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Wednesday, April 1, 2009

Chair

Mr. Paul Szabo

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● (1540)

[*English*]

The Chair (Mr. Paul Szabo (Mississauga South, Lib.)): Order.

This is the thirteenth meeting of the Standing Committee on Access to Information, Privacy, and Ethics. Pursuant to Standing Order 108(2), we are studying Access to Information Act reform.

Today we have two witnesses before us. Mr. Ken Rubin is well known for his work on access to information advocacy and as a frequent requester, so he has some experience that he may be able to share with us. As well, he's the author of many articles that you may have seen, some of which have been in *The Hill Times*. We also have with us, from the B.C. Freedom of Information and Privacy Association, Mr. Vincent Gogolek, who's the director of policy and privacy.

Both witnesses have brief opening statements for us. Let's have those now, and then we'll proceed to questions from the members.

Welcome, gentlemen. Who would like to proceed?

Mr. Vincent Gogolek (Director, Policy and Privacy, B.C. Freedom of Information and Privacy Association): Mr. Rubin prefers that I kick it off.

The Chair: Absolutely. Please proceed.

Mr. Vincent Gogolek: It's a pleasure.

[*Translation*]

Thank you, Mr. Chair.

Honourable members, I would like to start by apologizing for making my presentation in English. However, I will be happy to answer your questions in French.

[*English*]

The B.C. Freedom of Information and Privacy Association is a non-profit society that was established in 1991 for the purpose of advancing freedom of information, open and accountable government, and privacy rights in Canada. We serve a wide variety of individuals and organizations through programs of public education, legal aid, research, public interest advocacy, and law reform

Although we are based in British Columbia, FIPA has maintained an active role on the federal scene as well. We have joined the increasingly urgent calls for reform of this now outdated law. Earlier this year, in association with the Canadian Newspaper Association and the Canadian Taxpayers Federation, we wrote to the Prime Minister, asking him to follow the lead of President Obama and include ATI reform in the Speech from the Throne. He didn't. The same three groups also wrote to the Prime Minister during the last election campaign, asking him to bring in the reforms to ATI that he campaigned on in 2006. Of course, we are still waiting.

There is no doubt about the need for ATI reform. When the Access to Information Act came into force, in 1983, the world was very different from what it is today. The Chrysler Corporation was in financial difficulty, and the first minivan was introduced. The Berlin Wall was still up. Home computer enthusiasts could play Pac-Man on their Commodore 64s. In government offices, Wang word processors the size of Wurlitzer jukeboxes were just becoming available to process information.

Information and how it is handled has changed completely since then, but the law governing how Canadians get access to that information has remained fundamentally unchanged. Since that time we've been governed by seven Parliaments, with Liberal and Conservative majorities, as well as Liberal and Conservative minorities. Different parties have held the balance of power in these minority governments, yet reform is yet to come.

There have been serious detailed studies of the ATI Act, and many recommendations for reform. One of the earliest studies was conducted by the justice committee of this House. Their report was entitled *Open and Shut*, and it came out in 1987. The vice-chair was a young MP by the name of Rob Nicholson. I commend it to you, for the 1980's picture of the Minister of Justice—at least for that, although it does have some very worthwhile recommendations.

In November 2001, the committee on access to information issued a report called *A Call for Openness*. Again, nothing happened. This report was followed, in June 2002, by *Access to Information: Making it Work for Canadians.* This report was the result of two years' work, which included foreign travel and cross-Canada consultations, by a 14-member task force of senior specialists in the federal bureaucracy. The government released the report, but it never officially commented on it.

In 2005, then Information Commissioner Reid tabled a draft bill before this committee entitled the open government act. This proposed legislation would have made substantial changes to the ATI Act. FIPA supported this proposal, although we were disappointed with the commissioner's failure to seek order-making power.

In 2006 the Conservative Party platform contained extensive proposals for reform of the ATI Act, which FIPA supported. One of the proposals stated specifically that a future Conservative government would implement the Information Commissioner's recommendations for reform to the Access to Information Act.

In our 2006 submission on the Federal Accountability Act, which you have before you, FIPA expressed our disappointment that the government chose to defer most of these reforms and have them dealt with by this committee. We're concerned that reference to the standing committee could once again prove to be a graveyard for positive action.

Justice Canada also supported the Reid proposal, and the current commissioner, in his presentation to this committee, said he generally supports Mr. Reid's draft bill. In sum, this bill has been expressly supported by the last two information commissioners, Justice Canada, and last, but certainly not least, the current Prime Minister and his party.

It should also be noted that one of the eight commitments related to access to information legislation in the 2006 Conservative platform was the pledge to give the Information Commissioner the power to order the release of information. FIPA is of the view that a consensus was formed over the last four years that Commissioner Reid's draft bill with the addition of full order-making power for the Information Commissioner is the way forward.

● (1545)

I would now like to provide a brief response to the 12-step program the current commissioner has proposed. I will be pleased to elaborate on any or all of these points in response to your questions.

The first two recommendations are that there be a five-year parliamentary review, and that all persons have a right to request access to records under the act. FIPA agrees with both of these proposals.

Proposal three is that the Access to Information Act provide the Information Commissioner with order-making power for administrative matters. FIPA believes it is essential that the commissioner have full order-making power, not just the power to make orders regarding administrative matters. Order-making power is essential to ensure the proper functioning of the ATI Act. The information commissioners in four provinces have this power, and those systems work far better than the current federal regime.

Commissioner Reid expressed the view that order-making power would change the nature of his office. He was right, and FIPA believes this would be a positive change. By seeking the power to make orders on administrative matters, Commissioner Marleau has apparently accepted this change in the nature of his office. FIPA recommends against taking a half measure when full order-making power is clearly what's needed.

Recommendation four is that the Access to Information Act provide the Information Commissioner with discretion on whether to investigate complaints. FIPA is of the view that such a power would only be acceptable in situations equivalent to dismissal of a frivolous and vexatious lawsuit, and similar criteria should be used in these very rare circumstances.

Recommendation five is on the public education research mandate. Recommendation six is on the advisory mandate. Recommendation seven is that the application of the act be extended to cover the administrative records of Parliament and the courts. FIPA agrees with all three of these recommendations.

Recommendation eight is that the Access to Information Act apply to cabinet confidences. In most Canadian provinces cabinet documents are not excluded from review by the commissioner. This recognizes the fact that a cabinet confidence's exception, like all exceptions from disclosure, can be misapplied or abused. FIPA strongly recommends that cabinet records be made an exception to disclosure, subject to review by the commissioner.

Recommendation nine is that the Access to Information Act require the approval of the Information Commissioner for all extensions beyond 60 days. FIPA is concerned that while this proposal may reduce government's ability to take extremely long periods to reply to a request, it will have the unintended consequence of instituting an automatic 60-day delay for all requests.

This has been our experience in British Columbia, where the Campbell government has lengthened the response times from 30 calendar days to 30 business days, plus 30 more working days if the ministry felt that to respond faster would unduly interfere with the orderly operation of the department. In practice, although there is an appeal to the commissioner, no one does this because there is no way the commissioner's office could issue an order before the 30-day extension expired.

Recommendation 10 is that the Access to Information Act specify timeframes for completing administrative investigations. FIPA agrees and suggests a 90-day period, as set out in subsection 56.6 of the B.C. Freedom of Information and Protection of Privacy Act. We believe this 90-day period is supported by Commissioner Marleau.

Recommendation 11 is that the Access to Information Act allow requesters the option of direct recourse to the Federal Court for access refusals. FIPA is of the view that the Access to Information Act should provide requesters with an easy-to-understand, informal way of getting government information. This would include the procedures for resolving disputes over the release of documents.

The commissioner has provided this recommendation as an option, and FIPA considers this a prerequisite to supporting this idea. Sophisticated or well-heeled requesters may want to push things along more quickly and may be willing and able to pay for it, but the average requester, the average Canadian, should be able to get an informal administrative remedy and get their documents.

● (1550)

The person who is not familiar with the system and does not have money for a lawyer specializing in administrative law will need to have this informal process available. With full order-making power, the commissioner would be able to make an order for release of documents without requiring an individual to fight in court to exercise their right to information.

Recommendation 12 is that the Access to Information Act allow time extensions for multiple and simultaneous requests from a single requester. This recommendation would have to be subject to review and order by the commissioner, not the fiat of a government body.

In conclusion, I would like to repeat FIPA's view that we now have in this country a consensus that Commissioner Reid's draft bill, with the addition of full order-making power for the Information Commissioner, is the way to proceed, and time is of the essence.

Honourable members, you have the opportunity to make a real difference by bringing forward this proposal, which has widespread support. Many of Commissioner Marleau's proposals are useful, maybe even valuable. But FIPA does not believe it is necessary to settle for half measures. The small steps may be needed, but the big step is no less necessary. If you don't take the big step, Canada will be left further and further behind.

Thank you. I look forward to your questions.

The Chair: Thank you, Mr. Gogolek.

Mr. Rubin, please.

Mr. Ken Rubin (As an Individual): Thank you, Mr. Chair.

As you said, I'm a long-time advocate for the public's right to know and an experienced access user. I'm also not bilingual.

I am thankful for this opportunity to contribute to the access committee's continued attempt to get more than a largely dysfunctional Access to Information Act.

