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Monday, March 9, 2009

Chair

Mr. Paul Szabo

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● (1535)

[*English*]

The Chair (Mr. Paul Szabo (Mississauga South, Lib.)): This is the eighth meeting of the Standing Committee on Access to Information, Privacy and Ethics. Today, pursuant to Standing Order 108(2), our study is on the Access to Information Act reform.

We have before us again, from the Office of the Information Commissioner of Canada, Mr. Robert Marleau, Information Commissioner; Andrea Neill, assistant commissioner, complaints resolution and compliance; and Suzanne Legault, assistant commissioner, policy, communications, and operations.

As you know, we invited Mr. Marleau to come back to specifically address the 10 recommendations he left with us at our last meeting. Mr. Marleau also left us suggestions on five witnesses who are up to date, in his view, and proactive on the Access to Information Act and would be prepared to be witnesses. We contacted them, and three are available. They are all from out west, and it is my intention to call them to be witnesses on Wednesday so we can keep the continuity of the current work we're doing. So that's coming up.

You also have before you the matter from the Oliphant commission. We will deal with that at the end of the meeting. I'll give you an opportunity to look at it and consult, if necessary.

Mr. Siksay.

Mr. Bill Siksay (Burnaby—Douglas, NDP): Thank you, Chair.

I want to make one point about the witnesses appearing before the committee. Has it been the practice in the past for the committee to use only teleconferencing? I am concerned that when witnesses, especially from the west coast, are asked to provide testimony by teleconference, they miss the opportunity to come to Parliament Hill, meet members of the committee, and do the kind of networking that other Canadians who live in closer proximity are often granted the opportunity to do as a matter of course .

I have to flag that with the committee, because when I hear that witnesses from British Columbia are going to appear by teleconference, I often feel a little western alienation. Canadians from farther points in Canada miss out on the opportunity to do their work here with us in person. I'm not saying we shouldn't go ahead with what is planned for Wednesday, but in future we need to pay attention to that issue as well.

The Chair: Thank you, Mr. Siksay.

I agree with you fully. There was a bit of a tight timeline, which was part of the problem. I know at least one could not be here physically, so we were going to have to do teleconferencing anyway. We went that route simply for efficiency and cost-effectiveness, but I take note of your point. Thank you.

In conjunction with those witnesses, I wonder if I can get a motion from someone. We need a budget, over and above our ordinary budget, of $5,900 in total. That includes $3,600 for our witnesses' expenses, $1,800 for the video conference, and $500 for miscellaneous.

That is moved by Ms. Simson.

(Motion agreed to)

The Chair: Mr. Marleau, we had an opportunity to look at your recommendations and read some of the material, particularly material circulated to the members on Mr. Reid's recommendations. Those were made available to the members to get a more specific sense of the direction Mr. Reid was proposing. They are pretty comprehensive changes. Yours are somewhat more global, in some senses.

We're probably at the point where we would welcome you to go through them with us to present the substantive reason for the 10 recommendations, the main reason for each one, and any other comments you care to make. Then we'll go to members' questions.

Please proceed.

Mr. Robert Marleau (Information Commissioner, Office of the Information Commissioner of Canada): Thank you, Mr. Chairman, and thanks to the committee for the time it's providing me to address you once again on the issue of access to information reform.

With me today again are Suzanne Legault, the assistant commissioner, policy, communications and operations; and Andrea Neill, the assistant commissioner for complaints resolution and compliance.

At my appearance before you last week I tabled a document that elaborates on 12 recommendations to strengthen the Access to Information Act. These 12 recommendations are urgently needed to modernize the access to information regime from a legislative perspective and catch up with more progressive regimes both nationally and internationally. While I'm not presenting them to you as a package that is entirely take it all or leave none, there is a thread that runs through these recommendations, and I hope it'll come out in my remarks.

These changes address the general themes of parliamentary review, providing the right of access to all, strengthening the compliance model, public education, research and advice, coverage, and timeliness.

● (1540)

[*Translation*]

I want to stress that the list of recommendations represents an important first step in meeting the challenge of modernizing the act. The list is by no means exhaustive. The recommendations only tackle the most pressing matters. I will quickly go over the twelve recommendations I am prepared to respond to some more detailed questions in a moment.

First, I recommend that the act be amended to require a review by Parliament every five years. This schedule will provide an opportunity for parliamentarians to identify systemic issues, consider best practices in other jurisdictions and recommend changes to legislative or administrative structures.

[*English*]

In an environment of increasing globalization, people require access to information regardless of their physical presence. It's becoming difficult to sustain the concept of limited access. It prevents our regime from moving to the Internet age, which ultimately affects timeliness. It also increases costs by adding intermediaries.

Therefore, I recommend that the right of access be provided to all.

I also recommend providing the Information Commissioner with order-making powers for administrative complaints. This model would facilitate an expeditious resolution of administrative matters, which account for about 50% of my office's business.

Fourth, in order to exercise a measure of control over the complaint process and the utilization of resources, I recommend that the commissioner have the discretion to investigate complaints. Currently the Access to Information Act requires that I investigate all complaints received.

The two next recommendations deal with my mandate as Information Commissioner. I believe that these changes will assist in promoting greater dialogue, transparency, and increased accountability.

First, many of my counterparts, provincially and internationally, are expressly empowered to promote a public understanding of access rights and to conduct research into issues affecting the public's right to know. This expanded mandate would help ensure that Canadians are aware of how to exercise their rights to know. And therefore I recommend that the Information Commissioner be given a public education and research mandate.

In addition, I recommend that the role of the Information Commissioner in providing advice regarding proposed legislative initiatives be expressly recognized so that federal institutions are obligated to consult with my office in developing legislative proposals to ensure proper account is taken of the impact on freedom of information.

[*Translation*]

Canadians expect all publicly funded bodies to be accountable under access to information legislation. This is why the administrative records of the Senate, the House of Commons, the Library of Parliament and the judicial branch of government should be covered by the act. This is my recommendation number 7.

Another important proposal relates to cabinet confidences. The status of cabinet confidences has been under constant debate since the inception of the legislation. Currently, they are excluded from my review, which goes against one of the fundamental principles of freedom of information legislation — independent oversight. Therefore, I recommend that the Access of Information Act apply to cabinet confidences as discretionary exemptions.

[*English*]

As noted in my special report to Parliament, tabled last week, a greater oversight is required to ensure that extensions do not undermine the timely release of information. Therefore, I recommend that the approval of the Information Commissioner should be required for any extension that is greater than 60 days.

And timeliness of investigations is also an issue. My office is trying to tackle that. I briefed you last week on the backlog of cases. I believe it is appropriate to establish a 90-day timeframe for completing administrative investigations. That's my recommendation number 10.

The Access to Information Act does not provide direct access to the Federal Court for requesters. Instead, the Information Commissioner must first complete his investigation before a complainant can go to court if he or she desires. The time required to obtain a binding resolution of a complaint can be too long for some requesters. Recommendation number 11 provides for this option.

Institutions are sometimes faced with multiple and simultaneous requests from the same applicant. And as it currently stands, the provision for extending time limits cannot be applied to these situations. Therefore, I recommend that government institutions have the option of claiming time extensions when responding to multiple and simultaneous requests from the same requester that would unreasonably interfere with their operations.

In closing, Mr. Chairman, I would like to reiterate that I support, in principle, the Open Government Act, which was developed by my predecessor at the behest of this committee. However, the recommendations I am making in this document I believe should be implemented without delay. They would go a long way to appreciably improving the effectiveness of the regime in providing significant benefits to Canadians. And indeed, should Parliament adopt my first recommendation of a five-year review, if this legislation were amended accordingly today, five years from now we'd be in a position to report back on any changes that these recommendations may or may not have brought to the system.

● (1545)

[*Translation*]

Thank you for inviting me to share my thoughts on the reform of the Access to Information Act, Mr. Chair. We would be pleased to answer any questions you may have.

[*English*]

The Chair: Thank you.

We'll go right to the questions.

Madam Simson, please.

Mrs. Michelle Simson (Scarborough Southwest, Lib.): Thank you, Chair, and thank you again, Mr. Marleau, for appearing before the committee. Last week was very helpful.

In going through your recommendations, I couldn't agree with you more about number one, that the act has to be reviewed every five years. So this would be outside five years, or could it be subject to review within a five-year period—sooner if need be, if the change is technological or if anything else could arise? Is that a possibility?

Mr. Robert Marleau: Yes, the former proceduralist in me has to state that the act is in fact permanently before the committee. Through your mandate, you certainly have unfettered access to looking at it and making recommendations thereon. But a mandated review in the legislation, with a report to the House about the state of affairs, is really what I am trying to impress upon the committee as quite important.

