

*Office of the Information  
and Privacy Commissioner of  
Newfoundland and Labrador*

*2005 – 2006 Annual Report*

*The overarching purpose of access to information legislation ... is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process and secondly, that politicians and beauracrats remain accountable to the citizenry.*

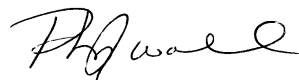
*former Supreme Court Justice  
Gerard LaForest  
Dagg v. Canada (Minister of Finance); 1997 2 S.C.R 403*



October 12, 2006

The Honourable Harvey Hodder  
Speaker  
House of Assembly  
Newfoundland and Labrador

I am pleased to submit to you the first Annual Report for the Office of the Information and Privacy Commissioner in accordance with Section 59 of the *Access to Information and Protection of Privacy Act*. This Report covers the period from the effective date of the *Act*, January 17, 2005 to March 31, 2006.

A handwritten signature in black ink, appearing to read "P. J. Wall". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Philip J. Wall  
Commissioner





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## FORWARD/INTRODUCTION

At the outset, let me say that in our Province most of those public bodies charged with the responsibility of providing access to information have a strong commitment to ensuring that not only are the provisions of the *Access to Information and Protection of Privacy Act* (the “Act”) being met, but also that the spirit and intent of the legislation is being interpreted properly. There have been a few cases, however, where that commitment was not always evident and there have been instances where there have been delays in the process, and refusals of access which initially have been unsupportable. These instances will be commented on later in this Report.

In addition, as this is the initial report from this Office, some relevant background commentary on the role of this Office and the *Act* is included in the following pages.

## ROLE

The Information and Privacy Commissioner (the “Commissioner”) is an independent Officer of the House of Assembly. This Office is responsible for protecting and upholding access to information and protection of privacy rights under the *Access to Information and Protection of Privacy Act*.

The *Act* was proclaimed on January 17, 2005 (with the exception of Part IV) and provides individuals with the right of access to information maintained and in the control of public bodies, including Provincial government departments, Crown corporations, municipalities, and health care and education bodies.

When an applicant requests the release of information in accordance with the *Act*, the public body has 30 days to respond. In some cases, up to an additional 30 days may be allowed where sufficient details on the information requested are missing, where a third party may be involved or where a large number of records need to be searched. If a public body does not provide access to the information requested, the applicant has the right to refer the matter to the Commissioner's Office.

The establishment of the Office of the Information and Privacy Commissioner is a cornerstone of the *Act*. The mandate of the Office is to investigate requests and complaints from individuals and groups who feel that their access to information rights under the *Act* have been violated. The Office has wide investigation powers which mirror those provided under the *Public Inquiries Act* and has full and complete access to all records in the custody and control of public bodies. The Commissioner does not have the authority to order resolution of a complaint, rather the *Act* provides for the exercise of persuasion in resolving disputes. This approach is carried out through meetings and discussions with the related parties and in some cases through the issuance of recommendations usually contained in public reports from the Office.

It is noted that at this time, the privacy provisions which are contained in Part IV of the *Act* are not yet in force. During the debate in the legislature leading up to the proclamation of the *Act*, Government indicated that the privacy provisions were being delayed for at least a year. Early in 2006 the Department of Justice further advised that the privacy provisions would be proclaimed only after adequate training of public bodies on those provisions of the *Act* was carried out, and that the timing would likely be in 2007, possibly as early as June or July.

## PURPOSE

With respect to the provisions of the *Act* concerning access to information, the purposes of the *Act* are to make public bodies more accountable to the public by:

- giving the public a right of access to records
- specifying limited exceptions to the right of access;
- providing for an independent review of decisions made by public bodies under the *Act*.

## RIGHT OF ACCESS

The right of access to information is available to any person and extends to all records in the custody or under the control of a public body, with a few exceptions. The term record is defined in the *Act* as meaning “information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium.”

Where a record contains information which is excepted from disclosure under the *Act*, and it is reasonable to sever or exclude that information from the record, public bodies have a responsibility to provide applicants with the remainder of the record. Public bodies must make every reasonable effort to assist applicants in making requests for access and to respond without delay in an open, accurate and complete manner.

## EXCEPTIONS TO ACCESS

As noted earlier, there are various exceptions to access provided under the *Act*. These include the following.

### *Mandatory Exceptions*

- *Cabinet confidences* – where the release of information would reveal the substance of deliberations of Cabinet.
- *Personal information* – recorded information about an identifiable individual, including name, address or telephone number, race, colour, religious or political beliefs, age, or marital status.
- *Harmful to business interests of a third party* – includes commercial, financial, labour relations, scientific or technical information and trade secrets.

### *Discretionary Exceptions*

- *Local public body confidences* – includes a draft of a resolution, by-law, private bill or other legal instrument, provided they were not considered in a public meeting.
- *Policy advice or recommendations* – includes advice or recommendations developed by or for a public body or minister. Advice is considered to be a suggested course of action and not a progress or status report.
- *Legal advice* – includes information that is subject to solicitor and client privilege and legal opinions by a law officer of the Crown.
- *Harmful to law enforcement* – includes investigations, inspections or proceedings that lead or could lead to a penalty or sanction being imposed.
- *Harmful to intergovernmental relations* – includes federal, local, and foreign governments or organizations.
- *Harmful to financial or economic interests of a public body* – includes trade secrets, or information belonging to a public body that may have monetary value, and administrative plans/negotiations not yet implemented.

- *Harmful to individual or public safety* – includes information that could harm the mental or physical well-being of an individual.

## ACCOMPLISHMENTS AND INITIATIVES

### *Requests for Review*

During the period of this Annual Report this Office received 51 Requests for Review under section 43 of the *Act* and 4 complaints under section 44. Of the Requests for Review, 27 were resolved through informal resolution and 11 resulted in a Commissioner's Report. The remainder were either closed or carried over to the 2006/2007 fiscal year. In addition to Requests for Review and complaints, this Office received 105 access to information related inquiries during this period.

Separate from Requests for Review, the *Act* also gives the public the right to make a complaint concerning whether the fees being charged under the *Act* are appropriate, or whether an extension of time for responding to a request for review is valid. All 4 complaints referenced above were investigated and concluded by this Office.

While the *Act* provides the Commissioner with significant investigative powers, it also allows him to take steps that he considers appropriate to resolve a Request for Review informally, thereby avoiding a more formal Commissioner's Report. As a matter of course, this Office routinely pursues informal resolution. This involves reviewing the various issues with the parties, considering and discussing the legislation, examining previous decisions of this Office as well as decisions in other jurisdictions, and attempting to mediate an acceptable resolution, while ensuring that the applicant receives all information to which they may be entitled. Of the 38 Requests

for Review completed within the 2005/2006 fiscal year, 27 (71%) were resolved through this means. This Office will continue to build on this success and will foster mutually agreed resolutions wherever possible.

It must be recognized, however, that in a number of cases one or more parties to a Review may not be fully satisfied with the outcome of these informal discussions. In these cases the Commissioner maintains the right to conduct a formal review of a public body's decision, act or failure to act, and to issue a Report of his findings. In the fiscal year 2005/2006 this Office issued 11 such Reports, all of which are available on our website.

### *OIPC Website*

Our website, [www.oipc.gov.nl.ca](http://www.oipc.gov.nl.ca), was launched in April of 2005, shortly after our Office was created. This website provides general information about this Office, instructions on how to submit a Request for Review and copies of our Reports in pdf format. In addition, our website contains appropriate forms and other resources as well as links to the legislation, fee schedule and all provincial and federal oversight offices. We encourage members of the public as well as all public bodies to use this site at their convenience.

