



Commissaire
à l'information
du Canada

Information
Commissioner
of Canada



INTER FERENCE

with Access to Information

Part 2

Special report to Parliament
by Suzanne Legault
Information Commissioner of Canada
April 2014

April 2014

The Honourable Noël A. Kinsella
Speaker of the Senate
Ottawa ON K1A 0A4

Dear Mr. Speaker:

Pursuant to section 39 of the *Access to Information Act*, I have the honour to submit to Parliament a special report entitled *Interference with Access to Information: Part 2*.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Suzanne Legault', written in a cursive style.

Suzanne Legault
Information Commissioner of Canada

April 2014

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

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Information Commissioner of Canada

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Message from the Commissioner

Access to government-held information is critical to the functioning of our democratic institutions. It supports accountability and transparency but also civic engagement and empowerment. More and more Canadians are interested in knowing what the government is doing and making requests for that information.



The *Access to Information Act* is the legal framework that confirms a quasi-constitutional right of citizens to access government information and establishes an objective and non-partisan process for obtaining that information.

The integrity and neutrality of the access system depends on strong leadership from the top. Ministers and senior managers must ensure their employees know their responsibilities with regard to access to information, and the limitations on their roles. Political and institutional leaders must ensure that their organizations follow the policies and procedures governing the access process. Most importantly, they must take strong and immediate action to stop behaviour of the type this investigation uncovered.

Through the investigation that is the subject of this report, I found a pattern of improper involvement by a small group of ministerial staff members at Public Works and Government Services Canada (PWGSC) in responding to requests under the *Access to Information Act*. These staffers inserted themselves in various ways into a process that was designed to be carried out in an objective manner by public servants. Consequently, the rights conferred under the Act were compromised.

At the conclusion of the investigation, I made a number of recommendations to PWGSC to prevent political interference from recurring. The Minister accepted all recommendations with the exception of referring the matters to the appropriate law enforcement agency. A number of measures were implemented by March 31, 2014.

I encourage all departments and the Treasury Board Secretariat to take note of my recommendations and implement them as needed.

Pursuant to section 39 of the *Access to Information Act*, the Information Commissioner is reporting her findings in relation to her self-initiated investigation into the processing of eight access to information or consultation requests received by Public Works and Government Services Canada (PWGSC) between July 22, 2008, and January 19, 2010. This investigation concerned the possibility of interference in the processing of these requests.¹

The attached Report of Facts and Findings (Appendix A) serves as the Commissioner's findings of fact in this investigation. Detailed summaries of the activities surrounding the five requests that form the basis of this report begin on page 44, below.

Background

On April 1, 2010, the House of Commons Standing Committee on Access to Information, Privacy and Ethics undertook a study of allegations of systemic political interference with access to information requests. In April and May 2010, the Committee summoned a number of witnesses from various federal departments in order to study these allegations.²

On May 13, 2010, the Committee approved a motion that ordered PWGSC to provide the Committee with all email correspondence from July 2008 to January 19, 2010, between Mr. Sébastien Togneri, then Director of Parliamentary Affairs in the office of Minister Christian Paradis, and officials in the PWGSC Access to Information and Privacy (ATIP) Directorate, including the ATIP Director.³ The motion also requested all email correspondence between Mr. Togneri and his then colleague, Ms. Jillian Andrews, and between Mr. Togneri and Ms. Isabelle Bouchard, then a member of the Prime Minister's Office staff.

In September 2010, then PWGSC Minister, the Honourable Rona Ambrose, provided the Clerk of the Committee with some of the requested correspondence. To the Commissioner's knowledge, records of correspondence between members of her predecessor's staff, as well as between ministerial staff and a member of staff in the Prime Minister's Office were not provided to the Committee.

On October 1, 2010, Minister Ambrose provided the same correspondence to the Information Commissioner. Upon review of the correspondence, the Commissioner was satisfied that, pursuant to subsection 30(3) of the Act, reasonable grounds existed to investigate whether

¹ For the purposes of this report, the term "request" or "requests" includes both access to information and consultation requests.

² This study was initiated during the Commissioner's investigation of another instance in which political interference was alleged (OIC file 3209-00718). The Commissioner reported the results of that investigation in March 2011 in a special report to Parliament (http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2010-2011_interference-with-ati-interference-avec-ati.aspx).

³ Motion text: That the committee orders the Department of Public Works and Government Services Canada to provide it with all email correspondence from July 2008 to January 19, 2010 between Sébastien Togneri and officials who work or worked within the Access to Information Branch of Public Works and Government Services Canada. The committee also orders all email correspondence from July 2008 to January 19, 2010 between Sébastien Togneri and Tom Makichuk, all email correspondence from July 2008 to January 19, 2010 between Sébastien Togneri and Jillian Andrews, and all email correspondence from July 2008 to January 19, 2010 between Sébastien Togneri and Isabelle Bouchard. And requests that said material be delivered to the committee within 5 days.

there had been interference in the processing and responses to requests or in the requesting or obtaining of records during the period of July 22, 2008, and January 19, 2010.⁴

On October 8, 2010, the Commissioner initiated a complaint against PWGSC and issued a Summary of Complaint to the department wherein she identified eight requests that she intended to investigate. The Commissioner subsequently sent two amended summaries to PWGSC, which included an additional seven requests to be investigated. In total, 15 files were examined by the Office of the Information Commissioner (OIC).

The Investigation

The OIC conducted a preliminary assessment of the 15 files originally identified for investigation.

The OIC obtained evidence from PWGSC in response to three Orders for the Production of Records issued pursuant to section 36 of the Act.

The first and second production orders, issued on November 19, 2010, and December 2, 2010, respectively, required the production of departmental information relating to the 15 files under review by the OIC. PWGSC complied with these production orders.

The third production order, which was issued on December 23, 2010, required the production of, among other things, all records of communications to and from the three ministerial staff members involved in this investigation. Records of communication were defined as emails with attachments, back-up emails, and PIN-to-PIN messages. On January 7, 2011, PWGSC responded that it would not produce the records of communications to and from the ministerial staff members because it considered these communications to be under the control of the Minister and not the Department.

On January 12, 2011, the Commissioner wrote to Minister Ambrose and requested that the records identified in the third production order be provided to the OIC. On January 26, 2011, Minister Ambrose informed the Commissioner that her office would provide the requested records. The OIC received the records on May 9, 2011.

The OIC also requested that the then Chief of Staff provide an affidavit confirming that all records responsive to the third production order had been provided in response to the production order. On August 22, 2011, the Minister's Chief of Staff provided the requested affidavit.

⁴ The scope of "political interference" is discussed in the Commissioner's previous special report on interference, page 15 (http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2010-2011_interference-with-ati-interference-avec-ati_2.aspx#4).

Based on the OIC's review of the records, the following eight files were selected for more in-depth investigation.

1. **A-2008-00588** (March 26, 2009): An access request for copies of four briefing notes to the Minister of PWGSC, one of which dealt with a public opinion research project. [translation]
2. **A-2008-00519** (February 20, 2009): An access request for all records pertaining to changes in PWGSC's daily activities in preparation for and during the visit of the American President to Canada. [translation]
3. **A-2009-00169** (June 24, 2009): An access request for copies of specific Question Period (QP) cards prepared for the PWGSC Minister, one of which concerned the issue of visible minorities. [translation]
4. **A-2009-00042** (April 21, 2009): An access request for information on financial disbursements by the Canadian Government on office furniture through the aboriginal set aside funds in 2007–2008.
5. **A-2009-00033** (April 27, 2009): An access request for a list of all QP notes created for the Minister from April 13 to April 27, 2009. In this list of QP notes, “(French)” was indicated next to the name of those notes drafted in French.
6. **AC-2009-00039** (June 16, 2009): A consultation request from Health Canada pertaining to an access request on the completed Affiliations and Interests Declaration Form for Chrysolite [sic] Expert Panel members.
7. **AC-2008-00049** (June 6, 2008): A consultation request from the Department of National Defence pertaining to an access request for briefing notes to the Minister on the status of the Cyclone Helicopter Procurement and/or problems with the contractor.
8. **AC-2009-00056** (July 22, 2009): A consultation request from Library and Archives Canada regarding written reports provided by the Independent Review Monitor appointed to oversee the request for proposals process for the Portrait Gallery of Canada.

In the course of the investigation, 17 witnesses were summoned to testify under oath.

Confidentiality orders were issued to protect the integrity of the investigation. The witnesses were advised of their right to retain counsel of their choice. Sixteen of the witnesses chose to be represented by counsel. The witnesses' testimony was transcribed by a court reporter. Witnesses were also given an opportunity to review the transcripts of their testimony. Certain witnesses received notices of potential adverse findings and were given an opportunity to present further evidence and/or representations prior to the finalization of the Preliminary Report of Facts and Findings. Representations were received and considered.

All witnesses were then given an opportunity to provide further evidence and/or representations in relation to the preliminary report. Representations that were received were considered in the preparation of the preliminary report.

On April 12, 2013, the OIC provided PWGSC with an opportunity to provide representations under section 35 of the Act. The letter requesting these representations was included as an appendix to the preliminary report. In addition to seeking representations on the findings set out in the preliminary report, the OIC also sought representations about the designation of requests as “high profile” or “interesting,” the internal processes put in place by PWGSC to address potential breaches of section 67.1 of the Act, the “zero-tolerance policy,” communications between access officials and members of the Minister’s Office, the duty to assist and records held in the Minister’s Office.

On May 10, 2013, the Deputy Minister provided representations on behalf of the Department.

In its representations, PWGSC indicated that it takes its responsibilities under the Act very seriously. PWGSC also noted that it had undertaken a number of initiatives during and after since March 2011, the date of the Commissioner’s previous special report on interference.⁵ Many of these initiatives were aimed at increasing awareness of the Act and the responsibilities of employees in its implementation. In addition, PWGSC made changes to its senior management review of responsive records by reducing the time allocated to senior managers and by conducting such reviews simultaneously. PWGSC also implemented a system whereby delays in the processing of requests are identified and promptly addressed at a senior level. Moreover, an increased level of resources was provided for the access to information function.

These are all laudable initiatives that, in the view of the Commissioner, should assist PWGSC in better meeting its responsibilities under the Act.

Of note, the Deputy Minister made no comment on or correction to the Preliminary Report of Facts and Findings. Accordingly, this document was finalized and is attached below as Appendix A. As such, the final version of the report serves as the Commissioner’s findings of fact in this investigation. These findings are based on the documentary evidence obtained, the testimonial evidence of the witnesses and the representations of the witnesses in relation to the notices of potential adverse findings provided to them.

⁵ PWGSC reported on the implementation of these initiatives in its annual reports to Parliament on access to information in fiscal years 2009–2010, 2010–2011 and 2011–2012.

Findings and Recommendations

From the evidence gathered in the investigation, the Commissioner reached a number of findings of fact and conclusions that are set out in Appendix A, page 17. The main conclusions can be summarized as follows.

1. Interference with the processing of access requests

The Commissioner's first main conclusion is that the improper involvement of ministerial staff members in the processing of five of the eight access request files reviewed in depth by the OIC constituted interference with those files. This interference took the form of directions to the ATIP Directorate from the ministerial staff members, who had no authority under the Act, to sever or remove information that the delegated authority had decided to disclose.

Based on the findings of fact in Appendix A, the Commissioner concluded that there was interference in five files: A-2008-00519, A-2008-00588, AC-2009-00039, A-2009-00033 and A-2009-00169. A detailed account of the evidence in relation to the processing of those files begins on page 44.

The documentary and testimonial evidence obtained during the investigation led the Commissioner to conclude that three ministerial staff members— Mr. Sébastien Togneri, Mr. Marc Toupin and Ms. Jillian Andrews—interfered with the processing of requests. In each instance, the ministerial staff members testified that they were aware that they did not have delegated authority under the Act. The ministerial staff members were also aware that those with delegated authority had made a decision as to disclosure. Despite being aware of these facts, the ministerial staff members insisted on changes or modifications to the information ATIP officials had decided to disclose.

Specifically, the involvement of Mr. Togneri in the processing of five requests and his directions to members of the ATIP Directorate concerning these requests constituted interference with requesters' right of access under the Act (files A-2008-00519, A-2008-00588, AC-2009-00039, A-2009-00033 and A-2009-00169; see page 44).

The involvement of Mr. Toupin in the processing of a consultation request, his directions to members of the ATIP Directorate in that regard and his interactions with ministerial staff members at Health Canada constituted interference with the requester's right of access under the Act (file AC-2009-00039; see page 49).

Finally, the involvement of Ms. Andrews in the processing of an access request and her directions to members of the ATIP Directorate in that regard constituted interference with the requester's right of access under the Act (file A-2008-00519; see page 44).

In the above files, ministerial staff members directed the non-disclosure of information that was responsive to requests and that delegated authorities had decided to release.

2. Failure to comply with the statutory duty to assist

The Commissioner's second main conclusion is that PWGSC failed to comply with its legal obligation to assist requesters, as found in subsection 4(2.1) of the Act. In four of the eight requests reviewed in this investigation, PWGSC did not release information when it was ready to be disclosed.⁶ Instead, officials delayed responding, between six and 30 working days, in order to obtain the approval of ministerial staff members who did not have any delegated authority under the Act. In the view of the Commissioner, these actions were inconsistent with the duty to assist, even when the response was provided to the requester prior to the expiry of the extended due date.⁷

The obligation to provide timely access is a key element of the duty to assist. This obligation is not limited to the obligation to respond by the extended due date. The duty to provide timely access requires that institutions respond to a request when the response is ready—that is, when it has been approved by a delegated decision maker.

3. A culture of maintaining good relations with the Minister's Office

The Commissioner's third main conclusion is that ministerial staff exerted pressure over employees in the ATIP Directorate. The evidence demonstrates that employees were instructed to preserve good relations with the Minister's Office and that this, at times, came at the expense of these employees' responsibilities under the Act. This culture of pleasing the Minister's Office was exacerbated by the failure of senior officials to ensure that members of the Minister's Office followed proper communication protocols.

Guidance issued by the Privy Council Office in 2008, *Accountable Government: A Guide for Ministers and Ministers of State*, makes it clear that “exempt staff do not have authority to give direction to public servants, but they can ask for information or transmit the Minister's instructions, normally through the deputy minister.”⁸

In this investigation, the evidence demonstrated that ministerial staff members, without any delegated authority under the Act, became increasingly involved in the processing of access requests and gave instructions to employees in the ATIP Directorate. This was contrary to *Accountable Government*.

In May 2011, the Privy Council Office updated the guide to specify that “significant contact between the Minister's Office and departmental officials should take place through or with the knowledge of the Deputy Minister's Office.” Annex E of the revised guide emphasizes that ministerial staff members “do not have a role in departmental operations,” that they

⁶ A-2008-00519, AC-2009-00039, A-2009-00033 and A-2009-00169

⁷ In all of the requests, except the consultation request, PWGSC extended the 30-day legislative due date. This investigation did not review the validity of these extensions or make any determination as to whether the length of those extensions was reasonable.

⁸ *Accountable Government: A Guide for Ministers and Ministers of State, 2008* (<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=aarchives/ag-gr/2008/ag-gr-eng.htm#6.1>).

“have no legal basis for exercising the delegated authorities of Ministers” and that “they may not give direction to departmental officials on the discharge of their responsibilities.”⁹

In the view of the Commissioner, it is essential that ministerial staff fully understand the limitations of their role in the institution. Steps should be taken to ensure that all members of the Minister’s staff and PWGSC employees are fully aware of the role of the Minister’s staff and the limitations on that role.

