



House of Commons
CANADA

Standing Committee on Access to Information, Privacy and Ethics

ETHI • NUMBER 040 • 1st SESSION • 38th PARLIAMENT

EVIDENCE

Tuesday, October 25, 2005

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Chair

Mr. David Chatters

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Tuesday, October 25, 2005

•(1110)

[English]

The Acting Chair (Mr. David Tilson (Dufferin—Caledon, CPC)): Good morning, ladies and gentlemen.

This is the Standing Committee on Access to Information, Privacy and Ethics.

Pursuant to Standing Order 108(3)(h), the order of the day is on the legislative proposal to reform the Access to Information Act.

We have with us today a number of guests from the Office of the Information Commissioner. We have the Information Commissioner, Mr. Reid. We have the Deputy Information Commissioner, Alan Leadbeater. I assume that Mr. Brunet and Ms. Francis are counsel; if I'm wrong, I'm sure Mr. Commissioner will correct me.

Good morning, Commissioner.

Hon. John Reid (Information Commissioner, Office of the Information Commissioner of Canada): Good morning.

The Acting Chair (Mr. David Tilson): I understand you have a statement that you'd like to give before we commence.

There are also responses from Mr. Leadbeater's appearance before us the last time he was here, which should have been distributed to members of the committee. I'll leave it to you to decide whether you're going to deal with those or let members of the committee read them. I'll leave it to your discretion.

Mr. Commissioner, you may proceed.

Hon. John Reid: Thank you very much, Mr. Chairman.

I want to say that I'm grateful for this opportunity to formally present the proposals, as Information Commissioner, for strengthening the Access to Information Act, and I want to acknowledge the debt I owe to my staff, to Daniel Brunet, to Alan Leadbeater, to Jennifer Francis, to Larry Kearley, and to Dan Dupuis, for the work they've put into this. I would be remiss if I didn't also acknowledge the work of Messrs. Ward and Tardi from the parliamentary counsel's office. They were a great assistance to us, and I'm grateful for the work they did.

The committee asked me, before the summer break, to provide a proposed reform bill in legislative language. I commend the committee for its determination to ensure that in Canada we have the strongest possible right to access to information. I think members of all parties understand that the transparency of government is essential to accountable government, and indeed every member of the House of Commons then present stood and voted in favour of

Bill C-201 at second reading, in favour of making government more open and accountable, and that has been the driving philosophy of the amendments we have presented to you.

The spirit of Bill C-201 is reflected in the proposal I present to you today. I think it's evidenced most clearly by the adoption of Bill C-201's provision that the name of the Access to Information Act be changed to the Open Government Act. My proposal, like Bill C-201, expands the number of institutions to be covered by the act; it reduces the scope of secrecy permitted by the act, it expands the powers of oversight by the commissioner in the courts, and it increases incentives for compliance and penalties for non-compliance.

Under my proposals, only the courts and offices of MPs and senators would not be subject to the right of access. My proposals make clear that offices of ministers and the Prime Minister's office would be covered by the act—the same provision that's in Bill C-201.

In the draft that I've proposed, the last remaining area of unreviewable secrecy, cabinet confidences, would become subject to review by the Information Commissioner and the courts. Under my proposal, existing mandatory class exemptions would be abolished in favour of discretionary injury test exemptions, and all exemptions from the right of access would be subject to a public interest override.

You will see too that my proposals would impose additional obligations on governments to, one, monitor the operations of the access to information program; two, collect appropriate statistics to enable parliamentarians and the public to assess the health of the system; and three, report annually to Parliament on the efforts it has made to make government truly open and transparent. The information commissioner too would have wider responsibilities to oversee, audit, and report on the government's compliance with the act.

None of these improvements can ensure accountability through transparency unless there is a foundation of professional record-keeping by public officials. The most fundamental, pivotal proposal I am making is that it be a legal duty to create appropriate records to be imposed and that an offence be created for failure to fulfil that duty. Although the latter proposal does not appear in Bill C-201, there is a universal acknowledgment of the reality that the right of access is being rendered meaningless by a growing oral culture in government. The failure by government officials to be professional in creating records is also undermining the work of Parliament, the Auditor General, the national archivist, the police, and judicial inquiries. Conducting government by winks and nods simply leads to poor decision-making, inept administration, and corruption.

I am aware that members of the committee have had a full briefing from my deputy commissioner, Alan Leadbeater, on the contents of the bill. I'm not going to go over the same ground. Rather, by way of concluding these remarks, I want to speak about a couple of proposals I have chosen not to make—reform that I feel would be unwise.

First, I am not recommending that the Information Commissioner be given order powers and hence be transformed from a specialized ombudsman to a specialized judge. There is no evidence that order powers would strengthen the right of access, speed up the process, or reduce the amount of secrecy. The experience of 22 years is that the ombudsman model works very well. Fewer than 1% of complaints end up before the courts. The experience in the jurisdictions that have order powers is that they rely heavily on the ombudsman approach, reserving the order-making role for the rare tough cases. Moreover, the amount of litigation is no less in the order-making jurisdictions; indeed, I think it's somewhat more, because governments are not hesitant to challenge the commissioner's orders in the provincial courts. Finally, I agree with my predecessor, John Grace, that the ombudsman model gives information commissioners more freedom to be as courageous as possible in interpreting the law and recommending remedial action.

• (1115)

Second, I am not recommending that the Office of the Information Commissioner be merged with the Office of the Privacy Commissioner under a single commissioner. This proposal was not part of Bill C-201, nor indeed part of anything that I have seen emerge from the government task force or from the foundation paper, nor has it been recommended by any parliamentary committee, task force, ad hoc committee of MPs, or interest group during the 22 years since the access act came into effect.

In my view, the government's decision to ask a former Supreme Court of Canada justice, Justice Gérard La Forest, to study the single commissioner model is curious in its timing. In my view, this issue is a red herring and should not divide attention away from the challenge of making the right of access as strong as is reasonably possible.

The message I have given to Justice La Forest is that Canada has derived great benefit from having separate commissioners to champion the values of privacy and openness. While these values do not come into conflict often, Parliament, the courts, and the public

have been counselled by the strong advocacy of opposing points of view put forward by separate commissioners.

In a single commissioner model, there's a risk that one value would be subordinate to the other and that public debate would give way to behind-the-doors debate within the confines of a single commissioner's office. I do not believe the public interest would be served by adopting the single commissioner model.

Thank you for your attention. I'm available to answer any questions you may have on this and other matters.

The Acting Chair (Mr. David Tilson): Thank you, Commissioner.

I trust the response of Mr. Leadbeater is strictly for information purposes.

To be clear, the first round is seven minutes per questioner, which includes questions and answers, as you all know, having been here a number of times. I remind the committee members of that as well.

Mr. Lukiwski.

Mr. Tom Lukiwski (Regina—Lumsden—Lake Centre, CPC): Thank you, Mr. Chair.

Thank you, Mr. Reid. Thank you to all of you for appearing before this committee once again.

I want to talk a little and ask a few questions on the latter part of your presentation, on the proposed merger of your office and that of Ms. Stoddart's. I've got a few specific questions.

But first, I noticed that you have a line in your report that I would like you to expand on, if you could. It's where you say the timing is curious with regard to Mr. La Forest's forthcoming investigation or report on whether or not the merging or the unification of the two offices would be in the best interests of Canadians. Why do you say that is curious in its timing?

Hon. John Reid: It's because that has not been one of the big issues of the day. It's curious because it comes out at a time when the government is wrestling with proposed amendments to the act and the Information Commissioner is working on proposed amendments to the act.

To my knowledge, this is not anything that has ever been discussed in a serious way before. The only time it was discussed was when I made a suggestion to that effect after the conclusion of the Radwanski affair, and that quickly died. Nobody was interested; the government was certainly not interested and nobody in the access area was interested. I thought it had been put to bed.

As you know, I have recanted that original paper. Those who know me well know how difficult it was for me to do that. But under the circumstances, I thought it was a proposal that was not going to go anywhere, nor did I think on reflection, after going through the Radwanski affair and everything else, that it should go anywhere.

Mr. Tom Lukiwski: Do you care to offer any opinion on why you think the timing has been chosen right now? Why did the government ask Mr. La Forest to begin this consultation process now?

•(1120)

Hon. John Reid: I have no idea. But in a sense, I am grateful, because it was one of the reasons they used to extend my term a second time.

Mr. Tom Lukiwski: On the proposed unification of the two offices, one of the questions to Ms. Stoddart that we heard in this committee, from the government side at least, was on whether there would be any cost efficiency. Frankly, I found what Ms. Stoddart told this committee to be amazing.

I would ask you the same question. She had not been asked by anyone in the government for a cost analysis on whether the merging of the two offices would save money. Have you or has your office been asked to do anything on the cost analysis side?

Hon. John Reid: We have received no request.

Mr. Tom Lukiwski: I find that curious, quite frankly, that if in fact the government is suggesting there would be a cost saving, and it's one of the primary reasons for the merging of the two offices...yet no one has asked your office or Ms. Stoddart's to do a cost analysis. Do you care to comment on that?

Hon. John Reid: I would think that if you looked at the past you would see what the costs were when the offices were merged and you would be able to draw some conclusions from that. What you would not see, however, was that when the offices were merged there was no accountability for the financial activities because the two commissioners at the time did not cooperate in terms of providing proper direction to the corporate manager.

