**Date: 20080619**

**Dockets: T-210-05**
**T-1209-05**
**T-1210-05**
**T-1211-05**

**Citation: 2008 FC 766**

**Ottawa, Ontario, June 19, 2008**

**PRESENT: The Honourable Mr. Justice Kelen**

**Docket: T-210-05**

**BETWEEN:**

**THE INFORMATION COMMISSIONER OF CANADA**

**Applicant**

**and**

**THE MINISTER OF NATIONAL DEFENCE**

**Respondent**

**Docket: T-1209-05**

**AND BETWEEN:**

**THE INFORMATION COMMISSIONER OF CANADA**

**Applicant**

**and**

**THE PRIME MINISTER OF CANADA**

**Respondent**

**T-1210-05**

**AND BETWEEN:**

**THE INFORMATION COMMISSIONER OF CANADA**

**Applicant**

**and**

**THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE**

**Respondent**

**T-1211-05**

**AND BETWEEN:**

**THE INFORMATION COMMISSIONER OF CANADA**

**Applicant**

**and**

**THE MINISTER OF TRANSPORT**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Does the public have the right to examine the Prime Minister's appointment book? Does the public have the right to examine the hand-written notes of a Cabinet Minister's Executive Assistant with respect to a departmental matter?

[2] This case involves four applications for judicial review filed by the Information Commissioner of Canada (the Commissioner) pursuant to section 42 of the *Access to Information*

*Act*, R.S.C. 1985, c. A-1 (the Access Act or the Act). The applications concern whether records located within the Prime Minister's Office, the Office of the Minister of National Defence, the Office of the Minister of Transport, and the Royal Canadian Mounted Police are subject to disclosure under the Act. The documents in question include the daily agenda books of the former Prime Minister, agendas and documents originating from meetings involving the former Minister of National Defence, and the itinerary and meeting schedules of the former Minister of Transport.

[3] The question for the Court is not whether the documents should be accessible to the public under Canada's "freedom to information" law, but whether the documents are currently accessible to the public under Canada's existing law. The Court does not legislate or change the law; it interprets the existing law.

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## I. FACTS

[4] The facts with respect to each application follow. The records at issue have been underlined for ease of reference.

### 1. Minister of National Defence (Docket T-210-05)

[5] On October 29, 1999, an access to information request was made to the Department of National Defence (the DND) for "the minutes or documents produced from the M5 management meetings for 1999." The term M5 was used to describe the informal meetings among former

Minister of National Defence, Art Eggleton (the Minister), senior exempt staff from the Minister's office, the Deputy Minister of Defence, and the Chief of the Defence Staff.

[6] The DND's initial response was that a search failed to uncover any documents related to the request. On February 26, 2000, the requester complained to the Commissioner, stating in part that "personally I find it very hard to believe that no records whatsoever are produced from these management meetings." Thereafter, the Commissioner commenced an investigation as required under section 30 of the Act.

[7] As a result of the Commissioner's investigation, 1413 pages of records were identified as relevant to the initial request. Of those 1413 pages, 765 pages were found to be located within the DND itself, and outside the Minister's office. Accordingly, these records were processed and disclosed subject to any applicable exemptions and exclusions as identified in the Act.

[8] The remaining 648 pages of records, which have become the subject of this application, pertain to the M5 meetings and were located within the physical confines of the Minister's office. These records include:

1. 185 pages of notes regarding the M5 meetings extracted from the notebooks of members of the Minister's exempt staff;
2. 342 pages of e-mail correspondence containing approximately 539 exchanges. Of these, approximately 101 e-mails are exchanges exclusively between members of the Minister's exempt staff, while approximately 438 are exchanges between

exempt staff and non-exempt staff in the Minister's office or exchanges forwarded or copied to non-exempt staff;

3. 82 pages of meeting agendas listing the items to be addressed at the M5 meetings; and
4. 39 pages of miscellaneous documents, including memoranda and briefing notes for the Minister and the other attendees of the M5 meetings.

[9] After formally inviting the Minister to make representations as to why portions of the records should be withheld, the Commissioner found the access complaint to be well-founded – *i.e.*, the Commissioner found that the records at issue were "within the control of a government institution" as required under section 4 of the Act – and recommended that the records be released to the requester, save for the portions exempted under the Act or otherwise excluded as Cabinet confidences.

[10] By letter dated November 15, 2000, the DND advised that it would not abide by the Commissioner's recommendation on the basis of its legal position that the records at issue were not "under the control of a government institution" and, therefore, not subject to the Act. In response, and with the consent of the requester, the Commissioner commenced this application for judicial review in accordance with section 42 of the Act.

**2. Prime Minister (Docket T-1209-05)**

[11] On June 28, 1999, the Privy Council Office (the PCO) received six access requests for the daily agenda books of the former Prime Minister, the Right Honourable Jean Chrétien (the PM). The requests, taken together, cover the period between January 1994 and June 25, 1999.

[12] On July 13, 1999, the PCO advised the requester that, with respect to five of the requests, there were no records that were under the control of the PCO. With respect to the sixth request, the requester was advised on August 11, 1999 that based on subsection 10(2) of the Act, the PCO neither confirmed nor denied the existence of any records relating to the subject matter of the request and, should such records exist, they would be exempt as personal information under section 19 of the Act.

[13] On August 24, 1999, the requester lodged a complaint with the Commissioner, whereupon an investigation was commenced as required under section 30 of the Act.

[14] During the course of the Commissioner's investigation, 2006 pages of the PM's daily agendas were found to be responsive to the request. Of these, 2002 pages were located within the Prime Minister's Office (the PMO) itself. The remaining four pages of records, which were responsive to one of the requests, were located in the office of the Executive Assistant to the Clerk of the PCO. Those records included the PM's agenda for July 23, 1999, and weekly copies of the agenda covering the period between May 23 and June 12, 1999.

[15] Hard copies of the agendas were shared with senior officials employed within the PMO. Until approximately the fall of 1999, it was the practice of the PMO to fax a copy of the next day's agenda to the Clerk of the PCO. It was understood that this copy was for the sole information of the Clerk and his Executive Assistant. In addition, a copy of the agenda showing only the locations to be visited by the PM was made available to the Royal Canadian Mounted Police (the RCMP).

[16] The practice of providing the RCMP with copies of the PM's agenda was discontinued in December 2001. Thereafter, the PMO continued to fax a timetable indicating departure times and destinations of the PM's intended travel in Ottawa, but included therein a directive to "please read and destroy."

[17] The respondent acknowledges that some portions or pages of the records at issue were found in government institutions, specifically within the PCO and the RCMP. However, it is the respondent's position that to the extent that those copies are "under the control" of a government institution, they are subject to exemptions and exclusions in the Act and are not to be released to the requester.

[18] Upon completing his investigation, the Commissioner determined that the complaint was well-founded and recommended that the records at issue be released, save for portions validly withheld under the Act's exemptions and exclusions. The PCO responded that it would not adopt the Commissioner's recommendations and maintained that the records warrant exemption in their entirety based on section 17, which relates to the safety of individuals; that the records contained

personal information pursuant to subsection 19(1); that the records were excluded as Cabinet confidences under section 69; and that severance under section 25 was not possible. In response, and with the requester's consent, the within application for judicial review was commenced pursuant to section 42 of the Act.

**3. Commissioner of the RCMP (Docket T-1210-05)**

[19] On November 14, 2000, the RCMP received a request "for all copies of the Prime Minister's daily agendas provided to the Royal Canadian Mounted Police by the Prime Minister's Office, from Jan 1, 1997 to the present." By letter dated December 7, 2000, the RCMP responded that it had conducted a search of its records, that it did not receive copies of the PM's daily agenda, and that such information was held by the PMO.

[20] On December 19, 2000, the requester complained to the Commissioner that information provided in related proceedings before this Court confirmed that the RCMP routinely received copies of the PM's daily agenda. During the Commissioner's subsequent investigation, 386 pages of records, entitled "Agenda du Premier Ministre," were found to be located at the RCMP in the branch known as the "PM's Protection Detail."

[21] In a letter dated April 4, 2002, the RCMP revised its response to the requester. While the RCMP acknowledged having located the records, it stated that they were denying access to them based on the exemptions contained in sections 17 and 19 of the Act, which deal with security concerns and personal information, respectively. In addition, the RCMP also stated that portions of

the records were being excluded under subsection 69(1) of the Act, as they contained Cabinet confidences. By letter dated April 12, 2002, the requester made a further complaint to the Commissioner on the basis that it was improbable that the entirety of the information contained in the records located in the PM's Protection Detail would fall under sections 17, 19(1), and 69(1) of the Act.

[22] A second "Summary of Complaint" was provided to the RCMP on May 31, 2002. The RCMP Commissioner responded by letter dated July 8, 2002, stating that the refusal to disclose the agendas was based on security concerns for the PM and his security detail. The agendas provide clear and distinct patterns of the PM's daily departures from his residence, arrivals at Parliament Hill, and other personal habits, such that the information, if disclosed, would provide invaluable information to any individual intending to harm the PM. The Commissioner responded on July 26, 2002, stating that the representations made on behalf of the RCMP were insufficient to discharge the burden by which access to records under the Act can be denied and that, as a result, the Commissioner's investigation would continue.

[23] On May 3, 2005, the Commissioner concluded that the requester's complaint was well-founded and recommended that portions of the requested records be disclosed. The RCMP Commissioner, on May 28, 2005, responded that the RCMP maintained its position and therefore would not comply the Commissioner's recommendations. As a result, and with the consent of the requester, the Commissioner commenced the within application for judicial review pursuant to section 42 of the Act.

**4. Minister of Transport (Docket T-1211-05)**

[24] On November 3, 1999, an access to information request was made to the Department of Transport (the DOT) for a copy of all of the Minister of Transport's (the Minister's) itinerary and/or meeting schedules for the period from June 1 to November 5, 1999. After consideration, the DOT provided an initial response to the requester on December 22, 1999, stating: "No records exist in Transport Canada's files which respond to your request. It should be noted, however, that the Minister's itinerary/meeting schedules are prepared and maintained by his political staff, and are not considered departmental records."

[25] On February 1, 2000, the requester complained to the Commissioner, stating in part that the schedules prepared for the Minister "regarding the department are records of the department" and failure to disclose such records is a "circumvention" of the Act. Thereafter, the Commissioner commenced an investigation as required under section 30.

[26] As a result of the Commissioner's investigation, 46 pages of records were identified as relevant to the initial request. Each page of records contained the Minister's agenda for a one week period during the relevant timeframe. Of those 46 pages, 23 pages were found to be archived in electronic form within the Minister's office.

[27] The remaining 23 pages of records, entitled "Agenda sent to the Deputy Minister for the period of May 30, 1999 to November 6, 1999," consisted of abridged versions of the pages

described above, and were archived in electronic form in the Minister's office, having at one point been provided to the Deputy Minister's office for administration of the DOT.

[28] During the investigation, the Commissioner carefully examined the content of the records in question. Upon doing so, the Commissioner concluded that the agendas related to matters falling within the Minister's responsibilities *vis à vis* the DOT, and were therefore under the control of a "government institution" as defined in the Act.

[29] After formally inviting the Minister to make representations as to why the records should be withheld, the Commissioner found that the access complaint was well-founded and recommended that the records be released to the requester. Further, the Commissioner also considered the DOT's claims to exemptions under the Act, but ultimately disagreed with a number of the exemptions claimed.

[30] In a letter dated March 12, 2005, the DOT advised the Commissioner that it would not abide by his request, maintaining the same legal position as taken by the DND; namely that the records at issue were not in the control of the DOT and were, accordingly, not subject to the Act.

[31] After receiving the DOT's letter, the Commissioner, with the consent of the requester, commenced this application for judicial review in accordance with section 42 of the Act.

## II. ISSUES

[32] In deciding whether the records at issue are subject to disclosure under the Access Act, there are three legal issues to be considered by the Court:

1. Are the Prime Minister's Office, the Office of the Minister of Transport, and the Office of the Minister of National Defence "government institutions" under subsection 4(1) and Schedule I of the Access Act;
2. What constitutes a record "under the control of a government institution" as stated in subsection 4(1) of the Act; and
3. What is the meaning and scope of the following exemptions under the Act:
    i. the "personal information" exemption under section 19;
    ii. the "advice or recommendations" and "account of consultations or deliberations" exemptions under paragraphs 21(1)(a) and (b); and
    iii. the exclusions under section 69 of the Act and section 39 of the *Canada Evidence Act*, which relate to confidences of the Queen's Privy Council.

The Court's determination of these issues will then be applied to the evidence in each individual application to determine whether the records at issue are subject to disclosure under the Access Act.

## III. RELEVANT LEGISLATION

[33] The legislation relevant to these applications is as follows:

1. *Access to Information Act*, R.S.C. 1985, c. A-1 (the Access Act or the Act);
2. *National Defence Act*, R.S.C. 1985, c. N-5;
3. *Department of Transport Act*, R.S.C. 1985, c. T-18;
4. *Federal Accountability Act*, S.C. 2006, c. 9;
5. *Library and Archives of Canada Act*, S.C. 2004, c. 11;
6. *Privacy Act*, R.S.C. 1985, c. P-21;

7. *Financial Administration Act*, R.S.C. 1985, c. F-11;
8. *Interpretation Act*, R.S.C. 1985, c. I-21; and
9. *Canada Evidence Act*, R.S.C. 1985, c. C-5.

The relevant provisions have been attached to these Reasons as Appendix "A." However a limited part of the provisions have also been incorporated into the text of these Reasons for ease of reference.

## IV. STANDARD OF REVIEW

[34] In assessing the appropriate standard to apply to the respondents' refusal to follow the Commissioner's recommendations, I am guided by the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL). In that case, the Supreme Court reconsidered the number and definitions to be given to the various standards of review, as well as the analytical process employed to determine the appropriate standard in a given situation. As a result of the Court's decision, it is clear that the standard of patent unreasonableness has now been eliminated, and that reviewing courts must focus on only two standards, those of reasonableness and correctness.

[35] In *Dunsmuir*, the Court held that the process of judicial review involves two steps. As Justices Bastarache and Lebel stated at paragraph 62:

> ¶ 62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[36] In the case at bar, the parties agree that the appropriate standard of review to apply to the respondents' refusal to disclose the relevant records is that of correctness. In support, the parties cite the decision of the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 (*RCMP*). In that case, the Court considered the appropriate standard of review to apply to a decision of the Commissioner of the RCMP to not disclose information relating to four officers on the ground that it was personal information, and therefore exempt from disclosure pursuant to subsection 19(1) of the Act. In that case, after conducting a standard of review analysis (formerly called a pragmatic and functional analysis), the Court held that the RCMP Commissioner's decision should be reviewed on a standard of correctness. This jurisprudence has determined in a satisfactory manner that the Court should review the issues in these four applications on a "correctness" standard of review.

[37] Accordingly, having been guided by the standard of review analysis mandated by the Supreme Court of Canada in *Dunsmuir*, above, and the relevant jurisprudence, I conclude that:

1. the issue of whether the Prime Minister's Office and other Ministerial offices fall within the meaning of a "government institution" shall be reviewed on a standard of correctness;
2. the meaning of "under the control of a government institution" shall be reviewed on a standard of correctness;
3. the issues of whether a record falls within the meaning of one of the Act's exemptions and exclusions shall be reviewed on a standard of correctness; and

4. whether the records at issue are subject to disclosure under the Access Act shall be reviewed on a standard of correctness.

[38] In reviewing the respondents' refusals on a standard of correctness, it is the responsibility of the Court to determine through its own analysis whether such a decision was justified or whether the documents requested should have been disclosed in accordance with the Commissioner's recommendations. As the Court held at paragraph 50 of *Dunsmuir*:

> ¶ 50 … When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

## V. BURDEN OF PROOF

[39] On judicial review, section 48 of the Act provides that the head of a government institution bears the burden of establishing that an access request was denied in accordance with law:

| | |
|---|---|
| **48.** In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned. | **48.** Dans les procédures découlant des recours prévus aux articles 41 ou 42, la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document incombe à l'institution fédérale concernée. |

[40] The onus created by this section was recognized by the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, where Mr. Justice La Forest stated at paragraph 90:

> ¶ 90 Section 48 of the *Access to Information Act*, however, places the onus on the government to show that it is authorized to refuse to disclose a record. …

Accordingly, in the review at bar the respondents must satisfy the Court, on the balance of probabilities, that the decision to refuse to disclose the relevant records was correct.

## VI. ANALYSIS

### Issue No. 1: Are the Prime Minister's Office, the Office of the Minister of Transport, and the Office of the Minister of National Defence "government institutions" under subsection 4(1) and Schedule I of the Access Act?

[41] Subsection 4(1) of the Act provides for a right of access "to any record under the control of a government institution." What constitutes a "government institution" is defined in section 3 of the Act as meaning:

1. any department listed in Schedule I;
2. any ministry of state of the Government of Canada listed in Schedule I; or
3. any body or office listed in Schedule I.

