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Mr. Blaine Calkins

Standing Committee on Access to Information, Privacy and Ethics

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● (0845)

[*English*]

The Chair (Mr. Blaine Calkins (Red Deer—Lacombe, CPC)): Good morning, everyone. I appreciate you being here, notwithstanding the weather outside. We don't have everyone here but I think we have enough folks to start.

I am pleased to welcome back to the committee the Information Commissioner of Canada, Ms. Suzanne Legault. You have with you, Nancy Bélanger, general counsel, director of legal services, and Jacqueline Strandberg, counsel, legal services.

We are embarking on a study. We don't know how long it's going to be yet, but we have a motion before the committee to study the Access to Information Act.

We are so glad you could come back and join us immediately after being here on Tuesday, Ms. Legault. If you would introduce your staff to the committee and then start your presentation, we would be happy to hear from you as we embark on this endeavour.

Ms. Suzanne Legault (Information Commissioner of Canada, Office of the Information Commissioner of Canada): Thank you very much, and good morning, Mr. Chair.

I'm here this morning with Nancy Bélanger. Nancy is the general counsel in my office. Nancy is responsible for any legal advice, but she also supervises any kind of litigation that we have and provides input to all our investigative files, particularly the complex files, and generally provides advice about everything that goes on at the OIC.

I'm accompanied as well by Jacqueline Strandberg. Jacqueline is a counsel as well within Nancy's group. Jacqueline was instrumental in the production of the report we're going to discuss this morning.

With that, Mr. Chair, I'll start my presentation. I have very brief remarks.

I thank you and I thank the committee members for the opportunity to discuss my special report to Parliament entitled, “Striking the Right Balance for Transparency”, which contains recommendations to modernize the Access to Information Act.

During my appearance before this committee this past Tuesday, I recommended that the number one priority for the committee should be the modernization of the Access to Information Act. After over 30 years of existence, the time has come to take bold steps to transform this piece of legislation.

An eminent expert in the field of access to information, Professor Roberts, wrote the following in 2012:

> Around the world, our understanding about the importance of governmental openness has advanced substantially. We know much more about what works, and what does not work, in the domain of RTI [right to information] law. And we also know that system of responsible government is resilient. Fears that the constitutional order would be up-ended by the adoption of this sort of legislation were overblown. There is a world of experience to be drawn upon while updating the Access to Information Act, and no good reason why it should not be done with boldness.

● (0850)

[*Translation*]

The recommendations in my report are instructed by international, provincial and territorial legislation, annual reports, model law, reform proposals made by former commissioners and parliamentarians, and reviews of the act. The recommendations are also based on my own experience, after completing over 10,000 investigations during my mandate. The recommendations are drawn from the highest standards and best practices for access to information legislation.

The recommendations are aimed at allowing greater scrutiny by Canadians of government activities and decisions, by extending the coverage of the act to all public institutions, including those that receive funding from the government.

The recommendations are aimed at strengthening the information management framework to ensure that the government remains accountable and transparent. The recommendations are aimed at ensuring timeliness in the processing of requests. As the first Information Commissioner, Mrs. Hansen aptly said "Delaying access to information in effect destroys the purpose of the act."

[*English*]

The recommendations are aimed at striking the right balance between transparency and the protection of specific interests that require protection. They are consistent with open government objectives, such as the disclosure of information that supports the accountability of decision-makers and citizens' engagement in public policy processes and decision-making. To maximize disclosure, exemptions should be narrow and focus only on protecting the interests they are intended to protect. No more. In most instances they should be injury based, discretionary, time limited, and subject to a public interest override.

The recommendations are aimed at effective oversight, based on key fundamentals, such as the ability to review all the records at issue and to issue binding orders. In fact 68% of all the countries that have implemented an access law in the past 10 years feature an order-making model. In Canada, the provinces of British Columbia, Alberta, Ontario, Quebec, P.E.I., and to some extent Newfoundland have binding order powers.

The recommendations are aimed at aligning the act with open government initiatives, such as publishing information that is of public interest, disclosing more information related to the repayment of grants, loans and contributions, and requiring institutions to adopt publication schemes.

[*Translation*]

The recommendations are aimed at introducing a comprehensive regime of sanctions to address actions contrary to the quasi-constitutional right of access.

Finally, the recommendations are aimed at addressing inefficiencies and longstanding issues with the access to information system.

Let me give you a few concrete examples of issues that require a legislated solution.