After the split had been made, it was the first time that I really felt I was truly accountable for my own financial activities.

Mr. Tom Lukiwski: I'd like to continue with the topic of financial accountability and perhaps cost saving. One thing that has come up consistently when we have talked with some government departments on the use of contractors—and these contractors would be filling vacancies of access to information and privacy officers. What we have discovered is that the use of contractors sometimes increases significantly the cost to these departments. Rather than hiring permanent staff, they're hiring contractors. Contractors are usually billed out at a far higher rate than one could pay if you had permanent staff. I wonder if you could comment on that.

Hon. John Reid: I think the use of contractors can be very helpful to departments when they have blips or spikes in the number of requests coming in, and it's a cheap and easy way to be able to get extra people. But we have always argued that departments should staff for the regular amount of work they're doing. They shouldn't hire contractors for that, but to hire extra staff or to find a flying squad within the government of people who can help you out when you get a spike, that is really desirable.

Mr. Tom Lukiwski: I don't know if I would agree with your analysis of cheap and easy. Easy perhaps; perhaps not cheap.

Hon. John Reid: It's very difficult under the old system—I don't know about the new system—to hire people into the public service. So sometimes the quick and easy and even the cheaper system is to be able to do it by going to an outside contractor.

Mr. Tom Lukiwski: How much time do I have, Mr. Chair?

Perhaps I'll cede my time, Mr. Chair, with only 30 seconds. I'll get to it in the next round.

The Acting Chair (Mr. David Tilson): Monsieur Laframboise.

[*Translation*]

Mr. Mario Laframboise (Argenteuil—Papineau—Mirabel, BQ): Thank you, Mr. Chairman.

Mr. Reid, my first question has to do with monetary considerations. I too find it odd that an initiative is under way to merge the two offices, whereas the basic problem is the lack of financial resources to handle requests. To my knowledge, there are never enough resources. What is the situation as we speak?

[*English*]

Hon. John Reid: We are making some progress on the backlog because we have received some extra money from Treasury Board. I note that when I am reviewing files on a regular basis, a whole series of files are coming over that are marked “backlog”. But we are, unfortunately, finding that our volumes in the normal way have increased somewhat as well. So I think we're basically making a little bit of progress, but we're not really cutting into it as much as we anticipate. Now that may change in the rest of the fiscal year because it depends on the volume of work that comes in and how it comes in.

•(1125)

[*Translation*]

Mr. Mario Laframboise: As you know, the minister has been fairly critical of the work undertaken by the committee. In a letter dated October 19 and addressed to the Chair, he declined to appear before the committee, noting that its terms of reference were more important than the tabling of a bill such as this one.

In the letter, he said the committee should hear from representatives of the seven Crown corporations not subject to the Access to Information Act. In his opinion, it would be very difficult to subject these corporations to the act's provisions. You do not seem to share the minister's reservations.

Can you sum up your position for us?

[*English*]

Hon. John Reid: Our position is very clear. Anywhere there is government money, there should be the Access to Information Act. If crown corporations require a special provision in the act, we would be prepared to look at that.

In the proposals we have made, we have provided a special provision for the CBC journalists. So we're not closed to the idea that if they can make a business case that they need a special kind of protection, we'd be prepared to look seriously at it. So far, the only ones who have made a case were the CBC, and you can see in our draft that we have provided a way for them.

The other serious case that was made was in the discussion of the other parliamentary officers, and we have also provided an exemption there. So we are always prepared to look at these things if people will make a business case that they require an exemption to protect whatever needs to be protected.

We've gone one step further that will also help some of the crown corporations, and those are the provisions that are in there now for defining a trade secret. A lot of things that some crown corporations have are trade secrets. We have now taken a definition of those trade secrets and we have incorporated it in the act so that should these other institutions come into the act, they would be protected in that way by that definition.

[*Translation*]

Mr. Mario Laframboise: That was our understanding and that's why we were more or less in favour of the idea. You're encouraging us to have them testify before the committee, to let us know how they feel about this possibility. Most likely that's what we'll do.

Regarding confidentiality provisions, the minister maintains that there are 70 such clauses in the act. Some, as we know, are outdated, but not all should be discarded. You've approached this from another angle. In your view, which confidentiality provisions should be maintained and what new approach should be taken to enforcing the legislation?

[*English*]

Hon. John Reid: The approach we took was fairly simple. We looked at all the exemptions and we said we're going to make them all face an injury test, so that if you want to keep this information, you have to be able to prove that there is probable harm. Secondly, we said in each one of these cases there should be a public interest override where it's required.

So we have taken the approach that the secrecy provisions are certainly there. We haven't meddled too much with the number or the kind of secrecy provisions that were already in the act, but we have opened them up somewhat. I have always said, as someone who spends a lot of time trying to find out where those markers are and making findings, I don't feel confident in coming before you to recommend those kinds of changes. I think that's work that you have to do, perhaps with the Department of Justice.

I do feel that by forcing the departments to deal with the fact of what injury will befall the government, what injury would befall the department if this comes out, and even if there is injury, what is the public interest override...I think that broadens the scope somewhat, but it doesn't fundamentally alter the existing system of confidences in the existing bill.

[*Translation*]

Mr. Mario Laframboise: Regarding the final point, there's no question that the minister was opposed, given that he had assigned to former Justice La Forest the task of analyzing the possible future merger of the two offices. In our minds, it was clear — and you were right to point this out — that no parliamentary committee or anyone else for that matter had called into question the existence of two offices. Therefore, we find the suggestion rather odd, all the more so given that with the presence of the Internet and the amount of

specialized research being done, privacy has become a very technical field.

Your particular area of expertise is access to information, specifically information held by the government. These are two completely different areas. I believe that this is a waste of money. You stated earlier that it enabled you to hang on to your job for awhile. Ms. Stoddart reacted as you did. She did not think a merger was a good idea.

I'm curious as to whether the Privy Council has done any studies before on administrative mergers.

• (1130)

[*English*]

Hon. John Reid: I regret to confess that the only paper of which I am aware about merging the two offices is my paper that I published four years ago. I have never heard of a paper within the Government of Canada and I've never heard of any discussion within the Government of Canada that the two offices be merged. So I'm responsible.

The Acting Chair (Mr. David Tilson): Mr. Laframboise, we're well over.

Mr. Bains.

Hon. John Reid: I want to add, Mr. Chairman, that I have recanted that position.

The Acting Chair (Mr. David Tilson): I've heard you give that speech, Mr. Commissioner.

Mr. Bains.

Hon. Navdeep Bains (Mississauga—Brampton South, Lib.): Thank you very much, Mr. Chair.

Mr. Reid, I appreciate the opening remarks you have at least given us a copy of. There's a question I had with respect to page 4, with respect to comments made by members of the opposition in the past about the notion of an oral culture within the government, where there seems to be a reluctance to document things. This is something that has been reiterated by the opposition in the past and has been brought before this committee as well.

You alluded to it on page 4 by saying, "None of these improvements", with respect to the improvements you outlined, "however, can ensure accountability through transparency unless there is a foundation of professional record keeping by public officials."

You mention this and you highlight it as well. Is there, in your opinion or your understanding, a lack of professional record-keeping by public officials at the present time, or is it something you think we need to further strengthen? Do you think there's a deficiency?

Hon. John Reid: I believe there is a very significant deficiency. When I came into office, one of the things that struck me was the number of searches that we ordered to be repeated, because when our people went over the documentation, they could see that there were gaps in the records. When they went back and ordered a second or third search, they would find additional records, not just on the periphery but sometimes very much in the core. It was then that I became very interested in the whole question of document management.

What happened was that the Treasury Board at the time had a reasonable policy, but it was based on paper records. As a result of our making this a *cause célèbre*, the government spent a fair amount of time, about a year and a half, and came out with a new policy called the “Policy on the Management of Government Information Holdings”. It's now the policy all civil servants are supposed to follow. What I'm suggesting is that in the proposed legislation this be given the force of law. Presumably every civil servant is following this pattern now, but I suspect not, because once you start trying to do things in an oral culture, it takes time to change that kind of culture to where you start keeping records.

Hon. Navdeep Bains: Since the time you've arrived in your position as Information Commissioner to the present time, have you seen an improvement or a deterioration in record-keeping?

Hon. John Reid: I would say there's been a slight improvement.

Hon. Navdeep Bains: The second question I have alludes to the notion brought forth by the member from the Bloc—and you've alluded to it as well in your presentation—that there has been no report or no work done into the merger of the two departments or the two offices. But you've indicated that you had four years ago taken it upon yourself, I believe, to write.... And you initially said they should have merged, and I know you've talked about this as well.

Have you been contacted by Mr. La Forest, the former justice and adviser to the minister, with respect to your views on this?

Hon. John Reid: Yes.

Hon. Navdeep Bains: And have you shared your current position, in terms of how you have changed?

Hon. John Reid: Yes.

Hon. Navdeep Bains: So he's taken that into account.

• (1135)

Hon. John Reid: Yes.

Hon. Navdeep Bains: You also indicated in your presentation, on page 7, that you find the timing a bit curious. Could you elaborate?

Hon. John Reid: I find it curious because there's been no debate about it. The only one who tried to start a debate about it was me, and nobody took it up, and what feedback I got from that debate was all negative: don't do it. It was negative, I'm told, from the cabinet of the day and negative from a lot of the administration. So it's curious, because it came out of nowhere. There has been no public debate on it at all.