This committee, back in the fall of 2006, was at the point of agreeing to send forward one modest reform legislative package, namely, the former Information Commissioner Reid's 2005 open government bill. That was an alternative then, but nevertheless a full bill, not a half measure.

But times change. Instead, piecemeal amendments to the access act were made in view of the Accountability Act in 2006. Unfortunately, while coverage was extended to more crown corporations, foundations, and parliamentary officers, it came at a price. The amendments brought with them broad exemptions and exclusions.

What Canadians are faced with now is even more of a right to secrecy, delay, and obstruction act. Leadership direction and vision to change this state of affairs is needed. Canada sits internationally at the bottom of the heap when it comes to the public's information rights. The short laundry list of possible amendments to the current Information Commissioner model does not provide that vision. His suggestions would have the effect of bureaucratizing further the existing dysfunctional access act and lessening the limited information rights the public would be accorded under the access act. I urge the committee not to adopt such a limited, shortsighted, and counterproductive administrative and punitive mix as Commissioner Marleau brought forward.

I come here, however, to respond positively to the House access committee's broader request for legislative bill options, with the vision to change the secrecy practices and bureaucratic mindset so prevalent in Ottawa. My proposed bill, which was circulated, entitled the Public Right to Know Act—and it would be good if the committee could table it in some form—is truly a second-generation freedom of information model act. It stands squarely for fuller transparency. It is a statutory effort to follow both the dollar trail and the safety, environmental, and consumer document trail, something the current act really falls down on. It seeks a way out of the current access to information crisis that is mostly about stalling release and issuing denials. It seeks to address for better information in growing economic and safety uncertainties, in these times.

The bill may be far from perfect in its drafting and was done on my own time, as a public service, but I'm reminded of how such access pioneers as MPs Barry Mather and Ged Baldwin must have felt as they developed model bills. They, too, sought a way out of the growing secrecy classifications being applied to government information and wanted a means to combat increasing public alienation and to restore trust in government.

Let me briefly explain the bill's twelve main features, many of which are found in progressive freedom of information acts around the world.

First, it would make information rights a constitutional right and not just a statutory obligation. Explicitly, then, the bill makes clear that the freedom of expression section found in Canada's Charter of Rights and Freedoms includes seeking, retrieving, and imparting information and opinion in any kind or any form. This is not a hard change to make, but a very, very significant one.

Second—and you have heard from other witnesses—there is a major change in the purpose clause of the bill, as it focuses exclusively on maximizing disclosure, and the previous Access to Information Act's emphasis on secrecy goals is dropped. It calls for universal disclosure codes in both the public and private sectors, so that public moneys and health, safety, environment, and consumer matters can be regularly and instantaneously traced and made available on the Internet. What is then created is a legal, mandatory obligation for widespread proactive disclosure, something the current act lacks. Proactive disclosure will not then be the last resort. It will no longer be limited to a few administrative selective records, like some senior official's travel costs that are belatedly posted on government websites with insufficient information.

● (1555)

Third, the bill enables much broader private as well as public sector coverage. How else, these days, can you monitor public spending and safety issues? It is especially meant to cover private agencies receiving federal benefits where many of those organizations now carry out public functions. No public moneys would go to those without proactive disclosure service. No corporate third parties would have special veto powers to object to disclosures. The Prime Minister and ministers would be included, as well as Parliament.

Fourth, the bill enables a legal duty to document decisions and key actions in detail. That duty includes an organization keeping up-to-date records readily retrievable, or otherwise facing penalties for non-compliance.

Fifth, the bill calls for quicker access at low cost. Twenty days, not thirty days, should be the norm. And much tighter consultation and time-extension rules are incorporated, with enforceable powers in place to get prompt service.

Sixth, fewer and narrower restrictions to disclosure are put forward for private personal information, national security, trade secrets, unannounced monetary tax or share decisions, criminal law investigations, and certain cabinet records. Gone are many sweeping special-interest secrecy claims like policy advice, or claims that only some general administrative records can be made public.

Narrowing the application of exempt areas also means greatly reducing the time periods for protection and applying significant injury tests. For instance, pre-decision or cabinet records, which in my bill are no longer called confidences, would be available within three years. But cabinet could release records earlier. Where the records are a factual analysis or the data involve safety, health, environment, and consumer or civil liberties issues or where there is no significant injury from their release, cabinet records would be releasable.

Most Treasury Board submissions and cabinet agenda items would be automatically discloseable and would no longer be hidden for up to 20 years.

One other example is that exact public employee salaries, bonuses, and benefits would no longer be exempted as protected personal information.

I would caution the committee not to fall into the trap of letting exemptions be class exemptions or be broadly defined or without injury tests or have short-term time restrictions. Further, the way the public interest override provisions are written in Canadian legislation is not all that useful. It is much better to have a proactive disclosure system than to greatly reduce the number of existing exemptions.

As well, no other acts of Parliament should supersede the Public Right to Know Act. All acts currently with blanket confidentiality clauses would be reviewed.

Seventh, a new administration whose main goal is facilitating proactive disclosure practices is legally necessary. This means replacing Treasury Board and the access officialdom with a new arm's-length public access authority whose prime goal is to release information, not to tangle it up and deny records.

Eighth, a tougher Information Commissioner with full binding order powers and broader functions backed up by enforceable penalties is proposed.

Ninth, the bill broadens transparency by providing for open meeting requirements for federal boards and commissions.

Currently, some organizations have provisions for holding general annual public meetings—in the case of the National Capital Commission, for public attendance at board meetings—but the real business is behind closed doors and there is no provision for appealing the necessity of in camera meetings.

Tenth, the bill provides that there be a permanent parliamentary oversight to advance disclosure practices.

Eleventh, the bill also provides for a public and court review program for those members of the public with fewer resources who need to have the means and support to challenge secrecy practices. Court injunctions could be sought as part of those challenges.

● (1600)

Finally, an arm's-length international centre for freedom of information excellence is proposed so that once again Canada can assist and make a contribution to global transparency as well as to developing intergovernmental pro-disclosure agreements.

I've doggedly persisted in getting data under the existing access regime. I've taken secrecy claims to the courts and been widely consulted on access matters, so I can see, 25 years later, that Canada's access legislation is in need of a major overhaul and not simply slight adjustments.

To name a few, I have had problems in getting or been denied food, drug, and air safety materials; environmental materials on toxic sites, climate change and tar sands; and data on the sponsorship program and on other government programs of questionable spending.

So I sought legislative solutions for everybody to be able to quickly and easily have this data. Hence my development of a public right to know act for Parliament and public use and debate.

I would ask that the committee carefully examine and make use of my alternative progressive access bill. It differs from the Reid bill in some respects. This is my contribution to the next stage of Canada's transparency journal, and certainly I'll be open to questions on things like what a proactive disclosure code is, why you need to trace safety and the dollar issues, what's wrong with the public interest safety override, what's wrong with just administrative records going out, timing solutions, what's paralyzing the access system now, what's the order power, and so on and so forth.

I thank you.

● (1605)

The Chair: Thank you to both of you gentlemen. I'm sure you've inspired some interest among all honourable members to get into it, so let's move right to the questions.

I'm going to start with Madam Simson, please.

Mrs. Michelle Simson (Scarborough Southwest, Lib.): Thank you, Mr. Chair.

Thank you, Mr. Gogolek and Mr. Rubin, for taking the time to appear before this committee. It's been an interesting exercise for me, because I've been hearing rather conflicting testimony with respect to witnesses who bring some level of expertise to the subject.

Specifically, with respect to the order-making power, I understand that in B.C. and four other provinces the commissioner has order-making power. I'd be interested in both of you answering this question. We did hear testimony from one witness, a dissenting voice, who said that granting order power to the commissioner may very well place in jeopardy his function as an officer of Parliament.

Do you agree with that statement, and if so, why? If not, in terms of the order-making power, do you believe that there should be monetary penalties, severe monetary penalties, attached to that power?

Mr. Ken Rubin: I think the time has long since come for full order-making power, and one way you have full order-making power is you have to complement that with enforceable penalties. To make an order enforceable, that's what you need.

One of the problems is that people have said this is a quasi-judicial body and it's going to get formal and so on. I think there's a bit of a misunderstanding, as a frequent user also of provincial legislation, of the order-making powers and their offices, because they do mediation, they do public education. They do a variety of other functions. And there are some people in the office who are assigned to be, say, Ontario adjudicators, and they do that kind of thing and issue orders on behalf of the commission, or in Quebec or B.C. So let's not, first of all, find it one or the other.

One of the other problems is that if you're going to go beyond, as I'm suggesting, into the private sector—federal benefits go to companies, or safety issues are now with certain airlines—and you have to get these records, then an ombudsman model doesn't work. It's more just strictly towards the government, whereas you need an officer who can deal with a public-private mix.

In my case, I suggest three commissioners with those powers. I think you also need a commissioner with a clearer mandate, more grounds to appeal, more grounds of what his functions are. And even if it amounts to having joint SWAT teams, I see the Privacy Commissioner and the Auditor General teamed up, and so should the Information Commissioner on things like sponsorship scandals. So should the environment commissioner with the Information Commissioner on things like environmental assessments and so on. They have complementary roles.

● (1610)

The Chair: Did you have a response to that question, Mr. Gogolek?

Mr. Vincent Gogolek: Regarding the first part of your question, that it would put in jeopardy the ombudsman function, that has not been our experience in B.C. The commissioner has a multi-faceted role, proactively advising the government about things they are doing that might cause problems for information or privacy, and he has been able to carry out all those functions perfectly well.