Also, in creating a dynamic in the system, you might find that the bureaucracy moves at a different pace in year four than it does in year one, knowing that Parliament will be looking at the legislation. So I think it could have corollary effects other than just from being a report to the House.

Mrs. Michelle Simson: Thank you.

Last week in your opening remarks, I was very interested when you made mention of the need for a new act. Certainly we need it revamped. But there seemed to be a bit of a problem with respect to the culture, in that there has to be a cultural change. So how do you see these recommendations working to bring about the cultural change that you believe is required to have things work a little more smoothly?

Mr. Robert Marleau: I think there are three recommendations that target different behaviours on the part of government responding to requests.

The first is the order-making power for administrative complaints. Should the commissioner have this order-making power, it would fill what has been identified as a flaw in section 30 of the act. That section lists the items upon which one can file an administrative complaint. But there's no recourse; you can't go to the courts on this. This way, administratively, the commissioner could address some of these issues and build an administrative jurisprudence that would guide departments in meeting their obligations under the statute. That's one component where I think this rule would change the culture.

The other, which was the body of my special report, is the restriction on extensions. We found that they average 120 days and, in some departments, much longer than that. We've cut it in half and modelled it on some of our provincial legislation, so that the commissioner should be the one to approve any extensions beyond 60 days. Those are the 30 days within which they are normally supposed to respond under the statute, and then they can claim a perfectly legal extension, but to a maximum of 60 days, so that within 90 days there should be an expectation that service will be provided to the requester. I think this would change the culture, because after they've come to the commissioner two or three times to justify the extension, there's a hesitance, I think, to keep coming back. So I think this would enforce a different behaviour within that 90-day window. This, I think, would change the culture.

The other is the recommendation I make that the commissioner have discretionary powers over investigations. Right now, the act says "I shall" investigate, and as a consequence, it doesn't matter what the context is or the content is; they just used to line up in a queue. Having a little discretion, I think, would help in dealing with some of the issues—which, in other legislation, are called vexatious and frivolous—and with departments in terms of how they respond to that. So it's a question again of changing behaviours and culture, but this time on both sides of the fence.

I'm sorry I took so much time, but those are the three components for cultural influence.

● (1550)

Mrs. Michelle Simson: No, that's absolutely fine.

You mentioned having the discretion to decide when not to investigate frivolous complaints. Have you tracked how many complaints you currently receive, say, annually, that might fall into that category if you had the power to do that today?

Mr. Robert Marleau: I think I answered that question indirectly last week. There are very few actually that I would deem to be absolutely vexatious and absolutely frivolous. There's sometimes some context to it that gives you a sense, but it depends on whether you're on the asking side or the receiving side.

The flexibility that I'm looking for, apart from dealing with those, is to ease the pressure on resources within my office. For instance, I may have four previously closed extensions to complaints. If I get another one that is almost identical, I have to open a file, I have to investigate, I have to assign a resource. So it would give me the discretion to apply, to some degree, the results that I've already established—the investigative results—to some of those coming in the door. So I could say, no, I won't investigate this because we dealt with it in another timeframe, in another annual report, in another context.

Mrs. Michelle Simson: So if you had that ability, would you also be recommending some type of appeals process, say, if a complainant didn't happen to agree with your ruling that a complaint wouldn't be investigated for some reason?

Mr. Robert Marleau: Well, I think I would have to give substantive reasons and, to some degree, take representations from the complainant. At this juncture, we haven't articulated an appeals process, but one could be easily devised.

The Chair: Madame Thi Lac, *s'il vous plaît*.

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac (Saint-Hyacinthe—Bagot, BQ): Good afternoon, Commissioner. We are pleased to welcome you back a second time in quite a short period of time.

You have made 12 recommendations. You have recommended that you be given order-making power regarding administrative complaints. How would you distinguish between administrative complaints and other types?

Mr. Robert Marleau: Section 30 of the act defines very clearly what requesters can complain about. The first heading is refusals—they may be partial, complete or deemed, because the answer was not provided within the timeframe. Other complaints are described as administrative, because they have to do with preparation, photocopying and other fees, the format in which the information was requested, the preferred language, and so on. The act defines what administrative complaints are very clearly, but there is no recourse to the courts for this type of complaint.

● (1555)

Mrs. Ève-Mary Thaï Thi Lac: Why do you not want to have this type of order-making power for all of the complaints you receive? Why do you want it only for administrative complaints?

Mr. Robert Marleau: I decided I would proceed on a step-by-step basis with respect to the order-making power for all complaints. First of all, there is a gap in the legislation regarding administrative complaints. There is a lack of clarity. The commissioner may make recommendations but does not act upon them, except for a public censure for non-performance.

Complaints regarding refusals are part of a very different dynamic within the legislation. In jurisdictions where order-making powers are absolute for all complaints, there is increased reliances on the courts. For example, the commissioner in Alberta faces the greatest number of court cases regarding the orders made. The Federal Court of Appeal has served Canadians well—both requesters and the government. We should not throw out the baby with the bathwater. This recourse in case law should continue. This involves a public discussion of the issue, rather than an order by the commissioner on a specific point which remains private under the act until all the steps in the procedure are completed.

Mrs. Ève-Mary Thaï Thi Lac: Do you have the resources you require at the moment to perform the new duties you are requesting?

Mr. Robert Marleau: The 12 recommendations should make it possible to work more effectively and to reassign resources to new duties. For example, if I get fewer complaints about requests for extensions, I can devote these resources to substantial complaints about refusals. Generally speaking, however, we will require more resources.

Mrs. Ève-Mary Thaï Thi Lac: You have also recommended that the act extend deadlines only when requesters submit multiple access to information requests. Does section 9 not authorize you to request an extension?

Mr. Robert Marleau: It is the department at issue that seeks an extension. For the time being, section 9 of the act requires the department to request an extension or to inform me of an extension for each request submitted by the same requester, and this adds to the paperwork involved. The department does not ask me for an extension; it simply takes it. When I am doing my investigations, I can combine them.

Mrs. Ève-Mary Thaï Thi Lac: However, you said that only one person knows the name of the requesters. Under your recommendation, how could one person know whether a requester has submitted a number of requests? Will there be information overlap? Will the officials in the various departments be talking to each other? At the moment, there is only one person who knows the requester's name. How can you apply this measure, if only one person knows the name of the requesters?

Mr. Robert Marleau: We're talking about multiple requests made at the same time by the same requester to an institution.

Mrs. Ève-Mary Thaï Thi Lac: To one institution.

Mr. Robert Marleau: The individual's name is known to the departmental coordinator or the department. I see no violation of confidentiality whether the person submitted 500 requests at the same time or just one. It stays within the department.

Mrs. Ève-Mary Thaï Thi Lac: I see.

Mr. Robert Marleau: Multiple requests submitted simultaneously by a requester have to do with a single institution, not the entire system.

Mrs. Ève-Mary Thaï Thi Lac: Thank you very much.

[*English*]

The Chair: Mr. Siksay, please.

Mr. Bill Siksay: Thank you, Chair.

Thank you, Mr. Marleau, for coming back with your colleagues.

Commissioner, with regard to your recommendation number three, about the order-making power, I gather a matter of great debate among information commissioners has been the advocacy model versus the quasi-judicial model. You recommended partially crossing that divide. I'm wondering, why not go the whole way? You said you wanted to do it progressively, and it sounds as if you might anticipate going the whole way, so why not go for the whole thing right now? Why only the administrative powers?

● (1600)

Mr. Robert Marleau: Mr. Chairman, there are two reasons.

First, I did take general advice from the users and practitioners, and I also took into account former Justice La Forest's report to the Governor in Council in a previous administration, the Martin administration.

On the one hand, there is a bit of a flaw in the legislation under section 30. You can go to court for refusals if you're not satisfied, but there is no recourse for an administrative review, other than a complaint to me. And if you're not satisfied with my results, if I say this extension is perfectly reasonable, you have no recourse. At the same time, if I say to the department that it's not reasonable and I recommend X, and they don't do it, I have no recourse. So the recommendation would fix part of that and bring, I think, more structure and discipline to the use of extensions and on other administrative issues.

I think Justice La Forest made a very strong argument, in that the Federal Court of Canada, as a public judicial body hearing fundamental issues on refusals, has heretofore been useful to Canadians. I was a little loath to go all the way, so as not to throw out the baby with the bathwater. There is some argument to be made, I think, in favour of a court process on the issue of disclosure and non-disclosure, versus what's happening in Alberta, where you litigate errors in law made by the commissioner. By the time we get to the Federal Court, we're on to a fundamental issue of interpretation of our legislation. Quite often the document that's being asked for becomes less important than the fundamental issue there.