Subsection 4(1) reads:

| | |
|---|---|
| **4. (1)** Subject to this Act, but notwithstanding any other Act of Parliament, every person who is | **4. (1)** Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande : |
| (*a*) a Canadian citizen, or | *a*) les citoyens canadiens; |
| (*b*) a permanent resident within the meaning of subsection 2(1) of the | |

| | |
|---|---|
| *Immigration and Refugee Protection Act*, has a right to and shall, on request, be given access to any record under the control of a government institution. | *b*) les résidents permanents au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*. |

Schedule I provides for an exhaustive list of the entities that are to be viewed as "government institutions" for the purposes of the Act. In relation to the case at bar, this includes the PCO, the DND, the DOT, and the RCMP.

[42] It is readily apparent from reading Schedule I that the PMO and the Offices of the Ministers of National Defence and Transport are not expressly listed therein. The question then arises whether these Offices were implicitly intended by Parliament to be included as "parts" of the government institutions listed, namely:

1. is the PMO intended to be included as a part of the PCO;
2. is the Office of the Minister of National Defence intended to be included as a part of the DND; and
3. is the Office of the Minister of Transport intended to be included as a part of the DOT?

The Court must apply the principles of statutory interpretation to answer these questions.

**Principles of statutory interpretation**

[43] Madam Justice Eleanor Dawson in *Canada (Attorney General) v. Canada (Information Commissioner)*, 2004 FC 431, 255 F.T.R. 56 (*Attorney General*) decided 25 applications for judicial review relating to the conduct of investigations by the Commissioner concerning the requests to the

PCO seeking access to the PM's daily agenda books, the request made to the DND for all records of the M5 meetings involving the Minister of National Defence, and the request to the DOT for the Minister of Transport's itinerary and meeting schedules. In deciding these applications, Justice Dawson set out the legislative context of the Act and the applicable principles of statutory interpretation.

[44] Justice Dawson held that the proper approach requires the Court to attribute a meaning to the Act that "best accords with both the text and the context of the provision." She stated at paragraph 18:

> ¶ 18 … the clearer the ordinary meaning of the provision, the more compelling the contextual considerations must be in order to warrant a different reading.

[45] The Act is to be interpreted in a purposive and liberal manner. Justice Dawson noted at paragraph 20 that the Act has been characterized as a "quasi-constitutional right of access," a factor for interpreting the Act in that it recognizes the "special purpose" of the legislation. I agree with this analysis.

[46] More recently, the Supreme Court of Canada provided further guidance on interpreting statutes in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601. For the Court, Chief Justice McLachlin and Justice Major held at paragraph 10:

> ¶ 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3

> S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> [Emphasis added.]

[47] In addition to the general guidance provided by the Supreme Court on statutory interpretation, the Court is guided by the following rules of statutory construction:

1. the presumption against tautology provides that Parliament avoids superfluous or meaningless words: *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269 at para. 73;
2. courts must avoid altering the word choice selected by Parliament in drafting legislation, particularly where the constitutional validity of legislation is not at issue, as is the case here: *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735 at para. 55;
3. there is a presumption of consistent expression. That is, within a statute the same words have the same meaning and different words have different meanings: *R. v. Zeolkowski*, [1989] 1 S.C.R. 1378 at p. 1387. The inference to be made from this proposition is that where a different form of expression is used, a different meaning is intended: *Jabel Image Concepts Inc. v. Canada* (2000), 257 N.R. 193 at para. 12 (F.C.A.). Additionally, as stated by Professor Ruth Sullivan in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths Canada

Ltd., 2002) at p. 165: “The presumption of consistent expression applies not only within statutes but across statutes as well, especially statutes or provisions dealing with the same subject”;

4. the Supreme Court has provided that it is a basic principle of statutory interpretation “that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording.” Legislative silence in a statutory scheme with respect to particular issue implies that Parliament did not intend to legislate on that issue: *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94 at para. 15; and
5. the latin maxim of statutory interpretation *expression unius est exclusion alterius*: to express one thing is to exclude another. This widespread and important rule of interpretation is also called “the implied exclusion rule.”

[48] The legislative context of the Act is to provide a right of access to information in records “under the control of a government institution,” and that government information should be available to the public subject only to necessary exceptions.

[49] In *Dagg*, above, Mr. Justice La Forest, speaking for the Supreme Court, held at paragraphs 61 and 63:

> ¶ 61 The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat

> explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.
>
> See also: Canadian Bar Association, *Freedom of Information in Canada: A Model Bill* (1979), at p. 6.
>
> [...]
>
> ¶ 63 Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the *Access to Information Act* recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.

**(a) <u>The ordinary meaning according to the experts</u>**

[50] The evidence tendered from experts in government machinery, including Mr. Nicholas d'Ombrain, a consultant on the machinery of government and public sector management with over 30 years experience as an adviser to governments; the findings of Mr. Justice John Gomery, Commissioner of the Gomery Commission of Inquiry into the Sponsorship Program and Advertising Activities; and a reference relied upon by Mr. d'Ombrain from the Honourable Robert Gordon Robertson, Clerk of the Privy Council and Secretary to the Cabinet from 1963 to 1975, states that the PMO is a separate and distinct organization from the PCO. While the two entities work closely together on some matters, the PMO is responsible for many matters unrelated to the

PCO. The same is true with respect to the relationship between a minister's office and the department over which the minister presides.

[51] Accordingly, the evidence demonstrates that in the ordinary sense of the words in subsection 4(1) of the Act, the PMO and the relevant ministerial offices are not part of the "government institution" for which they are responsible. Mr. Robertson stated:

> The Prime Minister's Office is partisan, politically oriented, yet operationally sensitive. The Privy Council Office is non-partisan, operationally oriented yet politically sensitive. It has been established between the principal secretary to the prime minister and his senior staff on the one hand, and the clerk of the Privy Council and his senior staff on the other, that they share the same fact base but keep out of each other's affairs. What is known in each office is provided freely and openly to the other if it is relevant or needed for its work, but each acts from a perspective and in a role quite different from the other.

Affidavit of Nicholas D'Ombrain, sworn September 29, 2000, Application Record, Docket T-210-05, vol. 3, p. 1043 at para. 57.

[52] Moreover, Mr. Justice Gomery stated at page 31 of his fact finding report, "Who is Responsible?":

> The Prime Minister is supported politically by the PMO and bureaucratically by the Privy Council Office (PCO). Although these are separate organizations, they are expected to work closely together to ensure that consistent timely advice is provided on the subjects of greatest importance to the Prime Minister.

Gomery Commission of Inquiry into the Sponsorship Program and Advertising Activities, Phase I Report: "Who is Responsible? – Fact Finding Report" at p. 31.

**(b) <u>The Minister and Prime Minister are the head of their respective departments. Does that make them part of the respective government institutions?</u>**

[53] The Commissioner submits that a minister is part of his or her department because he or she is defined under the Access Act as being the "head" of the government institution for the purposes of the Access Act:

| | |
|---|---|
| **3.** In this Act, | **3.** Les définitions qui suivent s'appliquent à la présente loi |
| "head", in respect of a government institution, means | «responsable d'institution fédérale» |
| (*a*) in the case of a department or ministry of state, the member of the Queen's Privy Council for Canada who presides over the department or ministry, or | *a*) Le membre du Conseil privé de la Reine pour le Canada sous l'autorité duquel est placé un ministère ou un département d'État; |
| [ …] | [ …] |

[54] As well, the statutes creating the DND and the DOT both provide that their respective ministers are responsible for the management of these departments. The *National Defence Act*, R.S.C. 1985, c. N-5 states at sections 3-4:

| | |
|---|---|
| **3.** There is hereby established a department of the Government of Canada called the Department of National Defence over which the Minister of National Defence appointed by commission under the Great Seal shall preside. | **3.** Est constitué le ministère de la Défense nationale, placé sous l'autorité du ministre de la Défense nationale. Celui-ci est nommé par commission sous le grand sceau. |
| **4.** The Minister holds office during pleasure, has the management and direction of the Canadian Forces and of all matters relating to national defence and is responsible for | **4.** Le ministre occupe sa charge à titre amovible et est responsable des Forces canadiennes; il est compétent pour toutes les questions de défense nationale, ainsi que pour : |
| (*a*) the construction and maintenance of all defence establishments and works for the defence of Canada; and | *a*) la construction et l'entretien des établissements et ouvrages de défense nationale; |

| | |
|---|---|
| (*b*) research relating to the defence of Canada and to the development of and improvements in materiel. | *b*) la recherche liée à la défense nationale et à la mise au point et au perfectionnement des matériels. |

Similarly, the *Department of Transport Act*, R.S.C. 1985, c. T-18 states at section 3:

| | |
|---|---|
| **3. (1)** There is hereby established a department of the Government of Canada called the Department of Transport over which the Minister of Transport appointed by commission under the Great Seal shall preside. | **3. (1)** Est constitué le ministère des Transports, placé sous l'autorité du ministre des Transports. Celui-ci est nommé par commission sous le grand sceau. |
| **(2)** The Minister holds office during pleasure and has the management and direction of the Department. | **(2)** Le ministre occupe sa charge à titre amovible; il assure la direction et la gestion du ministère. |

[55] Moreover, the Commissioner submits that the budgets for ministerial offices and the PMO are included in the budgets for their respective departments. The Court agrees that these facts support the interpretation that ministers' offices and the PMO are part of their respective departments, and therefore included in their respective government institution listed in Schedule I to the Access Act.

[56] However, the Court finds that the PM and the Ministers of National Defence and Transport have many other functions unrelated to their respective departments for which they are responsible. Accordingly, while the minister is responsible for the department, and is the head of that department, that does not make the minister or his or her office a component part of the department. While budgets for ministerial offices and the PMO are included in their respective departmental budgets as a separate line item, this does not make their respective offices part of the department.

Similarly, the Treasury Board has budgetary responsibility for the Office of the Information Commissioner, but the Commissioner is not part of the Treasury Board.

### (c) The intention of Parliament

[57] The legislative history of the Act and the contemporaneous understanding of the intent of Parliament by the Commissioner are before the Court in evidence.

[58] In 1981, prior to the Act's enactment in 1982, the Honourable Francis Fox, Secretary of State and Minister of Communications, the Minister responsible for this legislation, stated in the House of Commons on January 29, 1981:

> The purpose of the access legislation is stated in clause 2 of schedule I – to provide a right to access, subject to limited and specific exceptions and with an independent review process to ensure that the right can be fully used.
>
> Simply put, the [access to information legislation] reverses the present situation whereby access to information is a matter of government discretion. Under this legislation, access to information becomes a matter of public right, with the burden of proof on the government to establish that information need not be released.
>
> The right of access created by the [access to information legislation] is very broad: information in any form, held by more than 130 government institutions. The right will be exercised simply by making an application to the appropriate government institution.
>
> [Emphasis added.]

*House of Commons Debates*, Vol. 6 (29 January 1981) at 6690 (Hon. Francis Fox).

[59] Parliament's intent is clear: first, the exemptions and exclusions provided in the Act are "limited and specific"; second, the burden of proof, as noted above, lies with the government to

establish that the requested information need not be disclosed; and finally, Parliament intended that the Act apply to information, in any form, held by scheduled government institutions. This begs the question of whether the legislation was intended to include the PMO and the Offices of the Ministers of National Defence and Transport.

[60] An interpretation of "government institution" that included the PMO and offices of the relevant ministers would dramatically extend the right of access from records held by government institutions to records in those offices that are wholly unrelated to the department, including political records with respect to constituency matters, fundraising matters, Cabinet matters, and House of Commons matters. In my view, Parliament would not have intended such a dramatic result without express wording to that effect. The Commissioner agrees that Parliament did not intend the Access Act to apply to political documents. For reasons provided below, the Court finds no exemption or exclusion for such political records. Accordingly, the Court concludes that Parliament did not intend the PMO or ministerial offices be implicitly included as a component part of the government institutions listed in Schedule I. Parliament would have expressly so provided if it so intended.

**(d) Original interpretations by the Commissioner about the intent of Parliament**

[61] The original interpretations by the Commissioner following the enactment of the Access Act are evidence of the Commissioner's understanding as to the intent of Parliament at the time of the enactment. Under section 38 of the Act, the Commissioner is required to submit an annual report to Parliament. In the 1988-1989 Report to Parliament, the Commissioner reported that ministers' offices are not subject to the Access Act:

> The detailed records given to the complainant, including items paid by the Minister personally, were provided voluntarily by the Minister for disclosure. (The House of Commons and ministers' offices are not subject to the *Access to Information Act*.)
>
> [Emphasis added.]

[62] In a 1991 letter to an access requester, the Deputy Commissioner stated the following:

> Our inquiries confirm that the information you are seeking is not under the control of the PCO; it is held by the Prime Minister's Office (PMO). As that office is not covered by the provisions of the Access to Information Act, there is no requirement in law for the PMO to release that information to you. Consequently it is my finding that your complaint is not well-founded and I have so informed the PCO.
>
> [Emphasis added.]

Letter from J. Alan Leadbeater, Deputy Commissioner, November 20, 1991, Application Record, Docket T-1209-05, vol. 5, p. 1070).

[63] Finally, in a letter dated September 8, 1997, the then Information Commissioner, Mr. John W. Grace, wrote to a complainant who had requested that the PCO disclose the daily schedules for the list of appointments and engagements of the Prime Minister, stating:

> I am writing to report the results of our investigation into your complaint against the Privy Council Office (PCO). Under the Access to Information Act, you asked for the daily schedule or lists of appointments and engagements of the Prime Minister for the month of November 1996. When PCO replied that it had no responsive records, you complained to my office.
>
> […]
>
> Further discussions with the Office of the Clerk of the Privy Council and the Secretary of Cabinet have convinced me that the information you seek is not under the control of the PCO. You will know of course, that the PMO is not subject to the Access to Information Act.

> I am therefore unable to support your complain and will report it as not substantiated.
>
> [Emphasis added.]

Letter from John W. Grace, Commissioner, September 8, 1997, Application Record, Docket T-1209-05, vol. 5, p. 1071.

[64] These references from the Commissioner, in particular his official Report to Parliament a few years after the Access Act was proclaimed in force, confirm that the Commissioner understood the intent of Parliament was not to include the PMO or a minister's office in the government institutions listed in Schedule I of the Act.

[65] The Commissioner has altered course and changed this position over time. More recently, the position of the Commissioner has been that ministerial offices are subject to the Access Act. In fact, the Commissioner acknowledged that this has been an issue where there has been some doubt, and urged Parliament in one of his recent official Reports to amend the legislation to clarify this.

**(e) <u>Legislative silence can be relevent to determine intent</u>**

[66] Since the Commissioner publicly urged Parliament to amend the legislation to clarify that the PMO and ministerial offices are subject to the Access Act, Parliament has amended the Act several times and has not made this amendment. Most recently, in 2006, Parliament enacted the *Federal Accountability Act*, S.C. 2006, c. 9. At that time, 34 amendments were made to the Access Act. Prior to the amendments, in October 2005, the Standing Committee on Access to Information, Privacy and Ethics heard from the Commissioner with respect to proposed amendments to the Act.

Included in these proposed amendments, the Commissioner advocated clarification of the definition of a "government institution" so as to include the PMO and ministerial offices. The Commissioner's recommendations were then supported by Commissioner Gomery in his recommendation report entitled "Restoring Accountability" (see Gomery Commission of Inquiry into the Sponsorship Program and Advertising Activities, Phase II Report: "Restoring Accountability – Recommendations" at p. 183).

[67] If Parliament intended that ministerial offices be part of a government institution, it would have made the appropriate amendments in 2006. While Parliament's intention may not always be inferred from legislative silence, in this case, the silence is clear and relevant evidence of legislative intent. The office of a minister is not intended to be part of a scheduled government institution. This rationale was recently applied by the Supreme Court of Canada in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] S.C.J. No. 12 (QL) at paragraph 42:

> ¶ 42 While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders.

### (f) The Latin maxim of statutory interpretation: *expressio unius est exclusio alterius*

[68] The Latin maxim of statutory interpretation *expression unius est exclusion alterius* means "to express one thing is to exclude another." This widespread and important rule of interpretation is also called "the implied exclusion rule." In her text, Professor Sullivan states at page 186:

> … [I]f the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. …

The obvious application of this rule of statutory interpretation is that if Parliament had intended to include the PMO and ministers' offices in Schedule I, it would have referred to them expressly. This is evidence that Parliament intended to exclude the PMO and ministers' offices from the government institutions subject to the Access Act.

### (g) Ministers without portfolio

[69] The evidence demonstrated that there have been many ministers without portfolio since Confederation. If the Access Act intended to apply to the offices of ministers, the Act would not apply to a minister without portfolio because he or she does not have a corresponding "government institution" listed in Schedule I. Such a result is absurd.