PWGSC informed the OIC that there is no longer any contact between the ATIP office and ministerial staff. It also indicated that ministerial staff members no longer participate in the meetings that identify requests that might require communications products. These processes have been documented and were provided to the OIC in PWGSC’s representations made under section 35 of the Act.

4. Records held in the Minister’s Office

Another issue that arose as a result of this investigation concerns the retention and storage of information relating to departmental matters in the Minister’s Office. Some of the evidence obtained by the OIC was only retrieved as a result of a follow-up with the Minister’s Office on a production order issued to PWGSC that had sought, in part, electronic records between ministerial staff members. In response to the production order, PWGSC had refused to produce these records, claiming that they were not under PWGSC’s control but rather under the control of the Minister’s Office.

The Supreme Court of Canada’s decision in *Canada (Information Commissioner) v Canada (Minister of National Defence)* (2011 SCC 25) determined that records located in a Minister’s Office are nonetheless “under the control” of the related government institution when they concern departmental matters, and a senior official of the institution reasonably should be able to obtain a copy of the records upon request.

The records ultimately obtained from Minister Ambrose included electronic communications between former ministerial staff members at PWGSC and their counterparts at Health Canada about the processing of a consultation request. Accordingly, the Commissioner concluded that these communications contained information that enabled and documented decision making in support of the ATIP Directorate’s activities and mandate. The Commissioner also found that a copy of the records should have been stored in a departmental repository in the Minister’s Office, as required by governmental and ministerial policies, guidelines and directives, or been transferred to PWGSC to be put in its processing file.

Treasury Board’s *Policies for Ministers’ Offices* (2011) provides that “unless specifically exempted, ministers and their exempt staff are subject to Treasury Board policies and regulations.” Section 10.1 of this document requires that “Ministers should maintain separate

⁹ *Accountable Government: A Guide for Ministers and Ministers of State, 2011* (<http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=ag-gr/2011/ag-gr-eng.htm#E>).

information systems for Cabinet documents, institutional records, ministerial records and personal and political records.”

Institutions are bound by the Treasury Board document *Policy Framework for Information and Technology*.

The Treasury Board *Directive on Recordkeeping* (2009) provides numerous instructions aimed at “enable[ing] departments to create, acquire, capture, manage and protect the integrity of information resources of business value.” These are defined as any materials “created or acquired because they enable and document decision-making in support of programs, services and ongoing operations, and support departmental reporting, performance and accountability requirements.”

The 2011 version of *Accountable Government*, which applies to Ministers’ offices and exempt staff members, similarly acknowledges in Annex C that there are four categories of records kept in these offices, and requires records in these categories, including departmental records, to be filed separately.¹⁰

Finally, Library and Archives Canada’s *Guidelines for managing recorded information in a Minister’s Office* identifies the same four categories of records created and received in Minister’s Offices and provides guidance on how these records groups are to be managed. More specifically, the guidelines provide that “for quick reference to those official matters in which both the institution and the minister’s office are involved, the minister’s office may wish to maintain a complete or partial set of copies of institutional records.”

The position of PWGSC, communicated to the OIC, is that “in general we take the view that the Minister and her office do not generally create IRBV (information resources of business value), but when they do, they must transmit it to the department’s control for it to have any impact – or value.” The presumption is that unless information is communicated to the institution, records created in a Minister’s Office do not have any business value.

Based on the evidence obtained in this investigation, the policies noted above and the above-mentioned Supreme Court of Canada decision, the Commissioner does not agree with this approach.

It is the Commissioner’s view that the records provided to the OIC by Minister Ambrose in response to the third production order were of business value. Thus, the records should have been transferred to the appropriate corporate repository or stored in the Minister’s Office in accordance with the relevant legal and policy instruments.

5. Internal procedure to address possible breaches of section 67.1 of the Act

Finally, in the previous interference investigation involving PWGSC (OIC file 3209-00718) the Commissioner recommended that PWGSC establish internal procedures that specifically address possible breaches of section 67.1 of the Act and, among other things, that they

¹⁰ Compliance with *Accountable Government* forms part of the terms and conditions of the employment of ministerial staff.

outline measures for investigating and reporting suspected contraventions.¹¹ During this investigation, the OIC received a copy of PWGSC's *Procedure to Report a Potential Breach to Section 67.1 of the Access to Information Act*, and the Commissioner is of the view that it does not fully address the earlier recommendation. PWGSC's procedure meets the requirements of the Treasury Board *Policy on Access to Information*. However, given the findings of interference in the processing of requests and with requesters' right of access in this investigation and the similar findings of her previous investigation, the Commissioner is of the view that PWGSC should implement a more robust reporting system for possible breaches of section 67.1. This would include a requirement to notify the departmental security officer and where appropriate the relevant law enforcement agency.

Based on the foregoing and on the factual findings in Appendix A, the Commissioner concluded that this complaint was well founded.

In order to resolve the complaint, the Commissioner made the following recommendations to the Minister responsible for PWGSC, who is the head of the institution for the purposes of the Act. The Minister and the Deputy Minister provided responses to the recommendations.

Recommendation 1

Refer the five files in which the Commissioner has concluded there was interference to the appropriate investigative body.

PWGSC's response

- In July 2011, the Department received a response from the Commissioner of the RCMP which stated that your first report "contained no evidence that any person at PWGSC denied access to the document contrary to sub section 67.1 (1) of the *Access to Information Act*."
- Given the similarity of your two investigations in terms of the time period covered and the violations you have found to have occurred, it would not be a prudent use of the RCMP's limited resources to refer these current files to them.

¹¹ See recommendation 3 in the Commissioner's previous special report on interference, page 9 (http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2010-2011_interference-with-ati-interference-avec-ati_2.aspx#3).

Recommendation 2

Draft and post clear protocols guiding the interaction of ministerial staff with departmental access to information and privacy officials.

PWGSC's response

- The Department will prepare a protocol that makes it clear that exempt ministerial staff have no role in the administration of the *Act* and that they should not interact directly with departmental access to information and privacy officials.
- The protocol will also indicate that exempt staff in the office of the Minister of Public Works and Government Services can be informed of requests and records to be released, and can request communications materials in support of the Minister.
- It will be clear that these practices will in no way impact the information to be disclosed, nor cause delay in the timing of disclosures, as determined by the appropriate delegated authority.
- This protocol will be posted on the Department's intranet site, by the end of fiscal year 2013–2014.

Recommendation 3

Provide training to ministerial staff members about their role within the institution particularly in relation to the institution's obligations under the Act. Ensure that this training is given to all incoming ministerial staff members.

Minister's response

- My staff have already received training from departmental officials on the *Access to Information* and *Privacy Acts*, and are aware that they have no authority over the administration of information requests or their release, and that they are not to contact officials in the directorate responsible for the processing of information requests.
- My staff are aware that they can and should review records that are to be released, and that they can request communications materials from the appropriate departmental officials in order to ensure that I am able to respond to questions that may arise as a result of the release of a record.
- They are also aware that these preparations are not in any way to impact information to be disclosed, nor delay the timing of the release of a record, as determined by the appropriate departmental delegated authority.
- Any new staff members joining my office will receive such training within a month of their arrival.

Recommendation 4

Provide consistent training to access to information and privacy staff members about the role of ministerial staff under the Act. Ensure that this training is given to all incoming employees in the access to information and privacy directorate.

PWGSC's response

- The Department currently offers training (and consistently does so) to access to information and privacy officials emphasizing that ministerial staff have no authority under the Act to direct them or interfere with the processing or release of records.
- Training is also provided to incoming employees in the Access to Information and Privacy Directorate.

Recommendation 5

Establish and communicate a clear mechanism for employees in the access to information and privacy directorate to complain, without fear of reprisal, about interference by individuals who are not delegated under the Act.

PWGSC's response

- The PWGSC Procedure to Report a Potential Breach to Section 67.1 of the *Access to Information Act* is currently available on the departmental ATIP intranet site.
- The site also has a link to the *Public Servants Disclosure Protection Act*.
- The Department will take the additional step of including these references in Departmental Policy (DP) 002 on *Access to Information and Privacy Acts* by March 31, 2014.
- All PWGSC employees are regularly informed of the various recourse mechanisms available to them, to confidentially disclose without reprisal, or anonymously disclose, any breach of conduct, improper behaviour, or inappropriate interference in the discharge of their duties.

Recommendation 6

Amend the policy concerning possible breaches of section 67.1 of the Act to reflect the recommendations made in investigation 3209-00718.

PWGSC's response

- The Department will review its Procedures to Report a Potential Breach to Section 67.1 of the *Access to Information Act* and include a requirement for an official in receipt of a disclosure or of a report of a potential breach of Section 67.1, to inform the Assistant Deputy Minister, Departmental Oversight Branch, who will determine the appropriate measure.
- The modification to the Procedure will be completed by March 31, 2014.

Recommendation 7

Draft and post a policy on the duty to assist requesters under subsection 4(2.1) of the Act. Ensure that the policy distinguishes between the requirement to respond to requests within the legislative timeline under the Act and the broader duty to give timely access to information. This obligation includes a duty to respond as soon as possible. Training materials should be revised accordingly.

PWGSC's response

- The Department is fully compliant with Treasury Board of Canada Secretariat (TBS) policy and directives in that regard.
- The departmental process, which was updated in 2010 and shared with your office earlier this year, is consistent with the Treasury Board Directive on the Administration of the *Access to Information Act*.
- To make this more explicit, the Department will add a link to the TBS Principles for Assisting Requesters to our ATIP intranet site, and relevant guidance and material will be included in Departmental Policy (DP) 002.
- The Department will also revise its training materials to ensure it is clear that the duty to assist includes a duty to respond as soon as possible.
- These actions will be completed by March 31, 2014.

Recommendation 8

Ensure that all records of business value created by ministerial staff that relate to departmental matters are transferred to the appropriate corporate repository or are stored in a repository within the Minister's Office. That ministerial staff be reminded that the proper handling of information is a term and condition of employment for ministerial staff members and that measures to sanction non-compliance with proper information management practices be implemented.

Minister's response

- I have directed my ministerial staff to fully comply with the record keeping requirements set out for ministers and their staff in *Accountable Government, A Guide for Ministers and Ministers of State 2011*.
- In my office, institutional records are identified as such; as these are generally initiated or created by the department they are also found in the department's repositories.
- My staff are aware that the proper handling of information is a term and condition of their employment and that any breaches will be addressed as appropriate.

Conclusion

The evidence obtained in this investigation demonstrated that there was systemic interference by members of the Minister's Office staff at PWGSC during the period investigated. The evidence also demonstrated that senior departmental officials failed to address the interference in an appropriate manner consistent with section 73 of the Act and the requirements of *Accountable Government*. The result was a failure on the part of PWGSC to fulfill its duty to assist requesters. This failure led, in turn, to delay and lesser disclosure of government information.

The Commissioner is of the view that the steps PWGSC has taken to address seven of her eight recommendations will result in improvements to the processing of requests at PWGSC and serve to limit the ability of those without delegated authority from interfering with the processing of these requests.

Finally, this investigation again illustrates the issues the Commissioner identified in her previous special report to Parliament on interference in relation to the ability of the Commissioner to refer matters to law enforcement bodies for investigation.¹²

Under the current state of the law, ministerial offices are not "government institutions" for the purposes of the Act.¹³ Consequently, ministerial staff members cannot be considered directors, officers or employees of a government institution. Accordingly, the Commissioner was unable to exercise the discretion given to her by subsection 63(2) of the Act, which refers explicitly to "directors, officers or employees of a government institution." Thus, while there is, in the opinion of the Commissioner, some evidence of the commission of an offence, she was unable, at the time of the investigation, to disclose any information to the Attorney General of Canada.

Accordingly, the Commissioner was limited to making a recommendation that the Minister of PWGSC refer the matter to the appropriate investigative authority. Given the Minister's refusal to require a law enforcement investigation, the matter is at an end. Once again, this highlights the difficulties posed by the current state of the law, which excludes ministerial offices from the Act. This, along with other matters, will be addressed in the Commissioner's special report on the modernization of the *Access to Information Act*, which will be tabled in Parliament.

¹² The mandate of the Commissioner is to conduct administrative investigations into federal institutions' compliance with the Act and to make findings of fact. The OIC is not a court or tribunal, and the Commissioner has no authority to determine civil or criminal liability. In conducting an investigation, subsection 63(2) gives the Commissioner discretion to disclose information to the Attorney General when the Commissioner is of the opinion that there is evidence of the possible commission of an offence. Subsection 63(2) reads as follows:

(2) The Information Commissioner may disclose to the Attorney General of Canada information relating to the commission of an offence against a law of Canada or a province by a director, an officer or an employee of a government institution if, in the Commissioner's opinion, there is evidence of such an offence.

(2) Si, à son avis, il existe des éléments de preuve touchant la perpétration d'une infraction fédérale ou provinciale par un administrateur, un dirigeant ou un employé d'une institution fédérale, le Commissaire à l'information peut faire part au procureur général du Canada des renseignements qu'il détient à cet égard.

¹³ *Canada (Information Commissioner) v Canada (Minister of National Defence)* 2011 SCC 25.

Appendix A: Final Report of Facts and Findings

Background

On April 1, 2010, the House of Commons Standing Committee on Access to Information, Privacy and Ethics undertook a study of allegations of systemic political interference with access to information requests. In April and May 2010, the Committee summoned a number of witnesses from various federal departments in order to study these allegations.

On May 13, 2010, the Committee approved a motion that ordered Public Works and Government Services Canada (PWGSC) to provide the Committee with all email correspondence from July 2008 to January 19, 2010 between Mr. Sébastien Togneri, then Director of Parliamentary Affairs in the Minister's Office, and officials in the PWGSC Access to Information and Privacy (ATIP) Directorate, including the ATIP Director.¹ The motion also requested all email correspondence between Mr. Togneri and his then colleague, Ms. Jillian Andrews, and between Mr. Togneri and Ms. Isabelle Bouchard, then a member of the Prime Minister's Office staff.

In September 2010, PWGSC Minister, the Honourable Rona Ambrose, responded to the Committee motion and provided the Clerk of the Committee with the requested correspondence between members of her predecessor's staff and departmental officials. To the Commissioner's knowledge, the requested records of correspondence between members of the then PWGSC Minister's staff and of the Prime Minister's Office staff were not provided to the Committee.

On October 1, 2010, then PWGSC Minister Rona Ambrose, on behalf of former Minister Paradis, provided the same correspondence to the Information Commissioner that she gave the Committee. Upon review, the Commissioner was satisfied that reasonable grounds existed, pursuant to subsection 30(3) of the *Access to Information Act* (the Act), to investigate whether there was interference in the processing and responses to access to information and consultation requests or in the requesting or obtaining of records during the period of July 22, 2008, and January 19, 2010.

On October 8, 2010, the Commissioner initiated a complaint against PWGSC and issued a Summary of Complaint to the department wherein she identified eight access and consultation requests that she would investigate.² She subsequently sent two amended summaries to PWGSC, which included an additional seven requests to be investigated. In total, 15 requests were examined by the Commissioner.

¹ Motion text: That the committee orders the Department of Public Works and Government Services Canada to provide it with all email correspondence from July 2008 to January 19, 2010 between Sébastien Togneri and officials who work or worked within the Access to Information Branch of Public Works and Government Services Canada. The committee also orders all email correspondence from July 2008 to January 19, 2010 between Sébastien Togneri and Tom Makichuk, all email correspondence from July 2008 to January 19, 2010 between Sébastien Togneri and Jillian Andrews, and all email correspondence from July 2008 to January 19, 2010 between Sébastien Togneri and Isabelle Bouchard. And requests that said material be delivered to the committee within 5 days.