Hon. Navdeep Bains: Do you think Mr. La Forest is in a suitable position to take all the facts into account and make a decision that would be reasonable, based on his experiences?

Hon. John Reid: I can't answer that question. That would be one that he would have to answer, or that the Department of Justice, which has the contract with him, would answer.

Hon. Navdeep Bains: Do you think he's suitable for this type of undertaking?

Hon. John Reid: Oh, there's no question about that.

Hon. Navdeep Bains: I guess that's what I wanted to allude to. I know the timing, you've suggested, might be a bit curious, but the fact he's being brought forth to look into this.... He does have a reputation—

Hon. John Reid: Oh, he's an excellent person, and he fully meets the requirement of the government that he be an eminent person.

Hon. Navdeep Bains: I had another question that I was talking to my colleague about. Maybe you can assist me to understand this. With respect to access to information, there seems to be an exemption when it comes to members of Parliament and senators. Could you elaborate? Even though I've been given an explanation by some other people, I'd like to hear from you why that is, why members of Parliament and senators are excluded from access to information. You made a comment that anywhere there's government money, there should be access.

Hon. John Reid: That's right.

Hon. Navdeep Bains: You made that comment a few minutes ago, and that is government money.

Hon. John Reid: There are two reasons for that. When the act came through, the first group that was exempted was the Parliament of Canada—the Senate and the House. I've always thought that was not particularly correct. So the question then became, when we were doing the amendments, what should we do with Parliament? We agreed to bring in Parliament as an institution.

The next question was members of Parliament. What I had done in the past was to review all of the financial transactions of members of Parliament that are published on a regular basis by the Parliament of Canada. In fact, I think the latest edition of the *Hill Times* has a whole range of information. Because the House publishes so much of that material, it's not really necessary for financial arrangements of members of Parliament to be under the act in that way, because most of it comes out.

That's a question that you will have to decide eventually as to whether you come in, in the normal way, or not. My contribution was to go partway, to take Parliament as an institution in, but to leave the members out. If the members come back in, that would be their choice.

There's also another question—

Hon. Navdeep Bains: Sorry. In your opinion, do you think MPs and senators should be included?

Hon. John Reid: If I was a member of Parliament at the time, I was arguing against the exclusion of Parliament. I thought we should be in to show an example. I feel strongly that way now.

Hon. Navdeep Bains: Thank you very much, Mr. Reid.

The Acting Chair (Mr. David Tilson): Mr. Martin, it is your turn.

Mr. Pat Martin (Winnipeg Centre, NDP): Thank you, Mr. Chair, and thank you, Mr. Reid and witnesses.

I'd like to begin as well by complementing your staff on the work they did in not only putting forward the proposed changes, but the very helpful document they put together outlining the existing act versus the proposed changes, and even further, the comparison to some of the other work that's been done, including Bill C-201, which is in my name.

I can't avoid starting by saying how frustrated I am at the whole process and the place we find ourselves in today, months and months after a commitment by the government to do something meaningful in terms of introducing legislation. We really shouldn't have to draft our own bill, and you as the Information Commissioner shouldn't have to propose your own bill. That's really the Government of Canada's job, and our job to amend, craft, and make changes to it.

I noticed in your remarks today you made reference to Bill C-201. In your frank opinion, do you believe this committee could have in fact dealt with Bill C-201 in the normal course of events and still wound up with the changes as recommended by yourself? In other words, would it have been just as useful for you to come forward with recommended amendments to Bill C-201 as a starting framework instead of the laborious undertaking we find ourselves in now?

• (1140)

Hon. John Reid: My experience as a member of Parliament and my experience appearing before committees is that members are most comfortable when they have legislative packages in front of them. That was why I was grateful for the invitation to produce a legislative package for you, because members are trained to deal in those kinds of ways with that kind of information.

Mr. Pat Martin: That is true. It's difficult to write a pamphlet by committee, never mind an act, a law. So this is a good, helpful starting point.

I'd like to come back to one of the specifics you pointed out too, the legal duty to create appropriate records. I see the oral tradition creeping into provincial governments as well as the federal government.

I did ask a panel of institutions last week that got an F rating from your office in terms of their compliance—I asked every one of them—if they had ever been asked to keep something oral or had ever been asked to not create a written record of any kind of correspondence or document. All of them said emphatically, no, they had no knowledge of any directive ever given to that effect. I find that hard to believe.

Hon. John Reid: I find that acceptable, because it's one of those things that happen. When you move into an organization, there is a culture, and some things are done and some things are not done. You don't have to give special directives; it's a cultural matter. So the contest here is to change that culture to one where appropriate records are maintained and kept.

Mr. Pat Martin: A lot of people were satisfied that Bill C-201 was pretty good. Mr. Ken Rubin is in the audience today; he's one of those who feel strongly that it wasn't good enough. A lot of people

feel strongly that what you've put forward is good enough and want to get on with it.

At what point does this committee say we're just being sucked into doing more busy work to keep us occupied with this interesting academic exercise and not...? I appreciate your guidance and input on this too. Do you think it's of any value for us to carry on for a few more months, studying what needs to be done, or should we get this thing submitted and proposed as legislation, so that we can start making law?

Hon. John Reid: My advice would be that you should proceed apace to try to make law.

Mr. Pat Martin: That's sound advice; I hope everybody took note of that.

I agree with you on the idea of incorporating the two offices. I've never been a fan of that. I appreciate that you had a second view of it. I can't in my mind see how you can be a champion for the right to privacy and a champion for the right to freedom of information and not have an internal conflict at some point in time. If we sincerely believe in both those pillars, then they should each have their own advocate and their own champion.

I know one of the reasons the physical plant was split up was that the former Privacy Commissioner was quite adamant that the two offices be physically separated, for whatever motivation or reason he may have had. He wanted to operate in isolation. Do you see any value, or any business case, for sharing the physical plant or administrative help?

Hon. John Reid: We are into this as a result of the government's initiatives in shared services. All the parliamentary officers are examining whether we can share more services than we now do.

One of the things you have to understand about the small agencies is that we are pretty efficient in terms of how we do things. For example, in an examination of procurement in our office, the auditors have discovered that one person does five other jobs; procurement takes up about a quarter of his time. We don't need a full-time procurement person, so we found people who can do a variety of things to do that.

There are a number of things we could share with other departments who were of similar ilk, and we're exploring those with our colleagues, the other parliamentary officers.

• (1145)

Mr. Pat Martin: I think it's interesting that with the creation of a new whistler-blower officer of Parliament we got this corresponding effort to merge two other officers of Parliament. Maybe they're simply worried about having too many officers of Parliament, which means it's more about money than anything else.

I'm finished. Thank you.

The Acting Chair (Mr. David Tilson): Yes, Mr. Martin, and that concludes the seven-minute round.

Before we get into the three-minute round, I would like to ask a question I asked Mr. Leadbeater at the last session. It had to do with section 23—I thought you'd all have these sections memorized—and solicitor-client privilege, the waiver of the non-producing.... I see two lawyers at least here at the table, and the room seems to be full of lawyers.

I have a large problem with the existing section and the new section. I don't profess to be an expert, but I always got the impression that when solicitor-client privilege is going to be waived, a judge decides. You can't just say that the government decides, without any explanation, that there's solicitor-client privilege.

The provision that's been added, for those of you who don't have the section in front of you, talks about the waiver of the demand of solicitor-client privilege, and then paragraph 23(b) says “disclosure of the information could reasonably be expected to be injurious to the interests of the Crown”.

I don't want to put words in Mr. Leadbeater's mouth, but my recollection was something to the effect of hearing that's the way it's been, and other legislation has this. I don't care about that; we're talking about this legislation. How does one know that the disclosure of information could be reasonably expected to be injurious to the interests of the Crown?

Mr. J. Alan Leadbeater (Deputy Information Commissioner, Office of the Information Commissioner of Canada): Perhaps if I gave you an example, it would help.

As you know, the justice department is probably the repository of the largest number of legal opinions in one place in the country. Some of those legal opinions have been drafted and developed from before Confederation. They're a gold mine for researchers, and so forth, and bear no relationship to any ongoing litigation the government's involved in. They were paid for by taxpayer dollars. Very smart lawyers wrote them. But they are subject to solicitor-client privilege.

The proposal we're making is that we need to add on this injury test, when it comes to a privilege that is in the Crown, to show that yes, there's a privilege, but how would it injure the interests of the Crown...? I believe there are a lot of factors that could go into showing injury—ongoing litigation, contemplated litigation, an issue that's still unresolved, and so forth—but to continue it in perpetuity, we think, is not consistent with the purpose of the act.

The Acting Chair (Mr. David Tilson): I'm taking the member's time, but I'd like you to keep thinking about it, because it troubles me.

Ms. Jennings is next. Thank you, Ms. Jennings.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Thank you.

How much time do I have?

The Acting Chair (Mr. David Tilson): You have three minutes, Ms. Jennings.

Hon. Marlene Jennings: I have that much time? Well, I have a bountiful amount of time.

I have a very simple question. It concerns the provisions of the Anti-terrorism Act—the concerns you raised in your 2004-05 annual report—that allow the Attorney General of Canada to issue a certificate to halt investigations and other proceedings under the Access to Information Act when the stated goal or objective of such a measure is to prevent the release of sensitive information related to international relations, national defence, or national security. There has been a lot of criticism of those provisions. I'd like to know how your proposed bill addresses those concerns, first.