### (h) Internal structure of the Act

[70] The internal structure of the Act also provides insight into Parliament's intention with respect to the relationship between the office of a minister – including the PMO – and a government institution. Paragraphs 21(1)(a)-(b), 21(2)(b) and section 26 of the Act make reference to both

"government institution" and "minister of the Crown," which includes the PM in his capacity as Minister of the PCO:

**21. (1)** The head of a government institution may refuse to disclose any record requested under this Act that contains

(*a*) advice or recommendations developed by or for a government institution or a minister of the Crown,

(*b*) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate…

**21. (1)** Le responsable d'une institution fédérale peut refuser la communication de documents datés de moins de vingt ans lors de la demande et contenant :

*a*) des avis ou recommandations élaborés par ou pour une institution fédérale ou un ministre;

*b*) des comptes rendus de consultations ou délibérations auxquelles ont participé des administrateurs, dirigeants ou employés d'une institution fédérale, un ministre ou son personnel…

**(2)** Subsection (1) does not apply in respect of a record that contains

[…]

(*b*) a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared.

[…]

**(2)** Le paragraphe (1) ne s'applique pas aux documents contenant :

[…]

*b*) le rapport établi par un consultant ou un conseiller qui, à l'époque où le rapport a été établi, n'était pas un administrateur, un dirigeant ou un employé d'une institution fédérale ou n'appartenait pas au personnel d'un ministre, selon le cas.

[…]

**26.** The head of a government institution may refuse to disclose any record requested under this Act 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

**26.** Le responsable d'une institution fédérale peut refuser la communication totale ou partielle d'un document s'il a des motifs raisonnables de croire que le contenu du document sera publié en tout ou en partie par une institution fédérale, un mandataire du gouvernement du Canada ou un ministre dans les quatre-vingt-dix jours suivant la demande ou dans tel délai supérieur entraîné par les

of time as may be necessary for printing or translating the material for the purpose of printing it.

[Emphasis added.]

contraintes de l'impression ou de la traduction en vue de l'impression.

[Nous soulignons.]

[71] These sections demonstrate that Parliament distinguished and differentiated between a "government institution," and "a minister of the Crown" under the Access Act. Parliament did not intend government institution to include a minister of the Crown. To take a contrary view would be to go against the presumption that Parliament avoids superfluous words: see *Schreiber*, above. Using the words of Professor Sullivan, Parliament is an "idealized speaker." It says what it means and means what it says: see Sullivan, above, at page 155. In *Re Medical Centre Apartments Ltd. and City of Winnipeg* (1969), 3 D.L.R. (3d) 525 at page 542 (Man. C.A.), Justice Monin for the Manitoba Court of Appeal stated: "The Legislature is assumed to have used the clearest way of expressing its intentions." It must be assumed that when drafting legislation, Parliament uses words precisely and carefully.

[72] The Commissioner submits that paragraphs 21(1)(a)-(b) and 21(2)(b) support the position that ministerial offices, including the PMO, are subject to the Act. The Commissioner states that section 21 grants discretion to the head of a government institution to refuse to disclose records mentioned in section 21, for "a minister of the Crown or the staff of a minister of the Crown." It follows that such records are, at the outset, covered by the Act if not exempt or excluded. The Court disagrees because such a document developed for the Minister could be located in the departmental offices, and this a reason for exempting it in section 21.

[73] The distinctive use in the Act of "government institution" and "minister of the Crown," in my view, demonstrates that Parliament intended them to have two different meanings. Otherwise, under paragraph 21(1)(a), it would be redundant to directly follow "government institution" with the express phrase "or a minister of the Crown."

### (i) Presumption of consistent expression in federal legislation

[74] Parliament, in other legislation, has distinguished between a "ministerial record" and a "departmental record." In the *Libraries and Archives of Canada Act*, S.C. 2004, c. 11, a "government institution" is defined as an institution listed in Schedule I of the Act, a "ministerial record" is defined as

> a record of a member of the Queen's Privy Council for Canada who holds the office of a minister and that pertains to that office, other than a record that is of a personal or political nature or that is a government record,

and a "government record" is defined as a record under the "control of a government institution."

[75] If Parliament intended a "minister's office" to be a component of a "government institution," there would be no need to distinguish between a "governmental record" and a "ministerial record." By definition, they would be the same. Subsection 7(c) of the *Libraries and Archives of Canada Act*, under the heading of Objects and Powers, states:

| | |
|---|---|
| **7.** The objects of the Library and Archives of Canada are | **7.** Bibliothèque et Archives du Canada a pour mission : |
| […] | […] |
| (*c*) to be the permanent repository of publications of the Government of Canada | *c*) d'être le dépositaire permanent des publications des institutions fédérales, ainsi |

| | |
|---|---|
| and of government and ministerial records that are of historical or archival value.<br>[Emphasis added] | que des documents fédéraux et ministériels qui ont un intérêt historique ou archivistique.<br>[Nous soulignons.] |

Again, the legislation distinguishes between government and ministerial records.

[76] Parliament's consistency in distinguishing between governmental records and ministerial records is encapsulated in the principle of consistent expression. Professor Sullivan explains this principle in the following terms at page 162 of her text: "Once a particular way of expressing a meaning has been adopted, it is used each time that meaning is intended." Further, as Parliament uses language carefully and consistently, Professor Sullivan states that the presumption of consistent expression applies not only within statutes but across statutes as well, particularly statutes or provisions dealing with the same subject: see Sullivan, above, at pp. 162, 165. In my view, the different purposes of the *Library and Archives of Canada Act* and the Access Act do not detract from the consistency of the terminology employed by Parliament.

### (j) Conclusion

[77] When I apply the context of the Act, read the words in their ordinary sense harmoniously with the scheme of the Act and the intention of Parliament, and apply the principles of statutory interpretation, I conclude that the PMO cannot be interpreted as part of the PCO. Rather, the PMO is a separate office with staff not connected with the PCO and having a number of functions not related to the PCO. I am satisfied that the ordinary meaning of the PCO is clear, and that no contextual consideration could warrant the Court interpreting Parliament to have intended the PMO

to be part of the PCO for the purposes of the Act. The same is true with respect to ministers' offices not being part of the respective government institutions.

**Issue No. 2: What constitutes a record "under the control of a government institution" as stated in subsection 4(1) of the Act?**

[78] One purpose of the Act is to "extend the present laws of Canada to provide a right of access to information in records under the control of a government institution." In deciding whether the records at issue are subject to access under the Act, the Court must interpret the meaning of "control" in subsection 4(1).

[79] The meaning of "control" under the Act has been judicially considered by this Court and by the Federal Court of Appeal. I refer to this jurisprudence below in chronological order.

**Jurisprudence regarding the meaning of "control" under the Act**

**1st decision**

[80] In *Canada Post Corp. v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320 (T.D.), Mr. Justice Rothstein, then a member of the Federal Court, determined whether records in the possession of Public Works Canada pursuant to an agency agreement with Canada Post were "under the control of a government institution," thereby making them subject to disclosure pursuant to the Act's provisions. Canada Post, which as a Crown corporation is not subject to the Act, argued that such records were properly within its control and were, accordingly, not subject to disclosure. In concluding that the relevant records were in the control of Public Works Canada and were subject to

disclosure, Justice Rothstein addressed the issue of control through the guise of possession, stating at pages 346-347:

> … In my view, the fact that a government institution has possession of records, whether in a legal or corporeal sense, is sufficient for such records to be subject to the *Access to Information Act*.

This *dictum* is pertinent to the copies of the PM's agendas located within the PCO and the RCMP.

**2nd decision**

[81] This decision was affirmed on appeal in *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (C.A.). The majority decision by Mr. Justice Létourneau stated how "control" should be interpreted for the purposes of subsection 4(1) of the Act since "control" had been left undefined and unlimited by Parliament. Justice Létourneau held at pages 127-128:

> The notion of control referred to in subsection 4(1) of the *Access to Information Act* (the Act) is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or "*de jure*" and "*de facto*" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.

[82] Further, Justice Létourneau stated that the fact that Parliament saw fit to leave the term undefined lends support to the notion that Parliament's intention in passing the Act was to provide Canadians with a "meaningful right of access" that is best achieved through a broad and liberal interpretation of the meaning of control. He stated at page 128:

> ¶ 33 It is, in my view, as much the duty of courts to give subsection 4(1) of the *Access to Information Act* a liberal and purposive construction, without reading in limiting words not found in the Act or otherwise circumventing the intention of the legislature as "[i]t is the duty of boards and courts," as Chief Justice Lamer of the Supreme Court of Canada reminded us in relation to the *Canadian Human Rights Act*, "to give s. 3 a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature." … It is not in the power of this Court to cut down the broad meaning of the word "control" as there is nothing in the Act which indicates that the word should not be given its broad meaning. On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the Act to government information. …
>
> [Emphasis in original.]

**3rd decision**

[83] In *Canada (Privacy Commissioner) v. Canada Labour Relations Board* (2000), 257 N.R. 66 (F.C.A.), the Federal Court of Appeal was faced with a similar provision in the *Privacy Act*, R.S.C. 1985, c. P-21, namely whether the personal notes taken by members of the Canada Labour Relations Board (the CLRB) during hearings were subject to disclosure under the *Privacy Act* as "other personal information about the individual under the control of a government institution." While the Court considered numerous issues, including judicial independence, the Court decided the matter on the "threshold" question of whether the personal notes were under the control of a government institution. In quoting from Mr. Justice Marc Noël (as he then was), the Court of Appeal stated at paragraph 6 that the personal notes taken were not part of the CLRB's official records and could not be seen as being under the CLRB's control:

> ¶ 6 The trial judge made the following statement with which we agree:

> [...] The notes are viewed by their authors as their own. The CLRB members are free to take notes as and when they see fit, and indeed may simply choose not to do so. The notes are intended for the eyes of the author only. No other person is allowed to see read or use the notes, and there is a clear expectation on the part of the author that no other person will see the notes. The members maintain responsibility for the care and safe keeping of the notes and can destroy them at any time. Finally, the notes are not part of the official records of the CLRB and are not contained in any other record keeping system over which the CLRB has administrative control.
>
> In my view, it is apparent from the foregoing that however broadly one construes the word control, the notes in issue were not "under the control" of the CLRB within any of the meanings that can be attributed to that term. […]

This *dictum* is pertinent to the hand-written notes of the exempt staff in the Minister of National Defence file.

**4th decision**

[84] In *Rubin v. Canada (Minister of Foreign Affairs and International Trade)*, 2001 FCT 440, 204 F.T.R. 313, Mr. Justice Blanchard was faced with an access request for all environmental screening records related to the sale of Candu nuclear reactors to China that were under the control of the Department of Foreign Affairs and International Trade. At paragraph 18 of his decision, Justice Blanchard held that a determination of control must not be limited by how and on what terms the information came into the hands of the government institution:

> ¶ 18 … The plain meaning of ss. 4(1) and ss. 2(1) of the *Access Act* is that the *Act* gives access, subject to many exceptions, to any record, or information in a record, which happens to be within the

> custody of the government regardless of the means by which that custody was obtained.

[85] Having held that the issue of control must be assessed on a case-by-case basis, Justice Blanchard concluded that on there was no evidence that at the time of the request the Department was in control of any of the relevant records. He stated at paragraphs 20-21:

> ¶ 20 There is uncontradicted evidence before this Court … that the "Shanghai Report" was provided to FAIT under strict conditions, for a limited time frame, and on the condition that it be promptly returned to AECL. …
>
> ¶ 21 The evidence before this Court indicates that officials from FAIT used the "Shanghai Report" for a matter of days, with the assurance to AECL that all copies of the report would be returned to AECL. … There is no evidence in the case at bar that FAIT returned the "Shanghai Report" to AECL for an ill-motivated purpose, nor that FAIT contracted out of the *Access Act*. Given this evidence, I am satisfied that FAIT did not have control of the "Shanghai Report" when the applicant's access request was filed at the end of April 1997.

This *dictum* is pertinent to the copies of the PM's agendas, which were sent to the Clerk of the Privy Council, but then destroyed.

**5th decision**

[86] In *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 (*Hartley*), the Federal Court of Appeal was faced with one of the same matters currently before the Court, namely whether the Prime Minister's daily agenda books are records under the control of the PCO and therefore subject to disclosure under the Access Act. The issue before the Court at that time was whether a subpoena *duces tecum* issued by the Office of the Commissioner for the production of the agenda books should be struck out. In its decision, which was issued

collectively by the panel of Chief Justice Richard and Justices Evans and Noël, the Court of Appeal upheld the Commissioner's subpoena and concluded that the agenda books should be provided to the Commissioner, in confidence, for the purposes of his investigation. Following the decision, the agenda books were provided to the Commissioner, the Commissioner issued a report and recommendations regarding whether they were under the control of the PCO, the PMO opted not to follow that report, and the Commissioner commenced the within application for judicial review before the Federal Court to determine whether the agenda books should be produced in response to the access request.

[87] While the Court's ruling in *Hartley* only applied to the context of the Commissioner's investigation and not to whether the records should ultimately be disclosed to the access requester, the Court provided comments on the issue of control. After quoting with approval the statement of Mr. Justice Létourneau in the Court of Appeal decision in *Canada Post*, above – *i.e.*, that the notion of control was left undefined and unlimited in the Act and that Parliament did not see fit to qualify or limit the notion of control – the Court stated that the content of the records at issue and the circumstances surrounding their creation may be relevant to determining whether control lies in the hands of a government institution:

> ¶ 29 Further, contrary to the view seemingly held by the motions judge, the contents of the documents sought by the Commissioner and the circumstances in which they came into being may be relevant to determining whether they are under the control of the Privy Council Office which, as noted, is a government institution for purposes of the *Act*.

Despite these statements, the Court of Appeal did not, at any point, comment on whether the PMO is a component part of the PCO, which is listed as a government institution in Schedule I of the Act.

I can only assume that if the Court of Appeal believed that this was the case, it would have explicitly stated as such in its reasons. Nevertheless, this does not resolve the issue of whether the records at issue were within the control of the relevant government institution for the purposes of disclosure under the Act.

**6th decision**

[88] In a related matter before this Court, Madam Justice Dawson in *Attorney General*, above, echoed the view of Justice Létourneau in the Court of Appeal decision in *Canada Post*, above, and held at paragraph 104 that the interpretation of control must be broadly interpreted so as to confer a meaningful right of access:

> ¶ 104 Therefore, control is not to be given a limited meaning, but rather a broad meaning so as to confer a meaningful right of access. Things such as the content of a record may shed light on control as could a right of partial or transient or de jure access.
>
> [Emphasis added.]

Ultimately, Justice Dawson concluded that the issue of control was "premature and unripe" for determination at that time, in large part because the Commissioner's investigation was still in progress and many of the actual records in dispute were not in evidence before the Court.

[89] However, despite these factors, Justice Dawson provided *obiter* comments on the appropriate interpretation to be given to the term control for purposes of the Access Act. As noted above, Justice Dawson made clear that the "content of a record may shed light" on whether control lies within the appropriate government institution, thereby making the record subject to disclosure under the Act.

**7th decision**

[90] Finally, in another case involving Canada Post – see *Canada Post Corp. v. Canada (Minister of Public Works)*, 2004 FCA 286, [2004] F.C.J. No. 1453 (QL) (*Canada Post No. 2*) – the Federal Court of Appeal made the following comments in *obiter* on the notion of control per Mr. Justice Décary at paragraph 3:

> ¶ 3 The relationship of CIG to the Minister responsible for Canada Post Corporation, who happens to have been at the relevant time the Minister of Public Works and Government Services Canada, is irrelevant for the determination of the issue of whether the records were under the control of a government institution and thus subject to the Act. That the records were provided to CIG to allow it to perform its duty in relation to assisting the Minister in the administration of Crown Corporations does not diminish, or alter, the fact that CIG is part of the Department. We are not dealing here with records which are under the control of the Minister himself or his exempt staff, which records counsel for the respondent concedes are not under the control of a government institution for purposes of the Act.
>
> [Emphasis added.]

This *obiter dicta* is pertinent to the records held exclusively in the PMO and ministers' offices.

**Court's conclusion regarding the meaning of control**

[91] I have found this jurisprudence illuminating on the proper meaning of control for the purposes of the Access Act. The Court of Appeal decision in *Hartley*, above, and the decision of Madam Justice Dawson in *Attorney General*, above, have been of particular help due to their close connection to the matters currently before the Court. From this jurisprudence, I have extracted the following principles that will guide the Court's analysis in the case at bar:

1. control is not a defined term;

2. in reaching a finding of whether the records at issue are "under the control of a government institution," the Court can consider "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control, and "*de jure*" as well as "*de facto*" control;
3. Parliament did not restrict the notion of control to the power to "dispose" – *i.e.*, get rid of the documents in question; and
4. the contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the Act.

[92] Using these principles, the Court will consider the contents of the records and the circumstances in which they were created to surmise whether the government institution could obtain a copy upon request from the PMO or the Offices of the Ministers of National Defence and Transport.