Going one step still leaves the door open for the next. Should Parliament, five years hence, accept recommendation one, you will have the benefit of our experience over five years in this administrative area. Then it's up to you to decide if you want to open the door all the way.

Mr. Bill Siksay: Thank you.

With regard to recommendation nine, requiring the approval of the commissioner for all extensions beyond 60 days, in the commentary in the document you gave us the other day, you mentioned in the final line of the opening section that “institutions which are deemed to have refused access to information should forfeit the entitlement to charge fees”. That doesn't seem to have been formulated, or crop up, in a specific recommendation. I wonder why you didn't make that a specific recommendation. Is that something you're recommending to us to include as part of any revision of the act?

Mr. Robert Marleau: I would link that particular area of the forfeiture of fees with the order-making powers. If I decided that the preparation fees were too high or were being used in an abusive way just to delay providing that information, I could order that they be waived. So they're linked with the order-making power.

Mr. Bill Siksay: Okay.

Also with regard to that, you're still talking about 60 days, or beyond 60 days, and it seems, even from the examples you've given, that it's a long period for extensions. Many other jurisdictions have a much shorter period. You note that in Quebec it's 10 days; in Alberta and British Columbia and other provinces it's 30 days; and in the United States, the forfeiture of fees comes in after 20 days.

Why are we sticking with that longer period of time? Should we not be moving to a system that requires faster compliance than that?

Mr. Robert Marleau: Well, I certainly would want to see compliance before 90 days. That's an extension of up to 60 days. That would be 60, plus the initial 30. It's a judgment call. The system has been operating now, in my view, unacceptably at 180 days plus, 120 days being the average. Cutting it in half might get a more responsive system.

The other thing is that I hope these limits will force the departments to get into a delivery mode within that time period, rather than just seeking the approval of the commissioner on a regular basis.

Mr. Bill Siksay: Cutting it in half still makes it look like we're giving them way more time than other jurisdictions, so it may be taken that we're still not very serious about it.

Mr. Robert Marleau: Well, as a judgment call.... Something you could look at when the legislation is before you is that the average across the country is 30—that is, 30 plus 30. Is this bureaucratic apparatus, which has been living under this regime for 25 years, capable of adjusting its culture and resources overnight in order to deliver within a 30 plus 30 regime? That's the judgment call you have to make.

● (1605)

Mr. Bill Siksay: Commissioner, one of the things you didn't address in your recommendations was the whole issue of the use of crown copyright and how that seems to be a limitation on the intent, I think, of access to information, that when the government imposes issues of crown copyright it puts a real limitation on how the information that's been provided can be used. Is there a reason why you didn't include a recommendation on crown copyright?

Mr. Robert Marleau: I believe it's addressed in the package with the Open Government Act.

As I said, what I've tried to do here is to bring forward a package that is, from number 1 to number 12, consistent within, and not to throw in either process or procedural issues that are stand-alone if they're not in the package of 12. That doesn't mean that the rest of the OGA, the Open Government Act, ought not to go forward in a comprehensive review, but there are a whole series of things that I've left out, just to make it more cohesive.

Mr. Bill Siksay: Okay.

The Chair: Thank you, Mr. Siksay.

Mr. Poilievre.

Mr. Pierre Poilievre (Nepean—Carleton, CPC): Yes, thank you once again for being with us today.

I notice that in your second point in the presentation you shared with us earlier, Mr. Commissioner, you mentioned that “the right of access be provided to all”. Are you suggesting that Canadian citizenship would not be a precondition for the use of Canada's Access to Information Act?

Mr. Robert Marleau: Yes, sir. I feel that in the context of what other countries are doing, such as the U.S., and what some of our provinces are doing, and in the context of some of the commitments we've made both at the UN and in the Commonwealth, access to all in the Internet age is a must. For instance, if you are applying for immigration status in Canada from outside the country, and you're not a Canadian citizen but you wish to have access to your file, you now have to hire a third party broker to access that file. So it would cure that. Or if you're an academic sitting in Edinburgh and you're trying to do a comparative study between two policies of two different governments within the Commonwealth, and you ask for information, at this point in time, if it's not voluntarily given, you too have to hire a broker.

Mr. Pierre Poilievre: What is the total cost of processing all the access to information requests processed in this government?

Mr. Robert Marleau: I don't have it right in front of me, but someone will dig it up. My recollection from last week is that it's about $49 million.

Mr. Pierre Poilievre: It is $49 million. What is collected in fees?

Mr. Robert Marleau: It's $404,208.63.

Mr. Pierre Poilievre: So about 1% of the costs are recovered by the government.

Mr. Robert Marleau: Yes.

Mr. Pierre Poilievre: So we have an operating deficit for processing ATI requests of about $48 million, or 99%.

In the context of 30 million potential applicants—or less if you take away the people under the age of 18—when you expand the universe of potential ATIP users to 4 billion, what then becomes the operating cost or operating deficit of making an ATIP system work in this government?

Mr. Robert Marleau: Well, 4 billion times $1,425 would roughly be the answer to your specific question. But if we are to engage in a discourse or debate about the cost of ATI and the cost of expanding it to all users, what we have to do is to look at the international norm. In the United States of America, the FOI act is available to any citizen on the planet, including every Canadian, who can file an FOI request in Washington. All I'm proposing is that it be normalized here in line with what's being done in other jurisdictions, like the U. K. or some of our provinces.

I believe the net cost to you would be no different, or not much different. Those who are outside the country and currently accessing the act use a resident broker of some sort and get their information that way, so you've created a cottage industry to some degree. I'm not saying it's—

Mr. Pierre Poilievre: It's part of our economic stimulus plan.

Some hon. members: Oh, oh!

Mr. Robert Marleau: Well, it could be part of your economic stimulus package, but it's been there for 25 years and we've been criticized by the Commonwealth Secretary General for not normalizing our ATI access with that of other signatories at the UN and the Commonwealth, so that this information is free and accessible.

● (1610)

Mr. Pierre Poilievre: I wasn't meaning to suggest that 4 billion citizens of the world would rush out to file an ATIP request. However, we do have to consider the cost of potentially having new users, considering that 99% of the cost of an ATIP request is paid for by the taxpayer and not by the user. I'm wondering if you have any estimate of what the additional cost would be.

Mr. Robert Marleau: No, I have no specific estimate. My judgment of the situation is that it would be marginal. Those who are accessing the system from abroad now are accessing the system, and those who are not using it because they would have to pay a broker would be a very small percentage.

I think it's is a matter of principle in terms of what kind of image Canada wants to project concerning access to information, and compared with what's being done by other countries like Mexico or the U.S.

Mr. Pierre Poilievre: If there were an influx of new ATIP requests, for example, by researchers and others around the world who have a vested interest in knowing or having information about the Canadian government, do you not worry that waiting times for Canadian requesters could increase?

Mr. Robert Marleau: Again, if the number of users increases marginally, it will have the same marginal impact on the system. Academics are the lowest users within Canada now, so I would assume that the academics internationally who might use the act would roughly represent the same percentage of use.

Mr. Pierre Poilievre: But at our last meeting, you did agree that one of the reasons we have suffered from the backlogs, and one of the reasons the 30-day window is not being met as often as it once was, is the enormous expansion of the Access to Information Act introduced by the Conservative government under the Federal Accountability Act. That has generated more traffic and, therefore, more delays. Whenever you expand the scope of any kind of initiative, whether it be access to information or anything else, and you involve more people in its usage, you can add to the delays for people who are already using that system.

Mr. Robert Marleau: Mr. Chairman, I don't want to disagree with the honourable member, but my recollection of what I said was that the expansion of the statute to some 70-plus institutions has resulted in more requests and more complaints, but it's not the overwhelming cause. The increase is about 6% over six years, so there doesn't seem to be, year over year, a direct correlation with the number of requests filed.

There has been a large increase in the number of complaints. Instead of 35% over five or six years, the complaints are up 142%. Some of it, our data shows, is partially due to new institutions, apart from the CBC event of 2007-08. But they are not the cause of the increase in volume.

The Chair: Thank you kindly.

Mr. Wrzesnewskyj, please.

Mr. Borys Wrzesnewskyj (Etobicoke Centre, Lib.): Thank you, Chair.

Mr. Marleau, I'd like to continue along the lines of what Mr. Poilievre was just questioning. I think what he seems to be pointing to is a cumbersome process that's not very cost-effective. However, I think the conclusion he's heading toward, that we should restrict access, is the opposite conclusion that I believe you and most Canadians would arrive at.