### *Education and Awareness*

An important mandate of this Office is to inform the public and interested groups about the *Act* and the services we provide. As such, we welcome invitations to speak to groups, organizations and public bodies throughout the Province. The following is a list of presentations conducted by this Office during fiscal year 2005/2006:

- March 24, 2005 – Seniors Resource Centre, St. John’s
- May 12, 2005 – Kilbride Family Resource Centre, St. John’s
- May 30, 2005 – Canadian Bar Association, St. John’s
- May 31, 2005 – Family Resource Centre (Western Region), Corner Brook
- June 15, 2005 – Journalists, Clarenville
- June 17, 2005 – Canadian Payments Association, St. John’s
- June 22, 2005 – Office of the Child and Youth Advocate, St. John’s
- November 7, 2005 – Mount Pearl Lions Club, Mount Pearl
- November 9, 2005 – Atlantic Lottery Corporation, St. John’s
- February 14, 2006 – Memorial University of Newfoundland, St. John’s

### *Resources and Publications*

During our first year of operation, this Office produced five formal documents to assist public bodies and members of the public:

1. Request for Review or Investigation of Complaint Form
2. OIPC Brochure
3. Guidelines for Video Surveillance by Public Bodies in Newfoundland and Labrador
4. Privacy Audit – A Compliance Review Tool
5. Guidelines for Public Bodies in Preparing for a Review

In order to simplify the process of filing a Request for Review or complaint with the Information and Privacy Commissioner, this Office developed a simple two page form. Applicants may file a request or complaint by way of a letter to this Office, but are encouraged to take advantage of the convenience and efficiency of the prescribed form. For privacy reasons, however, we do not accept requests or complaints by e-mail. The second document provides general information on the *Act*, on this Office and on the review/complaint process.

The third and fourth documents are referenced in the Privacy section of this Annual Report, under the headings “Video Surveillance” and “Privacy Impact Assessments,” respectively. The fifth document was produced by this Office to assist public bodies in responding to a Request for Review. It provides information on preparing records for disclosure to this Office as well as suggestions for providing written submissions to the Commissioner.

All five documents are available on our website at [www.oipc.gov.nl.ca](http://www.oipc.gov.nl.ca), under the “Resources” link. In addition, our brochure is available at all Government Service Centres throughout the Province. Our Office will also be happy to send any of these documents by e-mail, facsimile or regular mail.

### *Consultation/Advice*

Throughout the year our Office received numerous inquiries and requests for advice and consultation. Our staff routinely provides guidance to individuals, organizations and public bodies on access and privacy related issues. For example, we have assisted a number of public bodies with the introduction of new, as well as the revision of existing, legislative regimes, policies and/or programs. We believe that providing such guidance and advice is an important aspect of our overall mandate and we encourage individuals and organizations to work with our Office to ensure that access and privacy matters are appropriately considered and incorporated into all public sector activity.

### *Staffing*

Our Office currently consists of a part time Commissioner and three full time staff, namely an Executive Director, an Investigator and an Administrative Officer. Our first day of operation, January 17, 2005, marked the first Office of the Information and



Privacy Commissioner for the Province of Newfoundland and Labrador. This was a significant milestone for our Province and I would like to take this opportunity to congratulate Government on this initiative and on its commitment to openness and transparency.

It being the first Office of its kind in this Province, our first task was to establish the infrastructure needed to accomplish our mandate. This ranged from the purchase of furniture and computer equipment to the establishment of appropriate policies and procedures. In addition, staff was challenged with a significant learning curve, a challenge that was met with confidence and enthusiasm. Within weeks this Office was fully functional and on February 24, 2005 we received our first Request for Review, resulting in our first Report 2005-001.

From that point forward there was a steady increase in demand for the services provided by this Office. Staff continued to meet the challenges of this demand and, by all accounts, have done an exceptional job carrying out our mandate and facilitating a commitment to the spirit and intent of the *Act*. Notwithstanding the dedication and commitment of our staff, I anticipate a continued increase in the use of our services throughout the next fiscal year and beyond. As individuals and organizations become more familiar with this Office and with the legislation it is highly likely that government will see a rise in the number of requests for information and, consequently, this Office will see a rise in the number of Requests for Review and complaints. In fact, subsequent to the year ended March 31, 2006, by September of 2006 the level had already reached the previous year's total. In addition, it is anticipated that the privacy provisions of the *Act* will be proclaimed into force in 2007, thereby creating significantly more demand on this Office. As such, I anticipate that at some point in the foreseeable future our current staff compliment will not be sufficient to meet the demands placed on this Office. I will continue to closely monitor these demands and, as circumstances dictate, will seek additional resources. I trust that this Government's commitment to

openness and accountability, as well as the protection of the personal information of its citizenry, will assure support of my efforts in this regard.

## PRIVACY

Part IV of the *Act* governs the collection, use and disclosure of personal information by public bodies in this Province. Personal information is defined in section 2 of the *Act* to mean recorded information about an identifiable individual. This type of legislation is the first of its kind in this Province and is intended to protect the privacy of the citizenry by preventing the unauthorized collection, use and disclosure of personal information by all public bodies and by giving individuals a specific right of access to their own personal information.

Unfortunately, Part IV of the legislation has still not been proclaimed into force, leaving the Province of Newfoundland and Labrador as the only jurisdiction in Canada without appropriate privacy legislation covering the public sector. The access provisions of the *Act* were proclaimed on January 17, 2005, however, government chose to defer proclamation of the privacy provisions. In December of 2004 Government announced in the House of Assembly that proclamation of Part IV would be delayed one year after the access provisions. In anticipation of this one year time frame, the Commissioner wrote the Department of Justice in October of 2005 asking when we could expect to have the privacy provisions proclaimed. In February of 2006 the Department responded indicating that Government was “committed to proclaiming Part IV as soon as practicable,” but did not commit to a specific time frame. Reference was made at that time to the need for public bodies to be ready to properly deal with the requirements imposed by the *Act*. In March of 2006 the Minister announced publicly

that the privacy provisions would likely be proclaimed in 2007, possibly as early as June or July.

While it may be reasonable to expect an appropriate period of time for the training and orientation of public bodies, the length of this time causes this Office some concern. Recognizing the unique nature of this legislation and its government-wide implications, the Commissioner supported a one year training and preparation period. However, we believe that continued delays beyond this time frame only serve to jeopardize the privacy rights of the people of this Province. Assuming the earliest possible proclamation date of June, 2007, this would be nearly two and one half years from the date the access provisions were proclaimed and over five years from the date the legislation was passed in the House of Assembly. This Office does not feel that such a lengthy delay is necessary and we encourage Government to take every reasonable step to proclaim this very important legislation as soon as possible.

I should also note that on January 1, 2004 the *Personal Information Protection and Electronic Documents Act* (the "PIPEDA") came into full effect. The PIPEDA is Federal legislation which applies to all personal information collected, used or disclosed by private sector organizations during the course of commercial activity. As such, since January of 2004 the private sector in this Province is governed by privacy legislation while the public sector is not. The continued delay of Part IV of the *Act* only serves to prolong this obvious inequity between private and public sector entities.

The statistics provided in Figure 9 emphasize the importance of privacy protection to the people of this Province. During the period of this Annual Report (January 17, 2005 to March 31, 2006), this Office received 167 privacy related inquiries, the majority of which involved a member of the public complaining about the collection, use or disclosure of their personal information. By comparison, we received

105 access related inquiries. This high rate of privacy inquiries supports our recommendation to proclaim Part IV of the *Act* at the earliest possible time.