**Application of meaning**

[93] The parties agree that the PMO and the offices of the relevant ministers deal with departmental matters – *i.e.*, matters related to the government institution – as well as political, constituency, parliamentary, and Cabinet matters. Upon review by the Court, if the content of the documents in the PMO or the Offices of the Ministers of National Defence and Transport relate to a departmental matter, and the circumstances in which the documents came into being show that the deputy minister or other senior officials in the department could request and obtain a copy of that

document to deal with the subject matter, then that document is under the control of the government institution. The meaning of "control" is to be given a broad and liberal interpretation to create a meaningful right of access to government information.

**Ordinary meaning**

[94] The meaning of a word such as "control" in a statute is a question of law to be given its ordinary or popular meaning. The Court can determine that meaning with the aide of dictionaries: see *Pfizer Co. Ltd. v. Deputy Minister of National Revenue for Customs and Excise*, [1973] F.C. 3 (C.A.) per Jackett C.J. at p. 7, rev'd on other grounds [1977] 1 S.C.R. 456.

[95] *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 2001) defines "control" as:

1. the power of directing, command (*under the control of*).

While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason. In this case, the Court interprets "control" to mean that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient" basis, or a "*de facto*" basis.

**Examples of documents under the control and not under the control of government institutions**

[96] A document in the Minister's office that relates to a departmental matter does not necessarily mean that the document is under the control of the government institution. If it was

created by a departmental official and sent to the Minister's office, then that departmental official should have a reasonable expectation that he or she can obtain another copy of it upon request. If this is the case, then the document is under the control of the government institution.

[97] Similarly, if the document was prepared in the Minister's office in consultation with a government/departmental official, then that individual should again have a reasonable expectation of obtaining a copy of it upon request, and the document can be seen as being under the control of the government institution.

[98] If, however, the document was prepared by someone in the Minister's office, was to be used for the sole purposes of the Minister's office, and if no government/departmental official has, or should have, a reasonable expectation of obtaining a copy of it, then that document is not under the control of the government institution for the purposes of the Access Act.

[99] The Commissioner submits, and the Court agrees, that political records are not subject to access under the Act. However, there is no clear exemption or exclusion under the Act for political records.

[100] Before applying the meaning of "control" to the documents in issue, the Court will first address relevant exemptions and exclusions at issue in these applications.

**Issue No. 3: <u>What is the meaning and scope of the following exemptions under the Act</u>?**

[101] A consideration of the exemptions in the Access Act is only necessary if the Court concludes that the records in question were under the control of the relevant government institutions when the access requests were made.

### i. <u>Exemption No. 1: "personal information" under section 19</u>

[102] Section 19 of the Access Act prohibits the head of a government institution from releasing any record that contains "personal information" as defined by section 3 of the *Privacy Act*.

[103] The starting point for an analysis of the interrelationship between the definition of personal information in section 3 of the *Privacy Act* and section 19 of the Access Act is Mr. Justice La Forest's discussion at paragraph 68 of *Dagg*, above. While Justice La Forest was writing in dissent, the majority agreed with him that "personal information" is to be broadly defined.

[104] Justice La Forest also held, and the majority agreed, that when interpreting the Access Act and the *Privacy Act*, it should be kept in mind that Parliament has woven the two pieces of legislation into a seamless code: see *Dagg* at para. 45. Section 3 of the *Privacy Act* sets out what constitutes "personal information" and section 19 of the Access Act states that a head of a government institution shall refuse to disclose any record requested that contains personal information as defined in the *Privacy Act*. However, subsection (j) of the definition of "personal information" in section 3 of the *Privacy Act* (hereinafter section 3(j)) carves out an important exception. Personal information may be disclosed about an individual who is an officer or an

employee of a government institution if that information relates to the position or functions of that individual. This corresponds with the purpose of section 3(j), which is to ensure that the state and its agents are held accountable to the general public:

*Access Act*

**19. (1)** Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

[…]

**19. (1)** Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.

[…]

*Privacy Act*

**3.** In this Act,

**"personal information"** means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

[…]

but, for the purposes of sections 7, 8 and 26 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,

[…]

**3.** Les définitions qui suivent s'appliquent à la présente loi.

**«renseignements personnels»** Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :

[…]

toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant :

*j)* un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :

[…]

[105] In *RCMP*, above, Mr. Justice Gonthier held at paragraph 34 that Parliament intended to give less protection to the privacy of federal employees when the information requested relates to their position or function. As a result, the Commissioner submits that the majority of the information in the agendas relate to the official duties, functions, and activities of the PM and the Minister of Transport so that this information is not exempt as personal information.

[106] The respondents, however, submit that the PM and the Minister of Transport are not "officers" or "employees" of a government institution as the terms are used in section 3(j) of the *Privacy Act* and that, accordingly, their information does not fit within the scope of the section 3(j) exception and is exempt from disclosure. With respect to the respondents' characterization of the PM and Minister of Transport as not being officers within the meaning of section 3(j), the Court disagrees.

[107] The *Financial Administration Act*, R.S.C. 1985, c. F-11, defines "public officer" as including "a minister of the Crown and any person employed in the federal public administration." The *Interpretation Act*, R.S.C. 1985, c. I-21, defines "public officer" as including "any person in the federal public administration who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or on whom a duty is imposed by or under an enactment." The Court finds this latter definition broad enough to include the PM and a minister of the Crown.

[108] I see no difference between the use of the word “officer” in section 3(j) of the *Privacy Act* and “public officer” as defined in the *Interpretation Act*. This is particularly the case in light of the fact that the Access Act imposes duties on Ministers as the heads of government institutions.

[109] The respondents submit that the information at issue is contained in the personal agendas of the PM and the Minister of Transport. They are a personal history of the person for that day, week, month, or year, and are personal documents. The agendas list what the person has done or will do with his or her time in a given period. The Court cannot agree. If the agendas are subject to production under subsection 4(1) of the Act, then the agendas are not exempt in their entirety as personal information. They list the meetings and appointments of the PM and the Minister of Transport, which include information relating to their duties and functions as the Minister responsible for a “government institution.” However, the private appointments not related to the job are exempt as “personal information.”

[110] The names of private individuals (not government employees) in the agendas are personal information, which must be redacted. If the PM meets with a political person, a businessman, a lobbyist, or even the CEO of a Crown corporation, the name of that individual is the private and personal information of that individual, and is exempt from disclosure. This exemption may spoil the curiosity of any access requester seeking information about who the PM met on different dates regarding different issues.

### ii. Exemption No. 2: "advice or recommendations" and "account of consultations or deliberations" under paragraphs 21(1)(a) and (b)

[111] Subsection 21(1) of the Act exempts from disclosure, *inter alia*, advice, recommendations, and accounts of consultations or deliberations with or developed for a Minister. If the records are subject to disclosure, the respondents have claimed section 21 exemptions to parts of the agendas of the PM and the Minister of Transport. The respondents also claimed a section 21 exemption to parts of the notebooks of the exempt staff of the Minister of National Defence with respect to the M5 meetings. These latter claims for exemption were accepted by the Commissioner and are not in issue before the Court. Subsection 21(1) states, in part:

| | |
|---|---|
| **21. (1)** The head of a government institution may refuse to disclose any record requested under this Act that contains | **21. (1)** Le responsable d'une institution fédérale peut refuser la communication de documents datés de moins de vingt ans lors de la demande et contenant : |
| (*a*) advice or recommendations developed by or for a government institution or a minister of the Crown, | *a*) des avis ou recommandations élaborés par ou pour une institution fédérale ou un ministre; |
| (*b*) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate, | *b*) des comptes rendus de consultations ou délibérations auxquelles ont participé des administrateurs, dirigeants ou employés d'une institution fédérale, un ministre ou son personnel; |
| [ …] | [ …] |

[112] In *Canadian Council of Christian Charities v. Canada (Minister of Finance),* [1999] 4 F.C. 245 (T.D.), Mr. Justice Evans, then a member of the Federal Court, stated at paragraphs 31-32 that the section 21 exemption balances the public's entitlement to openness to government documents with the necessary requirement that ministers and their advisors be able to develop policy in confidence without public scrutiny of the internal evolution of policies ultimately adopted:

> ¶ 31 It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness.
>
> ¶ 32 On the other hand, of course, democratic principles require that the public, and this often means the representatives of sectional interests, are enabled to participate as widely as possible in influencing policy development. Without a degree of openness on the part of government about its thinking on public policy issues, and without access to relevant information in the possession of government, the effectiveness of public participation will inevitably be curbed.

[113] Justice Evans stated that subsection 21(1) exempts a wide range of documents generated in the internal policy making process of a government institution. He stated at paragraph 39:

> ¶ 39 It is difficult to avoid the conclusion that the combined effect of paragraphs 21(1)(*a*) and (*b*) is to exempt from disclosure under the Act a very wide range of documents generated in the internal policy processes of a government institution. Documents containing information of a factual or statistical nature, or providing an explanation of the background to a current policy or legislative provision, may not fall within these broad terms. However, most internal documents that analyse a problem, starting with an initial identification of a problem, then canvassing a range of solutions, and ending with specific recommendations for change, are likely to be caught within paragraph (*a*) or (*b*) of subsection 21(1).

[114] The Commissioner submits that the items in the agenda do not constitute advice, recommendations, or accounts of consultations or deliberations. The Court agrees. There is no

subject matter included in the agenda entries, only the scheduling of meetings. Notice of a meeting does not disclose the advice or deliberations at the meeting. Accordingly, the subsection 21(1) exemptions claimed by the respondents would not apply.

### iii. Exemption No. 3: exclusions under section 69 of the Act and section 39 of the *Canada Evidence Act*, which relate to confidences of the Queen's Privy Council

[115] The application of section 69 of the Access Act and section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 (the CEA), which exclude from disclosure information found to contain Cabinet confidences, originally arose in the PM and Minister of Transport files currently before the Court.

[116] In addition to invoking section 69 of the Act, on March 19, 2001, with respect to the PM's daily agenda books, the Clerk of the Privy Council issued a certificate pursuant to section 39 of the CEA. That certificate excluded portions of the PM's agendas requested by the Commissioner on the grounds that they contained Cabinet confidences as defined in the CEA.

[117] On May 4, 2001, the Clerk of the Privy Council also issued a certificate under section 39 of the CEA objecting to the disclosure of portions of the Minister of Transport's weekly agendas on the grounds that they contained Cabinet confidences. However, on January 6, 2004, counsel for the Minister of Transport notified the Deputy Commissioner that as a result of the Supreme Court's decision in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, the Clerk had elected to not issue a subsequent section 39 certificate and was no longer claiming a Cabinet confidence exclusion. The letter stated, in part:

> As a result of the Supreme Court of Canada's decision in *Babcock* … the Clerk of the Privy Council will not be signing a certificate under s.39 of the *Canada Evidence Act* with respect to this document. Accordingly, the enclosed agenda contains additional information that was severed from the version provided to you on August 18, 2000.

Letter from Peter K. Doody to J. Alan Leadbeater, Deputy Commissioner, January 6, 2004, Application Record, Docket T-1211-05, vol. 2, p. 104.

[118] Accordingly, the respondent only relies on the Cabinet confidence exclusion in the PM file and not within the Minister of Transport file.

**The Legislation**

[119] Subsection 69(1) of the Access Act stipulates that "confidences of the Queen's Privy Council for Canada" are outside the scope of the Access Act and are therefore not subject to disclosure. The section also sets out a non-exhaustive list of what constitutes a Cabinet confidence for the purposes of the Act:

| | |
|---|---|
| **69. (1)** This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing, | **69. (1)** La présente loi ne s'applique pas aux documents confidentiels du Conseil privé de la Reine pour le Canada, notamment aux : |
| (*a*) memoranda the purpose of which is to present proposals or recommendations to Council; | *a*) notes destinées à soumettre des propositions ou recommandations au Conseil; |
| (*b*) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions; | *b*) documents de travail destinés à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil; |
| | *c*) ordres du jour du Conseil ou procès- |

(*c*) agenda of Council or records recording deliberations or decisions of Council;

(*d*) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(*e*) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (*d*);

(*f*) draft legislation; and

(*g*) records that contain information about the contents of any record within a class of records referred to in paragraphs (*a*) to (*f*).

[…]

*c*) documents de travail du Conseil ou procès-verbaux de ses délibérations ou décisions;

*d*) documents employés en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique;

*e*) documents d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le Conseil, ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa *d*);

*f*) avant-projets de loi ou projets de règlement;

*g*) documents contenant des renseignements relatifs à la teneur des documents visés aux alinéas *a*) à *f*).

[…]

[120] Under section 69, the Court can review the records at issue to determine if they are Cabinet confidences, and therefore excluded from the scope of the Act.

[121] Subsection 39(1) of the CEA sets out another procedure that can be followed by the Clerk of the Privy Council in certifying information as a Cabinet confidence. In so doing, this prevents that information from being disclosed or examined by a reviewing court:

**39. (1)** Where a minister of the Crown or the Clerk of the Privy Council objects to

**39. (1)** Le tribunal, l'organisme ou la personne qui ont le pouvoir de contraindre

| | |
|---|---|
| the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body. | à la production de renseignements sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, sans l'examiner ni tenir d'audition à son sujet, si le ministre ou le greffier attestent par écrit que le renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada. |

[122] Like subsection 69(1) of the Access Act, subsection 39(2) of the CEA sets out, in general terms, what constitutes a Cabinet confidence. In the matters currently before the Court, the Clerk followed the formal requirements of subsection 39(1) of the CEA and stated that various portions of the PM's agendas were excluded from disclosure pursuant to paragraphs 39(2)(c)-(f):

| | |
|---|---|
| **39. (2)** For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in | **39. (2)** Pour l'application du paragraphe (1), un « renseignement confidentiel du Conseil privé de la Reine pour le Canada » s'entend notamment d'un renseignement contenu dans : |
| […] | […] |
| (*c*) an agendum of Council or a record recording deliberations or decisions of Council; | *c*) un ordre du jour du Conseil ou un procès-verbal de ses délibérations ou décisions; |
| (*d*) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy; | *d*) un document employé en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique; |
| (*e*) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or | *e*) un document d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le |

| | |
|---|---|
| are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (*d*); and | Conseil, ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa *d*); |
| (*f*) draft legislation. | *f*) un avant-projet de loi ou projet de règlement. |

**The purpose of Cabinet confidences**

[123] The purpose of a certificate issued under section 39 of the CEA was addressed by the Supreme Court of Canada in *Babcock*, above. In my view, this applies equally to a Cabinet confidence under section 69 of the Access Act. In *Babcock*, Chief Justice McLachlin stated at paragraph 18 that the maintenance of Cabinet privilege ensures that

> ¶ 18 … [t]hose charged with the heavy responsibility of making government decisions [are] free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny…

and at paragraph 21, that section 39 amounts to "Canada's response to the need to provide a mechanism for the responsible exercise of the power to claim Cabinet confidentiality in the context of judicial and quasi-judicial proceedings."

**Cabinet confidence under subsection 69(1) of the Access Act**

[124] Unlike the CEA, the Access Act does not have any formal requirements that must be satisfied in order to obtain protection under subsection 69(1). Under section 69, the Court reviews the records. The protection will attach if the records fit within the meanings ascribed under paragraphs 69(1)(a)-(g). Further, this list is not exhaustive, as indicated by Parliament's use of the phrase "without restricting the generality of the foregoing."

[125] There is overlap between section 69 and the certification process provided for in section 39 of the CEA. Specifically, the items that constitute a Cabinet confidence are identical in both sections – *i.e.*, paragraphs 39(1)(a)-(f) of the CEA are identical to paragraphs 69(2)(a)-(f) of the Access Act. Despite these similarities, the Access Act is broader in terms of what it protects because of the non-exhaustive nature of the section and the inclusion of paragraph 69(2)(g), which removes from the reach of the Act "records that contain information about the contents of any record within a class of records referred to in paragraphs (a) to (f)."

[126] It is within this context that I will later address the application of section 69 of the Access Act and section 39 of the CEA as they relate to the disclosure of the PM's agendas in Docket T-1209-05.

## VII. APPLYING THE LAW TO THE FACTS OF EACH APPLICATION

### 1. Minister of National Defence (Docket T-210-05)

**The records at issue**

[127] As a result of the Commissioner's investigation, 1413 pages of records were identified as relevant to the request. Of these, 765 pages were found within the DND and were disclosed to the requester, subject to the application of the Act's exemptions. These records are not at issue in this proceeding.

[128] The remaining 648 pages of records were located within the Minister's office and fall into four categories:

1. 185 pages of notes regarding the M5 meetings extracted from the notebooks of members of the Minister's exempt staff;
2. 342 pages of e-mail correspondence containing approximately 539 exchanges. Of these, approximately 101 e-mails are exchanges exclusively between members of the Minister's exempt staff, while approximately 438 are exchanges between exempt staff and non-exempt staff working in the Minister's office or exchanges forwarded or copied to non-exempt staff;
3. 82 pages of M5 meeting agendas; and
4. 39 pages of miscellaneous records, including memoranda and briefing notes for the Minister and the other attendees of the M5 meetings.

