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Tuesday, February 15, 2011

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Chair

The Honourable Joseph Volpe

Standing Committee on Public Accounts

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•(1530)

[English]

The Chair (Hon. Joseph Volpe (Eglinton—Lawrence, Lib.):
Thank you, colleagues.

Pursuant to Standing Order 108(3)(g) and the motion adopted by committee on Thursday, December 9, 2010, Report of the Auditor General of Canada, “Public Sector Integrity Commissioner of Canada”, we have before us Mr. Rob Walsh, the law clerk and parliamentary counsel; from the Office of the Privacy Commissioner, Chantal Bernier, assistant privacy commissioner; and Nathalie Daigle, acting senior counsel.

Just before we begin, I want to thank our witnesses for coming forward. Perhaps they would bear with me for a moment or two while I update the committee on a couple of items that have relevance to our discussions.

First of all, there is documentation from the integrity commissioner's office requested by members at the December meeting. Part of it came last week and has been distributed to all members.

Documents were sent by the clerk's office via messenger to members' offices on January 31, February 7, and February 14. Not all of the original documentation received was in both official languages, so, as some colleagues may know, I instructed the clerk to distribute what was received in both official languages when it was received, and to forward the remaining information when translated.

Members should by now have all of the documentation. I believe the last piece arrived last evening.

I want to update you on two other items. I think, by the way, you have already received.... One of those items is the letter from PCO. We can talk about that in a moment.

Perhaps even more significant is the fact that we received a letter from legal counsel at Heenan Blaikie. I called the lawyer and spoke to his junior, who told me that only Mr. Whitehall was going to address the issue. I asked her to put me in touch with him. Friday, at about five o'clock, we had what I hope was a courteous conversation. I asked him whether he was indeed the counsel. He said yes. I asked him about Madame Ouimet's whereabouts. He said he could confirm that she was out of the country. I asked him where he was; he too was out of the country.

I pointed out to him that the committee was anxious to have Madame Ouimet appear before us for two reasons: one, to give her an opportunity to address the issues of her, personally, that were raised in the Auditor General's report; and two, the committee

needed to complete its work, and the committee needed to have Madame Ouimet there as the central figure in it.

The third point I asked about was...you know, she'd been hired, so clearly she must have known that the committee wanted to speak to her. We had some discussion about the subpoena. I said to him, why don't you consider the issues of availability and the issues of the subpoena and call me back; you don't have to do it Saturday, you don't have to do it Sunday, but please do it Monday, after you speak with Madame Ouimet.

Last evening, at about 5:30, he called me back. I asked him if he had spoken to Madame Ouimet. He said, no, he had not, but there had been an exchange of e-mails. He gave me an indication that she was in Florida.

I share that with you; it's important only because there were rumours about her being someplace else.

•(1535)

There was concern about the subpoena being served outside of Canadian boundaries. We had a brief discussion about that. I gave him an indication that I would report that he was concerned about that. I also indicated that I would report that he had not spoken to Madame Ouimet.

He initially gave me an indication that logistically he could not be at her side until sometime in April—one, because he was going to be out of the country on holidays until, I believe, March 7; and two, he had to prepare a presentation before a tribunal that would take him into April. So sometime after that they'd be able to address this issue. I told him I would relate that to the committee.

Yesterday he came back and said that they were prepared to come on March 10, because he'd cleared his agenda.

I gave an indication that I wasn't negotiating; I was simply conveying an interest on the part of the committee to have Madame Ouimet come before the committee so that the committee could do its work. I reminded him that we had been trying to do this since December 9 or 10, and that the committee was not pressuring anybody, but I asked him if he was prepared to receive a subpoena on Madame Ouimet's behalf, as he was now her legal counsel, and he said sure; but ten minutes later he called back and said it would be only in the context of March 10.

Again, I told him I was not negotiating for the committee; I was conveying to him where the committee has been. I said that the committee wanted to meet Madame Ouimet, that he knew, I guess, where she was, and that we'd like to have her before the committee, period. I said I'd be guided by the committee.

So I thought I would update you on that, because it's important for us to know exactly where we're going. I didn't want to withhold anything. I could go into the details of the conversation, but I don't think that's apropos anyway.

The letter from PCO has something that's specific. Our motion last Thursday indicated that we wanted a release of documents by February 19. PCO has come back and said, as you can see in the letter you have before you, that they want another week.

Obviously I would be guided by the committee, but my first inclination to the clerk was that we asked for the 19th as a committee, and that's what we'd like.

For those of you who may not have taken that off your computer yet, the clerk has copies.

I take it that we're solid on the PCO letter...

Mr. Bains.

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

In my experiences here in the House—I've been here since 2004—I've never encountered this type of behaviour from any witness. This is a serious matter. We've discussed this issue on many occasions. I, personally, find this to be completely unacceptable.

The commission was set up to improve accountability and integrity. It's very simple, very straightforward. It took three long years to set up this commission, as I indicated before: \$11 million, 228 complaints, and no action

And what are we left with? What are we dealing with today? We're dealing with a commission that's in crisis. We're dealing with a commission that's trying to clean up the mess of Ms. Ouimet. To validate that, the Auditor General's report clearly indicated that her conduct was inappropriate and unacceptable. That's the issue here. From my point of view—and many members will share this—we want her to come before the committee.

We as a committee have a responsibility to deal with this issue. It's not government operations, it's not ethics, it's our committee. We work very closely, hand in glove, with the Auditor General's office. We've been dealing with this issue since December 9, and according to my records here—I could be corrected—we've dealt with this issue six times in committee. Six times we've tried to figure out how to get Ms. Ouimet here.

We've sent her calls and letters. We've even summonsed her. Now we have Mr. Walsh and the Office of the Privacy Commissioner here today. We're doing everything in our capacity.

In my opinion, this has dragged on way too long. We don't negotiate with lawyers. This is the first time I've heard of this—trying to negotiate with lawyers. We don't negotiate with lawyers.

You say that she's in Florida. But if she's dealing with a lawyer, then, according to my opinion, she's received a summons. She's aware that we're trying to get her to come before committee. It's very simple: if you've hired legal counsel, there's a recognition that we're trying to make an effort to get her here—not once, not twice, not three times; we have taken every possible avenue available to us.

Enough is enough. I think we need to take action and report this to the House.

• (1540)

The Chair: Mr. Christopherson.

Mr. David Christopherson (Hamilton Centre, NDP): Thank you, Chair...

Is my mike on?

A voice: [*Inaudible—Editor*]

Mr. David Christopherson: Oh, it's on. Okay.

You'd think I'd naturally look to my left, eh?

Voices: Oh, oh!

Mr. David Christopherson: I need a little clarification, Chair, in terms of lawyers attending with witnesses. We've been down this road a number of occasions at this committee. It's convenient that Mr. Walsh is here, but can somebody remind me what the policy is vis-à-vis...?

I know the fact that any testimony given by a witness before a Commons committee cannot be used in any other venue; it can't be used in a court. This is what I'm recalling, but not the details. Therefore, the right to a lawyer to be right beside you and speak on your behalf is not there, because the trade-off is you're protected; anything you say at committee can't be used anywhere else.

I just wonder what the detail of that policy is. Are they allowed to sit there and consult before they answer?

The reason I'm asking, Chair, is that the lawyer's availability is affecting when Ms. Ouimet will attend. The question regarding the status of lawyers at these meetings has an impact on whether or not it's a legitimate request to delay the appearance until such time as said lawyer can make it or not.

The Chair: Mr. Kramp, on a point of order.

Mr. Daryl Kramp (Prince Edward—Hastings, CPC): On a point of order, Chair, we have witnesses here. A number of my colleagues are making points that are valid and deserve a response, but would we not be more effective as a committee if we were to listen to the witnesses we have here? Then their points could be brought out in the questions directed to those witnesses that we have here.