In respect of penalties in B.C., the penalties are not monetary, but the orders of the commissioner are enforceable as orders of the Supreme Court. Failure to obey a court order can result in contempt proceedings.

Mrs. Michelle Simson: Mr. Rubin, I'm interested in whether you think the 2006 Federal Accountability Act exacerbated or was the start of positive change with respect to what we've had described as a culture of secrecy and non-transparency. You referred to this as maybe not being a catalyst of change, and I'm interested in your opinion.

Mr. Ken Rubin: It is definitely true that the Federal Accountability Act did two positive things. First, it recognized that the act is very limited, so it extended it to some more agencies. Second, it put in a little stronger clause—I don't want to go much further—on the duty to assist requesters. It fell down, though, by making special deals with some of the crown corporations—Export Development Corporation, Atomic Energy, and so on—so that they got even better secrecy deals, better exemptions, better exclusions than the rest, and this has had a trickle-down effect. I often use the act, and I don't get many records from those agencies. I get blank pages. So you have to question the wisdom. If you're going to do it, make it a level playing field.

By the way, I'm not singling out the current government—the discussions were under way with the mandarins before this government came in.

Mrs. Michelle Simson: Mr. Gogolek, I'm interested in what your perception is, quickly.

Mr. Vincent Gogolek: You want the positives?

Mrs. Michelle Simson: I'm asking about the overall effect of the 2006 Federal Accountability Act.

Mr. Vincent Gogolek: If it was actually enacted as promised, it would be a very big benefit.

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

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac (Saint-Hyacinthe—Bagot, BQ): Good day. Thank you for coming here to share with us your recommendations and views on the proposed changes to the Access to Information Act.

I will start with a question for Mr. Gogolek.

In your third recommendation, you emphasize the importance of providing order-making power for administrative matters and of giving the information commissioner much broader powers, as is the case in several Canadian provinces.

Can you explain to me the impact of providing order-making power for administrative matters?

Mr. Vincent Gogolek: With respect to the commissioner's power to make orders, in British Columbia, the commissioner can assign to his assistants responsibility for setting timeframes related to other administrative aspects of the legislation. That way, it is possible to try and resolve matters before they are brought to the commissioner's attention for review. The fact that an order equivalent to one made by the provincial superior court can be made puts a certain amount of pressure on public servants, the government or government entities. This is added incentive for them to comply with the legislation.

● (1615)

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

We have received your recommendations, Mr. Rubin. They go much further than those of Mr. Reid and Mr. Marleau. Of all of your recommendations, which ones do you consider to be essential, even though they may have been passed over by Mr. Reid and Mr. Marleau?

[*English*]

Mr. Ken Rubin: Which ones? I'm merely going further, based on my international experience. Certainly I have found, out of appearing in front of court and without a constitutional right, that gives you a lot more leverage. If it's a mere statute, you have a lot more leverage. That's a difference.

Mandatory disclosure codes are absolutely essential, because it turns the whole access around, instead of, like in the Reid bill, under policy advice, putting a list of exceptions as to who can get polls or statistics or whatever. I say no, put that right up at the front as the code.

In terms of open meeting requirements, sunshine act, we need that. Certainly at the National Energy Board, there's an office in NRCan that's dealing with the Mackenzie Valley pipeline and nuclear safety issues. Those things have to be brought out in open meeting arrangements, and we have the right to appeal. You don't wait 20 or 30 days for your access request; you appeal right to the commissioner and say you can't get into that meeting right away. That's called transparency in a good sense.

The right to sue I think is not in any bill because citizens are frustrated by commissioners. They need to have the means to go straight to the courts by dealing with a different twist.

ATI users.... There's a discrepancy between corporate users and the average citizen, and those people really do need help. Why do we have such a low usage? Part of the reason is it's complicated and a lot of citizens are alienated from the system.

There's no international system. Give order powers, is what I'm suggesting, and let me just tie in there. If you limit it to administrative order powers, you're making the attention in investigations to secrecy, which is the main problem right now, second-class complaints and appeals. And I found that very wrong.

The last thing I will say, which may be obvious, is that I have greatly reduced the number of exemptions and narrowed them quite considerably. That, I think, is absolutely essential, because the secrecy is the main problem right now. And if we don't deal with it, 25 years from now we'll have the very same act.

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac: I see.

[*English*]

Mr. Ken Rubin: Even if it's the Reid bill.

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac: You talked about an arm's length administration and noted that there would be a considerable advantage to having this kind of authority in place. You concluded your response to my colleague's question by stating that requesters will clearly benefit from standardized public disclosure practices.

Do you feel that if an arm's length public access authority were created, it would be easier to bring in standardized public disclosure practices?

[*English*]

Mr. Ken Rubin: I would hope so. If it had a clear mandate for proactive disclosure practices, it could deal through a pool of talent and avoid all this extra time consultations with the Department of Foreign Affairs, the Privy Council Office, and the Department of National Defence, because those guys would all be in there together, even if they're delegated to departments.

They would also have the right to appeal to the Information Commissioner if they're not allowed to do their job. Part of the problem right now is they're stifled. They're in confined departments. They're issued a set of guidelines from an agency that doesn't show leadership, and that itself is very secretive. I'm trying to look for ways in which the mindset that their first job is gatekeepers applying complicated procedures, fees, and exemptions is no longer their main mandate. And I've thought time and time again that there are good people in the system, but they need much more of a framework and a body so they can do their jobs properly.

[*Translation*]

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

● (1620)

[*English*]

The Chair: Mr. Siksay, please.

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

Thank you to both of you for your testimony today.

Mr. Gogolek, I was interested in your comments on recommendation 11. That's the one about having direct access to the Federal Court around access refusals. You're concerned that there might be a better way of doing this, some administrative way or some more informal way, especially given the changes in the technological environment.

I wonder if you could say a bit more about that, about how not everybody has access to a lawyer—and nor should they in terms of appealing these access decisions?

Mr. Vincent Gogolek: I'm not saying that they shouldn't have access to a lawyer, but lawyers cost money.

Mr. Bill Siksay: Right.

Mr. Vincent Gogolek: If an individual is trying to get access to records, they may not be sophisticated...or it may be their first time with the system. The system should not be so complicated that the average person is not able to get records. They should not have to go to Federal Court.

It may be a useful thing to have a direct march so that somebody who wants to go directly to Federal Court can. For us, though, it would have to be an option. And if this is going to be in there as an option, the basic default position should be that the commissioner makes an order.

The way that Mr. Marleau's 12 steps are written, by not taking full order-making powers he's forced to have this workaround of, "Well, okay, if you don't get to me, you can always go directly to Federal Court." But you shouldn't have to. You should be able to go to the commissioner with the failure to disclose and say, "Commissioner, I don't think this is right." The commissioner gets to look at it and decide. You get your remedy.

That would reduce the workload on the Federal Court rather than having people trooping off or else just giving up, which is something that Mr. Rubin identified—people giving up on the system.

Mr. Bill Siksay: Can I ask you another question? In a conversation we had earlier, you mentioned the use of crown copyright as a way to do end runs around access to information. Could you say a little bit about that for the committee?

Mr. Vincent Gogolek: I can't say too much, because we're actually involved in a case before the B.C. commissioner. However, there's a very good article in *The Tyee*, one of the new media based in British Columbia. They did a very extensive review of that case, and I recommend it to you.

As far as we know, only the Government of British Columbia has done this so far. Essentially they chose certain selected requesters who went through the system and finally got their documents beaten out of the government. The government sent with those documents what they called a "helpful" letter, saying this to the requesters: The documents being released to you through the Freedom of Information and Protection of Privacy Act are subject to crown copyright, and therefore you can look at them yourself in the privacy of your own home, but if you want to put them up on the Internet, then you have to get permission from the intellectual property branch of the Government of British Columbia.

We have a bit of a problem with that. Michael Geist has also written about this in his blog. Essentially, there are single-digit applications of this act in terms of defending crown copyright. If you are looking for economies to make, maybe that's the place to be looking.

Mr. Bill Siksay: Mr. Rubin, I wonder if you could say a bit more about the exemptions, and about how you think the exemptions should be narrowed and reduced. In your proposal, you've done that. I wonder if you could talk about some of the other ones. You mentioned in particular the public safety override. Could you talk a bit more about what you see would be more appropriate in those areas?

● (1625)

Mr. Ken Rubin: First of all, the way I've put it in my bill is to call them restrictions or "secondary". They shouldn't be, as they are right in the preamble, as they now are in the access act.... It's not a principle. If you make it a principle, then you have a dual road, and guess which road wins? Secrecy wins, and that's what's happening.

I start from proactive disclosure, and therefore I don't think the public interest override in itself does much. I have tested that, not only federally under the commercial information clause, which has an override clause for health and safety issues.... I ended up in the Court of Appeal having to pay Health Canada and the Government of Canada $1,500 for that test case. That's what they think of it.

Provincially, where you have to prove compelling, overwhelming, legal public need, it's impossible. It's very nice for the Reid bill and others to put it in, but it doesn't work as a solution. Yes, there may be significant injury tests, and time restrictions, if a document has to be exempt for a year or two or three, depending on its sensitivity. Remember what Commissioner Grace and Commissioner Reid said: they haven't seen any documents that are really sensitive or that secret. I can say the same thing. I've seen cabinet records from 20 years, or even sooner. There's nothing sensitive about them.