[129] Despite the respondent's position that the records are not in the control of the DND for the purposes of the Access Act, the respondent applied the Act's exemptions and exclusions to the records and disclosed them, without prejudice, to the Commissioner during his investigation. Upon reviewing the records, the Commissioner concluded that all of the claimed exemptions were justified under the Act. Accordingly, the only issue to be determined is whether the records were under the control of the DND.

**Purpose of the M5 meetings**

[130] The term "M5" was used to describe informal meetings attended by the former Minister of National Defence, Art Eggleton, the Deputy Minister of Defence, the Chief of the Defence Staff, and senior members of the Minister's exempt staff.

[131] During the course of his investigation, the Commissioner heard evidence from the following individuals, all of whom took part in the M5 meetings:

1. Art Eggleton (Minister of National Defence);
2. Jim Judd (Deputy Minister);
3. Gen. Maurice Baril (Chief of the Defence Staff);
4. Emechete Onuoha (Executive Assistant to the Minister);
5. Meribeth Morris (Director of Operations to the Minister); and
6. Randy Mylyk (Director of Communications to the Minister).

[132] The Commissioner states in his Report that the purpose of the M5 meetings was to provide a forum for the Minister to obtain information and clarification on various subject matters relating to the DND. The meetings were intended to address areas of current operational and administrative interest, and to facilitate the flow of information between the Minister, Deputy Minister, and Chief of the Defence Staff. In his testimony before the Deputy Commissioner, the Minister stated that the M5 meetings were largely informal (Application Record, Docket T-210-05, vol. C-2, p. 268):

> **Mr. Eggleton:** … There is no particular – there is no formality to the M5 agenda, there are no minutes produced from it.

[133] On this basis, the Minister described the meetings as an opportunity for him to obtain clarification on matters or gain a better understanding about how the Department is operating (Application Record, Docket T-210-05, vol. C-2, p. 270):

> **Mr. Eggleton:** They are information meetings. They are for me to get further information, to better understand how things are operating or why the press have reported it in a certain way. …
>
> The only thing that distinguishes the stuff that goes to the M5 is if it's not major in nature, it's not something that's going to take a long period of time or just need a little clarification. …

[134] Further, the Minister underlined the informal nature of the M5 meetings by stating that in situations where the issues were more significant, a more formal briefing was held (Application Record, T-210-05, vol. C-2, p. 270):

> **Mr. Eggleton:** Now, there are many others, many other reports that I get that are more major in nature and require a more detailed briefing. And for that purpose, we would set up a separate meeting. I could have a full briefing with all sorts of people in the room, telling me about a certain policy that is being proposed or a certain purchase that is being proposed or whatever. …

[135] However, despite the informal and informative nature of the meetings, the Chief of the Defence Staff made clear that "there are some pretty difficult decisions that will start, originate or finish" within the context of the M5 meetings (Application Record, Docket T-210-05, vol. C-1, p. 201).

[136] As well, it is not in dispute that the subject matter of the M5 meetings was directly related and limited to departmental matters. During the course of the Commissioner's investigation, this

was confirmed by the Minister, the Deputy Minister, and by the Chief of the Defence Staff, who stated the following before the Deputy Commissioner (Application Record, Docket T-210-05, vol. C-1, pp. 188-89):

> **Mr. Leadbeater:** Is it fair to say, that the discussions at the M-5 concern matters which fall within the Minister's responsibilities as Minister of Defence?
>
> **General Baril:** Of course.
>
> **Mr. Leadbeater:** Are there any matters discussed that are not departmental business?
>
> **General Baril:** Sometimes we will joke around, but I mean beside that … The time of the Minister and my time and the [Deputy Minister] are pretty tight during the day. And besides the opening niceties that – no, until something happens it's business all the time.

**Notes of the exempt staff at the M5 meetings**

[137] The 185 pages of notes regarding the M5 meetings are from the notebooks of the Minister's Executive Assistant (Mr. Onuoha), Director of Operations (Ms. Morris), and Director of Communications (Mr. Mylyk).

[138] The evidence is that these individuals played a major role in the facilitation of the M5 meetings. As the Commissioner acknowledged at page 10 of his Report (Application Record, Docket T-210-05, vol. 5, p. 1472):

> The evidence confirms that, ordinarily, agendas were decided upon in advance by the Minister's Executive Assistant in consultation with the Minister. From time to time, the Minister's EA also sought input from the offices of the CDS and DM concerning agenda items. The agendas were prepared by the Executive Assistant and their content

> was communicated to members either in advance … or by being distributed at the meeting. …

[139] At those meetings, the evidence is that the Minister, Deputy Minister, and Chief of the Defence Staff did not take notes. As well, no "minutes" were taken of the meetings, only notes by the Minister's exempt staff. As the Commissioner further stated at page 10:

> … The evidence also confirms that notes of the M5 discussions were routinely taken by the Minister's Executive Assistant. The other exempt staff also made less extensive notes, from time to time.

[140] According to the Minister, the notes were to ensure that the proper follow up was taken with respect to any relevant item discussed (Application Record, Docket T-210-05, vol. C-2, p. 291):

> **Mr. Eggleton:** … Most of the time I rely upon the notes that my staff keeps, ensure that we get the proper follow up.

As the Minister further explained in his oral testimony, the exempt staff members were charged with the task of following up on items arising within the context of the M5 meetings (Application Record, Docket T-210-05, vol. C-2, p. 291-92):

> **Mr. Leadbeater:** That was going to be my next question. How is follow up managed, and do you rely on the notes of your staff in order to ensure proper follow up?
>
> **Mr. Eggleton:** Yes. My staff are charged; the executive assistant and the other assistants, as may be appropriate, are charged with the responsibility of doing any follow up.
>
> I might say, for example, "Well, okay, that's very interesting. Now, I would like a report on that, please. And it's an urgent issue, so I would like it in two weeks." So my staff write down, "he wants it in two weeks". So in two weeks, if it isn't there, I may have forgotten it since I am dealing with 100 items a day or so, they follow it up and make sure I get the report in two weeks.

[141] While the Minister relied upon the notes taken by his exempt staff during M5 meetings, he had never personally seen the notebooks, nor did he have any knowledge with respect to how extensive the notes were (Application Record, Docket T-210-05, vol. C-2, p. 304):

> **Mr. Eggleton:** Yes, but I have never seen these notes that my staff keep, so I don't know how extensive they would be. … They would make a note on that, but they wouldn't make a note on each and everything if there wasn't any follow up to be done, I would not expect they would. But I don't know for sure, because I never asked to see their notes.

This was confirmed by the Minister's Director of Communications, Mr. Mylyk, who stated in his Affidavit, sworn October 25, 2006, that the content of the notes were considered personal and were not shared with anyone in either the Minister's office or the DND (Application Record, Docket T-210-05, vol. 5, p. 1759):

> ¶ 33 I have always considered these notebooks to be personal to me. They are not shared with anyone in the Minister's office.
>
> ¶ 34 No official of the Department of National Defence ever asked to look at my notebooks. No such official, up to and including the Deputy Minister or the Chief of the Defence Staff, had authority to compel me to produce them.

The other exempt staff gave similar evidence.

**Does the DND have control over the M5 documents?**

[142] In determining whether the records relating to the M5 meetings were "under the control" of the DND despite being ultimately controlled by the Minister and his exempt staff and held within the Minister's office, the Court will examine the content of the records and the circumstances in which they were created.

[143] The M5 meetings were a vehicle to facilitate the flow of information between the Minister, Deputy Minister, and Chief of the Defence Staff. According to the Minister, they were informal in nature and were not intended to cover major matters related to the policy and direction of the DND. When considering the purpose of the meetings, it is clear that the M5 meetings related to the departmental business of the DND. The circumstances in which the records were created will now be examined for each category of record.

**The notes**

[144] The notes were the personal notes of the exempt staff. No person in the DND or the Minister ever asked to see the notes or be provided with a copy of them. The evidence is that the notes would not have been produced to departmental officials. If some information in the notes had ever been requested, which was not the case, the Court reasonably assumes that the exempt staff who took the notes would prepare a type-written record of the discussion.

[145] It is clear that the government institution did not have *de facto*, transient, or partial access to the notes of the meetings. When the Court reviewed the notes, it is evident that they were not intended for any third person. The writing is barely legible and the substance is not coherent to anyone other than the author. Accordingly, the notes in their original form would not be produced to a senior official of the DND upon request, and they are not under the control of the DND.

**The e-mail correspondence within the Minister's office**

[146] The e-mail exchanges dealt with scheduling of the Minister. They are not substantive information about departmental matters and they are not under the control of the government institution according to the criteria set out above.

**The agendas**

[147] The agendas listing the items to be addressed at M5 meetings were provided to the attendees, including the Deputy Minister and the Chief of the Defence Staff. In such cases, the departmental official would most likely be given another copy of the agenda from the Minister's office if he was missing his copy. Accordingly, these agendas are under the control of the DND and are subject to disclosure.

**The miscellaneous records**

[148] The 39 pages of miscellaneous records include memoranda and briefing notes for the Minister and the other attendees of the M5 meetings. If this is the case, then these records would be provided to a senior departmental official upon request. Presumably, the Minister's office would cooperate with a request for a copy of a document if it had already been provided to the Deputy Minister or Chief of the Defence Staff. The Court will refer these records back to the respondent to identify which documents were originally provided to the Deputy Minister or Chief of the Defence Staff. The records are under the control of DND.

## 2. Prime Minister (Docket T-1209-05)

### The records at issue

[149] The records relevant to this application consist of the daily agenda books of the former Prime Minister of Canada, the Right Honourable Jean Chrétien (the PM), for the period between January 1994 and June 25, 1999. In their entirety, the records total 2006 pages; 2002 pages of which were archived in electronic form within the PMO on a computer assigned to Bruce Hartley, the PM's Executive Assistant and a member of his exempt staff. The remaining four pages of records are comprised of hard copy versions of the above-noted records and were located within the PCO.

[150] As the Commissioner found in his Report, the agendas consist of a listing, by day and date, of the PM's daily appointments. He described the variety of different entries included in the agendas at page 5 of his Report (Application Record, Docket T-1209-05, vol. 4, p. 683):

> Some entries relate to the former Prime Minister's private life, such as family birthdays, medical appointments and social engagements. Some entries relate to the former Prime Minister's official functions (such as meetings to discuss government business, Question Period preparation meetings, cabinet meetings and official travel). Some entries relate to activities of the former Prime Minister which were public in nature (such as appearances at the War Memorial on Remembrance Day, appearances in Parliament for Question Period, and attendance at weekly caucus meetings). Some entries relate to meetings or functions which took place in the Prime Minister's Centre Block office, at 24 Sussex Drive or at other private venues. For some days, no entries appear on the agendas.

Further, the Commissioner noted that absent from the agendas is any reference to the subject matter of the meetings or functions listed therein.

**Creation of the records**

[151] All of the records at issue were created on a single computer located in the office of Mr. Hartley, the PM's Executive Assistant. Mr. Hartley deposed at paragraph 8 of his Affidavit, sworn October 25, 2006, the agendas served as a means by which he and the PM "communicated" for the purpose of managing the PM's time. Effectively, the agendas were a "plan for how the day may unfold" (Application Record, Docket T-1209-05, vol. 5, p. 824). Changes to the document were notated by Mr. Hartley on a paper copy throughout the day. These alterations may or may not have been recorded by Mr. Hartley's assistant in the electronic version of the agenda.

[152] Access to the computer on which the agendas were located was restricted to only Mr. Hartley and his assistants. A limited number of people within the PMO had "read-only" access to the agendas; however, such access was not granted to anyone outside the PMO.

**Use of the records**

[153] As the Commissioner reported in his investigation, hard copies of the agendas were "shared" within the PMO to assist in managing the PM's daily activities. On this basis, copies were shared with the PM's Chief of Staff, his senior policy advisor, Director of Communications, Director of Operations, and Press Secretary.

[154] As well, an edited copy of the agenda showing only the locations to be visited by the PM was forwarded to the RCMP and the House of Commons Security office to assist them in protecting

the PM. Mr. Hartley states at paragraph 10 of his Affidavit (Application Record, Docket T-1209-05, vol. 5, p. 825):

> ¶ 10 As well, on my instructions, a copy of the agenda showing only the locations to be visited by the Prime Minister was regularly made available to the Royal Canadian Mounted Police ("RCMP") and the House of Commons Security (also referred to as Parliament Hill Security). However, it is my understanding that on certain occasions, in error, the RCMP was provided with a copy of the agenda that included additional information beyond just the locations to be visited by the Prime Minister.

[155] Until September 1999, it was also the practice to fax an edited copy of the next day's agenda to the Clerk of the Privy Council (the Clerk) for the sole information of the Clerk and his or her Executive Assistant. According to Mr. Hartley's testimony before the Deputy Commissioner, these copies were faxed as a "courtesy" so that the Clerk would know the PM's whereabouts over the course of the next day (Application Record, Docket T-1209-05, vol. C-1, p. 185):

> **Mr. Leadbeater:** … Are you familiar with why those copies were sent to the Clerk of Privy Council?
>
> **Mr. Hartley:** Yes, purely as a courtesy. So the Clerk would know where to go the next day.

When asked whether providing a copy of the agenda to the Clerk was more than a courtesy – *i.e.*, whether the Clerk had a "work-related need" to know the PM's agenda – Mr. Hartley testified that the purpose of providing a copy to the Clerk was largely to facilitate the daily meetings between the Clerk and the PM (Application Record, Docket T-1209-05, vol. C-1, p. 186):

> **Mr. Leadbeater:** So it's possible that the Clerk might [have] a work-related need to know the Prime Minister's agenda?
>
> **Mr. Hartley:** Frankly, this – it was to make sure we knew we were having our meetings every day.

[156] The records provided to the Clerk were "modestly expurgated, or edited" from the original copies held by Mr. Hartley. As explained in the following exchange between the former Clerk, Mel Cappe, and the Deputy Commissioner (Application Record, Docket T-1209-05, vol. C-2, p. 660):

> **Mr. Leadbeater:** … Have you ever seen any other version of the Prime Minister's agenda, other than those you reviewed for the purpose of Cabinet confidences?
>
> **Mr. Cappe:** Well, as I said earlier, from time to time I'll see them on the corner of his desk. He's got his daily agenda there. I understood from Mr. Koops that the version we were getting, of which you have four pages here, were modestly expurgated, or edited. I don't know that, but I – I – my recollection is that the version we got wasn't the only version that existed….

In his testimony before the Deputy Commissioner, Mr. Hartley confirmed that while the agendas may have been edited to remove "highly personal" information, often the changes between the original and the copy sent to the Clerk was reflective of changes made to the PM's schedule throughout the day (Application Record, Docket T-1209-05, vol. C-1, p. 207):

> **Mr. Leadbeater:** Did you give any instruction as to severing the agendas that were to go to the Clerk of Privy Council?
>
> **Mr. Hartley:** Like I said earlier, there was the odd time that I know of items of a highly personal nature, I would not …
>
> […]
>
> **Mr. Leadbeater:** So it would be fair to say that in general, the version of the agenda that went to the Clerk of the Privy Council was the agenda that was available to everyone in the Prime Minister's Office, except it may have been somewhat out of date because things happen on a regular basis and you might have updated yours and not updated the Clerk's? Would that be correct?
>
> **Mr. Hartley:** I believe it's possible, yes.

[157] With respect to the disposal of the copies sent to the Clerk, it was Mr. Hartley's expectation that those copies would be destroyed once they were out of date. As the Commissioner notes in his Report, the practice of the Clerk's office was to destroy the dated copies. However, despite this practice, at the time of the access requests on June 25, 1999, four pages of agenda records were located within the PCO. These records include the PM's agendas for July 23, 1999 and the weekly periods of May 23 to June 12, 1999. As stated by the Commissioner, these records were not destroyed due to oversight on the part of the PCO.

[158] Further, the Commissioner noted at page 6 of his Report that the fact that these records were not destroyed became a point of contention between the PMO and the PCO, and led to the cessation of the practice of providing the Clerk with a copy of the upcoming day's agenda (Application Record, Docket T-1209-05, vol. 4, p. 688):

> The fact that these few records did exist in the Clerk's office at the time of the access requests (and, hence, were indisputably subject to the right of access) was of concern to the PMO. Upon being informed of these circumstances, (in the late Summer, early Fall of 1999) the former Chief of Staff of the Prime Minister ordered the cessation of providing copies of the former Prime Minister's agenda to the Clerk of the Privy Council. Thereafter, the Clerk of the Privy Council was to receive only oral notification of the Prime Minister's schedule….

This altered practice continued until the PM's retirement in 2003.

**Does the PCO have control over the Prime Minister's agendas?**

[159] With respect to the four pages of the PM's agendas found within the PCO, there is no dispute that these records were under the control of the PCO and are subject to the right of access

under subsection 4(1) of the Act. However, the respondent maintains that these records are exempt from disclosure as "personal information" under section 19.