From all indications, we seem to have a mid-20th century process for access to information. Yet we have seen all these tremendous technological advances that indicate that we could provide, very efficiently and cost-effectively, transparency in a democracy. I believe you or someone else gave the example of New Zealand, where information is automatically posted. It's proactive as opposed to entailing that people fill out forms, have those forms processed, and then have clerks go through and search archives.

Wouldn't it make sense, in the 21st century, to not be using this arcane 20th century method? Not only is it cost-ineffective, but it also allows the potential for abuse. I'm not sure if there is a correlation, but in the last couple of years we've seen an increase, a very significant increase, in the number of complaints about the actual process.

● (1615)

Mr. Robert Marleau: I think there are two parts to your question. The first one looks at the principle of access to information, at the right of citizens to have access. The statute was never designed to be user pay. Indeed, it was designed to be "on top of". The normal way to get information is simply to ask for it for free, since the taxpayer has already paid for the document that he or she may be looking for. And section 2 of the act, which was adopted in 1983, clearly says that the act is intended to complement and not replace existing procedures for access to government information. It is not intended to limit in any way the type of information that is normally available to the general public.

With regard to the concept of user pay, there was a $5 fee put in, and there were and are regulations to recover certain costs, certain fees. You have a basic right to so many free search hours and a basic right to so many free pages. After that, you pay certain fees.

If there's going to be debate on—

Mr. Borys Wrzesnewskyj: Sir, I don't mean to be rude, but there is limited time.

What about the New Zealand example of posting information? Or take our court system; we have an open judicial system where procedures are public, but then all of those court procedures are also immediately posted. They're available. What about that proactive system? Have you any comments about that type of system?

Mr. Robert Marleau: The reference I made to New Zealand last week was that they even post cabinet confidences on the website, within months of decisions being made. The more proactive disclosure we have, such as exists in Mexico and Scotland, the better. I've said before that the next generation won't be wanting to file an access request; they're going to be wanting to find it on a website themselves.

So yes, there should be larger repositories of proactive disclosures.

Mr. Borys Wrzesnewskyj: Is the system working well in New Zealand?

Mr. Robert Marleau: I'll defer to my colleague on that. She attended a conference where the New Zealand commissioner made a presentation. I think she'll be able to answer that more directly.

Mrs. Andrea Neill (Assistant Commissioner, Complaints Resolution and Compliance, Office of the Information Commissioner of Canada): Thank you.

On the cabinet confidence issue, having those posted proactively certainly does make a difference in what you end up looking for under the act. We also have now the Quebec example, where, under regulation, certain types of information now have to be proactively disclosed.

The message is still that the more you put out there informally, the less you'll have to use the act.

Mr. Borys Wrzesnewskyj: And the less costly the system.

Mrs. Andrea Neill: Yes.

Mr. Borys Wrzesnewskyj: I was quite disturbed last week by some of your commentary—for instance, that you often find, within the access to information sections, a culture of non-disclosure. That almost seems Orwellian. We're calling it "access" to information, yet there's a culture of non-disclosure.

Another thing that truly disturbed me was the fact that requests from members of Parliament and the media would get amber lighting. We're elected to work on behalf of the public. We're members of Parliament. We are supposed to hold the executive branch, the government, to account. Do you mean to tell me that the government departments are deliberately slowing down information to members of Parliament so that they can't fulfill their duties to the public?

Mr. Robert Marleau: Let me restate that ever so slightly. The inquiry we did on the Canadian Newspaper Association's complaint about amber lighting found that the media was not the group of requesters worst affected by amber lighting; lawyers and parliamentarians were considerably ahead of them.

Amber lighting is defining a request as being sensitive, usually in order to prepare some kind of communications response when the information is put forward, or to specifically brief someone in the hierarchy, up to and including the minister, on the issue that's about to be disclosed. I have no problem with that activity. What I have a problem with is that any class of requester sees his timeliness rights under the statute violated by any such special process.

● (1620)

Mr. Borys Wrzesnewskyj: Wouldn't it almost make sense that the opposite be true? As elected members of Parliament, one of our functions is to hold the government to account. We have to be able to see things in a transparent manner. Wouldn't it actually make sense that they be fast-tracked as opposed to slowed down?

We already have an untenable situation, according to you, that timelines are not being met for the general public. I once experienced the frustration, in fact, of having to wait six months for an access to information request. Wouldn't it make sense for the opposite to be true, then? Shouldn't one of your recommendations be that MPs' requests get fast-tracked?

Mr. Robert Marleau: That could form part of another component, if I can put it that way, of modernizing the legislation. In the U.S., for instance, legislators and the media have their fees waived for certain kinds of requests. There's a recognized status of accountability role for the media and for legislators in filing requests.

Yes, I agree with you, that's the nirvana of freedom of information. But as one who for many years assisted honourable members to draft questions on the order paper in order to get specific responses from the government, I know the timeliness of a response was also a problem back then.

The Chair: Thank you.

Mr. Dechert, please.

Mr. Bob Dechert (Mississauga—Erindale, CPC): Thank you, Mr. Chair.

Commissioner, thank you for your comments and testimony today.

You mentioned the amber lighting process. I believe that was part of what was referred to as the CAIRS program. At the last meeting, we referred to a number of articles that were written in the *Toronto Star* and other media between 2003 and 2005. Was that not instituted under the previous government?

Mr. Robert Marleau: Yes. The investigation spanned 2003 to 2005, and we published our findings last summer. The Treasury Board Secretariat and president have responded to three recommendations. They've agreed essentially to cease and desist, or to meet the timelines.

Mr. Bob Dechert: So this culture, as it were, is a culture that has existed for some time.

Mr. Robert Marleau: Oh, many of the issues I'm addressing here are 25 years old.

Mr. Bob Dechert: Thank you.

Earlier you mentioned your recommendation two, with respect to providing access to anyone, to people beyond Canadian citizens. You mentioned the United States and Mexico and what they do in those countries.

Could you enlighten us in terms of what the U.S. and Mexico do with regard to cost recovery, for example, on access to information requests by those who are not their citizens? Could you also describe whether or not both those countries allow or provide information on cabinet confidences?

Mr. Robert Marleau: In terms of how the U.S. treats requests from non-citizens, there's no distinction made. The regulations for fees apply equally to citizens and non-citizens.

Mr. Bob Dechert: Can you comment on the cost recovery in the U.S.?

Mr. Robert Marleau: I'd have to revisit the regulations, but they're roughly along the lines of what we have: a certain amount of free hours of search time, a certain amount of free photocopying and then 20¢ per page applies, and preparation fees and those kinds of things. It's very similar. The distinction is that they have no ombudsman and no commissioner. If you wish to appeal, you have to go to the courts, which could be very expensive, of course.

As for Mexico, I'll ask my colleague, who speaks Spanish, to reply to the Mexican experience.

● (1625)

Ms. Suzanne Legault (Assistant Commissioner, Policy, Communications and Operations, Office of the Information Commissioner of Canada): To my knowledge, there is no cost recovery specific to persons who are outside of the country or not citizens of Mexico.

The important aspect of having access to information legislation that's accessible to all means that it becomes possible to access it via the Internet, and this is a major technological advance. If we could get that in the legislation it would actually allow the system to move to the 21st century in terms of access by Internet. I suspect that it would save costs significantly in the long run.

This is how the Mexican system is developed. If you think about it in those terms, in Mexico a very small percentage of the population has access to the Internet. Therefore, it is still restricted, but in Canada, I believe, the data now is that probably in excess of 80% of the population has access to the Web, which would make a significant difference.

Mr. Bob Dechert: I certainly understand the desire to utilize the Internet in supplying this information, but are there not ways that you could request information about whether or not the person who's requesting the information is a citizen?

Ms. Suzanne Legault: Part of the difficulty that has been expressed to us by people at the Treasury Board Secretariat is that because they need to ascertain the residency status of the applicants they are therefore unable to move to a complete Web-based system.

Mr. Bob Dechert: What if they are just required to put in, for example, their SIN? Wouldn't that be an indication?

Ms. Suzanne Legault: Then I think we move into security and privacy issues.

Mr. Bob Dechert: Well, today you know who the person is anyway, or at least somebody in the government does, when they make a request.

What about cabinet confidence? Is that information available both in the U.S. and in Mexico?

Mr. Robert Marleau: In the U.S., executive privilege is claimed over those cabinet confidences. They're pretty watertight, to be honest. But the principle we have in Canada that is different from what the U.S. has is the oversight by a third party independent overseer. They don't have an ombudsman there.

Mr. Bob Dechert: So we're already ahead of them in that regard.

