

**SUPREME COURT OF CANADA**

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| **Citation:** Canada (Information Commissioner) *v*. Canada (Minister of National Defence), 2011 SCC 25, [2011] 2 S.C.R. 306 | **Date:** 20110513  **Dockets:** 33300, 33299, 33296, 33297 |

**Between:**

**Information Commissioner of Canada**

Appellant

and

**Minister of National Defence**

Respondent

- and -

**Canadian Civil Liberties Association, Canadian Newspaper Association,**

**Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists**

Interveners

**Between:**

**Information Commissioner of Canada**

Appellant

and

**Prime Minister of Canada**

Respondent

- and -

**Canadian Civil Liberties Association, Canadian Newspaper Association,**

**Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists**

Interveners

**Between:**

**Information Commissioner of Canada**

Appellant

and

**Minister of Transport Canada**

Respondent

- and -

**Canadian Civil Liberties Association, Canadian Newspaper Association,**

**Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists**

Interveners

**Between:**

**Information Commissioner of Canada**

Appellant

and

**Commissioner of the Royal Canadian Mounted Police**

Respondent

- and -

**Canadian Civil Liberties Association, Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association and Canadian Association of Journalists**

Interveners

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 75)  **Concurring Reasons :**  (paras. 76 to 112) | Charron J. (McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Rothstein and Cromwell JJ. concurring)  LeBel J. |

Canada (Information Commissioner) *v.* Canada (Minister of National Defence), 2011 SCC 25, [2011] 2 S.C.R. 306

**Information Commissioner of Canada** *Appellant*

*v.*

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and

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*v.*

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and

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**of Journalists** *Interveners*

**Indexed as: Canada (**Information Commissioner) ***v.* Canada (Minister of National Defence**)

2011 SCC 25

File No.: 33300, 33299, 33296, 33297.

2010: October 7; 2011: May 13.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

on appeal from the federal court of appeal

*Access to information — Access to records — Request for Ministers’ records located in ministerial offices — Whether records “under control of government institution” as provided in legislation — Access to Information Act, R.S.C. 1985, c. A‑1, ss. 3, 4(1).*

*Access to information — Exemptions — Privacy — Personal information — Request for Prime Minister’s agenda — Whether agenda constitutes “personal information” as defined in legislation — If so, whether agenda should nonetheless be disclosed because Prime Minister is “officer” of government institution — Access to Information Act, R.S.C. 1985, c. A‑1, s. 19(1) — Privacy Act, R.S.C. 1985, c. P‑21, s. 3.*

These appeals bring together four applications by the Information Commissioner of Canada for judicial review of refusals to disclose certain records, requested almost a decade ago, under the *Access to Information Act*. The first three applications concern refusals to disclose records located within the offices of then Prime Minister Chrétien, then Minister of Defence Eggleton, and then Minister of Transport Collenette, respectively. The fourth application concerns the refusal to disclose those parts of the Prime Minister’s agenda in the possession of the RCMP and PCO. The applications judge refused disclosure on the first three applications, but ordered it on the fourth. The Federal Court of Appeal overturned his decision on the fourth application only.

Held: The appeals should be dismissed.

*Per* McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.: Any refusal to disclose requested documents is subject to independent review by the courts on a standard of correctness. In turn, the standard of appellate review of the applications judge’s decision on questions of statutory interpretation is also correctness. However, the standard of review of his decision on whether the requested documents were in fact under the control of the government institution is one of deference, provided the decision is not premised on a wrong legal principle and absent palpable and overriding error.

On the first three applications, the applications judge’s reasons demonstrate that he conducted a full analysis of the statutes guided by well‑established principles of statutory interpretation. At the conclusion of his analysis, the applications judge held that the words in s. 4(1) of the *Access to Information Act* mean that the PMO and the relevant ministerial offices are not part of the “government institution” for which they are responsible. The Federal Court of Appeal rightly held that the applications judge’s analysis contains no error. The meaning of “government institution” is clear. No contextual consideration warrants the Court interpreting Parliament to have intended that the definition of “government institution” include ministerial offices.

The question then becomes whether the requested records held within the respective ministerial offices are nonetheless “under the control” of their related government institutions within the meaning of s. 4(1) of the Act. The word “control” is an undefined term in the statute. As the applications judge made clear, the word must be given a broad and liberal meaning in order to create a meaningful right of access to government information. While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control. Thus, if the record requested is located in a Minister’s office, this does not end the inquiry. Rather, this is the point at which a two‑step inquiry commences. Step one acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. If the record requested relates to a departmental matter, however, the inquiry into control continues. Under step two, all relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. There is no presumption of inaccessibility for records in a minister’s office. Further, this test does not lead to the wholesale hiding of records in ministerial offices. Rather, it is crafted to answer the concern. In addition, Parliament has included strong investigatory provisions that guard against intentional acts to hinder or obstruct an individual’s right to access.

Applying this test to the material before him, the applications judge concluded that none of the requested records was in the control of a government institution. The conclusions he reached on the issue of control were open to him on the record and entitled to deference.

On the fourth application, it is agreed that the Prime Minister’s agendas in the possession of the RCMP and the PCO were under the control of a “government institution”. Records under the control of these institutions must be disclosed, subject to certain statutory exemptions. Section 19(1) of the *Access to Information Act* prohibits the head of a government institution from releasing any record that contains personal information as defined in s. 3 of the *Privacy Act*.However, s. 3(*j*) creates an exception by allowing for the disclosure of personal information where such information pertains to an individual who is or was an officer or employee of a government institution and where the information relates to the position or function of the individual. The applications judge held that the Prime Minister was an officer of PCO. In doing so, he relied upon the definitions of public officer found in the *Financial Administration Act* and the *Interpretation Act*. The Federal Court of Appeal rightly held that the applications judge erred in relying upon these definitions. It would be inconsistent with Parliament’s intention to interpret the *Privacy Act* in a way that would include the Prime Minister as an officer of a government institution. Had Parliament intended the Prime Minister to be treated as an “officer” of the PCO pursuant to the *Privacy Act*, it would have said so expressly. Thus, the relevant portions of the Prime Minister’s agenda under the control of the RCMP and the PCO fall outside the scope of the access to information regime.

*Per* LeBel J.: Ministers’ offices are not listed in Schedule I of the Act, and accordingly they should not be considered “government institutions”. Nonetheless, this conclusion cannot be the basis for an implied exception for political records. The fact that Ministers’ offices are separate and different from government institutions does not mean that a government institution cannot control a record that is not in its premises. If a government institution controls a record in a Minister’s office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head of the government institution must facilitate access to it on the basis of the two‑part control test as stated in the reasons of Charron J. If the record holder is the Minister, the fact that his or her office is not part of the government institution he or she oversees may weigh in the balance. The reality that Ministers wear many hats must also be taken into account. A Minister is a member of Cabinet who is accountable to Parliament for the administration of a government department, but is usually also a Member of Parliament in addition to being a member of a political party for which he or she performs various functions and, finally, a private person. It is conceivable that many records will not fall neatly into one category or another. The head of a government institution is responsible for determining whether such hybrid documents should be disclosed. The first step in the assessment is to consider whether the records fall within the scope of the Act. If they do, the head must then perform the second step of the assessment process: to determine whether the records fall under any of the exemptions provided for in the Act. Depending on which exemption applies, the head may or may not have the discretion to disclose the document.

A presumption that a Minister’s records are beyond the scope of the Act would upset the balance between the head’s discretionary powers and the Commissioner’s powers of investigation. Such an interpretation of the Act would effectively leave the head of a government institution with the final say as to whether a given document was under the institution’s control and would run counter to the purpose of the Act, according to which decisions on the disclosure of government information must be reviewed independently. This is crucial to the intended balance between access to information and good governance.

In the circumstances in which the records at issue in the first three applications were created and managed, a government institution would not have a reasonable expectation of obtaining them. These documents were therefore not under the control of a government institution. As for the records in the possession of the RCMP and PCO, even though they were under the control of a government institution, the heads of those institutions had an obligation to refuse to disclose them.

**Cases Cited**

By Charron J.

**Referred to:**  *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Tele‑Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Francis v. Baker*, [1999] 3 S.C.R. 250; *Bristol‑Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Canada Post Corp. v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320; *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110; *Privacy Commissioner (Can.) v. Canada Labour Relations Board* (2000), 257 N.R. 66; *Rubin v. Canada (Minister of Foreign Affairs and International Trade)*, 2001 FCT 440, 204 F.T.R. 313; *Canada (Attorney General) v. Information Commissioner (Can.)*, 2001 FCA 25, 268 N.R. 328; *Canada Post Corp. v. Canada (Minister of Public Works)*, 2004 FCA 286, 328 N.R. 98; *Dagg v. Canada (Minister of Finance)*,[1997] 2 S.C.R. 403.

By LeBel J.