In terms of responding to these inquiries, officials with this Office routinely inform individuals that the privacy provisions are not yet proclaimed and, as such, we have no statutory authority to investigate their concerns. This is often met with surprise and frustration as these inquiries are often quite legitimate. It is for this reason that our Office will often contact a public body in the event that an individual's privacy has been adversely affected. The intent of this contact is simply to bring the information to the attention of the public body and to initiate a discussion in an attempt to allay the concerns of the individual and to mitigate future occurrences. This has met with significant success and the majority of public bodies involved deserve credit for taking these issues seriously and for initiating appropriate corrective action. By way of example, I will briefly describe some privacy related issues our Office has been involved with.

### *Video Surveillance*

In March of 2005 the media reported on the decision of a local nursing home board to utilize video surveillance cameras. When capturing and recording video images of identifiable individuals, a public body is collecting personal information and the use and control of that information will be subject to Part IV of the *Act*, once it is proclaimed into force. Recognizing the significant privacy implications of electronic surveillance techniques, this Office contacted the Board to provide some guidance in the early stages of the initiative and to help ensure that appropriate policies and procedures are in place when Part IV comes into force.

As a result of this initial contact, representatives from this Office met with Board officials to discuss issues such as design, operation, storage, access, retention,

destruction, training, notice, and safeguarding. The Board was very cooperative and provided this Office with material specific to its video surveillance program. While it was obvious that the Board had committed a significant amount of thought, research and preparation to this initiative, this Office suggested additional measures which would help ensure that their surveillance program would be consistent with Part IV of the *Act*. The Board accepted our recommendations and committed to ensuring that privacy would be maintained as a crucial aspect of its continued surveillance program.

As a result of our experience with video surveillance, this Office produced a set of guidelines for video surveillance by public bodies in Newfoundland and Labrador. These guidelines were released in April of 2005 and are available on our website at [www.oipc.gov.nl.ca](http://www.oipc.gov.nl.ca). Since releasing these guidelines this Office has received a number of requests from public bodies to review video surveillance policies and procedures. We are very encouraged by this and hope to continue working with public bodies in an effort to ensure that legitimate security protocols are balanced against the privacy of those individuals whose images are recorded under such protocols.

### *Public Registries*

On January 18, 2005 the Department of Government Services announced that the Registry of Deeds and Companies was now accessible through the Government's website. This service, known as Companies and Deeds Online (CADO), provided unrestricted 24 hour access to specific personal information of a large number of Newfoundlanders and Labradoreans. This Office does not take issue with information associated with companies, but is concerned that individual names and addresses are readily available through the online Registry of Deeds.

The availability of personal information through public registries has long been the subject of much debate throughout Canada. Such debate has been significantly

heightened with the proliferation of the Internet and the ability to access a wealth of personal information very quickly and easily from the comfort of one's own home, any time of the day or night. In the case of the Registry of Deeds, this information has traditionally been available to the public as long as individuals were willing to come into a government office during normal business hours. This in itself provided a certain level of privacy protection as, for the most part, only those individuals with a legitimate need to access the information would go through the trouble of physically traveling to the Registry during regular business hours. Making this information readily available on the Internet, however, removes all barriers and renders the information easily accessible to any individual with Internet access.

In her 2001 annual report (available at <http://www.ipc.on.ca/docs/ar-01e.pdf>) the Information and Privacy Commissioner of Ontario, Dr. Ann Cavoukian, reasoned that Internet access to public registries significantly reduces the privacy protection inherent in a system that requires an individual to travel to a government office during prescribed office hours. Internet access allows personal information to be easily retrieved, searched, sorted, manipulated and used for purposes unrelated to the original intent. Dr. Cavoukian went on to say that:

“...if a public registry is posted on a government Web site and can be searched by name and address, criminals such as stalkers and domestic abusers may be able to trace the whereabouts of their intended victim through the Internet. Identity thieves can more easily access and combine personal information from such registries with information gleaned from other sources in order to steal the identities of unsuspecting members of the public.”

The former Information and Privacy Commissioner of British Columbia, Mr. David Flaherty, also spoke to this point in his Investigation Report P98-011 (available at <http://www.oipcbc.org/investigations/reports/invrpt11.html>). This report references vulnerable individuals such as estranged wives of violent husbands, judges and jurors,

police officers, politicians, transition home workers, etc. The report states that these individuals "...are inherently less safe and the fact that their home address can be tracked down through the public property registries increases the threat of harassment or violence."

In light of the significant concerns associated with Internet access to personal information, the Commissioner wrote the Department of Government Services and provided a number of recommendations. While the Commissioner recognizes the value and convenience of e-commerce initiatives, it is our position that access to personal information contained in a public registry must be balanced with the protection of individual privacy to the greatest extent possible. In order to help strike this balance, our recommendations included: adjusting the Registry of Deeds portion of the CADO system so that it is searchable by property address only and not by name; providing a statement clearly setting out the legitimate purpose of the Registry; implementing a user fee; limiting access to registered users; and allowing for the suppression of personal information for legitimate health and safety reasons.

While there initially was some reluctance on the part of the Department to implement our recommendations, on November 15, 2005 the Minister announced a number of changes to CADO, including the imposition of a nominal fee, requiring users to register online. The Minister stated that "after careful consideration, my department decided to implement this privacy safeguard for the Internet access to ensure that only those with a legitimate use of the system would continue with their search." While all of our recommendations were not implemented, we are encouraged by the Department's recognition of our concerns and its commitment to a more privacy protective CADO system.

### *Privacy Impact Assessments*

A privacy impact assessment (PIA) is a tool to assist organizations in analyzing and determining their compliance with applicable privacy legislation. The intent of a PIA is to ensure that privacy issues are identified, fully considered and, where appropriate, resolved or mitigated. PIAs will likely prove very beneficial to public bodies in Newfoundland and Labrador when reviewing Part IV of the *Act* and determining whether they are appropriately collecting, using and disclosing the personal information of individual citizens.

While there is no statutory requirement for public bodies in this Province to use this tool, proclamation of Part IV will place significant responsibility on public bodies to ensure they are compliant with the provisions of the legislation. As such, this Office strongly recommends the use of a PIA. By providing a convenient method for public bodies to assess and adjust their privacy policies and practices, use of a PIA will help ensure a high level of privacy protection for the people of this Province.

In order to assist public bodies in this regard, this Office has created a document entitled *Privacy Audit – A Compliance Review Tool* (available on our website at [www.oipc.gov.nl.ca](http://www.oipc.gov.nl.ca)). This Privacy Audit is specifically designed for Newfoundland and Labrador public bodies to assess their compliance with the privacy provisions (Part IV) of the *Act*. It may be used to review existing programs and, as well, to ensure that privacy compliance is an integral part of any new program or activity or the modification of an existing program or activity.



## REPORT SUMMARIES

The majority of Requests for Review received at this Office are resolved through informal resolution. Over 70% of the Requests completed within the period of this Annual Report were resolved through this means. In these cases, we write the applicant and the public body, as well as any applicable third party, confirming that a resolution has been achieved and advising all parties that the file is closed or will be closed within a specified time period. Where informal resolution is successful, no Commissioner's Report is issued.

In the event that our attempt at an informal resolution is not successful, the file will be referred to a formal investigation. The results of this investigation, including a detailed description of our findings, are then set out in a Commissioner's Report. The Report will either contain recommendations to the public body to release records and/or to act in a manner consistent with the spirit and intent of the *Act*, or will support the position and actions of the public body. All Commissioner Reports are public and are available on our website.

