Part, government institutions should normally coordinate such consultations through the Access Coordinator, Department of External Affairs. Only when an established and acceptable system of liaison and consultation already exists should direct consultation take place. External Affairs should be kept informed of these channels of consultation.

.4.6 *Exemptions*

.4.6.1 *Information obtained 'in confidence' (section 13)*

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

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

(b) an international organization of states or 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 a government.

This is a mandatory class exemption. The term 'in confidence' means that the supplier of the information has stipulated that the information is not available for dissemination beyond the government institutions which have a need to know the information.

This exemption protects information provided 'in confidence' both formally and informally, by officials of other governments or international organizations and their institutions. In order to ensure that a claim for exemption in this area can be adequately proved, institutions should obtain in writing at the time of receipt of the record concerned notification or a statement from the supplier of the information indicating that it is being supplied 'in confidence'. Wherever feasible, it is advisable that government institutions have agreements with other governments, international organizations or their institutions stipulating those types of information which are exchanged 'in confidence'. In the case of oral communications, of which a record

is made, the federal government employee making the record should determine whether or not the supplier of the information considered it to have been given 'in confidence' and if so, ensure that the record of communication is labelled as such.

Where the status of information provided to a government institution prior to the proclamation of the Act is in doubt, the institution which originally obtained the information should consult the other government or international organization which provided the information, at the time an access request is received, to determine whether or not it considers that the information was provided 'in confidence' and retains that status.

Copies of information received 'in confidence' by one government institution are often in the files of several other government institutions. Because of the mandatory nature of this exemption, all copies of such information must be protected from disclosure. To ensure such protection, *government institutions receiving information 'in confidence' shall ensure that the information is marked accordingly as to status and source of distribution before copying for distribution to other government institutions. Further, government institutions shall not disclose information marked in any way as being received 'in confidence' that was provided to them by another federal government institution without first consulting with the government institution having provided the information to verify whether or not the 'in confidence' status still applies to the information requested*.

Permissible disclosure

Subsection 13(2) of the Access to Information Act provides that the head of a government institution may disclose information obtained 'in confidence' from another government or an international organization if the government or organization from which the information was obtained:

(a) consents to the disclosure; or

(b) makes the information public.

This subsection permits some limited discretion to a government institution in dealing with requests for access to information given 'in confidence'. When an institution either believes there is some merit in disclosure or has some doubt as to the continuing confidentiality of the information involved, it may contact the government or organization in order to seek its consent to release the information. When dealing with foreign governments or international organizations, such consultation must be carried out in accordance with the guidance covering such circumstances in article .4.5. Further, if the government or organization which provided the information takes the initiative and makes such information public, then a government institution may choose to release the information as well.

It should be stressed, however, that the disclosure permitted by this subsection is discretionary and that there is no requirement for an institution to release information given 'in confidence' by another government or an international organization, even if the conditions set out in subsection 13(2) are met.

.4.6.2 *Federal-provincial affairs (section 14)*

Section 14 of the Access to Information Act provides that a government institution may refuse to disclose any record that contains information the disclosure of which could reasonably be expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs. Examples given in the Act of types of information which might be covered by this provision are information:

(a) on federal-provincial consultations or deliberations; or

(b) on strategy or tactics adopted or to be adopted by the Government of Canada relating to the conduct of federal-provincial affairs.

This is a discretionary exemption based on an injury test. It is specifically aimed at protecting 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 its conduct of, or its role in, federal-provincial affairs. The categories of information (i.e. consultations, deliberations, strategy and tactics) are provided to illustrate types of information the release of which might prove injurious. The list is not exhaustive and other types of records relating 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 where 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 which continues to be sensitive should be protected until there is no likely possibility of injury.

(Institutions should consult with the Federal-Provincial Relations Office of the Privy Council Office before disclosing information relating to federal-provincial affairs and only senior officials should have delegated authority to exempt or disclose records under this section.)

.4.6.3 *International affairs and defence (section 15)*

Section 15 of the Access to Information Act provides that a government institution may refuse to disclose any record that contains information the disclosure of which could reasonably be expected to be

injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada, or the detection, prevention or suppression of subversive or hostile activities.

This is a discretionary exemption based on an injury test as applied to three general public interest areas. Access to information requested may be denied if disclosure could reasonably be expected to be injurious to:

(a) '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.

(b) '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 another state with which Canada may be linked for trade or other purposes outside the scope of a formal alliance.

(c) 'The detection, prevention or suppression of subversive or hostile activities': This exemption protects specific types of information relating to the security of Canada.

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 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, employee of the Government of Canada or property of the Government of Canada outside Canada.

It is important to note that 'defence of Canada...' is defined inclusively, this means that it is described in general terms. The definition does not, therefore, limit the types of information relating to defence which may qualify for the exemption. On the other hand, 'subversive or hostile activities' are defined restrictively. This means that the definition is specific and comprehensive. The exemption may only be invoked for the specific activities listed in the definition. Information relating to other security - intelligence activities such as security screening, immigration and citizenship vetting, domestic vital points and security inspections may only be exempted under this provision where it relates to one of the activities outlined in paragraphs 15(2)(a) to (f) of the Act.

Types of information

Paragraphs (a) through (i) of subsection 15(1) of the Act list specific types of information which are likely to be covered by the exemption. It is essential to remember, however, that the types of information listed in these paragraphs cannot be exempted as a class under subsection 15(1). The provision is an injury test exemption and, in order that the exemption apply to any category of information described therein, it is necessary that the head of a government institution be able to demonstrate that disclosure of the information requested could reasonably be expected to result in injury to one of the interests specified (i.e. 'conduct of international affairs'; 'defence of Canada...'; or 'detection, prevention or suppression of subversive or hostile activities').

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

> (a) any such 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 provision deals with a range of military plans encompassing both strategy (e.g. plans for intercontinental war) and tactics (e.g. plans for theatre operations) 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 (i.e. 'in connection with the detection, prevention or suppression of subversive or hostile activities');
>
> (b) any such 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 provision deals with information concerning weapons; both those in existence and those being designed.

'Defence equipment' is somewhat distinct from 'weapons' in that it refers to equipment held by the Department of National Defence that is sensitive and requires protection;

(c) any such 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 provision deals with defence establishments and military and national security personnel. 'Defence establishment' is defined in the National Defence Act as meaning '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 such information obtained or prepared for the purpose of intelligence relating to:

- the defence of Canada or any state allied or associated with Canada, or
- 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 ('obtained') as well as the refined product or analysis ('prepared');

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

(g) any such information on the positions adopted or to be adopted by the Government of Canada, governments of foreign states or international organizational of states for the purpose of present or future international negotiations. This paragraph deals with information relating to international negotiations. The exemption is restricted to present or future negotiations and does not encompass international negotiations which are past and completed (see also sub-article .4.6.10 for a discussion of 'negotiations' in respect to paragraph 21(1)(c) of the Act);

(h) any such 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. This paragraph covers information that is 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. Since an injury test is involved, much official correspondence will likely not qualify for exemption.

This is particularly true of correspondence relating to internal administration of posts, ministerial visits or cultural and public information programs;

(i) any such information relating to the communications or cryptographic systems of Canada or foreign states used:

- for the conduct of international affairs,
- for the defence of Canada or any state allied or associated with Canada, or
- in relation to the detection, prevention or suppression of subversive or hostile activities.

In this paragraph, which deals with communications systems used for defence, international relations or national security, the term 'cryptographic system' means cyphering and de-cyphering systems.

Consultation

*Government institutions shall consult:

(a) the Department of External Affairs before determining to exempt or disclose any information that could reasonably be expected to be injurious to the conduct of international affairs;

(b) the Department of National Defence before determining 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;

(c) the government institution having the primary interest (i.e. the Department of the Solicitor General, the R.C.M.P., National Defence or External Affairs) before determining to exempt or disclose any information that could reasonably be expected be injurious to the detection, prevention, or suppression of subversive or hostile activities.*

.4.6.4 *Law enforcement, investigations and security of penal institutions (section 16)*

Section 16 of the Access to Information Act is intended to protect:

(a) effective law enforcement, including criminal law enforcement;

(b) the integrity and effectiveness of other types of investigative activities (e.g. investigations in regulatory areas and air accident investigation);

(c) the security of penal institutions.

Paragraph 16(1)(a)

This paragraph provides that a government institution may refuse to disclose a record that contains information obtained or prepared by any government institution, or part of a government institution, that is an investigative body specified in the regulations in the course of lawful investigations pertaining to:

- the detection, prevention or suppression of crime, or
- the enforcement of any law of Canada or a province,

if the record came into existence less than twenty years prior to the request.

This is a discretionary class test exemption which protects the law enforcement records of police forces and investigative bodies akin to police forces, listed in Schedule I of the Access to Information Regulations (see Appendix B). This information is protected with a class test because of the difficulty in applying an injury test exemption to law enforcement records where virtually all information is of a sensitive nature and because of the large volume of requests anticipated in this area.

Three conditions must all be met before the exemption can be claimed:

(a) It can be claimed only where the information has been obtained or prepared by those limited number of investigative bodies listed in the regulations.

(b) It can apply only to information obtained or prepared by such an investigative body in the course of a lawful investigation. This means that the investigation itself must be authorized or pursuant to law and not be against the law. It does not, however, address the issue of the legality of techniques used during a lawful investigation or the issue as to whether or not evidence has been illegally obtained.

(c) It applies only to information obtained or prepared by such an investigative body in the course of lawful investigations pertaining to:

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

This latter provision limits the application of the exemption to information obtained during the conduct of investigations relating to crime or law enforcement. Subparagraph 16(1)(a)(i) refers basically 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 directed toward activities which are prohibited under federal or provincial laws. These can, of course, include activities which are crimes and thus there is some overlap between subparagraphs 16(1)(a)(i) and (ii). Primarily, the activities referred to in 16(1)(a)(ii) are those punishable as offences under federal or provincial law. Potentially, however, subparagraph 16(1)(a)(ii) could extend to activities for which a civil law remedy exists. It should be noted that the term 'law of a province' includes municipal laws.

Time Limitation

Paragraph 16(1)(a) applies only to records which are less than twenty years old. This does not mean that records covered by this exemption must automatically be disclosed pursuant to a request under the Access to Information Act once they are twenty years old. Rather, such records automatically fall outside the class test protection of paragraph 16(1)(a) and, if there is still a need to protect them, the injury test exemption in paragraph 16(1)(c) relating to records, the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province, can be applied to them.

Use of Discretion

It should be remembered that, despite its class nature, paragraph 16(1)(a) is a discretionary exemption. Government institutions should, therefore, consider disclosing some information covered by this class exemption where they are satisfied that no injury will result from the disclosure.

Consultation

It is important to note that the exemption under paragraph 16(1)(a) follows the record. Thus, it may be claimed for a record in the hands of a government institution other than an investigative body listed in the regulations as long as the record was prepared by, or at one point came into the hands of such an investigative body in the course of an investigation relating to the detection, prevention or suppression of crime or the enforcement of any law of Canada or a province. Thus, for example, the Department of National Health and Welfare can claim an exemption under paragraph 16(1)(a) for a report it holds which was originally prepared by the RCMP during a narcotics investigation.

Prior to determining to exempt or disclose information under paragraph 16(1)(a), government institutions shall consult with the investigative body which originally obtained or prepared the information.

Paragraph 16(1)(b)

Paragraph 16(1)(b) provides that a government institution may refuse to disclose information relating to investigative techniques or plans for specific lawful investigations.

This is a discretionary class exemption with no time limit restricting its application. Any information relating to 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. It does not, however, address the issue as to the legality of the investigative techniques used.