² For the purposes of this report, the term "request" or "requests" includes both access requests received by PWGSC and consultation requests from other government institutions.

The investigation

A preliminary assessment was done of the 15 files originally identified for investigation. The following eight files were selected for more in-depth investigation.

1. **File A-2008-00588** (March 26, 2009): An access request for copies of four briefing notes to the Minister of PWGSC, one of which dealt with a public opinion research project. [translation]
2. **File A-2008-00519** (February 20, 2009): An access request for all records pertaining to changes in PWGSC's daily activities in preparation for and during the visit of the American President to Canada. [translation]
3. **File A-2009-00169** (June 24, 2009): An access request for copies of specific Question Period (QP) cards prepared for the PWGSC Minister, one of which concerned the issue of visible minorities. [translation]
4. **File A-2009-00042** (April 21, 2009): An access request for information on financial disbursements by the Canadian Government on office furniture through the aboriginal set aside funds in 2007-2008.
5. **File A-2009-00033** (April 27, 2009): An access request for a list of all QP notes created for the Minister from April 13 to April 27, 2009.
6. **File AC-2009-00039** (June 16, 2009): A consultation request from Health Canada pertaining to an access request on the completed Affiliations and Interests Declaration Form for Chrysolite [sic] Expert Panel members.
7. **File AC-2008-00049** (June 6, 2008): A consultation request from the Department of National Defence pertaining to an access request for briefing notes to the Minister on the status of the Cyclone Helicopter Procurement and/or problems with the contractor.
8. **File AC-2009-00056** (July 22, 2009): A consultation request from Library and Archives Canada regarding written reports provided by the Independent Review Monitor appointed to oversee the request for proposals process for the Portrait Gallery of Canada.

Summaries of the processing of five requests (namely, A-2008-00519, A-2008-00588, AC-2009-00039, A-2009-00033, and A-2009-00169) that form the basis of this report begin on page 44, below.

In the context of this investigation, the Information Commissioner determined the procedure to be followed in the performance of her duties and used her formal powers under section 36 of the Act.

A preliminary assessment was done of the 15 files originally identified during the course of our investigation. The Commissioner chose to further investigate the above-noted eight files

after analyzing additional records she received from PWGSC in response to the three Orders for the Production of Records that she issued under to sections 34, 36 and 59 of the Act.³

The first and second production orders, issued on November 19, 2010, and December 2, 2010, respectively, sought information relating to the 15 files at issue. PWGSC complied with these production orders.

The third production order was issued on December 23, 2010, and sought, among other things, all records of communications to and from the three members of Minister Paradis' staff involved in this investigation. Records of communication were defined as emails with attachments, back-up emails, and PIN-to-PIN messages. On January 7, 2011, PWGSC responded that it would not produce, as requested, the records of communications to and from the ministerial staff members because it considered these communications not under its control, but rather under the control of the Minister.

The Commissioner wrote to Minister, Rona Ambrose on January 12, 2011, requesting the records identified in her third production order that the department indicated it would not provide. On January 26, 2011, Minister Ambrose informed the Commissioner that her office would assist in providing the requested records. These records were provided on May 9, 2011.

In order to confirm that the Minister provided the Commissioner with everything referred to in the third production order, the Assistant Commissioner issued a letter to the Minister's Chief of Staff on July 13, 2011, requesting that he sign an affidavit to that effect. On August 22, 2011, the Minister's Chief of Staff provided the requested affidavit.

In the course of the Commissioner's investigation, 17 witnesses were summoned to testify under oath. Their names and the positions they held at the time the requests were processed, are as follows:

1. Caroline Weber, Assistant Deputy Minister, Corporate Services, Policy and Communications Branch;
2. Jacqueline Jodoin, Acting Director General, Executive Secretariat, Corporate Services, Policy and Communications Branch;
3. Sarah Paquet, Senior General Counsel
4. Pierre-Marc Mongeau, Assistant Deputy Minister, Parliamentary Precinct Branch;
5. Sylvie Séguin-Brant, Director General, Executive Secretariat, Corporate Services, Policy and Communications Branch;
6. Tom Makichuk, Director, Access to Information and Privacy (ATIP) Directorate;
7. Katia Dalpé-Charron, Strategic Advisor, Deputy Minister's Office;
8. Sheriff Abdou, Departmental Assistant, Office of the Minister;
9. Rachelle Delage, ATIP Chief, ATIP Directorate;
10. Julie Lafrance, Acting Manager, ATIP Directorate;

³ Of these eight files, five of them led to the findings of this investigation and are discussed throughout this report. Summaries of the facts in these five files (namely, A-2008-00519; A-2008-00588; AC-2009-00039; A-2009-00033; and A-2009-00169) begin on page 44.

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11. Sylvie Lepage, Acting Manager, ATIP Directorate;
 12. William Hulme, Project Executive/Lead Negotiator/Major Projects, Real Property Branch;
 13. H el ene Paquette, Administrative Assistant, PWGSC Minister’s Office;
 14. Louise Benoit, ATIP Consultant;
 15. S ebastien Togneri, Director of Parliamentary Affairs, PWGSC Minister’s Office;
 16. Jillian Andrews, Special Assistant, PWGSC Minister’s Office; and
 17. Marc Toupin, Policy Advisor, PWGSC Minister’s Office.

Confidentiality orders were issued to protect the integrity of the investigation. The witnesses were advised of their right to retain counsel of their choice. Sixteen of the witnesses chose to be represented by counsel. The witnesses’ testimony was transcribed by a court reporter. Witnesses were also provided with the opportunity to review the transcripts of their testimony. Certain witnesses received notices of potential adverse findings and were given an opportunity to present further evidence and/or representations prior to the finalization of the Preliminary Report of Facts and Findings. Representations were received and considered by the Office of the Information Commissioner (OIC).

All witnesses were then given an opportunity to provide further evidence and/or representations in relation to the draft preliminary report. Representations that were received were considered in the preparation of the draft preliminary report.

The Assistant Commissioner wrote to PWGSC’s Deputy Minister to provide PWGSC with an opportunity to make representations under subsection 35(2) of the Act with respect to the preliminary report. She also asked for representations regarding other issues that arose during the investigation. The Deputy Minister provided representations on behalf of the Department. Representations were received and considered by the OIC. In her representations, the Deputy Minister made no correction to or comment on the facts and conclusions set out in the preliminary report provided to PWGSC. Accordingly, that report now constitutes the Commissioner’s Final Report of Fact and Findings.

Access to information and consultation requests and the PWGSC ATIP Directorate

The ATIP Directorate at PWGSC is responsible for administering the *Access to Information Act* and managing all activities involving access and consultation requests received by PWGSC. Until June 2011, the ATIP Directorate was part of the Corporate Services, Policy and Communications Branch, at which time the branch was renamed the Corporate Services and Strategic Policy Branch to reflect the fact that the branch’s communications function was removed.

In 2009, a transition occurred at the senior levels of the Corporate Services, Policy and Communications Branch. In July and August 2009, the positions of Director General, Executive Secretariat, and ATIP Director were filled on a permanent basis. Prior to that, and for the remainder of that year, management positions within the ATIP Directorate were often acting appointments.

During the time period under investigation, the PWGSC Minister, the Honourable Christian Paradis, delegated his authority to make decisions regarding access and consultation requests to the Deputy Minister of PWGSC, the Director General, Executive Secretariat, the ATIP Director, and some managers within the ATIP Directorate.

The departmental officials interviewed in the course of this investigation were all aware that the delegated authority for access matters rested with the ATIP Directorate. One senior official stated that she did not exercise her delegation while acting in the position of Director General for the branch. Another senior official, the ATIP Director, testified that he was unaware, when the access and consultation requests at issue were being processed, that members of Minister Paradis' staff, in particular the Director of Parliamentary Affairs, did not also have delegated authority with respect to access matters.

Members of the Minister's staff involved in this investigation all testified that they knew they did not have delegated authority with respect to access matters and that they were also aware that the ATIP Directorate was the decision-making authority.

Weekly access meetings and “tagging” of access and consultation requests for review

The purpose of these meetings was to identify access and consultation requests needing communication products, such as media lines. The ATIP Directorate solicited the input of meeting participants to identify those requests that would undergo review by senior management prior to the requested information being released. Those requests were designated, or “tagged,” as some witnesses stated, either “high profile” or “interesting.”

Prior to Minister Paradis' appointment in 2008, only representatives from PWGSC's ATIP Directorate, its Communications Directorate, the Deputy Minister's Office and, occasionally, offices of primary interest (OPI) attended the weekly access meetings. Members of the Minister's staff began attending these meetings when Minister Paradis was appointed.

In the time period under investigation, the Deputy Minister's Strategic Advisor attended the weekly access meetings on behalf of the Deputy Minister's Office. The Director of Parliamentary Affairs attended on behalf of the Minister's Office. Both officials played an active role in identifying requests that would be reviewed by senior management. The Deputy Minister's Strategic Advisor, for her part, would identify requests for review when the subject matter of the request required media lines or other communication products. The evidence showed that as a general rule, the Deputy Minister's Office did not want to review requests for which records were previously disclosed, since a communications strategy already existed.

The evidence demonstrated that the Director of Parliamentary Affairs would identify requests for review based on the subject matter and source of requests. He testified that he wanted to see requests from the media, political parties or the public (i.e. sources) and requests pertaining to issues management (i.e. subject). In cases in which information that was the subject of the request had been previously released, he would ask to review requests made by the media or a political party.

The evidence also shows that, during the time period under investigation, when the source of a request was not identified, such as with a consultation request, the ATIP Directorate attempted to obtain this information. Witnesses testified that the ATIP Directorate generally called consulting departments to obtain the source of requests.

Beginning in the fall of 2009, the Director General, Executive Secretariat (of the Corporate Services, Policy and Communications Branch), and/or other PWGSC senior managers started attending the weekly access meetings (see “Measures taken by a manager with delegated authority to end the direct interaction between ATIP officials and the Minister’s Office,” page 41, below).

Review of requests by PWGSC senior management

During the time period under investigation, access and consultation requests designated as “interesting” or “high profile” during weekly access meetings underwent a review process by senior management, occasionally referred to by departmental witnesses as the “purple folder process.” This term stemmed from the colour of the file folder on which the Notice of Release or Notice of Reply was attached and in which the responsive records and the proposed response letter to requesters were contained.

The Notice of Release or Notice of Reply read as follows:

Access to Information Request – Interesting – High Profile:

1) Enclosed, **for your information**, is a copy of the proposed letter of final reply along with the records.

2) **PLEASE REVIEW THE DOCUMENT TO ENSURE THAT YOU ARE AWARE OF AND PREPARED FOR ANY POTENTIAL IMPACT ON THE DEPARTMENT THAT MAY RESULT FROM THE DISCLOSURE OF THIS MATERIAL.**

3) Note that the ATIP Directorate intends to respond to this request 6 working days after the date of this notice”.⁴ [emphasis original]

In the middle of the notice, the ATIP Directorate set out its decision regarding disclosure of the requested records, in a section titled “ATIP Directorate’s decision on the disclosure of records.”

For the requests identified for review, once the ATIP Directorate completed the notice and signed it to indicate its decision to release the information, the folder was sent to the appropriate Assistant Deputy Minister (OPI) for his or her signature. From there, a representative from the Deputy Minister’s Office signed the form. Lastly, the folder was sent to a representative from the Minister’s Office for signature. Obtaining signatures confirmed

⁴ The OIC received a hard copy of the notice during the investigation. For the purposes of this report, we refer to PWGSC’s practice or process of disclosing information responsive to requests within six working days after the date of the Notice of Release or Notice of Reply as its “zero-tolerance policy.”

that the various levels of review were aware of forthcoming disclosures and could prepare themselves accordingly.

Since as early as 1995, representatives from the Deputy Minister's Office and Minister's Office were involved in the process of signing notices for the requests identified for review. The ATIP Directorate would await their signatures before releasing the requested information. It did so even though it had the delegated authority to release information without these signatures.

Minister's office signature on a Notice of Release or Notice of Reply

PWGSC officials testified that both before Minister Paradis' arrival as PWGSC Minister and during his time there, they could not recall a single instance when information was disclosed before obtaining a signature from the Minister's Office.

The departmental officials interviewed as part of the investigation testified that awaiting a signature on the Notice of Release or Notice of Reply by the Minister's Office is what led to delays in releasing information. Officials reported that the ATIP Directorate would not release information until a signature from the Minister's Office was obtained, even when doing so resulted in PWGSC failing to comply with its zero-tolerance policy that was implemented to minimize delays. The documentary evidence obtained in the course of this investigation shows that information was released only after the Minister's Office signed the Notice of Release or Notice of Reply, which one official described as "the blessing." [translation] Obtaining a signature was considered as an approval of sorts for information to be released.

For their part, ministerial staff members testified that they could not recall any situation in which information was released before the Minister's Office signed the Notice of Release or Notice of Reply. One ministerial staff member stated, "I'm not aware of a situation where they [the ATIP Directorate] would have released something without the Minister's Office knowing about it."

Senior departmental officials and ATIP officials who were interviewed agreed that the Notice of Release or Notice of Reply served as an informational document only.

Both the Director of Parliamentary Affairs and the Special Assistant in the Minister's Office agreed that the notices were not a solicitation for input from the Minister's Office or designed to solicit their questions about the ATIP Directorate's decision to release information. However, the Director of Parliamentary Affairs testified that it was his understanding that signing the notices was "to approve the release of the access to information request." When questioned further about this statement, he explained that the process of obtaining a signature on the notices "was here when I started." Ministerial staff members later confirmed the Director of Parliamentary Affairs' statement by indicating that requiring signatures on the notices indicated that the Minister's Office was called upon by the department to "approve" the release, and that this was a pre-existing system created and operated by the department.

PWGSC's zero-tolerance policy or practice

In July 2008, what was commonly called the “zero-tolerance policy” was implemented at PWGSC to minimize delays in releasing information reviewed by all levels of senior management. The policy, which was communicated in the Notice of Release or Notice of Reply, required that information be released six working days after the date of the notice. In practical terms, this meant that each level of senior management had two working days to review the information and to sign the notice. The information was to be released within six working days, even if the time had expired to obtain all the signatures.

In the course of this investigation, witnesses questioned whether the zero-tolerance policy was in fact a “policy.” One departmental witness testified that the zero-tolerance policy was more of a departmental “practice” to disclose information six working days after the ATIP Directorate signed the notice. This same official testified that he had never actually seen the policy. His testimony reflects the evidence given by another senior official, who stated being unaware that such a policy existed during the period of time under investigation. Our office requested a copy of the zero-tolerance policy to confirm its existence.

On June 23, 2011, PWGSC informed us that “no such document exists.”⁵

The zero-tolerance policy was to have been formally implemented in 2008 in response to the OIC report card on PWGSC, published in our special report to Parliament, *2007–2008 Report Cards on Systemic Issues Affecting Access to Information in Canada*.⁶ PWGSC's action plan identified procedures that were intended to ensure no delays would occur in the processing of requests identified for review. The zero-tolerance policy was also to be incorporated in PWGSC's policy on ATIP in March 2009 and is reflected in the wording of the Notice of Release or Notice of Reply.