**Referred to:**  *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84; *Béliveau St‑Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Rubin v. Canada (Clerk of the Privy Council)*, [1996] 1 S.C.R. 6; *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110.

**Statutes and Regulations Cited**

*Access to Information Act*, R.S.C. 1985, c. A‑1, ss. 2, 3 “government institution”, “head”, 4, 6, 7 to 9, 10, 13 to 26, 30(3), 35, 36, 37, 41, 42, 48, 49, 73.

*Canadian Charter of Rights and Freedoms*, s. 2.

*Federal Accountability Act*, S.C. 2006, c. 9.

*Financial Administration Act*, R.S.C. 1985, c. F‑11, s. 2 “public officer”.

*Interpretation Act*, R.S.C. 1985, c. I‑21, ss. 2 “public officer”, 3(1), 24, 35.

*Library and Archives of Canada Act*, S.C. 2004, c. 11, s. 2 “government record”, “ministerial record”.

*Privacy Act*, R.S.C. 1985, c. P‑21, s. 3 “head”, “personal information” (*j*).

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*Canadian Oxford Dictionary*. Edited by Katherine Barber. Toronto: Oxford University Press, 2001, “control”.

Drapeau, Michel William, and Marc‑Aurèle Racicot. *Federal Access to Information and Privacy Legislation Annotated 2011*. Toronto: Carswell, 2010.

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McEldowney, John F. “Accountability and Governance: Managing Change and Transparency in Democratic Government” (2008), 1 *J.P.P.L.* 203.

APPEALS from a judgment of the Federal Court of Appeal (Richard C.J. and Sexton and Sharlow JJ.A.), 2009 FCA 175, 393 N.R. 51, [2009] F.C.J. No. 692 (QL), 2009 CarswellNat 1521, affirming in part a judgment of Kelen J., 2008 FC 766, [2009] 2 F.C.R. 86, 326 F.T.R. 237, 87 Admin. L.R. (4th) 1, [2008] F.C.J. No. 939 (QL), 2008 CarswellNat 1979. Appeals dismissed.

APPEAL from a judgment of the Federal Court of Appeal (Richard C.J. and Sexton and Sharlow JJ.A.), 2009 FCA 181, 393 N.R. 54, 310 D.L.R. (4th) 748, [2009] F.C.J. No. 693 (QL), 2009 CarswellNat 1523, reversing in part a judgment of Kelen J., 2008 FC 766, [2009] 2 F.C.R. 86, 326 F.T.R. 237, 87 Admin. L.R. (4th) 1, [2008] F.C.J. No. 939 (QL), 2008 CarswellNat 1979. Appeal dismissed.

Jessica R. Orkin, Marlys A. Edwardh,Laurence Kearley and Diane Therrien, for the appellant.

Christopher Rupar, Jeffrey G. Johnston and Mandy Moore, for the respondents.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Paul Schabas, for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association and the Canadian Association of Journalists.

The judgment of McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. was delivered by

Charron J. —

1. Overview

1. These appeals bring together four applications by the Information Commissioner of Canada for judicial review of refusals to disclose certain records to a person who requested them under the *Access to Information Act*, R.S.C. 1985, c. A‑1. The records, requested almost a decade ago, generally consist of agendas, notes and emails relating to the activities of then-Prime Minister Jean Chrétien, then‑Minister of National Defence Art Eggleton, and then-Minister of Transport David Collenette.
2. The first three applications concern refusals to disclose records located within the offices of the Prime Minister, the Minister of National Defence, and the Minister of Transport, respectively. Each record holder, jointly called the “Government” in these appeals, takes the position that his office is not subject to the *Access to Information Act*. The fourth application concerns the refusal to disclose those parts of the Prime Minister’s agenda in the possession of the Royal Canadian Mounted Police (“RCMP”) and the Privy Council Office (“PCO”). The record holders in this application agree that they are subject to the Act; they argue, however, that the information contained in the requested records is exempt from disclosure under s. 19(1) of the *Access to Information Act*, as it constitutes “personal information” within the meaning of s. 3 of the *Privacy Act*, R.S.C. 1985, c. P-21.
3. The requester has the right, under s. 4 of the *Access to Information Act*, to be given access to “any record under the control of agovernment institution”. On the first three applications, there is no issue that, by definition, “government institution” includes the PCO, the Department of National Defence, and the Department of Transport. The question is whether each government institution includes the office of the Minister who presides over it. In other words: Is the Prime Minister’s office (“PMO”) part of the PCO? Is the office of the Minister of National Defence part of the Department of National Defence? Is the office of the Minister of Transport part of the Department of Transport?
4. Following a detailed analysis, Kelen J. of the Federal Court of Canada answered no to each question, holding that the respective entities were separate (2008 FC 766, [2009] 2 F.C.R. 86). In his view, the words of the statute read in their ordinary sense, in context, and harmoniously with the scheme of the Act and the intention of Parliament made this clear. Expert evidence on the functioning of government also supported this interpretation. He concluded that “no contextual consideration could warrant the Court interpreting Parliament to have intended the PMO to be part of the PCO for the purposes of the Act. The same is true with respect to ministers’ offices not being part of the respective government institutions” (para. 77). In a brief oral judgment, Sharlow J.A., speaking for the Federal Court of Appeal, upheld Kelen J.’s interpretation of the statute on this point (2009 FCA 175, 393 N.R. 51 (“Decision 1”)), and again in 2009 FCA 181, 393 N.R. 54 (“Decision 2”).
5. As the ministerial entities were held to be separate, a second question arose: Are the records requested, despite being physically located in the respective offices of the Prime Minister, the Minister of National Defence, or the Minister of Transport, nonetheless “under the control” of the related government institution within the meaning of s. 4 of the *Access to Information Act*?
6. After surveying the jurisprudence, Kelen J. concluded that no single factor is determinative of whether a record is under the control of a government institution. However, the relevant factors could usefully be distilled into a two-part test that asks: (1) whether the contents of the document relate to a departmental matter; and (2) whether the government institution could reasonably expect to obtain a copy of the document upon request. If both questions are answered in the affirmative, the document is under the control of the government institution. Kelen J. considered the contents of the records and the circumstances in which they were created, and concluded that none of the records requested was under the control of the related government institution. The Federal Court of Appeal agreed with the control test proposed by Kelen J. It also upheld his decision regarding the requested records, stating that it was open to him to come to this conclusion “by drawing reasonable inferences from the evidence before him, as he did” (Decision 1, at para. 9).
7. Thus, the answers provided by the courts below on the meaning of “government institution” and “control” effectively disposed of the first three applications in favour of the Government.
8. In the fourth application, there is no dispute that the RCMP and the PCO are government institutions and that, subject to any exemption under the *Access to Information Act*, records under their control must be disclosed. While a number of exemptions were at issue in first instance, the question on this appeal is whether the records requested consist of “personal information” within the meaning of s. 19(1) of the *Access to Information Act*. This provision prohibits the head of a government institution from disclosing “any record . . . that contains personal information as defined in section 3 of the *Privacy Act*”. Under this provision, “personal information” “means information about an identifiable individual that is recorded in any form”.
9. The parties agree that the Prime Minister’s agenda falls within the general definition of “personal information”. However, s. 3 “personal information” (*j*) of the *Privacy Act* creates an exception by excluding from the scope of protection such information which pertains to “an individual who is or was an officer or employee of a government institution” and the information “relates to the position or functions of the individual”. The exception seemingly reflects the view that federal officers or employees are entitled to less protection when the information requested relates to their position or function within the government. It is this exception that is arguably at play in the fourth application: the disclosure issue turns on the question of whether the Prime Minister is an “officer” of the PCO within the meaning of s. 3 “personal information” (*j*) of the *Privacy Act*.
10. Kelen J. held that the Prime Minister was an “officer” of the PCO. In a separate judgment, the Federal Court of Appeal overturned his decision, finding that the conclusion reached in the related appeals about the separate nature of the PMO from the PCO governed here as well. Sharlow J.A. held that it would be “inconsistent with the intention of Parliament to interpret the *Privacy Act* in a way that would include the Prime Minister within the scope of the phrase ‘officer of a government institution’” in s. 3 (Decision 2, at para. 8).
11. The Commissioner appeals from the dismissal of each application. She urges the Court to hold that, as “heads” presiding over departments, the Prime Minister and the Ministers are part of these “government institutions” within the meaning of the *Access to Information Act*, when exercising *departmental functions*. Similarly, she argues that the Prime Minister is an “officer” of the PCO. Alternatively, if ministerial offices are held to be separate entities, the Commissioner argues that any record *relating to a departmental matter* is presumptively under the “control” of the government institution over which the Minister presides, regardless of its creation or location within the ministerial office. Thus, any such record must be disclosed, unless it is specifically exempt under the Act.
12. While the Commissioner raises some specific issues regarding the interpretation in the courts below in support of her position, her arguments are grounded primarily in broad principles of constitutional law, political theory, democratic accountability, and ministerial responsibility. I note at the outset that these principles unquestionably form part of the context in which the *Access to Information Act* operates. The position advanced by the Commissioner also reflects a policy of democratic governance which Parliament could choose to adopt. However, as Kelen J. aptly noted in the introduction to his judgment:

The question for the Court is not whether the documents should be accessible to the public under Canada’s “freedom to information” law, but whether the documents are currently accessible to the public under Canada’s existing law. The Court does not legislate or change the law; it interprets the existing law (para. 3).