The types of investigations for which plans can be exempted is limited by the definition of the term investigation in subsection 16(4). The term is limited to those investigations that:

(a) pertain to the administration or enforcement of an Act of Parliament;

(b) are authorized by or pursuant to an Act of Parliament; or

(c) are within a class of investigations specified in the regulations.

The definition is more fully explained below under the heading 'Subsection 16(4)'.

Prior to determining to exempt or disclose information relating to investigative techniques or plans for specific lawful investigations, government institutions shall consult with the investigative body or other government institution with primary interest in the investigative technique or the specific investigation involved.

Paragraph 16(1)(c)

Paragraph 16(1)(c) 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. Examples of the types of information to which this exemption may apply are included in the Act. They are:

- information relating to the existence or nature of a particular investigation,
- information that would reveal the identity of a confidential source of information, or
- information that was obtained or prepared in the course of investigations.

The types of information cited in the Act are illustrative only. Other types of information can qualify for the exemption but for it to apply in any case injury must be proved.

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

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 included in paragraph 16(1)(a). It may be claimed where injury to the enforcement of the law could reasonably be expected to result from the disclosure in situations where paragraph 16(1)(a) does not apply. Thus, it will apply to the enforcement of federal and provincial regulatory legislation prohibiting certain types of activities or behaviour (e.g. information obtained or prepared by inspectors enforcing such legislation as the Hazardous Products Act) and types of investigations such as taxation audits undertaken by Revenue Canada. It can also apply to the enforcement of civil law remedies for prohibited activities or behaviour such as exist under the Canadian Human Rights Act. Finally, the exemption could be applied to information the disclosure of which could reasonably be expected to be

injurious to law enforcement but which was obtained or prepared outside the investigative process (e.g. information relating to detecting tax frauds or to computer programs used in law enforcement) and to information which would qualify under paragraph 16(1)(a) except that it came into existence twenty or more years prior to the request.

Injury to the conduct of lawful investigations

This exemption protects the integrity and effectiveness of those investigations which are not directed to the enforcement of law. Examples are investigations conducted to determine the cause of an accident, but not to lay charges or assess blame for the purposes of a civil remedy, and investigations into whether a person with a criminal record should be granted a pardon. Where, for instance, it can be shown that such investigative processes would be adversely affected by revealing the identity of persons providing information to the investigators on the basis that candour would be impaired, this exemption can be claimed to protect the identity of such persons or information from which their identity could be determined.

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

(a) The investigation must be lawful. This means that it must not be contrary to law. It does not, however, address the issue of the legality of techniques used during a lawful investigation or the issue as to whether the evidence has been illegally obtained; and

(b) The investigation must come within the definition of the term in subsection 16(4). Therefore, 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 within a class of investigations specified in the regulations.

The definition is more fully explained below under the heading 'Subsection 16(4)'. It should be noted, however, 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 an investigation under subsection 16(4) and, therefore, could not be exempted under this provision.

Prior to determining to exempt or disclose information on the basis of injury to the enforcement of a law of Canada or a province or the conduct of lawful investigations, government institutions shall consult with the investigative body or other government institution with primary interest in the law being enforced or investigation being undertaken.

Paragraph 16(1)(d)

Paragraph 16(1)(d) of the Act 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 security of a penal institution.

This is a discretionary exemption based on an injury test designed to protect information relating to the security of penal institutions, such as that which could be useful in an escape attempt or which relates to the location of arms storage facilities in an institution.

Prior to determining to exempt or disclose information on the basis of injury to the security of penal institutions, government institutions shall consult with Correctional Services Canada.

Subsection 16(2) - Facilitating the Commission of an Offence

Subsection 16(2) of the Access to Information Act provides that a government institution may refuse to disclose any record that contains information that could reasonably be expected to facilitate the commission of an offence. Examples of the types of information to which this exemption may apply are included in the Act. They are:

(a) any such information on criminal methods or techniques;

(b) any such information that is technical information relating to weapons or potential weapons; or

(c) any such information 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.

This is a discretionary injury test exemption that provides specific protection for information that could reasonably be expected to facilitate the commission of an offence.

The list of information cited in the subsection is for illustrative purposes only. A government institution must have a reasonable expectation that the release of the specific information requested would facilitate the commission of an offence. Included in the exemption is information on criminal methods and techniques (i.e. the modus operandi of the criminal world). Included as well is information on weapons technology (e.g. how to make a bomb) and information relating to the vulnerability of both public and private sector buildings, structures or systems, including computer and communications 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 on 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 the purpose here is to make it easier to process specific requests for information of this nature.

Subsection 16(3) - RCMP Provincial and Municipal Policing Information

Subsection 16(3) provides that a government institution shall refuse to disclose any record 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 2 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 to protect information obtained or prepared by the RCMP when performing its provincial or municipal policing role. It is included at the request of the provinces who contract with the federal government for provincial and municipal policing services by the RCMP. In order for exemption to be invoked, it is necessary that:

(a) the province or municipality request that the exemption be applied; and

(b) the federal government agree to the request.

It should be noted that the exemption applies not only while 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. *Where 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.*

Subsection 16(4) - Definition of 'Investigation'

Subsection 16(4) of the Access to Information 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 investigation specified in the 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 vast majority of investigations to which the exemptions can be applied are covered by paragraphs 16(4)(a) and (b). For example, an investigation such as that by the National Parole Board to determine if an individual should be granted a pardon under the Criminal Records Act would be covered by paragraph 16(4)(a). Investigations by safety officers under Part IV of the Canada Labour Code are an example of the types of investigations which would be covered by both paragraphs 16(4)(a) and (b). Paragraph 16(4)(b) would cover investigations of the type conducted by the Anti-Discrimination Branch of the Public Service Commission. Residual classes of investigations are provided for in paragraph 16(4)(c) and are listed in regulations to the Access to Information Act (see Access to Information Regulations, section 10, Appendix B). An example of this class of investigations is an investigation established on an ad hoc basis into the loss of separation by air traffic controllers.

Specification of exemption claim in section 16

When claiming any exemption under section 16, government institutions shall specify the subsection or paragraph upon which the claim is based.

.4.6.5 *Safety of individuals (section 17)*

Section 17 of the Access to Information Act provides that a government institution may refuse to disclose any record that contains information the disclosure of which could reasonably be expected to threaten the safety of individuals.

This is a discretionary exemption which permits a government institution to refuse access to information if it has reasonable grounds to expect that disclosure of the information could threaten the safety of an individual. This exemption will normally apply to information supplied by or about informants, that is individuals who provide information concerning criminal, subversive, or hostile activities but need not be exclusively so applied. It could also, for example, apply to information such as that about the flight plans of government aircraft.

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

.4.6.6 *Economic interests of the Government of Canada (section 18)*

Section 18 of the Access to Information 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.

Paragraph 18(a)

Paragraph 18(a) of the Act provides that a government institution may refuse to disclose any record that contains trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and has substantial value or is reasonably likely to have substantial value. This paragraph provides for protection for proprietary information of the government of Canada. It may include information that is patentable or that the government may want to licence.

This exemption is discretionary and is based upon a class test.

A trade secret is a recognized legal concept based upon case law. For a record to qualify under this paragraph as a trade secret, it must satisfy all of the criteria contained in the following list:

- it must consist of information;
- the information must be secret in an absolute or a relative sense (i.e. known only by one or a relatively small number of persons);
- the possessor of the information must demonstrate that he has acted with the intention to treat the information as secret;
- the information must be capable of industrial or commercial application; and
- the possessor must have an interest (e.g. an economic interest) worthy of legal protection.

In addition to trade secrets, the same paragraph also protects financial, commercial, scientific or technical information belonging to the government of Canada or a government institution listed in Schedule I of the Act (Information belonging to other government institutions not covered by the Act is considered as third party information; see sub-article .4.6.8 of this policy). The information must have 'substantial' as opposed to 'nominal' value now, or must be reasonably likely to have such value in the future. For the purposes of this paragraph, value is to be interpreted as 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 obvious example of information that may technically qualify for an exemption under this paragraph is research carried out by the National Research Council to be further developed by the private sector under various licencing arrangements.

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

The permissive aspect of this paragraph is intended to temper the class approach to permit the disclosure of records which might technically qualify for an exemption but the release of which would cause no injury or harm, as discussed in article .4.1, of this policy (General principles: Discretionary exemptions).

Any portion of the record(s) containing information relating to a third party can only be disclosed if it does not qualify for an exemption under section 20 of the Act.

Under subsection 20(2), an exemption under subsection 20(1) of the Act (Third party information) cannot be claimed for the mandatory disclosure of the results of product and environmental testing carried out by or on behalf of a government institution (see sub-article .4.6.8). Section 18 does not contain a similar provision precluding the application of paragraph 18(a) for the results of product or environmental testing where the information belongs to a government institution. As a matter of government policy, however, *results of product and environmental testing conducted by or on behalf of government institutions shall not be exempted under paragraph 18(a)*. This will ensure that product and environmental tests carried out by the government for federal government institutions will be treated in the same way as test results carried out by or on behalf of government institutions on private sector products or activities.

Paragraph 18(b)

Paragraph 18(b) of the Act provides that a government institution may refuse to disclose any record that contains information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution.

This exemption is discretionary and is based on an injury test of prejudice to the competitive position of a government institution. It is intended to protect information disclosure of which would weaken the competitive position of those government institutions which are in competition with the private sector. Crown corporations, not listed in Schedule I of the Act, cannot claim protection of paragraph 18(b)

because they are not 'government institutions' as defined by the Act. They are, however, 'third parties' under the Act and their competitive position may be protected under paragraph 20(1)(c).

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.

This exemption is discretionary and is based upon 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 is no longer covered by this exemption. In order for this exemption to be invoked, the officer or employee must be actively engaged in the research with a reasonable expectation of publication.

Paragraph 18(d)

Paragraph 18(d) of the Act provides that a government institution may refuse to disclose any record that contains information the disclosure of which could reasonably be expected to be materially injurious to the financial interests of the Government of Canada or the ability of the Government of Canada to manage the economy of Canada or could reasonably be expected to result in an undue benefit to any person. This is followed in the Act by a list of illustrative types of information which is set out in full below.

This discretionary exemption, based upon an injury test, seeks to protect two areas of concern:

(1) the financial interests of the Government of Canada, which refers to the government's financial position, its ability to collect taxes and revenues and to protect its own interests in transactions with third parties or other governments; and

(2) the government's ability to manage the economy, whether by means of tax, monetary or fiscal policies and 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.

The paragraph also seeks to avoid the result of an undue benefit accruing to any person through disclosure of information. The person who could reasonably be expected to benefit need not necessarily be the applicant in order for this paragraph to be invoked. 'Undue' means more than necessary or improper.

Paragraph 18(d) ends with a list of examples of information the disclosure of which could reasonably be expected to affect one of the two areas of concern or result in an undue benefit to any person:

- the currency, coinage or legal tender of Canada;
- a contemplated change in the rate of bank interest or in government borrowing;
- a contemplated change in tariff rates, taxes, duties or any other revenue services;
- a contemplated change in the conditions of operation of financial institutions;
- a contemplated sale or purchase of securities or of foreign or Canadian currency; or
- 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. It is important to note, however, that records containing the above or similar categories, such as, for example, the legal tender of Canada or a contemplated sale of land, are not exempt as a class; government institutions must demonstrate the reasonable likelihood of injury before information can be exempted under this paragraph.

Before invoking the exemption on the basis of financial interests or the ability of the government to manage the economy of Canada, government institutions should consult with the Department of Finance.

Specification of exemption claim in section 18

When claiming an exemption under section 18, government institutions shall specify the paragraph or subparagraph under which they are exempting the information.