So time restriction, injury-based, and so on.... I could elaborate more on cabinet records, but I don't know whether the chair wants me to add more.

The Chair: We have one minute left. Carry on.

We'll have one last question here.

Mr. Bill Siksay: Maybe you could say more about the need for national security and trade secrets kinds of restrictions, as two of the areas that often come up.

Mr. Ken Rubin: Former Commissioner Reid's bill started on the subject of trade secrets by saying, take out this consistent "confidential". It's just a ploy by the corporations to.... And I would go further. I would say, take out the third-party notifications of corporations, special privileges originally put in by the business lobby in the access act; they delay records to no end.

Commercial information is one of the most cited exemptions. If it were really crunched down and narrowed to "significant injury" to trade secrets, if they weren't environmental health safety matters, there would be some legitimacy. But you can't keep those secret forever. Part of the problem is that there has been jurisprudence built up around commercial confidentiality, which is tried by the lawyers from the corporations, who have many more resources. They've tried to confine it, but it's such a broad overwhelming thing that I've tried to restrict it even further.

National security is a difficult one. Again, I think you have to try to limit it. I would say to use a time restriction up to five years, but only for highly sensitive military defence data or data concerning verifiably hostile organized crime or terrorist activities. The problem is that it's so broad that you can't even find out, for instance, about the outsourcing of security contracts. In the United States, well over 50% or even more of the current security intelligence budget is consumed by groups that are unaccountable. We have to find out these things.

The Chair: Thank you.

Madam Block, please.

Mrs. Kelly Block (Saskatoon—Rosetown—Biggar, CPC): Thank you very much, Mr. Chair. Thank you as well to the witnesses for their testimony.

In his testimony before this committee on March 9, the Information Commissioner told us that the Conservatives' Federal Accountability Act was the most significant reform to the Access to Information Act since its inception in 1983. David Loukidelis, the Information and Privacy Commissioner for British Columbia, Stanley Tromp, the author of *Fallen Behind: Canada's Access to Information Act in the World Context*, and Murray Rankin, a lawyer specializing in information law and author of the preface to *Fallen Behind*, all agreed that the Federal Accountability Act was the most significant reform to the Access to Information Act since its inception. The same was true of Michel Drapeau and Marc-Aurèle Racicot, as well as Duff Conacher, when they appeared before the committee on Monday.

Would either of you disagree with this assessment?

● (1630)

Mr. Ken Rubin: Yes, I would. I think they're being far too polite to you.

I don't think, when you make special deals with crown corporations so that you can't—as my experience is—get anything out of them.... There's another clause in the Accountability Act that gives the definition of administrative records. It's been transposed into being like atomic energy control: you can't get a lot of stuff on nuclear safety, just on administrative records.

Mrs. Kelly Block: So you are disagreeing with that assumption?

Mr. Ken Rubin: Yes, I am, but let me just—

Mrs. Kelly Block: I would like to hear from Mr. Gogolek.

Mr. Vincent Gogolek: It seems you're asking me a question along the lines of asking "Would you say that General Motors is healthier than Chrysler?", and I would agree that it is. We're talking about important but still relatively minor amendments compared with what is required in this situation—with what the Conservative Party itself has identified as a problem and solutions.

Mrs. Kelly Block: In 2006-07, a total of 186 institutions were subject to the act; 69 additional institutions are now subject to the Access to Information Act, following the coming into force of the Federal Accountability Act. This brings us to 255 institutions that are now subject to the Access to Information Act. You are disagreeing with all of the experts who have appeared before the committee thus far. What specifically would you say was the most significant reform to ATIA since 1983, if not the Federal Accountability Act?

Mr. Vincent Gogolek: Ms. Block, I'm afraid I wasn't disagreeing with them; I agreed, but only in the sense that it is limited.

Mrs. Kelly Block: Mr. Rubin, what would you say was the most significant reform since 1983?

Mr. Ken Rubin: I happened to be involved with one in 1998-99, which was when the Liberal MP Beaumier got section 67.1 passed, which said you shouldn't alter or prevent records from getting out. That, I think, sent a ripple through the bureaucracy. We had had the blood committee records destruction; we had had Somalia, where certain records were covered up.

I'm not saying that you guys didn't try. I just think you might have been a little hoodwinked by the mandarins. If you had just brought in those corporations—and by the way, the 69 additions you talked about include some of the subsidiaries, whereas I mean the main guys—it would have been better if you hadn't added all their bells and whistles to pro-secrecy, and if you hadn't said we'll exclude, besides administrative records, the operational records, policy-making records, communication records, decision-making records. All those are excluded, in some cases. I don't feel that this is a wise move, because every other agency would like that too.

I would like to say that the Federal Accountability Act could have done whatever, but I'm getting blank pages. I'm not an expert who doesn't try using the act.

Mrs. Kelly Block: I'm just asking you about the most significant reform.

I want to move on to another question.

Mr. Drapeau and Mr. Racicot, in their article in *The Hill Times*, specifically questioned the wisdom of giving the Access to Information Act a global reach without first addressing the present wait times for information. We have raised similar concerns in this committee as well. Can you please tell this committee what you think the consequences of expanding the current scope of the ATIA from approximately 30 million Canadians and others with direct ties to this country to over four billion people worldwide would be?

Mr. Ken Rubin: I heard you ask that question before, but here's the thing: it's a red herring. Basically, there are only 30,000 or fewer people who use the act. If we had a million, which would be great, we would really have a good act. Why don't we have a million? It's because we have a lousy act.

Let me give you two examples—and really, there won't be much use. I now have to go to the United States, which I'm entitled to do, to get meat inspection reports, because our Canadian government no longer has any. There is a reason why I need to use other acts.

Secondly, one of the key decisions in the courts in this country involved the Ethyl Corporation, which took the government to task and won, with the help of the Information Commissioner, a very significant case that allows cabinet discussion papers now to be released. It's an American company.

Let's get real here. What we want is an act that can allow as many people as possible to use it. Who are some of the major users of this act right now? They're people who fall under the citizenship and immigration rubric. Why don't you put in proactive disclosure and let the refugees or the landed immigrants who need their files have a system such that they don't need to use the access act?

● (1635)

The Chair: It's your final question.

Mrs. Kelly Block: On Monday, Mr. Drapeau and Mr. Racicot spoke about the right to information, and for that reason opposed any sort of user-pay system of cost-recovery.

Do you agree that every Canadian has the right to information? If so, do you make any distinction between Canadians' rights and the rights of non-taxpayers or non-citizens?

I'm going to ask Mr. Gogolek to go first.

Mr. Vincent Gogolek: First of all, I'd just like to quote from the notes provided by former commissioner John Reid, wherein he addresses your question about possible effects. I'll quote him directly:

> Since anyone in the world may make access requests through a Canadian agent (and many do, especially in the immigration field), this change is not expected to significantly increase the number of access requests.

That seems logical.

There may be a marginal increase, because, for instance, researchers will now no longer have to ignore Canada because the system is too complicated and, if they're doing an international survey, decide to include Australia instead.

I think there would be a net benefit. I think it would also help raise Canada's profile internationally, which I think is something that this government is trying to do.

Mrs. Kelly Block: Thank you.

The Chair: Okay. This question about offshore interests has come up often. Someone did answer the question in a way that really helped me. Maybe others should be reminded. Anybody offshore who wanted to make an ATI request could simply get somebody who is here to do it on their behalf.

Chances are, in fact, that the 29,000 or 30,000 who are already asking do represent offshore interests anyway, so I'm not sure if I'm all that afraid of those things, simply because those who really want it can get it from wherever they are in the world.

Mr. Pacetti, please, for five minutes.

Mr. Massimo Pacetti (Saint-Léonard—Saint-Michel, Lib.): Thank you, Mr. Chairman.

Thank you to the witnesses.

It's a very complex situation and study that we're having here, so I may be out of context a little bit, but my personal problem in trying to access information has been either timeliness or getting the right information when I do actually get the information, which is what I think we've been discussing here.

In your opinion, when would you go to see the Information Commissioner if the information that is given to you is not 100% there? How do you know if you're actually missing information? I understand that you get the blacked out or blank pages, but when would it be worthwhile from a practical perspective to see the commissioner and say that you need more information when they've given you perhaps 50%?

I'm a member of the finance committee. I remember that last year we requested some backup information on income trusts. I think 280 out of 300 pages were blanked out. That was obvious, but what happens if you get the reverse? Let's say you get 20 pages blacked out or you get 20 blank pages in a 300-page document. Would that be a situation where we would go and see the Information Commissioner? That's the practical end of it. Also, we've talked about timeliness. How long would all of this take?

Mr. Vincent Gogolek: The fact is that the requester is always at a knowledge disadvantage, because you don't know and you can't know what is actually there. The government has to provide you with what sections they're relying on, so the blank page would have, for example, “section 21”, written on it for your information, so that you would know that's the section they're relying on to give you nothing.

This is where the order-making power becomes valuable, because at that point, you are able to go to the commissioner and get an enforceable order. The commissioner or his delegate gets to look at those documents and decide whether the government has properly applied, in a limited and restricted way, the exemptions that are in the act.