[160] With respect to the original electronic copies of the unedited PM agendas located on Mr. Hartley's computer, these records are in the possession of Mr. Hartley and are under the ultimate control of his superior, the former Prime Minister of Canada. However, the question is whether these records are also under the control of the PCO for the purposes of the Access Act. In that regard, it is important to consider the following finding of the Commissioner at page 61 of his Report (Application Record, Docket T-1209-05, vol. 4, p. 743):

> 1. A the time of the access request it was the practice for the PMO to send paper copies of the PM's agendas to the Office of the Clerk of the Privy Council. The arrangement was that there was no need for the Clerk's Office to keep copies because the agendas were archived in the PMO.
>
> I find that the decision to archive the agendas in the PMO only, does not remove these records from the control of the PCO for the purpose of section 4 of the Act. These copies were created for the use of the Clerk of the Privy Council and his officials. There is no contention that the Clerk could not have, at any time, retrieved previous copies from the Prime Minister's archived version. Indeed, subsection 4(3) of the Act mandates the retrieval/re-creation of records kept in computer databases.
>
> In other words, even under the theory of control offered by the PCO, I find that the Prime Minister's agendas were under the control of the PCO at the time of the access request.
>
> […]

[161] I agree with the Commissioner that the fact that the records were archived in the PMO does not remove the records from the control of the PCO for the purpose of section 4 of the Access Act.

The PM's agendas were prepared for the PMO to facilitate their work supporting the PM. The Clerk received a copy to facilitate his work meeting with and assisting the PM.

[162] However, I disagree with the Commissioner's finding that there is "no contention that the Clerk could not have, at any time, retrieved previous copies from the Prime Minister's archived version." The evidence of Mr. Hartley is that he would have refused any request for a copy of previous agendas unless directed to do so by one of his superiors, namely the PM or the PM's Chief of Staff. As Mr. Hartley stated at paragraph 14 of his Affidavit (Application Record, Docket T-1209-05, vol. 5, p. 825):

> ¶ 14 The agendas belong to the Prime Minister. If asked, I would have refused to provide the agendas to the Clerk of the Privy Council and his officials, unless I had been directed to do so by the Prime Minister or the Prime Minister's Chief of Staff.

[163] The PMO prepared an edited version of the agendas, which was sent daily to the Clerk of the Privy Council for a limited timeframe on the condition that these edited versions were to be destroyed at the end of each day. The Clerk never required or requested from the PMO a past copy of the edited agenda after the day had passed. Unlike the agendas for the Minister of Transport, there was no archived version of the edited copy provided to the Clerk.

[164] The unequivocal evidence from the PM's Executive Assistant is that he would have refused to provide the agendas to the Clerk if requested; that is, unless he was directed to do so by the PM.

[165] The Court will not speculate whether if the Clerk needed a past copy of the edited agendas for a matter related to PCO business, the PM would have instructed his Executive Assistant to provide the Clerk with an edited version of a past agenda. Such a case never arose. However, the Executive Assistant may simply have sent the Clerk a memo with the required information about a past meeting, instead of sending the old agenda.

(a) Contents

[166] The evidence before the Court is that the contents of the abridged and unabridged agendas primarily related to the business of the PM and the PMO. However, part of the agenda did relate to PCO business, such as the PM's meeting with the Clerk, Cabinet functions, and general government administration.

(b) Circumstances

[167] The evidence before the Court is that the edited agendas were provided to the Clerk under strict conditions, for a limited timeframe, and on the condition that the agendas be destroyed after their relevant date had passed. The evidence also showed that but for compliance with these conditions, the Clerk would never have received a copy of the agendas. In fact, after it was discovered that the Clerk had not destroyed four pages of the agendas, the Clerk stopped receiving copies of the agendas from the PMO.

[168] The evidence also established that the Clerk would not have been provided with past versions of the agendas if requested.

**The four pages of edited agendas located at the PCO and the exemptions claimed**

[169] The parties agree that these four pages of edited agendas are under the control of the PCO. The issue before the Court is: "Are the four pages of the edited agendas at the PCO exempt from disclosure as 'personal information' under section 19?" First, agenda items related to the duties and functions of the PM as an officer of the government are not personal information. Second, the names of any individual not an employee or officer of a scheduled government institution is personal information exempt from disclosure. This would include individuals who met the PM such as the CEO of Air Canada, a political party fundraiser, a lobbyist, or a business man. Third, agenda items related to the PM's personal life are exempt as personal information.

[170] With respect to the application of section 69 of the Access Act and section 39 of the CEA regarding Cabinet confidences, this issue only arises for the agendas located at the PCO. Since the agendas do not contain any of the subject matter of the meetings, they do not disclose any confidences of the Privy Council under section 69.

[171] Section 69 is broader in scope than section 39 of the CEA. The Court questions how the same records at issue can be Cabinet confidences under section 39. The words of Chief Justice McLachlin in *Babcock*, above, at paragraph 25, are exactly on point:

> ¶ 25 A third requirement arises from the general principle applicable to all government acts, namely, that the power exercised must flow from the statute and must be issued for the *bona fide* purpose of protecting Cabinet confidences in the broader public interest. The function of the Clerk under the Act is to protect Cabinet confidences, and this alone. It is not to thwart public inquiry nor is it to gain tactical advantage in litigation. If it can be shown from the evidence or the circumstances that the power of certification was

> exercised for purposes outside those contemplated by s. 39, the certification may be set aside as an unauthorized exercise of executive power….

[172] The certificate issued by the Clerk on March 19, 2001 with respect to portions of the PM's agendas pre-dates the Supreme Court of Canada's decision in *Babcock,* above, which provides very important new guidelines for the certification process. The Commissioner argues that the certificate does not comply with the Supreme Court's decision in *Babcock.*

[173] The certificate for the PM's agendas was issued with respect to a previous Court file.

[174] The certificate with respect to the excerpts of the agendas of the Minister of Transport was executed on May 4, 2001. On January 6, 2004 counsel for the respondents advised that the Clerk will not be signing a new certificate under section 39 of the CEA with respect to the excerpts from the agendas of the Minister of Transport in the current Court file as a result of the Supreme Court of Canada's decision in *Babcock*. There was no such advice from counsel for the respondents with respect to the PM's agendas. The Court asked counsel for the respondent "why." Counsel was not able to provide any answer. Counsel said he was given no instructions with respect to the discrepancy.

[175] According to *Babcock,* the Clerk must answer two questions before certifying information: 1) whether the information being certified is a Cabinet confidence within the meaning of subsections 39(1) and (2); and 2) whether the information being protected should be protected when accounting for the competing interests in disclosure and retaining confidentiality: see *Babcock* at

para. 22. The protection of subsection 39(1) is engaged only when the Clerk answers these two questions in the affirmative.

[176] The Court concludes that the certificate dated March 19, 2001 with respect to portions of the PM's agendas is not valid for this case. First, the certificate was filed with respect to previous Court files and a new certificate should have been filed with respect to the application at bar. Second, the certificate should be considered in accordance with the Supreme Court of Canada's decision in *Babcock*, which provides very important new guidelines for the certification process. Third, there should be a rationale provided by the respondents why the certificate regarding the agendas of the Minister of Transport is not being relied upon because of *Babcock*, while the certificate with respect to the PM's agenda is still being relied upon. During the Court hearing there was no logical explanation for this juxtaposition and inconsistency. The Court is not prepared to rely blindly on a certificate issued prior to *Babcock*, with respect to a previous Court file, and which is inconsistent with the position of the respondents regarding a similar certificate filed regarding the agendas of the Minister of Transport.

[177] Finally, the agendas do not contain any "advice or recommendations" for the Prime Minister or "an account of consultations or deliberations" with the Prime Minister, and would not be exempt under section 21. The fact that a meeting took place does not disclose the subject matter of the meeting.

**Conclusion**

[178] The 2002 pages of the PM's agendas archived in electronic form within the PMO are not under the control of the PCO. The four pages of the agendas located within the PCO are under the control of the PCO and subject to disclose under the Access Act after the personal information referred to above is severed. No other exemptions or exclusions are applicable.

## 3. Commissioner of the RCMP (Docket T-1210-05)

**The records at issue**

[179] The records in this application are the agendas of the former Prime Minister of Canada, the Right Honourable Jean Chrétien. The application applies to 386 pages of the PM's agenda that were located on RCMP premises in the branch known as the "PM's Protection Detail."

[180] The records sent to the RCMP were edited copies of the original agendas possessed by the PM's Executive Assistant, Mr. Hartley. They generally included only the locations to be visited by the PM, and contained no information regarding subject matter of the meetings. However, Mr. Hartley deposed in his Affidavit, sworn October 25, 2006, that on certain occasions the RCMP was provided with a copy of the agenda that included additional information beyond just the locations to be visited.

[181] According to the submissions of the Commissioner, the records located within the RCMP can be classified into seven categories:

1. agendas that contain no information. That is, there are no scheduled events or there are blank pages, save for title and times;

2. agendas that contain items of a public nature and/or items that refer to events which, within public knowledge, were attended by the PM;

3. agendas that contain some items that are purely public and others that are non-public. These include meetings with the PM's Chief of Staff and/or the Clerk of the Pricy Council;

4. agendas that contain items that are of a personal nature;

5. agendas that contain items relating to the PM's official duties;

6. agendas that contain a mix of both work and personal items; and

7. agendas in which it is difficult to determine whether the entries refer to personal or government business.

**Purpose of the records**

[182] The records were sent to the RCMP to provide the PM with 24-hour protection. Former Commissioner of the RCMP, Giuliano Zaccardelli, in his oral testimony before the Deputy Commissioner, stated (Application Record, Docket T-1210-05, vol. C-1, p. 399):

> **Mr. Zaccardelli:** It's basically the Prime Minister's Protective Detail Branch. They're the people that move the Prime Minister and provide the protection for him on the 24-hour basis wherever he is in Canada – in Ottawa, in Canada and around the world.

[183] According to the evidence before both the Commissioner and this Court, the RCMP did not issue any specific policies, post-orders, instructions, or other directives governing the handling, receipt, use, or destruction of the agendas received from the PMO. Any agenda that came into the RCMP's possession was placed in a bulk file after it served its purpose. Those files were then disposed of at the expiration of an established retention period (see letter from counsel for

Commissioner Zaccardelli, February 13, 2003, Application Record, Docket T-1210-05, vol. 3, p. 598).

[184] In 2001, the PMO discontinued the practice of forwarding copies of the PM's agenda to the RCMP. Thereafter, the PMO faxed a "timetable" of the PM's schedule indicating departure times and destinations of the PM's intended travel with a directive to "please read and destroy."

**Processing the access request**

[185] Once the records were located, the RCMP stated that the agendas were exempt under sections 17 and 19 of the Act, and would therefore not be disclosed. In addition, the RCMP stated that some portions of the records were also excluded under subsection 69(1) of the Act as they contained Cabinet confidences.

[186] The claim under section 17 of the Act was abandoned due to the lapse of time. The respondent maintains that the records are exempt from disclosure under section 19 of the Act, and that portions therein should also be excluded from the scope of the Act as Cabinet confidences under subsection 69(1).

**Court's conclusion**

[187] The Court concludes as follows:

(a) the agendas in the possession of the RCMP are records in the "control" of a "government institution" under subsection 4(1) and Schedule I of the Access Act;

(b) the section 17 exemption for "information which could reasonably be expected to threaten the safety" of the Prime Minister has been abandoned since the passage of time makes the former PM's pattern of travel irrelevant to the present time;

(c) the section 19 exemption for personal information is applicable to the same portions of the PM's agendas as outlined in paragraph 169 above with respect to the PM's agendas; and

(d) the section 69 Cabinet confidence exclusion is not applicable because the agendas do not disclose the subject matter of any meetings or any substantive facts that could constitute a confidence of the Privy Council.

Accordingly, the records are subject to disclosure after the respondent has severed the personal information referred to above.

## 4. Minister of Transport (Docket T-1211-05)

### The records at issue

[188] The records relevant to this application consist of the weekly agendas of the former Minister of Transport, David Collenette, for the period of May 30 to November 6, 1999.

[189] Of the 46 pages of records at issue, 23 pages consist of the original agendas of the former Minister, each accounting for a one week period during the relevant time. As the Commissioner found in his investigation, the contents of the agendas contain both daytime and evening entries, and relate to the full range of the Minister's activities. This includes the Minister's duties as head of the DOT, political and constituency activities, Cabinet and caucus responsibilities, and personal

appointments or engagements. According to the Commissioner, the contents of the Minister's agendas can be classified within four broad categories related to:

1. the Minister as a Member of the Cabinet;
2. the Minister as the head of the DOT;
3. the Minister as a private individual; however, these activities may relate specifically to:
    i. his political party;
    ii. his constituency or his role as an elected Member of Parliament;
    iii. the personal information of others; and
    iv. travel arrangements; and
4. the Minister's public activities.

The entries do not address the subject to be discussed at the listed meetings/events. Some logistical information such as airline flight numbers, phone numbers, hotel addresses, and car rental rates has been included.

[190] The remaining 23 pages of records consist of abridged copies of the above-noted agendas, and were entitled "Agenda sent to the Deputy Minister for the period of May 30, 1999 to November 6, 1999." The abridged versions were sent regularly to the Deputy Minister of Transport for departmental purposes.

**Creation and use of the records**

[191] The agendas were created by the Minister's private secretary with Sue Ronald, the Minister's Executive Assistant. Ms. Ronald and the Minister's private secretary were members of the Minister's exempt staff. The records were stored electronically on a computer in the Minister's office. No electronic copies of the full agenda or any abridged version were stored elsewhere.

[192] Access to the agenda was restricted to four individuals: the Minister; the Minister's private secretary; the Minister's Executive Assistant; and the Executive Assistant's assistant.

[193] The abridged versions of the agendas were produced for and provided to the office of the Deputy Minister to aid in the administration of the DOT. As the Commissioner stated at page 5 of his Report (Application Record, Docket T-1211-05, vol. 3, p. 656):

> The investigation determined that the practice of providing a censored version of the Minister's agenda to the Deputy Minister was to facilitate the conduct of departmental business. For example, the agenda assisted the Ministerial Affairs Coordinator (a departmental public servant) to ensure that appropriate departmental officials attended meetings with the Minister and to ensure that briefing notes and speaking notes on matters of departmental business, were produced for the Minister.

[194] This fact was confirmed by the former Deputy Minister of Transport, Margaret Bloodworth, in the following exchange with the Deputy Commissioner (Application Record, Docket T-1211-05, vol. C-1, pp. 75-76):

> **Mr. Leadbeater:** Can you tell me why you are provided with a copy of this agenda?
>
> **Ms. Bloodworth:** Yes. The Ministerial Affairs Coordinator, and you can see this by the handwritten notes on this copy, would use this as a means of determining which Briefing Notes are required.… There will be a Departmental official who will be asked to go with that. So that's one of the things she will determine and make sure is happening, and that there will also be a Briefing Note done by the Department since that's clearly a Transport related meeting.

[195] The Executive Assistant, Ms. Ronald, stated in the following exchange with the Deputy Commissioner that there was no definitive process for performing the edits (Application Record, Docket T-1211-05, vol. C-1, pp. 150-51):

> **Mr. Leadbeater:** … Or how is it decided what detail is going to be in the version of the agenda that is not immediately apparent on its face?
>
> […]
>
> **Ms. Ronald:** There's no process. There's no straight rule. It's a subjective thing. It might be a determination by myself. It might be a determination by the Minister's private secretary. It might also be a determination by the Minister himself. When he asks his private secretary to schedule something, he might indicate to her he would like it to be private on his agenda.

In his Report, the Commissioner noted that the "details removed from the agendas … concerned private or political matters usually unrelated to departmental business."

[196] Once edited, paper copies of the abridged agendas were provided to the Deputy Minister's office for each upcoming four week period, with updated versions being sent two or three times a week to reflect changes in the Minister's schedule.

[197] Once sent to the Deputy Minister, the Commissioner found that there was "no practice in the Deputy Minister's office to keep or archive copies of the version of the Minister's agenda received from the Minister's office." Once the agendas became dated – *i.e.*, the timeframe to which they applied had passed or a new version for an upcoming time period had been provided by the Minister's staff – the dated copies were destroyed by DOT officials. The Deputy Minister testified (Application Record, Docket T-1211-05, vol. C-1, p. 79):

> **Ms. Bloodworth:** … We treat them as a transitory record that helps us tell what we have to do and then we prepare what has to be done to prepare for the Minister, and it's discarded.

The Minister's Executive Assistant also testified that the Minister's staff destroyed outdated copies of the agendas.

