



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Procedure and House Affairs

PROC • NUMBER 046 • 1st SESSION • 41st PARLIAMENT

EVIDENCE

Tuesday, October 16, 2012

—
Chair

Mr. Joe Preston

Standing Committee on Procedure and House Affairs

Tuesday, October 16, 2012

•(1105)

[English]

The Chair (Mr. Joe Preston (Elgin—Middlesex—London, CPC)): We will call our meeting to order. We are in public this morning.

I would like to discuss some committee business at the end of our meeting today. We will set aside some time to talk about where we're going further on this review of the standing order on access to information requests and parliamentary privilege. We also want to talk about our witness lists for the study of Bill C-21 and how we're planning our time for that.

Perhaps we could leave a little bit of time for that, and for a couple of budgetary requests, too, at the end of the meeting.

Monsieur Bosc, Monsieur Denis, it's good to have you both here today. Hopefully you can help us with this. The Speaker has referred this issue to us. We're looking to you for a little knowledge this morning.

Monsieur Bosc, will you be going first?

Mr. Marc Bosc (Deputy Clerk of the House of Commons, House of Commons): I will.

The Chair: Great. Let's get started.

Mr. Marc Bosc: I do have a statement to make, which I think has been distributed.

The Chair: Pardon me, Mr. Toone?

Mr. Philip Toone (Gaspésie—Îles-de-la-Madeleine, NDP): [Inaudible—Editor]

Voices: Oh, oh!

The Chair: Perhaps Mr. Toone has not gotten the notice about crossing the floor.

Voices: Oh, oh!

The Chair: Let's see if we can fix that right now. It's a far-sighted thing; you can see your name better if it's across the way.

Sorry, Monsieur Bosc. Please go ahead.

[Translation]

Mr. Marc Bosc: On behalf of the Clerk of the House, Audrey O'Brien, who is unable to be here, I would like to thank the committee for inviting me to appear today regarding parliamentary privilege and access to information requests made to other parties. I am accompanied by Richard Denis, Deputy Law Clerk and Parliamentary Counsel.

[English]

Our purpose in appearing before you is to review some of the basic concepts of parliamentary privilege, with a particular emphasis on what has traditionally been considered to constitute a “proceeding in Parliament”, the key concept of interest in the matter before the committee.

I would also like to outline a series of broad considerations that the committee may wish to take into account in pursuing its study.

Let me begin by returning to the statement made by the Speaker to the House on September 17, after the House, by unanimous consent, had passed a motion to waive its privileges in a particular access to information case. He described the facts of the case and the series of events that have led us here this morning.

Let me turn first to the outline of certain fundamental tenets of parliamentary privilege.

The Speaker states at page 10005 of *Debates*:

[Translation]

The privileges, powers and immunities of the House of Commons [...] include freedom of speech and debate as set out, among other places, in article 7 of the Bill of Rights, 1689, which provides that:

The freedom of speech and debates of proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

[English]

As Erskine May's 24th edition, at page 227, states:

—underlying the Bill of Rights is the privilege of both Houses to the exclusive cognizance of their own proceedings. Both Houses retain the right to be sole judge of the lawfulness of their own proceedings and to settle—or depart from—their own codes of procedure.

House of Commons Procedure and Practice, at pages 91 and 92, explains that proceedings in Parliament include the giving of evidence before the House of Commons or its committees; the presentation of a document to either the House of Commons or its committees; the preparation of a document for purposes of or incidental to the transacting of any such business; and the formulation, making or publication of a document, including a report, by or pursuant to an order of the House. This has been seen to extend to all evidence, submissions and preparation for the participation by all persons participating in the proceedings of the House of Commons or its committees, all of which are protected by all the privileges and immunities of the House.

[Translation]

Writing of parliamentary privilege and what constitutes proceedings in Parliament, Joseph Maingot's *Parliamentary Privilege in Canada*, second edition, at page 80 states:

[English]

Privilege of Parliament is founded on necessity, and is...those rights that are "absolutely necessary for the due execution of its powers." Arguably, necessity should be a basis for any claim that an event was part of a "proceeding in Parliament," i.e. what is claimed to be part of a "proceeding in Parliament" and thus protected should be necessarily incidental to a "proceeding in Parliament."

[Translation]

Maingot goes on to emphasize that:

As a technical parliamentary term, "proceedings" are the events and the steps leading up to some formal action, including a decision, taken by the House in its collective capacity. All of those steps and events, the whole process by which the House reaches a decision (the principal part of which is called debate), are "proceedings".

[English]

As members of the committee are aware, although House of Commons committees are not subject to the Access to Information Act, they are sometimes given third party notice under section 27 of the act in relation to access to information requests made of government departments or other agencies that are subject to the provisions of the act. What has traditionally happened is that the department or agency is informed that the information in question, because it forms part of a parliamentary proceeding, is protected by parliamentary privilege and thus should not be released by them under the act. That is where the matter usually ends.

What the House did in adopting its resolution on September 17, 2012, was to agree to withdraw its objection to the release of information in one case. In other words, the House chose not to invoke its privileges in this instance. Speaker Scheer reminded members:

—this decision applies only to this case at hand and it is not precedent setting. The House's rights and privileges have not been jeopardized by the House's resolution, nor has the House ceded any of its traditional rights or privileges, particularly as they relate to parliamentary committees.