Should there be issues still outstanding, arising after that, then by all means... Our answers might come from our witnesses. If they're not, then of course we have this committee's right to go wherever it needs to go.

The Chair: Mr. Christopherson.

Mr. David Christopherson: That's entirely reasonable. I'll stand down my question. If it's covered in the presentation, great. If not, I'll get a chance to ask it here.

So I'm fine with that, Chair.

The Chair: Monsieur D'Amours.

[Translation]

Mr. Jean-Claude D'Amours (Madawaska—Restigouche, Lib.): Thank you Mister Chair.

I realize we have witnesses to hear, so, I will be brief. However, there are specific issues you have raised in your summary of the events of the past few days that have no bearing on today's briefs. There is one thing that I fail to understand. You stated that a lawyer is currently representing a client that they have never even spoken to. None of this seems to add up. How can a lawyer defend or represent a client that they have never even spoken to?

Quite a coincidence that they are either on vacation in the Caribbean or too busy to appear before the Committee. As far as I know, Mister Chair, Heenan-Blaikie definitely has more than one legal counsel on staff. If they are indeed the firm currently representing Ms. Ouimet, they ought to be able to assign someone else to her case. Simply palming us off with the argument that their legal counsel is either on vacation or too busy is not good enough. They should have alternate counsel able to take over her case.

It would be unacceptable for any lawyer, legal firm or witness to dictate to us when they will testify.

[English]

It will be not a lawyer, not a law firm, not a witness who will decide when they come to visit us to answer questions.

• (1545)

[Translation]

As part of our study, we are keen to afford Ms. Ouimet the chance to provide explanations to the Committee. Once again today, it is clear that these people have been stringing us along for weeks and even months. It is totally outrageous. It has been beyond acceptable for a longtime but now they are playing more games with us. These people will now have to face the consequences. They cannot be allowed to call the shots with us.

I would, Mister Chair, like to raise one last point with regard to the letter we received from the Privy Council Office. I fail to understand why the PCO says it requires more time. This is an unacceptable answer. If I am not mistaken, there are seven officials at PCO. They are senior independent House of Commons Officers, who correspond regularly with the Prime Minister's Office. Therefore, why are they not able to provide the documents we have requested on time?

I had asked for the documents to be provided to us yesterday, not in two weeks' time. Yesterday, I agreed to extend the deadline until February 19, if I am not mistaken. The Privy Council Office sent us a letter today, on the very day of the hearing, saying that is unable to provide the documents. There is a great deal of correspondence between PMO, Ms. Ouimet and her Office. Why then are they unable to provide us with the documents in a timely manner?

This response is unacceptable. If they have the information, they should provide it as and when it becomes available. They have until February 19 to submit the documents to us.

[English]

The Chair: Mr. Saxton.

Mr. Andrew Saxton (North Vancouver, CPC): Thank you, Mr. Chair.

I'd like to bring up two points.

First of all, I'd like to reiterate what my colleague Mr. Kramp said. I think we should get on with questioning the witnesses. They are here, and this is our opportunity to take advantage of that.

I'd like to remind my colleague Mr. D'Amours that in fact the Bloc motion originally stated February 24 as being the date that they wished to have these documents presented to the committee. Really, then, going back to the original Bloc motion, it's an extension from February 24 to 28.

Regardless of the dates, I think we received a letter that shows they're working on it, they're cooperating, and they intend to present what we have asked for. It's simply a reasonable request that they need more time, if there are that many documents, so I don't see why there's such a big issue. They are going to be coming here within due course. I think Mr. D'Amours should understand the constraints that the PCO is under.

An hon. member: [Inaudible—Editor]

Mr. Andrew Saxton: Mr. Chair, please, I think we should proceed with the witnesses. They're here. Let's continue.

Thank you.

The Chair: There's a point of order. I want to get to it very quickly. I also want to get to Mr. Kramp and Madame Faille, and then I'd like to go to our witnesses.

Go ahead on your point of order.

[Translation]

Mr. Jean-Claude D'Amours: Mister Chair, this is outrageous. Mr. Saxton ought to be ashamed of himself his afternoon. The Committee voted on this. The dates in the main motion are one thing but the Committee voted to approve a different deadline. He ought to respect the will of the Standing Committee on Public Accounts. We set February 19 as the deadline. We did not give an alternative date. That is the long and the short of it. At the very least, Mr. Saxton ought to be honest enough to respect that. There are perhaps other things he does not want to respect but he has to respect the will of the Standing Committee on Public Accounts.

The volume of correspondence between the Prime Minister's Office and Privy Council is enormous, so, why then, are they not able to provide this specific information?

The Chair: I understand your point. Thank you, Mister D'Amours.

[English]

Mr. Kramp, do you want me to go ahead?

Mr. Daryl Kramp: Chair, I have just a very brief comment.

We have witnesses here. Regardless of the points that are being brought forward for discussion—valid, worth discussion, we should do that—there's a time and a place. We have an agenda. Let's follow that agenda, deal with that, and give our witnesses the courtesy....

Quite frankly, we have brought them here because we want answers. Let's have our questions.

Mr. D'Amours was talking about four or five other areas of concern. They're legitimate concerns, but what are we going to discuss here today—those concerns or the reason that we brought our witnesses here?

I ask the chair to step up and take some control over this meeting and get us back on track.

The Chair: I'm trying to get it back on track. You've made that same point twice. I said that would finish this and then we'd go on to our witnesses.

Madame Faille, I'll ask you to be very brief as well.

[*Translation*]

Ms. Meili Faille (Vaudreuil-Soulanges, BQ): I will pass on my turn.

The Chair: You had finished, right?

We can now move on to hearing our witnesses, Ms. Chantal Bernier and Mr. Robert Walsh.

•(1550)

[*English*]

I would just remind all colleagues that there was a motion that was defeated, but I indicated that we would invite the Privacy Commissioner notwithstanding.

I'm glad that the office availed itself of the opportunity to appear before us, and thank you very much for doing so.

Madame Bernier.

[*Translation*]

Ms. Chantal Bernier (Assistant Privacy Commissioner, Office of the Privacy Commissioner of Canada): Thank you Mister Chair.

Thank you for inviting me to appear before the Committee on its study of the Office of the Auditor General's report on the Public Sector Integrity Commissioner of Canada.

First of all, my apologies on behalf of the Privacy Commissioner as she is ill and not able to be here today. As you said earlier Mister Chair, I am accompanied by Nathalie Daigle, one of our legal counsels.

My comments will briefly summarize the Privacy Act provisions as they relate to the disclosure of personal information and present some issues the Committee may wish to consider as it moves forward with its study.

The two main issues for the Committee to consider are whether the specific documents contain personal information and then the disclosure of that information.

The Privacy Act defines “personal information as information about an identifiable individual that is recorded in any form”. According to paragraph 3(f), this also includes “correspondence sent to a Government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence”.

Federal departments and agencies, subject to the Privacy Act cannot disclose personal information without the consent of the person concerned. However, there are exceptions to this provision listed under subsection 8(2) of the Act.

I will now discuss these exceptions in more detail with special emphasis on paragraphs 8(2)(m) and 8(2)(c).

Paragraph 8(2)(m) of the Privacy Act permits the disclosure of personal information where, in the opinion of the head of the federal institution in question, the public interest clearly outweighs any invasion of privacy that could result from the disclosure; or disclosure would clearly benefit the individual to whom the information relates. It is up to the head of the institution to determine whether the public interest outweighs the right to privacy.

I would like to underline two aspects of 8(2)(m). Firstly, disclosure is discretionary but is subject to a standard of clear public interest.

[*English*]

Privacy does more than protect the individual. Privacy is an important social value that is fundamental to democratic societies. Privacy is a constitutional right, protected by section 8 of the Canadian Charter of Rights and Freedoms, and the Privacy Act has been judged to be a quasi-constitutional statute.