1. Much as the courts below have concluded, it is my view that the interpretation advanced by the Commissioner on the meaning of “government institution”, “control” and “officer” cannot be sustained under the existing statutes at issue. As the Government rightly argues, such interpretation would dramatically expand the access to information regime in Canada, a result that can only be achieved by Parliament.
2. I would dismiss the appeals.

2. The Legislative Scheme

1. As this Court recently stated, “[a]ccess to information in the hands of public institutions can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance” (*Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, *per* McLachlin C.J. and Abella J., at para. 1). These general principles are reflected in the federal access regime under the *Access to Information Act*. The purpose of the statute is expressly stated as follows:

**2.** (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

1. Thus, the statute expressly recognizes that information in the hands of government institutions “should be available to the public”, but the right to access it is subject to “necessary exceptions”. Before discussing the provisions at issue, I will briefly describe the legislative scheme.
2. The right to “be given access to any record under the control of a government institution” is provided under s. 4(1). This broad right of access is expressly subject to other provisions of the *Access to Information Act*, but supersedes “any other Act of Parliament”. What constitutes a “government institution” for the purposes of the statute is key to these appeals. The definition is set out in s. 3 and will be discussed more fully below.
3. The process for accessing government information begins when a member of the public makes a request in writing for a record to a government institution (s. 6). The head of the government institution who receives a request must give written notice to the person who has requested the records as to whether or not access will be given in whole or in part within a reasonable time limit (ss. 7 to 9). Where the government institution refuses to give access to the records requested, it is required to provide notice to the requester that the records do not exist, or to expressly state the exemption it is relying upon in refusing to provide access to the records (ss. 10(1) to (3)). Further, the government institution must inform the requester of his or her “right to make a complaint to the Information Commissioner about the refusal” (s. 10(1)).
4. If the requester elects to exercise this right and makes a complaint, the Commissioner is entitled to commence an investigation if she is “satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act” (s. 30(3)). Once the Commissioner commences an investigation, the *Access to Information Act* grants her significant investigatory powers (s. 36). If the Commissioner concludes that the complaint is well founded, a report is sent to the head of the government institution containing the findings of the investigation and any recommendations the Commissioner considers appropriate; the report may also include a request to be notified of any action taken to implement the recommendations or reasons why no such action has been or is proposed to be taken (s. 37(1)).
5. If the government institution elects not to comply with the Commissioner’s recommendations, the individual requesting the record may apply for judicial review pursuant to s. 41 of the *Access to Information Act*. The Commissioner may also apply for judicial review of the government’s decision with the consent of the individual who initially requested the records (s. 42). The latter is what occurred here. The Government refused to disclose the information, and the requester complained to the Commissioner. Following her investigation, the Commissioner found the complaints to be well founded and made recommendations accordingly. The recommendations were not implemented by the Government, and the Commissioner brought these four applications for judicial review.

3. Judicial Review in the Courts Below

1. The four applications for judicial review were combined in one hearing before the Federal Court. Before reviewing the relevant material, Kelen J. determined the appropriate standard of review in accordance with the principles set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Under *Dunsmuir*, courts may usefully first inquire whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be given to a particular category of questions. Second, where the first inquiry proves unfruitful, courts proceed to analyze the factors that make it possible to identify the proper standard of review (para. 62). Kelen J. ended the inquiry at the first step, holding that this Court’s decision in *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66 (“*RCMP*”), determined in a satisfactory manner that the questions raised in these four applications should be reviewed on a “correctness” standard (para. 36).
2. The standard for judicial review of refusals by government institutions to disclose any requested documents under the *Access to Information Act* is not at issue in these appeals. Kelen J. rightly concluded that this Court authoritatively determined the matter in *RCMP*. Determining the appropriate standard of review requires courts to discern the intention of the legislature. Of particular note here is the fact that Parliament expressly states in s. 2(1) that one of the purposes of the *Access to Information Act* is to ensure that “decisions on the disclosure of government information should be reviewed independently of government”. Moreover, the burden is put on the government to demonstrate on judicial review that it is authorized to refuse to disclose the records that were requested (s. 48). If the court concludes that the head of the institution does not have the legal authority to refuse to disclose the relevant records, the court may substitute its own decision and order the disclosure of the documents, subject to any conditions it may elect to impose (s. 49).
3. In turn, Kelen J.’s decision is subject to appellate review in accordance with the principles set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8-9 and 31-36. His decision on questions of statutory interpretation is reviewable on a standard of correctness. His decision on whether the requested documents were in fact under the control of the government institution, provided it is not premised on a wrong legal principle and absent palpable and overriding error, is entitled to deference. Although not expressly stated, it is apparent from reading both judgments in the Federal Court of Appeal below that Sharlow J.A. reviewed Kelen J.’s decision in accordance with the proper standard of appellate review. I will review the decisions under appeal using the same approach.

4. Analysis

4.1 *Issue 1: Is the Office of the Prime Minister, or a Minister, a “Government Institution” Within the Meaning of the Access to Information Act?*

1. Subsection 4(1) of the *Access to Information Act* reads as follows:

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

(*a*) a Canadian citizen, or

(*b*) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,

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

1. Under s. 3 of the Act:

“government institution” means

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

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

1. Schedule I sets out a list of entities that are government institutions for the purposes of the *Access to Information Act*. This list includes the PCO, the Department of National Defence, the Department of Transport, and the RCMP. However, the PMO, the office of the Minister of National Defence and the office of the Minister of Transport are *not* expressly listed in Schedule I. The term “government institution” is similarly defined under the *Privacy Act*. The question becomes whether Parliament intended to implicitly include ministerial offices within the *Access to Information Act*.
2. The proper approach to statutory interpretation has been articulated repeatedly and is now well entrenched. The goal is to determine the intention of Parliament by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute. In addition to this general roadmap, a number of specific rules of construction may serve as useful guideposts on the court’s interpretative journey. Kelen J. instructed himself accordingly (paras. 43-49). He then conducted the following analysis:

- First, Kelen J. considered evidence from political scientists about how government actually works to determine the ordinary meaning of the term “government institution” according to the experts. He held that this evidence demonstrated that the PMO and the relevant ministerial offices are not part of the “government institution” for which they are responsible (paras. 50-52).

- Second, he noted that pursuant to s. 3 of the statute, the Minister is the “head” of his or her department. This fact supported the argument that the Ministers’ offices and the PMO are part of their respective departments. However, he found that the PMO and the Ministers also have many other functions unrelated to the respective departments for which they are responsible (paras. 53-56).

- Third, he considered Hansard debates from 1981, which made it clear that Parliament intended that the *Access to Information Act* apply to information, in any form, held by *specified* government institutions. While the Commissioner agrees that Parliament did not intend the Act to apply to political documents, no exemption or exclusion for such political records is provided for in the Act. Kelen J. therefore reasoned that an interpretation of “government institution” that included the PMO and offices of the Ministers would dramatically extend the right of access. Parliament would not have intended such a “dramatic result” without express wording to that effect (paras. 57-60).

- Fourth, following the enactment of the *Access to Information Act*, the Information Commissioner’s 1988-1989 Report to Parliament indicated that Ministers’ offices were *not* subject to the provisions of the Act. The Commissioner adopted the same view in 1991, and again in 1997. These original interpretations confirm that the office of the Information Commissioner itself understood the intent of Parliament was not to include the PMO or a Minister’s office in the government institutions listed in Schedule I of the Act (paras. 61-65).

- Fifth, since the time the Commissioner publicly urged Parliament to amend the legislation to clarify that the PMO and ministerial offices are subject to the Act, Parliament amended the Act several times, including recent amendments as part of the 2006 *Federal Accountability Act*, S.C. 2006, c. 9, and has not chosen to make this amendment. While Parliament’s intention may not always be inferred from legislative silence, in this case, the silence is clear and constitutes relevant evidence of legislative intent: *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, at para. 42 (paras. 66-67).

- Sixth, the Latin maxim of statutory interpretation *expressio unius est exclusio alterius* (“to express one thing is to exclude another”) supports the Government’s view. If Parliament had intended to include the PMO and Ministers’ offices in Schedule I, it would have referred to them expressly (para. 68).