The evidence shows that the zero-tolerance policy was not always followed at PWGSC. Of the five files that were investigated in more detail (and are summarized starting on page 44), four responses were not released on time by the ATIP Directorate because the Notice of Release or Notice of Reply had not been signed by all levels of review within the six days mandated by PWGSC's zero-tolerance policy. One notice was signed late by the Deputy Minister's Office and the four other files were signed late by the Minister's Office.

The evidence also shows that in instances in which the file under review was returned to the ATIP Directorate with the Notice of Release or Notice of Reply duly signed, the Directorate still did not release the requested information when an issue raised by the Minister's Office had not been resolved. In four of the files that were investigated, the ATIP Directorate released the information only after an issue with the Minister's Office was resolved, even though the Notice of Release or Notice of Reply had already been signed and returned to the

⁵ Moreover, the OIC was advised that PWGSC's zero-tolerance policy of responding to requests six working days after the date of the Notice of Release or Notice of Reply was replaced, in 2010, with a new process for senior management review, which was outlined in PWGSC's response to our previous interference investigation in which it was involved. Under the amended process, PWGSC indicates that senior management has a total of four days to review proposed disclosure packages (as opposed to six days under the previous policy). PWGSC indicates that, after four days, the requested information is disclosed, “without exception,” and that the process is discussed at the senior management table to preempt any “drift.”

⁶ http://www.oic-ci.gc.ca/eng/rp-pr_spe-rep_rap-spe_rep-car_fic-ren_2007-2008.aspx

ATIP Directorate. This delayed the responses to requests, even though the ATIP Directorate had already decided that the information should be released (see “ATIP Directorate’s approach to dealing with ministerial staff members on access-related matters,” page 38, below).

Monitoring of access and consultation requests in the review process

During the time period under investigation, the ATIP Directorate conducted regular follow-ups of access and consultation requests that were part of the review process. Several mechanisms were in place to disclose the information to the requester six working days after the date of the Notice of Release or Notice of Reply, including the preparation of weekly status reports tracking the location of files in the review process. These reports, which indicated the location of files at each stage of the review process, were electronically distributed to ATIP officials, departmental senior managers, members of the Minister’s staff and others.

Another monitoring mechanism was the weekly access meeting during which ATIP officials conducted verbal follow-ups of files in the review process. In addition, ATIP officials contacted departmental officials by phone and email to locate files in the review process. The documentary evidence shows that the ATIP Directorate conducted regular follow-ups of access and consultation files in the review process.

Minister’s Office and members of the Minister’s staff

Review of access and consultation requests by the Minister’s Office

Requests that were identified for review at weekly access meetings during the time period under investigation were sent to the Minister’s Office as the last step in the review process. One departmental official and two members of the Minister’s staff testified that the Director of Parliamentary Affairs, who also confirmed this fact, had been responsible for access-related matters within the Minister’s Office since his arrival to PWGSC in July 2008.

The Director of Parliamentary Affairs testified that he received access files on behalf of the Minister’s Office and assigned them to his colleagues, who reviewed them based on their portfolio. The other ministerial staff members interviewed by the OIC confirmed this testimony. They also explained that they reviewed access and consultation requests in order to identify, manage, prepare and inform the Minister so that he could respond to the media.

When an access or consultation file was given to a member of the Minister’s staff, he or she would conduct a review of the information that the ATIP Directorate had decided to disclose. The evidence shows that, in some cases, ministerial staff members would advise the Director of Parliamentary Affairs that the information should not be released and gave their reasons for believing that (see, for example, file A-2008-00519, page 44). In those cases, the Director of Parliamentary Affairs gave directions to the ATIP Directorate that reflected his colleagues’ advice.

The evidence obtained in the course of this investigation shows that, as a general rule, members of the Minister's staff would return the file to the Director of Parliamentary Affairs when they were satisfied or comfortable with the information the ATIP Directorate had decided to release. This signalled to the Director that he could sign the Notice of Release or Notice of Reply on behalf of the Minister's Office. The Director of Parliamentary Affairs confirmed that he would return files to the ATIP Directorate after his colleagues had reviewed them and he had signed the notices.

The Director of Parliamentary Affairs testified that he signed the notices on behalf of the Minister's Office because that was the process that was in place when he arrived at PWGSC.

The Director of Parliamentary Affairs relied on the advice of his colleagues in three separate cases among the files that were investigated by the OIC and in which he signed the Notice of Release or Notice of Reply, yet he acknowledged that he was unfamiliar with the subject matter. With regard to these files, his colleagues indicated that either the scope of the request should be narrowed or that exemptions should be applied (see files A-2008-00519, page 44, A-2008-00588, page 47, and AC-2009-00039, page 49).

With regard to the Health Canada consultation file pertaining to Chrysotile (file AC-2009-00039, page 49), the Director of Parliamentary Affairs signed the Notice of Reply on behalf of the Minister's Office despite not having reviewed the documents. When questioned on this file, he acknowledged that he did not understand the nature of the documents received from the consulting department. Despite that, he included a direction to the ATIP Directorate to "exclude" some of the information his colleague, who had reviewed the file, advised not be disclosed. The Director of Parliamentary Affairs testified that he signed the Notice of Reply, even though he and his colleague the Policy Advisor did not discuss the information with which the Policy Advisor had concerns.

With regard to the request for information concerning the American President's visit to Canada (file A-2008-00519, page 44), the Director of Parliamentary Affairs testified that he signed the Notice of Release without reviewing the file. The OIC was informed by the Director of Parliamentary Affairs that his colleague in the Minister's Office, who had reviewed the request, did not think the information the ATIP Directorate had decided to release was relevant. When questioned on the email he sent to the ATIP Directorate in which he stated that only 1 of the 132 pages was relevant and should be released, the Director of Parliamentary Affairs testified that he was presenting his colleague's views on the matter. He also testified that he relied on his colleague and that it was based on her position that he wrote the email to the ATIP Directorate.

Finally, with regard to the request for a public opinion research briefing note (see file A-2008-00588, page 47), the Director of Parliamentary Affairs signed the Notice of Release on behalf of the Minister's Office. Included in the file folder returned to the ATIP Directorate were three pink post-it notes affixed to the briefing note on the public opinion research project. The post-it notes referenced monetary figures that had been circled in red ink on the briefing note. The Director of Parliamentary Affairs acknowledged writing the comments on the three post-it notes but did not think he was the one who had circled the monetary figures.

He testified knowing very little about public opinion research and that he did not know why he had written those comments.

The administrative process in the Minister's Office for handling requests

The evidence gathered in the course of this investigation shows that, during the time period at issue, once the Notice of Release or Notice of Reply had been signed by the Director of Parliamentary Affairs, the Administrative Assistant in his office, who was a departmental employee, would coordinate the receipt and return of purple folders to the department. The Administrative Assistant described her role as Administrative Assistant to the Director of Parliamentary Affairs. It is noted that, during her testimony, the Administrative Assistant referred, on four separate occasions, to the Director of Parliamentary Affairs' role in "approving" access files sent to the Minister's Office for review. For their part, ministerial staff members could not recall the exact nature of the Administrative Assistant's responsibilities, other than that she was a departmental employee who offered administrative support to the Communications team in the Minister's Office. The evidence also shows that the Administrative Assistant would send an email to departmental and ATIP officials that the notice had been signed and that the file was being returned to the ATIP Directorate.

These emails generally read, "Please take note that the above mentioned ATIP Request has been signed and returned to the ATIP Office." This type of email was sent to the ATIP Directorate in four of the eight files examined by the OIC.

In one file (file A-2008-00519, page 44), the Administrative Assistant sent a different type of email indicating that the ATIP request was being returned to the Directorate "*for modification.*" [emphasis original] When questioned on her use of the words "for modification," the Administrative Assistant explained that she had used the same words the Director of Parliamentary Affairs had written and underlined on a post-it note he included with the purple file he returned to her. When questioned on this file, the Director of Parliamentary Affairs testified that he could not recall the details surrounding his review of this request. He testified that he did not instruct the Administrative Assistant to send the "for modification" email or any email on the status of access requests.

Access-related training given to ministerial staff members

The Strategic Advisor to the Deputy Minister testified that PWGSC would give training on access matters to new ministerial staff members. This training was given by the Deputy Minister's Office and the ATIP Directorate, and included a PowerPoint presentation that was generally given by the ATIP Chief.

The evidence shows that the members of the Minister's staff involved in this investigation all received training on access matters, which was approximately one hour in length. Two ministerial staff members attended the same training session on November 7, 2008, which was held shortly after they arrived in the PWGSC Minister's Office.

The PowerPoint presentation, "Overview of the *Access to Information Act*," reviewed section 67.1 of the Act, the roles and responsibilities of the ATIP Directorate, PWGSC managers and employees, the timelines allocated for the processing of access requests, the

delegation instrument, the duty to assist provision, and the processing of records in the Minister's Office, among other items. When asked whether the training involved discussions about the fact that ministerial staff members did not have delegated authority for access matters, the ATIP official who delivered the presentation replied, "No, just mentioning that we were providing a central processing of requests and the decisions were made by our office; that was made clear. But not stating that they had no authority, no."

One ministerial staff member testified that training participants were given a general overview of access matters within the department. This staff member could not recall, however, whether the training discussed exemptions. However, he did recall that there was a discussion about what kind of information in the Minister's Office was "atip-able." When asked what he meant by "atip-able," he explained that this referred to information in the Minister's Office that was subject to the Act. His testimony was supported by another member of the Minister's staff, who mentioned that the concept of "atip-able" information was broached at a similar training session on the Act.

The Director of Parliamentary Affairs testified that during the training session he and his colleagues in the Minister's Office were briefed on their role in reviewing information and the role of the public service in releasing information to the public. When asked what ministerial staff members were told concerning their role in reviewing information, the Director of Parliamentary Affairs testified that they were told they could review information going out and if they saw any information they felt should not be released, that they could submit their comments to ATIP officials, who would review their comments and make the final decision. He explained that he was also told that "they preferred it if we included a section of the Act with anything that we thought should be taken out or included for that matter." Finally, he explained that he and his colleagues were told during the training session that the ATIP Directorate preferred having the signature of the Minister's Office on the notice before releasing information. The Director of Parliamentary Affairs testified that he could not recall who told him that he could submit comments about the information he thought should not be released and the applicable exemption.

Two departmental officials, one who attended the training session on November 7, 2008, and the other who delivered the training, testified that members of the Minister's Office were not told during training that they could submit to the ATIP Directorate exemptions they felt should be applied to the records. They explained, however, that it was possible that ministerial staff members may have asked a question about their role if they saw something when reviewing access files. However, the official who delivered the training testified that she did not tell ministerial staff members that they could cite sections of the Act that they felt could apply. When asked whether someone else may have given this information during the ATIP training sessions, she explained that she was the only person who delivered training in the fall of 2008 and that such information did not come from the ATIP Directorate.

The OIC reviewed the PowerPoint presentation for the training session on November 7, 2008. One slide mentioned the role and responsibilities of the ATIP Directorate, with the first bullet reading, "Full authority under the Acts (ATI and Privacy Act) delegated by the Minister." Slides 24 to 26 address the best practices for ministerial

staff, which included segregating institutional records in the Minister's Office and the handling of sensitive information. None of the slides in the presentation indicate that the Minister's Office could comment on, or review, access or consultation requests. Slide 23 reads that the responsibilities of managers and employees are to "conduct a preliminary review of records and advise the ATIP Directorate on implications of disclosure and formulating appropriate recommendations."

Based on the evidence of the departmental officials who gave the training and a review of the training material, the Commissioner is not prepared to accept that departmental officials told the Director of Parliamentary Affairs during the training session that he was entitled to request that information be withheld during the processing of an access request.

The Deputy Minister's Strategic Advisor, who coordinated the training, testified that, in addition to this training, ministerial staff members were told that they could attend other training sessions for a "refresher," when necessary.

The testimonial evidence given during the investigation also shows that the ATIP Directorate and the Deputy Minister's Strategic Advisor played an educational role when ministerial staff members were involved in access-related matters. The Strategic Advisor stated that her responsibilities as liaison officer included an informal educational function. She explained that she frequently challenged and educated members of the Minister's staff when they provided their interpretation of the Act to the ATIP Directorate. She gave examples of two files during which she called ministerial staff members in this regard (files A-2008-00519, page 44, and AC-2009-00039, page 49).

Generally, when the notices were signed by all levels of review, they were returned to the ATIP Directorate by way of the Deputy Minister's Office, at which point the Strategic Advisor would become aware of any concern or direction from the Minister's Office. The Strategic Advisor testified that when this happened, she would challenge ministerial staff members and explain to them that they could raise their concerns should they come across something, but that the ultimate decision rested with the ATIP Directorate. With respect to access meetings, the Deputy Minister's Strategic Advisor testified that she told the Director of Parliamentary Affairs several times that, as ministerial staff members were reviewing files, they could make a suggestion or recommendation to the ATIP Directorate but not necessarily dictate in that regard. She testified that she reiterated verbally on many occasions that the ATIP Directorate had the decision-making authority with respect to access matters.

Duties and role of ministerial staff members in access matters

From July 22, 2008, to January 19, 2010, two main policy documents outlined the role of ministerial staff members with regard to access matters. The first was Treasury Board's *Policies and Guidelines for Ministers' Offices* (2008). The second was the Privy Council Office's *Accountable Government: A Guide for Ministers and Ministers of State* (2008). The latter document provided that compliance with *Accountable Government* was a term and condition of appointment for public office holders (including ministers and members of their staff).

The Minister's Director of Parliamentary Affairs testified that he was aware of *Accountable Government* and agreed that he was bound by the principles it contained. Another ministerial staff member was not aware of the document but agreed that it was not ministerial staff members' role to give direction to public servants, as per *Accountable Government*.

Increasing involvement by ministerial staff members in access matters

The testimony established that prior to Minister Paradis' appointment in the summer of 2008, ministerial staff members at PWGSC were not as involved in access matters. Departmental officials testified that the ministerial staff members' level of involvement increased upon Minister Paradis' appointment, with his staff members starting to attend weekly access meetings in the fall of 2008 and showing increased interest in access matters.

The evidence points to an increase in ministerial staff members' involvement in the spring/summer of 2009, when they started including statements in the files they returned to the ATIP Directorate. Those statements were generally about how the exemptions should be applied and how the scope of the request should be narrowed. There were two ways in which ministerial staff members went about doing so. The first was by writing directly on the responsive records and returning the file to the ATIP Directorate (file A-2009-00033, page 53). The second was by affixing handwritten notes (e.g. post-it notes) directly on the responsive records or writing directly on the Notice of Release or Notice of Reply (files A-2008-00519, page 44, AC-2009-00039, page 49, A-2009-00169, page 55, and A-2008-00588, page 47).

The evidence also shows that in 2009 members of the Minister's staff began communicating directly with the ATIP Directorate via email concerning access and consultation requests. If they questioned the release of certain information or if the Notice of Release or Notice of Reply was signed with comments, the Administrative Assistant that provided support to the Director of Parliamentary Affairs would send an email to departmental and ATIP officials, and copy ministerial staff members, all of whom were on a distribution list, to inform them of such. From there, direct communications between the department and the Minister's Office would occur.

The Administrative Assistant in the Minister's Office testified that she did not create the distribution list but that she was asked to send her emails to the people named on the list. The Director of Parliamentary Affairs testified that he did not instruct the Administrative Assistant to send such emails (see "The administrative process in the Minister's Office for handling requests," page 27).