In terms of the coverage of the act, the Supreme Court of Canada determined that ministers' offices are not institutions covered by the act. Decisions of Ministers can significantly impact Canadians. Ministers need to be accountable to the citizenry for the administration of their areas of responsibilities. Only a legislative amendment can extend the coverage of the act to their office.

In terms of information management, there is documented evidence of serious breaches by the public service of its obligation to create and preserve information of business value. Recent examples include the triple-deleted scandal in British Columbia and my report on the use of text messages. Information Commissioners from across the country co-signed a joint resolution in January calling on their respective governments to adopt a legal duty to document.

● (0855)

[*English*]

In terms of timeliness, Mr. Chair, delays are a frequent subject of complaints by requesters. On average, this represents 40% of the workload my office deals with in terms of administrative complaints. There is an efficiency to be gained in the entire system for dealing appropriately with the question of timeliness. One case in particular is a salient example of the lack of discipline currently in the act. Last year we finally had a decision in the case that I brought to the Federal Court questioning the reasonability of a 1,110-day extension applied by the Ministry of National Defence. Although the decision from the Federal Court is expected to have a positive impact on timeliness, the current legislative framework is inconsistent with progressive norms. It is truly compelling to think I had to take this matter all the way to the Federal Court of Appeal to have a decision that such a lengthy extension was unreasonable under the legislation.

In terms of maximizing disclosure, the Supreme Court of Canada recently interpreted the exemption for advice to government in the Ontario access to information law very broadly. The court's ruling extends far beyond in my view what must be withheld to protect the provision of free and open advice. The equivalent exemption in the federal law, section 21, uses similar language to its Ontario counterpart. Section 21 was already considered prior to the court's decision as the “Mack truck” of exemptions. The breadth of this exemption must be legislatively narrowed to strike the right balance between the protection of the effective development of policies, priorities, and decisions on the one hand, and transparency in decision-making on the other.

In terms of strengthening oversight, the commissioner's ability to issue orders would ensure that the processing of requests would be more timely, would instill more discipline and more predictability, would provide an incentive for institutions to make comprehensive and complete representations to the commissioner at the outset, would create a body of precedents that increases over time, and requesters and institutions would then have a clear direction as to the commissioner's position on institutions' obligations and requesters' rights under the act.

One of the most frustrating aspects of the work we do at the office, Mr. Chair, is that we find ourselves reinvestigating the same issues that have been dealt with many times by previous commissioners instead of having a body of precedents that will actually provide clear clarification. Again, there is a huge efficiency gain if we don't have to reinvestigate the same issues again and again.

In order to assist the committee, I will provide in the coming days a written submission with reference notes on each of the 85 recommendations. I have provided a sample of what we're going to provide the committee for chapter 1 of the recommendations. We simply didn't have time to translate the whole document before today, but the idea behind our table, Mr. Chair, is to provide the committee with an easy reference in terms of where the recommendations come from, where they were discussed before, and why they're in the recommendations. I will also provide to the committee a backgrounder that will enumerate the previous proposals to amend the legislation since its coming into force in 1983.

In closing, I would like to reiterate that the changes proposed in my report are, in my view, long overdue and urgently needed. Having a modern access law would assist Canadians in exercising their right to know. It would also facilitate the creation of a government culture that is open by default. In my view, unless we significantly modernize the Access to Information Act, we will not be able to effect this change of culture, which is absolutely essential to meet the government objective for an open and transparent government.

It would also re-establish Canada's position as a world leader in access to information. I strongly believe that the time has come to modernize this act. We need a new act, one that will pass the test of time, and one that will pass the test of successive governments.

Thank you, Mr. Chair.

● (0900)

The Chair: Thank you very much, Ms. Legault. We appreciate the fact that you've come before us again. As we go through the deliberations in the days and weeks to come, I'm hopeful that you would make yourself available to come back again should we have future questions in regard to some of the recommendations.

We'll now proceed to the questions in the seven-minute round.

Mr. Erskine-Smith, the floor is yours, sir.

Mr. Nathaniel Erskine-Smith (Beaches—East York, Lib.): Thanks very much.

Thank you for the presentation and also for the thorough report, "Striking the Right Balance for Transparency".

For my first question, I'll start at the beginning, with recommendation 1.1. The recommendation is that there be an expansion to all institutions that spend public money in whole or in part. I wanted to drill down a little. Is the recommendation that all institutions or organizations that receive funding from the federal government be subject to the Access to Information Act? Also, how far do we read "in part"?