- Seventh, the evidence at trial demonstrated that there have been many Ministers without a portfolio since Confederation. If the *Access to Information Act* was intended to apply to the offices of Ministers, the Act would not apply to a Minister without a portfolio because he or she would not have a corresponding “government institution” set out in Schedule I. Such a result is absurd (para. 69).

- Eighth, the internal structure of the Act also provides insight on this question. Sections 21(1)(*a*), (*b*), (2)(*b*) and 26 of the *Access to Information Act* demonstrate that Parliament distinguished between a “government institution” and “a minister of the Crown”. When drafting legislation, Parliament is assumed to have used words precisely and carefully, and so Parliament intended the terms to have different meanings (paras. 70-73).

- Ninth, provisions of the *Library and Archives of Canada Act*, S.C. 2004, c. 11, also draw a distinction between governmental records and ministerial records. The principle of consistent expression in statutory interpretation means that Parliament distinguishes between a “ministerial record” and a “departmental record” (paras. 74-76).

1. At the conclusion of his analysis, Kelen J. held that the words in s. 4(1) of the *Access to Information Act* mean that the PMO and the relevant ministerial offices are *not* part of the “government institution” for which they are responsible. That is, the PMO cannot be interpreted as part of the PCO, the office of the Minister of National Defence is not part of the Department of National Defence, and the office of the Minister of Transport is not part of the Department of Transport.
2. The Commissioner presents very little argument on any of the above-noted points. As I understand her submissions, she has only two specific complaints about the approach adopted by Kelen J. and affirmed by the Federal Court of Appeal. First, she argues that the applications judge erred in his use of expert evidence as an interpretative aid. Second, and somewhat related to the first point, she argues that the Federal Court of Appeal erred in relying on a non-existing “constitutional convention” for distinguishing between ministerial offices and their respective government departments. I will therefore deal specifically with these two arguments.

4.1.1 The Use of Expert Evidence

1. After setting out the relevant principles of statutory interpretation, Kelen J. briefly considered the evidence tendered from “experts in government machinery” (para. 50). In particular, he examined the evidence of Mr. Nicholas d’Ombrain, Mr. Justice John Gomery, and a reference relied upon by Mr. d’Ombrain from the Honourable Robert Gordon Robertson, Clerk of the Privy Council and Secretary to the Cabinet from 1963 to 1975. Kelen J. summarized the gist of this evidence as follows, at paras. 50-51:

While the two entities work closely together on some matters, the PMO is responsible for many matters unrelated to the PCO. The same is true with respect to the relationship between a minister’s office and the department over which the minister presides.

Accordingly, the evidence demonstrates that in the ordinary sense of the words in subsection 4(1) of the Act, the PMO and the relevant ministerial offices are not part of the “government institution” for which they are responsible.

1. The Commissioner submits that reliance upon such expert evidence to interpret the *Access to Information Act* constitutes an error of law. She maintains that it was entirely appropriate for her office to consider expert political science evidence at the investigatory stage. However, opinion evidence is inadmissible in the courtroom to prove the ordinary meaning of legislative terms, “as the interpretation and articulation of domestic law lies at the very heart of the judicial function” (A.F., at para. 110). She contends that this approach confirms that both courts below “viewed the central issue of the reach of a ‘government institution’ as a question of fact, to be determined primarily if not entirely on the basis of expert evidence” (para. 112). She argues further that the courts below “did not at any point seek to determine what was included within a ‘government institution’ as a matter of law”; rather, they simply accepted the “assertion that a ministerial office is separate from the department over which the Minister presides” (para. 112).
2. In response, the Government first observes that the Commissioner’s position on this point is “particularly curious”, as the expert evidence generated by the Commissioner’s office and compiled for her investigation was used extensively to support her recommendations and then placed in the record before the Federal Court (R.F., at para. 103). In any event, the Government submits that expert evidence can be properly used as an interpretative aid in discerning the ordinary meaning of words by Parliament when such evidence is relevant and reliable: *Francis v. Baker*, [1999] 3 S.C.R. 250, at para. 35; and *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533, at para. 47. Further, Kelen J.’s reasons demonstrate that the expert evidence played a limited role in his analysis. He did not rely on any expert opinion on the meaning of the words used by Parliament as contended,given thatno such opinion was tendered by the witnesses. He considered this evidence, rather, to situate the interpretative exercise in its proper context, an approach which was then correctly upheld by the Federal Court of Appeal.
3. I agree with the Government. No objection was raised in respect of this evidence in first instance, not surprisingly in my view, as consideration of expert evidence in the context of these applications was entirely appropriate. It is also apparent from Kelen J.’s reasons that he merely relied upon the expert evidence tendered by both parties to better appreciate the day-to-day workings of the government and to situate his interpretation of the *Access to Information Act* within its proper context. Further, Kelen J.’s meticulous analysis of the law belies any contention that he “viewed the central issue of the reach of a ‘government institution’ as a question of fact” (A.F., at para. 112). His reasons demonstrate, rather, that he conducted a full analysis of the text, guided by well-established principles of statutory interpretation. I see no merit to the Commissioner’s argument on the alleged misuse of expert evidence.

4.1.2 Alleged Reliance on a Non-Existing Constitutional Convention

1. Along the same lines, the Commissioner takes issue with Sharlow J.A.’s characterization of the distinction between ministerial offices and their respective government departments as a “well understood convention” (Decision 1, at para. 7; Decision 2, at para. 7). The Commissioner focuses a significant portion of her argument on the legal criteria for a constitutional convention and takes the position that none is met here. She therefore argues that this phrase demonstrates that the Federal Court of Appeal “erroneously accorded constitutional weight to a disputed, ill-defined and inconsistently followed practice” (A.F., at para. 116).
2. The Government responds that the Commissioner used the term “convention” in her material in the courts below simply to describe an understanding of the roles and duties of Ministers and government institutions. The Government submits that, similarly, when Sharlow J.A. used the phrase “well understood convention”, it is clear from the context that she was simply referring to the day-to-day workings or “conventions” of government.
3. Again, I agree with the Government on this point. I find no support at all in the record for the suggestion that Sharlow J.A. was actually referring to constitutional conventions in their legal sense.

4.1.3 “Function-Based” Approach Advocated by the Information Commissioner

1. Except for the above-noted specific complaints about the use of expert evidence and the reliance on government “conventions”, the Commissioner’s arguments are grounded primarily in broad principles of constitutional law, political theory, democratic accountability, and ministerial responsibility. The Commissioner expounds on these principles in considerable detail and submits that “the right of access and apparatus created by [the *Access to Information Act* was] meant [by Parliament] to be integrated into these legal rules” and “to function as a supplementary mechanism to ensure accountability for the exercise of executive power” (A.F., at para. 102). She therefore urges the Court to adopt a “function-based analysis” so as to create a dividing line between a Minister’s departmental functions on the one hand and non-departmental functions on the other. She explains in her factum that this “analysis is easily translated into the scheme” of the *Access to Information Act* in respect of the ministerial offices at issue in the following manner (A.F., at para. 150):

. . . a record is subject to [the *Access to Information Act*], regardless of its physical form or location, where it was created by or on behalf of a Minister to document or give effect to a Minister’s exercise of departmental powers, duties or functions, or relies directly on departmental staff in order to exercise the Minister’s departmental powers, duties or functions. By contrast, the record is not subject to [the *Access to Information Act*] if it is created by the Minister or exempt staff for political or non-departmental purposes. Similarly, if the Minister or exempt staff receive information from departmental staff, and then generate further records for political, non-departmental purposes, the additions are not subject to [the *Access to Information Act*].