● (1640)

Mr. Massimo Pacetti: So in your opinion, the Information Commission could decide, "Well, you have 80% or 90% of the information, so be happy with that, and see you later".

Mr. Vincent Gogolek: No. The government is not and should not be allowed to hold back information from you unless they can find something in the act saying that this is why, for certain policy reasons, you can't have it. If they don't have that, they have to give it to you. That's what the commissioner's role should properly be: to say that you're entitled to it, so give the man his documents.

Mr. Massimo Pacetti: Thank you.

Mr. Rubin.

Mr. Ken Rubin: Well, again, commissioners with order-making power have a little more clout in this area, because they can ask the institutions why their response is incomplete and ask for proof of what they have. The applicant can try, if they know, and suggest that certain things could be possible, by saying that they've looked at the company publications and they know that certain information should exist.

Let me be blunt here and say that the problem at the federal level is that right now we have a dysfunctional commission. A lot of users are no longer even bothering to go to the commission, because they can't be heard. Our whole review rights are being put in abeyance because of the backlog or for whatever the reason. So we have to look, at times, to other means. We negotiate with the departments to ask them if they can do better than this. We seek publicity and say that this is uncalled for. Right now we're in a quandary, because we do need a better review process.

Mr. Massimo Pacetti: This is just a quick question. In terms of penalties—I'm not sure if I heard correctly—are we talking about punitive penalties or monetary penalties to departments that don't disclose?

Mr. Ken Rubin: Do you mean in terms of what I'm proposing?

Mr. Massimo Pacetti: Yes.

Mr. Ken Rubin: We're talking about significantly more monetary penalties—up to $250,000. That is in PIPEDA.

Mr. Massimo Pacetti: So companies would be paying from one federal department to another?

Mr. Ken Rubin: Well, part of the penalties could be discipline, demotion, disciplinary action, termination—

Mr. Massimo Pacetti: What about paying the requester? What about paying the demander, or the person who requested the access to information?

Mr. Ken Rubin: You mean paying the penalties directly to the requester?

Mr. Massimo Pacetti: Yes. Would that work?

Mr. Ken Rubin: I don't think that's in the cards. This is not contingency-fee heaven. No, I think you have to send a message to the bureaucracy itself. So, yes, at times that could mean the imposition of jail sentences.

Listen, maybe the way you're going to get action is by firing a few deputy ministers. What can I tell you?

The Chair: Thank you, Mr. Pacetti.

I would just like to let the members know that I think we have enough time on the clock to get through the second round totally, so that everybody should have a chance. That should give us about ten minutes to deal with the other matter of business we have before us.

Mr. Dechert, please.

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

Thank you, gentlemen, for your presentation.

Mr. Gogolek, I understand the British Columbia system charges different fees to commercial users of the access to information system. What is your view on that rule?

Mr. Vincent Gogolek: Well, that is our system. I'm not overly familiar with how that is done, to the extent that we're requesters, we're not commercial. We have not run into that, and we have not had experience with that.

There are a number of policy reasons for doing it that way, especially if you have flow-throughs, reasons of GST, or other things. There are a number of reasons it could be done that way. In B.C. we have not had any particular problems with it being done the way it is. But I would really have to refer you to Mr. Loukidelis for detailed information on that.

Mr. Bob Dechert: I wanted your views about whether you thought that was a good idea generally and whether you think maybe something like that should be applied to the federal system.

Mr. Vincent Gogolek: Well, in our experience in B.C. we have not had major problems with it. But as to the reasons we have not had any major problem with it, I'm afraid I'm just not—

Mr. Bob Dechert: Your organization doesn't—

Mr. Vincent Gogolek: We do not have a policy on this.

Mr. Bob Dechert: Right. Okay. I understand.

It's been suggested that large commercial enterprises that collect information, say, on companies doing business with the government often do access to information requests and use that information in the general credit information that they have on all Canadian companies and foreign companies that do business with the Canadian government, and then they sell that information to their customers. Do you think in that sort of a circumstance it would be fair for taxpayers to have some relief from the cost of providing that information to those organizations?

● (1645)

Mr. Vincent Gogolek: I think we have to be very careful about transferring systems that would be appropriate for somebody using a government service, and who would take that aspect and use it for their own commercial benefit. I think that's a little different, because what we're talking about here is a right guaranteed under statute, which the Supreme Court of Canada has said has quasi-constitutional status.

Our organization's view at FIPA is that we don't want to see anything restricting the average Canadian's ability to get information, because that's how accountability and transparency work. The huge danger here is that if you bring in a system like this, it could be used.... And we see this happening right now. I'm sure Mr. Rubin could tell you about the times he's been punished with fees or huge estimates for producing documents. We've had fee assessments overturned in British Columbia frequently, where governments have assessed fees.

Mr. Bob Dechert: All right. Thank you.

Mr. Rubin, you describe yourself as a frequent access requester. How many requests would you make on an annual basis, on average?

Mr. Ken Rubin: I'm not sure, but a few hundred or more.

Mr. Bob Dechert: Okay.

Are you doing this as a journalist? On whose behalf would you normally be making those access requests? I ask this in a generic sense, as I'm not asking for the individuals' names.

Mr. Ken Rubin: It's whoever comes to me, but normally it's public interest groups, and perhaps the media. I do a lot on my own, and for corporations too.

Mr. Bob Dechert: Okay. Just out of curiosity, how are you paid for your services?

Mr. Ken Rubin: That's curious. Sometimes I am, and sometimes I'm not.

Mr. Bob Dechert: Okay.

Mr. Ken Rubin: But I'm not a data broker—

Mr. Bob Dechert: No, I understand that.

Mr. Ken Rubin: —and I'm not a heavy commercial user, if that's what you're trying to get at.

Mr. Bob Dechert: I'm just curious to know the types of individuals, the class of the individuals who make significant requests, and on what basis.

With respect to cabinet confidences, could you give us an example of a recent cabinet matter that you would want to have access to, just to give us a flavour of the kind of thing, say, within the last year or two, that you might have made a request for on your own behalf, or somebody else's behalf?

Mr. Ken Rubin: Well—

Mr. Bob Dechert: I'm just interested to know.

Mr. Ken Rubin: Well, I mean, you can't get them, so that's point number one.

Mr. Bob Dechert: But if you could get them, what kind of thing would you request?

Mr. Ken Rubin: Well, as I was saying, it would primarily be on things like why, for instance, is the environmental assessment process being dismantled? Is there any federal input into how the tar sands should be developed in the future? What's the cabinet doing about the funding and future of asbestos, and its use overseas? What are they doing on the infrastructure program, and how are they setting it out so that some of these programs will be accountable?

Mr. Bob Dechert: Okay.

To Mr. Rubin again—and perhaps Mr. Gogolek could answer this as well—do you believe that Canadians should have a right to know who is asking for information from the government? If we're moving to a system where we're making virtually everything available, and to people outside of Canada, do you think it's also fair for Canadians to know who's asking for their information?

For example, I think Canadians might want to know if a foreign government were asking for information, especially on matters where there might be a dispute between Canada and that foreign government. What do you think about that? Do you think we have a right to know who is asking for information from our government?

Either one of you could respond.

● (1650)

Mr. Ken Rubin: The short answer is no.

Mr. Vincent Gogolek: I would have to say that governments probably do this now. If they are filing access requests to Canada, they're doing it through third parties. Also, given the way the system now works and how hard it actually is to get information.... If you're identified as being media or political, you're amber-lighted, and tiger teams work out on you.

If you're hoping to get your information at any time in this lifetime, you'd better apply as Mickey Mouse, or somebody else—otherwise, you're going into the ringer.

Mr. Bob Dechert: You mentioned amber lighting. Could you tell us when amber lighting started as a process in the access to information system?

Mr. Vincent Gogolek: That is formally or informally? I'm not inside the system; you're probably better placed to answer that.

The Chair: One can only speculate, and we don't speculate too much. Maybe you'll get a chance, and somebody can answer that.

Mr. Ménard.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): Thank you.

You don't have to convince me of the need for ATI reform. I have taught courses on this act and I was struck when I read in a book that while all democracies bragged about having ATI legislation, as soon as legislation was adopted, the government did everything it could to restrict the application of the act. It would appear that this universal rule also applies to Canada.

I have some specific questions. I don't want you to think that I question whether many of your proposed reforms should be introduced. One in particular intrigues me. You recommend—and in this respect you agree with Mr. Marleau's seventh recommendation—that the application of the act be extended to cover records related to the administration of the courts.

To my knowledge, everything, or almost everything, related to justice matters is in the public domain in Canada. Is there anything that is not public that you would like to see become so?

[*English*]

Mr. Ken Rubin: Well, I'll put it to you this way. On the court side, yes, there is an open court system, and I don't think—if I understood Commissioner Marleau correctly—he consulted the courts. I don't know how they would feel about it.

It's Parliament that I'm more concerned about, because if you limit it just to the general administration.... Remember I made that delineation between operational, policy, and communication records. For instance—

[*Translation*]

Mr. Serge Ménard: I'm sorry to interrupt you, sir, but we don't have a lot of time. I don't have a problem as far as Parliament is concerned. However, what information would you like to courts to disclose that is already not made public?

[*English*]

Mr. Ken Rubin: I'm at a loss there, except if they had administrative problems, then you might want to know something more about them.

[*Translation*]

Mr. Serge Ménard: Yes, I see.