.4.6.7 *Personal information (section 19)*

Subsection 19(1) of the Access to Information Act provides that, subject to subsection 19(2), a government institution shall refuse to disclose any record containing personal information as defined in section 3 of the Privacy Act.

This is mandatory class test exemption that, subject to the exceptions set out in subsection 19(2), prohibits the disclosure of personal information under the Access to Information Act. 'Personal information' is defined in section 3 of the Privacy Act as information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing:

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual;

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) any identifying number, symbol or other particular assigned to the individual;

(d) the address, fingerprints or blood type of the individual;

(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations;

(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence;

(g) the views or opinions of another individual about the individual;

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual; and

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual;

but, for the purposes of sections 7, 8 and 26 of the Privacy Act and section 19 of the Access to Information Act, does not include:

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including;

- the fact that the individual is or was an officer or employee of the government institution;
- the title, business address and telephone number of the individual;

- the classification, salary range and responsibilities of the position held by the individual;
- the name of the individual on a document prepared by the individual in the course of employment; and
- the personal opinions or views of the individual given in the course of employment;

(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of such services;

(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit; and

(m) information about an individual who has been dead for more than twenty years.

It should be noted that, despite the length of the definition, it is not comprehensive. The definition is intended, in part, to give examples of the type of information considered to be personal information and to indicate that the term is to be defined very broadly. Thus, information not specifically mentioned in the list, but clearly covered by the opening words, such as information relating to a person's lifestyle, income or sexual preference, is to be considered personal information. The definition of the term is discussed in greater detail in Chapter 410, Part III, section .1.

Limitations on the Definition of Personal Information

Paragraphs (j), (k), (l) and (m) of the definition place certain limitations on the meaning of the term, personal information, when a request for information is made under the Access to Information

Act. Paragraph (m) sets a time limitation on the type of information for which an exemption under section 19 can be claimed. Once an individual has been dead for twenty years, information about him or her is no longer considered to be personal information for the purposes of section 19.

Paragraphs (j), (k), and (l) exclude specific types of information, normally considered to be personal information, from the meaning of the term where a request for information is made under the Access to Information Act. Thus a section 19 exemption cannot be claimed for information relating to the position or functions of a government employee (see paragraph (j)), information relating to services being performed by an individual performing services under contract for a government institution (see paragraph k), or information about a discretionary benefit of a financial nature conferred on an individual (see paragraph l).

These exclusions in paragraphs (j), (k) and (l) reflect the fact that there is certain information relating to 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 these paragraphs should, however, be construed narrowly, bearing in mind that these are specific exclusions to the general principle that personal information should be exempt from the right of access under the Access to Information Act. Thus, for example, paragraphs (j) and (k) should be interpreted as applying to information of a factual nature only. Personnel assessments and other subjective assessments of a person's job performance, or reports of disciplinary action taken against an employee or a person under contract, are not to be included. In paragraph (l), the phrase, 'discretionary benefits of a financial nature' modifies the types of licences and permits to which the paragraph applies. Thus, an individual must obtain a direct financial benefit from the licence or permit for the paragraph to apply.

Permissive Disclosure

Subsection 19(2) of the Act provides that a government institution may disclose any record containing 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.

This provision permits the release of personal information in certain circumstances where an individual has consented to waive his or her right to privacy, the information is already publicly known (e.g. the Prime Minister's address is 24 Sussex Drive), or the request would qualify for a permissive disclosure under subsection 8(2) of the Privacy Act. The provision allows institutions discretion to answer some requests for access which they would not otherwise be able to respond to because of the mandatory nature of this exemption. It is important to note, however, that subsection 19(2) does not create a right of access to personal information when particular circumstances are met. Rather, it permits a government institution to release personal information on a discretionary basis if any of the circumstances outlined above prevail but does not oblige it to do so. The circumstances in which disclosure is permitted under subsection 19(2) are identical to the circumstances in which government institutions are permitted to disclose personal information under the use and disclosure code in the Privacy Act (sections 7 and 8). The use and disclosure code and the basic principles for interpreting it are discussed in Chapter 410, Part III, section .3.

Government institutions shall refer to policies relating to the obtaining of consent, determining when personal information is publicly available and governing disclosure under section 8 of the Privacy Act contained in Part III of this chapter, before disclosing any personal information under subsection 19(2).

Relation to Requests for Personal Information under the Privacy Act

As a result of section 19, no right of access to personal information exists under the Access to Information Act in any circumstances, even to the individual who is the subject of the information. Where an

individual is seeking access to information about himself, therefore, he or she should, generally speaking, apply under the Privacy Act and the individual will only have an enforceable right to the information when a request is made in this way.

Government institutions should be aware that some individuals may attempt to circumvent those exemptions in the Privacy Act which are not included in the Access to Information Act (these are, the exemption for security clearance reports (section 23), inmates' files (section 24) and medical records (section 28)) by applying under the Access to Information Act for information about themselves and providing their consent to the disclosure of the information. In addition, where an individual consents to the disclosure of information about himself or herself pursuant to the request under the Access to Information Act by a third person, government institutions should review the information carefully to ensure that it would not be exempt from disclosure under the Privacy Act if a request by the individual whom it concerns were received under that Act. (The exemptions in the Privacy Act are discussed in Chapter 410, Part III, section .7.)

As a matter of government policy, *government institutions should insist that an individual applying for access to information about him or herself apply under the Privacy Act. Where a third person requests access to information about an individual and that individual consents to its disclosure, government institutions must review the information carefully to ensure that it could not be exempt under the Privacy Act if the individual who is the subject of the information requested access to it*.

.4.6.8 *Third party information (section 20)*

Section 20 of the Access to Information Act deals with what is called third party information. As defined in section 3 of the Act, 'third party' means, in respect of a request for access to a record under the Act, 'any person, group of persons or organization other than the person that made the request or a government institution'. The definition of third party, therefore, encompasses federal crown corporations

and other government organizations to which the Act does not apply (e.g. Air Canada). Procedures respecting the notification of third parties where information about them or which would affect their interests is to be disclosed are set out in sections 28 and 29 of the Act and are discussed in detail below.

A flowchart with the decision points required for determining the disclosure of third party information is provided in Appendix D.

Subsection 20(1)

Subsection 20(1) of the Act protects from disclosure, on a mandatory basis, financial, commercial and scientific information received from, pertaining to or affecting third parties. The application of the exemptions set out in paragraphs (a) through (d) of 20(1) may, in some circumstances, be affected by the operation of subsection 20(2), (5) or (6). These subsections are discussed separately below.

Trade secrets: Paragraph 20(1)(a)

Paragraph 20(1)(a) of the Act provides that a government institution shall refuse to disclose any record requested under this Act that contains trade secrets of a third party.

This is a mandatory exemption, based on a class test.

A 'trade secret' is a recognized legal concept which is chiefly the product of case law. The elements of a trade secret are the following:

- it consists of information;
- the information must be secret in an absolute or relative sense (i.e. known only by one or a relatively small number of persons);
- the possessor of the information must demonstrate that he has acted with the intention to treat the information as secret;
- the information must be capable of industrial or commercial application; and

- the possessor must have an interest (e.g. an economic interest) worthy of legal protection.

For a record to qualify for this exemption, the information contained in it will have to satisfy all of the criteria contained in the above list. Research data or abstract ideas not capable of being used industrially or commercially cannot qualify for an exemption as a trade secret, but may qualify for exemption under paragraph 20(1)(b) or (c).

Confidential financial, commercial, scientific or technical information: Paragraph 20(1)(b)

Paragraph 20(1)(b) of the Act provides a mandatory class exemption for any record that contains 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 is intended to protect information of a confidential nature provided by a business or other commercial interest to the government, regardless whether it was provided pursuant to a statutory obligation or on a voluntary basis. Its purpose is to ensure that the obligation of the government to maintain this information on a confidential basis will continue, notwithstanding the Access to Information Act.

There are several elements which must be satisfied before this exemption applies:

(a) The information involved must be financial, commercial scientific or technical information

This category can include, for example, profit & loss statements, auditors' reports, customer lists, licensing arrangements, formulae, designs, prototypes, production methods, and computer software.

(b) The information must be 'confidential information'

The concept of 'confidential information' as used in this exemption is a legal one which has been developed in Anglo-Canadian case law relating to actions for breach of confidence. It applies to information which is of value to the possessor of the information and which has been entrusted to another person in circumstances which create an obligation on that person to maintain the information in confidence. This obligation may be based in contract, express or implied, or may arise by virtue of the relationship of the parties and the circumstances under which the person to whom the information was provided learned the information.

It should be noted that this concept would certainly cover information which is a trade secret. However, it is a broader notion than a trade secret, in that the information need not be capable of industrial or commercial application or use. The only requirement in respect of the secrecy of confidential information is that it not be in the public domain, that is not be generally known or be available for the asking.

(c) The information must have been supplied to the government institution by a 'third party'

This exemption, therefore, only applies to information provided to the government and not to information which it generates itself.

(d) The information must be treated consistently in a confidential manner by the third party

As can be seen from the description above, the notion of 'confidential information' is potentially very broad, as it is based on the relationship established between two parties.

However, as a result of the limitation provided in this paragraph, the obligation on a government institution to maintain the information on a confidential basis will only apply vis-à-vis a third party who consistently treats the information involved in a confidential manner.

Government institutions receiving information on a confidential basis from third parties should ensure that the information is designated and labelled as such at the time of receipt. (The directives and guidelines concerning information collection activities by government institutions are contained in Chapter 415 of the Administrative Policy Manual.) 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 see if it qualifies as confidential information and is treated consistently in a confidential manner. Government institutions will have under their control at the time of proclamation, third party information which might qualify as confidential information. *In order to ensure protection for information requiring confidential treatment where the status of information received before proclamation of the Act is in doubt, government institutions shall consult the appropriate third party or parties forthwith, upon receipt of an access request, in order to establish whether or not the information is confidential*.

All copies of information received on a confidential basis must receive equal protection from disclosure. Where government departments and agencies transmit copies of such information to other federal government institutions, *the receiving institution shall not disclose information which it believes may have been received on a confidential basis without first consulting with the government institution that provided the information*.

Material financial loss or gain or prejudice to the competitive position of a third party: Paragraph 20(1)(c)

Paragraph 20(1)(c) of the Act provides that government institutions shall refuse to disclose any record requested under the Act that contains 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.

This is a mandatory exemption, based on an injury test. The paragraph applies to the disclosure of information supplied by or pertaining to a third party or which could reasonably be expected to affect any third party in the ways set out in the paragraph. In order to exempt the information, the government institution must have a reasonable expectation of (1) material financial loss to a third party, (2) material financial gain to a third party or (3) prejudice to the competitive position of a third party. None of these terms is defined in the Act but the word 'material', for example, will have to be considered as 'significant' or 'important'.

Here, as in paragraph (d), the number of third parties potentially affected by any one disclosure of information could be large. The information in the record itself should be the basis to determine which are the third parties likely to be directly affected by the disclosure and this paragraph should be construed only to apply to them.

The following are some examples of types of information which might qualify for an exemption under this paragraph if the injuries specified in the exemption could reasonably be expected to result:

- information relating to the resource potential of a particular corporation;
- confidential economic evaluations of a corporation such as those which are filed with regulatory bodies;
- reports required to be filed with the government by manufacturers, for example those relating to design problems leading to automobile recalls.

Contractual or other negotiations: Paragraph 20(1)(d)

Paragraph 20(1)(d) of the Act provides that a government institution shall refuse to disclose any record requested under the Act that contains information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

This is a mandatory exemption, based on an injury test, applied to any third party who could reasonably be expected to be prejudiced by the disclosure. The nature of the injury is self-explanatory. In applying the injury test, government institutions must determine whether disclosure of the record(s) requested could reasonably be expected to impair the ability of any third party (likely to be directly affected by the disclosure) to negotiate in a non-prejudicial environment whether or not the party is the submitter of the information.