1. The Commissioner further submits that a similar analysis could be adopted in relation to Ministers of State “[t]o the extent that a Minister of State exercises the powers, duties and functions of a department”, and also “in relation to government institutions other than departments that fall within the portfolio responsibilities of a given Minister (or Minister of State)” (A.F., at paras. 152-53).
2. The Government submits that the “function-based” approach advocated by the Commissioner renders the list of institutions detailed in Schedule I essentially meaningless. Her approach is entirely focused on the nature and content of the record and, as such, conflates the issue of defining “government institution” with the issue of how one determines which entity has “control” of a specific record. Moreover, although the Commissioner recognizes that political and non-departmental matters would not be subject to release under the Act, the statute provides no exemption for such records. Her attempt to remedy this deficiency by conceptually building it into a function-based definition of “government institution” goes “well beyond any concept of statutory interpretation recognized by this or any other Court” (R.F., at para. 129).
3. I agree with the Government. None of the broad principles relied upon by the Commissioner is contentious in these appeals. In my respectful view, nor are they particularly helpful in answering the questions of statutory interpretation at issue. For example, the Commissioner relies heavily on the quasi-constitutional characterization of the *Access to Information Act*. (See *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, where the Court affirmed this status in respect of the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), and the *Privacy Act* (paras. 23-25).) She argues that, as such, the purpose of the Act becomes of paramount importance in the interpretative exercise, and that the legislation should be interpreted broadly in order to best promote the principles of responsible government and democratic accountability. While I agree that the *Access to Information Act* may be considered quasi-constitutional in nature, thus highlighting its important purpose, this does not alter the general principles of statutory interpretation. The fundamental difficulty with the Commissioner’s approach to the interpretation of the term “government institution” is that she avoids any direct reference to the legislative provision at issue. The Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted.
4. It is important to recall that Parliament’s statement of purpose in s. 2 of the Act recognizes that exceptions to public accessibility are “necessary”. For example, in s. 21, Parliament has recognized the need for confidential advice to be sought by and provided to a Minister and, consequently, records in a government institution offering such advice are exempt from disclosure at the discretion of the head of the institution. The advice provided to a Minister may come from a variety of sources and may pertain to a broad range of matters, including matters relating to the department over which the Minister presides. Some of these matters may have a political dimension and some may not. Similarly, the policy rationale for excluding the Minister’s office altogether from the definition of “government institution” can be found in the need for a private space to allow for the full and frank discussion of issues. As the Government rightly submits: “It is the process of being able to deal with the distinct types of information, including information that involves political considerations, rather than the specific contents of the records” that Parliament sought to protect by not extending the right of access to the Minister’s office (R.F., at para. 82). Of course, not all documents in a Minister’s office are excluded from the scope of the Act. As we shall see, despite its physical location in a ministerial office, any document which is “under the control” of the related, or any other, government institution is subject to disclosure.
5. The functional approach advocated by the Commissioner not only creates the problem identified by Kelen J. that some Ministers would be covered by the Act, whereas others would not. It also ignores the practical difficulty of carving out a political class exemption when none is provided in the Act. If a Minister’s office is a government institution, all records under its control would be subject to release under the Act, unless expressly exempted or excluded by the Act. The proposal of carving out “political” documents based on an analysis of their content is easier said than done. As the Government notes, “records in a Minister’s office are not neatly arranged into clearly defined ‘political’, ‘constituent’ and ‘departmental’ piles. The intermingling of these issues and facts is what makes the Minister’s office unique. The simplistic approach of ‘carving out’ political records is unrealistic” (R.F., at para. 88).
6. Of course, Parliament could have opted for a different access scheme. However, it did not. Kelen J.’s interpretative analysis contains no error. The meaning of “government institution” is clear. In my view, the courts below rightly concluded that no contextual consideration warrants the Court interpreting Parliament to have intended that the definition of “government institution” include ministerial offices. I would not give effect to this ground of appeal.

4.2 *Issue 2: Are the Records Requested, Despite Their Physical Location in the Respective Ministerial Offices, “Under the Control” of the Related Government Institution Within the Meaning of Section 4 of the Access to Information Act?*

1. In light of my conclusion regarding the first issue, the question then becomes whether the requested records held within the respective ministerial offices are nonetheless “under the control” of their related government institutions within the meaning of s. 4(1) of the Act. Kelen J. concluded that they were not, and the Federal Court of Appeal upheld his decision. The Commissioner appeals from this conclusion.
2. None of the Commissioner’s arguments is directed at the findings of fact made by Kelen J. regarding the particular records requested. The success of the Commissioner’s appeal on this point is dependent, rather, on whether the Court accepts her proposed test for determining what constitutes “control” for the purposes of access under the Act. As I will explain, the test for control proposed by the Commissioner is entirely focussed on the function or content of the record and, in substance, is essentially the same as the test she proposes for defining a “government institution”. Consequently, much for the reasons stated above, the Commissioner’s interpretation of the word “control” cannot be sustained as it finds no support in the wording of the Act.
3. First, I will review the control test adopted by the courts below.
4. The word “control” is an undefined term in the statute. Its meaning has been judicially considered in a number of cases, and Kelen J. turned to this jurisprudence for guidance. In particular, he reviewed the following cases: *Canada Post Corp. v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320 (T.D.); *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (C.A.); *Privacy Commissioner (Can.) v. Canada Labour Relations Board* (2000), 257 N.R. 66 (F.C.A.); *Rubin v. Canada (Minister of Foreign Affairs and International Trade)*, 2001 FCT 440, 204 F.T.R. 313; *Canada (Attorney General) v. Information Commissioner (Can.)*, 2001 FCA 25, 268 N.R. 328; and *Canada Post Corp. v. Canada (Minister of Public Works)*, 2004 FCA 286, 328 N.R. 98. From this jurisprudence, Kelen J. gleaned a number of principles, which I will paraphrase as follows.
5. As “control” is not a defined term in the Act, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are “under the control of a government institution”, courts have considered “ultimate” control as well as “immediate” control, “partial” as well as “full” control, “transient” as well as “lasting” control, and “*de jure*” as well as “*de facto*” control. While “control” is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the meaning of a word such as “control” with the aid of dictionaries. The *Canadian Oxford Dictionary* defines “control” as “the power of directing, command (under the control of)” (2001, at p. 307).In this case, “control” means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a “partial” basis, a “transient” basis, or a “*de facto*” basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the Act (paras. 91-95).
6. In applying these principles to the records at issue, Kelen J. articulated the following test, at para. 93:

Upon review by the Court, if the content of a document in the PMO or the offices of the Ministers of National Defence and Transport relates to a departmental matter, and the circumstances in which the document came into being show that the deputy minister or other senior officials in the department could request and obtain a copy of that document to deal with the subject-matter, then that document is under the control of the government institution. [Emphasis deleted.]

1. The Federal Court of Appeal agreed with this test, holding that, in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request? (Decision 1, at paras. 8-9).
2. As I understand her arguments, the Commissioner does not take issue with any of the principles Kelen J. gleaned from his review of the relevant jurisprudence. Indeed, she substantially adopts these principles in her factum at para. 168 and rightly so. Those principles should inform the analysis. Her complaint lies, rather, with how these principles were distilled into the two-step inquiry described above. She submits that the courts below have erred in law by essentially reducing the legal inquiry concerning “control” to two seemingly simple factual questions — whether the record relates to a departmental matter and whether senior members of the departmental staff could request and obtain a copy of the record. She submits that these factual indicia can be too easily manipulated by government actors to avoid releasing documents that validly fall within the scope of the Act. In particular, she submits that the “mechanism of a hypothetical ‘request’” under step two of the test is weak and unacceptable as it “inappropriately relies on past practices and prevalent expectations, rather than the legal relationships at issue” (A.F., at para. 169). Put more colloquially, she argues that if this Court adopts the control test articulated in the courts below, the Minister’s office may effectively become a “black hole” used to shield certain sensitive documents that properly fall within the ambit of the *Access to Information Act* (A.F., at para. 162).
3. I agree with the Commissioner that it would be an error to interpret the words “under the control” in a manner that allowed government actors to turn the Minister’s office into a “black hole” to shelter sensitive records that should otherwise be produced to the requester in accordance with the law. However, as I will explain, I am not persuaded that the courts below erred as she contends. In essence, the Commissioner’s complaint on this ground of appeal is based on the same criticism of the institutional distinction between the Minister and the department over which he or she presides argued under the first ground. This is readily apparent from the alternative test that she proposes. In order to counter the “black hole” problem, the Commissioner urges the Court to hold that a record in a Minister’s office is under the control of the corresponding government institution when the following two conditions are met:

(a) the record was obtained or generated by the Minister or on his or her behalf; and

(b) the record documents or gives effect to the Minister’s exercise of departmental powers, duties or functions, or relies directly on departmental staff in order to exercise the Minister’s departmental powers, duties or functions. [A.F., at para. 172]

1. As the Government rightly responds, the test for control proposed by the Commissioner effectively eliminates the need to consider the definition of “government institution”. As the Government puts it in its factum: “If the function or content of the record determines control, then it does not matter if the record is in a government institution or a Minister’s Office, as they are the same entity for the purposes of determining ‘control’” (R.F., at para. 179). I agree. A decision on the issue of control based almost exclusively on the content of the record would have the effect of extending the reach of the Act into the Minister’s office where, as discussed earlier, Parliament has chosen not to go.
2. Further, the Commissioner’s argument on the deficiency of the control test crafted by the courts below presupposes that the two-part distillation of the test, particularly as articulated by the Federal Court of Appeal, is not intended to fully capture the principles upon which the test was crafted. I do not read the judgments below as having that effect. As Kelen J. made clear, the notion of control must be given a broad and liberal meaning in order to create a meaningful right of access to government information. While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control. Thus, if the record requested is located in a Minister’s office, this does not end the inquiry. The Minister’s office does not become a “black hole” as contended. Rather, this is the point at which the two-step inquiry commences. Where the documents requested are not in the physical possession of the government institution, the inquiry proceeds as follows.
3. Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry. The Commissioner agrees that the *Access to Information Act* is not intended to capture non-departmental matters in the possession of Ministers of the Crown. If the record requested relates to a departmental matter, the inquiry into control continues.
4. Under step two, *all* relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on “past practices and prevalent expectations” that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the *Access to Information Act* (A.F., at para. 169). The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably *should* be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word “could” is to be understood accordingly.
5. My colleague LeBel J. agrees with this control test, but takes exception to the creation of “an implied presumption that the public does not have a right of access to records in a Minister’s office” (para. 76). With respect, his concern is founded on a misinterpretation of these reasons. There is no presumption of inaccessibility. As LeBel J. rightly notes, at para. 91:

The fact that Ministers’ offices are separate and different from government institutions does not mean that a government institution cannot control a record that is not in its premises. If a government institution controls a record in a Minister’s office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head must facilitate access to it on the basis of the procedure and the limits specified in the Act.