[Translation]

The Speaker's statement confirms that the resolution does nothing to diminish the scope of its privileges, as the House understands them, in similar cases that may arise in the future but, as well, that the privileges and immunities of the House of Commons must be affirmed and protected. The House remains free and unfettered to exercise its privilege to insist that certain documents and communications not be disclosed or published by another party.

• (1110)

[English]

However, as the Speaker indicated, House committees and their officials will most likely continue to be confronted with this kind of third party request. At the same time, we know that only the House can decide whether it will not insist on its privileges or whether it will enforce them. Accordingly, one way to examine the issue before you is to ask: Is there a different, simpler way for parliamentarians, particularly those sitting on committees, to consider such third party requests?

I need to point out that we are referring here only to documents that are requested of departments and agencies, where these departments and agencies have the documents in their possession. We are not talking about the full range of committee documents.

I said earlier that House administration officials have regularly responded to such requests, first by determining if the material requested was part of a parliamentary proceeding, and if so, explaining that the material was covered by parliamentary privilege and could not be released. This was widely accepted by departments and agencies and posed no difficulties. I need to stress that the material requested in many of these cases was already publicly available, so it is not confidentiality that is the concern, it is the privileged nature of the proceedings.

Should the committee want to modify what has been the traditional approach, it may want to recommend a process that would allow expeditious handling of ATIP requests of this nature. However, I would caution the committee to remain mindful of the potential risks to House committees with respect to such access to information requests.

[Translation]

Let me outline a few potential areas of concern.

First, regarding confidential procedural advice, correspondence between the committee clerk and the chair, parliamentary secretary, committee members or departmental officials could reveal the content of procedural advice regarding the discussions or negotiations relating to the admissibility or the disposal of a motion or amendment to a bill.

[English]

Second would be witnesses. Correspondence between the committee clerk and the chair, the parliamentary secretary, department officials, or the witness could reveal the content of discussions on plans, questions, intentions or decisions of the committee regarding the selection of witnesses.

Correspondence containing various iterations of a witness's speaking notes, brief or documentation before his or her appearance before a committee could cause harm to his or her reputation or reveal information that would otherwise have remained private. Witnesses could be reluctant to share this information ahead of time if there was a fear that it could become public later on.

[Translation]

Third, regarding privacy issues, correspondence between the committee clerk and a witness who refuses to or cannot appear—for example, for health reasons—and gives the reason in the said correspondence could reveal personal information about the witness.

[English]

Fourth would be the disclosure of elements of a committee report. Correspondence between the committee clerk and/or the chair with a witness regarding the content or potential recommendations of a report could reveal elements of the report that were considered but not adopted by the committee or discussed during an in camera meeting.

[*Translation*]

Fifth, regarding committee decisions and plans, decisions that are made by the committee during an in camera meeting or that do not appear in the minutes of the committee meeting could be traced through correspondence—for instance, emails between department officials, the parliamentary secretary and the committee clerk before or after the meeting.

Correspondence between departmental officials and the committee clerk could reveal sensitive information regarding a committee's travel plans, subjects it is studying or matters it is interested in pursuing. In certain cases, this could involve issues dealing with national security or compromise the security of members—for example, travel to a military base in Afghanistan.

[*English*]

These are very general concerns that I am putting before you. They are not insurmountable and I'm confident that substantive discussions among members of this committee could lead to helpful recommendations on a proposed course of action.

I will close by suggesting to the committee that any proposed approach to deal with this issue should include, as an underlying principle, the protection of the privileges of the House and its members, and by extension, of those of its committees and its witnesses. In fact, I believe that in so doing the committee could make a significant contribution to House of Commons practice, allowing it to evolve to meet expectations on transparency, while protecting its fundamental rights and privileges.

[*Translation*]

Our role as House officials is to support you in this process and to ensure that you have available to you all the relevant information necessary to make the appropriate recommendations.

Thank you for your attention. The Deputy Law Clerk and I are now ready to answer any questions you may have.

• (1115)

[*English*]

The Chair: Thank you, Mr. Bosc.

We will go to questions and answers.

Mr. Lukiwski, you're up first.

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

Did we determine how much time we've got in each round?

The Chair: Yes. I think we'll do a seven-minute round and then we'll do a shorter round.

Mr. Tom Lukiwski: Thank you very much, Mr. Bosc and Mr. Denis, for being here.

Even though the issue at hand has been widely discussed, for the record, Mr. Bosc, perhaps you could relate the particular access to information case that led us to be here this morning and the one, of course, on which the House waived its privilege. Let's set the framework here and talk about this particular case.

If you could, please remind the committee members of the case in question.

Mr. Marc Bosc: The case in question has to do with a request that came from the Office of the Auditor General to a number of committees. I'll quote the request and then I'll ask Richard to describe the particulars.

The request was for all emails pertaining to the Auditor General appearing in front of a parliamentary committee from 17 January 2012 to 17 April 2012. That was the nature of the request.

Mr. Tom Lukiwski: Okay. Mr. Denis.