Secondly, for the RCMP... I can't find my notes now, but it would take the information that is currently protected and would require it to be subjected to this injury test, if I'm not mistaken. I would like to know why you would propose that.

• (1150)

Hon. John Reid: Let me deal with anti-terrorism first.

No certificate so far has yet been issued, but we have been debating it in the other forum, where there is a special committee of the Senate struck to look into this. We have made our case against those clauses there.

As a result of having made our case there, we did not make a change in our proposals here. We made a small change to deal with the Privacy Act, but we have avoided trying to deal with this one explicitly, because we had gone to the other place. We thought that's where it was going to end up anyway, and we didn't think this was going to be something this committee would be dealing with.

Hon. Marlene Jennings: I'm interested in it even if it's peripheral to this committee, because I was part of—and am part of, because we still exist—the Interim Committee of Parliamentarians on National Security, which did a major study of what kind of governance and accountability of parliamentary committees or infrastructure exists in other jurisdictions, to propose something. In fact, our report was tabled last fall, and the government's response was tabled this spring. They have not brought forward legislation on this, but I can tell you—and I think every member of that committee, notwithstanding which party they come from, would tell you—that we were told in no uncertain terms by our allies that a condition for sharing intelligence information is that it is protected and that there is a guarantee that there will not be any release of that information publicly without prior consent of the ally that provided the information.

My concern then is that if the protection that is provided to that kind of information is suddenly subject to an injury test, our allies will simply say they are not going to share any more information with us.

The Acting Chair (Mr. David Tilson): I want to interject at this stage. As chair I'm supposed to keep the rules of this place. You're well over. We're going to allow the question to be answered, but we have a problem with questions after the seven-minute round. Members of the committee are going to have to shorten their questions somehow. But we will allow the question to be answered.

Hon. Marlene Jennings: I apologize for taking up the entire three minutes with my question. I'll try to be more succinct in the future.

The Acting Chair (Mr. David Tilson): Thank you very much.

Commissioner Reid.

Hon. John Reid: I just want to say that this clause was to prevent information being released by the Information Commissioner. The Information Commissioner has no power to release any information; I have no power to release any information.

What it really did was block the case from going to the courts. This is what the effect was, because the only person who can release information that's in dispute is... It's not the Information Commissioner; it's only if it goes on appeal to the courts. It was never a question of being directed at the Information Commissioner per se; it was always directed at the courts, because they didn't want, for whatever reason, it to go to the court. The Information Commissioner himself has no ability to release any information at all.

The Acting Chair (Mr. David Tilson): Thank you.

Mr. Epp.

Mr. Ken Epp (Edmonton—Sherwood Park, CPC): Thank you.

Mr. Reid, I want to get right down to some issues here. I have to go to another meeting, so I'm going to have to run.

I want to know about your statement on page 5 of the written copy of your opening remarks today. You say:

Conducting governance by winks and nods simply leads to poor decision-making, inept administration and corruption.

That's a very strong statement for you to make, that it's possible because of there not being adequate written records, because in fact things are being done only orally, that this could actually lead to corruption. I'm thinking that people who are engaging in things that are illegal, which is another word for corruption, in my view, are not likely going to say "We'd better make sure we obey this rule that says we have to leave records", when they're ready to engage in all sorts of things that are just the opposite of good moral behaviour. How do you think this can ever happen?

I agree with you that's probably true. I agree with you we have to fight against this tendency to have oral records and not to keep records. I like the stuff you're saying about having to keep a record of the records and of which ones have been disclosed, so that you can report on access to information and all this stuff. But how is that ever going to be implemented? It will only be implemented by the honest guys, and the dishonest ones are going to continue to hide it.

What's your response?

• (1155)

Hon. John Reid: My response to that is that what we're trying to do here is change a culture. We have made some progress, in the sense that the government has updated its management of government information policies. But these are policies. Sometimes these policies are obeyed and sometimes they're not; sometimes they're followed and sometimes they're not. We have put that policy into the legislation and say, if you do not follow this policy—if you do not keep records—then there are real life, criminal consequences to your lack of action. You have to change the system.

I agree with you. In any large organization there will be people who are going to commit crimes, commit fraud. Even the Auditor General is saying they can't follow a whole range of cases because the written records in the financial area are not up to date. I keep referring people to the final report by Denis Desautels, who was the

previous Auditor General, who made that point very powerfully. That's the kind of culture we're trying to work against.

This is one of the weapons we would like to have in place to be able to do that.

Mr. Ken Epp: I agree with you that it's a step forward. Now you can nail them just for not keeping records, notwithstanding that what those records might contain would condemn them.

Hon. John Reid: That's a problem that never goes away. But what you're doing is changing a culture and putting up further barriers.

The Acting Chair (Mr. David Tilson): Mr. Desrochers.

[Translation]

Mr. Odina Desrochers (Lotbinière—Chutes-de-la-Chaudière, BQ): Thank you, Mr. Chairman.

Mr. Reid, I have a question for you and for your associate. My colleague informed you in no uncertain terms that the Minister of Justice had declined to meet with the committee to discuss eventual changes to the Access to Information Act.

Has the minister agreed to meet with you, or is his excuse for not doing so Justice La Forest's anticipated report?

Hon. John Reid: No.

Mr. Odina Desrochers: He doesn't want to meet with you?

[English]

Hon. John Reid: No, we have never met.

[Translation]

Mr. Odina Desrochers: You have yet to meet with your designated minister, Mr. Cotler, since taking on the job of Information Commissioner. Is that what you're telling me?

[English]

Hon. John Reid: That's correct.

[Translation]

Mr. Odina Desrochers: Is that normal, in your opinion?

Hon. John Reid: I can't say.

Mr. Odina Desrochers: How long have you been in office?

[English]

Hon. John Reid: I was elected by the House of Commons and the Senate in April 1998.

[Translation]

Mr. Odina Desrochers: Unlike Mr. Cotler, did the other Justice ministers agree to meet with you?

[English]

Hon. John Reid: No, I've never met with the Minister of Justice. There has really in a sense never been a requirement to do so. I have never sought a meeting with the Minister of Justice.

[Translation]

Mr. Odina Desrochers: Mr. Reid, neither the Privacy Commissioner nor you want this merger to proceed. Who then is in favour of this merger?

Hon. John Reid: I don't know.

Mr. Odina Desrochers: You have received no indication whatsoever that this merger is in reality being championed by the Prime Minister?

[English]

Hon. John Reid: The only person I know who advocated this was me, and I have changed my mind.

[Translation]

Mr. Odina Desrochers: Why the change of heart?

[English]

Hon. John Reid: I changed my mind because of a series of incidents that took place. There were a number of bills I was interested in and a number of bills the Privacy Commissioner was interested in, and we had different views. I felt the debate we had before parliamentary committees and the exchange of correspondence and notes of that nature was very healthy. I think in both cases members and the government were able to make intelligent decisions based on the argument we had.

I became fearful of the idea that if it were me, I'd have to make decisions that would affect both privacy and access, but my prejudice would be to come at it from the access point of view. It's far better for us to have strong commissioners advocating their points of view so that members of Parliament and the government can make intelligent decisions based on the arguments they put forward.

• (1200)

The Acting Chair (Mr. David Tilson): Thank you.

Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Thank you. I have two issues if I have time, one if I don't.

For Mr. Desrochers, I should say if he's curious about who's interested in possibly merging privacy and information commissioner offices, I'm one who'd like to look at the issue, and there are others. But as I mentioned at an earlier meeting, Mr. Chairman, the reason is driven by the possible potential for cost efficiencies, and not much else.

However, going back to the issue of the exemption of Parliament, I would have thought the reason Parliament would be exempt is that, just as the courts are a separate institution in government, fully divorced from the big G government itself, so is Parliament an institution on its own, divorced from big G government. Yes, the ministers sit in Parliament, but Parliament itself as an institution is quite divorced. We routinely exempt the courts. The statute does now, and there's no plan to change that.

That would be, in my view—and I'm going to suggest this to Mr. Reid for his comment—a fundamental reason for exempting Parliament from the operation of the Access to Information Act and for looking to Parliament, as an institution, to run its affairs in a way that was public, to have transparency in its work, except for those portions of Parliament where transparency was not appropriate.

What is your reaction to my bold statement, Mr. Reid?

Hon. John Reid: Well, that was the argument that carried the day back in the 1970s and the early 1980s when the act was passed. I was opposed to it at that time because I thought we, as members of

Parliament, were leading the way into this brave new world of openness and transparency and should be ones who led by example. I didn't win that argument.

We have looked at it, and there have been some changes in the approach. I think the House of Commons itself is much more open with its own accounting processes. As I said, members of Parliament are much more open about their accounting processes too.

I did feel that on balance we should open the institution, and secondly, that we would protect members of Parliament. I was more concerned about members' offices, because the bulk of the material in members' offices is not theirs; it belongs to clients. Their political activities are outside the act in any event, as are their personal activities. The core of what's there is basically your financial reporting, and the House publishes that material on a regular basis, I think on a yearly basis.

So I felt that you accomplished most of the things you would do if you were under the act.

Mr. Derek Lee: There clearly was a need 20 or 30 years ago for more transparency throughout government, but I think you accept, don't you, that Parliament doesn't let the courts order it around, ever, and Parliament doesn't let government order it around, ever, and as a separate institution it should be developing its own system of transparency? You'd be satisfied with that in the long haul, if we got the transparency right around here?

