



**HOUSE OF COMMONS
CANADA**

THE POWER OF COMMITTEES TO ORDER THE PRODUCTION OF DOCUMENTS AND RECORDS

Report of the Standing Committee on Public Accounts

**Hon. Shawn Murphy, MP
Chair**

**DECEMBER 2009
40th PARLIAMENT, 2nd SESSION**



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STANDING COMMITTEE ON PUBLIC ACCOUNTS

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THE STANDING COMMITTEE ON PUBLIC ACCOUNTS

has the honour to present its

TWENTY-SECOND REPORT

Pursuant to its mandate under Standing Orders 108(1) and 108(3)(g), the Committee has studied the power of committees to order the production of documents and records and has agreed to report the following:

THE POWER OF COMMITTEES TO ORDER THE PRODUCTION OF DOCUMENTS AND RECORDS

Pursuant to its mandate, the Standing Committee on Public Accounts periodically holds meetings, during which witnesses are questioned on subject matter that may be relevant to the Committee's studies. When witnesses appear before the Committee, members of the Committee may order that the witness produce documents related to the topic under discussion. Committees are empowered to order such production under section 108 of the Standing Orders of the House of Commons.

On 24 March 2009, the Committee heard witnesses from Public Works and Government Services Canada (PWGSC) on the Auditor General's December 2008 report on Contracting for Professional Services.¹ In the course of the meeting held on the audit report, officials from PWGSC were asked questions relating to the Government Enterprise Network Services (GENS), a proposed government initiative relating to IT contracting.² In response, Mr. François Guimont, the Deputy Minister of PWGSC, stated that he would undertake to provide the Committee with a number of videocassettes (later found to be audio recordings) on the industry consultation on GENS. These documents were to be provided by 7 April 2009.³

In a letter dated 7 May 2009, Mr. Guimont said that PWGSC would be delivering the requested documents, but on the advice of legal counsel, would do so only in accordance with the *Access to Information Act* and *Privacy Act*, and would seek the consent of the participants of the GENS consultations before releasing them. On 12 May 2009, the Committee adopted a motion requiring PWGSC to deposit the requested documents. Following the motion, PWGSC supplied the documents, but informed the Committee that pursuant to the *Privacy Act*, they had been redacted to eliminate references to the names of individuals who did not consent to disclosure.

¹ Report of the Auditor General of Canada, "[Chapter 3 – Contracting for Professional Services – Public Works and Government Services Canada](#)", December 2008.

² GENS forms part of the federal government's IT Shared Services initiative, under which PWGSC is working with departments towards an enterprise-wide approach to the provision of telecommunications infrastructure and services.

³ House of Commons Standing Committee on Public Accounts, Meeting 11, 24 March 2009, at 16:00.

The *Privacy Act* protects the personal information collected by government institutions. Section 8(1) of the *Privacy Act* serves as a default provision, stating that personal information under control of a government entity shall not be disclosed without consent. However under our law, the power of the Committee to require the production of these documents is not diminished or affected by any statutory provision unless that provision expressly states so.⁴ This *Privacy Act* provision does not do so, and does not restrict the Committee's powers. In fact, and although unnecessary for our purposes here, under section 8(2)(c), the *Privacy Act* does not apply if the documents are requested by "a person or body with jurisdiction to compel the production of information."

As stated in *House of Commons Procedure and Practice*, the Committee has the power to order the production of documents:

The power to send for persons and papers, which is accorded to committees, includes not only the power to invite the appearance of witnesses and the filing of briefs, but also to order, by summons, that individuals appear or that certain documents be filed with the committee...[W]here a committee meets with a refusal to provide a document it deems essential to its work, the committee may pass a motion ordering its production. If such an order is ignored, the committee has no power to compel its production, but may report the matter to the House and request that appropriate action be taken. Although the House has not placed any restrictions on the power to send for papers and records, it may not be appropriate to insist on the production of papers in all cases.⁵

⁴ Joseph Maingot, *Parliamentary Privilege in Canada*, (2nd Ed.) (House of Commons of Canada and McGill University Press, 1997) p.20; Arthur Beauchesne, *Rules and Forms of the House of Commons of Canada*, (4th Ed) (Toronto: Carswell, 1958), p. 96.

⁵ Robert Marleau and Camille Montpetit, *House of Commons Procedure and Practice*, 2000, pp. 860, 864-5.

Parliament is not bound by the *Privacy Act*, and has a right to have any documents laid before it which it believes are necessary. This principle was established in Canada through the *Constitution Act 1867*, which passed the “privileges immunities and powers” of the British House of Commons into Canadian law at the time of Confederation.⁶ The power to send for records has been delegated by the House of Commons to its committees in the *Standing Orders of the House of Commons*. A committee’s power to call for persons, papers and records is said to be absolute, but seldom exercised without consideration of the public interest.⁷

In response to the department’s refusal to provide the requested documents, the Committee held a meeting on 18 June 2009 with departmental officials and the Law Clerk of the House of Commons to discuss the matter. At that meeting, the Law Clerk provided an opinion on the issue:

[T]his committee, not for the first time, is taking up time dealing with an issue in respect of which, in my view, there shouldn't be any confusion. The committee asks for information. It gets it. The committee might think twice about some of the information it's asking for, but that is the committee's call. The committee might decide not to pursue certain information out of the interest of privacy. That is the committee's call. That is not the call of any official to tell the committee it can't have information because they think better of giving it to the committee. That is fundamental as a legal matter. I'm not speaking politically or entering a debate. I'm speaking legally. That is fundamental to the constitutional status of committees of the House, and of the House itself, of course.⁸

⁶ See Standing Committee on Justice and the Solicitor General, *Minutes of Proceedings and Evidence*, 29 May 1990, Issue No. 39, p. 3; 4 December 1990, Issue No. 56, p. 3; 18 December 1990, Issue No. 57, pp. 4-6; *Journals of the House of Commons*, 19 December 1990, p. 2508; 28 February 1991, p. 2638; *Debates of the House of Commons*, 28 February 1991, pp. 17745-6; *Journals*, 17 May 1991, p. 42; 29 May 1991, pp. 92-9; 18 June 1991, pp. 216-7; and Standing Committee on Justice and the Solicitor General, *Minutes of Proceedings and Evidence*, 19 June 1991, Issue No. 4, pp. 5-6.

⁷ *Journals*, 29 May 1991.

⁸ House of Commons Standing Committee on Public Accounts, Meeting 29, 18 June 2009, at 16:05.

The Law Clerk provided the Committee with a legal opinion on the powers of committees pertaining to the production of documents. The legal opinion summarized the applicability of statutes to Parliament under the Canadian constitution, and cited precedent from the Supreme Court of Canada that Parliament has an adjudicative role as the “grand inquest of the nation.” The Law Clerk concluded:

In summary, constitutional law has priority over statute law, that is, the provisions of a statute, such as the *Privacy Act*, are to be read in a manner that is consistent with the constitutional laws of Canada. The Supreme Court of Canada has affirmed that no part of the Constitution, including the *Charter of Rights and Freedoms*, prevails over any other part of the Constitution, including the constitutional powers, immunities and other rights that constitute the parliamentary privileges of the House and its committees.⁹ Accordingly, there can be no doubt that, as a matter of law, the power of a House committee to order the production of documents prevails over the seemingly contrary provisions of a statute, including the *Privacy Act*.

The Committee adopts the interpretation provided by the Law Clerk. Under Canadian law, the executive is responsible to Parliament, and Parliament has been accorded certain privileges and powers enabling it to exercise its oversight.

Following the June meeting, PWGSC provided the Committee with unredacted versions of the documents in question, and the issue has been resolved. However this problem is a recurring one, and legal advisors for government departments often seem confused over the application of the law in regards to documents requested by parliamentary committees. The Committee recommends:

⁹ *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Canada (House of Commons) v. Vaid* [2005] 1 S.C.R. 667.

RECOMMENDATION 1

That for greater certainty, the government revise its policies to reflect the legal right of parliamentary committees to demand the production of documents and records.

RECOMMENDATION 2

That Justice Canada provide its legal counsel with adequate training in parliamentary law, including instruction on the right of parliamentary committees to demand the production of documents and records.

APPENDIX A LIST OF WITNESSES

| Organizations and Individuals | Date | Meeting |
|------------------------------------------------------------------------------------------------------|-------------|----------------|
| Department of Public Works and Government Services | 2009/06/18 | 29 |
| Daphne Meredith, Associate Deputy Minister | | |
| Christine Payant, Director General, Product Management, Information Technology Services Branch | | |
| Ellen Stensholt, Senior General Counsel, Legal Services Branch | | |
| Caroline Weber, Assistant Deputy Minister, Corporate Services, Policy and Communications Branch | | |

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant Minutes of Proceedings ([Meetings Nos. 29 and 40](#)) is tabled.

Respectfully submitted,

Hon. Shawn Murphy, MP

Chair

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SUPPLEMENTARY OPINION

Presented by the members of the Committee representing the Conservative Party of Canada

CPC Members want to highlight that when a committee or the House of Commons calls for persons, papers and records the consideration of the public interest needs to be the first and most important consideration. During the March 24, 2009 committee meeting, the Member of Parliament for Vaudreuil-Soulanges requested the audiocassette of the GENS consultations. The participants in these consultations understood that their participation and comments were to be protected from disclosure by the Privacy Act and therefore may have shared confidential information that they would not otherwise have shared. When the committee debated requesting the audiocassettes, we believe that the opposition parties did not consider the public interest when demanding the production of these audiocassettes.

CPC Members also note the former General Counsel to the House of Commons, Ms. Diane Davidson, outlined the powers of a parliamentary committee to summon for persons, papers and records in her article, *The Powers of Parliamentary Committees*. The article states,

“The first step is for the committee to adopt a motion ordering the production of the required information or the attendance of the witness and then to report the refusal to the respective Houses. Since committees do not possess contempt powers as of right, it is the Houses themselves, which must decide what action is to be taken.”¹

¹ Diane Davidson, "The Powers of Parliamentary Committees", *Canadian Parliamentary Review*, Vol.18, No. 1 (Spring 1995).