Mr. Richard Denis (Deputy Law Clerk and Parliamentary Counsel, House of Commons): I will give a bit more detail about what the emails were referring to specifically: agendas of the committees; discussions between the clerks of the committees and the officials in the departments; appearances of witnesses; answers to questions posed by the committees and potential questions that may be asked; draft opening statements of witnesses; and other related committee business.

Generally, when we analyzed the documents, that's pretty much what they were talking about: appearances, how to prepare for them, and opening statements.

Mr. Tom Lukiwski: Correct me if I'm wrong, but was the Auditor General requesting this information because he felt this information would be able to assist him in his duties?

Mr. Marc Bosc: No. This is a third party request. The Auditor General received a request under the Access to Information Act to release this information that involved the House.

In those circumstances the House, in this case these committees, are the target. They are a party to it.

Mr. Tom Lukiwski: The Auditor General received this third party request from whom?

Mr. Marc Bosc: We're not normally advised of where it comes from.

Mr. Tom Lukiwski: All right. I don't think that really matters.

Was Parliament sitting at the time this request was made?

Mr. Marc Bosc: No, it was not.

Mr. Tom Lukiwski: Would that have made a difference?

Mr. Richard Denis: Mr. Chair, if I may, I could give you a bit of a timeline of the event, just to have that on the record, as Mr. Lukiwski said.

The original five requests came in between June 19 and June 21 of this year to the five committee clerks. I think the House adjourned on June 18 or something like that, and it was just after the House adjourned.

Discussions ensued. On June 28 our office provided written representation to the ATIP coordinator at the AG's office about our position regarding the emails, specifically that in our opinion they were protected by parliamentary privilege.

There was a meeting of counsel on July 19 to discuss the matter further.

On August 14, we provided the Auditor General with more representations, again as to why we felt the specific emails were protected by parliamentary privilege.

On August 21, a few days later, the Office of the Auditor General issued their decision. They did not accept our position regarding the fact that the emails were protected by privilege and therefore they would release the documents.

When a third party is advised that the documents will be released, at that point the third party, in this case the House, has the option under section 44 of the Access to Information Act to ask for a judicial review of the decision. This means we could ask the Federal Court for its opinion about whether or not the emails are protected by parliamentary privilege and whether they should be released.

At that time, as you know, the House was not sitting. The House was scheduled to resume on September 17. We asked the Auditor General for an extension, but we were not provided with one. Once the trigger of section 44—20 days to request a judicial review—starts to run, there are no changes to that. That's a strict deadline.

Ultimately, the deadline for the judicial review application was September 10 and the House was coming back on September 17. Based on these circumstances, we advised the Clerk to get authorization to go in front of the Federal Court for review of the decision.

• (1120)

Mr. Tom Lukiwski: I don't know if it would be correct to classify this as a one-off, but can you tell me whether this kind of situation has occurred in the past? Is this the first time you have encountered something like this?

Mr. Richard Denis: This is the first time we've met this situation. We normally receive third party requests for information. In this particular case we are dealing with information that is covered by parliamentary privilege, but we often get third party requests for information, for example, somebody requesting information from a department. For example, there is a request that was made to the Department of Public Works relating to a situation, an event that touches on the House administration or the House of Commons itself, something related to the long-term planning program.

In this case, there are exceptions that are provided for in the act. Depending on the situation, the House will agree or not to the release of the documentation.

We've had a few issues in the past from four or five different departments, I'm told, and when we have raised the issue that the documents were protected by parliamentary privilege, that was accepted by the departments.

In the case of this request for these emails, the Auditor General did not accept the position that privilege applied to the documents. I am not speaking for them, but the way we were told they were interpreting the act is that there is nothing in the act providing for privilege as an exception for not releasing the documents. Therefore, they felt they had no choice but to say we don't have an exception in our act for privilege and therefore we will release the documents. We said that these documents, according to practice, are covered by privilege, and therefore we have to follow the provisions of the act.

The Chair: Okay.

Your time is up, Mr. Lukiwski, but it appears that we may have time to come back.

Madame Turmel, seven minutes.

[*Translation*]

Ms. Nycole Turmel (Hull—Aylmer, NDP): Thank you, Mr. Chair.

I think I have understood the order of events and the information on privilege protection.

The Access to Information Act greatly restricts the information provided, since individuals cannot be mentioned without authorization. You make a number of recommendations in your presentation. You explain that we should watch out for certain incidents that could arise or for potential consequences.

Could you provide us with an example? If the committee is to establish a procedure or make a recommendation, we should have an idea of what could and could not be disclosed.

Mr. Marc Bosc: It is difficult to describe a truly hypothetical situation, but I can tell you that, even today, certain requests that are submitted to a department or an institution have to do with documents that are already accessible. There are actually situations where people who don't know which information is available on the Web or on the website of the House of Commons make a request to a department or an institution regarding committee proceedings on a given topic. That is an example of requests that can really be accessed without difficulty, since the documents are public. A person can, for instance, ask an institution to provide them with a statement that institution made publically, before the committee. In that case, the information is already available to the public.

Mr. Denis would perhaps like to add something.

• (1125)

Mr. Richard Denis: Thank you, Mr. Chair. I will complete that answer.

You are looking for or would like to explore potential solutions. We are currently considering the idea whereby the committee, and ultimately the House, could set criteria based on the type of information requested from us.