Environmental and product testing: Subsection 20(2); (3) and (4)

Under subsection 20(2) a government institution shall not, pursuant to subsection 20(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. So even if a record would be exempt from disclosure under subsection (1), a government institution is not permitted to claim exemption under subsection 20(1) for any part of the record which contains the results of product or environmental testing carried out by or on behalf of a government institution.

However, if 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(2) does not apply. Thus, for example, the provision does not apply to product testing done by the National Research Council on a commercial basis. The provision also does not apply to testing done by a third party and submitted to a government institution, either on a voluntary or mandatory basis.

Government institutions should note that it is only that part of the record dealing with the test results which is subject to this subsection and the part of the record containing the results will have to be severed from the rest of the record.

Subsection 20(4) provides that the results of product or environmental testing do not include the results of preliminary testing conducted for the purpose of developing test methods.

When the results of product and environmental testing are disclosed pursuant to subsection (2), under subsection 20(3), the government institution is required to provide the applicant with a written explanation of the methods used in conducting tests. The requirement to create a new record is provided in order to ensure that test results, which could be misleading if released on their own, are fully explained.

Disclosure in accordance with subsection 20(2) is subject to third party notification procedures (see sub-article .4.6.9 of this Part). It must be noted, however, that third party representations subsequent to notice of intended disclosure of testing results are limited to the issue as to whether or not the information in question constitutes test results carried out by or on behalf of a government institution, which was not done as a service to person, etc., other than a government institution and for a fee.

Permissive disclosure

(a) *Consent: Subsection 20(5)*

Release of information described in subsection 20(1) may be permitted, if the third party to whom the information relates consents to its disclosure, as provided in subsection 20(5). Such consent is deemed waiver of the requirement that a third party be notified of intended disclosure pursuant to subsection 28(2).

This provision is intended to prevent situations where the institution would be under an obligation not to disclose a record even if the third party agreed to disclosure. Consent of the third party may be obtained at the time of submission, during informal consultation or in response to the notification of the intent to disclose by the government institution. *Third party consent to disclose information described in subsection 20(1) shall be obtained by government institutions in writing*.

(b) Public interest: Subsection 20(6)

Government institutions may disclose any record that contains information described in paragraphs 20(1)(b)(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. Trade secrets, however, may not be disclosed pursuant to this subsection.

Disclosure under subsection 20(6) is permitted if the government institution determines that the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.

Disclosure in the public interest is discretionary and therefore government institutions must carefully weigh the public interest in disclosure against the nature and magnitude of the injury the third party is likely to suffer as a result of such a release. In order to allow an opportunity to the third party to explain the potential injury they would suffer if the information was disclosed, or to present their case if they believe that the information to be released contains a trade secret, the notification procedures described in sub-article .4.6.9 must be followed.

Discretionary disclosure in the public interest overrides all mandatory exemptions for third party information, with the exception of trade secrets.

Specification of exemption claim in section 20

When claiming an exemption under section 20, government institutions shall specify the paragraph under which they are exempting the information.

.4.6.9 *Third Party Intervention (Sections 28, 29, 33, 35(2)(c), 43 and 44)*

The Access to Information Act includes a procedure which:

- requires government institutions to notify third parties about whom they hold information *prior* to the release of any such information under the Act; and
- provides such third parties with a right to make representations to the government institution, the Information Commissioner and the courts as to the reasons such information should not be disclosed.

The above procedures must be followed (1) when a government institution intends to disclose a record which may contain information described in subsection 20(1) pursuant to a request under the Act, (2) when the Information Commissioner intends to make a recommendation that such information be disclosed or (3) when such information is the subject of proceedings instituted under the Act before the courts. The procedures which must be followed by a government institution, and the rights accorded to the third party, at each of these stages are discussed below.

Under subsection 28(1), the third party notification and intervention rights set out in the Act apply whenever a record containing information described in subsection 20(1) may be disclosed under the Act. These rights, therefore, apply where the disclosure of such information is to be made pursuant to subsection 20(2) or 20(6). The only exception to the notification requirements is when the disclosure is being made pursuant to subsection 20(5) (i.e. where the third party has consented to the disclosure (subsection 28(2)).

Government institutions are encouraged to contact the third party informally, if during the initial review of the record(s) requested they are uncertain whether or not subsection 20(1) applies.

A flow chart illustrating the notification and intervention process is contained in Appendix D.

1. Initial Decision Making Stage (Section 28)

Third party notification and intervention rights are invoked under section 28 where the head of a government institution proposes to to disclose information which he has reason to believe may contain

information described in subsection 20(1). It should be noted, however, that the requirements regarding third party notification are only invoked where a preliminary decision has been made to disclose the information. If the institution intends to claim an exemption for third party information under subsection 20(1), the requirements for third party notification under section 28 will not apply.

(a) Requirements for Notification Under Subsection 28(1), where a government institution intends to disclose a record which might contain information described in subsection 20(1), a third party who owns the information, who supplied it to a government institution or who could reasonably be expected to be affected by the disclosure in a way described in paragraphs 20(1)(c) or (d) must be notified:

- in writing; and
- within 30 days after the access request is received if the third party can be 'reasonably located'.

The notice should be sent by registered mail to the last known mailing address of the third party.

Where the record to be disclosed may contain trade secrets of a third party (paragraph 20(1)(a)) or confidential information supplied by a third party (paragraph 20(1)(b)), generally only one third party will be involved and the third party will be easily identifiable. However, where 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), third parties other than the submitter of the information can be involved. Subsection 28(1) requires that all such third parties be notified of the intended disclosure.

(b) Waiver of Notification Rights. Under subsection 28(2), a third party may waive the right to be notified of an intended disclosure under subsection 28(1), either at the time the information was obtained or subsequently. A third party who has consented to disclosure is deemed to have waived this

right. Third party notification rights, thus, will not apply to a disclosure made under subsection 20(5). *Government institutions shall obtain waivers and consent to disclosure from a third party in writing.*

(c) Contents of the Notice. Subsection 28(3) 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, which may contain information described in subsection 20(1);
- a description of the contents of the record, or part thereof, which belong to, were supplied by or relate to the third party; 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. (See Appendix D, Model Letter A).

(d) Extension of Time Limits. Under subsection 28(4), an extension of the 30 day time limit for responding to an access request, set out in section 7, can be extended under section 9 of the Act where third party notification requirements under section 28 are invoked. The procedures regarding time limit extensions under section 9 apply to an extension made because of third party notification. (See article .2.3 of this Part).

(e) Representations by a Third Party. Paragraph 28(5)(a) requires that a government institution provide a third party who has been notified of an intended disclosure under section 28 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(6)).

If no response is received from the third party to the notification 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.

(f) Decision Following Third Party Representations. (Paragraph 28(5)(b) and subsections 28(7) and (8)) 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(5)(b)). 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.

- Decision to Disclose the Record. (Subsections 28(7) and (8)) When the government institution decides to disclose the record, or part thereof, following receipt of third party representations, the notice to the third party must contain a statement that:
- the third party is entitled to apply to the Federal Court - Trial Division for a review of this decision under section 44; and
- access to the record or part thereof will be provided to the person who has requested it forthwith on completion of 20 days after this notice is given unless the third party applies to the Federal Court for a review of the decision (subsection 28(7)). (See Appendix D, Model Letter C).

In such a situation, a government institution shall 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 shall be given access to it on the completion of the 20 day time period (subsection 28(8)).

(ii) Decision to Exempt the Record. (Paragraphs 7(a) and 28(5)(b)) Where the government institution decides to claim an exemption for the record, or part thereof, following receipt of third party representations, notice of the decision shall be given within 30 days to both the third party (paragraph 28(5)(b)) and the person who requested access to the record (paragraph 7(a)). (See sub-article .2.4.4 of this Part and Appendix D, Model Letter E).

2. Proceedings before the Information Commissioner (Section 33 and paragraph 35(2)(c)

(a) Notice by Government Institution to Information Commissioner. When a government institution claims an exemption under Subsection 20(1) for a record requested under the Act and the applicant complains to the Information Commissioner about the refusal to disclose the record, the government institution is required to notify the Information Commissioner of any third party which it would have notified if it had intended to disclose the record. (Section 33).

(b) Notice by the Information Commissioner to a Third Party. If, as a result of an investigation made under the Act, the Information Commissioner intends to recommend to a government institution that it disclose a record or part thereof which might contain information described in subsection 20(1), 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)).

3. Following Consideration of a Recommendation of the Information Commissioner (Section 29)

When, following review of a recommendation by the Information Commissioner, a government institution decides to disclose a record, or part thereof, which it has reason to believe might contain information described in subsection 20(1), the government institution is required, under section 29, to:

- notify any third party that has been notified under subsection 28(1) or would have been notified under subsection 28(1) at the time of the request if the institution had intended to disclose the record (i.e. any third party to whom the information belongs, who submitted the information to a government institution or who could reasonably be expected to be affected by the disclosure in a way described in paragraph 20(1)(c) or (d)) of the decision to disclose. The notice shall contain a statement that the third party is entitled under section 44 to apply to the Federal Court - Trial Division for a review of the decision within 20 days after notice has been given (See Appendix D, Model Letter H);
- notify the person who requested the record of the decision to disclose the record. The notice shall 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 person who requested the record will be given access to it. (See Appendix D, Model Letter F).

The government institution shall not disclose the information until the 20 day period for filing an application with the Federal Court has expired. If the third party does not apply to the Court for review within this time period, the government institution shall provide the person who requested the record with access to it on the completion of the 20 day period. Government institutions are notified of applications to the Federal Court, by the Federal Court. However, in order to ensure

that no disclosure occurs when an appeal has been filed within the time limits, but notification is delayed, (government institutions, through their legal advisor, should obtain confirmation that no application has been filed).

4. Proceedings Before the Federal Court (Sections 43 and 44)

(a) Notification requirements can arise in relation to proceedings before the Federal Court - Trial Division in the following circumstances:

(i) Proceedings Initiated by the applicant or the Information Commissioner (Section 43)

Where a government institution has refused to disclose a record on the basis that it is exempt under subsection 20(1) and the person who requested the record or the Information Commissioner brings proceedings against the government institution in the Federal Court - Trial Division under sections 41 or 42, the government institution is required under subsection 43(1) to give written notice of the proceedings to any third party which has been notified of the request under subsection 28(1) or any third party which would have been notified under subsection 28(1) if the government institution intended to disclose the record. (See Appendix D, Model Letter J). Under subsection 43(2), the third party has the right to appear as a party to the proceedings.

(ii) Proceedings initiated by the Third Party (Section 44)

A third party who has been notified by a government institution of an intended disclosure under paragraph 28(5)(b) or subsection 29(1) may, within 20

days after the government institution has given the third party such notice, apply to the Federal Court - Trial Division for a review of the matter.

Where a government institution receives notices that a third party has brought proceedings under section 44, the government institution is required under section 44(2) to notify forthwith the person who requested the record in writing of the fact that the proceedings have been initiated. (See Appendix D, Model Letter K). The applicant has the right to appear as a party to such proceedings (subsection 44(3)).

(b) Orders of the Court (Sections 49 and 51) When the status of third party information is being considered by the Federal Court - Trial Division, in proceedings brought under the Act, the Court will order the information disclosed if it determines that it is not exempt under section 20 (Section 49). If the Court determines that the record contains information described in subsection 20(1), and that subsections 20(2), (5) or (6) do not apply in the circumstances to set aside the mandatory nature of the exemption in subsection 20(1), it will order the government institution to not disclose the record (section 51).