In accordance with these principles, committees should explore with government departments some respectful privacy alternatives that balance a committee's authority with the legal responsibilities of federal institutions. This could be done, for example, through in camera meetings; restrictions and enforcement to guidelines on how documents are delivered, whether electronically or in paper format; and proper procedures for securing that information.

I note this was done by this committee on December 14, 2010, when, after requesting information about 228 disclosures of wrongdoing, members chose not to seek the names of individuals. I think this was a reasonable approach, and I applaud the committee for being able to identify a way to access the information while showing sensitivity to privacy.

•(1555)

[*Translation*]

It is important to note that the threshold for disclosure under the Public Servants Disclosure Protection Act is set at a rather high level.

Section 22.2 of the Privacy Act, which was added as a result of the creation of the PSIC, states that the Public Sector Integrity Commissioner shall refuse to disclose personal information requested under subsection 12(1) of the Privacy Act (access requests) that was created in the course of an investigation. This is an even higher threshold than our own investigations at the OPC.

Secondly, and although I am not an expert on the Public Servants Disclosure Protection Act, Section 44 of the Act states that information (and not only personal information) derived from an investigation should only be disclosed when it is “required by law, and not only authorized by law”.

In conclusion, we recognize Parliament’s authority to compel the production of documents that are necessary to do its work, but we also believe it is possible that the personal information requested should be limited to what is necessary to keep public servants accountable without jeopardizing the intent of the Public Servants Disclosure Protection Act.

Thank you and I look forward to your questions.

[English]

I'm open to any questions.

Thank you.

[Translation]

The Chair: Thank you Ms. Bernier.

[English]

Now I'm going to go to Mr. Robert Walsh, who is at a bit of a disadvantage, because we invited him before my communication with the lawyer.

I've just read his brief, so....

Mr. Walsh, we apologize if the situation is proving to be very fluid, but you have the benefit of a couple of questions you may wish to address in the course of your presentation—or not.

The floor is yours, Mr. Walsh.

Mr. Rob Walsh (Law Clerk and Parliamentary Counsel, House of Commons): Thank you, Mr. Chairman.

I have a presentation that was prepared before I was aware you had these exchanges with the lawyer. But I'll proceed with the presentation anyway; it doesn't make a material difference.

I have been asked to outline the options for further action where a witness has not responded to invitations to appear before the committee and has seemed evasive when attempts have been made to contact her. I understand that some members of the committee feel the committee should immediately report this matter to the House and seeks its aid in bringing the witness before the committee, perhaps including a citation for contempt of Parliament.

I understand the witness is presently outside Canada, and she is not expected back until late April. A lawyer has recently contacted the committee clerk and indicated that he has been retained by the witness but that he too is outside the country. He is not expected back in the country for several weeks, I believe.

Nonetheless, it would appear that a channel of communication with the witness is available through the lawyer, and I would suggest that the committee ask the lawyer whether he will accept service of the committee summons on behalf of his client, the witness. It is an important consideration in this case that the witness, for whatever reason, has not yet been personally served with the committee summons.

[Translation]

If the lawyer is not prepared to accept service of the summons on behalf of the witness, the Committee could attempt to effect service upon the witness directly if the Committee knows where she is. While a House committee has no jurisdiction to exercise enforcement powers outside of Canada, service of a document is not an exercise of enforcement but simply the delivery of a document, which can be done anywhere. The summons cannot be enforced outside Canada, however.

• (1600)

[English]

An immediate option for the committee is to report this matter to the House to seek the aid of the House to bring the witness before the committee. In its report, the committee should fully set out the facts indicating the many attempts of the committee to contact the witness, and to serve a summons upon her, and the fact that the witness did not appear before the committee when scheduled to do so.

The report should not fail to also point out that the witness has not been personally served with a summons to appear before the committee, though attempts at service were made.

[Translation]

The Committee report might also express the view that the witness’ failure to appear before the Committee, as scheduled and, if it is the view of the Committee, that her seemingly evasive conduct touches on the privileges of the Committee and, indirectly, those of the House. As privilege is not within the mandate of this Committee, it cannot itself make a determination that the witness has breached the privileges of the Committee or those of the House or that the witness is in contempt of Parliament. This determination is reserved for the House, usually after the matter has been considered by the Standing Committee on Procedure and House Affairs whose mandate includes consideration of matters of privilege when referred to it by the House once the Speaker determines that prima facie there has been a breach of privilege.

[English]

Once a report is tabled in the House, any member of the committee, or the chair on behalf of the committee, can rise in the House on a point of privilege and make the case for finding a prima facie breach of privilege. Usually at the end of his or her presentation, the mover indicates to the Speaker that if the Speaker finds a prima facie breach, he or she is prepared to make the appropriate motion. The usual appropriate motion is to refer the matter to the Standing Committee on Procedure and House Affairs for review and a report to the House.

[*Translation*]

It is not always the case that matters of privilege are referred to the Standing Committee on Procedure and House Affairs. Upon a finding of prima facie breach by the Speaker, the mover could make a motion calling upon the House to affirm that the witness has breached the privileges of the House and its Committees and is in contempt of Parliament. The motion might go further and declare the witness to be persona non grata within the precincts of the House and to not have access to the precincts, other than for a meeting with the Member of Parliament, until such time as the contempt is purged by an appearance before the Committee.

[*English*]

As the witness has not been served with a summons, a finding of contempt of Parliament would seem premature at this time, although it is not beyond the powers of the House to do so.

In 2003, the privacy commissioner of that time was found in contempt of Parliament for providing misleading information to the government operations and estimates committee. Further action was contemplated against him, but he resigned moments before a motion was made, and so no further action was taken against him—I should say that he apologized and resigned.

In 2008, a senior RCMP officer was found in contempt of Parliament for deliberately misleading this committee in her testimony. No further action was taken by the House.

In this case, the witness is a former officer of Parliament as Public Service Integrity Commissioner.

That concludes my general remarks regarding options, Mr. Chair. I'm pleased to answer any questions that members may have for me.

The Chair: Okay.

As you all know, colleagues, we are in public.

I just would like to ask our witnesses, before we go into question and answers, whether, given the dialogue they need to have, they feel they'd prefer to go in camera or to stay public.

Madame Bernier.

[*Translation*]

Ms. Chantal Bernier: I would be quite happy to have the discussion in public session.

[*English*]

The Chair: Mr. Walsh.

Mr. Rob Walsh: Mr. Chairman, I'm quite prepared and pleased to respond to committee members' questions in public. It's just that in the nature of my role as legal adviser, it's not usually the case that a client takes legal advice in public. It understandably will put constraints on what I might provide by way of advice. If I'm advised to give full and frank advice as to the options, that might be difficult to do—and not serve the interests of the committee to be doing it publicly.

The Chair: Thank you, Mr. Walsh and Madame Bernier.

I have two interventions before I...

Just those two, please.

Mr. Bains.

• (1605)

Hon. Navdeep Bains: Thank you very much.

Chair, I, too, was considering that when I was putting together some questions. I'm just thinking out loud, but with respect to having this in a public forum, due to the nature of the discussion, maybe to ensure a frank, open, and honest discussion, maybe in camera would be more applicable. That way we could have a candid exchange.

That's my viewpoint. I'm not sure if other colleagues share it, but I wanted to express that.

The Chair: Mr. Young.

Mr. Terence Young (Oakville, CPC): I agree with Mr. Bains.

Thank you, Mr. Chair.

The Chair: I'm sorry, what is it that you agree with Mr. Bains about?

Mr. Terence Young: I'll let Mr. Bains restate it.

Hon. Navdeep Bains: It would be in camera.

The Chair: You prefer to go in camera?

Mr. Terence Young: Yes.

The Chair: Are you speaking for everybody here?

Mr. Daryl Kramp: No, he's not.

The Chair: Initially I said that I was going to take only two interventions, but I'm going to stop with one, two, and three. Then I'm going to make a decision on which way we go.