● (1655)

Mr. Vincent Gogolek: Perhaps I could answer that question. Perhaps we could talk about the scheduling of trials. Why does it take years for a case to come to trial? We're not interested in seeing the personal notes of a judge or of a Crown prosecutor. We're more interested in administrative matters. There are always some missing elements, and while they may not be that important, why can we not access them?

Mr. Serge Ménard: I see. Mind you, court proceedings are a matter of public record. The lawyers plead their case for the scheduling of the proceedings and ultimately the ruling becomes a matter of court record.

Moving along, there are limitations, as far as the police is concerned. In my view, you are right to feel that the power of the police to refuse to disclose information is too broad. However, I think you're prepared to concede that information about a criminal investigation should not be disclosed.

Right now, I'd like to talk about disciplinary decisions involving the police. Let's say a disciplinary decision calls for police to conduct a broader investigation with a view to making some changes to the disciplinary system. Would the public have access to this type of decision?

Mr. Vincent Gogolek: If I understood your question, you're referring to systematic reforms and to the availability of the facts and of statements made by the government or law enforcement authorities concerning the running of a police service.

Mr. Serge Ménard: No, I'm talking specifically about disciplining police officers. I know that an extensive investigation was conducted by the RCMP and reports were submitted to the commissioner calling for some changes, further to an incident where four female officers accused an investigator of sexual assault. Three superior officers were asked to report on this incident.

In your opinion, should the disciplinary report drawn up by these superior officers be made public?

Mr. Vincent Gogolek: This is one of these grey areas where privacy rights must be considered along with the public's right to know how the police service operates.

Mr. Serge Ménard: Mind you, I have been waiting three years to get my hands on one of these reports. I know that 13 recommendations were made.

Do I have time for another question?

The Chair: You can put your second question, Mr. Ménard.

Mr. Serge Ménard: I would like to talk about a more general issue, but it could lead to a lengthy discussion, so I will settle for a question about something very specific.

I'm not clear on recommendation 10 of Mr. Marleau which reads a follows: That the Access to Information Act specify timeframes for completing administrative investigations".

What exactly do you mean by "administrative investigations"?

Mr. Vincent Gogolek: I'm sorry, but I didn't catch the last bit.

Mr. Serge Ménard: What exactly do you mean by the reference to "administrative investigations" in recommendation 10?

[*English*]

Mr. Ken Rubin: Can I speak for Marleau? There's time, time extension, fee kinds of complaints, operational complaints on the access procedures. The problem with a lot of Commissioner Marleau's recommendations is like that game of pin the tail on the donkey: it's just like here, here, and there. You don't get any sense that there's any systematic, clause-by-clause approach to reforming the act.

Here you have a system where you say "I have administrative binding order powers for things like time, time extensions, and so on. And let's see, if I read Marleau correctly, on fees, he'll set things, on fee waivers, on time extensions, which won't necessarily be in the interests of an access user." But then he'll say that I have to do something about these within 90 days. Well, if you add how long it's going to take him for gathering—the new norm will be half a year, less than half a year—I'm not willing to settle for that kind of recommendation.

The Chair: Mr. Dreeshen, please.

Mr. Earl Dreeshen (Red Deer, CPC): Thank you, Mr. Chair.

Thank you both for your testimony today.

It seems there has been a lot of conflicting expertise at most levels with respect to the access of information for the last three meetings that we've had. Perhaps you can appreciate why we would be coming at this from a few different angles to try to get some answers with regard to this.

There has been a certain amount of anecdotal evidence that says there are pages being withheld and so on. I'm curious about whether there has been any statistical data to support that conclusion. Do you have any comment on that?

Mr. Vincent Gogolek: I don't think there is an overall number in terms of how many pages have been withheld. In terms of anecdotal evidence, in B.C. we've had cases where the B.C. government or public bodies have withheld documents and what has happened is somebody brown-enveloped the actual whole document, usually to a reporter. There's the usual front-page story with all the....

● (1700)

Mr. Earl Dreeshen: Is it in order to get that front-page story, or is this something that happens quite often?

I suppose I'll come back to another question.

Mr. Rubin, what percentage of the requests you would put in would perhaps go to the complaint stage?

Mr. Ken Rubin: I was intimating that I rarely use the complaint stage any more because it's so totally broken down. A lot of other users would say the same thing. If you're going to have to wait a year or two to even get on, and then you're going to be triaged so you can't even get your complaint in the queue, your rights are not going to apply.

If you want me to say how many of what I would like to complain about our records are exempt, it's well over three-quarters—not totally, but well over three-quarters. That's what the problem is, as well as the time problems. Most of my time extensions are for well over 120 days. One of them is even 800 days.

Mr. Earl Dreeshen: If you're saying that this just happened in this last little while, what types of problems did you have prior to that? Has there been a change?

Mr. Ken Rubin: Yes, there has been, because you don't even get a letter of acknowledgement for your complaints. You don't even hear from an investigator, nor does the department, for months at a time. What's the point of going there?

One of the principles of the current Access to Information Act is that you have the right to access, you have the right for certain records and the right to review. But if your right to review is being made impossible, there's a crisis, like there is in departments, because it's dysfunctional on the part of some departments when they are putting your requests off for 200 days, or whatever.

Mr. Earl Dreeshen: I have a couple more questions, Mr. Chair.

We talked a lot about the report cards. Could the flooding of a department with access requests create a situation in which an inordinate number of complaints are occurring, and could that be one of the reasons you could go from a B to a D, and so on? Do you have any comment on the report card stage, and should the grading system be revisited?

It might happen to be like the CBC, which did come in, and all of a sudden there were a lot of requests that may have been just curiosity or whatever. I'm curious what your thoughts are with respect to that grading process.

Mr. Vincent Gogolek: There are a couple of ways of looking at it.

The report card provides a letter on a scale. There are a number of reasons for it, and you do have to look at the reasons. You may have a very small department such as, let's say, Veterans Affairs, and suddenly an issue comes up that results in a lot of concerned individuals putting in for information, and the department is not set up for it. It sounds like that may have been the case with the CBC. It really does depend on the individual case, so I think you do have to look at the actual facts in each one.

Mr. Earl Dreeshen: I have another comment, and then I'm sure my time is getting close to the end.

Part of the amendments I have read here include amendments since the passage of the Anti-terrorism Act in 2001. Basically I'm curious about the mindset that existed when that Anti-terrorism Act was amended. As well, do you have any comments on the current thinking in that regard?

Mr. Vincent Gogolek: Are you talking about the clerk's certificate to stop any complaint?

Mr. Earl Dreeshen: Yes.

Mr. Vincent Gogolek: I'm not sure why. I have some personal knowledge of this issue, because I actually tried to argue it in the Federal Court as an individual back in the mid-1990s, when I put in an application concerning how the government sets fees. Essentially they charge a nickel or a dime or a quarter for photocopies. I was told there were 1,700 documents, 1,600 of which were cabinet confidences.

Two and a half years after complaining to the then Information Commissioner, I got a note back from the commissioner saying they were sorry it took so long. I thought there was a loophole there. I took it to Federal Court. The judge said they weren't going to look at it.

It seems to me that the government essentially brought in the equivalent to section 39 of the Canada Evidence Act. They brought the certificate out of an abundance of caution. It was to make sure nobody would ever look at it and to kill off the complaint.

● (1705)

Mr. Earl Dreeshen: Okay. Thank you.

The Chair: Mr. Siksay is next.

Mr. Bill Siksay: In the hearings the other day, one of the witnesses raised the concern that should the Information Commissioner have full order-making power, it could lead to delays in disclosure when orders were challenged in court. He suggested that this was happening in Ontario.

Could both of you address whether you've seen this happening? As well, what is the experience in British Columbia, Mr. Gogolek, and has that occurred?

Mr. Vincent Gogolek: I don't see how the order-making power itself would bring about the delays. The delay comes when the government or the public body tells you that they're not giving you the documents, and you complain about it. The beauty of the order-making power is that you're able to get a remedy, the equivalent of a Superior Court order, that is enforceable with contempt powers.

I don't think that concern holds water in British Columbia. I'll leave Ontario to Mr. Rubin.

Mr. Ken Rubin: Well, there are other jurisdictions, such as Alberta.

Yes, there are some judicial reviews going on, but when you look at the total perspective of how many orders are issued, it's a very minor number of them, which means that either you have to have better orders or that the government has to stop....

That's why I'm proposing a more proactive disclosure administrative system. You know, it's as if you slip on the pavement and city hall says “Strike that” and challenges you on anything you do. That's the mentality, so that's part of the problem. The problem lies more with the government.

One approach sees order-making power as a terrible thing. People who want to cite these things are people who just don't want to get on with the fact that, in the end, this country needs somebody with order-making powers.

Mr. Bill Siksay: I wonder if I could also ask about the requirements to create records. I think, Mr. Rubin, you addressed this. There's been some suggestion that this would be more appropriate to the Archives Act, rather than access to information.

Mr. Ken Rubin: Certainly the national librarian has to be involved. The problem is that they've been involved with Treasury Board for 25 years, and we're in a sad state of affairs with our records and documentation retrieval. There is also the fact that an oral tradition has grown up, to the point that many decisions, in detail or otherwise, aren't done. We don't even have cabinet record verbatim its meetings' minutes. So when I get these 20 years later, I get some sanitized summary, as I do with records of decisions of a lot of agencies.