The evidence shows that the Director of Parliamentary Affairs, who was copied on the emails, responded to these emails even though they were addressed to ATIP officials. The evidence also shows that, at times, the Director of Parliamentary Affairs brought his colleagues in the Minister's Office into the exchange and opened the lines of communication between his colleagues and departmental staff. Over time, this led to ministerial staff members engaging in direct contact with ATIP officials by email or telephone to discuss access files. An ATIP official testified that direct contact between ministerial staff members and ATIP officials had not occurred prior to the arrival of then PWGSC Minister Paradis.

This official testified as follows: “We were never in direct contact with exempt staff before. It was peculiar.” [translation]

Communication between the Minister’s Office and ATIP officials

Established lines of communication

Although the evidence shows that ministerial staff members started communicating directly with ATIP officials in the spring/summer of 2009, there was already a procedure in place at PWGSC in terms of communications within the department. The purpose of this procedure was to ensure that communications between departmental officials, including ATIP officials, and ministerial staff members went through the Deputy Minister’s Office. This procedure was in keeping with *Accountable Government* (2008), which addressed interactions between departmental officials and ministers’ offices.

Inquiries coming from the Minister’s Office were supposed to go through the Deputy Minister’s Office, usually via the Deputy Minister’s Strategic Advisor. An ATIP official testified that the responsibilities of the Strategic Advisor included liaising between the Minister’s Office and the Corporate Services, Policy and Communications Branch on access-related matters. This testimony was confirmed by the Strategic Advisor herself, who testified that part of her role was to liaise with the Minister’s Office and the Corporate Services, Policy and Communications Branch, which included the ATIP Directorate. She explained that she would receive documents, questions or issues from the Minister’s Office or the views of ministerial staff concerning access requests, and transmitted this information to the ATIP Directorate.

The Strategic Advisor testified, however, that despite a procedure being in place, she was aware of instances in which communications between the Minister’s Office and the ATIP officials did not go through her. She also explained that her involvement in access and consultation files generally ceased after the file was returned to the ATIP Directorate from the Minister’s Office. This sometimes meant she was not aware of the direct communications between members of the Minister’s staff and ATIP officials once the file was returned to the ATIP Directorate.

The Director of Parliamentary Affairs testified that it was usual for members of the Minister’s staff to go through the Deputy Minister’s Office to communicate with the department. The Minister’s Special Assistant also confirmed that the usual process was for communication to take place via the Deputy Minister’s Office.

ATIP officials generally respected the established communications procedure. For the most part, they followed up on files in the Minister’s Office via the Deputy Minister’s Strategic Advisor. When required, they would also ask her for clarification on directions given by members of the Minister’s staff when requests were returned from the Minister’s Office. The Deputy Minister’s Strategic Advisor explained that, given her role as liaison officer and the Director of Parliamentary Affairs’ responsibility for access-related issues within the Minister’s Office, she generally dealt with him on these matters.

At times, however, ATIP officials directly emailed the Administrative Assistant, a departmental official in the Minister's Office, for updates on requests in the review process. The evidence also shows one instance in which an ATIP official did not include in or copy the Strategic Advisor on emails sent to the Administrative Assistant in the Minister's Office and instances in which the Director of Parliamentary Affairs responded directly to emails on which he was copied. These emails consisted of communications between departmental officials and the ATIP Directorate, who were discussing how the Minister's Office wanted certain requests to be processed. The evidence shows that the Director of Parliamentary Affairs would respond to these emails directly even though he was not the main recipient.

Other ministerial staff members also became involved in email exchanges between departmental officials. This occurred in two of the files the OIC examined (files AC-2009-00039, page 49, and A-2008-00519, page 44). With regard to the involvement of ministerial staff, one ATIP official acknowledged that the interest of the Minister's Office in access matters was not merely passive or informational in nature. This official testified that ministerial staff members were actively involved in how requests should be processed at PWGSC.

Ministerial staff members' communications with the ATIP Directorate

In the context of this investigation, ministerial staff members who testified framed their involvement in access matters as limited to asking questions regarding the ATIP Directorate's decision to disclose information or as simply expressing their views in that regard. They testified that their emails or notes on access matters only contained "questions," "explanations," "justifications" or "suggestions" on the nature of the documents the ATIP Directorate had decided to release.

ATIP and departmental officials, however, described ministerial staff members' emails and various notes as "opinions," "statements," "orders" or "directions" to the ATIP Directorate.

Email communications from ministerial staff members to the ATIP Directorate demonstrate, by their tone and content, that members of the Minister's staff were directing the ATIP Directorate how to apply exemptions to the information it had decided to release, what the scope of requests was and whether the information the ATIP Directorate had decided to disclose fell within that scope.

The evidence shows that the Director of Parliamentary Affairs would, at times, email ATIP officials directly. When questioned on why he emailed ATIP officials directly, the Director of Parliamentary Affairs testified that he attended weekly access meetings with ATIP officials, and sometimes ATIP officials contacted him directly.

In file A-2008-00519 (page 44), ministerial staff members' emails to the ATIP Directorate indicated that "we should not be releasing the remainder of the ATIP," that "this should be the only part of the ATIP to be released," that "only the work stop order document relates to the original ATIP request," that "I encourage the ATIP department to remove everything but the workorder" and that "Hopefully, the ATIP that will be sent back up will have that change." The Minister's Office was directing that only one page (i.e. the work stop order) be

released, as opposed to the 132 pages the ATIP Directorate had decided to release. Similarly in file AC-2009-00039 (page 49), ministerial staff members sent an email to the ATIP Directorate indicating that “those comments are inappropriate and improper, not relevant to the request and should not be disclosed.”

In one request (file A-2008-00519, page 44), the Director of Parliamentary Affairs agreed that his comments were “strongly worded.” The evidence shows that these types of emails by ministerial staff members affected the processing of access and consultation requests.

The evidence does not support the position that the Minister’s Office was only asking questions. None of their emails actually include question marks and they were directive in nature.

Of the eight files the OIC examined, five show ministerial staff members instructing the ATIP Directorate how the *Access to Information Act* should be applied with respect to the information the ATIP Directorate had already decided to release or, in the case of a consultation, had recommended for release.

For example, in the access request concerning the American President’s visit to Canada (file A-2008-00519, page 44), the ATIP Directorate decided to disclose, in its entirety, the 132 pages of records provided by the OPIs. The purple file folder, as returned to the ATIP Directorate unsigned by the Minister’s Office, included a post-it note with a statement that read as follows:

If the only modification [to PWGSC’s daily activities] was the “work stop order” found on the last page of the ATIP, then we should not be releasing the remainder of the ATIP.

The Director of Parliamentary Affairs subsequently sent the ATIP Directorate the following email:

Some of the documents have been released but they are looking for a specific document. We need to only release and provide what they are asking for. If they wanted all documents relating to President Obama’s visit, they would get that, but they are not asking for that. We reviewed the atip and one document related to the demand is relevant and actually fully answers the request. For more in depth analysis, please speak to [the Minister’s Special Assistant].

At that point, the Minister’s Special Assistant, who had reviewed this request and testified that she wrote the post-it note, responded to everyone in the email chain, and did so before the ATIP Directorate even asked for her input or analysis. Her email read as follows:

To be more specific, the ATIP request indicates that the only thing they are looking for are modifications to the regular operations during Obama’s visit. Our department specifically states that the only

documentation they have pertaining to this is the work stop order. This document is found on the last page of the ATIP. Therefore, this should be the only part of the ATIP to be released.

In his testimony, the Director of Parliamentary Affairs recalled that the Special Assistant had concerns with the information the ATIP Directorate wanted to release. He explained that she felt some of the information in the file was not the right information being given to the requester and that the file was not accurate. He also testified that the Special Assistant urged him to send the email to the ATIP Directorate and that he was presenting their views to the ATIP Directorate.

For her part, the Minister's Special Assistant testified that she emailed the ATIP Directorate directly because she wanted to understand why the department was providing the requester with more information than was requested. She testified that the email was her explanation of how she was interpreting the content of the ATIP and what was being requested. She added that the sentence in her email that read, "this should be the only part of the ATIP to be released" was "my justification and [my] explanation of the way I'm interpreting the content of the ATIP and what's being requested." She added that her justification was really a question that she was providing to the Director of Parliamentary Affairs. She further explained that she intended to clarify her view and understanding that the information requested was part of what was being released. She testified that it was not her role to give directions to public servants. She would seek more information to understand why the ATIP Directorate was applying the Act in certain ways.

With respect to her overall involvement in this request, she stated, "I raised my concerns and my questions with [the Director of Parliamentary Affairs] to let him know from my side what my view was."

With respect to this file, one ATIP official described the involvement of the Minister's Office in the file as scoping: "It was not an issue of exemptions. It was an issue of interpretation, of scoping." [translation] This testimony is in keeping with the evidence given by a senior official who similarly testified that the Director of Parliamentary Affairs was "scoping" the information in this access request. In other words, he was aiming to limit the release of information. In this regard, the Deputy Minister's Strategic Advisor explained that during the weekly access meetings, ministerial staff members would sometimes express concern that the information the ATIP Directorate had decided to release was not within the "scope" of the particular request being discussed.

ATIP officials also testified that, in their view, the Minister's Office was giving an order or was stating its position to the ATIP Directorate concerning the information it had decided to release. The ATIP officials felt this way after receiving the Director of Parliamentary Affairs' email, "I encourage the ATIP department to remove everything but the workorder. [...] Hopefully, the ATIP that will be sent back up will have that change." Indeed, the ATIP Acting Manager who processed the request testified that the Director of Parliamentary Affairs was giving her "orders" to put only the work stop order (as opposed to the entire 132 pages) in the file that was returned to the Minister's Office for signature. Also, the ATIP

Director testified that, in his view, the initial email from the Administrative Assistant in the Minister's Office informing the ATIP Directorate that the file was being returned "for modification" was not a collegial request for information. His view is that the Administrative Assistant's email was a "statement" that the file was being returned for modification, and he acknowledged that it seemed like a decision had been made by someone in the Minister's Office.

The Director of Parliamentary Affairs and the Special Assistant both testified that they were comfortable with the explanation provided in response to their questions by the ATIP Directorate and that they ultimately accepted the Directorate's decision to release all the information.

Another example is in a consultation file from Health Canada concerning Chrysotile asbestos (file AC-2009-00039, page 49). In this file, the ATIP Directorate reviewed the information and found that no exemptions applied to the records and that Health Canada should disclose the information in its entirety. The file was circulated for signature and the Notice of Reply was returned duly signed to the ATIP Directorate. Included in the file was a note by the Director of Parliamentary Affairs referring to several sentences in the records that had been highlighted. When the ATIP Directorate asked the Administrative Assistant in the Minister's Office about the Director's note, the Minister's Policy Advisor, who had reviewed the information, replied directly by email as follows:

Those comments are inappropriate and improper, not relevant to the request and should not be disclosed.

When questioned as to why he thought the comments were "inappropriate and improper," the Policy Advisor testified that he felt the highlighted sentences may have hindered intergovernmental relations. He also testified that, in sending this email, his intent was to convey an opinion to the ATIP Directorate. The documentary evidence shows that the ATIP Acting Manager who processed this request did not agree with the Policy Advisor's opinion that the comments were inappropriate and improper, not relevant to the request and should not be disclosed. She replied to the Minister's Policy Advisor that the legislators did not include a section in the Act for exempting inappropriate and improper comments.

The Minister's Office also attempted to get the ATIP Directorate to adopt its interpretation of how the Act applies in file A-2009-00169 (page 55). The file dealt with a request for a copy of 11 Question Period notes, one of which was in draft form. The issue of draft QP notes appears to have been contentious for the Minister's Office and a recurring issue between the Minister's Director of Parliamentary Affairs and the Corporate Services, Policy and Communications Branch, the departmental branch responsible for parliamentary affairs at PWGSC.

In this case, the Director of Parliamentary Affairs thought the note should not be released because it was a draft and had not been requested or approved by the Minister's Office. He signed the Notice of Release but wrote the following direction on the notice that was returned to the ATIP Directorate:

I am strongly opposed to releasing the visible minorities note because this was never requested, nothing was sent up to alert of this issue and the note was never in the QP book of the Minister. A note must be included relaying that information in the ATIP release. In future ONLY QP notes that are approved and/or put in the QP book will be considered “QP notes.” [emphasis original]

The Director of Parliamentary Affairs testified that his second sentence meant that an explanation must be included in the cover letter to the requester. He explained this was a suggestion to the ATIP Directorate to include such an explanation to the requester. With respect to the last sentence of his written comment, he testified that he was referring to future ways of creating QP notes at PWGSC.

A final example of ministerial staff members communicating to the ATIP Directorate how the Act should apply and the proper scope of a request involves the request for a list of all QP notes created for the Minister during a specified period (file A-2009-00033, page 53). In order to respond to the request, the department created a list of the requested notes and indicated “(French)” next to the 14 QP notes drafted in French. The folder was circulated for signature and the Notice of Release was returned to the ATIP Directorate duly signed by the Minister’s Office. The word “(French),” however, had been crossed out 14 times on the document.

The Administrative Assistant sent an email advising the ATIP Directorate that the file was being returned. The Director of Parliamentary Affairs responded to all the individuals in the email chain, as follows:

It is signed to go out on the condition that the changes I requested be made.

When questioned on this email, the Director of Parliamentary Affairs testified that it was a suggestion that the ATIP Directorate make changes to the document that he felt were needed. He testified that he crossed out the references to “(French)” because he felt this information was an inaccurate description of the QP notes. He explained that all QP cards drafted for the Minister were translated in both official languages and that to tell the requester that a QP note was drafted in French only was inaccurate.

The ATIP Acting Manager who processed this request explained that for this request, no exemptions were at play but that the issue for the Minister’s Office concerned the “scope” of the request. The Acting Manager testified that both the ATIP Directorate, and the OPI, had no issue with releasing the 14 references to “(French).” She acknowledged that the word “(French)” was not essential information, but that it was nevertheless information that could be shared with the requester. The ATIP Directorate removed the 14 references to “(French),” as per the wishes of the Minister’s Director of Parliamentary Affairs. The ATIP Acting Manager testified that the list had been created to respond to the request and that removing the word “(French)” was not considered to be altering the record. Moreover, the ATIP Directorate did not believe that removing this supplementary information was restricting the right of access and that the information as requested was in fact being provided to the

requester. She acknowledged, however, that in her view the Director of Parliamentary Affairs was interpreting the “scope” of the request when he crossed out information that was not explicitly requested.

Ministerial staff member communicating with a ministerial staff member in another department

There was one instance in which a ministerial staff member contacted his counterpart in the ministerial office of another federal department with a view to coordinating the response to an access request (file AC-2009-00039, page 49). The file in question concerned the issue of Chrysotile (i.e. asbestos) and a consultation request from Health Canada. The Minister’s Policy Advisor, who reviewed the file on behalf of the Minister’s Office, testified it was tagged “interesting” because it concerned asbestos. This was an interesting or important issue for Minister Paradis, since the last Chrysotile mine in North America is located in his electoral district.

On this consultation request, the PWGSC ATIP Directorate had determined that it would recommend that the information be fully disclosed to the requester. The purple file underwent the review process and the Notice of Reply was returned to the ATIP Directorate signed by all levels of review.

After that, discussions between the ATIP Directorate and ministerial staff members ensued about the scope of the request. The evidence shows that the Minister’s Policy Advisor contacted his counterpart at the Health Canada Minister’s Office and sent him the consultation request for review by that office.

Upon receiving the consultation request that originated from his own department, the Health Canada ministerial staff member inquired, via email, “What changes are you looking for?” The PWGSC Minister’s Policy Advisor replied, “I would like to apply severances on informations that could show tension and dissension between the departments, over the issue of the expert panel on chrysotile asbestos.” The Policy Advisor attached those portions he had highlighted in the responsive record in his email to the ministerial staff member at Health Canada. The Policy Advisor’s changes were adopted in the response Health Canada sent to the requester.