The following are summaries of a selected number of Reports issued during the period of this Annual Report:

### *Report 2005-001 - College of the North Atlantic*

Report 2005-001 was the first Report issued by the Office of the Information and Privacy Commissioner for Newfoundland and Labrador. The Applicant had sought access to a number of records in the custody of the College. The Applicant subsequently claimed that the College failed to respond to his request within the appropriate time

frames and, in addition, failed to fulfill its duty to assist in an open, accurate and complete manner.

This investigation revealed that the College failed to meet many of its obligations under the legislation, including adherence to statutory time frames, appropriately engaging the designated Access and Privacy Coordinator and appropriately applying the fee schedule and fee estimate process. In addition, our Report expressed great concern over the College's failure to respond to this Office in a manner consistent with the *Act*. As such, the Commissioner concluded that the claims of the Applicant were well-founded.

The Commissioner noted in this Report that the College accepted considerable responsibility for its actions on this file and referenced a number of self-imposed remedies initiated by the College. While the Commissioner was encouraged by the College's commitment to specific corrective action, he did issue the following recommendations:

- That the College take steps to ensure that it meets the time limits imposed by the legislation;
- That the College ensure a timely and complete response to any individual applying for access to information;
- That the College fully engage the designated Access and Privacy Coordinator in all access to information requests;
- That the College perform its duties under the *Act* in a manner that is consistent with the duty to assist an Applicant;
- That the College provide documents to the Commissioner, when requested, within the statutory time lines set out in the legislation; and

- That the College apply the Fee Schedule, including the issuance of estimates, in strict accordance with the legislation and established policies and procedures.

In its response to the Report, as required by section 50, the College maintained that under the circumstances the delays encountered were not unreasonable. The College did, however, accept full responsibility and informed this Office that it would comply with our recommendations.

### *Reports 2005-002 and 2005-004 – Executive Council*

The Applicant filed two access to information requests with Executive Council for various public opinion poll results. Executive Council denied access to the majority of these records, resulting in two Reports from this Office.

#### 2005-002

In this case, Executive Council claimed that release of the polling information would harm this Province's relations with the Government of Canada (section 23) and would cause harm to the financial interests of the Province (section 24). The Commissioner found that neither of these sections applied to the responsive records, with the exception of a single page.

In reaching our conclusions this Office relied in part on the test of harm. The Courts have clearly interpreted a reasonable expectation of harm to mean a clear and specific expectation of probable harm, and not merely the possibility of harm. In light of a public body's burden of proof as mandated by section 64, the Commissioner concluded that Executive Council did not meet the minimum test of harm as anticipated by the legislation and supported by the case law. As such, our Report recommended

that the responsive records, with the exception of one page, be released to the Applicant.

In addition to the issue of harm, our Report references the public nature of public opinion polls. The Commissioner stated that "...public opinion polls are 'public' documents and do not invite the same level of confidentiality as one would expect from other internal documents. Such polls deal with public issues and are supported by public funds. I simply cannot accept that such information would adversely affect either the intergovernmental relations or the economic interests of this Province."

In response to our Report, Executive Council released the polling information as recommended by our Office.

#### 2005-004

This Report also involves a request for public opinion poll results. In this case, however, Executive Council claimed that release of the majority of polling results would reveal the substance of deliberations of Cabinet (section 18). Executive Council did release three of the requested polls to the Applicant but denied access to eight other polls under section 18. The Commissioner found that this exception to access did not apply to the responsive records, with the exception of some small portions.

In denying access to the eight polls, Executive Council argued that they had all been provided to Cabinet and are therefore considered Cabinet documents. Given the mandatory nature of section 18, Executive Council took the position that releasing this information would be inconsistent with the legislation. The Commissioner concluded that Executive Council was applying a "blanket" exception in this case and he disagreed with such a broad interpretation of section 18. The language of section 18 is clearly specific in that it only protects information that would reveal the "substance of

deliberations” of Cabinet. Information that does not meet this test does not invite the protection of this exception.

In reaching his conclusions, the Commissioner relied on the test set out by Saunders, J.A. of the Nova Scotia Court of Appeal, in *O’Connor v. Nova Scotia*, 2001 NSCA 132. In order to conclude that information would reveal the substance of deliberations of Cabinet, Saunders stated that disclosure of that information must permit the reader to draw accurate inferences about Cabinet deliberations. The Commissioner concluded that this test had not been met with respect to the majority of the responsive records and he recommended that these records be released to the Applicant.

In its response to this Report, Executive Council maintained its position that the release of the responsive records would reveal the substance of deliberations of Cabinet and, as such, stated that it did not agree with the Commissioner’s recommendation to release those records. In accordance with section 61(1) this Office, with the consent of the Applicant, filed a Notice of Appeal with the Supreme Court Trial Division appealing the decision of Executive Council not to follow our recommendations. Our Report was issued on June 27, 2005 and the Notice of Appeal was filed on July 28, 2005. In accordance with the required time frames, this Office proceeded to file the appropriate documentation with the Court, including the Appellant’s Factum. On November 16, 2005 Government asked for an extension with respect to filing their documentation to mid-December. In correspondence dated December 20, 2005, however, Government informed our Office that it was not necessary to proceed with the Court action as Cabinet had now authorized the release of the polling information. On December 22, 2005 the responsive records were released to the Applicant in accordance with our recommendation of June 27, 2005. As such, a Notice of Discontinuance was filed with the Court on January 12, 2006.

While we are encouraged by Executive Council's decision to ultimately release the responsive records in accordance with our recommendation, we do feel that the considerable time and resources, particularly legal costs, spent leading up to the release of the information was unnecessary.

### *Report 2005-005 – Department of Labrador and Aboriginal Affairs*

The Applicant applied for access to briefing notes prepared for the Minister upon his appointment as Minister Responsible for Labrador Affairs. The Department of Labrador and Aboriginal Affairs originally denied access to these records in their entirety, claiming that release of this information would reveal policy advice or recommendations (section 20). As a result of discussions with the Commissioner's Office, the Department eventually agreed to release a portion of the records, but in so doing invoked several other exceptions in support of their decision to withhold the remainder of the records. The Commissioner found that some of the information did fall under the section 20 exception, but concluded that the majority of the severed records did not. The Commissioner considered any mandatory exceptions not originally invoked by the Department, but did not accept those discretionary exceptions subsequently raised by the Department. The Commissioner recommended that the Department release the majority of the records to the Applicant.

In responding to the Applicant the Department denied access to entire sections of information, depending on the area the information was found within the records. For example, all information under the heading "Key Messages" was severed. The Department argued that

*While some of the information in the Key Messages section could be considered factual if it was included in the Background section, its positioning in a section developed to provide advice on speaking notes for the Minister changes the context and so is excluded.*

The Applicant on the other hand had pointed out that factual material is specifically not protected as advice or recommendations (section 20(2)(a)).

The Commissioner first clarified his position that advice is a suggested course of action, and not merely factual information. Furthermore, he opined that the explicit language of section 20(2)(a) excludes factual material from the protection of section 20(1) regardless of where this material is found within the record. Based on the pattern of severance in this case the Commissioner concluded that the Department was applying section 20 as a “blanket” exception and had not conducted an appropriate line-by-line review of the information. The Commissioner cautioned that public bodies should avoid applying exceptions to information based on its title or location.