Despite the fact that the protection of parliamentary privileges must be maintained, those criteria would allow certain documents to be made public, depending on the type of information requested. The Deputy Clerk just gave an example of documents that are already public. As it moves forward in its study, the committee could perhaps analyze the type of information for which we receive requests and decide, based on the most objective and transparent criteria, how to make them public or not.

Ms. Nycole Turmel: If I have understood correctly, you are recommending that we not go beyond that stage. What is public could be disclosed, and we would maintain the principle according to which a document is public because it has been made public as part of a committee. No additional confidential information would result in a failure to protect parliamentary privilege.

I wanted to go a little bit further. Some documents are public, yes, but I also keep in mind that we are accountable to Canadians when it comes to our work as members of Parliament. Some public documents can be easily accessed through the website or another source, but do you have anything else in mind?

Mr. Marc Bosc: Perhaps an example would help.

In 2009, this committee submitted a report to the House, following hearings. The clerk and the law clerk actually appeared at that time. The topic was copyright related to the use of House of Commons debates.

As you know, on the last page is a statement regarding the Speaker's permission. In short, it says that House of Commons debates are privileged documents and the property of the House, but that they can be used, under certain conditions. The protection is maintained. However, the House allows users, educators and others, to use some of those documents without having to ask the House for permission every time.

That is the direction we are encouraging you to move in. Other types of documents could fall into those categories. The House could approve a report produced and submitted to it by this committee, which would set out the criteria a committee should follow before granting such a request. In other words, if a request meets the criteria outlined, the committee would pre-emptively have the permission of the House to share those documents as another party. If I have expressed my thoughts properly, I believe that is the direction you want to move in. You want to define the criteria that would make that possible.

The Chair: Mr. Garneau, go ahead.

Mr. Marc Garneau (Westmount—Ville-Marie, Lib.): Thank you, Mr. Chair.

Mr. Bosc, thank you for your presentation. It was very clear, and so were the answers to our questions.

Most of my questions have already been asked, but I just wanted to make sure I have understood correctly.

• (1130)

[*English*]

If I understand it correctly, there have been five or six instances in the past where requests were made for information, such as happened in this specific incident, where you did your job in saying that this was protected by parliamentary privilege and that it was therefore not accessible. This was not contested, if I'm correct.

I believe this is the first instance you did your interpretation but the House decided to waive its privilege. Am I correct in saying that this is the first instance of this happening?

Mr. Marc Bosc: To our knowledge, yes.

Mr. Marc Garneau: I'm going to ask you to use your crystal ball. Do you think with the use of access to information as it exists today there may be a flood of these things in the future, or do you think there will be isolated incidents and in most cases saying that it's protected by parliamentary privilege will suffice? Are you expecting more challenges in the future?

Mr. Marc Bosc: These cases are all relatively recent, and so it's hard to say if this is a trend or if these are just coincidental requests that have come in. We have no way of knowing.

Mr. Marc Garneau: The five or six incidents that have occurred, when did they start and how recent are they?

Mr. Richard Denis: All have occurred over the last two years, since 2011. That's where we've seen a bit of an increase. It's hard to tell if this will create a flood or not, but essentially the answer will remain the same. In other words, the privileges of the House and its members individually are there. They're recognized constitutionally, and will continue to exist. Whether there are more requests or not, the way we handle them will not change.

Mr. Marc Garneau: Thank you.

The Chair: I would like to ask one question, and then we'll go to Mr. Lukiwski next.

You mentioned the fact that we weren't sitting. The 20-day countdown started in the summertime. Had the House been sitting, what action would have taken place?

Mr. Richard Denis: The same thing would have happened because it's not for House officials, the Clerk, or the Speaker to make a decision regarding the House's privilege. It's only for the House itself. It made things more difficult in the summer, in August, when only a few of us were in the office and no members were sitting.

If the House had been sitting, I think maybe consultations would have taken place earlier, more easily. But I suspect that, based on the fact that this was the first time we were in the position of applying the privilege to specific documents, the process would have been the same.

The Chair: Thank you.

Mr. Lukiwski.

Mr. Tom Lukiwski: I want to thank you, Mr. Chair, for stepping on the question I was about to ask.

To expand on what the chair was saying, it appears to me that had the House been sitting at the time, we could have dealt with this fairly expeditiously since the House granted unanimous consent to waive its privilege. Of course, the House doesn't sit 12 months a year, and that's the problem we have. Access to information requests come in throughout the year and the House only sits a portion, nine months or so, of the year.

I have a couple of questions.

First, from a procedural standpoint, for the House to waive its privilege, does it require unanimous consent?

Mr. Marc Bosc: No, it could be done by way of a motion, debated and decided.

Mr. Tom Lukiwski: A majority of the House could agree to waive this privilege.

Mr. Marc Bosc: Correct.

Mr. Tom Lukiwski: All right.

I think we all understand the very necessary concept of parliamentary privilege. You've outlined in your written submission, I think very effectively, some of the pitfalls we could see if we rushed into this and tried to give a blanket exemption or something like that. I think we have to be very careful.

Based on the fact there has only been one documented example that has proven to be problematic, the one we're discussing today, but also given the fact there appears to be more and more access to information requests coming in from third parties, we may have to deal with this and try to find some procedural way in which we can cover off requests that may come in at times when Parliament is not sitting. I'm not sure if that's possible.