Hon. John Reid: I think we all would be happy about that.

Mr. Derek Lee: Thank you.

The Acting Chair (Mr. David Tilson): Thank you.

Mr. Lukiwski.

Mr. Tom Lukiwski: Thank you, Mr. Chair.

I want to go back again to the potential merger of the two offices. I am firmly opposed to it. I agree with your analysis. I think they should be separate; they're two separate functions and should be treated as such. But in the government's rationale as to why they think perhaps this merger would be beneficial to Canadians, one was the cost factor. Mr. Lee and others have talked about that. Yet there's been no request for a cost analysis by any office that I know of.

The second one they always refer to is that in provincial jurisdictions there is one office rather than two. My understanding is, and I'd like some clarification or confirmation of this, that in provincial jurisdictions they started out with one office; they didn't have two offices and then merge or unify. It's also my understanding that in several provincial jurisdictions, if you asked the information commissioners, they would prefer—at least, the information I have is through personal discussions with one information officer in my home province of Saskatchewan—to see their office actually separated into two distinct functions.

Could you comment on that? Does that argument about having one office in provincial jurisdictions hold any water with you whatsoever?

•(1205)

Hon. John Reid: I know there is a debate on this in Quebec, and I know there have been commentaries by a number of the commissioners over the Listserv about it. My judgment is that some are happy with the dual role and others would like to see it separated.

Originally they were put together for reasons of economy. For example, in New Brunswick it's the ombudsman who does the access, privacy, and all the ombudsman work, as well as other material, and it's the same in Manitoba. In Alberta, at one time Bob Clark was the access to information commissioner, the privacy commissioner, and the ethics commissioner. So there has been a pattern in some provinces to combine a whole range of things into the office.

My own view would be that the reason, if you look around into the small agencies of the Government of Canada, we have those small agencies is to provide the government with an ability to bring focus to these areas. When you start combining them into larger organizations, you start losing that kind of intense focus. My view is that when we're dealing with openness and transparency and accountability and the democratic process, you need as much focus as you can possibly have.

Mr. Tom Lukiwski: Specifically, then, you are suggesting you reject the argument that because some provinces are doing it, that would be a reason?

Hon. John Reid: I would say in some provinces there's actually a debate going on to split up the joint administration. Whether that action will be taken or not is not clear to me, but I know there is consideration being given to it.

The Acting Chair (Mr. David Tilson): Thank you.

Mr. Powers.

Mr. Russ Powers (Ancaster—Dundas—Flamborough—Westdale, Lib.): My comment is I'm not surprised that the judge has not come to you and asked for figures, because I'll tell you, if I were going to departments for finances, I wouldn't go directly to the departments that are being affected. I would go to the Treasury Board in order to get that information, and if there were questions, I would come back after. That's my response.

I generally share the sentiments that, if you want to call them officers, separate officers are indeed warranted. My view is perhaps in keeping with Mr. Lee's, that perhaps there are administrative efficiencies that may be determined. It may or may not be a total integration of full administrative functions, but there may be some savings that can be generated by perhaps pooling the legal resources, or whatever the case is. Have you any thoughts on that, Mr. Reid, please?

Hon. John Reid: We have under way a process with the government for shared services, and we are negotiating among ourselves—the parliamentary officers—how we can meet those demands. We recognize there are some things we can share, and we should be able to achieve some economies. At the same time, we're also aware of the problems you get into with the larger types of organizations. We have no great desire to go into the great Public Works one-size-fits-all model, but we think the parliamentary officers are a sufficiently strange breed of cat that we can find

some efficiencies that would be satisfactory out of those kinds of shared services. That's where we would like to go.

Mr. Russ Powers: It's my feeling that the judge will pursue all of those opportunities, and I believe his report back by the middle of November will be a very balanced report.

The Acting Chair (Mr. David Tilson): You have another minute, Mr. Lee.

Mr. Derek Lee: I was looking for some help with a little bit of confusion. It's only hypothetical confusion here.

In your remarks you referred to an apparent shrinkage in paper trail and records. I also think back five or ten years, or earlier, to when there was actually an initiative in government to shrink the paper or the paper trail. Could we please use less paper? Could we please economize on our communications? Could we please just keep the paper down?

Here we have the poor public servant, who is being pushed by ecologists to keep the paperwork down, and by efficiency experts to keep the communications and the useless memos down, and then you have the commissioner, Mr. Reid, or others who want information, saying, "Please avoid the oral culture. Please increase your record-keeping. We want that paper."

In a conversation I had with you just before the meeting, Mr. Reid, you indicated that approximately 85% of the paper, when it goes to the archive, is junked, shredded, tossed out.

So you have "shrink the paper", "increase the paper trail"—which is sometimes electronic now—and then you go to the archive and they're junking 85% of it. As a public servant, I'm saying, "Where do I look for guidance that will show me and my department how much paper on the front end, how much paper trail in the middle, and how much in the end? I'm lost."

•(1210)

The Acting Chair (Mr. David Tilson): Mr. Lee, I give you a minute and you take two.

Mr. Derek Lee: It was a great question, though.

The Acting Chair (Mr. David Tilson): I know.

I don't know whether you have a comment, Mr. Reid.

Hon. John Reid: Well, I have two answers. The first answer I would give is that if you look at the Treasury Board policy on the management of government information, you will find a whole range of answers to those questions, because they have worked very hard, and it's a policy I support. It's a policy that is also supported by the library and archivist.

So we're very happy with the policy that's in place; we now want to make sure it happens. We're not interested in creating records for the sake of creating records. What we want are records that show the transactions that take place, we want to see records of decisions, and we want to be able to say we can follow the paper trail or the electronic trail of financial transactions by the Government of Canada.

We're not interested in what we would call the transitory documents we all have. They can go, but what we want is that core.

The Acting Chair (Mr. David Tilson): That government exchange took five minutes.

Mr. Martin is next.

Mr. Pat Martin: Mr. Reid, the more I look at this and the more I think about it, the more it strikes me that the Liberals have ducked the bullet on this one, for this Parliament at least.

My Bill C-201 was the first bill, government or private, of this 38th Parliament—they start at Bill C-200—and they were screwed. Frankly, the government knew it was going to pass. Our count was 250 to about 50 for the head count of the people who were going to vote in favour of Bill C-201.

They came to me and talked me out of it on the promise that they would have a bill as good or better in this session of this Parliament, and this is nine months later. It would have been done by now and we'd be up and running. So I'm really frustrated that we're having such a leisurely academic exercise here.

The Liberals are so confident that they don't even send their full slate. If they were serious about having access to information legislation foisted upon them in this session of Parliament, when we have the Information Commissioner here before this committee, you'd think they'd have everybody here, in case there was a snap vote, or at least this whole exercise would have a different tone of some sense of urgency. But they know that within a few weeks or months at the most we're going to have an election, and there is no way on God's earth your hard work and my hard work and John Bryden's decade of hard work will ever manifest itself into a bill we could vote on.

Hon. John Reid: Mr. Chairman, I have two comments to make. The first comment is that the legislative proposals I have presented belong to the committee, and the committee can do with them as it sees fit.

•(1215)

Mr. Pat Martin: That's very helpful too.

Hon. John Reid: The second thing is that members of Parliament can use this to devise their own private member's bill for upcoming parliaments. Thirdly, this piece of proposed legislation gives you a standard that you can judge all other legislative proposals by.

So it gives the committee, in my judgment, a tool it can use to proceed.

Mr. Pat Martin: The operative words, though, Mr. Reid, are “in upcoming parliaments”, because the chances of anything being done now in this Parliament, even if we accepted all of your recommendations, which I'm leaning towards, and crafted them into what we have in Bill C-201, and getting it through the House and the legislative agenda and the Senate.... It's just not going to happen before Parliament prorogues.

The Acting Chair (Mr. David Tilson): There are a lot of people here with more experience than I, including yourself, Mr. Martin, but it would seem to me it's free for someone to take this bill as a private member's bill, someone who has some time before Christmas. There's nothing to preclude them from doing that, if they're on the list. I don't know whether it might be you or Mr. Lee who have been around longer than I have, but that's my observation: if someone wanted to do it, they could.

Mr. Pat Martin: I certainly hope there's the will around this committee table to do something just like that, because otherwise.... Somehow we have to get that side interested in this again as a real legitimate fear. This issue is worth more to the Liberals on the doorstep as a promise made during an election campaign than as a promise kept. There's not a whole lot of advantage to the ruling party being now subject to genuine, legitimate, open government, but it does have great cachet on the doorstep to say, if you re-elect us, we will do something to make us a more honest government next time.

That's the value here. I have a feeling we're being played like a fiddle as we sit around this table. That's my feeling.

The Acting Chair (Mr. David Tilson): Even with my interjection, Mr. Martin, you're over time.

Mr. Laframboise.

[*Translation*]

Mr. Mario Laframboise: Thank you very much, Mr. Chairman.

Representatives of departments that were graded “F” in your 2004-2005 annual report were called to testify before the committee. The following is noted on page 18 of your report:

There appear to be five main causes of delay in processing access requests:

Inadequate resources in ATIP offices;

Chronic tardiness in the retrieval of records due to poor records management and staff shortages in offices of primary interest (OPIs);

Difficulties encountered during the consultation process with third parties and other government institutions;

Top-heavy approval processes, including too much “hand-wringing” over politically sensitive requests and too frequent holdups in ministers’ offices; and

Poor communications with requesters to clarify access requests.