Mr. Robert Marleau: That's right. They're headed in that direction.

In Canada, it is the only area where the commissioner must take the word of the government or the clerk for a certificate that says, no, you can't see this, that this is a cabinet confidence.

Mr. Bob Dechert: So how, for example, would you prohibit—

The Chair: I apologize, Mr. Dechert. Unfortunately, we have to move to another member at this time, but maybe you can get on the list again.

Monsieur Guimond.

[*Translation*]

Mr. Claude Guimond (Rimouski-Neigette—Témiscouata—Les Basques, BQ): Thank you, Mr. Chairman.

Good afternoon, Mr. Marleau. In recommendation 8, you suggest that the act should apply to cabinet confidences. In other words, they should be included in the act.

Does the British parliamentary system operate in this way at the moment?

Mr. Robert Marleau: A number of provinces have a provision of this type in their legislation. In British Columbia and Alberta, the commissioner has at least to look at complaints that are refused. I'm not sure whether this is true in Quebec as well; we will check into that.

The recommendation would change the absolute exclusion into a discretionary exemption. Documents would not necessarily be disclosed, but at least the principles regarding exemptions set out in the act would be applied, and the commissioner would have a right of oversight over the complaints.

At the moment, these documents are automatically excluded based on a unilateral decision by the government, without the commissioner having any right to see the complaint.

Mr. Claude Guimond: How does the system work in the institutions and administrations you just mentioned?

Mr. Robert Marleau: I have had conversations with the provincial and territorial commissioners, and this does not seem to cause them any difficulty at all. The fact that a third party would at least have looked at the document would give requesters more confidence. If I tell you that you cannot get a document in accordance with an exemption set out in the legislation, at least you have the satisfaction of knowing that someone independent of the government made this decision.

In some cases, we can determine whether the Privy Council or other institutions went too far, and perhaps encourage them to show greater flexibility in exercising their discretion. The objective is to promote disclosure.

● (1630)

Mr. Claude Guimond: This would certainly change things.

Do you think that the inclusion of cabinet confidences in the act would have an impact on the proceedings or decision-making of the highest level of government?

Mr. Robert Marleau: I think comments made in cabinet would remain exempted, and for good reason. In the Westminster model you mentioned, cabinet solidarity is important. Having a common position on particular policies does remain fundamental to the system.

This is not a problem in New Zealand, where there is very proactive disclosure of cabinet decisions, sometimes within two to three months. Here, it takes 20 or 30 years.

Mr. Claude Guimond: Thank you.

[*English*]

The Chair: *Merci*.

Monsieur Dechert, please.

Mr. Bob Dechert: Thank you, Mr. Chair.

I wanted to follow up, Mr. Marleau, on the discussion we were having earlier about your recommendation number two, insofar as it relates to your recommendation on extending the information to be provided to include cabinet confidences.

For example, how would you prevent some group like the Taliban or some other foreign governments that might have some reason to want to make frivolous and vexatious information requests to the Canadian government from using this Web-based access to information system to fire in thousands of requests for information concerning the mission in Afghanistan or from requesting cabinet confidences on that? How would you see that being handled?

Mr. Robert Marleau: As I said earlier, I don't think it would make much difference. No doubt right now the Taliban have resources—their own brokers—they can hire, and they can be totally anonymous in the process by using a broker from abroad who is a resident of Canada.

Mr. Bob Dechert: At least we would know who they were.

Mr. Robert Marleau: You might know, but it's hard to determine, depending on the individual. It's supposed to remain private or confidential within the department. In that sense, I don't see that there would be much of an issue.

As far as cabinet confidences are concerned, we're recommending that we go from using exclusions, which are absolute right now, to discretionary exemption, which means that the Privy Council Office will still have to make a decision on what is being released. It's not just a question of opening up the doors to cabinet. There's third party oversight, which means the commissioner can look at it and say to you as a requester, "I'm sorry, you can't have this." You'll accept that with a lot more confidence, I believe, in terms of the mandate of my office than if I say, "I'm sorry, I can't see it. The clerk tells me it is a cabinet confidence."

Mr. Bob Dechert: Do you know today if foreign governments use the Access to Information Act as a way, for example, of finding out information about trade negotiations that Canada might be involved in? Have you ever seen any evidence of something like that?

Mr. Robert Marleau: I don't recall anything in the context of our complaints investigations, but remember, the rest of the statute applies. There is a series of exemptions. The departments have the duty to keep state secrets a secret. Quite frankly, if you look at the 25 years of experience under this statute, it has served that community well. There has not, to my knowledge, been a serious substantive leak through access to information on matters that should not have been released.

We're asking to bring within the scope of that application certain documents that are excluded, such as cabinet confidences.

Mr. Bob Dechert: I'm concerned about how that might play out in a Web-based system, which is free and easy for anybody with a computer anywhere in the world. I can see that becoming unmanageable.

Mr. Robert Marleau: I can tell you that my conclusion from the last report is that the paper world is unmanageable as it sits. The government is crumbling under the weight of its own paper, and every time there's another request, we add another layer of paper.

Mr. Bob Dechert: Wouldn't moving to a Web-based system exacerbate the problem?

Mr. Robert Marleau: No, I believe that more proactive disclosures on the Web will be a first step, as we've advocated before. Repositories of what has already been released and easily accessible would also help. Additionally, whether you are applying exemptions on a piece of paper using a black felt marker to exempt, or using software in order to exempt and send it on the website, you are still performing the same task. I think it's a lot faster to do it on the Web.

● (1635)

Mr. Bob Dechert: With respect to your third recommendation regarding order-making power, can you give me an example from a case that you've dealt with of an order power that you might be contemplating?

Mr. Robert Marleau: Let's use a hypothetical case. A particular department is using preparation fees as a way to discourage requests. In other words, you ask for a search on a particular set of documents and they come back to you and say it is going to cost $5,000. As a requester you might want to think twice about pressing on with that. So you narrow it down even further, not through the assistance of the department, but because you can't afford it. So you get it down to $250. That is against the spirit of the act.

There is no recourse for this, even when I get a complaint. We do have considerable influence through our investigative process on dealing with fees, for instance. In this case I could simply order the department to waive its fees or forfeit its fees if it's a deliberate abuse, of trying not to release information. In some cases they are trying to buy time to manage their workload. There is a resource issue related to this. If they ask this requester to pay more than he might pay, then he might go away in the meantime so they can get on with some of the other stuff.

The order-making powers for administrative purposes would be to deal with those kinds of issues.

Mr. Bob Dechert: Have you seen those kinds of situations?

Mr. Robert Marleau: Yes, sir.

Mr. Bob Dechert: Okay.

With respect to your recommendation number five about public education research, can you give us an idea of what kind of budget you might be thinking of in order to do that kind of education, advertising workshops, etc.?

Mr. Robert Marleau: We haven't pegged a figure for it. There are benchmarks in the system. The Privacy Commissioner has this authority. Some of our provincial colleagues have also. As is my usual way, I would advocate a prudent and progressive approach to it.

Right now no one is doing this. The Treasury Board Secretariat has a mandate to educate and train the public servants. I have an advocacy mandate, which sometimes gets the Treasury Board quite uncomfortable depending on how far I'm going. I really can't justify taking investigative resources and putting it into printing pamphlets. But there is no one there, certainly no one independent of government, who has the mandate to educate citizens on their rights.

I'll give you a brief example, Mr. Chairman, from the press conference I held on the report two weeks ago. An experienced reporter aggressively asked me a question about why I was not exercising the full powers of the commissioner and why was I not simply ordering this information to be released. I had to gently remind him in front of all his colleagues that I don't have order-making powers. I can only recommend. So there are myths around the statute that could be easily dispelled by simple education and didactic material.

The Chair: Thank you.

Mr. Siksay, please.

Mr. Bill Siksay: Thank you, Chair.

Commissioner, recommendation number four is the one about providing the commissioner with the discretion on whether to investigate complaints. You are seeking that discretionary power. I know you've noted that the usual judicial review process would still apply in those situations where a decision not to investigate was made. You also note in the benchmarking section of your documentation that different jurisdictions handle that discretionary power in different ways. In some cases it's very broad, where commissioners have the discretionary power to refuse to conduct an inquiry as circumstances warrant. In other jurisdictions it's much more specific and there's a longer list of limitations on that, where it has to be trivial, not made in good faith, frivolous, vexatious, or amounts to an abuse of the right to access.

Do you have any opinion on whether you should have a broad mandate there or whether there should be some stated limitation on it?