I know you're somewhat hesitant to offer any opinions in a hypothetical context, and I appreciate that, but it appears to me that it would be a very difficult, if not outright impossible, solution to a problem that hasn't occurred much in the past but may start to occur in the future. I don't think we want to start tinkering with the parliamentary privileges of this place for obvious reasons, some of which you've presented in your brief.

To me, the obvious solution is that when Parliament is sitting we can deal with it on a one-to-one basis. If Parliament determined unanimously, as in this case, that it was willing to waive its privilege, we would be satisfying everyone involved.

I think what you're suggesting is that we try to find a solution to deal with these types of situations that might occur when Parliament is not sitting, so that you and the Speaker's office have the ability to respond according to the wishes of the House.

That's where I think we're going to need a little bit of assistance, Mr. Bosc and Mr. Denis, to try and help us come up with a potential solution. Based on what you've seen and what you know, have you any suggestions that we may want to consider? I don't want to put you in a difficult situation. I'm honestly asking if you have any thoughts on the matter that might help us try to resolve a situation that is somewhat problematic.

• (1135)

Mr. Marc Bosc: Certainly, I can try and answer the question.

I would start by saying, though, that it isn't only for times when the House is not sitting. It really would help at any time, when faced with these kinds of requests. I think the trick is to develop criteria and perhaps categorize the types of documents in the possession of committees and of witnesses that could be considered okay to release via a third party request versus those that a committee would not want to release. For instance, the committee might say that as part of its criteria anything to do with in camera proceedings cannot under any circumstance be released.

The idea of a process is to have something in place so that whether the House is sitting or not, a committee seized of a situation has something to work with to make a decision and it doesn't have to go back to the House. I think the idea is to avoid having to go back to the House each time, because it is not a good use of the House's time to be dealing with these requests each and every time if, indeed, there is a trend on the upswing for these kinds of requests.

There's no evidence of that. There are a few cases we have and, as Richard pointed out, they've been dealt with efficiently and quickly and the departments have accepted the House's arguments. But it's for those cases like this one where that hasn't happened that the problem arises. It really becomes a question of whether it is a good idea to develop those criteria, that procedure, that kind of blanket approach.

Mr. Tom Lukiwski: I agree. I think the obvious one that you pointed out is in camera proceedings. I think we can all agree with that, but if you're talking about exceptions, those which will never be allowed and those which may be allowed, it's going to be somewhat difficult for this committee to do it without some assistance from an expert panel, shall we say, or at least some people from your perspective assisting us.

Would it be appropriate for us, if we wished to do so, to ask perhaps Monsieur Denis to give us a proposed list of the criteria which you may think we would want to consider to be exempt?

Mr. Marc Bosc: Before Richard answers, at the outset I would say to the committee that both Richard's team and the Committees Directorate management team are at the disposal of the committee to work with your researchers to flesh some of that out. They're absolutely at your disposal to do that.

Whether it's effective to do it in a public meeting is an open question, I would say, but I think they're available—

• (1140)

The Chair: Someone may want that information—

Voices: Oh, oh!

The Chair: There is a conundrum here.

Mr. Lukiwski, your time is up.

Mr. Richard, go ahead.

Mr. Richard Denis: We have already started looking at the types of documents, and I think categorizing is the way to go. Of course, as you know, it's when you get into the middle, the grey zone, that things are difficult to assess.

Specific to your question about when the House is not sitting, as Marc was saying, the request is made to the committee, so there would have to be a way for the committee, or the committee chair or some committee members, using the developed list, to assess the nature of the documents received, and based on the criteria, to make a decision, as opposed to the House administration itself making a decision. You're looking at waiving the House's privilege, so members in a way should be involved, but of course when the House is not sitting, there has to be a quick, easy way for committee clerks to know whom to talk to—probably their committee chairs and maybe the members—to deal with the issue.

In terms of developing criteria, we see that as probably the best way. Then we'll be able to list the types of requests and give you suggestions as to how they could be handled.

The Chair: Okay.

Mr. Toone.

We've gone over on those questions, but now I see a lot more people wanting to get on the list, so let's tighten it up if we can.

Mr. Philip Toone: Starting with me?

The Chair: Well, it depends which side you're sitting on.

Voices: Oh, oh!

The Chair: Go ahead.

Mr. Philip Toone: Seeing as I am sitting on this side, I'm forced to ask the question about the timeline.

I'm still a little unclear. What was the urgency over the summer that it had to be answered? I think the law actually provides for a certain delay, and maybe that was the reason. I just want you to explain why that decision had to be taken so quickly.

I'd like to point out that since 2006, I think, the actual time it takes to get a response for an ATIP request has extended dramatically. I was wondering if you have any sense of how long it takes to get an acceptance or a rejection from ATIP generally. If I'm not mistaken, the law calls for 30 days.

Maybe that's why you wanted to make a decision, but you may in fact be the only department I know of that answers within 30 days. Was that the reason it was answered so quickly?

Mr. Richard Denis: Let's be clear. The House is not a department. The House is not a government institution. The House is not covered by the Access to Information Act.

The reason we are consulted is as a third party. Someone is requesting information from the department, and the information that's requested touches on or relates to the House of Commons. That's why we are consulted.