**Does the DOT have control over the Minister's weekly agendas?**

[198] On the basis of the evidence before him, the Commissioner concluded that the records at issue were under the control of the DOT for the purposes of the Act since the content of the records related to the "portfolio business" of the Minister as head of the DOT. In that regard, the Commissioner made the following findings at pages 36-37 of his Report (Application Record, Docket T-1211-05, vol. 3, pp. 685-86):

> 1. At the time of the access request, the paper copy, severed version of the former Minister's agenda, which had been sent to the Deputy Minister, no longer existed in the files of the Deputy Minister's office.
>
> I find that the decision to archive this version in the Minister's office does not remove these records from the control of the DOT for the purposes of section 4 of the Act. These versions were created for the Deputy Minister and her officials. There is no contention that the Deputy Minister could not have, at any time, retrieved previous copies from the Minister's attached version. Indeed subsection 4(3) of the Act mandated the retrieval/re-creation of records kept in computer data bases. In other words, even under the theory of control offered by the DOT, I find that this version of the Minister's agenda was under the control of the DOT at the time of the access request.
>
> 2. I find that, taking into account the factors set out previously, including the content, purposes and uses of the minister's agenda, as well as the role and the status for the Minister and creators of the records, the unsevered copy of the records were under the control of the DOT at the time of the access request.
> […]

[199] I agree with the Commissioner that the archived agendas being in the Minister's office does not automatically remove them from the control of the DOT. A proper interpretation of the meaning of "control" requires that the Court look beyond physical possession to the content of the records and the circumstances in which they were created.

(a) Contents

[200] With respect to the abridged copies of the Minister's weekly agendas, the evidence is clear that those records were provided to the Deputy Minister to facilitate the administration of the DOT. Further, while the Minister's Executive Assistant testified that the Deputy Minister could perform her functions without being provided with a copy of the abridged agenda, she nevertheless admitted that more work would be required of the Executive Assistant in order to effectively coordinate departmental meetings. The abridged copies of the agenda were created for the department and were used to facilitate departmental matters.

(b) Circumstances

[201] The evidence before the Court is that copies of the abridged agendas were provided to the Deputy Minister for a limited timeframe, and on the understood condition that the abridged agendas would be destroyed after their relevant date had passed. The Deputy Minister confirmed this in her evidence and confirmed that she did not reasonably expect to be able to obtain another copy of the agenda after the relevant date had passed because these agendas were restricted to the Minister's office. The agendas were kept strictly confidential by the Minister's office. This is reflected in the

following exchange between the Deputy Minister and the Deputy Commissioner (Application Record, Docket T-1211-05, vol. C-1, p. 87):

> **Mr. Leadbeater:** Now, if these versions are the same versions as the ones in the Minister's Office, it is something that we don't know at this point, and if they had been destroyed already by your staff, would it not be reasonable to go and get those versions that had already been provided to your office from the Minister's Office?
>
> **Ms. Bloodworth:** No.
>
> **Mr. Leadbeater:** And explain to me why you think that wouldn't have been, assuming they're the same?
>
> **Ms. Bloodworth:** In my view, and I think this view is consistent with, as you know, around town on at least the government side, is that records in a Minister's Office are not covered by the Access to Information requests. I'm not arguing the legal debate about that. I'm just saying my understanding of that.

[202] Given this evidence, I am satisfied that the DOT did not have control of the past abridged agendas when the access request was filed. This case is similar to the fact scenario in *Rubin*, above, where Mr. Justice Blanchard came to the same conclusion. The agendas are under the exclusive (and guarded) control of the Minister's office, which the Federal Court of Appeal in 2004 said, in *obiter*, are records not under the control of a government institution: see *Canada Post No. 2*, above, at para. 3 per Décary J.A.

[203] With respect to the unabridged agendas, the evidence is that they were not provided to the Deputy Minister or anyone else in the DOT. The remaining contents of the unabridged agendas compared with the abridged agendas dealt with broad categories identified by the Commissioner at the hearing, which did not relate to the Minister's responsibilities as the head of the DOT. For this

reason, the Court concludes that these unabridged agendas do not constitute records under the control of a government institution for which the public has a right of access under subsection 4(1) of the Access Act.

[204] In the alternative, the Court will deal with the exclusions and exemptions claimed with respect to the agendas in this application.

**Application of section 19 – the personal information exemption**

[205] With respect to the application of section 19 of the Act, the respondent's argument mirrors that taken by the respondent in the PM file; namely, that the information contained in the agendas is "inextricably linked" to the Minister as an individual and, for that reason, the agendas should be exempted from disclosure in their entirety.

[206] The Commissioner, however, is of the view that while certain information contained within the agendas falls within the meaning of personal information under section 19, the remainder can be reasonably severed and disclosed in accordance with the Act.

[207] Since the Court has found that the unabridged agendas do not constitute records under the control of a government institution, the application of section 19 does not arise. If they did arise, the Court would apply section 19 as follows:

1. that information relating to the position, functions, or responsibilities of the Minister as an officer of the government is not exempt as personal information;

2. that the unabridged agendas be remitted to the respondent so as to separate the agenda items that relate to his appointments as a Minister from those that relate to his appointments as a private individual; and

3. that personal information, such as the name of individuals in the agendas who are not government officers or employees, be redacted since they constitute "personal information."

**Application of subsection 21(1) – the advice and recommendations exemption**

[208] Paragraph 21(1)(a) of the Act exempts from disclosure that information containing "advice or recommendations developed by or for a government institution or a minister of the Crown." The Commissioner argues that the exemptions claimed by the respondent are not justified as the records were of a "bare bones" nature, and did not include anything that could be seen as being "advice or recommendations" or "an account of consultations or deliberations" within the meaning of subsection 21(1).

[209] I agree with the Commissioner that the listing of appointments does not disclose any subject matter that would be exempt under section 21. A listing of meetings does not disclose "advice or recommendations" or "an account of consultations or deliberations."

**Conclusion with respect to the Minister of Transport file**

[210] Upon review by the Court, while the contents of the abridged agendas relate to departmental matters, the circumstances in which the abridged agendas came into being show that the Deputy Minister could not request and obtain a past copy of the abridged or unabridged agenda. Past copies were restricted to the Minister's office. The copy that had been sent to the Deputy Minister was for

a limited timeframe and on the understood condition that it would be destroyed after its relevant date. Accordingly, the Court must conclude that the government institution did not have any kind of control over past agendas at the time the access request was filed.

## VIII. GENERAL CONCLUSIONS OF THE COURT

[211] The conclusions of the Court are as follows:

**The three general issues**

1. the PMO, the Office of the Minister of Transport, and the Office of the Minister of National Defence are not "government institutions" or part of "government institutions" under subsection 4(1) and Schedule I of the Access Act;

2. a record "under the control of a government institution" as stated in subsection 4(1) of the Act includes documents in the PMO or other ministerial offices that:

    i. relate to a departmental matter; and

    ii. were created in such circumstances that the Deputy Minister or other senior official in the government institution could request and reasonably obtain a copy of that document to deal with the subject matter included therein;

3. the meaning and scope of the following exemptions under the Access Act include:

    i. the section 19 exemption for "personal information" does not exempt the agendas of a minister, including the Prime Minister, with respect to appointments related to their duties and functions as a minister;

    ii. however, private appointments not related to the job are exempt as "personal information." Also, the names of private individuals contained within the agendas who are not government officers or employees are "personal information" exempt from disclosure under the Access Act. Accordingly, if the PM meets with a political person, a businessman, a lobbyist, or even the CEO of a Crown corporation, the name of that individual is the private and personal information of that individual, and is exempt from disclosure;

    iii. in the agendas of the PM and the Minister of Transport, there is no subject matter details included in the agenda entries, only the scheduling of meetings.

Notice of a meeting does not disclose advice or recommendations of that meeting. Accordingly, the exemption in subsection 21(1) does not apply; and

iv. the exemption for Cabinet confidences under section 69 of the Access Act and section 39 of the CEA does not apply to the agendas because they do not contain the subject matter of the meetings thereby disclosing any confidences of the Privy Council. The fact that a meeting took place does not disclose a Cabinet confidence;

**The Minister of National Defence records**

4. the 648 pages of records within the Office of the Minister of National Defence relating to the M5 meetings are partly subject to disclosure under the Act:

i. the personal notes of the Minister's exempt staff would not, if ever requested, have been produced to DND officials. The Court reasonably assumes that any request for information from the notes would be prepared by the exempt staff in a typed-written record of the discussion. Accordingly, the DND did not have any form of control over the personal notes of the exempt staff taken at the meetings;

ii. the e-mail correspondence within the Minister's office is not under the control of the DND;

iii. the agendas for the M5 meetings, which were originally provided to the Deputy Minister and the Chief of the Defence Staff, would reasonably be provided upon request so that they are under the control of the DND; and

iv. the 39 pages of miscellaneous documents, which include memoranda and briefing notes for the Minister and were originally provided to the Deputy Minister and/or the Chief of the Defence Staff, would be reasonably provided again to the Deputy Minister and/or the Chief of the Defence Staff and, accordingly, are under the control of the DND;

**The PM agendas**

5. of the 2006 pages of records uncovered during the Commissioner's investigation, only the four pages located within the PCO are subject to disclosure under the Act:

i. the 2002 pages of the PM's agendas archived in the PMO could not have been obtained by the Clerk of the Privy Council upon request after their relevant date. The PMO prepared an edited version of the agendas, which was sent daily to the Clerk for a limited timeframe on the condition that these edited versions be

destroyed each day. The unequivocal evidence from the PM's Executive Assistant is that he would have refused to provide the agendas to the Clerk after the fact unless directed to do so by the PM or the PM's Chief of Staff. The Court reasonably assumes that the Executive Assistant would have sent the Clerk a memo with any requested information about a past meeting rather than sending a copy of the old agenda. Accordingly, these agendas were not under the control of the PCO;

ii. the four pages of the edited agendas located within the PCO are under the control of the PCO and must be disclosed under the Access Act except for appointments of the PM that relate to his private life and not his functions or duties as Prime Minister, and names of any individual not an employee or officer of the government (including individuals such as the CEO of a Crown corporation, a political party fundraiser, a lobbyist, or a businessman). Such information is the personal and private information of the individual and is exempt as "personal information" under section 19 of the Access Act; and

iii. since the agendas do not contain any of the subject matters of the meetings, they do not disclose any confidences of the Queen's Privy Council subject to exclusion under section 69 of the Access Act or section 39 of the CEA. Similarly, the agendas do not contain any advice or recommendations for the Prime Minister or an account of consultations or deliberations with the Prime Minister which would be exempt under subsection 21(1) of the Access Act;

**The RCMP records**

6. the 386 pages of the PM's agendas located on RCMP premises are under the control of the RCMP and are subject to disclosure under the Access Act except for the "personal information" exempt under section 19, which is referred to above;

**The Minister of Transport records**

7. the 46 pages of weekly agendas of the former Minister of Transport are not subject to disclosure under the Act:

i. an abridged copy of these agendas, which account for 23 pages of the records, were archived in the Minister's office and were created and provided to the Deputy Minister to facilitate the administration of the DOT. However, these abridged agendas were provided for a limited timeframe on the condition that they be destroyed after their relevant date had passed. The Deputy Minister testified that she did not reasonably expect to be able to obtain another copy of the agendas after the relevant date had passed because the agendas were

restricted to the Minister's office. In view of this evidence, the DOT did not have control over the past abridged agendas when the Access request was filed; and

ii. with respect to the unabridged agendas of the Minister of Transport, which accounted for the remaining 23 pages of records, the evidence is that they were not provided to the Deputy Minister or anyone else in the DOT. For this reason, these unabridged agendas do not constitute records under the control of a government institution;

**General Comments**

8. while the PM's agendas are not subject to disclosure under Canada's current Access Act, the Court notes that even if the PM's agendas were accessible, the names of individuals not employed with the government would be redacted as "personal information" under section 19 of the Act. This would frustrate an access requester who was seeking information about whether the PM met with a particular private individual; and

9. the Court does not decide whether documents such as the PM's agendas should be accessible to the public. The Court does not legislate or change the law. If Parliament wants the PM's agendas open to the public, Parliament must amend the Access Act in such a way as to make this possible.

## IX. LEGAL COSTS

[212] These four applications have been dismissed with respect to the majority of the records sought. However, the applications are allowed with respect to a small part of the Minister of National Defence file (Docket T-210-05), a small part of the PM file (Docket T-1209-05), and a large part of the RCMP file (Docket T-1210-05). The application in the Minister of Transport file (Docket T-1211-05) has been dismissed in its entirety. Since the result is divided, the Court shall make no order as to costs.

[213] The Commissioner requested that the Court exercise its jurisdiction under subsection 53(2) of the Act to award costs to the Commissioner even if the Commissioner has not been successful in the result because the Court is of the opinion that these applications raised important new principles in relation to the Act. The Court cannot agree. The Court has applied the existing jurisprudence to the actual records in issue to assess their content and the evidence regarding the circumstances in which the records were created. While the Commissioner asked the Court to interpret the meaning of "control" to mean any record in a minister's office that relates to a departmental matter, this interpretation is not supported by the jurisprudence and, in the Court's view, would stretch the meaning of "control" beyond reason. If that interpretation prevailed, then any document in the minister's office which related to the department would be under the control of the government institution. That would make the government institution synonymous with the minister's office for the purposes of the current Access Act. If Parliament wants such documents open to the public, then Parliament must amend the Access Act.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that:**

1. The application for judicial review with respect to the records in the Office of the Minister of National Defence in Docket T-210-05 is allowed in small part:

   (a) the personal notes of the Minister's exempt staff and the e-mail correspondence within the Minister's office are not subject to access under the Act; and

   (b) the agendas and the miscellaneous documents for the M5 meetings originally provided to the Deputy Minister and/or the Chief of the Defence Staff are subject to access, while the remainder of the agendas and miscellaneous documents are not subject to access under the Act;

2. The application for judicial review with respect to records in the Prime Minister's Office in Docket T-1209-05 is allowed in small part:

   (a) the 2002 pages of the former PM's agendas archived in the PMO are not subject to access under the Act; and

   (b) the 4 pages of the edited agendas located in the PCO are subject to access except for portions of the agendas related to the private life of the PM and except for the names of private individuals not employees or officers of the government;

3. The application for judicial review with respect to the former PM's agendas in RCMP premises in Docket T-1210-05 is allowed in large part:

   (a) the 386 pages of the PM's agendas are subject to access under the Act except for portions related to the private life of the PM and except for the names of private individuals not employees or officers of the government;

4. The application for judicial review with respect to the records in the Office of the former Minister of Transport in Docket T-1211-05 is dismissed:

(a) the abridged and unabridged agendas of the former Minister of Transport are not subject to access under the Act;

5. Within 60 days of the date of this Judgment the respondents shall disclose to the access requesters the portions of the records subject to access under the Act after severing the portions identified above. If there is a disagreement with any disclosure or severance, the Commissioner may refer the matter back to this Court within 30 days after the respondents have completed the severance and disclosure; and

6. There is no order as to costs.

"Michael A. Kelen"

Judge

## APPENDIX "A"

### 1. *Access to Information Act*, R.S.C. 1985, c. A-1

**3.** In this Act,

**"government institution"** means

(*a*) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and

(*b*) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*;

**"head"**, in respect of a government institution, means

(*a*) in the case of a department or ministry of state, the member of the Queen's Privy Council for Canada who presides over the department or ministry, or

(*b*) in any other case, either the person designated under subsection 3.2(2) to be the head of the institution for the purposes of this Act or, if no such person is designated, the chief executive officer of the institution, whatever their title;

[…]

**4. (1)** Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(*a*) a Canadian citizen, or

(*b*) a permanent resident within the meaning of subsection 2(1) of the

**3.** Les définitions qui suivent s'appliquent à la présente loi

**«institution fédérale»**

*a*) Tout ministère ou département d'État relevant du gouvernement du Canada, ou tout organisme, figurant à l'annexe I;

*b*) toute société d'État mère ou filiale à cent pour cent d'une telle société, au sens de l'article 83 de la *Loi sur la gestion des finances publiques*.

[…]

**«responsable d'institution fédérale »**

*a*) Le membre du Conseil privé de la Reine pour le Canada sous l'autorité duquel est placé un ministère ou un département d'État;

*b*) la personne désignée en vertu du paragraphe 3.2(2) à titre de responsable, pour l'application de la présente loi, d'une institution fédérale autre que celles visées à l'alinéa *a*) ou, en l'absence d'une telle désignation, le premier dirigeant de l'institution, quel que soit son titre.

[…]

**4. (1)** Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :

*a*) les citoyens canadiens;

*Immigration and Refugee Protection Act*,

has a right to and shall, on request, be given access to any record under the control of a government institution.

[…]

**10. (1)** Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(*a*)

(*a*) that the record does not exist, or

(*b*) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,

and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

**(2)** The head of a government institution may but is not required to indicate under subsection (1) whether a record exists.

[…]

**17.** The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to threaten the safety of individuals.

[…]

*b*) les résidents permanents au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.

[…]

**10. (1)** En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente loi, l'avis prévu à l'alinéa 7*a*) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l'information et, d'autre part :

*a*) soit le fait que le document n'existe pas;

*b*) soit la disposition précise de la présente loi sur laquelle se fonde le refus ou, s'il n'est pas fait état de l'existence du document, la disposition sur laquelle il pourrait vraisemblablement se fonder si le document existait.

**(2)** Le paragraphe (1) n'oblige pas le responsable de l'institution fédérale à faire état de l'existence du document demandé.