The Commissioner also considered the mandatory exceptions of Cabinet confidences (section 18), personal information (section 30) and the business interests of a third party (section 27). He agreed that some information should be withheld in accordance with sections 18 and 30. With respect to section 27, the Commissioner noted that it contains a three-part harms test. The language of this provision is clear in its requirement that all three parts of the test must be met in order to invite the protection of this exception. The Department, however, had quoted specific parts of the test, to the exclusion of other parts, thereby failing to understand and appropriately apply the three-part test. While the Commissioner did conclude that some of the information protected under section 27 should be released to the Applicant, he recommended that the Department reconsider all other situations where it cited section 27, appropriately apply the three-part test and provide detailed and convincing evidence to this Office that all parts of the test have been met. Where the Department is unable to provide such evidence the Commissioner recommended that it contact the third party under authority of section 28.

Notwithstanding the application of specific exceptions to access, this Office noted that a significant portion of the information withheld by the Department had been previously released to the public, in some cases verbatim. Of the 82 pages of records under review, this Office was able to identify information on 50 of those pages that had been previously released, primarily by way of news releases. In addition, this Office found several cases of information being withheld in one section of a record, yet released to the Applicant in another section of the same record. In both of these cases the Commissioner recommended that all such information be released to the Applicant.

In addition to the recommendations to release additional information, the Commissioner also concluded that the Department had failed to meet its duty to assist the Applicant as required by section 9. As such, the Commissioner recommended that the Department perform its duties under the *Act* in a manner consistent with section 9, including full and complete cooperation with this Office.

In its initial response to our Report the Department agreed to release some additional information, but declined to accept our recommendations with respect to the majority of information. Subsequent to this response, however, the Department reassessed its position and decided to release significantly more information in accordance with our recommendations. As a result, no appeal of the Department's decision was filed.

### *Report 2005-007 – Intergovernmental Affairs Secretariat*

The Applicant applied for access to a series of video tapes produced by Newfoundland and Labrador's Royal Commission on Renewing and Strengthening Our Place in Canada (the Royal Commission). Intergovernmental Affairs Secretariat (IGA) denied access to these tapes, claiming that a significant portion of the tapes contained personal information as defined by the *Act*. The Applicant argued that the



information should not be considered personal information and, in any event, should not be protected because the Royal Commission was established under the *Public Inquiries Act* and all information associated with it should be publicly available. The Commissioner found that the records at issue are subject to the *Act* and he agreed with IGA that much of the information in the records is personal information and is protected by section 30.

The Commissioner first considered whether the responsive records were subject to the *Act*. Section 5 sets out several classes of records which are not subject to the legislation, including Court records and records associated with a judicial or quasi-judicial function. The Commissioner found that the Courts have clearly distinguished between a Court proceeding and an inquiry established to gather and analyze information. The Commissioner also found that a judicial or quasi-judicial proceeding involves significant judicial power, including the ability to render a decision or order. This is quite different from the more administrative function of issuing recommendations in response to an inquiry. Based on jurisprudence in this area and a review of the Royal Commission's Terms of Reference, the Commissioner rejected the application of section 5 and concluded that the responsive records are subject to the *Act*.

Having established jurisdiction, the Commissioner then reviewed the application of section 30. He found that a significant portion of the responsive records contained personal information as defined by the *Act*. The Commissioner agreed, therefore, that the records were appropriately withheld.

The Commissioner noted that IGA offered to provide the Applicant with a transcript of the video tapes, with all personal information appropriately severed. In addition, IGA indicated that it would disclose the personal information of any individual in the videos who provides written consent allowing IGA to do so. The

Commissioner agreed that this offer was reasonable and in accordance with the legislation. The Applicant, however, did not accept either of these options.

The Commissioner concluded that IGA acted appropriately in responding to this request for information and, accordingly, he did not issue a recommendation. The Applicant did not file an appeal in accordance with section 60.

### *Report 2006-004 – Executive Council – Rural Secretariat*

The Applicant applied for access to a number of records directly associated with a job competition within Executive Council's Rural Secretariat (the "Secretariat"). The Applicant had been a candidate for this competition but was unsuccessful. The Secretariat disclosed some information to the Applicant, but denied access to other information claiming that it was personal information (section 30). The Secretariat also claimed that some of the information being requested by the Applicant was excluded from the *Act* in accordance with section 5(1)(g). The Commissioner concluded that the Secretariat had appropriately severed the responsive records and had properly determined that the *Act* did not apply to some of the records.

The Secretariat did provide some information to the Applicant, but denied access to all information about other candidates, with the exception of the name of the successful candidate, in accordance with section 30. The Commissioner concluded that this information was clearly personal information and, due to the mandatory nature of this exception, the Secretariat had acted appropriately in denying access to the Applicant.

The Secretariat had also denied access to the interview questions, claiming that they were exempt from the *Act* in accordance with section 5(1)(g). This provision provides that "...a question that is to be used on an examination or test" is not subject to

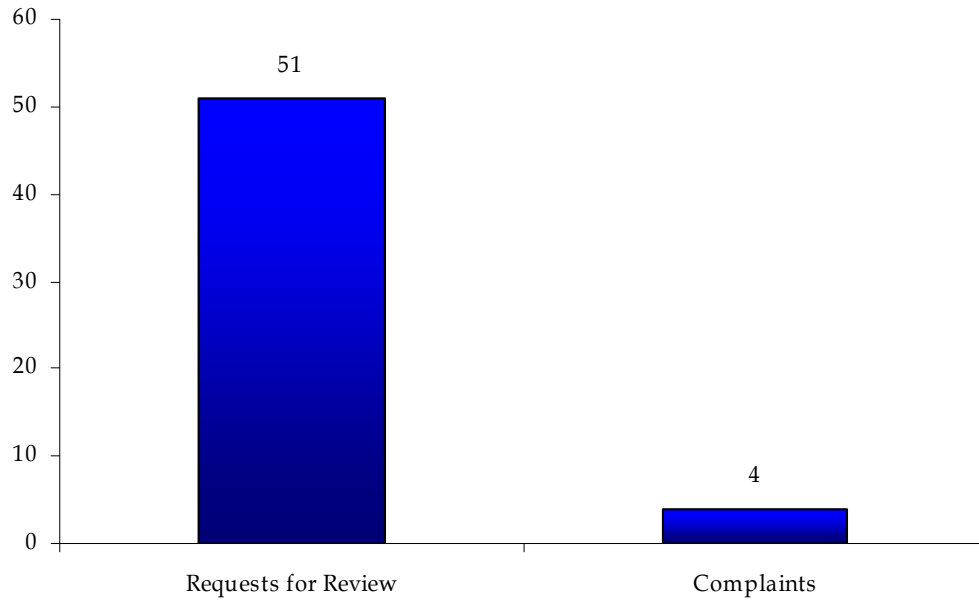
the *Act*. The Applicant argued that the term “is to be used” should not be interpreted to mean “that was used.” The Commissioner first concluded that an interview process is clearly captured by the general definition of the word “test.” He further concluded that it is reasonable for an organization to use interview questions more than once. As such, he accepted that questions that have been used, but will be used again in the future, are captured by the term “is to be used.” The Commissioner agreed, therefore, that interview questions are not subject to the legislation. Again, the Commissioner concluded that the Secretariat had acted appropriately in applying the provisions of the *Act*.

The Commissioner concluded that all information withheld by the Secretariat was withheld appropriately and, accordingly, he did not issue a recommendation. The Applicant did not file an appeal in accordance with section 60.