.4.6.10 *Advice (section 21)*

Subsection 21(1) of the Access to Information Act sets out a discretionary class test exemption which protects certain classes of information relating to the internal decision-making processes of government the disclosure of which would interfere with the operations of government institutions. The exemption can only be invoked if a record came into existence less than twenty years prior to the request for the information.

(a) Advice and recommendations

Paragraph 21(1)(a) provides that a government institution may refuse to disclose any record that contains advice or recommendations developed by or for a government institution or a Minister of the Crown.

This discretionary exemption encompasses as a class all types of advice and recommendations tendered within government institutions at all levels.

Protection is offered to the decision-making process in order to maintain candour in the giving of advice and recommendations. It is intended to retain accountability within government institutions where officials give advice and make recommendations according to their best judgement and those in senior positions are free to follow or reject them.

There is, of course, some overlap between the terms 'advice' and 'recommendations' as used in the exemption. The term 'recommendations' refers to formal recommendations about courses of action to be followed which are usually specific in nature and are proposed mainly in connection with a particular decision being taken while, on the other hand, the term 'advice' refers to less formal suggestions about particular approaches to take or courses of action to follow. The exemption applies to advice and recommendations developed by officials at all levels within a government institution and by Ministers of the Crown. It also applies to similar information created for a Minister by his or her staff.

This exemption protects advice and recommendations as a class. It is based on the concept that the release of such information would probably be injurious to the decision-making process of the government. Much advice and many recommendations are of such a nature that release of this type of information can cause great damage to the ongoing internal processes within government for obtaining advice and recommendations. It can have a chilling effect on the candidness of such advice and recommendations, and can lead to reluctance to deal with difficult questions in an objective fashion. For these reasons, such information should be protected until there is no likely possibility of injury or harm resulting from its disclosure.

However, the following types of information, though they may qualify for exemption under another provision of the Access to Information Act, would not normally be considered to qualify for the exemption in paragraph 21(1)(a):

- guidelines to assist officials of government institutions in interpreting legislation or applying discretion provided to them under an Act of Parliament. For example, the exemption would not apply to the guidelines and directives set out in this manual or to the manual prepared by the Department of Justice to assist its lawyers in interpreting the Charter of Rights and Freedoms; and
- factual information.

(b) Consultations and deliberations

Paragraph 21(1)(b) provides that a government institution may refuse to disclose any record that contains 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.

This discretionary exemption is intended to protect as a class accounts of consultations or deliberations involving officials, ministers and ministerial staff. Its primary purpose is to allow the frank exchange of views among these persons. Examples of records containing information falling into this category would be minutes of meetings and other memoranda and letters containing information relating to such consultations or deliberations.

(c) Negotiations

Paragraph 21(1)(c) 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 discretionary exemption 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.

'Positions and plans' refer to information which may be used in the course of negotiations. 'Considerations' are somewhat broader in nature, covering information relating to the factors involved in developing a particular negotiating position or plan. Examples of the type of information which 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. However, the exemption covers only those negotiations outside the federal government and does not apply to such activities when carried on among government institutions.

(d) Personnel and administration plans

Paragraph 21(1)(d) provides that a government institution may refuse to disclose any record that contains plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation.

This part of the advice exemption protects as a class plans relating to the internal management of government institutions, including such documents as plans relating to the re-location or reorganization of government institutions. The provision is temporary for plans which are implemented. 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 which were considered before deciding on the plan need not be disclosed. Plans which are never implemented can be protected for the twenty year period provided for in this subsection if injury or harm to the efficiency of the operations of the institution would result from disclosure.

Exercise of Discretion to Waive Exemption

Subsection 21(1) of the Access to Information Act is a discretionary class test exemption. Its permissive aspect is intended to temper the class approach and to permit the disclosure of records which might technically qualify for exemption but the release of which would cause no injury or harm. In order to limit the instances in which this exemption is claimed to those where it is necessary, institutions are required to undertake a two step process when invoking this exemption. Institutions must:

(a) determine if the information requested qualifies for one of the classes of advice described in the exemption; and

(b) if it does so, then determine whether or not disclosure of the information will result in injury or harm to the particular internal processes to which it relates.

Determination of injury or harm within the advice exemption should be judged on the basis of the impact of disclosure will have on the institution's ability to carry on similar internal decision-making processes in the future. Would disclosure make advice or recommendations less candid and comprehensive; consultations or deliberations less frank; destroy the ability of the government to develop and maintain strategies and tactics for present or future negotiations; or undermine the institution's ability to undertake personnel or administrative planning? Such determinations can only be based on the specific content of the advice, recommendations, account, position or plan that has been requested; the procedures involved in the decision-making process, and the sensitivity of the information requested. Institutions should take into account the effect disclosure will have on all steps in a decision-making process and not just the immediate interests involved with the information itself.

Limitations on exemption

Paragraph 21(2)(a) of the Access to Information Act provides that subsection 21(1) does not apply in respect of a record that contains an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person.

This paragraph excludes from the advice exemption, in certain circumstances, the text of decisions and the account or statement of reasons supporting those decisions. The decisions involved are of two kinds. First, there are those decisions made in the exercise of a discretionary power. Examples of such decisions are the awarding of a grant or the funding of a project by the government. Second, there are decisions made in the exercise of an adjudicative function such as a tax appeal, unemployment insurance adjustment or personnel grievance. In both types of decisions, the exercise of discretionary power must affect the rights of a person. The exclusion 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 which formed the basis of the reasons supporting the decision.

Paragraph 21(2)(b) of the Access to Information Act provides that subsection 21(1) does not apply in respect of a record that contains a report prepared by a consultant or adviser who was not, at the time the report was prepared, an officer or employee of a government institution or a member of the staff of a Minister of the Crown.

The reports of consultants and advisers not employed by the government are excluded from protection because such individuals or firms are contracted to work outside the normal governmental process on a fee basis for work done.

Specification of exemption under section 21

When claiming an exemption under section 21, government institutions shall specify the paragraph under which they are exempting the information.

.4.6.11 *Testing procedures (section 22)*

Section 22 of the Access to Information Act provides that a government institution may refuse to disclose any record that contains information relating to testing or auditing procedures or techniques or details of specific tests to be given or audits to be conducted if such disclosure would prejudice the use or results of particular tests or audits.

This is a discretionary exemption which provides protection for procedures and techniques involved in testing and auditing, and for details relating to specific tests or audits about to be given or conducted when an injury to these operations is involved. Injury is based on prejudice to the use or results of a particular test on audit. In other words, the information is protected where the disclosure poses a danger to the employing of similar tests or audits in the future or makes possible the invalidation of the results of specific tests about to be given or audits about to be conducted.

The terms 'test' and 'audit' are intended to be interpreted broadly to cover a wide variety of activities undertaken by the federal government in regard both to its own institutions and in the private sector (e.g. environmental testing, language testing, personnel audits, financial audits etc.). The exemption applies to testing and auditing carried out by both federal institutions and consultants and contractors. This section does not, however, provide an exemption for the results of tests or audits. (Government institutions should not exempt information on previous tests or audits unless the same procedures are to be used in future operations.) Additional guidance as to the release of the results of environmental and product testing is provided in sub-article .4.6.8, Third party information.

.4.6.12 *Solicitor-client privilege (section 23)*

Section 23 of the Access to Information Act provides that a government institution may refuse to disclose any record that contains information that is subject to solicitor-client privilege.

This discretionary exemption ensures that communications between a government institution and its solicitors are protected to the same extent as is legal advice in the private sector. The privilege also extends to materials prepared by or for the solicitor expressly for the purpose of providing advice or presenting a case in court.

Government institutions should consult their legal advisor prior to invoking solicitor-client privilege in order to determine if the information is in fact privileged and also before disclosing such information in order to ascertain if the disclosure could injure the government's legal procedures or positions. This exemption should be used when the disclosure of information could:

(a) circumvent the normal process of discovery in cases presently before the courts; or

(b) prejudice the government's legal position in present or future litigation or negotiation; or

(c) impede the ability of government institutions to communicate fully and frankly with their legal advisors.

.4.6.13 *Statutory prohibitions (section 24)*

Subsection 24(1) of the Access to Information Act provides that a government institution shall 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.

This is a mandatory exemption which incorporates within the Access to Information Act those specific prohibitions against disclosure included in other statutes. These are listed in Schedule II. When a government institution is invoking the section 24 exemption, it will have to make a determination as to whether the information being requested is the same information protected by the statutory provision.

The Access to Information Act takes precedence over all other prohibitions against the disclosure of information which exist in federal statutes or regulations other than those listed in Schedule II

of the Act. Thus, if the information protected under some other statutory prohibition is to be protected pursuant to a request under the Access to Information Act, it must be brought within one of the other exemptions in the Act. This interpretation is based on the fact that the Access to Information Act is a statute of general application. It applies regardless whether the provision containing the prohibition was enacted prior or subsequently to the Access to Information Act.

Subsection 24(2) provides for a review of these prohibitions by the Parliamentary committee designated under section 75 of the Act. The committee is instructed to report within three years whether and to what extent the statutory prohibitions listed in the Schedule are necessary.

.4.6.14 *Information to be published (section 26)*

Section 26 of the Access to Information 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, agent of the Government of Canada or 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.

This is a discretionary exemption which permits government institutions to retain some control over manuscripts and other materials for which they may wish priority rights to publication. The provision simply defers release of the information until publication occurs. The exemption is also intended to deal with those types of government documents which 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 which must be published in the public interest will be made available to all at the same time and in both official languages.

In order for a record to qualify for this exemption, the head of an institution must 'believe on reasonable grounds' that the particular material which has been requested will be published within ninety days

or such further time as will facilitate translation and printing. Such '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 pursuant to a contract, or by a Minister of the Crown. Publication by the private sector would not qualify for this exemption.

The provision is intended only to provide protection on a short-term basis and is based on normal and reasonable time limits for the publication process. *If there is no certainty that the material will be published within a reasonable time beyond the ninety day limit, institutions shall make the information available to the applicant.*

.4.6.15 *Transitional provision (section 27)*

Section 27 of the Access to Information Act provides that a government institution may refuse to disclose any record:

> (a) during the first year after the coming into force of the Act, in the case of a record that was in existence more than three years before 1983;
>
> (b) during the second year after the coming into force of the Act, in the case of a record that was in existence more than five years before 1983; and
>
> (c) during the third year after the coming into force of the Act, in the case of a record that was in existence more than five years before 1983 where, in the opinion of the head of the institution, to comply with a request for the record would unreasonably interfere with the operations of the government institution.
>
> In simplified form, the transition clause means that:

(a) from 1983 to 1984, access to records created prior to 1980 may be denied;

(b) from 1984 to 1985, access to records created prior to 1978 may be denied;

(c) from 1985 to 1986, access to records created prior to 1978 may be denied if complying with a request for a record would unreasonably interfere with the operations of a government institution;

From 1986, for all records subject to the Access to Information Act, no basis would exist for exempting records under the transitional provision.

This section provides government institutions with a discretionary period of grace to adjust internal procedures to accommodate to the requirements of the Act and to phase in its operation. It is particularly aimed at requests for large quantities of older records which may be poorly organized and difficult to review. However, it is necessary for institutions to use some discretion in invoking the transitional provision. Where a request concerns records which may fall within the transitional provision and the information is easily located and produced, the request should be processed. (The transitional provision should only be invoked when a request is of such a nature that it would cause disruption of the normal operations of an institution to process it.)

Part II

.5 Review of decisions under the Access to Information Act

.5.1 *General principles*

The Access to Information Act provides for a two-tiered system of review of decisions made under the Act. The first stage is complaint to the Information Commissioner, an individual with the power of an ombudsman. The second is appeal to the Federal Court - Trial Division.