We have a serious problem, not only for history but for access users. We don't keep proper records, so you don't necessarily get an accurate picture of what's going on. That's why the duty to document decisions and actions in detail is so very important.

With respect to the Information Commissioner's role, there are grounds for appeal, grounds for investigation, grounds for order, grounds for penalties. Obviously, you have to have cooperation inside of the government. But we're at a point where this absolutely has to be looked at. If we want to talk about why we're here, then we have to look at the combination of some of the outsourcing that's been done, the millions of dollars spent on record management, and the attitudes of some of the people inside to literally avoid keeping records. This can't be changed by voluntary methods. You need to create a new duty-to-document clause that is going enforce rights.

The Chair: Mr. Gogolek.

Mr. Vincent Gogolek: With respect to the duty to document, Commissioner Reid put it in his draft bill. The commissioner, as a creature of statute, can't look in the archives; he needs it in his own act.

● (1710)

The Chair: Ms. Simson.

Mrs. Michelle Simson: With respect to Internet proactive access, if we ever got to the point where we were forward-thinking enough to automatically get as much as possible up there and make it accessible to as many people as possible, do you see this as creating a security issue? Could the Taliban access our information? What should we be shooting for?

Mr. Ken Rubin: First of all, you have to understand that right now we don't have such a system. We have government websites that put on limited stuff. Some of it's pure propaganda. We're not talking about putting up only proactive disclosure, travel expense lists, contract lists, or other administrative records. We're talking about putting up briefing notes, papers, and so on.

Mrs. Michelle Simson: If we got to that point—

Mr. Ken Rubin: If you have provisions within the act, which I certainly do in my bill, that allow you to exempt things related to a narrowly defined national security area, then obviously those things don't go on the Internet. But other things do. They don't just go on the Intranet, which is the internal government communications system; they go right out. And they go right out to anybody and everybody.

Mrs. Michelle Simson: Mr. Gogolek.

Mr. Vincent Gogolek: As an organization, we're very much in favour of proactive disclosure, and the new technologies are making it much easier. It's a completely different world now. We have what used to be government information in filing cabinets. Even the best-intentioned bureaucracy cannot run off a thousand copies of a document, pile them up outside the door, and tell somebody to please come and get them. You can do that on the Internet. It's the way of the future.

Mrs. Michelle Simson: I don't think anybody would disagree that this is an old, broken, and totally ineffective act. That being said, how would you rate the 12 recommendations Mr. Marleau gave as a starting point? Could they be implemented right away? Do you see any of them as being regressive?

Mr. Ken Rubin: It's a non-starter. Yes, there are a few good things in there, like extending to Parliament our universal access rights, or bringing in cabinet records—although you won't get any of them as a user. The five-year review could be done—this committee can review the act any day. But his system of administrative records, which are only on orders and extensions, is just going to prolong the agony and make the act more dysfunctional with respect to time extensions and so on.

With respect to his main attitude toward certain users in his recommendations, if we're trying to extend information rights, I don't think it's the right way to go. We're looking at something that people in other countries, and in our own country, should be proud to move forward. The committee dealt with this before. It doesn't have to go back to cherry-picking the bad apples and signing off on a few good ones. You have a plan of action.

I'm giving an alternative plan of action that is a little more progressive. To do this is not impossible. If you, as a committee, put your mind to it, you could soon have something in front of Parliament. But to bring in half measures or counterproductive ones will not do the job. I urge the committee to think twice, because it's going to affect me. My litmus test is how many more records am I and the Canadian public going to get? And if I'm not going to get more under Marleau's, I don't want it.

The Chair: Okay.

Mr. Vincent Gogolek: Commissioner Marleau, in his remarks to the committee, I believe on March 4, said he supports the open government act that was developed by his predecessor. He does not have a problem with it. FIPA, as an organization, does not see why we need half measures, when so many of Mr. Marleau's recommendations are included in the Reid bill.

● (1715)

The Chair: Okay.

Mr. Poilievre, please.

[*Translation*]

Mr. Pierre Poilievre (Nepean—Carleton, CPC): Thank you for coming here to testify. My questions will centre on two main issues.

[*English*]

To start with, the committee has been told that the complaint system has been overwhelmed by only three individuals, and that 99% of the costs of the program are paid by Canadian taxpayers, not ATIA users through user fees. Given the potential for commercial abuse, would you support a fee structure that is different for frequent users from what it is for people who use the system occasionally and incidentally, to acquire information about themselves, for example?

Mr. Vincent Gogolek: I think perhaps my previous answer would stand on this, that the B.C. system deals with users who use it for a commercial purpose, not merely frequent users.

We would support a restriction on somebody where it is the equivalent of a court application to strike something for being frivolous and vexatious or for an abuse of process. These do exist. Court cases are occasionally struck out because somebody is abusing the system. There's no reason why the FOI system would be any different, but it would be a very limited and rare case where it is. And it may well be that these.... I'm not familiar with the three cases.

Mr. Pierre Poilievre: There are two separate subjects, though. One is the issue of those who use the system frivolously. I actually don't think that is a particularly large problem. There is not really an incentive for people to file frivolous ATIs, because they have to do the work and they don't get paid for it.

What I'm worried about is people who do this as a business. They sell the information that taxpayers pay to extract for them, and they —the data brokers—reap the financial rewards of the work that taxpayers have funded. I wonder if you could talk more about how the benefit could be more strictly tied to the cost in the case of commercial users.

Mr. Vincent Gogolek: I think you start running into some very serious problems when you start judging it on the number of requests. You start running into issues of freedom of the press, because a number of reporters would probably file a request a week, or a request a day. The threshold becomes very difficult to establish. It would be problematic, but again I would recommend to your attention—and perhaps further inquiries of Commissioner Loukidelis—the B.C. system, which seems to work well.

Mr. Pierre Poilievre: Not to cover old ground, but for example if a law firm dedicates a branch of its operation to data brokerage and it sells information that it acquires through ATIA to clients, how does the British Columbia system impose the real cost of the research on the firm that is benefiting from it?

Mr. Vincent Gogolek: The system does not look at full cost-recovery, because then you start getting into real problems with how you assess the cost of creating it. You also start getting into the problem I was outlining earlier in response to—

Mr. Pierre Poilievre: The problem I'm pointing to is that you have taxpayers across the country paying for this information to be extracted—because it's not always at the fingertips. Sometimes questions that are contained in ATIPs require research, or they require information to be compiled, ordered, or counted—and all of this costs money. If the information is being used for commercial reasons—in other words, it is being sold by, as I say, a data broker or someone else who does this as a business—it is reasonable to expect that such a business person would absorb the cost of the product they are selling. I'm asking how the British Columbia system addresses that.

● (1720)

Mr. Vincent Gogolek: I'm afraid I'm not able to respond in the detail that you want, because we as an organization do not fall into that category.

Mr. Pierre Poilievre: I understand that, but you have put British Columbia's fee system up as an example.

Mr. Vincent Gogolek: Yes.

Mr. Pierre Poilievre: So do you have information on how it would work in the hypothetical I just provided?

Mr. Vincent Gogolek: I have information in the sense that we have not had problems with the way it is set up, or at least not major problems. So that's why I commend it to you as an example, because it seems to work.

As to the details of how it works, I'm afraid I really couldn't provide you with that information. I'm sorry.

Mr. Pierre Poilievre: Mr. Rubin, do you have any ideas on the subject?

Mr. Ken Rubin: As one who knows a lot of users and all the rest, I'm afraid there are perhaps two misconceptions that I can totally clear up. One is that in this country there are such things as data brokers, because there's not a big enough market here. I don't think people cough up a huge amount of information and resell it and resell it. It's just not in the nature of the way things are done. You might have clients who ask you to get information for them, but you don't go and collect information and have a huge warehouse and deposit it.

The other thing is I think it was quite unfortunate of Commissioner Marleau.... Remember the distinction that he was also trying to make between access users and complainants. By putting in front of the committee the fact that two or three complainants on that list are tying up his system—I'm not going to say that they're right or wrong, since that's their right—I think you have to look at what's wrong with his system that he can't handle it with the extra resources that you've given him, and that he can't even handle my six or so complaints, and that he can't handle anybody else's, and that people don't want to come to him.

I don't think that you have a right that you can start making distinctions. Another way of approaching it is that if somebody makes a request and there is a huge volume of records, past a certain point I think it's legitimate to have charges. There are ways of handling this. You could talk to the requester and try to come to some grips with it. But to destroy the whole act because you think or you perceive there's the bogeyman of one or two people who supposedly are abusing it, that's a dangerous slippery slope.

Mr. Pierre Poilievre: I might have inadvertently put the two issues together. One is the filing of complaints, and the other is the filing of ATIPs themselves. I shouldn't have mixed them quite so directly.

I think what the commissioner was getting at was to try to put into perspective the number of complaints the system has received. That number has gone up. At the same time, if you start to look at where the complaints come from, they come from a very small number of people, and they're directed at a very small number of government agencies.

My sense is that he was trying to give some context to the complaint numbers. If you just looked at the raw data your eyes might pop out of your head, and you might think that there's tremendous dissatisfaction. But I think many users are very pleased with the system, and I hear that from time to time. There are some good stories, and it is a good system. There is room for improvement, and you've both made some good suggestions.