In terms of the delays specifically, Mr. Toone, once the decision by the Auditor General was made to release the document, we were informed on August 21. Then, according to section 44, there were 20 days to ask for a review of that decision. That's a strict delay of 20 days from August 21, and that took us to September 10, a time when the House was not sitting. That's why time was of the essence. That's why we had to get instructions about doing something.

Mr. Philip Toone: Thank you.

The Chair: Madam Latendresse, do you want to take the rest?

[*Translation*]

Ms. Alexandrine Latendresse (Louis-Saint-Laurent, NDP): Thank you, Mr. Chair.

In short, if I have understood correctly, a balance must be established between communicating information openly and transparently, and protecting our parliamentary privileges.

It was easy to see the difference with your example, which was very simple. No one would object to disclosing material that has already been made public or to providing information after the fact. Conversely, we really want to protect parliamentary privilege when it comes to in camera debates.

Regarding the grey area—somewhere in the between—I agree with Mr. Lukiwski. We would be glad to get your help in drawing a

line between what is accessible and what is not. That would be something of a guide. It could be very useful to get your opinion on that issue. I don't know whether it would be simpler to consider that matter in a subcommittee. We could suggest it.

• (1145)

Mr. Marc Bosc: As I said earlier, Ms. Latendresse, the staff of the Committees Directorate and Richard's team can help you do that work. They are readily available to you. This is not always easy to do, but we think it's possible to develop criteria and categorize documents.

[*English*]

The Chair: Mr. Armstrong.

Mr. Scott Armstrong (Cumberland—Colchester—Musquodoboit Valley, CPC): Mr. Bosc, first of all, I was wondering if this issue has come up in other Westminster-type democracies. A lot of countries have access to information policies now. Have you been aware of other issues where a situation like this came up, and if you are, how did they deal with it in other countries?

Mr. Marc Bosc: In terms of other jurisdictions, there are variations in what I would call Westminster-style parliaments. The regimes in each of the countries that you consider—United Kingdom, Australia, New Zealand—all vary. In the United Kingdom the House of Commons is subject to access to information legislation. I know of a court case going on right now in New Zealand over an access to information request, where the New Zealand House is taking a position similar to the one taken in our House.

Richard may have more to say about the legal regimes in other countries but that's just an example of the variation that exists. It's very difficult to compare directly.

Mr. Scott Armstrong: What we are seeing is this balance of access to information and parliamentary privileges. This is not just a Canadian issue right now. It is reflective of the way information is moving more quickly and more openly now than we've seen in previous generations and previous parliaments.

Mr. Marc Bosc: I'll just say, in fact, that's why this committee a few years ago did the revised Speaker's permission. It's to keep up with trends.

Mr. Scott Armstrong: On this particular case we got over the hurdle because we gave unanimous consent. Do you need unanimous consent of all members of Parliament in the future? If we don't get this change right away, what would happen if one member of Parliament, say, an independent member who wasn't related to any party, was doing it maybe just to cause trouble or throw a wrench in the system? Would a member have the ability to cause that trouble?

Mr. Marc Bosc: As I said earlier, there is no requirement for unanimous consent. It can be done by majority decision of the House. Obviously, that involves more use of House time.

Mr. Scott Armstrong: They couldn't actually stop the House from moving forward if they made the decision. They could just slow us down and cause further procedures and votes.

Mr. Marc Bosc: Correct.

Mr. Scott Armstrong: I just wanted to double-check and be clear on that.

We talked about what if the House isn't sitting. What would happen if an issue like this came up and the House was prorogued, like the Ontario legislature is prorogued right now? What would happen if the House was prorogued and this situation came up?

Mr. Richard Denis: I'm not sure. Talk to the lawyers.

That would cause a serious problem. Essentially what we would have to do as a representative of the House dealing with legal counsel from the other side is ask for an extension. Sometimes you have a client who cannot attend a court case or whatever, so you will ask for an extension. In this situation we would ask for an extension of time based on the understanding that until the House could itself waive the privilege, nothing else could be done.

As I said before, no officers of the House, not the Clerk, not the Speaker can make that decision. It's really for the House to decide. You need the House to make a decision. Maybe we would go to court if we had to. Again, it's the process in section 44. We would ask the tribunal to wait for the House to resume to give a decision on whether or not we want to go ahead with releasing the document.

Mr. Scott Armstrong: Realistically, we're going to have to come up with some process or procedure to deal with this, because we can't predict in the future when these are going to come up and what the status of the House is going to be when they do come up.

Mr. Richard Denis: No, and I will just go back to your first question about what's happening in other jurisdictions.

Other jurisdictions, even if they have access to information, have a process in place that recognizes the privileges of Parliament and the right for the House itself to make a decision as it relates to specific types of documentation. In the U.K. the Freedom of Information Act applies, but they refer to information that is exempt and necessary to avoid an infringement on the privileges of the House, and the Speaker produces a certificate saying the requested documents are protected by privilege and therefore they don't have to be released.

There's something similar in Alberta. The head of a public office may refuse to disclose information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege. Only the Speaker of the legislative assembly may determine whether information is subject to parliamentary privilege. There's a process. Often they refer to the Speaker to make a decision about what is covered by privilege.

In our case, the act doesn't apply. What we're proposing is for members to find a way for themselves to make those decisions.