When asked about the PWGSC and Health Canada ministerial staff members’ involvement in this consultation request, for which the ATIP Directorate had initially recommended that all the information be disclosed, an ATIP official who processed this file agreed that the involvement of ministerial staff members in this file constituted “interference.”

ATIP Directorate’s approach to dealing with ministerial staff members on access-related matters

Although the purpose of the folder process was not to solicit senior managers’ feedback but to advise them of forthcoming disclosures so they could prepare accordingly, it was common practice within the ATIP Directorate to address concerns ministerial staff members would raise regarding access and consultation requests, or the directions they gave. The evidence shows that the ATIP Directorate would gather sufficient information to respond to input or

concerns raised by ministerial staff members. ATIP officials who testified all agreed that they never ignored the input of ministerial staff regarding the scope of a request or the application of exemptions, and explained that they took into account anything raised by ministerial staff members to ensure the quality of access responses.

One ATIP official testified that, in reviewing files, the Minister's Office could sometimes see things that the ATIP Directorate had missed. Another official testified that "it was normal to examine questions that were asked of us," [translation] regardless of where they came from. Similarly, the ATIP Director testified that, at times, the Minister's Office raised valid concerns when reviewing an access file. Because of this, all input received during the purple file process was addressed, and responsive records were reviewed in light of the input by the Minister's Office and other stakeholders.

In one file (file A-2008-00588, page 47), the request was for briefing notes prepared for the Minister, one of which concerned a public opinion research project. The directions received from the Minister's Office, specifically the Director of Parliamentary Affairs, were clearly taken into account by the ATIP Directorate, and the information the Directorate decided to release was reviewed in light of those directions. These directions, written in red ink on post-it notes affixed to the responsive records, read, "Research projects #s should not be released," "None of these #s should be released" and "Should not be released."

After further consideration and discussions at the departmental level, the reviewing ATIP official agreed that the directions from the Minister's Office should be applied. In the end, the ATIP Directorate released the information in accordance with the directions given by the Minister's Policy Advisor.

Even in instances in which the file under review was returned to the ATIP Directorate with the Notice of Release or Notice of Reply duly signed, the Directorate would not release the requested information when a direction issued by the Minister's Office was outstanding. In four of the files that were investigated, members of the Minister's staff ordered that a different approach be followed than what the ATIP Directorate had intended, even though the Notice of Release or Notice of Reply had already been signed and returned to the ATIP Directorate (files A-2008-00588, page 47, AC-2009-00039, page 49, A-2009-00033, page 53, and A-2009-00169, page 55).

The evidence also shows that, in four of the eight requests reviewed, attempting to address the concerns raised and directions given by the Minister's Office resulted in a breach of PWGSC's zero-tolerance policy of releasing the information six working days after the date of the Notice of Release or Notice of Reply.

One ATIP official testified that if the extended due date had not yet passed, the ATIP Directorate would generally overlook the zero-tolerance policy to address concerns raised by members of the Minister's Office. The official also testified that the ATIP Directorate did not ignore questions from the Minister's Office and would not release information until the disagreement with the Minister's Office was resolved, even when the disagreement resulted in the zero-tolerance policy not being respected. On this point, an ATIP official testified, "It

affects our job more if the file becomes late due to their questions. If we still have time legally to look at the file, then it's not such a big issue having them in the process, even if they shouldn't be." When questioned why this official believed ministerial staff members should not be involved in the process, this official responded, "Because they're not supposed to be in the process, it doesn't say anywhere in the Act that our work should be overseen by the Minister's Office, we have delegation of authority." This official conceded, however, that "but it's done that way."

Based on the investigation, the Commissioner concluded that the ATIP Directorate was efficient in addressing issues raised by ministerial staff members. Although there was an increased risk that responses to these requests would be unduly delayed because of discussions between ATIP officials and ministerial staff members, the ATIP Directorate took immediate action to address their concerns. One departmental witness testified, "In order to ensure that the file was signed and returned quickly to us, we had to react fast and provide a response to an opinion of the Minister's Office as quickly as possible, even if we were not in agreement with this opinion. The more we delayed to respond, the more chances increased that they would retain the file." [translation]

Despite this approach, the involvement of ministerial staff members resulted in delays to the processing of four of the eight requests. The evidence shows that, at times, responses deemed ready by the ATIP Directorate were delayed to ensure the concerns of the Minister's Office were fully addressed.

A culture of maintaining good relations with the Minister's Office

The evidence shows that PWGSC considered it important to take into account the position of ministerial staff members on the scope of requests or the application of exemptions and any direction they gave in order for the department to maintain good relations with the Minister's Office. In the context of the request for 11 QP notes (file A-2009-00169, page 55), one of which the Director of Parliamentary Affairs did not want to release (i.e. the one pertaining to "visible minorities"), the Assistant Deputy Minister of the Corporate Services, Policy and Communications Branch testified that the department tried to persuade the Director of Parliamentary Affairs of the correctness of its position in order to maintain good relations with the Minister's Office.

The Director General, Executive Secretariat, agreed with the ATIP Directorate that any concern raised by the Minister's Office was always taken into account. She acknowledged that the department had the responsibility and obligation of taking into account questions, statements or directions by the Minister's Office. She explained that ministerial staff members could have opinions on access matters and could also ask questions, but could not make decisions on access files. The Director General further explained that, in general, the ATIP Directorate is required to respond to concerns raised by the Minister's Office but that the ultimate decision on access matters lies with those who have delegated authority.

The Acting Director General, Executive Secretariat, mentioned the importance of providing effective service delivery to the Minister's Office. She testified that her team was regularly at the frontline in terms of dealing and interacting with the Minister's Office and that, in this

regard, the Corporate Services, Policy and Communications Branch “ensured that it was building effective relationships through effective service delivery to the Minister’s Office.”

One ATIP Acting Manager testified that the Minister’s Office was “at the top” of the bureaucratic structure, which made it necessary to respond to any of ministerial staff members’ access-related questions or to take into account any concern or direction they expressed in this regard. The ATIP Director testified that this occurred because members of the Minister’s staff were of a higher authority in terms of the bureaucratic organizational structure. Testimony received from the ATIP Directorate confirmed that ministerial staff members were not considered colleagues.

Although the ATIP Directorate had the delegated authority to release information without obtaining a signature from the Minister’s Office on the Notice of Release or Notice of Reply, the evidence relating to the requests that the OIC investigated and that were processed between July 2008 and early 2010 shows that concerns raised or directions given by ministerial staff members were always addressed before responding to requests. In this respect, one departmental official testified that the need to maintain good relations with the Minister’s Office put a lot of pressure on departmental officials who interacted with members of the Minister’s staff on a regular basis. This official recalled a “constant pressure” in meeting with ministerial members, such as during the weekly access meetings. The testimony gathered in the course of this investigation confirmed that departmental officials felt pressured in their interactions with members of the Minister’s Office. One witness described the involvement of ministerial staff members in access matters at PWGSC as “inappropriate.”

There was also mention of a culture at PWGSC of maintaining good relations with and of pleasing the Minister’s Office. Some departmental officials also testified that, when members of the Minister’s staff would become involved in the processing of requests, they felt a lack of support from some of the senior officials with delegated authority. One witness also explained that when she informed her senior managers, who did not have delegated authority, of her belief of inappropriate involvement in access requests by ministerial staff members, she was advised to simply keep challenging ministerial staff members in order to maintain good relations.

ATIP officials all testified that they were never told to disregard input from members of the Minister’s Office staff, who did not have delegated authority. A departmental official and an ATIP official testified that they felt an absence of direction and support on the part of some officials with delegated authority in dealing with members of Minister Paradis’ staff. An ATIP official testified that ATIP analysts and managers would have appreciated support from their superiors in their interactions with the Minister’s Office, especially when being told to do something under the Act that they were of the view should not be done.

Measures taken by a manager with delegated authority to end the direct contact between ATIP officials and ministerial staff members

The Director General, Executive Secretariat, testified that when she arrived at PWGSC in August 2009, which is towards the end of the time period under investigation, she started attending the weekly access meetings.

On August 26, 2009, the position of Director General, Executive Secretariat, in the Corporate Services, Policy and Communications Branch was permanently filled. The ATIP Director testified that, on this day, he met with the Director General and informed her of his concerns regarding the regular participation of the PWGSC Minister's Office in access-related matters. The Director General confirmed having met with the ATIP Director on, or close to, her arrival and that they discussed a number of issues, including the involvement by members of the Minister's staff in access matters.

Shortly after she was appointed, the Director General indicated that she became aware that the established communications procedure at PWGSC was not being followed. She testified as follows with respect to the direct contact between ministerial staff members and ATIP officials: "I felt that this practice should not exist, that it should not be part of the norm." [translation] She also explained that when she learned of direct communications between ATIP officials and members of the Minister's staff, she took steps to end them. She later indicated that a change of ministers would be an opportune time to put an end to the participation of ministerial staff at the weekly access meetings.

Beginning in September 2009, the Director General instituted a practice whereby all contact between the ATIP Directorate and PWGSC senior management (in the Deputy Minister's Office, the Assistant Deputy Ministers' Offices, and the Minister's Office) would be channelled through her. This change in practice concerned all communications (including telephone and email) that the ATIP Directorate received from the Minister's Office and for which the Minister's Office needed a response. One senior manager described the Director General's role as that of "interlocutor." This change in practice served to protect the ATIP Directorate from influence in decision making.

Of the eight files the OIC investigated, two were processed during the time immediately following the Director General's arrival, in the fall of 2009. In both these files, the Director General was copied on email communications between ATIP officials and members of the Minister's staff.

In the fall of 2009, the Director General also put an end to the practice of ATIP officials attending the weekly access meetings without a senior manager from the Corporate Services, Policy and Communications Branch. This reflects the testimony of ATIP officials that the Director General, who had delegated authority, started attending the weekly access meetings. The Director General testified that "it was a better practice to at least have a Director General attend those meetings." [translation]

Despite the interventions of the Director General, the direct communication between ATIP officials and the Minister's Office persisted at PWGSC. ATIP officials testified that ministerial staff members still contacted them directly. One departmental official testified: "It wouldn't stop them [members of the Minister's staff] from perhaps making contact by telephone or by email or in person." He further explained that, what it would do, is allow the Director General to "better understand what was being asked from the Minister's Office". He also testified that the Director General wanting to know about all contact between ATIP officials and ministerial staff members, "served to protect the ATIP office from influence."

Findings

Based on all of the above, the Commissioner has made the following findings:

1. Members of the Minister's staff, who had no delegated authority under the Act, were improperly involved in the processing of access and consultation requests during the time period under examination.
2. Information identified for review at the weekly access meetings (such as the information in "high profile" or "interesting" requests) was only released once the Minister's Office signalled that it was satisfied with the information being disclosed.
3. Identifying requests for review during weekly access meetings increased the risk of delay and interference in the processing of these requests and of reduced disclosure of information.
4. PWGSC had inadequate practices to ensure that proper communication channels with the Minister's Office were followed, thereby allowing direct communications between departmental staff and ministerial staff members to occur.
5. Ministerial staff members failed to follow the proper communication channels, set out in *Accountable Government* (2008), when they communicated directly with departmental staff members in the ATIP Directorate.
6. PWGSC's zero-tolerance policy was not always respected when members of the Minister's staff became involved in the review process, since their involvement increased the response time of requests.
7. The involvement by the Minister's Director of Parliamentary Affairs in the processing of five separate access and consultation requests and his directions to members of the ATIP Directorate in those five requests constitute improper involvement with requesters' right of access.
8. The involvement by the Minister's Policy Advisor in the processing of a consultation request, his directions to members of the ATIP Directorate and his interactions with Health Canada ministerial staff members, constitute improper involvement with the requester's right to access (file AC-2009-00039, page 49).

9. The involvement by the Minister's Special Assistant in the processing of an access request and her directions to the members of the ATIP Directorate in that request constitute improper involvement with the requester's right to access (file A-2008-00519, page 44).

10. The involvement of the Minister's Director of Parliamentary Affairs, the Minister's Policy Advisor, and the Minister's Special Assistant in five access files contributed to delay in responding to requests (or in the case of consultations, providing recommendations to the institution) because an issue remained unresolved with the Minister's Office (file A-2009-00033, page 53) or the Minister's Office either did not sign the Notice of Release or Notice of Reply within the allocated time in the following four files:

File A-2009-00169 (page 55): The Notice of Release was signed by the ATIP Directorate on September 22, 2009. As per the "zero-tolerance policy," all levels of review were required to sign the notice no later than September 30, 2009. The notice arrived in the Minister's Office on September 29, 2009. The Minister's Office signed the notice on October 19, 2009. In total, the file was in the Minister's Office 14 working days.

File A-2008-00588 (page 47): The Notice of Release was signed by the ATIP Directorate on June 29, 2009. As per the "zero-tolerance policy," all levels of review were required to sign the notice no later than July 8, 2009. The notice arrived in the Minister's Office on July 10, 2009—that is, two days beyond the time allocated for review. The Minister's Office signed the notice on August 4, 2009. In total, the file was in the Minister's Office 17 working days.

File AC-2009-00039 (page 49): The Notice of Reply was signed by the ATIP Directorate on July 6, 2009. As per the "zero-tolerance policy," all levels of review were required to sign the notice no later than July 14, 2009. The notice arrived in the Minister's Office on July 10, 2009. The Minister's Office signed the notice on July 20, 2009. In total, the file was in the Minister's Office six working days.

File A-2008-00519 (page 44): The Notice of Release was signed by the ATIP Directorate on July 23, 2009. As per the "zero-tolerance policy," all levels of review were required to sign the notice no later than July 31, 2009. The notice arrived in the Minister's Office on July 24, 2009. The Minister's Office signed the notice on August 5, 2009. In total, the file was in the Minister's Office eight working days.

The delays occasioned by these reviews, conducted by persons without delegation under the Act, were contrary to the legislative duty to provide access to information in a timely manner, as set out in subsection 4(2.1) of the Act.

Summaries of the access and consultation requests

1. Access to information request A-2008-00519

On February 25, 2009, PWGSC received the following request:

All records as may be required to find about changes in your daily activities in preparation for and during the visit of the President of the United States to Canada. [translation]

On March 4, 2009, this request was designated “high profile” at the weekly access meeting. By letter to the requester dated March 23, 2009, PWGSC took an extension of 150 days, pursuant to paragraph 9(1)(b) of the *Access to Information Act*, in order to conduct consultations on this request. This made August 24, 2009, the extended due date to respond to the request.

The Notice of Release was signed on July 23, 2009, by the ATIP Directorate. The notice indicated that “information has been severed as recommended by Foreign Affairs and International Trade. 15(1) and 19(1).”

Also on July 23, 2009, the Assistant Deputy Minister of PWGSC’s Real Property Branch signed the notice. The Deputy Minister’s Office signed the notice the following day. In accordance with the department’s zero-tolerance policy, all levels of review were required to sign the Notice of Release no later than July 31, 2009.

On July 29, 2009, an Administrative Assistant in the Minister’s Office sent an email to various individuals working in the ATIP Directorate, the Deputy Minister’s Office and the Minister’s Office, advising that “the ATIP request has been returned to the ATIP Office *for modification*.” [emphasis original]

When questioned on her use of these words, the Administrative Assistant testified that she had used the same words the Director of Parliamentary Affairs wrote and underlined on a post-it note he included with the purple file he returned to her. For his part, the Director of Parliamentary Affairs testified that he did not instruct the administrative assistant to send the “for modification” email.