Mr. Kramp.

Mr. Daryl Kramp: Chair, I think the comments should be public at this point, because we are discussing process. We are seeking direction. We are not asking for legal advice that is going to deal with a specific case or option, at which point, I would agree, Mr. Walsh's comments would definitely and emphatically be reserved for in camera.

I think our process should be public. This is a public House. The public has a right to know what is going on. They need to know how their government, how the rules and everything, operate. We are discussing process and procedure here. We are not discussing the actual elements of the specific case.

If Mr. Walsh felt that a question would, in his mind, somehow create a problem for a particular action down the road, I'm certain his experience would guide him in his response to suggest that he wouldn't be answering it at that particular point for a wide variety of reasons, as he would certainly state to this committee.

So I would suggest that at this point, while we are discussing process and not the actual case itself, the public interest would be better served to continue, with our Privacy Commissioner and with our legal expertise advising the committee on how to proceed, in public.

The Chair: Madame Faille, then Mr. Christopherson, and then I'll close it.

[Translation]

Ms. Meili Faille: As far as the question of privilege is concerned, the Committee must decide whether to continue in public session or whether to go in camera so as to protect any detailed information Mr. Walsh might provide us. I am leaning both ways on the issue. I have some questions I could ask Mr. Walsh and the Commissioner's replacement in public session. However, the Chair of the Standing Committee on Government Operations and Estimates that Mr. Kramp and I sat on did, on occasion, indicate that it would be more appropriate to deal with some issues in camera since the disclosure of specific information, such as contracts, could have legal consequences. I remember this happening.

However, I do not think that all Members' questions need to be dealt with in camera. I myself have a number of questions that I could ask in public session.

[English]

The Chair: Mr. Christopherson.

Mr. David Christopherson: Thanks, Chair.

Well, we asked our two experts for their opinions, and we heard them, so it seems to me that the common-sense thing to do is to hear the assistant privacy commissioner in public. Our goal is always to be in public as much as possible and to exhaust all our questions and discussions there. Mr. Walsh has made it clear that...

You know, I've been on this committee a long time, and this is not an unusual procedure that we would go in camera to take legal advice. I would ask colleagues to remember that it's not just a matter of wanting to look like a good small-d democrat to the public that's watching; we have obligations too—for instance, the House: we are a committee of the House.

If we ask some questions...or something is said publicly that limits, in any way, options for us or the House because we didn't take the advice of the parliamentary law clerk to take his advice in camera, then the House has every right to turn to us and say, "What were you thinking? You asked the law clerk whether you should be in camera or not. He said it was best if you went in camera so that he could give you full, frank answers. You didn't do it. Now you've ended up tying our hands. Thanks very much, public accounts committee."

I'm here in the fourth party. I'm the one who should have the easiest time saying we should do everything in public and damn the torpedoes. But that's not the responsible thing to do. The torpedoes do matter.

As well, Mr. Chair, Mr. Kramp said we're not going to discuss the elements of a specific case. I would disagree: that is exactly what we are doing. The procedural answers, I grant you, are similar, but the questions we're going to ask will be very germane to the case in front of us. That's why we asked him to come here.

So I feel very comfortable taking the advice of the assistant privacy commissioner in dealing with this presentation in public in all its entirety; then that we would go in camera, on the advice of the parliamentary law clerk, and have our full, frank legal discussion; and then that we would return to continue our business in public.

Thank you.

● (1610)

The Chair: As I said, we would stop there before I'd make a decision....

Mr. Kramp.

Mr. Daryl Kramp: On a point of order, there was an incorrect statement from my colleague, with the greatest respect. He said we are here discussing the particular case. Well, we are not.

The purpose of this committee hearing was to hear from the witnesses with regard to process, not to discuss the actual case. If at that point this is something that we could and should and would do, then we would do that.

Now, if we are going to question the witnesses directly on the actual Auditor General's case, then quite frankly we might even be pre-empting ourselves without first having heard from the witness.

I really think we're going down the wrong road to do that, because what we're doing then is we're using this hearing to basically set the direction for the committee with regard to an actual investigation rather than setting the parameters of study.

There are two different things. The parameters of study are one thing, but the actual investigation is something else. If we're going to get into the case investigation now, then that's a whole different ball of wax.

If my honourable colleagues want to go down that path right now, I think we have to be very, very careful. We could be prejudicing the entire direction that we could be going in, because we will not then be following necessarily the mandate of this committee.

The Chair: Thank you, Mr. Kramp.

I'm going to remind colleagues about one thing before I proceed to the next step.

We had, as per our own motions, invited Mr. Walsh to give us advice regarding next steps, and that advice would be legal advice as we would go along the way.

On your behalf, I invited Madame Bernier in order to provide us with some insights with respect to the privacy issues that would flow from that...even though the committee said, no, we've done that. I thank her again for coming, and I thank Mr. Walsh for coming.

All of this is to say, Mr. Christopherson and Madame Faille, that perhaps we can accommodate both perceptions, but I think in terms of chronology, we might hear from Mr. Walsh first, and any of the decisions that we might have questions from with respect to Madame Bernier would take place afterwards.

So I would say that we would continue—because we're talking about next steps first, and then implications therefrom—and that we would suspend to go in camera first and afterwards go public for any other questions we might have for Madame Bernier.

I'm prepared to entertain a motion to that effect.

Mr. Bains is the one who made the suggestion that he wanted to go in camera.

If you make a motion, then we can have an indication right away—unless everybody is in agreement right now.

Mr. Bains.

Hon. Navdeep Bains: I'd like to put forward a straightforward motion. Based on the advice given by Mr. Walsh, I suggest we take the discussion in camera.

The Chair: Okay.

There's no debate—

Mr. Terence Young: Just for a point of clarification, though, does the motion mean all questions that we might want to present to Mr. Walsh, or...? As you suggested, there might there be other questions we wanted to ask on the record.

• (1615)

The Chair: Well, if any questions flow from anything you've heard from Mr. Walsh, or indeed from Madame Bernier, we can deal with them with Madame Bernier and Mr. Walsh. But what we want to do, because we had invited Mr. Walsh to give us some legal advice first, would be to reverse the order. That's all. That's all we're talking about.

Mr. Christopherson.

Mr. David Christopherson: Thank you, Chair.

I'm not that far apart in my thinking from what you've outlined, but to me it makes more sense that we would do the public session first to allow everybody who wants to be at the public session to just stay where they are and have that. Then when we go in camera, those who have to leave can leave, and they're finished their time.

So just from a practical point of view, it seems to me we should do it the other way around.

Some hon. members: Agreed.

The Chair: Mr. Bains, just quickly, what is it you want to do? You're the guy who made the motion.

Hon. Navdeep Bains: I stated my position. Basically, I'm of the view that we first deal with this in camera, with Mr. Walsh; then if there are any further questions that do come up, particularly pertaining to the Privacy Commissioner, we can proceed to deal with them in a public manner, if acceptable.

So that was my original thought, but I'm open to other suggestions.

The Chair: So are you still staying with that, or what?

Hon. Navdeep Bains: That was my recommendation. That's what I'm staying with. So it depends; if there is further debate, great. If not, then I'll reconsider.

But is there further debate?

The Chair: There is no debate. I just asked for the motion so that I could simply call the vote on it and that's it.

I think some members wanted to be ingenious and ask for points of order, but we've closed that off.

Hon. Navdeep Bains: Okay.

The Chair: So the motion by Mr. Bains is that the committee sit in camera to hear Mr. Walsh first and then go on to Madame Bernier and Mr. Walsh.

(Motion negatived)

The Chair: All right. We're not going to have Mr. Walsh first.

Do I have...?

Mr. David Christopherson: Another motion?

The Chair: Yes.

Go ahead, Mr. Christopherson.

Mr. David Christopherson: I move that we hear the deputy privacy commissioner in public, and when we've exhausted that discussion, we then take a motion to move into...