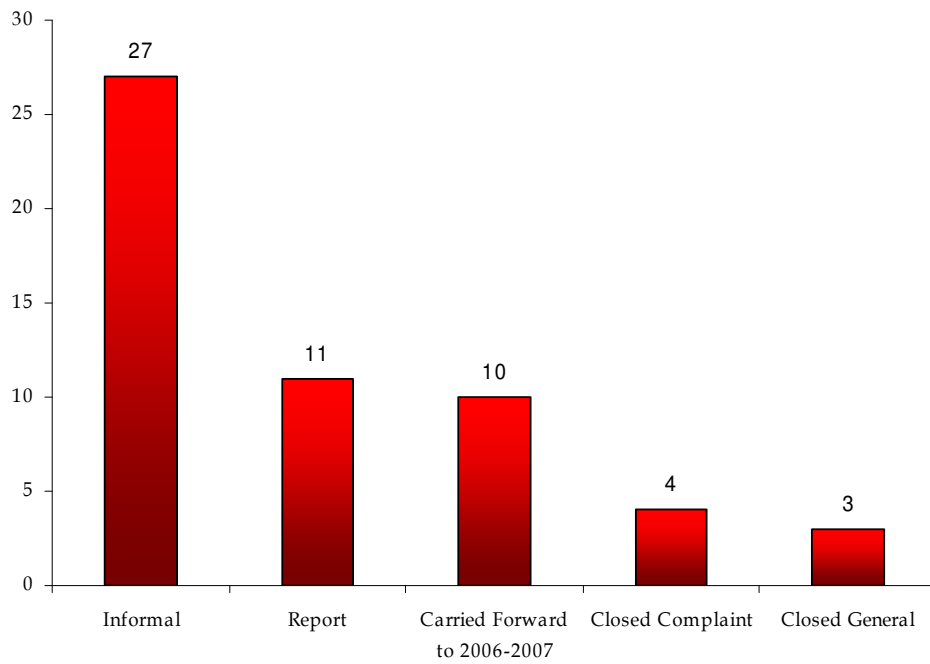


# STATISTICS

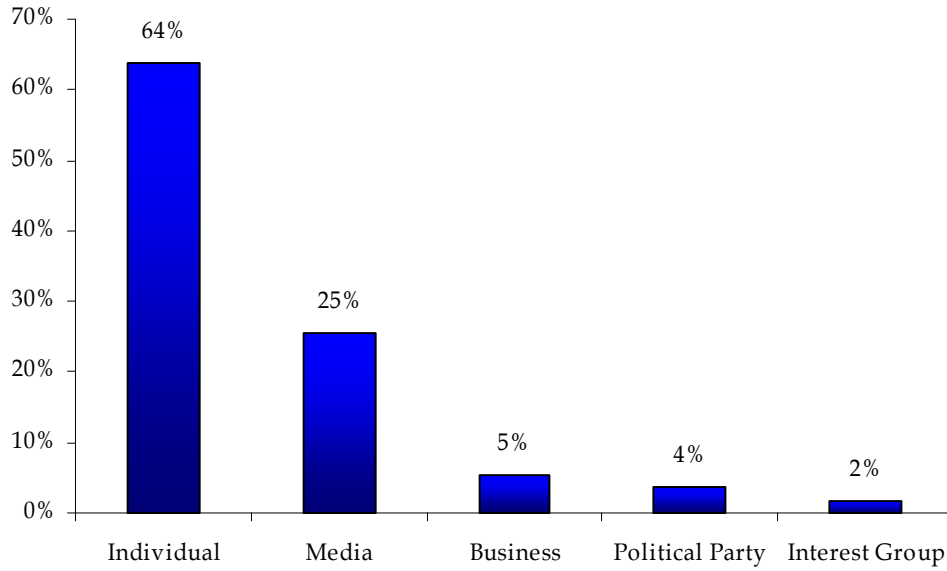
**Figure 1: Requests for Review/Complaints Received**



**Figure 2: Outcome of Requests for Review/Complaints Received**



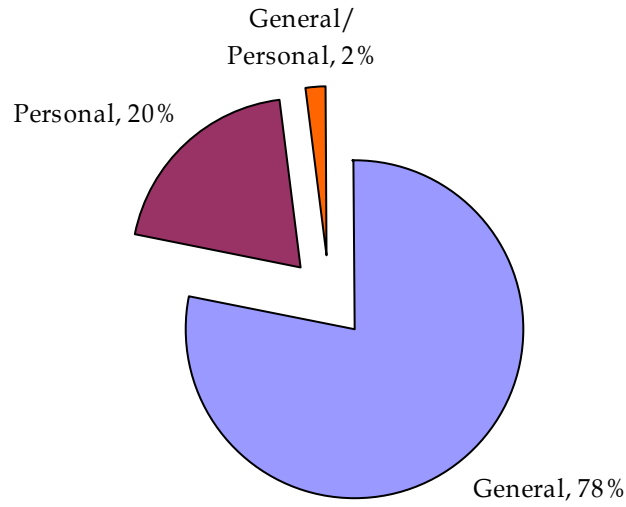
**Figure 3: Reviews by Applicant Group**



**Table 3: Reviews by Applicant Group**

<i>Public Body</i>	<i>Number of Reviews</i>	<i>Percentage</i>
Individual	35	64%
Media	14	25%
Business	3	5%
Political Party	2	4%
Interest Group	1	2%

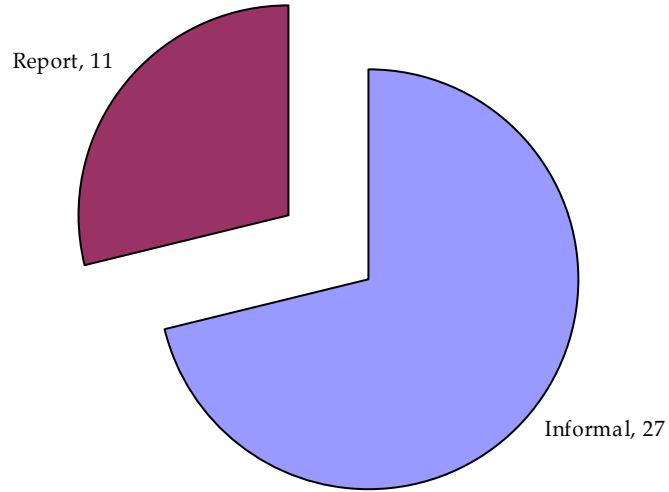
**Figure 4:** Reviews by Information Requested