.5.2 *Purpose*

The purpose of this section is to assist in the interpretation of those provisions relating to the powers of the Information Commissioner and the Court and to discuss the nature of the remedy available at each level of appeal.

.5.3 *Review by the Information Commissioner (sections 30-40)*

(a) Complaints

Subsection 30(1) of the Act provides that the following matters may be the subject of a complaint to the Information Commissioner:

- denial of a request for access;
- the amount of fees charged under section 11;
- extension of time limits for response to a request under section 9;
- the official language in which access is provided under subsection 12(2);
- the length of time taken to translate a record into the official language preferred by the applicant under subsection 12(2);
- any publications or bulletins referred to in section 5; and
- any other matter relating to requesting or obtaining access to records.

Complaints regarding any of these matters may be brought by an applicant or his or her representative (see subsection 30(2)). As well, the Information Commissioner may initiate an investigation into any matter relating to requesting or obtaining access to records under the Act, if satisfied that there are reasonable grounds for doing so (see subsection 30(3)). This means that the Information Commissioner is free to act without a complaint being lodged, if a matter comes to his or her attention and there are reasonable grounds to believe that it could form the basis for a complaint. It should be noted that a complaint relating to a publication or bulletin may be brought by any person or initiated by the Commissioner regardless of whether or not a request for access has been made under the Act.

Normally, complaints to the Information Commissioner are required to be made in writing but this requirement may be waived by the Commissioner. A complaint relating to a request for access to a record (i.e. refusal of access, fees, time extensions or language) must be lodged with the Commissioner within one year from the time that the particular request concerned was received by the government institution to which it was sent by the applicant (see section 31).

(b) Investigations

Subsection 36(1) provides that the Information Commissioner has, under the Access to Information Act, the following powers in relation to carrying out investigations:

- to summon persons and compel them to give evidence;
- to compel the production of documents;
- to administer oaths;
- to receive evidence;
- to enter premises occupied by a government institution;
- to converse in private with any person in such premises; and
- to examine or make copies of any records related to an investigation.

Government institutions must provide to the Information Commissioner for examination any record requested by the Commissioner, except a confidence of the Queen's Privy Council (i.e. Cabinet confidences, see sub-section 36(2)). No access is provided to this type of record because section 69 of the Act excludes such records from the legislation. Section .3 of this Part discusses which types of records qualify as Cabinet confidences. The Information Commissioner's right to examine records extends to persons working on behalf of or under the direction of the Commissioner.

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 (see subsection 36(5)).

In order to ensure proper security arrangements for information required pursuant to an investigation, section 61 of the Act provides that the Information Commissioner and every person acting on behalf or under that official's direction in any investigation shall, in gaining access to and using any information required in the investigation, satisfy any security requirements applicable to, and take any oaths of secrecy required to be taken by persons who normally have access to and use the information.

Prior to commencing an investigation, the Information Commissioner must inform the head of the government institution concerned of his or her intention to carry out an investigation and of the substance of the complaint (see section 32). Subsection 35(2) ensures 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, any third party who is involved in the complaint action. Third party representation and notification procedures relating to an investigation by the Information Commissioner (see section 33 and subsections 35(2), 37(2) and 37(4)(b)) are discussed in detail in sub-article .4.6.9 of this Part. All investigations by the Commissioner must be conducted in private and no party is entitled, as a

right, to be present during, to have access to, or to comment on representations made by another party involved in the complaint (see section 35). Any person summoned to appear before the Information Commissioner is, at the Commissioner's discretion, entitled to receive witness fees and allowances similar to those permitted for attendance in the Federal Court (see subsection 36(4)).

Evidence that an employee of a government institution or any other person involved in the complaint gives in the course of an investigation is not admissible as evidence against the employee or person in a court or any other proceeding except in a prosecution for an offence under section 122 of the Criminal Code (false statements in extra-judicial hearings), in a prosecution for an offence under this Act, in a review before the Court under this Act or in an appeal resulting from such review (see subsection 36(3)). Government employees should not impede in any way an investigation by the Information Commissioner. Section 67 of the Act provides that such obstruction of the Commissioner or his or her delegates in the performance of duties and functions under the Act is an offence and subject, upon summary conviction, to a fine not to exceed $1000.00.

(c) Findings and recommendations

Subsection 37(1) of the Access of Information Act provides that, when the Information Commissioner has investigated a complaint and finds that it has merit, the Commissioner must report to the head of the government institution that has the record under its control concerning the findings of the investigation and any recommendations resulting from it (see paragraph 37(1)(a)). This report is first made to the head of the institution in order that that individual will have an opportunity to take any appropriate action resulting from the recommendations to meet the complaint. This report may also include a request by the Commissioner that the institution notify him or her within a specified time of any action taken or proposed to be taken to implement the recommendations made in the report or, if no action is to be taken by the institution, the reasons for this decision (see paragraph 37(1)(b)).

A similar process applies where the Information Commissioner initiates an investigation and finds that the reasons for having done so are well-founded.

Where an institution notifies the Information Commissioner that access is to be given to a record or part of it, the institution shall, if no third party notification is involved, forthwith give access (see subsection 37(4)). Similarly, if an institution notifies the Commissioner that it will meet any other matter of complaint (i.e. fees, time extensions, language etc.), it shall forthwith carry out remedial action.

In all instances the Information Commissioner is bound to report to the complainant concerning the results of his or her investigation but where a time limit has been specified for an institution to report on compliance with the recommendations resulting from an investigation, the Commissioner may not report to the complainant until the notification period has expired (see subsection 37(2)). However, after expiration of the time limit, if the institution does not comply with the recommendations or its response is, in the view of the Commissioner, inadequate, inappropriate or will not be taken in a reasonable time, the Commissioner must include in the report to the complainant his or her findings and recommendations, the response of the institution to these and may include in such report any comments he or she sees fit on the matter under consideration (see subsection 37(3)).

It is important to note that the Information Commissioner has the powers of an ombudsman. This official can, for instance, recommend that a complainant be given access to a record but cannot order the government institution to provide access. The Commissioner's power derives from a mandate to fully investigate a matter and to make recommendations for the resolution of a complaint which are fair and impartial. Further, if the recommendation is that access be given and the institution refuses, the Commissioner may advise the complainant to apply to the Federal Court for a review of the matter; may, with the complainant's consent, apply for such a review; may represent the complainant or may appear as a party to the review. Moreover, the Commissioner can report to Parliament when the head of a government

institution does not comply with his or her recommendations. This may be done at any time, in a special report when the Information Commissioner considers the matter involved is of an urgent, important or serious nature (see section 39) or reference may be included in the annual report to Parliament required of this official under section 38 of the Act.

Investigation, report and recommendation by the Information Commissioner is the only level of appeal for all matters except the refusal of a request for access. However, where an institution refuses to comply with the recommendation of the Commissioner to give access to a record, the Commissioner is required to inform the complainant of his or her right to apply to the Federal Court - Trial Division for further review of the matter (see subsection 37(5)).

.5.4 *Review by the Federal Court (sections 41-53)*

When the Information Commissioner's investigation is complete, a person who has not obtained access to a record requested under the Act has the right to apply to the Federal Court - Trial Division for a review of the matter (see section 41). As noted above, this review may occur only when a head of a government institution has refused access to a record requested under the Act. The Act does not provide for review by the Court of complaints about other matters which arise under the Act, such as fees and time limits. Normally, an applicant must make an appeal within 45 days after the results of the investigation by the Information Commissioner have been reported to him or her. An application to the Federal Court-Trial Division is to be heard and determined in a summary way (see section 45).

The Information Commissioner also may apply to the Federal Court for review of a decision to refuse access, provided the Commissioner first obtains the consent of the person who requested the record. In addition, the Commissioner may appear as a party in any case brought under the Act and may represent an applicant for a record who has initiated proceedings before the Court (see section 42).

Any third party about which the government holds information to which the exemption in subsection 20(1) may apply also has the right to initiate proceedings in the Federal Court to prevent disclosure of the information. Any such third party has the right to appear as a party in a case initiated by the applicant or Information Commissioner regarding a decision to withhold a record under subsection 20(1) (see section 44 and sub-article .4.6.9 of this Part).

During proceedings brought under the Access to Information Act, the Court has the power to examine all records except Cabinet confidences (see section 46). As explained above, the Act does not apply to this type of record (see section .3 above). To ensure the confidentiality of information which is the subject of proceedings before the Court, and other sensitive information produced during such proceedings, the Court may conduct hearings in private and receive representations ex parte (see subsection 47(1)). The Court may disclose to any appropriate authority information relating to the Commission of an offence against any law of Canada or a province on the part of any officer or employee of a government institution, if in its opinion evidence exists of such an offence (see subsection 47(2)). In cases arising under the Act concerning review of refusal of access, the burden of proof regarding a decision to refuse access, always rests with the government institution (see section 48).

The type of review which the Court is authorized to conduct in a case brought under the Access to Information Act depends on the exemption which has been claimed. In the case of denials of access based on the following exemptions the Court may undertake a de novo review of the decision:

(a) section 13 - information obtained in confidence from another government or international organization;

(b) paragraphs 16(1)(a) and (b) - law enforcement information collected or obtained by specified investigative bodies and investigative techniques and plans;

(c) subsection 16(2) - information which would facilitate the commission of an offence;

(d) subsection 16(3) - information obtained or prepared by the RCMP when performing its provincial policing role;

(e) section 17 - information the release of which would threaten the safety of individuals;

(f) paragraph 18(a) - proprietary information belonging to the Government of Canada;

(g) paragraphs 18(b) and (c) - prejudice the competitive position of a government institution or scientific research by a government employee;

(h) section 19 - personal information;

(i) subsection 20(1) - trade secrets and confidential information of a third party; and prejudice to competitive position or the negotiations of a third party;

(j) section 21 - advice;

(k) section 22 - testing procedures and audits;

(l) section 23 - solicitor-client privilege;

(m) section 24 - statutory prohibitions.

De novo review means that the Court will examine the merits of the issue; that is whether or not the exemption applies to the record before it, on hearing the applicant, the government institution and, where appropriate, any third party involved. If the Court decides that the exemption applies to the record, the record will not be released (see

section 51). If the Court concludes that the exemption does not apply, it will order the head of the institution to release the record (see section 49).

However, if the denial of access is based on the following exemptions:

(a) section 14 - injury to the conduct of federal-provincial affairs;

(b) section 15 - injury to international affairs, defence and security;

(c) paragraphs 16(1)(c) and (d) - injury to law enforcement, the conduct of investigations or the security of penal institutions;

(d) paragraph 18(d) - injury to the financial interests of the Government of Canada or its ability to manage the economy.

the court is limited to a determination of whether or not the head of the government institution had 'reasonable grounds' for its decision to withhold a record. Thus, it can only order the record released where it finds that reasonable grounds for the decision do not exist. Otherwise, the decision of the head of the government institution to withhold the record will be upheld (see section 50).

Part II

Appendix A

Schedule I - Access to Information Act
Government Institutions and Heads of Institutions

(To be distributed at a later date.)

Part II

Appendix B

Access to Information Regulations

1982-1077

P.C.
C.P.

CANADA

PRIVY COUNCIL · CONSEIL PRIVÉ

(T.B. Rec.
(Rec. du C.T.

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Justice and the Treasury Board, pursuant to subsection 77(1) of the Access to Information Act*, is pleased hereby to make the annexed regulations respecting access to information.