I put the same question to the representatives of each department and agency that testified before the committee, namely Agriculture and Agri-food Canada, Library and Archives Canada and Foreign Affairs and International Trade Canada. In their estimation, the approval process had never been top-heavy. That's good to hear.

The Privy Council Office, which does business with all departments, has admitted to us that it does not have a record of all information. It must request information from each department. It also maintains that there is no interference on the part of ministers' offices.

Surely you included these comments in your report and gave some departments a grade of “F” because you felt that the minister and deputy ministers were interfering in the process.

Which offices in particular were you singling out? Or is the problem widespread? Or is everyone covering their backs in this case?

Judging from their testimony, departments that received an “F” were not at fault and the ministers and deputy ministers never intervened in the process.

[English]

Hon. John Reid: Sometimes the way it is done is by an extraordinary, elaborate decision-making process as to what goes out. You may see a document or a file go up, and there may be about eight points where a decision has to be reached. What we try to say is that you eliminate all that kind of interference and all of that worry if you concentrate the authority to make a decision in the coordinator.

Where we find most departments have trouble meeting their obligations is that the decision point is too far up in the chain, and once it gets too far up in the management chain, all sorts of things come into play. Our experience is that once you have people, properly educated and trained at the level of the coordinator, making the decisions, a lot of that material goes away.

For an example of what one might call interference, I refer to the testimony that was given by the coordinator for Public Works before the Gomery commission, in which she described what happened when she was trying to release documents she felt ought to come out under the Access to Information Act.

• (1220)

The Acting Chair (Mr. David Tilson): That concludes the second round, Mr. Commissioner.

Before we commence the third round, I have a question. I attended, as did you, a seminar or conference held by the Canadian Newspaper Association in August here in Ottawa. There was a list of excuses given, which were rather amazing, by staff from different ministries as to why information would not be provided. Someone, and I can't remember whether it was one of the presenters, said that part of the problem could be just that they didn't want to release the information, for whatever reason—they wanted to protect their bosses, they wanted to protect themselves....

Another reason that was given, which I'd like you to comment on, was that it seems there are members of the government staff, the bureaucracy, who don't understand the information legislation. The suggestion was made that the government provide an education program to those people who had it within their jurisdiction to release information.

Do you agree with that, and if you do, should it be part of legislation, or should it be part of regulation, or should it be something the government would hopefully pick up?

Hon. John Reid: I was told that when the act was brought into force in the early 1980s, Treasury Board put together a very good team of individuals who went out and provided the necessary training and education throughout the government, and gradually that mandate was seen to be over and the team was disbanded. I think it's time we had some form of proper educational training program for the basic staff.

A number of years ago, the archivist and I went to the head of the Government of Canada's public service school with a suggestion that they put in something about the Access to Information Act in all their courses. The director at the time said that was not what she was about; she was to train managers, not to propagandize the information act. So we didn't go very far with that.

I would like to see Treasury Board get into this again in a big way. It's their responsibility to make sure the system operates. We know they can do it, because they have done it well in the past. We'd like to see them do it again. We'd like to see them doing it with a view to concentrating on the second section of the act, which says this is about openness and transparency, not about secrecy.

The Acting Chair (Mr. David Tilson): Hopefully, your successors or you will point that out to them.

The third round is to Mr. Lukiwski.

Mr. Tom Lukiwski: Thank you very much, Mr. Chair.

Mr. Reid, I want to state for the record that I concur completely with Mr. Martin's comments about the frustration he feels about Bill C-201 and subsequent legislation that was promised but never delivered. Maybe we're spinning our wheels here, but hopefully there will be an opportunity for a private member's bill to take what you have proposed, or Bill C-201, or a combination of both, and get this on the agenda as quickly as possible.

Speaking to your proposal and some of the suggestions you're making in your recommendations, you seem to recommend or suggest a process in which if you want to include more government departments or crowns and the like, one could go to the Federal Court for inclusion. It would seem to me that a far more efficient manner would be just to expand the coverage of the act to include all crowns and agencies and organizations that spend public money; cover that under the act itself, and then if one wanted to exclude a certain government department, for whatever reasons, one could provide legislation to deal with the exclusion.

Why didn't you use that route in your proposals? Do you have some problems with the overall expansion to total coverage and then exclusion by legislation? Why did you suggest what you suggested?

Hon. John Reid: It was simply a technique to make certain that everybody was covered and to provide citizens with an opportunity to make sure anything they thought was covered...because that allowed them to go to court.

The way it's done now is that the government adds something to the schedule, so it's at the behest of the government that something goes on or does not go on. What we wanted to do was take it out of the hands of the government and give a definition of what a government agency could be or is. Then you as a citizen, if it was not there, would have the right to go to court to have it put on.

• (1225)

Mr. Tom Lukiwski: But again—maybe I'm missing something here, and I probably am—if you included everything, all government agencies, crowns, departments, organizations that receive public money or perform public functions, if that were already included under the coverage of the act, would it not take care of what you're suggesting, that the public be better served?

Hon. John Reid: Yes, but let Mr. Leadbeater say something on that.

Mr. J. Alan Leadbeater: Your point is well taken, and that would be great for the day you did it. But what about the next day, when a new organization is created and a new form of governance is put together? We felt we needed some sort of more descriptive analytical tool to allow, in the future, for future types of government institutions to be added. So yes, you could do this and get a snapshot right now of every organization that exists, but that's only good for that day.

Hon. John Reid: For example, who ever heard of foundations until they appeared in the budget? You have to have a mechanism to force things back onto the list of agencies that are covered by the act.

The Acting Chair (Mr. David Tilson): Monsieur Desrochers.

[Translation]

Mr. Odina Desrochers: Thank you, Mr. Chairman.

As you know, Mr. Reid, from February to May of 2004, the Standing Committee on Public Accounts worked hard to bring to light the details of what has come to be known as the sponsorship scandal.

In your opinion, would the recommendations in your bill give MPs more latitude and better access to information? I'd like your opinion on this matter because we've been encountering many obstacles lately. We're having a difficult time getting information.

Also, when requests were made, did they go directly through you, or through the Privy Council Office?

[English]

Hon. John Reid: I'll answer the second question first. When a request comes in, it goes to the department that holds the records, so they have the obligation to answer. It only comes to my attention when the person who has asked for the information is not satisfied. They have the right to appeal to the Information Commissioner. So we see everything after the fact.

The files we see are probably about 10% of the files that come into the access to information system. So we have to be very careful, in terms of not generalizing too far, since we only see about 10%.

On the first question you asked, about information for parliamentary committees and the difficulties there, I recall the testimony given by Mr. Guité, who said to the committee, "I did not keep records, so that I could avoid the Access to Information Act." That is one of the reasons we've put in there the clause that says that if you don't keep records, it becomes a criminal offence, and that you have to keep records according to the policies that are outlined in the "Policy on the Management of Government Information Holdings", which is the policy at Treasury Board. We feel there's a series of things we have added there that will strengthen the hands of citizens and members of Parliament who want to be able to pierce these curtains of secrecy around a lot of government activity.

[Translation]

Mr. Odina Desrochers: You maintain, Mr. Reid, that your proposed changes will improve the flow of information. Never again will we see the day when people claim either not to have the files or to have misplaced them, or some such thing. That's what you're telling us. Endorsing your proposals would be a major step forward.

[English]

Hon. John Reid: It will be a step forward, but I think, as was pointed out to me by another member of Parliament, it's not absolute. If people refuse to keep records, they will expose themselves to certain penalties, but you can't guarantee that people are going to keep records. What you can do by a measure such as this is begin the process of changing the culture that says "no records is a good thing". You want to change to a culture that says "no records is a very bad thing, and it has repercussions against me". That's what we want to do.

The Acting Chair (Mr. David Tilson): Thank you.

That concludes the third round. We'll proceed with the fourth round.

Mr. Lee.

Mr. Derek Lee: Thank you.

This is a follow-up to Mr. Desrochers' question. He gave the impression that the public accounts committee was relying on the Office of the Information Commissioner, or at least relying on the act, to get information, when I would have thought the powers of Parliament, having no restrictions on them—the powers of Parliament to send for "persons, papers and records", and the power of subpoena of Parliament—are hugely more effective and direct than the ATI. But I understand and accept the accuracy of his comment that in a revised ATI legislation, the statutory imposition of a burden to keep a record for a government decision, making it mandatory, would help establish the paper trail, and that would be a positive thing when Parliament or the citizen goes looking for records.

I just wanted to make that comment, Mr. Chair.

• (1230)

The Acting Chair (Mr. David Tilson): Thank you, sir.

Mr. Lukiwski.

Mr. Tom Lukiwski: Thank you very much, Mr. Chair.

I want to continue along the lines of this discussion. Under the provisions of your proposed legislation, there would be repercussions if any agency of government, or department or crown or whatever, purposefully withheld information. I think that's really what you're getting at here.

Mr. Bains earlier on was talking about the opposition maybe trying to make waves in saying this was the culture right now of oral rather than written record-keeping and the like, perhaps with the implication that this was just something the opposition members were trying to promote, but it was not really true.