No, I'll put it in this motion: we then go into camera to hear and have questions with Mr. Walsh.

The Chair: Those in favour of that motion?

(Motion agreed to [See *Minutes of Proceedings*])

Mr. Bev Shipley (Lambton—Kent—Middlesex, CPC): Mr. Chair, I can't ask Mr. Walsh any general questions?

The Chair: Well, you're going to leave that up to me right now.

An hon. member: No, it's public—

The Chair: Just a moment, Mr. Kramp.

The idea here is to make sure that we have a fulsome discussion. Everybody has expressed a desire to have Madame Bernier here to answer questions publicly.

I'm going to ask those on my list to address their questions to Madame Bernier first, so that we can then proceed to the second part.

[*Translation*]

Ms. Faille, you have the floor.

Ms. Meili Faille: I am going to try to answer a number of Mr. Kramp's concerns. I have checked the official procedure for in-camera meetings. If there were unanimous consent or a majority decision to have the comments made by Mr. Walsh in camera made public, this could be achieved through a motion to the Committee requesting this.

This information should answer the concern raised. If, after the in camera session, we deem Mr. Walsh's testimony to be in the public interest, the Committee may decide to make that portion of the in-camera session part of the public hearing.

[*English*]

The Chair: Well, I think we can have that decision afterwards, Madame Faille. In the interests of carrying on with the debate, let's go on.

Those who have questions—

Mr. Andrew Saxton: Mr. Chair, I have a quick intervention that I'd like to make. I've been trying to get your attention for some time.

The Chair: For the last 10 seconds.

Mr. Andrew Saxton: Perhaps we could proceed as follows: in the open session with Madame Bernier, we may also address a question to Mr. Walsh, and Mr. Walsh is the person who decides whether or not he thinks that is something he can answer in camera or out of camera. Perhaps it should be Mr. Walsh who makes that decision.

The Chair: Mr. Saxton, thank you very much for your intervention.

I think I'm going to go immediately now to the speakers list.

Mr. Bains, you begin.

I'm going to try to keep this speakers list to a series of very brief questions, so each round will be three minutes, please.

Hon. Navdeep Bains: Okay. I will be very brief, because I'm trying to share my time with my colleague.

The Chair: Madame Bernier is the subject of our conversation.

Hon. Navdeep Bains: Absolutely.

According to the presentation that you made this afternoon, you said that the public interest needs to be served, and particularly when we're looking at privacy issues. In light of the fact that this committee has a mandate to examine the Auditor General's report in trying to find all the appropriate information, is the public interest being served from the work the committee's trying to do?

• (1620)

Ms. Chantal Bernier: The definition of public interest of course rests with the committee. There are parameters that should guide us. Those parameters include, for example, the consideration of harm to a person, the consideration of health and safety, and so on. There are parameters put in place.

What is most important to recall is that the public interest, in the case of an invasion of privacy, must clearly outweigh that invasion. That is within the discretion of the committee to assess.

Hon. Navdeep Bains: The second question I had was with regard to your own comments here. With respect to the goodwill that's been demonstrated by this committee and others, you note that in the work done by this committee on December 14, requesting information about 228 disclosures of wrongdoing, members did not seek the names of the individuals.

In your opinion, we have demonstrated good judgment and goodwill in the past, correct?

Ms. Chantal Bernier: Yes. We applaud that decision.

Hon. Navdeep Bains: So we more or less have defined those parameters, we've exercised those parameters, and we've demonstrated that good judgment in the past.

Ms. Chantal Bernier: That is certainly the conclusion we draw from that decision.

Hon. Navdeep Bains: Thank you very much.

The Chair: Mr. D'Amours, you still have a minute and a half.

[*Translation*]

Mr. Jean-Claude D'Amours: My first question is for Ms. Bernier. I may develop this theme further in later rounds. I would like to start with a comment. Perhaps the Assistant Commissioner could help me out here.

If we look at page 2, second last paragraph. Perhaps I missed it but I think you might have forgotten to read this paragraph when you switched from French to English. You skipped directly to the following paragraph, which begins with "Privacy..."

[*English*]

"Privacy does more than protect the individual."

[*Translation*]

The paragraph you omitted begins:

In relation to section 8(2)(c), we recognize Parliament's authority to compel the production of documents that may contain personal information...

I may be mistaken but I do not think that we have addressed this paragraph.

Ms. Chantal Bernier: Indeed, I wonder whether the copy I made my presentation from is the same as the one distributed to Members.

Mr. Jean-Claude D'Amours: Mister Chair, if Ms. Bernier cannot find the text I referred to, she can answer my question in the next round. That would be quite acceptable.

Mrs. Nathalie Daigle (Acting Senior Counsel, Office of the Privacy Commissioner of Canada): That is right.

Ms. Chantal Bernier: There is a paragraph missing in my copy. My apologies. I would imagine this happened during the merging of the French and English passages. I will refer to the copy you have. The paragraph that begins: "In relation to section 8(2)(c), we recognize Parliament's authority ..." is crucial. Thank you for pointing that out.

In fact, I believe we have distributed a letter we sent on August 9, 2010 to the Member at the time, Mr. Murphy, in which we specifically recognize that Parliament has the authority to demand the production of documents and files. This letter also recognizes that the Privacy Act allows for the disclosure of personal information to Committees.

The Chair: Thank you, Ms. Bernier.

Ms. Faille, you have the floor.

Ms. Meili Faille: My question is for the Assistant Privacy Commissioner. Earlier, you referred to a motion tabled by this Committee asking the Privy Council Office and Treasury Board Secretariat among others to provide us with the information reported by Ms. Ouimet. Could you help us here?

Why would the Public Sector Integrity Commissioner report wrongdoing in her correspondence with the Privy Council Office or Treasury Board? More specifically, why would specific public servant whistle-blowers be named in this correspondence?

Normally, the correspondence we have requested be produced should not contain this information. I suppose I am asking you for your assurance that this type of problem will not arise in documents provided to the committee. Normally, any specific names contained in correspondence between Government institutions should be blacked out by the Public Sector Integrity Commissioner of Canada. If any names slip through it means that the Office has failed to do its job properly. I hope that you are confident about the documents that are to be submitted to us. If all the names have been blacked out then the Commission will have met its legal obligations.

I have a question of a more specific nature I would like to ask you. Earlier, Mr. Walsh mentioned an unfortunate incident in 2003 involving your Office. Unfortunately, it was not dealt with through the available Parliamentary process. You are here today with your legal counsel.

How would you have managed that situation? We are facing a similar set of circumstances with Commissioner Ouimet. If you had been summoned to appear before the Committee, what would you have done? Which organizations would you have approached?

• (1625)

Ms. Chantal Bernier: Thank God, I was not at the Office at the time. Consequently, I do not really know what took place, apart from, like you, what I read in the press. It would be totally inappropriate to make a judgment on issues that I am not at all familiar with.

Ms. Meili Faille: Nevertheless, these types of situation do arise. It might be worth giving it some thought just in case it happens again. Of course, it is to be hoped that it does not.

Thank you.

The Chair: Thank you, Ms. Faille.

Mr. Christopherson, you now have the floor.

[English]

Mr. David Christopherson: Thanks, Chair.

Thank you very much. That was a very concise, clear, understandable presentation. I appreciate it.

I'd like just a little clarification on the fourth-last paragraph. I think I know what it means, but I'd like to bump that up to I *know* what it means. It says:

Section 22.2 of the Privacy Act, which was added as a result of the creation of PSIC, states that the Public Sector Integrity Commissioner shall refuse to disclose personal information requested under subsection 12(1) of the Privacy Act (access requests) that was created in the course of an investigation. This is a even higher threshold than our own investigations at the OPC.

Can you just expand on that a little for me. Exactly what does that mean?