Ms. Suzanne Legault: The idea with the recommendations in that part of the report is to do a couple of things. One is to really have a principled approach to how we have institutions covered by the act. Right now we have a schedule that has the list of institutions. The Governor in Council can define criteria and can add institutions to the list. What we are proposing is to have a principled approach of criteria that would basically be used to determine which institution is covered or not covered. Those criteria that you have in the recommendations are really based on previous proposals or international norms.

On the other part of it, we felt it important to specify that some specific institutions really must be covered, and those are ministers' offices, the Prime Minister's Office, courts administration, Parliament administration, and so on, simply for the sheer amount of taxpayers' dollars actually located in those institutions and the necessary accountability that would flow from that. So—

Mr. Nathaniel Erskine-Smith: Just to jump in on that point, where there's a great deal of public funds being spent, obviously, but I just wondered if there is a *de minimis* application here where an institution or an organization just isn't spending a great deal of public funds. I note in your recommendations that there isn't a *de minimis* requirement set out. I wonder if you could speak to that.

Ms. Suzanne Legault: This is a good question. I actually haven't thought about that. This is something that was proposed previously and that we felt was a necessary criterion, but what you're suggesting is a very interesting point in terms of looking at that specific criterion.

Mr. Nathaniel Erskine-Smith: Staying with recommendation 1.1, the third bullet point in the report refers to "institutions that perform a public function". That's an additional criterion. Is the suggestion that it would apply to institutions that perform a public function even if they don't receive public funds or are subject to government control?

Ms. Suzanne Legault: Yes, that is part of the criteria. We'd have to look at the various types of institutions that are federal institutions, that operate in the federal realm, to see whether they fit within these criteria.

Mr. Nathaniel Erskine-Smith: For the purpose of your report, there is not a working definition of "public function". It seems to be quite a broad term. Again, just to have a sense of what we're restricting the application of the act to, do you have any sense of how we might define "public function"?

Ms. Suzanne Legault: That's something we would have to really look into very specifically.

These are very good points.

Mr. Nathaniel Erskine-Smith: Still staying with recommendation 1.1, in proposing the expansion of the act—and that makes good sense, as more institutions that spend public funds should be subject to access to information requests and transparency—is there any worry, given the existing delays in the system, that absent additional funding we're going to expand the application of the act to many more institutions and that this is going to create further and further delays?

Ms. Suzanne Legault: I don't necessarily think that further and further delays would be a result of that, because part of the proposal would be that each institution subject to the act have strict timelines to respond to access requests. The areas in which additional funding is required are due to each institution's having to have infrastructure sufficient to answer to access requests, and it's difficult to predict how many requests each institution is going to get.

For example, the CBC, when they first became subject to the act, thought they would get a certain number of requests every month, and they ended up getting a large number of requests very quickly.

Various institutions receive a varying volume of requests. Citizenship and Immigration receives more than half of the total amount of requests, around 34,000 requests. Most of the smaller institutions receive very few requests. My office receives maybe about 100 requests a year.

● (0905)

Mr. Nathaniel Erskine-Smith: Speaking to that point, in your experience, do organizations require dedicated staff to respond to these requests? I ask because, if we're expanding the scope and application to a number of institutions—and smaller institutions, perhaps—is there any worry that they may not have the resources to properly respond?

Ms. Suzanne Legault: It depends upon the institution. Many of the smaller institutions, many of the port authorities, for instance, receive very few requests. A lot of them receive no requests at all, and some port authorities will receive a few. The way they are structured, they often have their general counsel responsible for access to information requests, or their corporate secretary, or someone who is actually responsible for those functions. An institution such as VIA Rail, for instance, receives a few more, so they may need to have a consultant.

It really varies from institution to institution.

Mr. Nathaniel Erskine-Smith: Let me move to the next series of recommendations, 1.2 through 1.7. This set concerns extending coverage to the Prime Minister's Office and ministers' offices, providing parliamentary support for institutions, and even court support services.

I know those are all broad and these are various separate organizations, so let's stick to the Prime Minister's Office or the ministers' offices. Can you give an example of current documents or a set of documents that you think ought to be disclosed but aren't currently being disclosed? This is just so that we have a working example.

Ms. Suzanne Legault: I think the best example was some of the records that were at issue in the Supreme Court of Canada decision in what is referred to often as "the Prime Minister's agenda". We refer to this case as the "Prime Minister's agenda", but there were other types of records in that case that have real importance to Canadians. These were minutes that were taken of meetings between the minister and the chief of staff and senior officials in the Department of National Defence. The only records of those meetings were actually notes of exempt staff, and the court decided on the current test that these records would not be subject to access to information.