Mr. Robert Marleau: As a general response, I feel it could have some definition in terms of scope, but a broad mandate would be more useful. It would give the commissioner the kind of flexibility I think is required to change the behaviours that are not necessarily vexatious and frivolous but borderline. But if I have to go to court and prove “vexatious”, I might not win the case. That's a lot of investment and resources.

I'm accountable to Parliament. Certainly using categories and that sort of thing would make our annual reports on cases we may have declined to investigate as transparent as I can without violating the privacy of the requesters or the complainant so Parliament gets a sense that the commissioner is not going crazy and abusing his or her authority.

We're 25 years out. We're a mature democracy. If you're going to confer upon the commissioner some pretty extensive search powers and trust me or her to use them, it seems this is a very small step towards trying to build some efficiency in the system. I think with the other powers we already have under the act, which demand considerable responsibility and accountability, it's a small adjunct.

● (1640)

Mr. Bill Siksay: With regard to your recommendations around parliamentary review every five years, without the power for a parliamentary committee to actually bring in legislation based on that review, is that just another committee report that gathers dust on a parliamentary shelf if that government, which has the vested interest in protecting information, is not prepared to act on the recommendations? Is there another mechanism for ensuring that when a review of that kind is done recommendations get debated in the House and put forward in the form of legislation?

Mr. Robert Marleau: Certainly in terms of debate, the committee has access to the House by its powers to report to the House, and of course it could propose concurrence in such a report. In that sense it would be somewhat of a guarantee that once every five years the House is seized of the subject matter. As far as guaranteeing change goes, that's a little difficult. Minority parliaments have more clout than majority parliaments.

But it's important to look at our 25-year experience. There was a mandated review in 1987 and very little happened. The next event was 1997, for an amendment to subsection 67(1). The next event was 2006, with the expansion of the statute of the FedAA. All three were not correlated. All three never had a parliamentary review in the sense of what we're advocating here. It's a question of timely seizing the House and the committee of the issues of the day and the evolution and maturing of the system.

Mr. Bill Siksay: Do you know if there is any mechanism for a standing committee, for instance, to table legislation and have it debated in the House without the support of the government in any other parliamentary system?

Mr. Robert Marleau: No, I don't, not in the Westminster model. The committees devise their powers from the chamber itself. If I may briefly put a hat on as former Clerk of the House—

Mr. Bill Siksay: I hoped you might.

Mr. Robert Marleau: —I strongly advise against putting parliamentary procedures in statute. It hampers the flexibility the House needs from time to time to go in the direction of its choice. If it's bound by law, it has no choice.

The Chair: Mr. Siksay, I'm sorry, but we're going to have to move on.

Mr. Wrzesnewskyj, please.

Mr. Borys Wrzesnewskyj: Thank you.

We have a costly and cumbersome system under which a culture of non-disclosure has developed. In the last couple of years we've seen complaints increase at an exponential rate. We don't seem to have a particular appetite to move into the 21st century and use modern technology to help us with transparency in government, so we're stuck with fixing the existing system.

Moving beyond the particular suggestions and recommendations you've made, I believe ATIP sections are to be at arm's length within each department. Is that not correct?

Mr. Robert Marleau: Well, they form part of the operations. There's a delegated authority under the act from the head of the institution to a particular coordinator, but they form part of the operations of the department.

Mr. Borys Wrzesnewskyj: So they're not truly at arm's length?

Mr. Robert Marleau: No. They get a delegated authority from the head of the institution.

Mr. Borys Wrzesnewskyj: The staff in the ATIP sections typically would come out of the department?

● (1645)

Mr. Robert Marleau: Yes. They're generally public servants under the public service act.

Mr. Borys Wrzesnewskyj: So if someone's using the ATIP process because they have some complaints about a department, the staff in an ATIP section may in fact be putting together documentation on a complaint from an area that they've worked in for years. Could that not happen?

Mr. Robert Marleau: There are two aspects. There is the ATIP coordination office, which manages all of the requests, and they refer them to what we call the OPIs, the operating program area. So I'm a busy public servant working on getting pension cheques out in a timely fashion and I get an access request from the coordinator's office that says we drop tools and answer it. That's the dynamic within the department. The information usually comes from the operational side and is not gathered necessarily in a proactive way by the ATIP coordinator. They've furnished the ATIP coordinator according to the needs—

Mr. Borys Wrzesnewskyj: So even potentially, it's slightly worse that the request goes right to where the problem may lie.

Mr. Robert Marleau: Potentially. That's certainly something we experience with—

Mr. Borys Wrzesnewskyj: That's not a very good system.

Mr. Robert Marleau: I think the system is predicated such that public servants will respect the law and serve Canadians.

Mr. Borys Wrzesnewskyj: On that point, last week before the public accounts committee, I raised the issue of the testimony of RCMP officers who worked in an ATIP section. One officer in particular raised the whole issue of how he prepared an ATIP request to be sent out, was called in by a deputy commissioner into the commissioner's boardroom, and was asked for a switcheroo to take place. The deputy commissioner had prepared a different package and wanted it to be switched with the package that the officer had presented.

We heard other disturbing testimony as well. In fact, a parliamentary committee made a request for documents from the ATIP section within the RCMP on a Wednesday evening. On the Friday, right at close, one of the deputy commissioner's key staffers arrived requesting those very same documents, documents that I would assume they would already have copies of within the deputy commissioner's office, so I'm not quite sure why they would have been requested.

You see, what I'm getting at is this. How can you have confidence that the system is working when there isn't an arm's-length relationship between the department and those access sections? As for most people who would be requesting, either they have an academic interest.... But the average citizen, journalist, or MP would be requesting because they have concerns. We're making those requests for people to be absolutely forthright and transparent with us. We're making requests to the very people who may in fact have made mistakes or, in the worst of all worlds, who may be engaged in a cover-up.

The Chair: We're almost out of time. I'm going to give this to Mr. Marleau for his response.

Mr. Robert Marleau: I'll try to respond very briefly, Mr. Chairman.

We hear anecdotes of ATIP coordinators under pressure by management to delay, to not disclose, to amber-light to buy time, and all that sort of thing. We hear that. Part of it, I think, is mythical and part of it is probably true, but in terms of what we see through investigations, it is a rare occasion that we can actually pinpoint an individual in that kind of behaviour you are describing.

What's wrong with the ATIP coordinator's relationship with the head of the institution is that too many times they are so far down the rung that they have very little influence on the system within their own department. They're under-resourced, and sometimes that may be deliberate, I can't say for sure. But certainly there isn't the commitment to fix it such as they did in the Department of Justice recently.

Unless these people are specifically trained and have their own identity, the competencies and the certification, like internal auditors who have professional accountabilities that they must live up to, that won't change. I think that would go a long way in building confidence, expertise, and professionalism in the corps of ATIP coordinators.

The Chair: Thank you.

Mrs. Block, please.

● (1650)

Mrs. Kelly Block (Saskatoon—Rosetown—Biggar, CPC): Thank you very much, Mr. Chair.

I appreciate the opportunity to meet again with Mr. Marleau.

Earlier you stated that the addition of 69 new institutions to your mandate did not materially impact your workload. But I understood you to say last week that at least half of the complaints you're dealing with are directly related to the CBC. There seems to be a misalignment between those facts and your statement today. Could you clarify this for me?

Mr. Robert Marleau: If we take just the crown corporations as an example, the CBC was really an exception last year, which was the first year they came in under the statute. For all of the other crown corporations, we've seen normal activity, either in terms of numbers of requests globally or in numbers of complaints.

The CBC was facing a situation, as I described in recommendation 12, of multiple similar requests by a single user all at the same time. No institution, in my view, could have responded within 30 days, and no institution could have responded, with a reasonable extension that we're proposing, in terms of 60 days. At the same time, I got 435 complaints or whatever it was. There's no way I could respond to those within 90 or 120 days.

We have to take the CBC out of that mix, I think, if we want to look at the curve. In terms of the extension of the scope of the act to the extra agencies, the total requests in the system came to about a 6% impact, year over year.

On the complaints side, the 142% increase was not due to the specifics of the added institutions but partly due to the fact that the complaint period was reduced to 60 days from one year. Requesters are complaining sooner; they must complain sooner or lose their right to complain.

Mrs. Kelly Block: I have another question. Is it not true that the reforms made by the Conservative Federal Accountability Act are the most significant reforms to ATI since the act was passed in 1983?

Mr. Robert Marleau: Yes, they considerably broadened the scope of the act.

Mrs. Kelly Block: Is it also true that the reforms introduced by this Conservative government expanded the act to cover organizations like the CBC and the Wheat Board?

Mr. Robert Marleau: Yes.