1. I agree. Conversely, if a document is under the control of the Minister’s office and *not* under the control of the related, or any other, government institution, it does not fall within the purview of the *Access to Information Act.* If one views this result as creating a factual “presumption of inaccessibility”, or alternatively an implied exemption for political records, in my respectful view, it is a consequence that inevitably flows from the fact that Ministers’ offices are not government institutions within the meaning of the Act, a conclusion with which LeBel J. agrees.
2. Thus, the test articulated by the courts below, properly applied, does not lead to the wholesale hiding of records in ministerial offices. Rather, it is crafted to answer the concern. In addition, as the Government rightly notes, Parliament has included strong investigatory provisions that guard against intentional acts to hinder or obstruct an individual’s right to access. My colleague reviews some of these investigatory powers. It is true, as he points out, that the statutory power to enter any “government institution” would not allow the Commissioner to enter a Minister’s office. However, again here, it seems to me that this result inevitably flows from the limited scope of the term “government institution” and must be taken to have been intended by Parliament. I disagree with my colleague that this limitation on the Commissioner’s powers effectively leaves the Minister as head of the government institution with the final say as to whether a given document is under the control of a government institution (para. 109). The Commissioner has significant powers of investigation that include the authority to “summon and enforce the appearance of persons”, including Ministers, “and compel them to give oral or written evidence on oath and to produce such documents and things as the Commissioner deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of record”: s. 36(1)(*a*). Further, as an additional safeguard, any refusal to disclose requested records is subject to independent review by the courts on a standard of correctness.
3. In the result, I agree with the Federal Court of Appeal that the two questions posed by Kelen J. were adequate to determine whether the records requested in the three applications at issue were under the control of a government institution. It is also clear from his detailed analysis that he considered all relevant factors on an objective basis, as discussed above. Applying this test to the material before him, he concluded that none of the requested records was in the control of a government institution. In brief, he disposed of the first three applications on the following bases.
4. First, the Prime Minister’s agendas were not under the control of the PCO. The agendas were created by the Prime Minister’s exempt staff and were always in possession of the Prime Minister or his exempt staff. No “government institution” had physical possession of the records or the right to obtain them.
5. Second, the Minister of Transport’s unabridged and abridged agendas were not under the control of a government institution. The unabridged agendas were always in the possession of the Minister’s office and were not provided to the Deputy Minister or anyone else in the government institution. The abridged agendas were in the possession of the government institution for a limited time, but were not kept after the relevant date and there was no expectation that the Minister’s office would provide the agendas for a second time.
6. Third, the notebooks held in the Minister of National Defence’s office were not under the control of the Department of National Defence. They were created and maintained by exempt staff for their personal use and would not have been produced to government officials. While the Minister relied upon his exempt staff for taking notes of meetings, he himself never looked at the notes. The emails also were not under the control of the Department of National Defence. They did not contain substantive information about departmental matters.
7. As stated earlier, the Commissioner presents virtually no argument in respect of the findings of fact made by Kelen J. I agree with the Federal Court of Appeal that the conclusions reached by Kelen J. on the issue of control were open to him on the record and entitled to deference.
8. I would not give effect to the second ground of appeal on the issue of control. Consequently, I would dismiss the Commissioner’s appeals on the first three applications with costs.
9. On the fourth application, it is agreed that the Prime Minister’s agendas in the possession of the RCMP and the PCO were under the control of a “government institution” for the purposes of the *Access to Information Act*. Therefore, this brings us to the final issue.

4.3 *Issue 3: Are the Prime Minister’s Agendas at Issue Exempt or Excluded From Disclosure Pursuant to Section 19 of the Access to Information Act and Section 3(j) of the Privacy Act?*

1. The definition of “government institution” is the same under both the *Access to Information Act* and the *Privacy Act*.The RCMP and the PCO are specifically listed in Schedule I and, as such, are government institutions. Records under their control must be disclosed, subject to certain statutory exemptions. Section 19(1) of the *Access to Information Act* prohibits the head of a government institution from releasing any record that contains “personal information as defined in section 3 of the *Privacy Act*”. However, s. 3(*j*) creates an exception by allowing for the disclosure of personal information where such information pertains to “an individual who is or was an officer or employee of a government institution” and where the information in question “relates to the position or functions of the individual”. In short, the s. 3(*j*) exception will apply, and those parts of the Prime Minister’s agenda that relate to his job must be disclosed, if the Prime Minister is an “officer . . . of a government institution”.
2. Under both statutes, the “head” of a government institution includes “in the case of a department or ministry of state, the member of the Queen’s Privy Council for Canada”. The Prime Minister is the head of the PCO under this definition. The term “officer”, however, is not defined. The question is whether the Prime Minister as “head” of a government institution is also an “officer” of that institution.
3. Kelen J. held that he was. In reaching this conclusion, he relied upon the definition of “public officer” found in the *Financial Administration Act*, R.S.C. 1985, c. F-11, s. 2, which includes “a minister of the Crown and any person employed in the federal public administration”. He also relied on the definition of “public officer” in the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 2, which includes “any person in the federal public administration who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or on whom a duty is imposed by or under an enactment” (para. 107).
4. The Federal Court of Appeal reversed this finding, holding that Kelen J. “erred in law in importing into the *Privacy Act* the definitions of ‘public officer’ from statutes dealing with different subjects that use that term in different contexts” (Decision 2, at para. 5). In its view, “[t]he same understanding about the special governmental role of the Prime Minister” discussed in the first three applications “would have formed part of the foundation for the drafting of the *Privacy Act*” (para. 8). The Federal Court of Appeal concluded that it would be inconsistent with Parliament’s intention to interpret the *Privacy Act* in a way that would include the Prime Minister as an officer of a government institution.
5. I agree with the Federal Court of Appeal that Kelen J. erred in relying on the definition of “public officer” in two other statutes. It is clear that the definition of “public officer” found in the *Financial Administration Act* is a broad definition which deals with an unrelated subject and operates in a different context. The definition contained in the *Interpretation Act* could arguably be relevant, as s. 3(1) states: “Every provision of this Act applies, unless a contrary intention appears, to every enactment, whether enacted before or after the commencement of this Act”. However, I find no support for incorporating the definition of “public officer” in this context. First, while there may be overlap between the two terms, the term “public officer” used in the *Interpretation Act* is simply not the same as the term “officer . . . of a government institution” used in the *Privacy Act*. Second, the definition “public officer” is contained in the list of definitions under s. 2 of the *Interpretation Act*,which is expressly stated to apply “[i]n this Act”. The definition is not repeated in the definitions contained in s. 35, which conversely, apply “[i]n every enactment”. Finally, the *Interpretation Act* itself differentiates between a “public officer” and a “minister of the Crown” (see, e.g., s. 24). In my view, the Federal Court of Appeal rightly concluded that the meaning of “officer of a government institution” must be ascertained in its proper context.
6. In effect, the Commissioner’s position on this issue follows the same rationale underlying her arguments on the other grounds of appeal. She argues in favour of a function-based approach in order to interpret the term “officer”, according to which a Minister would be considered an officer of a government institution when exercising powers in relation to the institution, and not an officer of a government institution when exercising powers unrelated to the institution. The problem with this approach, however, is that there is nothing in either statute suggesting that a person might be an officer for some purposes and not for others.
7. Nor is there any support in either statute for finding that a Minister is intended to be an “officer” of the government institution simply because he is the “head” of that institution. In fact, s. 73 of the *Access to Information Act* suggests the opposite, given that it provides that the “head” of the government institution may delegate powers and duties under the Act to one or more “officers or employees” of the government institution. A distinction is therefore drawn between “head” and “officer” in that provision. Further, as noted earlier in discussing the definition of “government institution”, s. 21 of the *Access to Information Act* also makes a distinction between “officer”, “employee”, and “minister”.
8. Finally, as this Court explained in *Dagg v. Canada (Minister of Finance)*,[1997] 2 S.C.R. 403 (*per* La Forest J. in dissent but not on this point), and reiterated in *RCMP*, the *Access to Information Act* and the *Privacy Act* are to be read together as a seamless code. The interpretation of Kelen J. and the Commissioner would create discordance between the two statutes. Under the *Access to Information Act*,a Minister or Prime Minister would not be part of a government institution, while under the *Privacy Act*, he would be considered an “officer” of the government institution. I agree with the Federal Court of Appeal. Had Parliament intended the Prime Minister to be treated as an “officer” of the PCO pursuant to the *Privacy Act*, it would have said so expressly. Applying s. 3(*j*) of the *Privacy Act* to the relevant portions of the Prime Minister’s agenda under the control of the RCMP and the PCO, I conclude that they fall outside the scope of the access to information regime.
9. I would therefore dismiss the Commissioner’s appeal on the fourth application with costs.