In my view, seriously, these were highly important records of decisions in a time of preparation for war. They could have been exempted under a national security exemption, but they should have been subject to the act.

That was a really clear example, and it's something that is documented.

The Chair: Thanks, Ms. Legault and Mr. Erskine-Smith.

We now move to Mr. Jeneroux, for seven minutes, please.

Mr. Matt Jeneroux (Edmonton Riverbend, CPC): Thank you very much.

I thank you very much again, guys, officially on the record. Thank you for being here today. It's impressive that you're able to come back twice in one week.

In my seven minutes, I want to ask a bit about how your office is structured so that as we start to go through the process, I have a good sense of it. Let's go back to 2006. I was reading in the report that this was when the last...you don't call it modernization, but that's when the act was last reviewed. Perhaps you could walk me up from 2006 to here, I guess, on why we're doing this again. It's not that I disagree with it; I'm just curious as to your thoughts.

Ms. Suzanne Legault: Walk you up in terms of what proposals have been made before, or the history of it?

Mr. Matt Jeneroux: Arguably 2006 wasn't that long ago. You're reviewing the act after 10 years, and I'm wondering how you defend that.

Ms. Suzanne Legault: Okay.

Since the coming into force of the act in 1983, there have been several reviews. We'll provide that to the committee.

In 2006 the previous government, when they came into power in 2006, had promised to implement all of the recommendations of Commissioner Reid, who had actually worked with the previous committee and had produced the open government act, which incorporated a whole series of amendments.

The government in 2006 actually passed legislation in the Federal Accountability Act. That legislation contained a subset of some of those recommendations. It increased the coverage of the act to a lot of the crown corporations—CBC, Canada Post, Via Rail—and agents of Parliament, including my office and the office of all the commissioners, except for the Ethics Commissioner. The other commissioners are now subject to the Access to Information Act. That was part of that reform.

As part of that reform as well, there were some very specific either exemptions or exclusions that applied to all of those entities. I talk about that in the recommendations. That was done, and there was also a duty to assist put into the legislation.

Aside from that, in the history of the act, there was one other significant amendment, and I think it was in 1999. That's when the criminal offence was put in. That's section 67.1 in the act, and that flowed from a private member's bill. In terms of looking at other coverage, in terms of looking at the exemptions, in terms of looking at the timeliness, in terms of looking at the order-making power....

The other thing that really was not part of the 2006 discussion at the very least, and reform, was how do we modernize the act in the context of open government, open government by default. That's fairly new, actually.

● (0910)

Mr. Matt Jeneroux: What was the implication, then, on your office at that time? Did you have to expand your office? Did crown corporations then have to hire additional staff dedicated to these ATIP requests? What are your thoughts on that?

Ms. Suzanne Legault: We actually had to implement an access to information office in our office. I know that other agents of Parliament had to do the same. Certainly CBC had to do the same, and Canada Post as well. So yes, they had to implement some infrastructure to respond to access to information.

You know, I think we have to look at it in the context of what the responsibilities of public institutions are. For instance, we all have reporting obligations under the Financial Administration Act for the way in which we expend public monies. Those are considered to be normal. I have a staff that deals with all of our financial responsibilities because it's considered to be a necessary obligation. It's the same for access to information, in my view, when one becomes subject.

If Parliament decides that this is something that is necessary, it's ultimately always up to the legislator to decide whether this is a necessary thing for public institutions or not.

Mr. Matt Jeneroux: Right.

I just wanted to make sure that we don't go down a path where we're grinding certain institutions to a halt because suddenly there's an influx of this. I just wanted to be careful on that.

In terms of the goals you set and the averages, you mentioned that Citizenship and Immigration takes up the majority of your requests. Have you set internal goals on where you'd like to get those numbers to, whether that be percentages or number of days, etc., for some of these recommendations?

Ms. Suzanne Legault: What do you mean, number of days?

Mr. Matt Jeneroux: Maybe number of days isn't a good example because you have the standard number of days. Percentage-wise, are you looking to reduce the number of requests? Are you going to see an increase in the number of requests?

What's the benchmark in your office that you'd be happy with?

Ms. Suzanne Legault: It's important to understand that the access to information requests are made to the public institutions that are covered by the act. The President of the Treasury Board is the minister responsible for the administration of the access to information requests that are made within the federal government.

My office investigates complaints that are generated if requesters are not satisfied with the response they get. There are 250 or so institutions covered now under the act. There were about 68,000 requests overall in the system last fiscal year. Half of that comes from and comes to Citizenship and Immigration. They have a low ratio of complaints. They are actually, in my view, supporting the system overall. If CIC were to do poorly, it would be a disaster for the access regime.