*S.C. 1980-81-82, c. 111

REGULATIONS RESPECTING ACCESS TO INFORMATION

Short Title

1. These Regulations may be cited as the Access to Information Regulations.

Interpretation

2. In these Regulations,

"Access to Information Request Form" means the form prescribed by the designated Minister pursuant to paragraph 70(1)(b) of the Act for the purpose of requesting access to records under the control of a government institution;

"Act" means the Access to Information Act;

"appropriate officer" means the officer of a government institution whose title and address is published pursuant to paragraph 5(1)(d) of the Act.

Limitation on Production of Records

3. For the purpose of subsection 4(3) of the Act, a record that does not exist but can be produced from a machine readable record under the control of a government institution need not be produced where the production thereof would unreasonably interfere with the operations of the institution.

Procedures

4. (1) A request for access to a record under the Act shall be made by completing an Access to Information Request Form and forwarding the Form, together with the required application fee, to the appropriate officer.

(2) Notwithstanding subsection (1), where a written request that provides sufficient detail to enable a government institution to identify a record under its control is received, the head of the institution may waive the requirement for the Access to Information Request Form.

5. Where access to a record is to be given to a person under the Act, the head of the government institution that has control of the record shall, where appropriate, forthwith inform the person

(a) that the record may be examined by that person in order to save the cost of reproduction of the record;

(b) that the person may specify that he requires only certain parts of the record to be reproduced;

(c) of any amount required to be paid as a deposit before the search or production of the record is undertaken or the record is prepared for disclosure;

(d) of the estimated total cost of the search for the record and preparation of the record for disclosure; and

(e) of any amount required to be paid before access is given to the record including the cost of production or reproduction.

Transfer of Request

6. (1) The head of a government institution may, within 15 days after a request for access to a record is received by the institution, transfer the request to another government institution as provided in subsection 8(1) of the Act, on condition that the head of the other government institution consents to process the request within the time limit set out for such a request in the Act.

(2) A request that has been transferred under subsection (1) shall not be transferred to a third government institution.

Fees

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; and

(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, $0.25 per page,

(ii) for microfiche duplication, non-silver, $.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.

(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.

Access

8. (1) Where a person is given access to a record or part thereof under the control of a government institution, the head of the institution may require that the person be given an opportunity to examine the record or part thereof, rather than a copy of the record or part thereof, if, in his opinion,

(a) the record or part thereof is so lengthy that reproduction of the record or part thereof would unreasonably interfere with the operations of the institution; or

(b) the record or part thereof is in a form that does not readily lend itself to reproduction.

(2) Where a person is given access to a record under the control of a government institution, the head of the institution may require that the person be given a copy of the record, rather than an opportunity to examine it, if, in his opinion,

(a) the record forms a disclosable part of a record for which disclosure may otherwise be refused under the Act and from which it cannot reasonably be severed for examination; or

(b) the record is in a form that does not readily lend itself to examination.

(3) Where access to a record under the control of a government institution is given in the form of an opportunity to examine the record, the head of the government institution shall

(a) provide reasonable facilities for the examination; and

(b) set a time for the examination that is convenient both for the institution and the person.

(4) The head of a government institution shall not give a person who requests access to any record access thereto until that person has paid any fee or other amount or part thereof required to be paid under the Act and these Regulations in respect of that request.

Investigative Bodies

9. The investigative bodies for the purpose of paragraph 16(1)(a) of the Act are the investigative bodies set out in Schedule I to these Regulations.

Classes of Investigations

10. The classes of investigations for the purpose of paragraph 16(4)(c) of the Act are the classes of investigations set out in Schedule II to these Regulations.

SCHEDULE I

(s. 9)

Investigative Bodies

1. Canada Ports Corporation Police and Security,
   Department of Transport

2. Canadian Forces Military Police

3. Director of Investigation and Research,
   Department of Consumer and Corporate Affairs

4. Intelligence Division,
   Department of National Revenue (Customs and Excise)

5. Preventive Security Division, Securities Branch,
   Canadian Penitentiary Service

6. Royal Canadian Mounted Police

7. Special Investigations Division,
   Department of National Revenue (Taxation)

8. Special Investigations Unit,
   Department of National Defence

SCHEDULE II

(s. 10)

Classes of Investigations

1. Investigations by a Fact Finding Board established by the Department of Transport to investigate air traffic control where it has been alleged that owing to a system deficiency

(a) flight safety may have been jeopardized; or

(b) less than the minimum required separation between aircraft may have existed.

2. Investigations by a Flight Service Station Review Committee established by the Department of Transport to investigate reported occurrences relating to aviation safety where

(a) procedures or actions or a lack thereof,

(b) systems failure, or

(c) other causes

have brought the reliability of a Flight Service Station or the Flight Service Station System into question.

3. Canadian Forces flight safety accident investigations other than those conducted in the form of a board of inquiry or summary investigation under the National Defence Act.

4. Investigations by or under the authority of the Canadian Forces Fire Marshall for the purpose of determining the cause of a fire, other than those conducted in the form of a board of inquiry or summary investigation under the National Defence Act.

EXPLANATORY NOTE

(This note is not part of the Regulations, but is intended only for information purposes.)

These Regulations establish procedures for providing access to records under the control of government institutions.

Part II

Appendix C

Model Letters and Flowcharts Related to Access Requests Under the Access to Information Act