[…]

**17.** Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements dont la divulgation risquerait vraisemblablement de nuire à la sécurité des individus.

[…]

**19. (1)** Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

**(2)** The head of a government institution may disclose any record requested under this Act that contains personal information if

(*a*) the individual to whom it relates consents to the disclosure;

(*b*) the information is publicly available; or

(*c*) the disclosure is in accordance with section 8 of the *Privacy Act*.

[…]

**21. (1)** The head of a government institution may refuse to disclose any record requested under this Act that contains

(*a*) advice or recommendations developed by or for a government institution or a minister of the Crown,

(*b*) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,

(*c*) 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, or

(*d*) plans relating to the management of personnel or the administration of a

**19. (1)** Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la *Loi sur la protection des renseignements personnels*.

**(2)** Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :

*a*) l'individu qu'ils concernent y consent;

*b*) le public y a accès;

*c*) la communication est conforme à l'article 8 de la *Loi sur la protection des renseignements personnels*.

[…]

**21. (1)** Le responsable d'une institution fédérale peut refuser la communication de documents datés de moins de vingt ans lors de la demande et contenant:

*a*) des avis ou recommandations élaborés par ou pour une institution fédérale ou un ministre;

*b*) des comptes rendus de consultations ou délibérations auxquelles ont participé des administrateurs, dirigeants ou employés d'une institution fédérale, un ministre ou son personnel;

*c*) des projets préparés ou des renseignements portant sur des positions envisagées dans le cadre de négociations menées ou à mener par le gouvernement du Canada ou en son nom, ainsi que des renseignements portant sur les considérations qui y sont liées;

government institution that have not yet been put into operation,

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

**(2)** Subsection (1) does not apply in respect of a record that contains

(*a*) 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; or

(*b*) a report prepared by a consultant or an adviser who was not a director, an officer or an employee of a government institution or a member of the staff of a minister of the Crown at the time the report was prepared.

[…]

**25.** Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

**26.** The head of a government institution may refuse to disclose any record requested under this Act 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

*d*) des projets relatifs à la gestion du personnel ou à l'administration d'une institution fédérale et qui n'ont pas encore été mis en oeuvre.

**(2)** Le paragraphe (1) ne s'applique pas aux documents contenant :

*a*) le compte rendu ou l'exposé des motifs d'une décision qui est prise dans l'exercice d'un pouvoir discrétionnaire ou rendue dans l'exercice d'une fonction judiciaire ou quasi judiciaire et qui touche les droits d'une personne;

*b*) le rapport établi par un consultant ou un conseiller qui, à l'époque où le rapport a été établi, n'était pas un administrateur, un dirigeant ou un employé d'une institution fédérale ou n'appartenait pas au personnel d'un ministre, selon le cas.

[…]

**25.** Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente loi pour refuser la communication du document, est cependant tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

**26.** Le responsable d'une institution fédérale peut refuser la communication totale ou partielle d'un document s'il a des motifs raisonnables de croire que le contenu du document sera publié en tout ou en partie par une institution fédérale, un mandataire du gouvernement du Canada ou un ministre dans les quatre-vingt-dix jours suivant la demande

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.

[…]

**30. (1)** Subject to this Act, the Information Commissioner shall receive and investigate complaints

(*a*) from persons who have been refused access to a record requested under this Act or a part thereof;

(*b*) from persons who have been required to pay an amount under section 11 that they consider unreasonable;

(*c*) from persons who have requested access to records in respect of which time limits have been extended pursuant to section 9 where they consider the extension unreasonable;

(*d*) from persons who have not been given access to a record or a part thereof in the official language requested by the person under subsection 12(2), or have not been given access in that language within a period of time that they consider appropriate;

(*d*.1) from persons who have not been given access to a record or a part thereof in an alternative format pursuant to a request made under subsection 12(3), or have not been given such access within a period of time that they consider appropriate;

(*e*) in respect of any publication or bulletin referred to in section 5; or

(*f*) in respect of any other matter relating to

ou dans tel délai supérieur entraîné par les contraintes de l'impression ou de la traduction en vue de l'impression.

[…]

**30. (1)** Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information reçoit les plaintes et fait enquête sur les plaintes :

*a*) déposées par des personnes qui se sont vu refuser la communication totale ou partielle d'un document qu'elles ont demandé en vertu de la présente loi;

*b*) déposées par des personnes qui considèrent comme excessif le montant réclamé en vertu de l'article 11;

*c*) déposées par des personnes qui ont demandé des documents dont les délais de communication ont été prorogés en vertu de l'article 9 et qui considèrent la prorogation comme abusive;

*d*) déposées par des personnes qui se sont vu refuser la traduction visée au paragraphe 12(2) ou qui considèrent comme contre-indiqué le délai de communication relatif à la traduction;

*d*.1) déposées par des personnes qui se sont vu refuser la communication des documents ou des parties en cause sur un support de substitution au titre du paragraphe 12(3) ou qui considèrent comme contre-indiqué le délai de communication relatif au transfert;

*e*) portant sur le répertoire ou le bulletin visés à l'article 5;

*f*) portant sur toute autre question relative à

requesting or obtaining access to records under this Act.

**(2)** Nothing in this Act precludes the Information Commissioner from receiving and investigating complaints of a nature described in subsection (1) that are submitted by a person authorized by the complainant to act on behalf of the complainant, and a reference to a complainant in any other section includes a reference to a person so authorized.

**(3)** Where the Information Commissioner is satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act, the Commissioner may initiate a complaint in respect thereof.

[…]

**38.** The Information Commissioner shall, within three months after the termination of each financial year, submit an annual report to Parliament on the activities of the office during that financial year.

[…]

**42. (1)** The Information Commissioner may

(*a*) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;

(*b*) appear before the Court on behalf of any person who has applied for a review under section 41; or

la demande ou à l'obtention de documents en vertu de la présente loi.

**(2)** Le Commissaire à l'information peut recevoir les plaintes visées au paragraphe (1) par l'intermédiaire d'un représentant du plaignant. Dans les autres articles de la présente loi, les dispositions qui concernent le plaignant concernent également son représentant.

**(3)** Le Commissaire à l'information peut lui-même prendre l'initiative d'une plainte s'il a des motifs raisonnables de croire qu'une enquête devrait être menée sur une question relative à la demande ou à l'obtention de documents en vertu de la présente loi.

[…]

**38.** Dans les trois mois suivant la fin de chaque exercice, le Commissaire à l'information présente au Parlement le rapport des activités du commissariat au cours de l'exercice.

[…]

**42. (1)** Le Commissaire à l'information a qualité pour:

*a*) exercer lui-même, à l'issue de son enquête et dans les délais prévus à l'article 41, le recours en révision pour refus de communication totale ou partielle d'un document, avec le consentement de la personne qui avait demandé le document;

*b*) comparaître devant la Cour au nom de la personne qui a exercé un recours devant la Cour en vertu de l'article 41;

(*c*) with leave of the Court, appear as a party to any review applied for under section 41 or 44.

**(2)** Where the Information Commissioner makes an application under paragraph (1)(*a*) for a review of a refusal to disclose a record requested under this Act or a part thereof, the person who requested access to the record may appear as a party to the review.

[…]

**48.** In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

[…]

**53. (1)** Subject to subsection (2), the costs of and incidental to all proceedings in the Court under this Act shall be in the discretion of the Court and shall follow the event unless the Court orders otherwise.

**(2)** Where the Court is of the opinion that an application for review under section 41 or 42 has raised an important new principle in relation to this Act, the Court shall order that costs be awarded to the applicant even if the applicant has not been successful in the result.

[…]

**69. (1)** This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,

*c*) comparaître, avec l'autorisation de la Cour, comme partie à une instance engagée en vertu des articles 41 ou 44.

**(2)** Dans le cas prévu à l'alinéa (1)*a*), la personne qui a demandé communication du document en cause peut comparaître comme partie à l'instance.

[…]

**48.** Dans les procédures découlant des recours prévus aux articles 41 ou 42, la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document incombe à l'institution fédérale concernée.

[…]

**53. (1)** Sous réserve du paragraphe (2), les frais et dépens sont laissés à l'appréciation de la Cour et suivent, sauf ordonnance contraire de la Cour, le sort du principal.

**(2)** Dans les cas où elle estime que l'objet des recours visés aux articles 41 et 42 a soulevé un principe important et nouveau quant à la présente loi, la Cour accorde les frais et dépens à la personne qui a exercé le recours devant elle, même si cette personne a été déboutée de son recours.

[…]

**69. (1)** La présente loi ne s'applique pas aux documents confidentiels du Conseil privé de la Reine pour le Canada, notamment aux :

(*a*) memoranda the purpose of which is to present proposals or recommendations to Council;

(*b*) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(*c*) agenda of Council or records recording deliberations or decisions of Council;

(*d*) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(*e*) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (*d*);

(*f*) draft legislation; and

(*g*) records that contain information about the contents of any record within a class of records referred to in paragraphs (*a*) to (*f*).

**(2)** For the purposes of subsection (1), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

**(3)** Subsection (1) does not apply to

(*a*) confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or

*a*) notes destinées à soumettre des propositions ou recommandations au Conseil;

*b*) documents de travail destinés à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil;

*c*) ordres du jour du Conseil ou procès-verbaux de ses délibérations ou décisions;

*d*) documents employés en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique;

*e*) documents d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le Conseil, ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa *d*);

*f*) avant-projets de loi ou projets de règlement;

*g*) documents contenant des renseignements relatifs à la teneur des documents visés aux alinéas *a*) à *f*).

**(2)** Pour l'application du paragraphe (1), «Conseil» s'entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs.

**(3)** Le paragraphe (1) ne s'applique pas:

*a*) aux documents confidentiels du Conseil privé de la Reine pour le Canada dont l'existence remonte à plus de vingt ans;

(*b*) discussion papers described in paragraph (1)(*b*)

(i) if the decisions to which the discussion papers relate have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

*b*) aux documents de travail visés à l'alinéa (1)*b*), dans les cas où les décisions auxquelles ils se rapportent ont été rendues publiques ou, à défaut de publicité, ont été rendues quatre ans auparavant.

## 2. ***National Defence Act*, R.S.C. 1985, c. N-5**

**3.** There is hereby established a department of the Government of Canada called the Department of National Defence over which the Minister of National Defence appointed by commission under the Great Seal shall preside.

**3.** Est constitué le ministère de la Défense nationale, placé sous l'autorité du ministre de la Défense nationale. Celui-ci est nommé par commission sous le grand sceau.

**4.** The Minister holds office during pleasure, has the management and direction of the Canadian Forces and of all matters relating to national defence and is responsible for

(*a*) the construction and maintenance of all defence establishments and works for the defence of Canada; and

(*b*) research relating to the defence of Canada and to the development of and improvements in materiel.

**4.** Le ministre occupe sa charge à titre amovible et est responsable des Forces canadiennes; il est compétent pour toutes les questions de défense nationale, ainsi que pour :

*a*) la construction et l'entretien des établissements et ouvrages de défense nationale;

*b*) la recherche liée à la défense nationale et à la mise au point et au perfectionnement des matériels.

**3. *Department of Transport Act*, R.S.C. 1985, c. T-18**

**3. (1)** There is hereby established a department of the Government of Canada called the Department of Transport over which the Minister of Transport appointed by commission under the Great Seal shall preside.

**(2)** The Minister holds office during pleasure and has the management and direction of the Department.

**3. (1)** Est constitué le ministère des Transports, placé sous l'autorité du ministre des Transports. Celui-ci est nommé par commission sous le grand sceau.

**(2)** Le ministre occupe sa charge à titre amovible; il assure la direction et la gestion du ministère.

**4. *Library and Archives of Canada Act*, S.C. 2004, c. 11**

**7.** The objects of the Library and Archives of Canada are

(*a*) to acquire and preserve the documentary heritage;

(*b*) to make that heritage known to Canadians and to anyone with an interest in Canada and to facilitate access to it;

(*c*) to be the permanent repository of publications of the Government of Canada and of government and ministerial records that are of historical or archival value;

(*d*) to facilitate the management of information by government institutions;

(*e*) to coordinate the library services of government institutions; and

(*f*) to support the development of the library and archival communities.

**7.** Bibliothèque et Archives du Canada a pour mission:

*a*) de constituer et de préserver le patrimoine documentaire;

*b*) de faire connaître ce patrimoine aux Canadiens et à quiconque s'intéresse au Canada, et de le rendre accessible;

*c*) d'être le dépositaire permanent des publications des institutions fédérales, ainsi que des documents fédéraux et ministériels qui ont un intérêt historique ou archivistique;

*d*) de faciliter la gestion de l'information par les institutions fédérales;

*e*) d'assurer la coordination des services de bibliothèque des institutions fédérales;

*f*) d'appuyer les milieux des archives et des bibliothèques.

**5.** ***Privacy Act*, R.S.C. 1985, c. P-21**

**3.** In this Act,

**"personal information"** means 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,

**3.** Les définitions qui suivent s'appliquent à la présente loi.

**«renseignements personnels»** Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment :

*a*) les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;

*b*) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;

*c*) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;

*d*) son adresse, ses empreintes digitales ou son groupe sanguin;

*e*) ses opinions ou ses idées personnelles, à l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

*f*) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;

(*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 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,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

*g*) les idées ou opinions d'autrui sur lui;

*h*) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa *e*), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;

*i*) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la *Loi sur l'accès à l'information*, les renseignements personnels ne comprennent pas les renseignements concernant:

*j*) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment:

(i) le fait même qu'il est ou a été employé par l'institution,

(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,

(iii) la classification, l'éventail des salaires et les attributions de son poste,

(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,

(v) les idées et opinions personnelles qu'il a exprimées au cours de son

(*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 those 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;

emploi;

*k*) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées au cours de la prestation;

*l*) des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;

*m*) un individu décédé depuis plus de vingt ans.

**6.** ***Financial Administration Act*, R.S.C. 1985, c. F-11**

**2.** In this Act,

**"public officer"** includes a minister of the Crown and any person employed in the federal public administration […]

**2.** Les définitions qui suivent s'appliquent à la présente loi.

**«fonctionnaire public»** Ministre ou toute autre personne employée dans l'administration publique fédérale. […]

**7.** ***Interpretation Act*, R.S.C. 1985, c. I-21**

**2. (1)** In this Act,

**"public officer"** includes any person in the federal public administration who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power,

**2. (1)** Les définitions qui suivent s'appliquent à la présente loi.

**«fonctionnaire public»** Agent de l'administration publique fédérale dont les pouvoirs ou obligations sont prévus par un texte.

or on whom a duty is imposed by or under an enactment […]

[…]

**8. *Canada Evidence Act*, R.S.C. 1985, c. C-5**

**39. (1)** Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

**39. (1)** Le tribunal, l'organisme ou la personne qui ont le pouvoir de contraindre à la production de renseignements sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, sans l'examiner ni tenir d'audition à son sujet, si le ministre ou le greffier attestent par écrit que le renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada.

**(2)** For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in

**(2)** Pour l'application du paragraphe (1), un «renseignement confidentiel du Conseil privé de la Reine pour le Canada» s'entend notamment d'un renseignement contenu dans :

(*a*) a memorandum the purpose of which is to present proposals or recommendations to Council;

*a*) une note destinée à soumettre des propositions ou recommandations au Conseil;

(*b*) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

*b*) un document de travail destiné à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil;

(*c*) an agendum of Council or a record recording deliberations or decisions of Council;

*c*) un ordre du jour du Conseil ou un procès-verbal de ses délibérations ou décisions;

(*d*) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or

*d*) un document employé en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique;

the formulation of government policy;

(*e*) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (*d*); and

(*f*) draft legislation.

*e*) un document d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le Conseil, ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa *d*);

*f*) un avant-projet de loi ou projet de règlement.

**(3)** For the purposes of subsection (2), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

**(3)** Pour l'application du paragraphe (2), «Conseil» s'entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs.

**(4)** Subsection (1) does not apply in respect of

(*a*) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or

(*b*) a discussion paper described in paragraph (2)(*b*)

(i) if the decisions to which the discussion paper relates have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

**(4)** Le paragraphe (1) ne s'applique pas :

*a*) à un renseignement confidentiel du Conseil privé de la Reine pour le Canada dont l'existence remonte à plus de vingt ans;

*b*) à un document de travail visé à l'alinéa (2)*b*), dans les cas où les décisions auxquelles il se rapporte ont été rendues publiques ou, à défaut de publicité, ont été rendues quatre ans auparavant.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKETS:** | T-210-05, T-1209-05, T-1210-05 and T-1211-05, |
| **STYLE OF CAUSE:** | THE INFORMATION COMMISSIONER OF CANADA v. MINISTER OF NATIONAL DEFENCE<br>THE INFORMATION COMMISSIONER OF CANADA v. THE PRIME MINISTER OF CANADA<br>THE INFORMATION COMMISSIONER OF CANADA v. THE COMMISSIONER OF THE RCMP<br>THE INFORMATIN COMMISSIONER OF CANADA v. MINISTER OF TRANSPORT CANADA |
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