Well, I want to draw to your attention a more recent example of what I think you're referring to, and I would ask you to comment on what the penalties could be in this particular case. It deals with Indian and Northern Affairs Canada, which signed a deal with Ottawa-based Totem Hill Inc., which is a consulting firm. Specifically, the contract stated that presentations shall be oral, with supporting material provided only to aid comprehension, but not retained by the department. This was a provision within a contract signed with a consulting firm, not to have written records. This to me is unconscionable, yet there it is.

Under your proposed legislation, what repercussions could the government expect from this type of attitude?

Hon. John Reid: I don't want to answer that question, because we have a case on this that is currently being investigated. So I would not like to deal with that.

Mr. Tom Lukiwski: Can I simply ask you, in a perfect world, would this be allowed to happen if proper legislation were brought forward?

The Acting Chair (Mr. David Tilson): We can go so far in this, but then we start cross-examining the witnesses, and I don't know whether I want to get into that.

Do you have any other questions?

Mr. Tom Lukiwski: I will the next time we have three minutes, Mr. Chair.

The Acting Chair (Mr. David Tilson): Indeed.

Monsieur Laframboise.

[*Translation*]

Mr. Mario Laframboise: When you responded earlier to my question about the five main causes for delays, one of which was the holdups in ministers' and deputy ministers' offices, you stated that Public Works and Government Services Canada officials had told that Public Accounts Committee, or the Gomery Commission, that they were not in a position to, or were being pressured not to, disclose certain information. You made this comment as part of your 2004-2005 review of certain departments.

I don't appreciate the Privy Council Office telling me that to its knowledge, there have never been any holdups in ministers' or deputy ministers' offices, whereas you, as Commissioner, maintain the opposite. These are the very cases that pique my interest. The Gomery Commission highlighted many instances of interference. Therefore, I don't appreciate the Privy Council Office telling us that it is not aware of any such cases and that basically, the comments in your report are false.

Have you observed cases where the Privy Council Office has interfered or are you aware of any interference by ministers or deputy ministers when it came to handing over the information you requested?

[*English*]

Hon. John Reid: I have a problem, in the sense that my legislation says I can't talk about these kinds of cases and go into detail. But I can assure you we have had cases where there has been interference, in a number of cases where senior officials and ministers' offices have interfered. Sometimes it has been interference

in the sense that the box has come up for review and the box has just sat there because the person was too busy to read through it or wasn't interested; sometimes it has been direct interference, but generally speaking, I think those are declining over time, because we have become very aggressive about dealing with them.

We have, as you've probably noticed, been insisting that with delegation—that is, the person who makes the decision—the more delegation authority can be given to the coordinator, the less possibility there is for that kind of interference. We've been seeing an improvement in departments over time, with them moving the delegation down. Every time you can move the delegation down to that coordinator position, the possibility for that kind of interference disappears; it becomes not a question of worrying about embarrassment, but a question of dealing with the law, and that's a big improvement. So I'd say we are improving on it.

• (1235)

The Acting Chair (Mr. David Tilson): That concludes the fourth round.

We'll go to Mr. Lukiwski for the fifth round.

Mr. Tom Lukiwski: Thank you, Mr. Chair.

Mr. Reid, if I could, I'd like to just bring a specific example about which I've been written to and have been asked to explore, and I'd just like to get your opinion on this. It deals with a company called Nav Canada. I'm not sure if you're familiar with them, but I trust by your nod that you are.

You're obviously aware of their unique situation. They're considered to be a private, non-profit company, yet they have a monopoly and deal with what could quite correctly be considered a public function. My understanding is that they also pay no income tax, so it could be argued that they actually receive government financial assistance in lieu of not paying income tax. But for those people who argue that this is a private company rather than a public or government operation, should they be subject to ATI?

Hon. John Reid: With the way we have drafted the appropriate provision in here, I believe they would become subject to ATI. We look at it not only from the point of view of where government money is, but who in fact is performing what we would call important public functions in health and safety.

Mr. Tom Lukiwski: I'm not disagreeing with you, sir. I'm trying to get some clarification. One of the arguments Nav Canada would have for not falling under the compliance of ATI is that, as a private company, they raise money for projects through the issuance of bonds and the financial market and do that type of thing, and that complying with ATI requests is a very burdensome and costly exercise that might cause undue financial hardship on the company. Does that have any bearing on your...?

Hon. John Reid: It's the same argument every crown corporation uses.

Mr. Tom Lukiwski: Except that they don't raise money through the financial markets and issue—

Hon. John Reid: A number of them do.

Mr. Tom Lukiwski: Not primarily, not—

Hon. John Reid: No, but they do have relationships with, for example, the Business Development Bank.

Mr. Tom Lukiwski: Yes. So, again, are the criteria you use in performing a...?

Hon. John Reid: Is it performing a public function?

Mr. Tom Lukiwski: If it is, if the argument is—

Hon. John Reid: If it is, then it should be under it. It doesn't matter whether it is done in terms of a private company or a non-profit company, whatever it happens to be. If you're performing that kind of function, it seems to me there's a public interest that overrides your ownership criteria.

The proposal we have here is in paragraph 77(1)(e):

(e) all bodies or offices performing functions or providing services in an area of federal jurisdiction that are essential to the public interest as it relates to health, safety or protection of the environment.

Mr. Tom Lukiwski: I thank you for the clarification. As I say, this is something I have been asked to inquire about and offer an opinion on, and I appreciate your answers.

The Acting Chair (Mr. David Tilson): That concludes the fifth round.

You're on again, Mr. Lukiwski, for the sixth round.

Mr. Tom Lukiwski: Thank you very much.

Mr. Reid, you have in your annual report the chapter on report cards, which you formalize within the Open Government Act. I know we've had some discussion on that already, but I wonder if you could expand on this and whether you intend to report on all government departments or just the ones you have listed right now—a selection of departments, as it were?

Would you like to expand on that? If you say no, why? Is it a matter of financial considerations more than anything else?

● (1240)

Hon. John Reid: We don't have the resources to go beyond what we do, and our practice is to look at where the complaints are coming in and where the problems are and to go in there. The idea is that if we can go in and deal with the department in such a way that they come up to an A, then we'll leave them alone. In looking at the statistics of the complaints coming into our offices, when we see that they slip back, then we will go in and have another round with them. Our idea is to try to pick out all of the difficult cases and to hone in on them.

The statistical work that we're suggesting be done by Treasury Board will give us a much better indication of where the system is strong and where the system is weak. Right now the statistics that we have are not really satisfactory to allow us to make good decisions in terms of how the system itself is operating.

We are a part of that system, but it's Treasury Board that has the responsibility for making sure the whole structure works. We don't want to interfere there, but we do want to continue our audit function like that and we do want to continue our ability to go in and give them advice as to how they can improve their systems and bring them up to date. Because we have a great repository now of that kind of data, we know how to provide that kind of consulting advice.

Mr. Tom Lukiwski: So if I'm hearing you correctly, it's a matter of human resources that is preventing you from expanding it to all government departments and agencies, but, again, if you talk about this perfect world, you're trying to get to a point where there is as much compliance as possible.

Hon. John Reid: What we're trying to do is provide help and assistance to departments that get into a lot of trouble. We do that because when we go in, it's not only a question of examining why they failed, we also come out and say, "Here is where your problems are, and here are some suggestions as to how you can get about them." We look upon it as a way of making the system much more efficient and effective, because if we can do that then it reduces our workload, and we're always interested in doing that.

Mr. Tom Lukiwski: I have a couple of other questions not really

The Acting Chair (Mr. David Tilson): That concludes the sixth round. You can go on to the seventh round.

Mr. Tom Lukiwski: Thank you, Mr. Chair.

Hon. John Reid: I think this is the highest number of rounds I've ever been through.

Mr. Tom Lukiwski: As another point of clarification dealing with the justice minister's comments—and I apologize if I was engaged in another conversation when this discussion took place, if it did take place—this fall he originally said he would bring down new legislation. That has obviously been changed to a discussion paper, and now he's talking about bringing forth amendments. Have you had any discussions with the Minister of Justice on this issue? Particularly, are there any amendments that he does plan to bring forward, and what is the status of those amendments?

Hon. John Reid: I have had no conversation with him about this subject at all. There have been discussions at the staff level.

Mr. Tom Lukiwski: Can you give us any update on exactly what is going on with the justice minister?

Hon. John Reid: Mr. Leadbeater can say a few words.

Mr. J. Alan Leadbeater: I'm aware that the officials of the justice department are working actively on the drafting of proposals for their minister in this field. We have discussed options on both sides, but I have no information on what the minister or the cabinet is leaning toward.

Mr. Tom Lukiwski: When you say there have been some discussions with members of the justice department on proposals, would those proposals be amendments to the current act or would they be new legislation? Have you any sense of that?

Mr. J. Alan Leadbeater: I have no sense of whether they would come in the form of amendments or an entirely new bill. I have no information on that.

Mr. Tom Lukiwski: Are we on to the next round, Mr. Chair, or do we just keep going?

● (1245)

The Acting Chair (Mr. David Tilson): Yes.

Mr. Tom Lukiwski: I want to shift gears a little bit and talk about the appointment process for future information and privacy commissioners, and perhaps all officers of Parliament.

Right now, I certainly believe the method for the selection process for new officers should be one in which all parliamentarians play a role. I'm wondering if you care to comment on what you would like to see in terms of both the appointment and removal of officers of Parliament, particularly your own office, in the future.