The following are the reasons delivered by

LeBel J. —

1. Overview

1. I agree with Charron J.’s conclusions and with much of what she says in her reasons, including her findings on the applicable standard of review and on the use of expert evidence, and the controltest she proposes. I also agree with my colleague’s view that a Minister’s office is not a “government institution” for the purposes of the *Access to Information Act*, R.S.C. 1985, c. A-1 (“the Act”). Nonetheless, in my opinion, this conclusion cannot be the basis for an implied exception for political records. The legal relationship between a Minister’s office and the government institution for which the Minister is responsible may have some bearing on whether or not the institution in question controls a requested record. However, that relationship does not give rise to an implied presumption that the public does not have a right of access to records in a Minister’s office.
2. As my colleague points out, at para. 41, s. 2 of the *Access to Information Act* indicates that exceptions to the public’s right of access must be “necessary”. Moreover, such exceptions must be “limited and specific” according to the Act. If the Act does not specifically exempt political records, the right of access is presumed to apply to them. For the reasons that follow, I disagree with my colleague and with the Government that this presumption, which follows from a plain reading of the Act, “would dramatically expand the access to information regime in Canada” (see para. 13).

2. Purpose of the *Access to Information Act*: To Strike a Balance BetweenDemocracy and Efficient Governance

1. As my colleague points out in para. 15, this Court recently stated that access to government information “can increase transparency in government, contribute to an informed public, and enhance an open and democratic society. Some information in the hands of those institutions is, however, entitled to protection in order to prevent the impairment of those very principles and promote good governance” (*Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, *per* McLachlin C.J. and Abella J., at para. 1).
2. Access to information legislation embodies values that are fundamental to our democracy. In *Criminal Lawyers’ Association*, this Court recognized that where access to government information is essential, it is protected by the right to freedom of expression under s. 2(*b*) of the *Canadian* *Charter of Rights and Freedoms* as a derivative right. Statutes that protect *Charter* rights have often been found to have quasi-constitutional status (see, e.g., *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at paras. 21-23, but also *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, and *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345). One such statute is the *Privacy Act*, R.S.C. 1985, c. P-21, which, as has often been stated, must be read together with the *Access to Information Act* as a “seamless code” (see *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 22, and *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441, at para. 2).
3. Moreover, this Court’s position is consistent with the view that access to information legislation creates and safeguards certain values — transparency, accountability and governance — that are essential to making democracy workable (see M. W. Drapeau and M.-A. Racicot, *Federal Access to Information and Privacy Legislation Annotated 2011* (2010), at p. v). Before the advent of modern government, the mechanisms that embodied these values were subsumed in the doctrine of ministerial responsibility, according to which Ministers were accountable to Parliament for their actions. The sovereign Parliament, and only Parliament, was responsible for holding governments to account (J. F. McEldowney, “Accountability and Governance: Managing Change and Transparency in Democratic Government” (2008), 1 *J.P.P.L.* 203, at pp. 203-4).
4. As McEldowney observes, the growing complexity of modern government has entailed unprecedented delegation of parliamentary powers to the executive branch of government. In this context, “[t]he complexity and variety of bodies involved in decision-making has contributed to a gap in our system of accountability” (p. 209). In Canada, access to information legislation was enacted to respond to and deal with the rising power of administrative agencies (see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 60-61; see also G. J. Levine, *The Law of Government Ethics: Federal, Ontario and British Columbia* (2007), at pp. 109-10).
5. This being said, in access to information matters, the Court has consistently sought to ensure a degree of government accountability to Canadian citizens, while at the same time accepting that rights of access and the values they safeguard must be balanced against the interests of efficient governance (see *Criminal Lawyers’ Association*, at para. 1, and *Dagg*, at paras. 45-57). This balance has been struck in access to information legislation by means of a presumption of a right of access — as opposed to a presumption that access should be refused — to all records, subject to exceptions that are specified in the legislation.
6. In *Criminal Lawyers’ Association*, this Court reaffirmed that the right of access to government documents is not absolute (para. 35; see also *Rubin v. Canada (Clerk of the Privy Council)*, [1996] 1 S.C.R. 6). There is no constitutional right of access. The right is created by statute and is subject to specific exceptions provided for in the statute. Though the right must be interpreted liberally, exceptions to it must be interpreted narrowly, as is suggested by s. 2 of the Act, which requires that exceptions be not only “specific”, but “limited”. Accordingly, it is imperative that exemptions be limited to those provided for in ss. 13 to 26; qualifying words should not be read into the Act (see *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110 (C.A.)).

3. To Protect “Full and Frank Discussion” in a Minister’s Office Without Excluding Ministers’ Offices From the Scope of the Act

1. “[P]olitical records” are not explicitly exempt from disclosure under the *Access to Information Act*. They are records that pertain to a Minister’s activities as a member of a political party, as opposed to his or her duties as a member of Cabinet who is accountable to Parliament for the administration of a government department. In line with the interpretative approach adopted by this Court in *Criminal Lawyers’ Association*, we must conclude that the right of access can be presumed to apply to political records but that it is subject to any of the statutory exceptions that apply. These exceptions reflect the complexity of the various functions of Ministers of the Crown in a modern parliamentary democracy.
2. I agree completely with my colleague that this interpretative approach must be reconciled with “the need for a private space to allow for the full and frank discussion of issues” (para. 41). I also agree with her that in s. 21 of the Act, Parliament has recognized “the need for confidential advice to be sought by and provided to a Minister and [that], consequently, records in a government institution offering such advice are exempt from disclosure at the discretion of the head of the institution” (para. 41). I would contend, however, that the structure of the Act and the inclusion of s. 21 already address this concern explicitly.
3. As a result, I disagree with the assertion that the need for a full and frank discussion justifies excluding Ministers’ offices from the scope of the Act. To read such a broad exemption into the Act is not “necessary” within the meaning of s. 2, because the concern is already addressed explicitly. In my view, to read this exclusion into the Act is to deviate from the approach adopted by the Court in *Criminal Lawyers’ Association*, as outlined above.
4. The conclusion that a Minister’s office is not a government institution flows from the modern approach to statutory interpretation, which my colleague describes as a “general roadmap”, at para. 27. But I feel it necessary to distance myself from the findings of Kelen J., which my colleague draws on as “useful guideposts” for her interpretation (para. 27).
5. More specifically, I take issue with Kelen J.’s interpretation of Parliament’s silence regarding political records (2008 FC 766, [2009] 2 F.C.R. 86, at paras. 57-60). On the basis of that silence, Kelen J. reasoned that an interpretation of the term “government institution” that included Ministers’ offices would dramatically extend the right of access. I cannot agree with this view.
6. As I mentioned above, this Court’s approach has been that access to information legislation creates a general right of access to which there are necessary exceptions that must be limited and specific. If the legislature is silent with respect to a given class of documents, such as political records, courts must assume, *prima facie* at least, that the documents in question are not exempt. Whether access can indeed be obtained as requested is a different matter for which it is necessary to design an appropriate control test. Therefore, it cannot be inferred from the legislature’s silence that political records were not intended to be disclosed at all. Politics and administration are sometimes intertwined in our democratic system. As a result, the contents of ministerial records may straddle the two worlds of politics and pure administration, if it is even possible to draw so sharp a distinction between the different roles of Ministers in Canada’s political system. On this basis, the much bolder inference that Ministers’ offices are presumptively excluded from the purview of the *Access to Information Act* is also incorrect.
7. Kelen J. also concluded that all ministerial records are presumptively excluded on the basis that the *Library and Archives of Canada Act*, S.C. 2004, c. 11, differentiates “government records” from “ministerial records”. Government records and ministerial records are indeed different. In s. 2 of the *Library and Archives of Canada Act*, a “government record” is defined as “a record that is under the control of a government institution”. On the other hand, a “ministerial record” is a record