● (1150)

The Chair: Thank you.

Please go ahead, Madam Turmel.

[Translation]

Ms. Nycole Turmel: Thank you. You have answered the questions.

If my understanding is correct, we have to find a way to establish criteria that do not violate the Constitution or the law of privilege.

However, a document—which Michel submitted to us—has been produced in the past few years. That document recommends that the Access to Information Act apply to the Senate and the House, while respecting the law of privilege. It appears that things have not gone any further; no recommendations have been made and no study has been conducted to establish those criteria. It was said that the law of privilege was still in force.

Mr. Marc Bosc: Actually, since the act does not apply to either the House or the Senate, the fundamental criteria of parliamentary privilege continue to apply to all the proceedings of the House and its committees. So the status quo has been maintained.

However, as Richard said, as far as requests by other parties go, the House co-operates with departments as much as possible, especially when it comes to House administration, as that administration is not subject to parliamentary privilege in the same way.

Ms. Nycole Turmel: Why were things not taken further, even though it was recommended that the Access to Information Act be applied while maintaining parliamentary privilege?

Mr. Richard Denis: The decision to propose a piece of legislation is an executive privilege. The Cabinet decides to introduce bills or move amendments to legislation. That's its prerogative. Why has that not happened? We are not in a position to answer that question. At any rate, even if such a piece of legislation was at some point introduced, parliamentary privilege should be taken into account by the drafters of the bill, as has been the case in other jurisdictions, such as England, Alberta and Australia.

As I was saying earlier, regardless of whether the legislation applies or not, we think the privilege regarding documents or issues discussed at debates and parliamentary work covered by parliamentary privilege should be recognized. So we need to come up with a process that would help recognize that, while also making it possible to provide the requester with information based on the criteria established or determined by parliamentarians.

Mrs. Sadia Groguhé (Saint-Lambert, NDP): Thank you, Mr. Chair.

If I have understood correctly, the non-disclosure of information is more of an exception, correct?

Generally speaking, information is transmitted in a totally natural way, without any real problems.

However, should a decision be made to establish the criteria for that disclosure, I think those criteria would rather address exceptions because, constitutionally, House privileges exist, whether the House is sitting or not. They are used all the time. If I have understood correctly, exceptions would be used to establish those criteria.

● (1155)

Mr. Marc Bosc: For instance, a list should be established of all the documentation held by a department, an auditor general or another officer of Parliament that could be requested by someone for consultation. We are talking about a fairly limited number of documents. Among them are emails, briefs and draft submissions. There is a list of documents that could be requested.

I do want to make it clear that we are not talking about access to information requests made to the committee. It's a matter of requests made to other parties. We're not talking about all the documents the committee has.

Mr. Richard Denis: That's why it is important, Mr. Chair, to have criteria so that certain situations that may affect other parties can be analyzed. I am referring to confidential information and things we don't want to disclose.

Earlier, I talked about requests regarding the statements of witnesses appearing before a committee. In some cases, we may not be talking about the final version of those presentations, but they would nevertheless contain information that should not be disclosed.

That whole issue must be analyzed so that, when parliamentarians make a document public, they can ensure the protection of their privilege.

Mr. Marc Bosc: I would also add that witnesses greatly benefit from parliamentary privilege when they appear before the committee and deal with it. That's a very important element.

[*English*]

The Chair: I don't do this very often, but I'll ask another question.

You suggested during this process it doesn't matter that it was the AG who had the ask for an access to information, but in this case it was that. They ruled in their thought process that privilege was not one of the exclusionary methods. They had decided parliamentary privilege was not one of the reasons to exclude documents in an ATIP request.

You suggested to them, on our behalf hopefully, that you thought it was a reason for exclusion on an ATIP. They came back and said no, they still thought it wasn't.

Is this where a solution is? Do we just put privilege in that spot where the interpretation is that some privileged documents from committees would be exactly that?

Mr. Marc Bosc: I have a slight variation on that description in the following way. Really the argument was over what constitutes a proceeding in Parliament. I think the view they took was that the emails were not part of a proceeding in Parliament.

Is that accurate, Richard, or not quite?

Mr. Richard Denis: Not exactly. Again, I don't want to speak in the name of the Auditor General's legal counsel, but the way the position was presented to us is they did not find an exception for parliamentary privilege in the act, so they're saying there's nothing that allows us not to release the documents because it doesn't talk about privilege. However, the position being that we felt it was, we thought that going to court and asking the Federal Court for a decision about it would be the only way that they would accept that the documents could be released. That's why it ended up as a process

in front of the Federal Court. They didn't have the exception in their legislation, which you find in some other jurisdictions, and we thought the documents were covered.

Really it's because there was a lack in the act, not dealing with parliamentary privilege, that did not allow them to find the exception that would have been accepted.

The Chair: Thank you. I thought maybe there was a solution there. It looks as if we're a little more distant.

Mr. Garneau.

Mr. Marc Garneau: I was going to say that Monsieur Denis said it.

The Chair: He covered it, yes.

That's all I have on the list. Thank you very much for what you have shared with us today. I'm not certain we haven't asked more questions than we have answered, but it is now up to this committee.