The post-it note that was affixed to the Notice of Release read as follows:

If the only modification was the “work stop order” found on the last page of the ATIP, then we should not be releasing the remainder of the ATIP.

The Minister’s Special Assistant who was responsible for the Real Property portfolio testified that she believed the post-it note to be in her handwriting and that it was meant for her colleague, the Director of Parliamentary Affairs. She explained that the post-it note was the explanation to justify the question and concern that she had (i.e. with the information the ATIP Directorate had decided to release). She explained that she wanted to understand why PWGSC was giving out more pages to the requester when only one page (i.e. the work stop

order) responded to the request. She further testified that she was not directing anybody because she knew that her responsibility and her role was to ask questions, to seek more information and to understand why the ATIP Directorate was applying the Act in certain ways. She explained that she raised her concerns with the Director of Parliamentary Affairs but that she was not aware that the file would be returned to the ATIP Directorate for modification. She again testified that her post-it note was not a suggestion to the ATIP Directorate but rather the justification of a question she had regarding what the ATIP Directorate was proposing to release.

Upon reading the email from the Administrative Assistant that the ATIP request was being returned to the ATIP Directorate “for modification,” the Deputy Minister’s Strategic Advisor replied to all, “Wasn’t [the information] release[d] on a previous ATIP request?”

The ATIP Acting Manager who was part of the email string forwarded the Strategic Advisor’s question to another ATIP Acting Manager and the analyst who had processed the request. Despite not being the intended recipient of the email, the Director of Parliamentary Affairs responded by email that, although “some of the documents have been released,” the requester was “looking for a specific document” in this case and that “we reviewed the atip and one document related to the demand is relevant and actually fully answers the request.” He also wrote that the ATIP Directorate should speak with the Minister’s Special Assistant, who had reviewed the request, if the Directorate required a more in depth-analysis. The Director of Parliamentary Affairs included his colleague on that email response.

Shortly thereafter, the Special Assistant replied to everyone on the chain as follows:

Our department specifically states that the only documentation they have pertaining to this is a work stop order. This document is found on the last page of the ATIP. Therefore, this should be the only part of the ATIP to be released.

An ATIP Acting Manager who had processed the request confirmed that at no time during the processing of this request did she, or anyone in the ATIP Directorate, request assistance from the Minister’s Office to interpret the scope of requests.

The Deputy Minister’s Strategic Advisor testified that she telephoned the Minister’s Special Assistant after reading her email to advise her that the ATIP Directorate had the decision-making authority on all ATIP matters.

The ATIP Director and the Acting Director General, Executive Secretariat, Corporate Services, Policy and Communications Branch, were both copied on the email from the Minister’s Special Assistant in which she explained that the documentation that responded to the request was the work stop order found on the last page of the ATIP. The Acting Director General explained that she did not take action because the ATIP Director was the functional authority responsible for access matters, and because the issue was not escalated to her level. As such, she relied on the ATIP Director to manage the issue.

The ATIP Director testified that he was not intimately involved in the processing of this request, since as of July 22, 2009 he was acting as Director General, Executive Secretariat, Corporate Services, Policy and Communications Branch. He also explained that he did not take action when reading the email from the Minister's Special Assistant because he relied on his employees to manage issues raised by the Minister's Office, and the Director of Parliamentary Affairs, whom he believed, at the time, had delegated authority on access matters. Finally, he explained that the Acting Director General, Executive Secretariat, the person whom he was replacing, was also copied on the Special Assistant's email and that she was more familiar with the environment in the department, given her extensive experience.

Between July 29, 2009, and July 31, 2009, the ATIP Directorate worked to resolve the issue that was raised by the Minister's Office. On July 30, 2009, an ATIP Acting Manager emailed both the Director of Parliamentary Affairs and the Special Assistant to inform them that two separate offices of primary interest (OPI) had provided records in response to this request. The Director of Parliamentary Affairs responded to that email as follows:

Only the work stop order document relates to the original ATIP request. The other documents may demonstrate the organization that went into preparing the visit however, they don't represent changes to the daily operations. Hence, they are not relevant.

When questioned on the nature of his emails to the ATIP Directorate, the Director of Parliamentary Affairs testified that he was putting forward both his views and those of his colleague in the Minister's Office that the wrong information was going to be released.

In an email to members of the Minister's staff and others, an ATIP Acting Manager reiterated her belief that all the records were responsive to the request. Another ATIP Acting Manager agreed with this position. In order to "add more weight" to the ATIP Directorate's view that the information sought was responsive to the request, one of the ATIP Acting Managers emailed that she would seek written confirmation from the relevant OPI that the records were, in fact, responsive to the request.

On July 31, 2009, the OPI provided written confirmation that the documents in question were responsive to the request. The ATIP Acting Manager forwarded this confirmation to both the Director of Parliamentary Affairs and the Special Assistant, writing, "with your agreement I will return the purple folder for sign-off." The Director of Parliamentary Affairs responded as follows:

I encourage the ATIP department to remove everything but the workorder. It is part of daily operations to prepare for diplomatic visits. Hopefully, the ATIP that will be sent back up will have that change.

With no further communication between the ATIP Directorate and members of the Minister's Office staff, the Deputy Minister's Strategic Advisor emailed one of the Acting ATIP Managers on August 5, 2009, and asked, "Is this still an issue for you guys?" to which the ATIP Acting Manager responded as follows:

Yes, this is still an issue for me since the OPI has confirmed that this is not part of their daily operations. Those documents do not contain sensitive issues other than those exempted, and therefore, in the spirit of the Act, should be released.

The Deputy Minister's Strategic Advisor testified that she then phoned the Director of Parliamentary Affairs and explained that the ATIP Directorate had the delegated authority to decide the scope of the request. She also reiterated, by way of email, the ATIP Directorate's position that the information provided by the OPI was responsive to the request. She concluded her email by writing, "Are you OK to proceed as is?" to which the Director of Parliamentary Affairs replied, "Okay I give up." He explained that this response meant that he and the Special Assistant accepted that their concerns were no longer valid.

The Deputy Minister's Strategic Advisor emailed one of the ATIP Acting Managers to "please release" the records. The ATIP Acting Manager later asked, "Do we have to send the purple [file] back to MO for sign-off[?]" The Deputy Minister's Strategic Advisor replied, "Please send me the file[.] I will get a signature very fast..." The ATIP Directorate awaited a signature from the Minister's Office on the Notice of Release before releasing the records. One of the ATIP Acting Managers described such a signature as a "blessing" [translation] by the Minister's Office or an approval of sorts for the information to be released.

The Deputy Minister's Strategic Advisor thus obtained the Director of Parliamentary Affairs' signature on the notice on August 5, 2009. On August 6, 2009, the responsive records—that is, the entire 132 pages (and not just the one-page work stop order)—were disclosed, one day later, in keeping with the ATIP Directorate's decision to release.

As per PWGSC's zero-tolerance policy of disclosing the requested information within six working from the date of the notice, this meant senior management had until July 31, 2009 to sign it and disclose the information. In this case, although the extended due date of August 24, 2009, was met, the Minister's Office signed the notice three days late, on August 5, 2009, thereby failing to follow PWGSC's zero-tolerance policy. This led to a delay in releasing the information to the requester.

2. Access to information request A-2008-00588

On March 30, 2009, PWGSC received a request for a number of briefing notes, one of which dealt with a public opinion research project.

On April 8, 2009, this request was designated "high profile" at the weekly access meeting. By letter to the requester dated April 22, 2009, PWGSC took an extension of 140 days, pursuant to paragraph 9(1)(b) and (c) of the Act, in order to conduct consultations. As such, the extended due date to respond to the request was September 16, 2009.

The Notice of Release was signed by the ATIP Directorate on June 29, 2009.

The notice indicated that the ATIP Directorate "considered the recommendations made by the Acquisition Branch for one of the requested briefing notes and determined that the

information could not be severed in its entirety as some of the information had already been made public in newspaper articles and on the Competition Bureau Website.” The ATIP Directorate further indicated that “the other briefing notes were being released as per recommendations made by the OPIs.” The ATIP Directorate also decided to release the monetary figures set out in the briefing note on the public opinion research project.

In accordance with the department’s zero-tolerance policy, all levels of review were required to sign the notice by no later than July 8, 2009.

On July 3, 2009, an official in the Assistant Deputy Minister’s Office (Corporate Services, Policy and Communications Branch) signed the notice and provided written comments in support of the ATIP Directorate’s decision.

Already two days beyond the time allocated for review under the zero-tolerance policy, the Deputy Minister’s Office signed the notice on July 10, 2009.

On August 4, 2009, the Director of Parliamentary Affairs signed the notice on behalf of the Minister’s Office. Included with the purple file returned to the ATIP Directorate were three pink post-it notes affixed to the briefing note on the public opinion research project. The post-it notes referenced monetary figures that had been circled in red ink in the briefing note. The post-it notes read as follows:

Research projects #s should not be released
None of these #s should be released
Should not be released.

The Director of Parliamentary Affairs acknowledged writing the three post-it notes that were affixed to the requested record but did not think he was the one who had circled the monetary figures. He testified knowing very little about public opinion research and that other than putting a signature on the notice, he had nothing to do with the file.

Also on August 4, 2009, the purple file was returned to the Deputy Minister’s Strategic Advisor. She testified that she read the post-it notes from the Minister’s Office and felt that the office had made good points, which she wanted to convey to the ATIP Directorate. Shortly thereafter, she emailed the ATIP Acting Manager as follows:

Please come and pick up the file. We will need to discuss the figure issue.

The Strategic Advisor testified that she emailed the ATIP Acting Manager on August 4, 2009, to pick up the file so that they could discuss the points raised by the Minister’s Office. She explained that she then phoned the ATIP Acting Manager to discuss what she felt were good points made by the Minister’s Office. The strategic advisor testified that she was not directing the ATIP Directorate to apply exemptions to the briefing note but rather asking the Directorate to take into account the comments by the Minister’s Office.

On August 5, 2009, the ATIP Acting Manager replied by email:

We are looking at your comments.

The ATIP Acting Manager then looked into the issues raised by the Minister's Office. She explained that, in the end, the figures in question were severed because she was satisfied that the exemption did, in fact, apply. She added that she would have maintained her initial position to release the information had she felt that the exemption did not apply.

On August 6, 2009, the Deputy Minister's Strategic Advisor emailed the ATIP Acting Manager as follows:

Thank you for taking our considerations. You may now release the ATIP.

The Strategic Advisor explained that she used a poor choice of words in that email and that what she meant to say was that she was comfortable and to thank the ATIP Directorate for taking into account the comments of the Deputy Minister's Office, which was the originator of the document.

On August 6, 2009, the responsive records were released in accordance with the directions from the Director of Parliamentary Affairs to remove the monetary figures in the briefing note on the public opinion research project.

For this file, the Deputy Minister's Office signed the Notice of Release two days after what was mandated by the zero-tolerance policy. The Minister's Office signed 17 days after that (i.e. August 4, 2009), and the information was released two days later. This is an example of PWGSC's zero-tolerance policy of releasing the information six working days after the date of the notice not being respected.

Despite the fact that the notice had been signed by all levels of review, the evidence shows that the ATIP Directorate did not release the records until the issue with the Minister's Office had been resolved. The evidence also shows that the ATIP Directorate—ultimately agreeing with the directions of the Director of Parliamentary Affairs—chose to release the responsive records with severances to the monetary figures.

3. Consultation request AC-2009-00039

On June 16, 2009, PWGSC received a consultation request from Health Canada with respect to an access request it had received, part of which is reproduced below:

The completed Affiliations and Interests Declaration Form for the Chrysolite [sic] Expert Panel members, namely for:

Dr. Trevor Ogden – Chair (Occupational Health Sciences)
Dr. Leslie Stayner (Epidemiology)
Dr. Graham Gibbs (Epidemiology)
Dr. Kenny Crump (Statistics/risk assessment)

Dr. David Bernstein (Toxicology)
Dr. Bice Fubini (Toxicology)
Dr. Nick De Klerk (Physics/Epidemiology) ...

On June 30, 2009, this request was designated “interesting” at the weekly access meeting.

After this meeting, the Director of Parliamentary Affairs emailed the Minister’s Policy Advisor, who was responsible for advising on asbestos-related issues, to inform him that the consultation file would be coming to the Minister’s Office for review: “We are going to have to carefully read this atip....A doctor writes bad things about Chrysotile.”

The Notice of Reply was signed on July 6, 2009, by the ATIP Directorate. The notice indicated that the ATIP Directorate’s recommendation was that the requested information be “all disclosed; communiquer en entier.”

Included with the file was the ATIP Directorate’s draft email response to Health Canada, which stated, in part, “The documents you have sent have been reviewed. PWGSC has no objection to the disclosure of the records.” The ATIP Directorate’s initial recommendation, then, was that the requested records be fully disclosed.

In accordance with the department’s zero-tolerance policy, all levels of review were required to sign the Notice of Reply by no later than July 14, 2009.

The Notice of Reply was signed by the Assistant Deputy Minister of the Parliamentary Precinct Branch on July 7, 2009. Three days later, on July 10, 2009, the Deputy Minister’s Office signed the notice.

On July 16, 2009, the Minister’s Policy Advisor, who was responsible for asbestos files, reviewed the request. He testified that requests concerning asbestos-related issues were important or of interest to the then-Minister because asbestos mining occurred in his riding.

On July 20, 2009, four days beyond the time mandated by the zero-tolerance policy, the Director of Parliamentary Affairs signed the notice on behalf of the Minister’s Office. He wrote directly on the responsive records to “please exclude the following that is highlighted.” The Minister’s Policy Advisor testified that he was the one who highlighted those portions of the records to which the Director of Parliamentary Affairs referred. He also testified that he highlighted those portions of the records because he felt they could somehow hinder intergovernmental relations.

On July 21, 2009, an administrative assistant in the Minister’s Office emailed individuals in the ATIP Directorate, the Deputy Minister’s Office and the Minister’s Office, advising that the Minister’s Office had signed three requests, including this consultation request, and that they were being returned to the ATIP Directorate. When the files were returned to the ATIP Directorate, the ATIP Acting Manager replied to the Administrative Assistant that she would need additional information from the Director of Parliamentary Affairs regarding his note to “please exclude the following that is highlighted.”

Within minutes, the Director of Parliamentary Affairs, who was copied on the email exchange between the Administrative Assistant and ATIP Acting Manager, replied to both directly that they should contact a colleague of his in the Minister's Office, namely the Policy Advisor who had reviewed the file. The Director of Parliamentary Affairs included the Policy Advisor in his email response. The Administrative Assistant, who was copied on this email, asked that the Minister's Policy Advisor respond to the ATIP Directorate's question as soon as possible. Shortly thereafter, the Policy Advisor emailed the ATIP Acting Manager, the Director of Parliamentary Affairs, and the Administrative Assistant as follows:

Those comments are inappropriate and improper, not relevant to the request and should not be disclosed.

When questioned on why he thought the comments were "inappropriate and improper," the Minister's Policy Advisor testified that he felt the highlighted sentences may have hindered intergovernmental relations. He also testified that, in sending this email, his intent was to convey an opinion to the ATIP Directorate and that the purpose of his email was to clarify the Director of Parliamentary Affairs' earlier statement to "please exclude the following that is highlighted."