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

1. With respect, the fact that these two kinds of records are treated differently in the *Library and Archives of Canada Act* does not mean that ministerial records are presumptively outside the scope of the *Access to Information Act*. My position on the legal relationship between a Minister’s office and the government institution for which the Minister is responsible flows from a plain reading of the Act. As my colleague mentions, Ministers’ offices are not listed in Schedule I of the Act, and I accordingly agree with her that they should not be considered “government institutions” for the purposes of the Act. This being said, it does not follow that Ministers’ offices are presumptively excluded from the scope of the Act. The fact that Ministers’ offices are separate and different from government institutions does not mean that a government institution cannot control a record that is not in its premises. If a government institution controls a record in a Minister’s office, the record falls within the scope of the Act. If it falls within the scope of the Act, the head must facilitate access to it on the basis of the procedure and the limits specified in the Act.
2. The *Access to Information Act* applies to records. Ministers’ offices remain within the scope of the Act inasmuch as they possess “record[s] under the control of a government institution” (s. 4). The right of access is presumed to apply to such records unless they fall under a specific exemption.
3. In my view, the presumption that the Act applies to Ministers’ offices does not expand the right of access at all. Any requested record that is located in a Minister’s office is subject to the two-part control test proposed by my colleague.
4. For this purpose, the “head” of the government institution must determine, first, whether the requested record relates to a departmental matter. In other words, does the record contain government information? This first stage of the test, “a useful screening device” (para. 55), will exclude all documents, such as political records (e.g. plans for a party fundraiser), that do not relate to a departmental matter.
5. Second, the head of the government institution must determine whether the institution could reasonably expect to obtain a copy of the record upon request. As my colleague proposes, this stage of the test requires an objective analysis to determine whether that expectation is reasonable in which all relevant factors, including the content of the record, the circumstances in which it was created and the legal relationship between the government institution and the record holder, are taken into account (para. 56). If the record holder is the Minister, the fact that his or her office is not part of the government institution he or she oversees may weigh in the balance; it does not, however, create a presumption of an exception to the right of access.

4. Question of “Hybrid” Records

1. The *Access to Information Act* is of course not applied in a vacuum. The reality that Ministers wear many hats must be taken into account in doing so. Thus, a Minister is a member of Cabinet who is accountable to Parliament for the administration of a government department, but is usually also a Member of Parliament in addition to being a member of a political party for which he or she performs various functions and, finally, a private person. Records connected with these different functions may blend into each other in the course of regular business.
2. As I mentioned above, the right of access is presumed to apply to “political records”, but such records are unlikely to be under the control of a government institution if they do not relate to a departmental matter. At the other end of the spectrum are records that relate to departmental matters and are under the control of a government institution. I will refer to the latter as “government records” for the purposes of this discussion. If requested, government records should be disclosed under the *Access to Information Act*.
3. It is conceivable, however, that many records will not fall neatly into one category or another. For example, departmental matters are sometimes decided on the basis of political priorities. Documents in which departmental targets are assessed in light of political aims would fall into a grey area. I will refer to such documents as “hybrid records”.
4. The *Access to Information Act* provides for the existence of this grey area, at least to some extent. Thus, s. 25 provides for the severance of part of a record. Where a Minister is authorized to refuse to disclose a record, the Minister can redact the exempted portions of the document, but must disclose the portions that are not exempted.
5. In addition, s. 21(1) provides that, subject to specific exceptions in s. 21(2), a Minister has a very broad authorization to refuse to disclose a requested record that contains any of the following:

**21.** (1) . . .

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

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

(*c*) positions or plans developed for the purpose of negotiations carried on or to be carried on by or on behalf of the Government of Canada and considerations relating thereto, or

(*d*) plans relating to the management of personnel or the administration of a government institution that have not yet been put into operation,

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

Section 21(2) reads as follows:

**21.** . . .

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

(*a*) an account of, or a statement of reasons for, a decision that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of a person; or

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

1. Section 21 covers many of the circumstances in which certain kinds of hybrid records that contain information relating to departmental matters are produced (see s. 21(1)(*a*)). Section 21(1) is specifically designed to cover material produced in the course of *full and frank discussions*, such as deliberations in which directors, officers or employees of a government institution participate together with a Minister or a Minister’s staff (see s. 21(1)(*b*)).

5. Investigatory Powers of the Commissioner

1. Though the head of a government institution has a broad discretion to either disclose or retain hybrid records, the Information Commissioner is given equally broad investigatory powers in s. 36 of the *Access to Information Act*. These powers can act as a check on the Minister’s discretion. As I mentioned above, Parliament has sought to strike a balance between access rights and efficient governance. On the one hand, through s. 21 and the general structure of the Act, Parliament has created a space in which Ministers may review and debate issues in private. On the other hand, through s. 36 and the general structure of the Act, Parliament has ensured that this private space is not abused.
2. The Commissioner has the same power to summon witnesses and compel them to give evidence as a superior court of record (s. 36(1)(*a*)), and also has the power to administer oaths (s. 36(1)(*b*)), and to receive and accept such evidence as the Commissioner sees fit (s. 36(1)(*c*)). The Commissioner may also enter any premises of a government institution for the purposes of an investigation, as well as converse with persons and examine documents in those premises (s. 36(1)(*d*)). However, since a Minister’s office is not a government institution for the purposes of the Act, the Commissioner does not have the power to enter one.
3. Importantly, pursuant to s. 36(2), the Commissioner has the power to examine “any record to which this Act applies that is under the control of a government institution”. In light of the above reasoning, records located in a Minister’s office can fall within the ambit of this provision. Section 36(2) is crucial to the balance Parliament intended to strike. Indeed, it is the first mechanism, prior to judicial review, for applying the principle that “decisions on the disclosure of government information should be reviewed independently of government” (s. 2).
4. Under s. 21, the head of a government institution is responsible for determining whether requested hybrid documents located in a Minister’s office should be disclosed. The first step in the assessment is to consider whether the records fall within the scope of the Act: for this purpose, the head must perform the control test we propose. If the requested documents are found to fall within the scope of the Act, the head must then perform the second step of the assessment process: to determine whether the requested records fall under any of the exemptions provided for in the Act, including in s. 21. Depending on which exemption applies, the head may or may not have the discretion to disclose the document.
5. The purpose of the Commissioner’s investigatory powers is to determine whether the head of a government institution has complied with the Act in performing his or her duties. This includes an inquiry into whether the head has conducted the correct analysis at both stages.
6. If a head claims to have refused access on the basis that the requested document was not under the control of a government institution, then the Commissioner may exercise only his or her powers under s. 36(1)(*a*)to (*c*). If the evidence garnered under those subsections leads the Commissioner to believe that the documents are likely under the control of a government institution, he or she may examine them to ascertain whether the control test was applied properly.
7. If the Commissioner is entitled to inquire into whether the head applied the control test properly, the Commissioner may require access to some documents that are ultimately outside the scope of the Act. This does not broaden the public’s right of access. Section 35(1) of the Act provides that “[e]very investigation of a complaint . . . by the Information Commissioner shall be conducted in private.” Further, in the course of an investigation, parties affected by the investigation have a right to make representations (s. 35(2)). Following an investigation, the Commissioner cannot compel the head of a government institution to disclose the documents in question; rather, the Commissioner may only make recommendations to the head (s. 37). Finally, anyone who has been refused access to such records after an investigation is entitled to apply for judicial review of the decision (s. 41).
8. With respect, I am of the view that a presumption that a Minister’s records are beyond the scope of the Act would upset the balance between the head’s discretionary powers and the Commissioner’s powers of investigation. My colleague’s analysis involves a presumption that the Commissioner would have no power whatsoever to examine records located in a Minister’s office. The Commissioner’s power would be limited to summoning witnesses and compelling them to give evidence concerning such records. Even if that evidence led the Commissioner to suspect that the control test had not been applied properly, the Commissioner would not be able to examine the documents to confirm his or her suspicions. Such an interpretation of the Act would effectively leave the head of a government institution with the final say as to whether a given document was under the institution’s control and would run counter to the purpose of the Act as outlined in s. 2, according to which decisions on the disclosure of government information must be reviewed independently. In my opinion, the presumption of an exception to the right of access that my colleague proposes would significantly weaken the Commissioner’s powers of investigation, which are crucial to the intended balance between access to information and good governance.

6. Application to the Records at Issue

1. I agree with my colleague that, in the circumstances in which the records at issue in the first three applications were created and managed, a government institution would not have a reasonable expectation of obtaining them and that these documents were therefore not under the control of a government institution.
2. As for the records in the possession of the Privy Council Office and the Royal Canadian Mounted Police, I agree with my colleague that, even though they were under the control of a government institution, they were subject to s. 19 of the *Access to Information Act* and the heads of those institutions accordingly had an obligation to refuse to disclose them.
3. For these reasons, I would dismiss the appeals.

*Appeals dismissed with costs.*

Solicitor for the appellant:  Information Commissioner of Canada, Ottawa.

Solicitor for the respondents:  Attorney General of Canada, Ottawa.

Solicitors for the interveners:  Blake, Cassels & Graydon, Toronto.