**Table 4:** Reviews by Information Requested

<i>General</i>	<i>Personal</i>	<i>General/Personal</i>
43	11	1
78%	20%	2%

**Figure 5:** Resolutions of Requests for Review

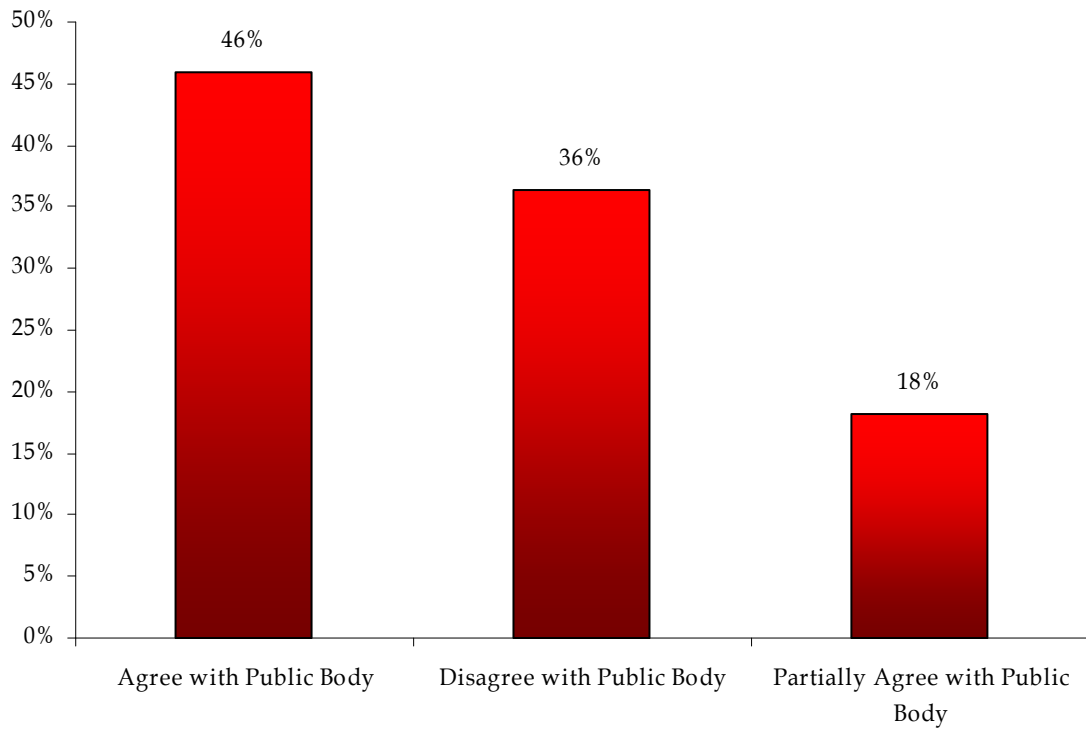


**Table 5:** Resolutions of Requests for Review

<i>Informal</i>	<i>Report</i>
27	11
71%	29%



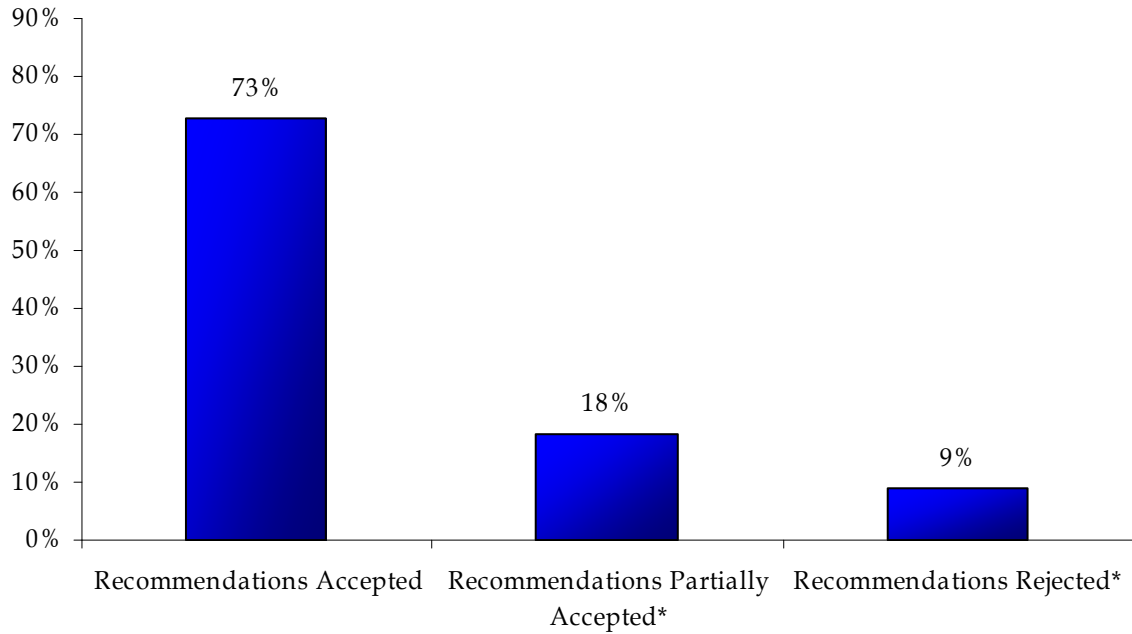
**Figure 6:** Conclusions of Commissioner



**Table 6:** Conclusions of Commissioner

<i>Agree with Public Body</i>	<i>Disagree with Public Body</i>	<i>Partially Agree with Public Body</i>
5	4	2
46%	36%	18%

**Figure 7: Public Body Response to Commissioner’s Reports**

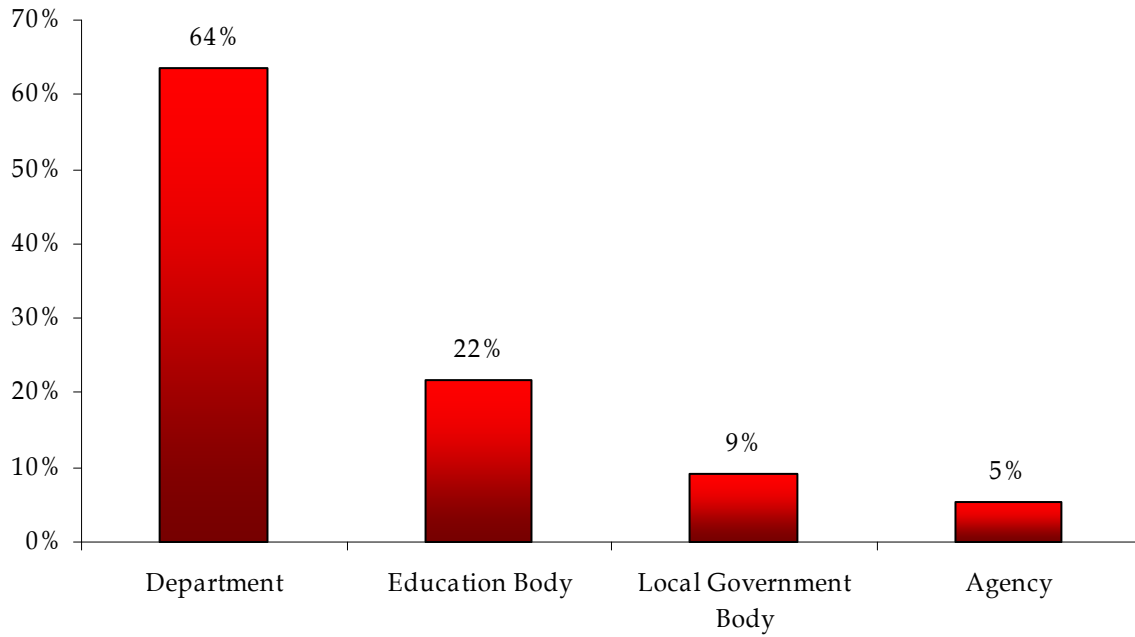


\* Recommendations to release information were subsequently accepted and the majority of information was released (see Report Summaries 2005-004 and 2005-005)

**Table 7: Public Body Response to Commissioner’s Reports**

<i>Recommendations Accepted</i>	<i>Recommendations Partially Accepted*</i>	<i>Recommendations Rejected*</i>
8	2	1
73%	18%	9%