I will just conclude by asking you a question. The accountability act didn't go as far as you had wanted it to go. It did make some big improvements, but if there was one thing that you could ask—and I'm going to ask you to be a politician just for five seconds—one thing that's politically realistic in the context of a minority Parliament that you think we could do, what would it be and why?

● (1725)

Mr. Ken Rubin: I'll give you two.

Mr. Pierre Poilievre: Pick your favourite one.

Mr. Ken Rubin: I'd say make it a constitutional right, section 2.

But if you don't mind me also saying, here's the dilemma that I'm having. I don't necessarily blame this government or a previous government, because you both put out a lot of inspectors to pasture. You said to people like Canada Packers, you do the listeria testing. You said to people on the airline front, Air Canada, you do the testing. In the past I have been able to get safety records, which I think we should be entitled to. That's why I'm saying extend the act where there's a public function still so there's a disclosure code, so I can get those inspection reports and so the public can be reassured that the health and safety environment in this country is still in good hands. That is a very serious concern. That's why I made that at the forefront.

Mr. Pierre Poilievre: Mr. Gogolek.

Mr. Vincent Gogolek: In terms of something that could be done, the Reid report with order-making powers, recommendations one and two of your platform from 2006—I think that's important. I think there is a real consensus.

Mr. Pierre Poilievre: You said one and —

Mr. Vincent Gogolek: Recommendations one and two, the Reid report, full order-making powers.

The Chair: I'm sorry, we did go a little over here. But I did promise Mr. Dechert one more question, so I took a little time off this to give him his slot.

Mr. Bob Dechert: Thank you for your indulgence, Mr. Chair.

Mr. Gogolek, earlier we mentioned the process known as amber-lighting, which is sometimes applied to access to information requests. Are you familiar with Professor Alasdair Roberts?

Mr. Vincent Gogolek: Yes.

Mr. Bob Dechert: He's a Canadian academic, as you know, who is currently at Syracuse University. He said in 2003 in an article when he was referring to the CAIRS system and amber-lighting in particular: “No other country maintains a government-wide database like CAIRS. CAIRS is the product of a political system in which centralized control is an obsession.” He further said that the process known as amber-lighting is unjustifiable.

Could you comment on your views on amber-lighting?

By the way, those articles were dated in 2003 and 2005, under a previous administration.

Mr. Vincent Gogolek: I would like to. Unfortunately, I don't have full recall and I don't have the articles in front of me.

In terms of amber-lighting, the act should govern. If you're supposed to get your documents within *x* period of time, you should get them within that period of time. If the government is able to go off and prepare response lines in regard to what may come out of that within that period of time, there's no problem with that.

The problem is when something is sidetracked. When it's put on a siding where it doesn't go anywhere, where it's delayed, then there's a problem. That problem was identified in British Columbia regarding environmental groups. The commissioner made a mediation recommendation in that.

Mr. Bob Dechert: Right.

Mr. Rubin, were your requests ever amber-lighted in the past?

Mr. Ken Rubin: Sure. I'm one of the favourites, and so are political parties. The Reform Party, for instance, used to be on it all the time.

Mr. Bob Dechert: Going back how many years?

Mr. Ken Rubin: Near the beginning. Maybe it wasn't called amber-lighting. In Ontario it's called red alert. You can apply it to sensitive hot issues, whatever you want to call it.

Mr. Bob Dechert: So this is—

Mr. Ken Rubin: This committee looked at the issue back in 2006, by the way. It's a problem. It isn't just a time-delay problem; it's a problem like you're trying to come to grips with two categories of fees, or multi-use by an access user. Where do you draw the line? If you're not going to treat every access request the same, then you have a system that's discriminatory and is creating barriers. Once you have one barrier, there will be other barriers. That's why this system is dysfunctional right now. That's why you need an administrative authority that isn't going to play games like this; it's just going to believe in proactive disclosure and get on with it. Most of the stuff is rather mundane, but it's important to the average Canadian, and it should be out.

● (1730)

The Chair: And finally, Mr. Gogolek.

Mr. Vincent Gogolek: Very briefly. This is also dealt with in Mr. Reid's bill, where the access coordinator is responsible and should be responsible for how the request is handled, but ultimately the request also has to go to the deputy minister and the minister for how these things happen.

The Chair: Gentlemen, you've been very helpful, both of you. It's good we're not hearing the same thing from everyone.

We know the productivity and performance of our ATI system isn't meeting the public's expectations or standards that we would like to have. Some have blamed the act; some have blamed the commissioner; some are blaming the minister responsible for it; some are blaming PCO for lack of leadership, etc. There's lots of blame to go around, but I think we're committed to pushing for the consensus issues.

It looks as if Mr. Reid seems to have some support in all sectors. I think maybe we should continue our work to the extent possible, but ultimately any changes that are going to happen are going to have to be tabled in Parliament by the government.

Thank you kindly, gentlemen. You're excused.

We have a matter we want to deal with very quickly.

Colleagues, there was a notice from Mr. Poilievre about a motion. It is on our agenda. I took the time to do a little bit of background checking with the Privacy Commissioner's office. The Privacy Commissioner is away this week, but I did talk to the Deputy Privacy Commissioner. She advises me that they have been under negotiation with Google for some time with regard to the street-view project, and they have come to a preliminary agreement on three conditions. First is implementation of the blurring technology for faces, licence plates, and other personal private information. Second, prior to activation of the street view, Google would give the appropriate notice to the Canadian public. It is a blanket global public notice of what's happening and why. Third, they finally reached an agreement with regard to the retention of identifiable images, the original pictures: the software has to deal with them, but they wouldn't be allowed to retain the original images; they would have to start dropping off and not be kept at all. Those discussions are expected to be completed when the commissioner comes back.

I'm also told that internationally a group has been lodging complaints in every jurisdiction that has these services or similar surveillance systems. They fully expect a complaint will be lodged, and the Privacy Commissioner is fully preparing right now to launch an investigation, which means that the parties to that investigation and the complainants probably won't be discussing any of their issues with regard to the complaint before us. They will be doing it before the commissioner.

It is interesting, but as we all know, all the surveillance issues fall under PIPEDA, the Personal Information Protection and Electronic Documents Act, not the Privacy Act. Technically, the chair should rule Mr. Poilievre's motion out of order. Under the circumstances, though, there will be some developments over the next couple of weeks, and I think I'd like to defer the item until the Monday meeting when we return. We'll probably have a little more information about whether there's a problem.

I read from this report from the Deputy Privacy Commissioner that there isn't a problem with PIPEDA. They're telling me that PIPEDA, which was amended or changed substantially two Parliaments ago, is technology-neutral. The principles within the act and the standards to be met with regard to protecting personal information are very clear and can be applied in virtually any application or use of private information. So if we do this, it may involve a little bit more than one witness from one party. If we're going to do something here, I think any motion that comes before us should be a more precise motion, that a study be done should it be found that there is an identified concern about the video surveillance and related types of issues, and leave it at that, because then the committee can decide the scope of witnesses, the timing, etc.

● (1735)

I think most members probably would agree that once we deal with this on that Monday, we should leave it open to the chair to determine whether we would attempt to do that, should a gap appear in our time schedule before the summer, just to make sure that we use our time. So it will give us another item to work with.

Let's clean up the motion just a little bit and resubmit it, and we'll deal with it on the Monday we get back.

Go ahead, Mr. Poilievre.

Mr. Pierre Poilievre: I'll be very brief.

I think what you've said sounds reasonable. I should put on the record, though, that we've been speaking with the Privacy Commissioner's office, right up until this afternoon, and they did not confirm that there was any sort of agreement whatsoever, even in principle. They also said that they will not give us any indication of how they would proceed with an investigation until a complaint is lodged. I think you've made the point that a complaint is almost inevitable, so this is going to come up.

It's hard to say whether PIPEDA deals with this. It does have specific exemptions for artistic, journalistic, and literary purposes. It does not have any for photographic or mapping systems, so there might be a problem in the act, and I emphasize might. If there is, I think we should be the first to study it and propose a solution. I should add that this technology is very exciting. It's good news for Canada that it's coming here. We want to ensure that it's a welcoming environment, while we protect the privacy of the Canadian people.

I'm not in a mad rush to have the study happen immediately. If we can work together over the next couple of weeks by phone and e-mail to propose wording that would be appropriate, and then perhaps fill a few of the days that we might have open between now and summer, that would be great. But I do think that a study would be welcome. If the matter is at some point resolved, that's even better. We can hear about the resolution in a one-day hearing.

The Chair: Just for everybody's information, when these motions are brought forward, the more generic or broad the better. If you get a little too specific, we get stuck having to put forward amendments and subamendments as we try to work it through. Have a little consultation with fellow colleagues, and just keep it as banal as possible. I think that gives the committee the latitude to move in whatever direction seems appropriate as we move through our work.

Mr. Pierre Poilievre: We have it on the agenda for the Monday back.

The Chair: Yes, we'll put it on for the Monday. But help me with the PIPEDA thing, because technically I have to rule it out of order, because it's not part of our current study.

Mr. Pierre Poilievre: Either we can move it outside of the current study or make it its own study.

The Chair: It can be either way. I think separate is fine.

Is everybody comfortable with that?

I have these binders on the in-and-out. Not all the materials have been translated yet. Over the two-week break, I'm going through them. I want to be sure that whatever you get is important for you to have and is properly translated for all honourable members.

Thank you.

The meeting is adjourned.

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