Mr. Lukiwski said that if you have some thoughts on solutions to this perhaps you could provide them to us. I think we're all looking for a light switch to flick that's going to fix this in a more wholesome sense. If you have that light switch, please share it with us. If you don't, or if it's a series of switches, I guess we'll have to get that too.

How can we count on that transfer of information?

• (1200)

Mr. Marc Bosc: Mr. Chairman, if you agree, we can have our staff talk to the committee analysts and share thoughts and convey some ideas to the committee in that way.

The Chair: That would be a great method of doing it. I have been discussing our next steps with our researchers and analysts. I think that's sharing of information so by the time we meet again we can have some discussion on what this committee will do next. I think we're still in the gathering of information stage rather than the fixing stage, so let's have your department talk to our analysts about this. We'll set some time aside as a group to suggest whether that is or is not a solution.

As I said, I wish we could grab this one as a one size fits all, and use it, but it doesn't work that way.

Are there thoughts from the committee on what the chair has just suggested?

Great. Thank you.

Thank you for joining us today.

We have some committee business to cover, so we will suspend and go in camera and discuss it.

[*Proceedings continue in camera*]

MAIL  POSTE

Canada Post Corporation / Société canadienne des postes

Postage paid

Port payé

Lettermail

Poste-lettre

**1782711
Ottawa**

If undelivered, return COVER ONLY to:

Publishing and Depository Services
Public Works and Government Services Canada
Ottawa, Ontario K1A 0S5

En cas de non-livraison,

retourner cette COUVERTURE SEULEMENT à :
Les Éditions et Services de dépôt
Travaux publics et Services gouvernementaux Canada
Ottawa (Ontario) K1A 0S5

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

SPEAKER'S PERMISSION

Reproduction of the proceedings of the House of Commons and its Committees, in whole or in part and in any medium, is hereby permitted provided that the reproduction is accurate and is not presented as official. This permission does not extend to reproduction, distribution or use for commercial purpose of financial gain. Reproduction or use outside this permission or without authorization may be treated as copyright infringement in accordance with the *Copyright Act*. Authorization may be obtained on written application to the Office of the Speaker of the House of Commons.

Reproduction in accordance with this permission does not constitute publication under the authority of the House of Commons. The absolute privilege that applies to the proceedings of the House of Commons does not extend to these permitted reproductions. Where a reproduction includes briefs to a Committee of the House of Commons, authorization for reproduction may be required from the authors in accordance with the *Copyright Act*.

Nothing in this permission abrogates or derogates from the privileges, powers, immunities and rights of the House of Commons and its Committees. For greater certainty, this permission does not affect the prohibition against impeaching or questioning the proceedings of the House of Commons in courts or otherwise. The House of Commons retains the right and privilege to find users in contempt of Parliament if a reproduction or use is not in accordance with this permission.

Additional copies may be obtained from: Publishing and
Depository Services
Public Works and Government Services Canada
Ottawa, Ontario K1A 0S5
Telephone: 613-941-5995 or 1-800-635-7943
Fax: 613-954-5779 or 1-800-565-7757
publications@tpsgc-pwgsc.gc.ca
http://publications.gc.ca

Also available on the Parliament of Canada Web Site at the
following address: <http://www.parl.gc.ca>

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

PERMISSION DU PRÉSIDENT

Il est permis de reproduire les délibérations de la Chambre et de ses comités, en tout ou en partie, sur n'importe quel support, pourvu que la reproduction soit exacte et qu'elle ne soit pas présentée comme version officielle. Il n'est toutefois pas permis de reproduire, de distribuer ou d'utiliser les délibérations à des fins commerciales visant la réalisation d'un profit financier. Toute reproduction ou utilisation non permise ou non formellement autorisée peut être considérée comme une violation du droit d'auteur aux termes de la *Loi sur le droit d'auteur*. Une autorisation formelle peut être obtenue sur présentation d'une demande écrite au Bureau du Président de la Chambre.

La reproduction conforme à la présente permission ne constitue pas une publication sous l'autorité de la Chambre. Le privilège absolu qui s'applique aux délibérations de la Chambre ne s'étend pas aux reproductions permises. Lorsqu'une reproduction comprend des mémoires présentés à un comité de la Chambre, il peut être nécessaire d'obtenir de leurs auteurs l'autorisation de les reproduire, conformément à la *Loi sur le droit d'auteur*.

La présente permission ne porte pas atteinte aux privilèges, pouvoirs, immunités et droits de la Chambre et de ses comités. Il est entendu que cette permission ne touche pas l'interdiction de contester ou de mettre en cause les délibérations de la Chambre devant les tribunaux ou autrement. La Chambre conserve le droit et le privilège de déclarer l'utilisateur coupable d'outrage au Parlement lorsque la reproduction ou l'utilisation n'est pas conforme à la présente permission.

On peut obtenir des copies supplémentaires en écrivant à : Les
Éditions et Services de dépôt
Travaux publics et Services gouvernementaux Canada
Ottawa (Ontario) K1A 0S5
Téléphone : 613-941-5995 ou 1-800-635-7943
Télécopieur : 613-954-5779 ou 1-800-565-7757
publications@tpsgc-pwgsc.gc.ca
http://publications.gc.ca

Aussi disponible sur le site Web du Parlement du Canada à
l'adresse suivante : <http://www.parl.gc.ca>