Hon. John Reid: I lean toward the pattern that exists in British Columbia and in Alberta, where it is the committee that puts out the request for people who want to be commissioners, and then vets them, interviews them, and decides.

There's an interesting exercise going on in British Columbia, because they have now passed legislation that allows the existing commissioner, Mr. David Loukidelis, to be extended, but he has to apply just as everybody else does. It will be interesting to watch what the committee does, how it works, and how it decides to go about doing this. I would suggest that as an interesting role model that you might want to check out.

Mr. Tom Lukiwski: Speaking of your own—

The Acting Chair (Mr. David Tilson): Mr. Lukiwski, you're out of time.

Mr. Laframboise.

[*Translation*]

Mr. Mario Laframboise: Thank you, Mr. Chairman.

In his letter declining our invitation to appear before the committee, the minister raised the important question of balancing accountability with necessary protections.

He noted the following:

[...] you may wish to hear the view of Agents of Parliament. No doubt the Auditor General, for one, has firmly held views on this important question [...]

Have you discussed balancing accountability with necessary protections with Ms. Fraser?

[*English*]

Hon. John Reid: The conversations that I have had with the Auditor General have had to do with two elements. One I've already talked about, and that is the sometimes difficult inability to follow financial transactions through. The second case has been what kinds of exemptions she feels her office would require if it were to come under the Access to Information Act.

What we do as parliamentary officers contains an enormous amount of information that is held in confidence as property of the government. It should go out under certain circumstances, but it should not really go out through the parliamentary offices. Our information basically is government information, so you'll notice in the legislation that we have proposed a series of exemptions that will permit that.

Those are the two areas of conversation that I've had with her on access to information.

[*Translation*]

Mr. Mario Laframboise: If I understood correctly, you've provided these exemptions for the Auditor General in your bill. The Minister does not appear to have grasped that fact.

[*English*]

Hon. John Reid: There may be other concerns that she has that we have not discussed, but I will certainly make it my business to find out.

The Acting Chair (Mr. David Tilson): Thank you, sir.

We are now on to round eight, and Mr. Lukiwski.

Mr. Tom Lukiwski: Is this some sort of record, Mr. Chair?

The Acting Chair (Mr. David Tilson): I don't know. I don't really want to talk about it.

Go right ahead, sir.

Mr. Tom Lukiwski: I want to ask a question about the timing of when you will be departing this office.

As you know, Parliament overwhelmingly voted in favour of extending your appointment for a full twelve months. We voted on that in June of this year. My understanding is that currently your appointment has been extended only until March 2006.

Two things come to mind. One, that seems to be a direct contravention, if you will, a slap in the face of Parliament. It certainly doesn't seem to be addressing the democratic deficit, as the Prime Minister has promised, because, again, Parliament overwhelmingly voted to extend your appointment for a year.

The second thing is one of a more practical difficulty that I see arising. There is a good possibility that we will be in an election next March or April. If the country and parliamentarians, including the Prime Minister, are engaged in an election campaign, I'm not sure that would be the best time to have you depart the office. I don't know if there's any provision for your replacement at that particular time. Have you had any discussions with the Prime Minister or anyone else from his office in regard to this particular scenario? How would you respond to that scenario if an election is in fact called at the very time when you're supposed to be leaving this office?

Hon. John Reid: If that happened, there would be two alternatives open to the government. The first is that you could appoint an interim commissioner for six months and six months only. That appointment could not be renewed. The other alternative is that I have signed the necessary delegations, and the deputy commissioner would then become the acting commissioner, so we're covered there.

To answer your first question on whether I have talked to anybody in the government about that, yes, it is true that I have spoken to the Clerk of the Privy Council, and he raised it. Secondly, I told him I would be going to talk to the personnel people in the Privy Council and the Prime Minister's offices in the new year to alert them that this decision would be coming due and they would have to take some action one way or the other.

• (1250)

Mr. Tom Lukiwski: Thank you.

The Acting Chair (Mr. David Tilson): You have concluded?

Monsieur Laframboise.

[*Translation*]

Mr. Mario Laframboise: Let me quote from the Minister's letter once again:

Also, I am not aware of any widespread consultations having been undertaken by Mr. Reid and his office on the legislative reforms contained in his proposal.

The Minister chastizes you for tabling a bill before undertaking widespread consultations. Contrary to the Minister, we feel that you are the best person to table a bill, given your experience and the consultations you have initiated in the past seven years, that is since taking office in 1988. We have confidence in your ability.

How would you respond to the Minister?

[*English*]

Hon. John Reid: Well, you should understand what we did in preparing this for you. What we did was to look at the traditional position taken by previous commissioners, Inger Hansen, John Grace, and me—and there's a summary of those positions in the response that I made to the task force publication. So that was one source.

The second source was that we again went through the task force that was set up by the government to make sure that we understood everything they had done, and that was a large consultation.

We also looked at all of the provincial legislation to make sure we would be in harmony with it, by looking at the innovations the provinces had created, because all of their legislation was newer than ours.

I have been part of an international group of information commissioners who have shared a certain amount of information on this.

So we have basically had a public debate over the last 10 or 15 years.

By the way, one that I forgot to add was “Open and Shut”, the report of the first parliamentary committee that looked at the act.

So we have looked at all of the material that has come out of those debates in the last 15 years and have extracted the consensus of that discussion. To do that we've had to put aside some of my more radical ideas, but we wanted to give you what was in the office and in the access to information community in Canada, and to take advantage of the consultations and the work that had been done by others.

The Acting Chair (Mr. David Tilson): We're now in the ninth round, Mr. Lukiwski.

Mr. Tom Lukiwski: I'm sure that is a record. I think somebody's

The Acting Chair (Mr. David Tilson): I don't want to encourage you, but we have a long way to go.

Mr. Tom Lukiwski: Mr. Reid, in the previous annual reports that you've submitted, you've talked about the divided loyalties of some access coordinators in various government departments, who may feel somewhat conflicted between their loyalty to their departments and their supervisors and the public's right to know. You have suggested previously that perhaps some independence should be given to these access coordinators, inasmuch as lawyers providing

legal opinions should also be given some independence. How does your proposed bill address this issue?

Hon. John Reid: That is why we renamed the coordinator from an access to information and privacy coordinator to an open government coordinator, and it's why we put the coordinator in the proposed act with some authority. We thought that was the best way to be able to provide that kind of recognition and status.

Mr. Tom Lukiwski: Does that provide them with the independence you had—

Hon. John Reid: It provides them with much more independence than they had before, when they basically had very little, but now they have much more status and therefore more independence.

● (1255)

Mr. Tom Lukiwski: Just for my benefit, could you expand a little bit on exactly how they have been granted this independence and status?

Hon. John Reid: I'd like to ask Mr. Leadbeater to say something about that.

Mr. J. Alan Leadbeater: One of our proposals that we think could contribute to the coordinator having greater influence in their organization is that the minister's decision-making authority, if delegated, must be delegated to this coordinator. We now see it being delegated to line managers, assistant deputy ministers, deputy ministers, and assistant secretaries to the cabinet. We don't feel there can be an adequate challenge function in an organization if line managers are making decisions about access to their own records, so requiring the delegation to go to the coordinator would therefore provide some internal independence in the organization.

We're also recommending that a specific line of accountability be drawn to Parliament and the public from the coordinator, the deputy head, and the minister. This modification to the notion of ministerial accountability would I think encourage and require most coordinators to pay more attention to their legal obligation than to their internal career path concerns.

We don't go as far as suggesting that they all report to a separate department like lawyers do, because we just haven't seen the evidence that this gives lawyers that much more independence in government either. There is still very much a client-centred approach by the justice department, as there would be I think with the access coordinators if they were an institution.

Mr. Tom Lukiwski: I just have a quick question on that. If this special status were given, would it change at all the skill set required for access coordinators?

Mr. J. Alan Leadbeater: Yes, it definitely would. It would certainly require a greater level of legal knowledge. I don't think they'd all have to be lawyers, but I think they'd have to have a greater legal knowledge.

I think they would also have to have the trust and support of the senior management committees in departments, so they would have to be in the executive category, I assume, at a senior enough level that they would have the trust of their managers.

Mr. Tom Lukiwski: We've heard from other witnesses before this committee about the problems with staffing and the lack of human resources. While I agree conceptually with you, would trying to get someone else in a more specialized role to fill these positions pose even further burdens on staffing requirements, in your opinion? It might be an unfair question.

Mr. J. Alan Leadbeater: I don't believe so, because in the major departments they have already moved in that direction; they're recognizing the importance to the institution of a senior-level individual being their coordinator.

Mr. Tom Lukiwski: Thank you very much.

The Acting Chair (Mr. David Tilson): Thank you.

That appears to conclude the questions for you, Commissioner, and for your staff. I thank you very much for coming. I would also like to thank you for not proceeding with the media until you had

addressed the committee on this subject. As you've now addressed the committee, I'm sure we have no problem with your discussing the proposed bill with the media.

The committee will soon be holding public hearings and will announce them soon. If you're looking for something to do tomorrow night, the Honourable Gérard La Forest is coming to us to talk about the possible merger of the offices of the information and privy commissioners.

I thank you and your staff for coming, and you are released. Thank you very much.

• (1300)

Hon. John Reid: Thank you.

The Acting Chair (Mr. David Tilson): Having done that, the meeting is adjourned.

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

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