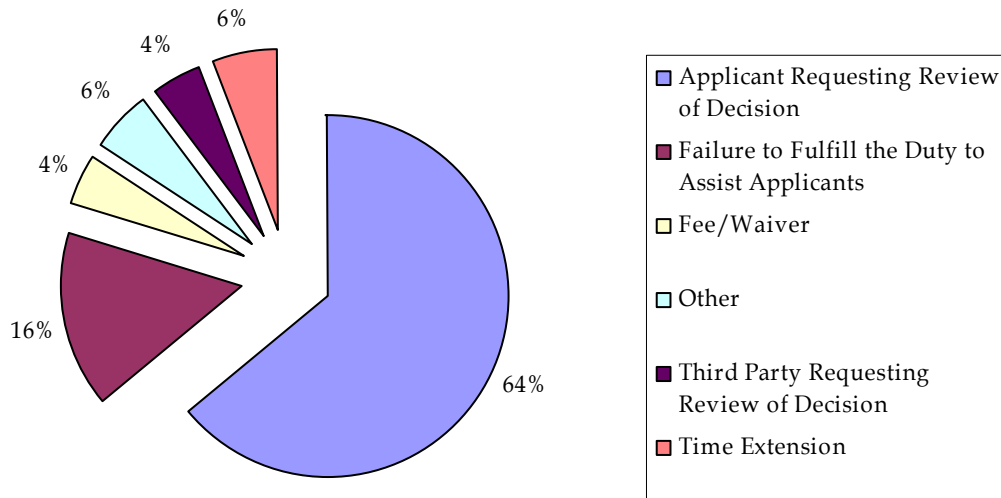
**Figure 8: Public Body Requests for Review**



**Table 8: Public Body Requests for Review**

Department	Education Body	Local Government Body	Agency
35	12	5	3
64%	22%	9%	5%

**Figure 9: Requests for Review by Issue**



**Table 9: Requests for Review by Issue\***

<i>Applicant Requesting Review of Decision</i>	<i>Failure to Fulfill the Duty to Assist</i>	<i>Fee/Waiver</i>	<i>Other</i>	<i>Third Party Requesting Review of Decision</i>	<i>Time Extension</i>
44	11	3	4	3	4
64%	16%	4%	6%	4%	6%

\*A Request for Review often relates to several issues.

Figure 10: Inquiries

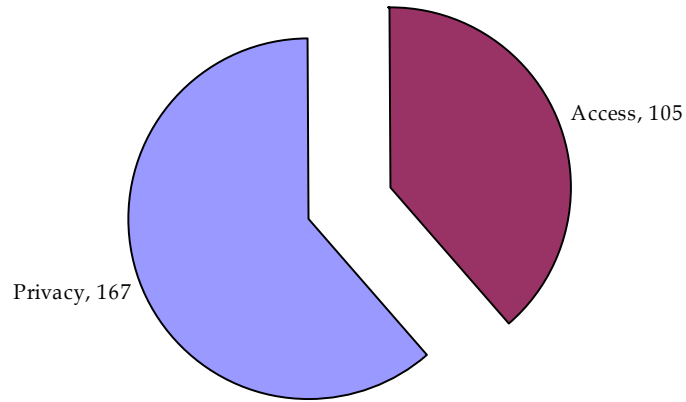
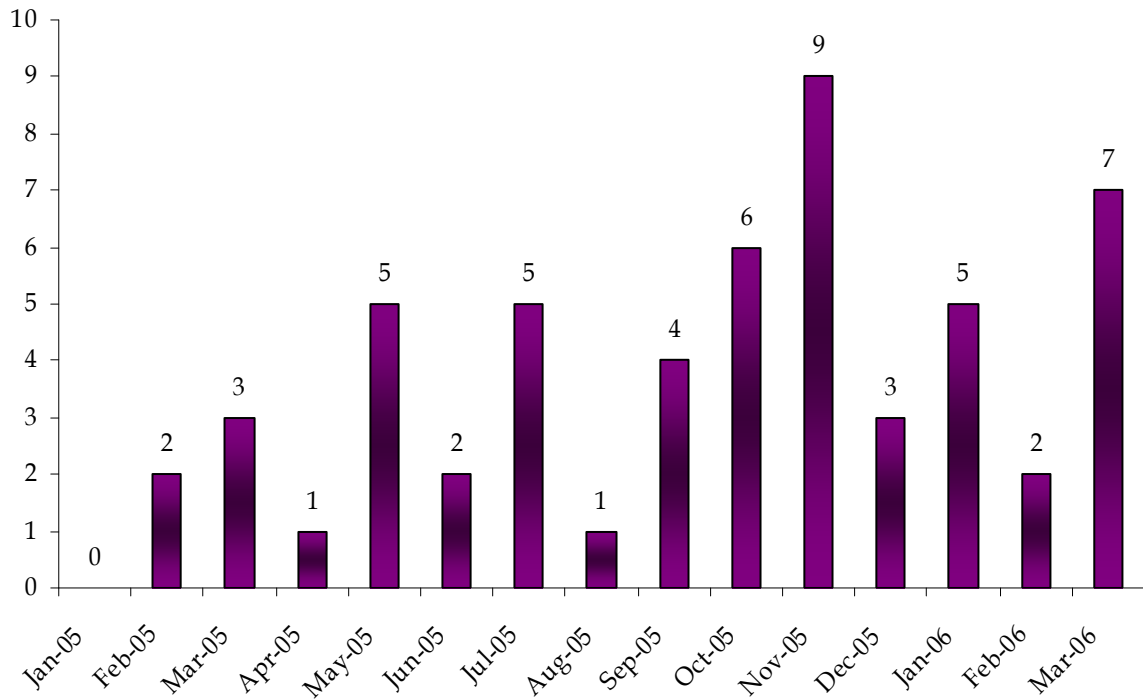


Figure 11: Requests for Review/Complaints (Monthly)





## APPENDIX A

### *Making an Access Request*

- Determine which public body has custody or control of the record.
- Contact the public body, preferably the Access to Information Co-ordinator, to see if the record exists and whether it can be obtained without going through the process of a formal request.
- To formally apply for access to a record under the Act, a person must complete an application in the prescribed form, providing enough detail to enable the identification of the record. Such applications are available from the public body or from our website [www.gov.nl.ca/oipc](http://www.gov.nl.ca/oipc).
- Enclose a cheque or money order for the \$5.00 application fee payable to the public body to which the request is submitted (or, if a government department, payable to the Newfoundland Exchequer).
- Within 30 days, the public body is required to either provide access, transfer the request, extend the response time up to a further 30 days or deny access. Additional fees may also be imposed.
- If access to the record is provided, then the process is completed. If access is denied, or other action has been implemented which you dispute, you may request a review by the Information and Privacy Commissioner. In addition, an appeal may be made to the Supreme Court Trial Division.

### *Making a Request for Review*

- Upon receipt of a complaint or formal request for review, the Information and Privacy Commissioner will review the circumstances and attempt to resolve the matter informally.
- If informal settlement is unsuccessful, the Information and Privacy Commissioner will prepare a Report and will make recommendations to the public body and provide a copy of the Report to the applicant.
- Within 15 days after the Report is issued, the public body must decide whether or not to follow the recommendations, and the public body must inform the applicant and the Commissioner of this decision.
- Within 30 days, after receiving the decision of the public body, the applicant and/or the Information and Privacy Commissioner may appeal the decision to the Supreme Court Trial Division.

***Contact Information***

*5<sup>th</sup> Floor, East Block  
Confederation Building  
P. O. Box 8700  
St. John's, NL  
A1B 4J6*

*Telephone: (709) 729-6309*

*Facsimile: (709) 729-6500*

*E-mail: [oipc@gov.nl.ca](mailto:oipc@gov.nl.ca)*

*Web Site : [www.gov.nl.ca/oipc](http://www.gov.nl.ca/oipc)*