Mrs. Kelly Block: Given the actions taken by this government in just over three years, would it not be fair to say that we are following the recommendation that Parliament review the Access to Information Act by developing the Federal Accountability Act and expanding your mandate to cover more organizations?

Mr. Robert Marleau: It's not expanding my mandate to cover more organizations, because I deal with complaints; now I have more organizations who can complain.

But in response, in terms of the recommendations I'm making today, I would say that while it's true the scope of the act was expanded, and that while it's true Parliament acted in a proactive way to increase the reach for more transparency, we've created a bigger problem. Now we have these many more agencies who essentially have the same kinds of issues to deal with—paper-based, extensions, lack of resources, not enough trained individuals in the system. As a matter of fact, the crown corporations cherry-pick some of the best away from the public service, including from my office, in order to get up to speed.

So while it was well-intended in terms of scope, if we don't fix some of the structure and some of the mechanics, we just create a bigger problem.

Mrs. Kelly Block: Thank you.

Mr. Pierre Poilievre: Could I intervene?

I'm sorry, I think we're getting some mixed signals over here on the government side. On the one hand, we're being told to expand access and make it applicable to a larger number of agencies. On the other hand, when you discuss the fact that we have done exactly that, you point out that it only causes the problems that are associated with ATI generally to be applicable to a larger number of agencies.

So what is the overriding recommendation—more access or less?

Mr. Robert Marleau: Well, sir, I can say that I was not one of those who were calling for more access back in 2006 as the Federal Accountability Act came forward. On the record are the views of my predecessor, the previous commissioner, on the merits of that statute. I need not go there again.

What I'm saying to you today is that it is laudable that the scope of the act was extended. I have no problems with that. Maybe it didn't go far enough. There are other institutions who could..... But the structural issues that I've been reporting on for two years were there before the FAA. They're still there. Unless there's the political will to invest and change and bring the statute into the 21st century, we're just.... If you expand it some more, you're just expanding some of the structural issues.

● (1655)

Mr. Pierre Poilievre: Finally, I just want to address this issue of the increased number of complaints. You have said that those complaints do not resolve from the sweeping expansion of the Access to Information Act that the government brought in, but that there are other factors. You might be right that there are other factors, but again, one new institution that we added to the act is responsible for half of all of the new complaints. You might say that was a particularity of that agency, but it continues to be a reality that those 500 complaints are counted as part of the 1,000 new complaints that you cite in your report and are therefore responsible in large degree for the increased number of complaints. It's not that the government is doing a poorer job; it's just that there are a larger number of agencies against which complaints can be made, and therefore there are a larger number of complaints.

Mr. Robert Marleau: That is partially true in that the more there are, the more complaints there can be. My numbers over one year went up 81%. That includes CBC. That's coming down. We're still going to stay around the 2,100—let's say—margin. CBC this year is down to about 250 over the previous year. It should flatten out in terms of any one institution.

The other component is the reduced period, which came in with the Federal Accountability Act. I don't think that's a bad thing since having a one-year timeline was a bit long. Having 60 days focuses the mind, both for the requester and for the departments.

Mr. Pierre Poilievre: What percentage of the new complaints would you attribute to that change, if you had to estimate?

Mr. Robert Marleau: If I had to estimate, I'd say 40% to 50%.

Mr. Pierre Poilievre: So there you have half of the new complaints coming from one agency that was newly added to the act, and the other, roughly, half attributable to the changes in the complaint period. In reality there is not a real increase in the number of complaints, according to the numbers you've shared with us today and in your report.

Mr. Robert Marleau: I can tell you that I had 1,560. I now have 2,350. To me the difference is real and concrete.

The Chair: Okay. This will be an important area for committee members to examine, I'm sure. We have to really understand whether there is a problem, and if there is a problem, how it is fixed. I'm pretty sure Mr. Marleau said a number of times at the press conference and so on that the increase in the number of complaints is not proportionate to the extension of the time. Really, the extension of the time issue is something I think we have to examine a little more fully, but I'm sure we'll get on to that.

Because I've just been taking people as they've arrived, I have Mr. Siksay followed by Madam Thi Lac, and any other member who has a pressing need to pop in before we move on to our last item.

Mr. Siksay, please.

Mr. Bill Siksay: Thank you, Chair.

Chair, before Mrs. Block or Mr. Poilievre fall over from patting themselves on the back so hard about this, I just want to point out that the Conservative Party made a very extensive platform commitment around freedom of information and access to information in 2006, and they've actually failed miserably to implement almost anything related to that campaign promise, including enacting former Commissioner Reid's recommendations in a draft bill that he put forward, which the current Information Commissioner has said a number of times is still very important to move forward. So I think the self-congratulation needs to be limited slightly—and I don't normally want to be that partisan in a meeting here.

Commissioner, one of the big issues around access to information is the requirement to keep appropriate records. There's been a very significant concern among folks who are interested in this that the government isn't doing that. I don't see it specifically in your recommendation. I think there's something in former Commissioner Reid's recommendations, but does that go far enough? Will former Commissioner Reid's recommendation address the problems around the requirement to keep records?

● (1700)

Mr. Robert Marleau: My recollection on the duty to keep records is that the position of the former commissioner is mine as well. It does not belong in this statute. It belongs, I think, in the National Archives of Canada Act.

The duty to keep records and the concept of access to those records are two principles. It should be the responsibility of the archivist to articulate what is necessary and should be kept for preservation over the long term and what should be kept in a temporary timeframe, so that the history of policy development is in a framework that the archives, at the end of the day, will require.

Now, on the duty to keep records, you will get into the definition of what a record is and whether it is a handwritten Post-it note. It gets complex from there onward.

My responsibility is to ensure access rights to those records that exist. Of course, I have to be an advocate for them to exist, but I believe it belongs in the National Archives of Canada Act.

Mr. Bill Siksay: Do you know if there have been any suggestions for changes specifically that would, in your opinion, improve the record keeping?

Mr. Robert Marleau: I remember reading the debate around the Federal Accountability Act. There was some debate around creating the responsibility of a duty to record, and the debate ranged from whether it should be a criminal offence, at one end of the scale, for deliberately not keeping a record that should be kept, to the usual administrative or disciplinary measures for non-performance.

Mr. Bill Siksay: I think I asked you this the other day. There are still government organizations that are not covered by our Access to Information Act, even with the changes that have been made since the Conservatives came to power. Is there anything in Mr. Reid's recommendations or your recommendations that would see all government agencies, for instance, and all government departments covered by the act?

Mr. Robert Marleau: I said in my testimony last week that our default position is to follow the dollar. If the taxpayer is paying for it, it should be accessible.

Mr. Bill Siksay: Is that covered in Mr. Reid's draft bill, to your recollection?

Mr. Robert Marleau: In part, but it in fact does not quite go as far as following the dollar.

Mr. Bill Siksay: How would you put "follow the dollar" in a piece of legislation or a legislative recommendation?

Mr. Robert Marleau: On the issue, for instance, of covering the Senate, the general administration of the Senate is paid for by the taxpayer and is not within the reach of the Access to Information Act right now. Certain grants made outright to organizations with contractual obligations to Her Majesty might be another area.

Following the dollar can take you quite far, but the principle that should apply is that if the taxpayers have paid for it, they should have access to it.

Mr. Bill Siksay: Thank you, Chair.

The Chair: Madame Thi Lac, *s'il vous plaît.*

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac: At our meeting last week, Commissioner, I asked you whether some of the repeated requests for information could be accounted for by the fact that passages in the documents people received had been blacked out. We're talking about multiple requests, but it may be the same requesters submitting repeated requests.

How many requests for the same information by the same requester could be described as follow-ups to the initial requests?

Mr. Robert Marleau: It is difficult for me to give you a figure, because I do not receive the complaints. I have no idea of what is happening in the system with respect to the situation you describe. I can see from the complaints that some requesters regularly ask for the same information. They are tracking a particular issue. The request is not always the same. Sometimes it covers a slightly different period than the one mentioned in the original request. When requesters receive certain information, it often leads them to request more. However, if they are not satisfied with the information, if it has been heavily redacted, they complain to us and we conduct an investigation.

● (1705)

Mrs. Ève-Mary Thaï Thi Lac: We hear that the number of requests is growing and that there are delays in responding, but the cause could be that the information provided is so watered down that the requesters often have to submit additional ATI requests, even though the initial request was clear. The problem was that they did not receive an adequate response.

Mr. Robert Marleau: The situation you describe does happen. However, it is not necessarily the rule. Since the amendments under the Federal Accountability Act, the head of the institution has a duty to assist. If the requester asks for information and the request is not clear enough, there is a duty to assist the requester in finding the document or clarifying the request so that information can be provided within the timelines set out in the act.