1. Notification Requirements and Time Limits Under the Access to Information Act

2. Decisions Required for Processing Access Requests

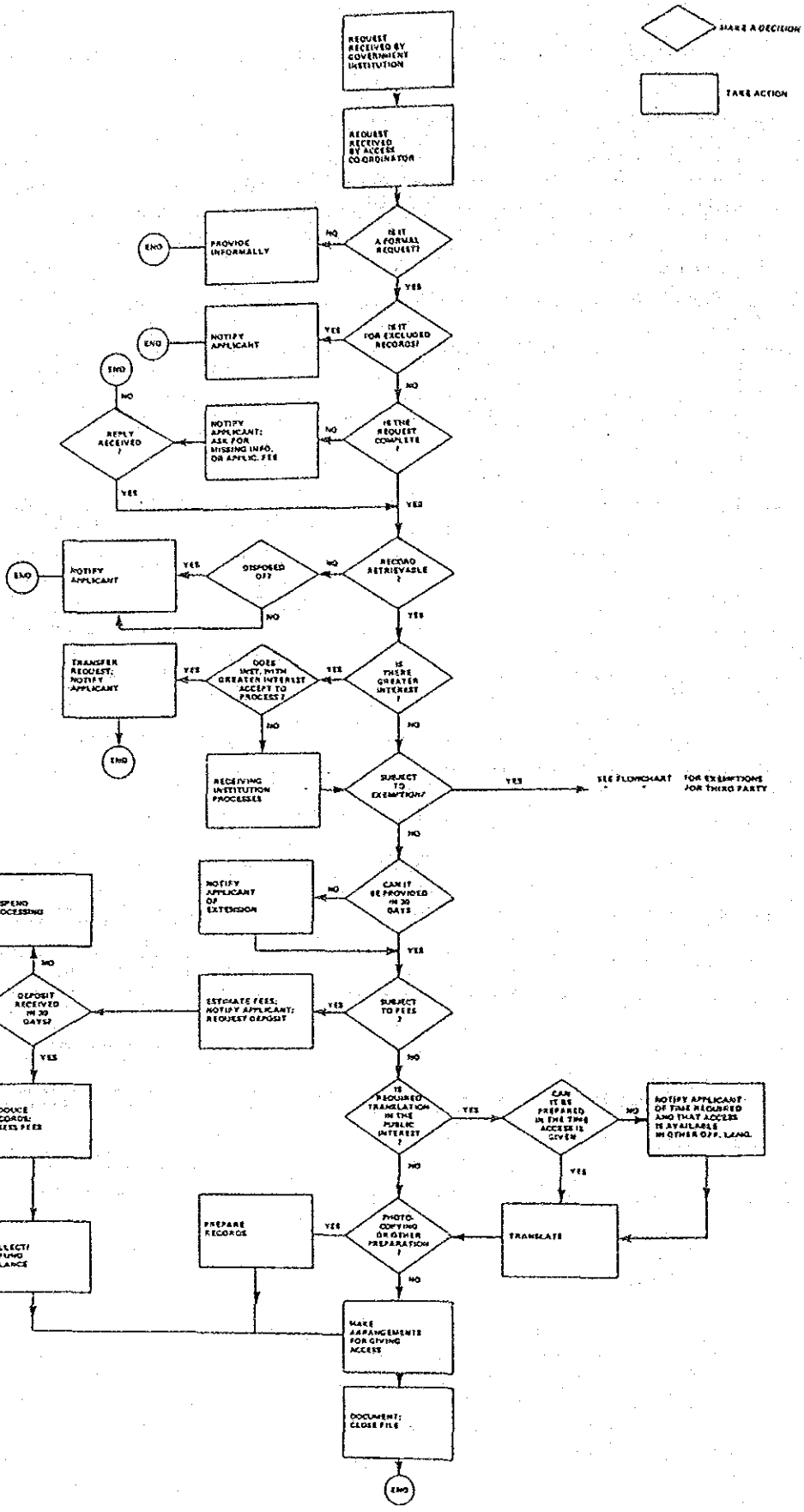
3. Exemption Application Procedures

4. Model Letters:

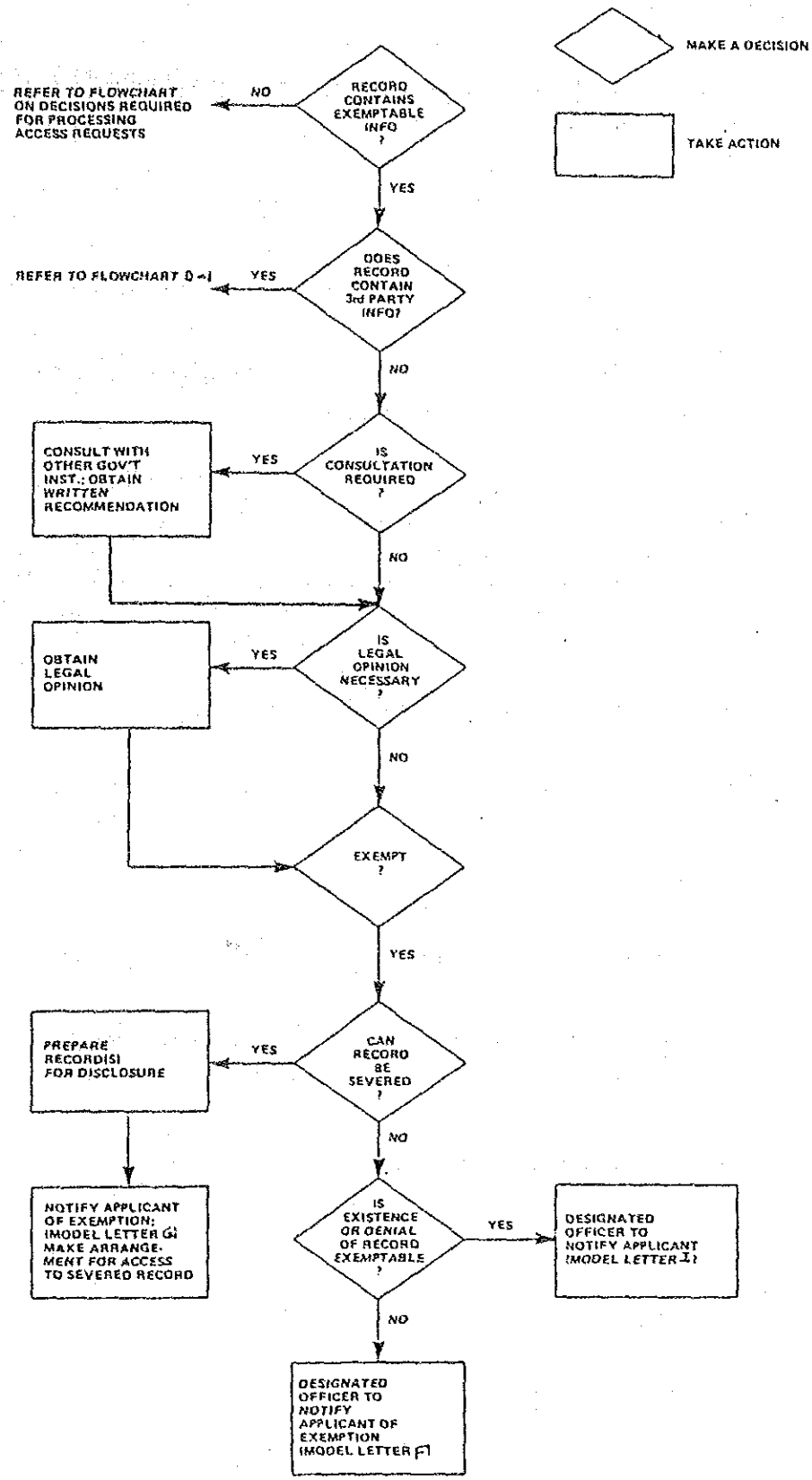
NOTIFICATION REQUIREMENTS AND TIME LIMITS UNDER THE ACCESS TO INFORMATION ACT

RECIPIENT	STATUTORY PROVISION	CRITICAL DATE	PURPOSE
APPLICANT	Response to a request: s.7	30 days from receipt of complete request	Government inst. to indicate whether or not access is to be given.
	Transfer of a request: s.8	15 days from receipt of complete request	Government inst. to indicate transfer to inst. with 'greater interest'.
	Extension of time limits: s.9(1)	30 days from receipt of complete request	Government inst. to indicate time extension.
	Cost estimate (and deposit requirement): s.5 Regs.	Upon determining that access shall be given	Government inst. to indicate cost estimates, required deposits and means of reducing costs.
	Intended disclosure of third party info.: s.28(8)	20 days from notice given to third party under s.28(3)(b)	Government inst. to indicate that disclosure is intended, unless third party requests federal court review.
	Recommended disclosure by info. commissioner: s.29(1)	Within time limit specified by info. commissioner's report	Government inst. to indicate compliance with info. commissioner's recommendation to disclose, unless a third party requests federal court review.
	Report to complainant: s.37(2)	Upon expiration of time given for notice under 37(1)(b)	Information commissioner to report results of investigation.
	Right of review: s.37(5)	N/A	Information commissioner to notify applicant of right of review by federal court where gov't. inst. gives no notice of intended access.
	Notice of court review by third party: s.44(2)	Forthwith on being given notice of federal court review	Government institution to notify applicant that a third party has applied for review of intended disclosure.
THIRD PARTIES	Notice of intended disclosure: s.28(1)	30 days from receipt of complete request	Government inst. to notify third party or third parties of intended disclosure.
	Decision after third party representation s.28(5)(b), s.28(7)	30 days from notice under s.28(1)	Government inst. to notify third party of decision.
	Decision after recommendation by information commissioner: s.28(4)	Within time specified by info. comm. in report under s.37(1)(b)	Government inst. to notify third party or parties of invention to disclose on the recommendation of info. comm.
	Report to third party: s.37(2)	Upon expiration of time given for notice under s.37(1)(b)	Information commissioner to report result of investigation to third parties.
	Notice of appeal to federal court: s.43(1)	Forthwith upon notice of appeal under s.41 or s.42	Government inst. to notify any third party of appeal by applicant to the court.
GOVERNMENT INSTITUTION	Notice of intent to investigate: s.32	Before commencing investigation	Information commissioner to notify government inst. of complaint, its substance and intent to investigate.
	Findings and recommendations: s.37(1)		Information commissioner to provide government inst. with findings/recommendations.
INFORMATION COMMISSIONER	Time extension: s.9(2)	Same as notice under s.9(1)	Government inst. to notify information commissioner if the time extension required is for more than 30 days.
	Identifying third parties: s.33	Forthwith upon notice of complaint by applicant in respect of a refusal	Government inst. to advise information commissioner of any third party that would have been identified under s.28(1).
	Notice of action to be taken: s.37(1)(b)	Within time specified by information commissioner	Government inst. to report to information commissioner action taken or intended, or reasons why not such action is taken to implement recommendations.

DECISIONS REQUIRED FOR
PROCESSING ACCESS REQUESTS



EXEMPTION APPLICATION PROCEDURES



Appendix C

Model letters related to access requests under the Access to Information Act

Index

A. Notification of requirement for application under the Act.

B. Request for correction of errors, omissions or insufficient information to locate the record.

C. Request for (missing) application fee.

D. Notice that information is not available under the Access to Information Act.

E. Notice of transfer of access request.

F. Notification of exemption.

G. Notification of partial exemption.

H. Notification of time extension to process request.

I. Notification of refusal to acknowledge existence of information.

J. Notice of assessment fees.

MODEL LETTER A

Notification of Requirement for Application under the Act

Applicant's Name: Date:

Address:

Reference Number:

Dear _____:

In order to process your request for information, formal application must be made under the Access to Information Act, using the enclosed Access to Information Request Form.

If you would like to exercise your right of access under the Act, please complete and mail the enclosed form and the prescribed application fee to us so that we may process your request.

Yours sincerely,

Access to Information
Coordinator

Enclosure

MODEL LETTER B

Request for Correction of Errors, Omissions, or Insufficient Information to Locate the Record

Applicant's: Date:

Address:

Reference number:

Dear _____:

In order to complete the processing of your request for access to information under the Access to Information Act which was received by us on _____, _____, additional information is required.

We are returning your original Record Access Request Form, indicating the areas to be completed or corrected.

Please complete the enclosed blank request form with the necessary adjustments and return it to us for processing.

Yours sincerely,

Access to Information
Coordinator

Enclosures

MODEL LETTER C

Request for missing application fee

Applicant's name: Date:

Address:

Request Reference Number:

Dear _____:

In order to process your request for information under the Access to Information Act, a prescribed application fee of $_____ is required to accompany the request. Please mail the above amount to us so that we may proceed with your request.

Yours sincerely,

Access to Information
Coordinator

MODEL LETTER D

Notice that information is not available
under the Access to Information Act (exclusions)

Applicant's name: Date:

Address:

Reference Number:

Dear _____:

We have received your request for the following information on _____.

The information to which you have requested access may not be disclosed as it is excluded from access under the Access to Information Act, as expressed by:

- s.68(a) of the Act which states

  or

- s.68(b) of the Act which states

  or

- s.68(c) of the Act which states

  or

- s.69(1) of the Act which states

Yours sincerely,

Access to Information
Coordinator

MODEL LETTER E

Notice of transfer of access request
to institution with greater interest

Applicant's name: Date:

Address:

Reference number:

Dear _____:

We have received your Record Access Request Form on _____, _____. A review of your request indicates, that another government institution, the _____ has greater interest in the records in question. Your request therefore, has been transferred to the above institution, with their agreement to process the request under the Access to Information Act. All future correspondence and communications relating to this request should be directed to and will be received from _____.

Yours sincerely,

Access to Information
Coordinator

MODEL LETTER F

Notification of Exemption

Applicant's name: Date:

Address:

Reference number:

Dear _____:

This is in reply to your request for information under the Access to Information Act, which was received in this institution on _____. We cannot provide the records you have requested as they are exempt under the Act.

Specifically, the records in question fall under s._____ of the Act, which states:

Please be advised that you are entitled to bring a complaint regarding the denial of access to the records requested by you to the Information Commissioner, within one year of the date of your request. Notice of complaints should be addressed to:

Information Commissioner

_____

_____

_____

Yours sincerely,

Access to Information
Coordinator

MODEL LETTER G

Notification of partial exemption (severability)

Applicant's name: Date:

Address:

Reference Number:

Dear _____:

This is in reply to your request for information under the Access to Information Act, which was received in this institution on _____.

Attached please find copies of all the accessible records you requested under the Access to Information Act. Please note, that portion of the record(s) have been severed, pursuant to section 25 of the Act. The sections severed qualify for exemption under:

section ____, which states

Please be advised that you are entitled to bring a complaint, regarding the withholding of the severed information in the records you have requested, to the Information Commissioner. Notice of complaints should be addressed to:

Information Commissioner

_____

_____

_____

Yours sincerely,

Access to Information
Coordinator

Attachment

MODEL LETTER H

Notification of time extension to process request

Applicant's name: Date:

Address:

Reference number:

Dear _____:

This is in response to your request under the Access to Information Act, received by us _____.

An extension of up to _____ days is required beyond the 30 day statutory limits to process your request because

Please be advised that you are entitled to bring a complaint regarding the time extension to the Information Commissioner. Notice of complaints should be addressed to:

Information Commissioner

_____

_____

_____

Yours sincerely,

Access to Information
Coordinator

MODEL LETTER I

Notification of refusal to acknowledge existence of certain records

Date:

Record Access Request Form

Reference Number:

Dear _____:

This is in reply to your application for information under the Access to Information Act, which was received in this institution on _____.

This is to advise you that we cannot comply with your request. If such information did exist, however, it would qualify for exemption under

section ____, according to which

Please be advised that you are entitled to bring a complaint regarding your request to the Information Commissioner. Notice of complaints should be addressed to:

Information Commissioner

_____

_____

_____

Yours sincerely,

Access to Information
Coordinator

MODEL LETTER J

Notice of Assessment of Fees

Applicant's name: Date:

Address:

Reference Number:

Dear _____:

We received your Record Access Request Form on _____. In order to provide you with access to the information you have requested, charges have been assessed under Sections 11(2)(3) and (4) of the Act.

A total of $_____ is assessed for the processing of your information request. Please note that the cost of processing for the first 5 hours has been borne by our institution. The charges are required to cover the following:

Please note that the reproduction costs assessed for your application may be reduced if you choose to examine the record in person rather than receive your own copies.

If you wish us to proceed in processing your request for access to information please use the reference number assigned your application and forward the required deposit of $_____. The balance owing will be payable before the records are disclosed to you. Payment of your deposit must be received by this office within 30 days of mailing to continue consideration of your request.

Please be advised that you are entitled to bring a complaint regarding the amount of fees to the Information Commissioner, within 30 days of this notification. Notice of complaints should be addressed to:

Information Commissioner
_____
_____
_____

Yours sincerely,

Access to Information
Coordinator

Enclosures

Part II

Appendix D

Model Letters and Flow-Charts Relating to Third Party Exemption and Notification

(1) Flow Chart - Third Party Notification and Intervention

(2) Flow Chart - Third Party Exemption Application Procedures

(3) Model Letters:

(A) Notice to Third Party of Intention to Disclose

(B) Notice to Third Party of Intention to Disclose in the Public Interest

(C) Notice to Third Party of Intention to Disclose Following Representations By Third Party

(D) Notice to Third Party of Intention to Disclose in the Public Interest Following Representations by Third Party

(E) Notice to Third Party of Decision Not to Disclose Following Representations by Third Party

(F) Notice to Applicant of Decision to Disclose Record on Recommendation of Information Commissioner

(G) Notice to Third Party of Complaint to Information Commissioner

(H) Notice to Third Party of Decision to Disclose Record on Recommendation of Information Commissioner

(I) Notice to Third Party of Decision to Disclose Record on Recommendation of Information Commissioner

(J) Notice to Third Party of Appeal by Applicant or Information Commissioner to Federal Court

(K) Notice to Applicant of Appeal by Third Party to Federal Court

(L) Notice of Intention to Disclose Testing Results Under S.S.20(2)

(M) Notice to Third Party of Intention to Disclose Under S.S.20(2) Following Representations By Third Party