The Deputy Minister's Strategic Advisor testified that, after reading the "inappropriate and improper" email, she phoned the Minister's Policy Advisor to explain, among other things, that the ATIP Directorate did not see any exemption that could be applied to the records at issue and that the ATIP Directorate was the decision-maker. She also explained that the ATIP Directorate could only make recommendations on consultation requests and that, in this case, Health Canada would ultimately decide whether to follow the recommendations.

One ATIP official who was questioned on the involvement of ministerial staff members in the processing of access and consultation requests testified that the Director of Parliamentary Affairs was generally not shy about letting the ATIP Directorate know of his concerns.

For her part, the ATIP Acting Manager responded to the Policy Advisor's email of July 21, 2009, as follows:

FYI—While I understand your concerns, it would be difficult to apply any severances to the records based on these reasons. Please note that the Access to Information Act was created to provide access to records under the control of federal institutions, and limit the application of severances. Therefore, the legislators did not include a section in the Act for "inappropriate and improper" comments. Unless you can provide us with additional information regarding the injury that this information could have on PWGSC, if released, we will not be in a position to recommend the application of exemptions to these records. This said, it would be appreciated if you could respond to this email as soon as possible, as we were to respond to Health Canada by July 22, 2009, [...]. Do not hesitate if you require any additional information or have any questions/concerns.

The Minister's Policy Advisor did not immediately respond to that email. Instead, on July 23, 2009, he emailed, "as requested," a copy of the consultation request (with attachments) to a ministerial staff member in the Office of the Minister of Health because, as per his testimony, he had identified potential issues for the PWGSC Minister's Office and had discussed them with his ministerial counterpart at Health Canada.

When his counterpart at Health Canada asked what changes he was looking for, the Policy Advisor in the PWGSC Minister's Office replied as follows:

I would like to apply severances on informations that could show tension and dissension between the departments, over the issue of the expert panel on chrysotile asbestos. For instance, I invite you to look at the attached document (Item #7 and the last sentence of the first page of this document).

His counterpart in the Office of the Minister of Health responded, "thanks."

The Policy Advisor in the PWGSC Minister's Office testified that his involvement in the file ceased at that point and that he does not know what transpired after last emailing his counterpart at Health Canada.

During these exchanges between ministerial staff members, the ATIP Acting Manager received telephone calls from the ATIP office at Health Canada requesting an update on the consultation file still at PWGSC. The ATIP Acting Manager testified that she called the Minister's Policy Advisor at PWGSC when he did not respond to her email about the legislators' not including a section for "inappropriate and improper comments" and that she left him a voice message. She explained that they played "phone tag" and that, a few days later, he left her a voice message about how he had spoken "with the Minister's Office at Health Canada and that everything was okay and to contact the analyst in the ATIP shop [at Health Canada] to make sure the recommendations would be followed."

As instructed, the ATIP Acting Manager then spoke with the ATIP analyst responsible for the file at Health Canada to discuss PWGSC's recommendations for exemptions to the responsive records. She testified that the ATIP analyst at Health Canada told her that the OPI there concurred with the exemptions recommended by PWGSC.

The ATIP Acting Manager then reversed her initial recommendation and wrote to the PWGSC ATIP analyst as follows: "Please change response to indicate the portions where we recommend sec. 21(1). Please send to me after for final review."

The ATIP Acting Manager testified that she also spoke with her counterpart at Health Canada to verbally advise it of PWGSC's recommended severances to the responsive records.

The ATIP Acting Manager testified that she changed her initial recommendation (to disclose all the information) to apply the exemption at section 21(1)(a) of the Act. She acknowledged

that this new “recommendation” sought to apply section 21(1)(a) of the Act to those portions of the records that were highlighted by the Director of Parliamentary Affairs. She testified that she changed her recommendations based on the position of her counterpart at Health Canada that the OPI, whom she qualified as an expert on the subject matter, believed the highlighted information could qualify for exemption. She testified that she was taking the word of her counterpart at Health Canada that what the Minister’s Office had highlighted would be exempt under the Act, and that she let the recommendations go on that basis.

On August 27, 2009, PWGSC responded to Health Canada that “portions of the records be exempted pursuant to section 21(1)(a) of the Act (see highlighted information).”

This “new” recommendation by the ATIP Directorate was in keeping with the note included with the Notice of Reply by the Director of Parliamentary Affairs on July 20, 2009 and the statements in the Minister’s Policy Advisor’s July 21, 2009, email that the highlighted portions of the responsive record are “inappropriate and improper, not relevant to the request.”

As mentioned, the Minister’s Office failed to follow PWGSC’s zero-tolerance policy when it signed the Notice of Reply six days after the time allocated for reviewing and signing notices. This resulted in a delay in releasing the information to the requester.

Despite the fact that the Notice of Reply had been signed by all levels of review, on July 20, 2009 (i.e. four working days after what was mandated by PWGSC’s zero-tolerance policy) the evidence shows that the ATIP Directorate only responded to Health Canada on August 27, 2009, when the issue with the Minister’s Office had been resolved. The involvement of the Minister’s Office resulted in the ATIP Directorate’s reversing its initial recommendation to release everything to recommending to Health Canada, as per the wishes of the Minister’s Office, that portions of the records be severed.

4. Access to information request A-2009-00033

On April 27, 2009, PWGSC received a request for:

A list of all QP [Question Period] notes created for Minister of Public Works and Government Services Canada from April 13, 2009 to April 27, 2009.

On May 6, 2009, this request was designated “interesting.”

The Notice of Release was signed by the ATIP Directorate on May 14, 2009. The notice indicated that the ATIP Directorate had “considered the recommendations made by the Communications Sector” and “determined that the information can be released in its entirety.”

The document to be released was a list of QP notes created by the OPI in response to the request. In this list of QP notes, the word “(French)” was included next to the title of those notes that had been drafted in French.

In accordance with the department's zero-tolerance policy, all levels of review were to review and sign the notice by no later than May 22, 2009.

On May 19, 2009, the Assistant Deputy Minister of the Corporate Services, Policy and Communications Branch signed the notice, with a comment pertaining to a typographical error in the list. The Deputy Minister's Office signed the notice on May 22, 2009.

Also on May 22, 2009, the Director of Parliamentary Affairs signed the notice on behalf of the Minister's Office but crossed out the word "(French)" in the responsive record a total of 14 times. He included the words "see comments" under his signature. Note: the responsive record in this file had been created by PWGSC in order to respond to the request. It contained a list of the requested notes that included the word "(French)" next to the titles of the 14 notes drafted in French.

On May 26, 2009, an administrative assistant in the Minister's Office sent an email to individuals in the ATIP Directorate, the Deputy Minister's Office and the Minister's Office, indicating that the "ATIP Request has been signed and returned to ATIP office." Shortly thereafter, the Minister's Director of Parliamentary Affairs replied to this email indicating, in another example of a ministerial staff member directing the ATIP Directorate on how to apply the Act and the proper scope of a request, that the notice was "signed to go out on the condition that the changes I requested be made."

When questioned about this email, the Director of Parliamentary Affairs testified that it was a "suggestion" that the ATIP Directorate make changes to the document that he felt were needed.

The Director of Parliamentary Affairs testified that he did not want the word "(French)" to appear on the list of QP notes because "it was wrong[;] this was an inaccurate description" of the QP notes. He further explained that all QP notes drafted for the Minister were translated in both official languages the day they were made and that to tell the requester that there was only a French QP note was inaccurate. In response to the Director of Parliamentary Affairs, the ATIP Acting Manager informed him that the ATIP Directorate would look at his requested changes. After receiving the file from the Minister's Office and taking into account the input from the Minister's Office, the ATIP Acting Manager emailed the Director of Parliamentary Affairs as follows:

We have received the purple folder and we will remove the reference to "French" in the list.

The ATIP Acting Manager testified that the ATIP Directorate implemented the changes requested by the Director of Parliamentary Affairs because it did not believe it was restricting access to information, although the Acting Manager also testified that no exemptions were at play but that the issue for the Minister's Office concerned the scope of the request. She explained that the list of QP notes was created by the department in response to the request and that it was still providing the information requested, even in removing the 14 instances of

the word “(French).” The ATIP Chief agreed that the modification was made because the word “(French)” “was not essential information” but rather “additional information”.

On May 27, 2009, the requested information was released and, in accordance with the directions of the Director of Parliamentary Affairs, the 14 references to “(French)” were removed.

Despite the fact that the Notice of Release had been signed by all levels of review, albeit not within the six-day timeline mandated by PWGSC’s zero-tolerance policy, the evidence shows that the ATIP Directorate did not release the information until the issue with the Minister’s Office was resolved. This again led to a delay in releasing the information to the requester.

5. Access to information request A-2009-00169

On June 26, 2009, PWGSC received an access request for 11 Question Period notes, one of which dealt with visible minorities.

On June 30, 2009, the request was designated “high profile” and, on July 24, 2009, PWGSC took an extension of 90 days pursuant to paragraph 9(1)(b) of the Act to conduct consultations. The extended due date for responding to the request was therefore October 26, 2009.

The Notice of Release was signed on September 22, 2009 by the ATIP Directorate. The notice indicated that certain information had been “severed as recommended by the Department of Justice” and that National Defence and Defence Construction Canada had “no objection to the disclosure of information related to their institutions.”

In accordance with the department’s zero-tolerance policy, all levels of review were required to sign the notice by no later than September 30, 2009.

On September 29, 2009, the Assistant Deputy Minister, Corporate Services, Policy and Communications, signed the notice. On the same day, the Deputy Minister’s Office signed the notice.

On October 8, 2009, in the context of another access request, an administrative assistant in the Minister’s Office sent an email to officials working in the ATIP Directorate that a file had “been signed and returned to the ATIP Directorate.” Shortly thereafter, the Director of Parliamentary Affairs emailed the ATIP Acting Director (copying others in the ATIP Directorate and the Administrative Assistant) as follows:

Note that I have not yet signed off on A-2009-00169.

Minutes later, he emailed the ATIP Acting Manager and the Administrative Assistant explaining that this other access request could be released but that he had “a problem with 169.”

The ATIP Acting Manager replied to this email as follows:

Please let us know what the problem is and we will look at the records again.

On October 19, 2009, 13 days beyond the time allocated by the zero-tolerance policy for the different levels of review to sign the notice, the Director of Parliamentary Affairs signed the notice. Also on that day, an Administrative Assistant in the Minister's Office sent an email to people on the same distribution list advising that the notice had been signed by the Minister's Office and the file returned to the ATIP Directorate.

Enclosed with that email was an attachment for the action of the Director General, Executive Secretariat, to draft a letter to the requester setting out that the visible minorities note had not been approved or requested by the Minister's Office. The Deputy Minister's Strategic Advisor acknowledged writing the attachment for the Director General.

When the file was returned to the ATIP Directorate, there was a handwritten note on the Notice of Release, also dated October 19, 2009, which read as follows:

I am strongly opposed to releasing the visible minorities note because this was never requested, nothing was sent up to alert of this issue and the note was never in the QP book of the Minister. A note must be included relaying that information in the ATIP release. In future ONLY QP notes that are approved and/or put in the QP book will be considered "QP notes." [emphasis original]

The Director of Parliamentary Affairs acknowledged in his testimony that he was the one who wrote this note on the notice to the ATIP Directorate. He testified that he did so because he was opposed to the visible minorities note being released, since "it never came to us for approval[;] it was never [in] the Minister's book" or in "the back up book" and, as such, was "not a QP card." He further testified that, if the ATIP Directorate wanted to keep the visible minorities note in the release, then some kind of explanation should be given to the requester so as to not give the false impression that the visible minorities note was really a QP card.

The Director of Parliamentary Affairs explained that the part of his handwritten note indicating that "a note must be included" was a suggestion to the ATIP Directorate to provide an explanation to the requester. He indicated that the last part of his note—that "in the future, only QP notes that are approved and/or put in the QP book will be considered 'QP notes'"—was intended as a comment on the process of drafting QP notes in the department, since this was of concern to him.

According to the ATIP Acting Director, if a QP card fit within the scope of a request, it would be released to the requester, unless a valid exemption could be applied. She explained that, as far as she was concerned, the QP card on visible minorities, whether a draft or the final version, was not subject to any exemption.

The Director of Parliamentary Affairs testified that, prior to signing the notice, he discussed the QP note issue, and this particular QP note, with the Assistant Deputy Minister of Corporate Services, Policy and Communications because she was responsible for parliamentary affairs for the department. He explained that going to the Assistant Deputy Minister was about fixing a departmental process that he felt was broken, since PWGSC was including QP notes that were not approved or part of the Minister's binder. He also spoke with the Assistant Deputy Minister because he felt the visible minorities note was not a QP note. For her part, the Assistant Deputy Minister explained that this was an example of a situation in which the Minister's Office was right in pointing out that some of the QP notes had not been seen or requested. She explained that there was a general feeling of embarrassment that the department needed to explain this somehow, to avoid creating a risk of embarrassment for the Minister.

Between September 29 and October 19, 2009, the Corporate Services, Policy and Communications Branch worked towards resolving, with the Minister's Office, the draft QP note issue. Numerous emails were exchanged between Communications and the Assistant Deputy Minister's Office and between Communications and ATIP officials. A legal opinion was also sought by the Assistant Deputy Minister on the issue of the visible minorities QP note being a draft and the Director of Parliamentary Affairs' not wanting to release it.

The Deputy Minister's Strategic Advisor testified that she first became aware of the Director of Parliamentary Affairs' handwritten note on the notice when the file was returned to the Deputy Minister's Office on October 19, 2009. She testified that she phoned the Director of Parliamentary Affairs after reading his email and explained to him that all responsive records (including drafts) had to be provided to the ATIP Directorate, which had the decision-making authority in this regard. She testified that, during this telephone call, she advised the Director of Parliamentary Affairs that it might be a good idea to provide the requester with an explanation about the draft nature of the QP note. After their conversation, the Strategic Advisor testified that she spoke with the Assistant Deputy Minister about the issue of draft documents, at which point it was decided that the requester would be provided with an explanation.

Between October 21 and 26, 2009, the ATIP Directorate and Communications coordinated the drafting of a response letter to the requester to include an explanation regarding the preparation of QP notes at PWGSC and the circumstances surrounding the QP note on visible minorities.

On October 26, 2009, the responsive records were released as per the ATIP Directorate's initial recommendation. The response letter for the requester was amended to add four paragraphs explaining the process of drafting QP notes in anticipation of questions posed in Parliament, and how the visible minorities note had not been requested or approved.

The ATIP Acting Director, who coordinated the response, testified that, in her experience, it was uncommon that an explanatory note be provided in the response letter to the requester. She explained that she had never before seen explanatory paragraphs like the ones in the response letter in this file. She did explain, however, that the ATIP Directorate's role is to

assist requesters in understanding the information they are receiving and that the Act does not prevent PWGSC from providing additional information in this regard.

The Director of Parliamentary Affairs testified that he agreed that the visible minorities note should be released once he learned that it had been previously released in the context of another access request. He explained that he “agreed that the visible minorities card or note should—because it was identified from another record, that it should be sent out, absolutely.”

For this file, the Minister’s Office failed to respect PWGSC’s zero-tolerance policy when it signed the Notice of Release 13 days after the time allocated for review. This also led to a delay in responding to the requester. Even after the Minister’s Office signed the notice, the ATIP Directorate worked to resolve the issue raised by the Minister’s Office. Only on October 26, 2009, were the records released to the requester.

The evidence shows that the directions of the Minister’s Office resulted in the ATIP Directorate’s including additional paragraphs in the cover letter sent to the requester regarding the fact that the visible minorities note had not been approved.