So the duty to assist has been added to the act. There is supposed to be a dialogue. Some requesters ask for all the emails between the Minister of the Environment and the deputy minister of the Environment with all their provincial colleagues between 2004 and 2007.

Is the requester looking for something specific? In some cases, if requesters are prepared to be a little more specific, they will get faster service. In other cases, it will take much longer, depending on the scope of the request.

Mrs. Ève-Mary Thaï Thi Lac: Last week I also asked some questions about the complaints you received—those that received priority and the others. I had some fun by pointing out that complaints from parliamentarians were only in the first category.

There is something I would like to know. What percentage of these complaints stems from the fact that there was no follow-up or that inadequate information was provided in response to the initial request?

Mr. Robert Marleau: It is difficult to give you an exact figure. We have categories of requests, those that received a partial or complete refusal, and those regarding administrative matters. There's about the same number of each type. However, there are slightly more administrative complaints—52% or 53%—and 46% or 47% for refusals. The complaints about refusals we receive make up about 50% of the cases.

Mrs. Ève-Mary Thaï Thi Lac: You say you want legislative reform. We agree with you, and think this is absolutely necessary.

When you talk about legislative reform, should there not be some provision that would require departments to be more transparent? Is this not part of the solution?

Mr. Robert Marleau: My colleague will add something on this.

Ms. Suzanne Legault: I just wanted to mention that when we did the report cards, one of the commitments made by the office was that in reviewing complaints, we would evaluate to what extent the disclosure was complete, accurate and based on the act.

That is something we are not doing at this time, and that we have said we would do in future. Even though we have some complaints that are settled, and are therefore valid, in the case of refusals to disclose, we do not have adequate information in our files at the moment to determine whether the departments, the institutions, applied the exemptions properly and whether they disclosed the maximum amount of information. That is something that must be done.

[*English*]

The Chair: Mr. Wrzesnewskyj, please.

Mr. Borys Wrzesnewskyj: Thank you.

Mr. Marleau, could you give us a definition of cabinet confidences?

Mr. Robert Marleau: Essentially they're in section 69 of the act.

● (1710)

Mr. Borys Wrzesnewskyj: In particular, what types of cabinet confidences would be outside the ability for people to access through an ATIP process?

Mr. Robert Marleau: For instance, memoranda to cabinet, which are essentially the mechanism by which cabinet is seized of a new proposal coming from a department. Some of the discussion paper is in and around, but we've had a debate over the years about what working papers, discussion papers, are. The records of their deliberations, deliberations of ministers, as such, are excluded—those kinds of documents. Also communications between ministers about cabinet matters.

Mr. Borys Wrzesnewskyj: So there's some clarity, but there's flexibility as well.

What about timelines? What types of cabinet confidences—and at which point in time—would it then be in the public's interest to make available? Is there any reference to that?

Mr. Robert Marleau: If you make it a discretionary exemption, as we're proposing, then it would be cabinet's call. It would be the Clerk of the Privy Council's call. Right now the clerk doesn't have a choice in his advice to the Prime Minister. He simply has to say, "These are excluded; they fall within the exclusion." But if it's discretionary, the pressure is on to look at the request, look at the consequences, at what the injury might be, what the timeline might be.

Mr. Borys Wrzesnewskyj: So we can currently end up in this ludicrous situation, for instance, where a year ago I made an ATIP request to Heritage on discussions about funding to various multicultural groups, and either 46 or 47 out of 49 pages came back blank because of cabinet confidences. It was even more ludicrous, because I was requesting information not from the time when the Conservatives were in government, but when the Liberals were in government. In fact, the ministers of that time were more than happy to publicly talk about these various requests and the moneys involved, but we couldn't get the documents because the Conservatives were actually blocking them due to cabinet confidence, referring to a period of time when the Liberal government was in power.

Isn't it high time that even when it comes to cabinet confidences, we tighten up this discretionary ability of the Privy Council, ministers, and the PMO to blank out page after page of requests? Don't you agree it's time that we put clear limits on what cabinet confidences are, what's allowed, and the timelines for the sake of transparency in government?

Mr. Robert Marleau: The current legislation has a 20-year timeline before any release. Clearly we're recommending that be revised.

The legislation proposed under the Open Government Act reduces it to 15 years. Many jurisdictions have it at five years. If it's a discretionary exemption, it's cabinet's call that maybe it would be in the public interest to release something before those timelines are reached.

Right now I can't criticize the clerk for saying this is excluded, because it is under the law. He doesn't even have the choice of recommending it be disclosed; it says "excluded".

Mr. Borys Wrzesnewskyj: So we need added clarity and exactness in rules.

Mr. Robert Marleau: That's right.

Mr. Borys Wrzesnewskyj: There was an expansion to include crown corporations, and it has caused some bureaucratic difficulties. What about arm's length non-profits formed by the government like airports, for example? The Greater Toronto Airport Authority has no shareholders to hold them to account. They are at arm's length from the government and there is no access to internal information, yet taxpayers would be on the hook for billions upon billions of dollars if things went wrong.

Do you have any recommendations when it comes to those types of structures the government has put in place through legislation?

Mr. Robert Marleau: Some of it is accessible indirectly through transport issues—airports, air traffic control issues, and those kinds of things. Even though they are not directly funded by government, the regulatory role of government comes into play.

As I said earlier, follow the dollar. The taxpayers are paying for it, so they have the right to ask the question and get an answer, whether it's about the Wheat Board or other boards that have been brought into the scope of the act. I think to follow the dollar is your best course.

● (1715)

The Chair: We have had an interesting discussion and it's going to carry on.

Mr. Marleau, you said at the last hearing that if the act was not amended—and I don't want to put words in your mouth—it would not be able to achieve its objectives, as it currently exists. That was a pretty serious position to take—that the act is not working and therefore Canadians are not being served.

Despite everybody's attempt to fix it in other ways, it appears that the only effective way to deal with this, if there are going to be changes to the act, is through a bill presented by the government to Parliament. Is that your view?

Mr. Robert Marleau: Yes, and I think I said at the last meeting, and I certainly said it at my press conference, that the kind of change that is required here will require a considerable investment in resources—and steering, of course—that will require a ministerial initiative with a royal recommendation attached to any such bill. I don't think we can fix it just by defining new processes administratively within the statute without considerable investment.

The Chair: I have all kinds of questions, but I'm going to save them for our witnesses. We hope to have the minister come before us after the break week, either on that Monday or Wednesday. We certainly would like to get their feeling as to where we might go. I don't want to speculate on how that might go, but I want to reassure you that the committee is looking forward to taking the time to consider all of the inputs that we received from you and from witnesses and from the minister, and from our own discussion, to make a report to Parliament that we feel is appropriate at this time.

So we thank you at this time for giving us all of your time and raising these issues. You may want to think about one issue that really causes me some interest, and it's the issue of who's going to decide whether the public interest outweighs the importance of secrecy. Every jurisdiction that has to report on it could really bog the system down. Maybe your job will double overnight if that happens. We'll find out from the witnesses.

So thank you very kindly.

I'm going to suspend until we can resume with the last item I'd like to raise with the committee.

● _____ (Pause) _____

●

● (1720)

The Chair: We'll resume our meeting.

Colleagues, on Friday Mr. Walsh, who is with us right now, the law clerk of the House—and he's joined by Mr. Greg Tardi, who's senior parliamentary counsel for the House as well—received a letter from the Oliphant commission, counsel to counsel, as it were, or lawyer to lawyer. He raised it with me on Friday; he sent me a copy of it to look at and asked for my input.

I shouldn't talk to this yet, because there is a procedural matter we have to deal with, but I thought it was important to bring it to the committee. I asked Mr. Walsh to write up some matters, and I personally only considered the very last item, which is the motion itself, to be relevant here. I was concerned that the commission is going to proceed with its work unless we respond. I'm sure Mr. Walsh is going to respond, and I think he's basically asking whether or not this committee should reaffirm the undertaking it made to our witnesses with regard to parliamentary privilege.

So I'm asking to bring it to the committee for consideration. My concern is simply with regard to times, since those hearings are going to start. If we don't respond to them, they're going to go and try what they can, but I do understand efforts will be made to use the testimony before the public inquiry, as a consequence. I think it's important that we decide whether or not we want to reaffirm our view and get that communicated to the commission as early as possible so there's no misunderstanding as to the rules of Parliament.

First of all, I have to ask whether or not the committee will waive the 48-hour notice required to bring an item before the committee.

An hon. member: Agreed.

Mr. Pierre Poilievre: We on this side do not agree to that.

The Chair: There's no agreement.

Thank you.

The meeting is adjourned.

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