Ms. Chantal Bernier: Absolutely. If you indeed look at the act—I'm going to ask my colleague to give me her assistance—you see that our own investigations are confidential. It says clearly that they are confidential. And yet there is a second paragraph in relation to our investigations that reads:

However, the Commissioner shall not refuse under subsection (1) to disclose any personal information that was created by the Commissioner or on the Commissioner's behalf in the course of an investigation conducted by, or under

the authority of, the Commissioner once the investigation and all related proceedings, if any, are finally concluded.

So we have that exception that at the end we can indeed reveal the investigations. In fact, if you look at our annual report on the Privacy Act, you will see a description of salient investigations.

If you compare that to the provision relative to the Public Sector Integrity Commissioner, you will notice that there is no such exception that the investigation can become public once it is concluded. That's what we mean by saying that they have an even higher threshold of confidentiality than our own investigations.

Mr. David Christopherson: Bear with me: so this is speaking to any information that you acquire or accumulate as a result of an investigation; that is in a separate category from other information.

Is that right? Is that what you're saying—the fact that it was found in the course of the investigation?

Ms. Chantal Bernier: Yes, that is how the provision is written.

Mr. David Christopherson: Okay.

Ms. Chantal Bernier: Essentially everything that we gather to—

Mr. David Christopherson: Why would that be? Can you help me understand? What's the rationale behind that?

Ms. Chantal Bernier: Well, because there is sensitive personal information, it by nature—

Mr. David Christopherson: Yes, but I'm assuming there's personal information all around a given file. This is particular information that's found during the course of an investigation. So if you find reference to a letter and material, that could be captured by privacy if there's personal information. If you go and get a copy of that letter or a subsequent follow-up letter to it, because it was found in an investigation as opposed to already being there when you started, that differential alone means it's treated differently...?

I'm just trying to understand why. They're both private information.

• (1630)

The Chair: Madame Bernier, you're going to have to answer that when you get a chance, okay?

Ms. Chantal Bernier: Well, the—

The Chair: No, I'm sorry, you'll have to hold onto that—unless my colleagues on this side want to give up some of their time to have you answer it.

Mr. Saxton.

Mr. Andrew Saxton: Thank you.

My questions are for Madame Bernier.

In your opening remarks, in the second to last paragraph, you state:

...information (and not only personal information) should only be disclosed when it is "required" by law, and not only "authorized" by law.

And then in the following paragraph, you go on to state as follows:

...we also believe it is possible that the personal information requested should be limited to what is necessary to keep public servants accountable without jeopardizing the intent of the Public Servants Disclosure Protection Act.

Well, in your opinion, who should be making those decisions? Obviously some of them are subjective.

Ms. Chantal Bernier: The committee should. As I was saying earlier, it is at the committee's discretion to assess, to ponder public interest and how far is necessary to go to fulfill your legitimate objectives.

Mr. Andrew Saxton: Okay. Thank you.

Next, what is Parliament's obligation, if any, to ensure the privacy of individuals whose information may be disclosed as a result of a blanket request for papers and records? What is Parliament's obligation?

Ms. Chantal Bernier: It's to respect the intent of the law. When we look at the legislation that created the office of the integrity commissioner, we see this very high threshold of confidentiality precisely to allow the disclosure, precisely to ensure that people will come forward with allegations as they occur, with the lacks of integrity that they observe.

So protecting that is systemic, is to ensure that the whole system, the whole regime that has been set up, is indeed robust and sound.

Mr. Andrew Saxton: What are the legal obligations of Parliament, then, in handling that confidential information?

Ms. Chantal Bernier: The general legal principles are that privacy should not be invaded beyond what is strictly necessary in relation to a legitimate objective in a manner that is proportionate to that objective. Those are the considerations that we feel should guide the decisions of this committee, as any other public institution.

Mr. Andrew Saxton: Okay.

I'd just like to read another quote from an opening statement that says, and I quote:

As the witness has not been served with a summons, a finding of contempt of Parliament would seem premature at this time....

To either witness, do you feel there is some other course of action that the committee could take prior to that?

The Chair: You have 20 seconds.

Mr. Rob Walsh: That statement was with reference to the option of seeking a finding of contempt of Parliament in particular. Now, the committee could well report to the House and propose that other actions relative to a breach of privilege be taken, short of contempt of Parliament, or that the finding of contempt of Parliament be conditional on the individual taking certain steps—in which case, if those steps were taken, they'd be purged.

The Chair: Thank you, Mr. Walsh and Mr. Saxton.

Mr. D'Amours.

[*Translation*]

Mr. Jean-Claude D'Amours: Thank you, Mister Chair.

Ms. Bernier, my question builds on Ms. Faille's earlier comment. I would like a yes or no answer to a pretty straight forward question.

In principle, should the Public Sector Integrity Commission and the Privy Council Officer exchange the names of those public servants who have complained to the Integrity Commission?

Ms. Faille stated that there should be no problem. However, this has raised a question in my mind. The Commission's goal is not to protect federal whistle-blowers. Consequently, should we not expect to see the names of specific public servants in the documents that we have subpoenaed from the Privy Council Office?

• (1635)

Ms. Chantal Bernier: In principle, no.

Mr. Jean-Claude D'Amours: That being the case, what would be the consequences of names being blacked out just before the documents are handed over to us? I am sure we could obtain the procedures in place for this type of situation.

Ms. Chantal Bernier: Before thinking about consequences, it would be appropriate to determine whether disclosure was authorized and legitimate. As I said earlier, there are exceptions to the non-disclosure requirement. Consequently, the first step would be to determine whether any exceptions applied. If there were none, this would constitute a breach of the Privacy Act.

Mr. Jean-Claude D'Amours: You mentioned the Privy Council Office but it would also apply to any other requests. We are being told that the quantity of documents makes it impossible to provide them and that there is so little contact between Privy Council Office and the Office of the Privacy Commissioner that we should not expect much information. However, according to reports, there are so many documents that it appears there was a huge volume of correspondence between the two.

I understand if you do not feel it appropriate to comment on what I have just said.

The Chair: Please finish your question so that the witness may answer.

Mr. Jean-Claude D'Amours: This is unacceptable. Could you address the consequences?

Ms. Chantal Bernier: In the case of unjustified disclosure, those persons whose personal information has been disclosed could complain to the Commissioner and we would investigate.

The Chair: Thank you.

Mister Kramp, you have the floor.

[*English*]

Mr. Daryl Kramp: Thank you, Chair.

To Madame Bernier, I'm concerned with not just now; I'm concerned also with the future. I'm concerned about the perception, about a potential cooling that might be in force among people who thought they had an absolute level of protection.

We've heard—from Mr. Walsh, and through previous letters, and from you—that there might be some circumstances, under the purview of a committee decision, to override that disclosure, to basically say that obviously the common good dictates, which means the absolute level of protection is not there.

Is there a fear that this perception might keep a number of people away in the future from being a whistle-blower, from coming forward, knowing that any disclosure that they do sign is not absolute? There is no complete protection. People beyond the signature of that document can arbitrarily, for valid reasons, change that.

Ms. Chantal Bernier: I will not pronounce on what was the intent of that legislation, since this is not the legislation that we administer. But I don't think we even need to go that far. I think any violation of the right to privacy is consequential. It erodes a sense of trust in government in general.

So even strictly on the basis of the Privacy Act, we would have concerns in any disclosure that would not be compliant with the Privacy Act.

Mr. Daryl Kramp: Okay. Thank you.

To Mr. Walsh, Standing Order 108 is not codified, and I'm concerned. Could either a misuse by committee or a mistake in invoking the standing order have the potential to become a precedent for future Houses or the public to rely on?

In other words, whatever we're doing here with this entire process, does the fact that it's not codified in Parliament have the potential for becoming de facto case law?

Mr. Rob Walsh: Mr. Chair, the issue of precedent primarily arises in terms of House business in relation to rulings by the Speaker. It is always an argument that something happened a certain way once upon a time and that should be taken as a precedent, but that's a matter of debate.

To my knowledge, there is no binding rule about precedent based on a particular practice or action taken by a committee or a House at one point that binds a subsequent House, or the same committee at a subsequent time, in looking at a similar situation. They might or might not choose to follow the previous actions.

• (1640)

Mr. Daryl Kramp: So you can allay potential fears I have that any action we do here will not prejudice another decision down the road.

Mr. Rob Walsh: One way of putting it is that subsequent committees are at liberty to take corrective action.

Mr. Daryl Kramp: Good point.

Thank you.

[Translation]

The Chair: Ms. Faillie, it is your turn.

Ms. Meili Faillie: I have one last question for the Assistant Privacy Commissioner. The Auditor General reported that, in her opinion, the Commissioner had breached the Privacy Act. What action did you take? Did you investigate these infringements?

My motion does not list you as one of the people from which we have requested correspondence. However, I do not think that any of us here had considered asking you to testify on this issue. Did you take action? Did you investigate the allegations?

Ms. Chantal Bernier: We have not received any complaints with regard to the Auditor General's allegations. Were we to receive complaints, we would of course investigate.

Ms. Meili Faillie: Did the Auditor General's report not ring an alarm bell? Do you not think that you should perhaps conduct an investigation?

Ms. Chantal Bernier: Of course, it was very concerning. However, we feel that the Auditor General's was sufficiently comprehensive as to have resolved the issue. Consequently, we do not consider that it would be a good use of taxpayer money to undertake another investigation in addition to the Auditor General's already very robust enquiry.

Ms. Meili Faillie: You will, therefore, not be taking steps against Ms. Ouimet?

Ms. Chantal Bernier: No.

Ms. Meili Faillie: That leads me to my questions for Mr. Walsh. I am currently following ten or so cases before the Federal and Superior Court. It seems to me that there are times when witnesses are not available and courts do not rule them in contempt.

Mister Walsh, I was wondering whether it would be possible to research the issue, perhaps with Justice Canada, to ascertain whether compelling Ms. Ouimet to appear before the Committee – or even deciding to move up the date of her appearance – could end up compromising the Government's strategy if she has already been subpoenaed to testify in a different Crown case.

I do not know whether you see what I am getting at.

The Chair: Please, keep your answer to no more than 30 seconds.

Mr. Rob Walsh: I think I understand the crux of your question. Testimony to a Committee could indeed undermine a witness involved in a court case. In principle, testimony before a Committee is not available to be used in court proceedings.

By the same token, witness' counsel would be concerned that a witness might say something before the Committee that could be used by someone else ...

Ms. Meili Faillie: Do we know...

The Chair: Ms. Faillie, I am sorry but your time is up. Mr. Shipley, you have the floor.

[English]

Mr. Bev Shipley: Thank you.

Mr. Walsh, what is Parliament's obligation? When we've asked for blanket information and requests of papers and records, what is Parliament's obligation to ensure the privacy of the individuals whose information may be disclosed?

Secondly, Mr. Walsh, when a committee deals with that sensitive information—as this committee will, if it happens—and it's obtained under the Privacy Act, how have they proceeded in the past? I don't know if you can answer that or not. I think we've always got to be concerned; we talked about our legal obligations. What do we have to be mindful of?

To Madame Bernier, the committee has asked for sensitive documents. How do you think they should be distributed? Is there a better way? Should there be a hard copy? Who keeps track of those copies? Do we get them only when the committee is in session? Can they go through an e-mail process in which we receive most of our information, it seems? Or is it something that we should only receive here, we view it, and at the end of the day, when everybody leaves, we hand it back?

Those are just some thoughts, but for those three questions I'd appreciate answers.

● (1645)

The Chair: Excuse me, but there's a series of questions there, some of them directed to Mr. Walsh. As per our discussion earlier on, about responses that relate to advice that we might get from our counsel, we'd refer it to the in camera session.

So Mr. Walsh, I'm affording to you the opportunity to say you'd prefer to answer that later. And if you do exercise that option, then I'll go immediately to Madame Bernier to answer the questions that Mr. Shipley asked of her.

Mr. Rob Walsh: Thank you, Mr. Chairman.

I think the question is of a general nature, and I'm quite comfortable answering it, hopefully adequately for the member's purposes.

Let me first say that I am in virtually 100% agreement with Madame Bernier regarding the position of this committee relative to the Privacy Act.

First, the Privacy Act itself does not apply to the business of this committee in a legal, direct sense. But she has articulated, and I don't need to repeat it now, the general public interest principles that apply certainly in her domain and relative to the Privacy Act, the foremost principle being the public interest.

Now, this committee, as a parliamentary committee, of course serves the public interest, but it serves the public interest for a different purpose, as opposed to the Privacy Commissioner, who serves the public interest for the purposes of the Privacy Act. This committee has a larger public interest, and that's why committees are not governed by statutes directly. They, in my view, ought to be mindful of the public interest and they ought to exercise their discretion in a manner that's as much as possible consistent with the public interest. But what that public interest is in a particular case, what action the committee should take in a particular case, is purely for the committee to determine; it's subject to any counter rule from the House, of course, but it's for the committee to take.

There's no legal obligation in the usual sense upon this committee. There's no way anyone can go to a court and get a court order telling the committee it can't do something. The committee has full discretion to exercise its powers as it sees fit.

But I would agree with Madame Bernier that there is, in my view, for all committees and all business of committees, the constitutional obligation, if you like, but more of a moral obligation, to respect and serve the public interest by what you do. I would argue that personal privacy has become a well-established value in our society. Insofar as all of us hope that all public authorities and institutions, including

committees, respect the rule of law, the rule of law is premised on some values, and one value is privacy. I would hope that every committee that may see themselves looking for information of a personal nature would pause and reflect on whether they must have that information or whether, in fact, they can serve their purposes without causing the personal information to be disclosed. But it's the committee's call in every case.

The Chair: Thank you, Mr. Walsh.

Madame Bernier, I'll try to give you a chance to answer some of these questions a little later, but I have to go to Mr. Christopherson.

Mr. Christopherson, I had to cut off your last session at Madame Bernier's potential response. You can proceed from there.

Mr. David Christopherson: Thanks, Chair.

Perhaps she can recall the question back then; I was asking her to just help me understand the difference between private information, that was there when the file started, versus privacy information that became apparent after the file was opened.

Once you've answered that, please feel free to use the rest of my time to answer other questions that have been put to you.

Ms. Chantal Bernier: Thank you.

Let me explain the investigation process, then. We receive a complaint. There is hardly any information at the start. The complainant will say, for example, "I fear that my personal information has been unduly disclosed" and will give us some evidence that they think.... For example, they could have been told that someone has received a letter containing personal information about them from someone else. We could have an inmate, for example, who would have received an inmate's report of someone else, and therefore would come to our office and say that they have this information that makes them believe there was a breach of their privacy.

Therefore, we start with that. We have investigators who will interview people and who will gather information through these interviews and thus constitute a file, then do an investigator's report with a recommendation of finding, which therefore concludes with a finding for me to sign.

So the issue of the information that is there, whether it is related to the investigation or not, doesn't really arise, because all the information is truly gathered exclusively in the process of conducting the investigation.

● (1650)

Mr. David Christopherson: Thank you.

The Chair: Mr. Christopherson, you still have a minute and 10 seconds.

Is it still your wish to share that time?

Mr. David Christopherson: Yes, I could share.

If you want to use my time to answer the questions, I'm fine with that.

Ms. Chantal Bernier: Well, there was a question as to how the information could be secured. Indeed, there are many ways. For example...I mean, they are well known, but simply to recall: using paper, using sealed envelopes, and using a very limited number of copies and numbered copies so that there is a tracking system. The usual safeguards that apply to secure information, Mr. Chair, would therefore apply here.

The Chair: Thank you very much, Madame Bernier.

Mr. Young.

Mr. Terence Young: Thank you, Mr. Chair.

My first question is for Mr. Walsh.

Thank you for being here today.

Mr. Walsh, can you imagine any way that Parliament should make an affirmation of contempt against a person who has never legally been served a summons under these conditions?

Mr. Rob Walsh: Mr. Chairman, it's a hypothetical question, of course, but it has some relevance to the facts, as I understand them, before this committee. It is difficult, in my view, speaking as a lawyer who is accustomed to the process in the courts. That's not determinative of the issue by any means; I don't mean to say that the courts are your model, but it is out there, and the public expectation is somewhat informed by the usual practice in the courts.

It is usually the case that you don't take action against someone without having given them notice of your intention to do so. My real view on that is that this committee puts itself at risk of appearing to not respect that rule if it were to take serious action against the individual here without giving formal notice to the individual of its requirement that she appear in front of this committee.

Mr. Terence Young: Thank you.

In your view, how would such an action encroach upon the individual's constitutional rights?

Mr. Rob Walsh: I don't believe it's a matter of constitutional rights as such. If you're thinking about the charter, the charter does not apply to the House proceedings and committee proceedings as such.

Mr. Terence Young: I'm thinking more of natural justice.

Mr. Rob Walsh: All right. In terms of natural justice, that really is a principle that might apply to what I just said. It's a sense of natural justice that you don't do something against someone—against the person of someone, certainly—by going out to arrest them or apprehending them without having afforded them an opportunity to get notice that they were required to do something, failing which they may be arrested. That's all I'm saying.

If that were in the repertoire of the committee and the House to take action against her of that kind, I would think that natural justice would require that she be personally notified that the committee expects her to be here and that failure to attend could have that result.

Mr. Terence Young: Thank you.

My next question is for Madame Bernier.

How important do you believe privacy is to the efficacy of the Public Servants Disclosure Protection Act?

Ms. Chantal Bernier: I think the wording of section 44 of the disclosure act shows that it is crucial to its functionality. Without that confidentiality, clearly Parliament believed that the regime would not be able to function.

Mr. Terence Young: Based on your experience, how often would public servants who feel conflicted in their jobs report the source of that conflict if they believed their name might become public unrelated to that report—

The Chair: You're going to have to try to answer that a little later.

Mr. Bains and Mr. D'Amours, I understand you're splitting your time.

Hon. Navdeep Bains: Correct. Thank you very much, Chair.

Mr. Walsh, you clearly indicated that you will do your best to answer questions that you think are of a general nature. If you are able to answer these, that would be greatly appreciated; if not, hopefully you can do so in camera.

First, I just want to get a clarification on the point you made a few times with respect to the service of a summons. You're saying that it's not an issue of enforcement but an issue of delivery: namely, did the person actually receive it.

In your opinion and from your position, does the fact that we have Ms. Ouimet dealing with her lawyer, through the chair, indicate that she has been served? Clearly, from my point of view, the fact that she is acknowledging that she needs to come to committee indicates the fact that there's recognition on her part, or an understanding on her part, that she's been requested to do so.

Obviously I can outline the various attempts we've made, but in your opinion, in light of the fact that she's dealing with her lawyer, through the chair, has she been served?

• (1655)

Mr. Rob Walsh: The service could be effected upon her through her lawyer. If her lawyer has instructions from her to accept service on her behalf, then delivery of the summons to her could well be taken—again, in the usual practice, from the context of the courts—as service upon her. But he would have to have instructions from her to authorize him to accept service for her for that to be the case.

Hon. Navdeep Bains: Okay. I'll come back to that point.

My second question is with respect to the point you made about the fact that this committee has an obligation to do everything in its power to give the person the opportunity to be served or to be given notification. If the person is being evasive, then we have to look at other steps.

We've been dealing with this issue since the Auditor General reported on December 9 with a scathing report about Ms. Ouimet's conduct and her office's conduct. We've had numerous committee meetings. We've called her house a few times. We've sent letters. We've asked her to be summonsed.

In your opinion, do you think she's being evasive?

Mr. Rob Walsh: Well—

Hon. Navdeep Bains: If it's not appropriate, we can do this in camera.

Mr. Rob Walsh: —in other contexts, as you know, there's a difference between avoidance and evasion, a very significant difference. I don't know, in this case, whether it's proper to characterize the facts as being...one of avoidance or evasion. All I can say is that it is the committee's call as to how it wants to characterize the facts so far.

You used the word “obligation”. There is no obligation on this committee, in my view, of a legal nature requiring it to wait for the formal step of a service of summons to be effected upon her. I'm just saying that's the usual expectation that would happen.

There would be the risk of a negative public perception of the committee if you were to proceed in disregard of that—or in disregard, in the case of privacy, of the principles articulated by Madame Bernier. It's all a matter of how well the proceedings of this committee are perceived and whether the committee continues to enjoy the respect of Canadians generally by the way it carries on its proceedings. That's what I'm talking about.

You can use the word obligation if you like, but it's obligation in that context, not in the sense of a legal obligation. It's your call as to whether you think more steps have to be taken or whether you think enough is enough and you're going forward. Then, later, it will be the House's call as to whether it agrees with you on that.

The Chair: Thank you, Mr. Walsh and Mr. Bains.

Mr. Dreeshen.

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

In your testimony, Ms. Bernier, you were speaking about the Public Servants Disclosure Protection Act. I just wanted some clarification on one part, where you said—in reference to section 44—that information should only be disclosed when it's required by law and not when it's authorized by law.

I'd like to know what you meant by that.

Ms. Chantal Bernier: Well, there is a different threshold: “authorized” by law gives more latitude; “required” by law shows that there is absolutely no discretion to disclose.

Mr. Earl Dreeshen: Thank you.

If disclosures are made, then, with the assumption that only the public sector integrity office would be privy to that information, would any of the people who would have made a disclosure have any right to legal action against PSIC, or Parliament, for releasing the information?

Ms. Chantal Bernier: I'm actually not sufficiently familiar with the disclosure act to be able to tell you what consequences there could be. I don't know if my colleague is familiar with it.

We administer the Privacy Act and, as you know, the private sector privacy act as well, so I can really only speak expertly to those

two acts, not to the disclosure act. The only reason I mentioned it is that it's an interesting contrast in terms of the thresholds of confidentiality.

Mr. Earl Dreeshen: Okay.

Nathalie, did you have something?

Mrs. Nathalie Daigle: A complaint could be made to the Privacy Commissioner, though, if there was a disclosure that was made possibly against...if personal information was disclosed contrary to the Privacy Act. So the commissioner could always investigate such a complaint.

Mr. Earl Dreeshen: Okay. Thank you.

You were just about to finish off answering Mr. Young's question that he had asked earlier. Did you have any further comments with regard to his question?

● (1700)

Ms. Chantal Bernier: We have absolutely no information as to how much it would inhibit disclosure or not. We really are not privy to any such study or analysis on that. We have no statistics on that at all.

Mr. Terence Young: May I make a comment, Chair?

The Chair: Yes, you may.

Mr. Terence Young: This is what I was asking: in your view, if a public servant were conflicted and were considering reporting the conflict in the interest of the government and in the interest of Canada, and they thought their name might appear and become public in some unrelated manner, how likely would they be to make that report—in your view?

Ms. Chantal Bernier: Then I repeat what I said earlier on, that clearly that was Parliament's concern and that is why they have put the threshold of confidentiality so high.

The Chair: Thank you, Madame Bernier.

Merci à tous les collègues.

I'm going to now clear the room to go in camera.

The law clerk and his staff can stay behind, but only the law clerk and his staff—along with, of course, members, and one staff apiece.

I want to thank Madame Bernier, Madame Daigle, and all their staff for the time they made available.

[*Translation*]

Ms. Chantal Bernier: Thank You.

[*English*]

The Chair: Thank you.

[*Proceedings continue in camera*]

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