That's where the bulk goes. Then you have CBSA and the RCMP.

● (0915)

Mr. Matt Jeneroux: Okay, but obviously in modernizing the act, do you have an intent to reduce complaints, then? So is there something internally....

Is my time up? Okay, we'll come back to that. Thanks.

The Chair: It is, but the chair was busy doing several other things and was advised by the clerk.

We'll now move to Mr. Blaikie, for seven minutes.

Mr. Daniel Blaikie (Elmwood—Transcona, NDP): Does that mean I'm getting more time too?

The Chair: There was no more time allocation, but I appreciate the insinuation. Your time starts now, Mr. Blaikie.

Mr. Daniel Blaikie: If you don't ask, you don't get, right?

I want to come back in a very loose way to recommendation 1.2 about expanding coverage to ministers' offices, but on a more general note. You're absolutely right that ministers' offices are making important decisions, but I think there is a general tension, and I don't think an insurmountable one. As an amateur historian, you want to have the records there, but as people have more access to certain records now, it discourages actually making those records, and then you can never find out why that decision was made.

I'm just wondering how we can be sensitive to that tension, to try to create records that the public could have access to, but still maintain what, I think, on the face of it makes sense. When I'm in a meeting, for instance, I want to make private notes. I may have things that I don't want on the record forever. They're fleeting ideas. They're things that I just want to explore later that I'm not committed to. It really wouldn't make sense to have them be part of the record.

We talk about making people's notebooks accessible. Granted, if those are the only records of a meeting, then I think there's a far better case actually to make those accessible. Granted, there really ought to be some sort of record of the meeting and decisions, but how can we proceed? I think often that tension is used as an excuse not to provide any form of access at all, and that's partly how we're getting to where we are. That argument ends up trumping, and people say, well, don't we have the right to be able to consult and have our own decision-making process, and won't you be impeding on the good decision-making of government if we don't have that?

I'm just wondering how we could proceed in a way that recognizes that people need time, that some people think on paper, and they need to be able to have that process before they come to decisions. How do we do that so that this argument can't be used as a fig leaf for those who would just want to deny access for the sake of denying access?

Ms. Suzanne Legault: What you're saying is something that we hear quite a lot.

When I talk about changing the culture of government, that's exactly what I'm talking about. People actually have to understand that all of us are carrying a public function. We are working for other people, all of us, in everything we do every day.

The other misconception is.... The Access to Information Act is actually structured in a way that what needs to be protected is going to be protected: solicitor-client privilege, personal information, advice and deliberation; all of these exemptions are there for that specific reason.

In the example I gave about the notes, obviously these notes would have been covered by the national security exemption. There is nothing improper about that. When people and institutions are covered by access to information, it does generate a certain decorum. The decorum should not be that you don't take notes. The decorum should not be that you do not create records. But the decorum can be that you don't make disparaging comments about a colleague in your notes because those will be disclosed. You will find that there has been quite good discipline instilled in the public service in the way that communications occur in the workplace. Those are good things, actually.

But in terms of taking notes, yes, they would be covered and they are covered for all of us within public institutions, and that is not necessarily a bad thing. We just have to own up to fact that these notes are part of the record. Probably in many instances they would be transitory records, so they are subject to an access to information request. If they exist at the time the access to information request is made, they are part of what is responsive to the request. Unless they are really crucial notes that you need to put into your file, they would become part of the official records, and if they are part of transitory records that you're allowed to let go after a while, then that's fine. It becomes a question of whether that's a record of business value or whether that's a transitory record.

● (0920)

Mr. Daniel Blaikie: Yes, it's an interesting question so I find myself thinking, what would I do with the pages in my notebook? I go to a lot of meetings so those don't make it on the file because I'm not in the habit of tearing out sheets from my notebook. Under the current act, it's not an issue for me; I'm not covered. But maybe it's partly a learning process for me in terms of what that would mean, and even the format of my notebook, needing tearable sheets, I don't know, but....

Ms. Suzanne Legault: I received an access to information request for my notebook when I first became Information Commissioner and I tend to doodle quite a lot, and there was a really nice drawing of a horse, I remember, and it's fine. It just gets disclosed. I don't mind.

People just have to grow into this culture of disclosure at a certain point and if there are references in my notes about specific files and they are subject to confidentiality requirements under the act, they get processed like that by the ATIP folks. Notes of conversation with my general counsel can be protected under solicitor-client privilege. If there is personal information because I'm dealing with a labour relations issue, then that gets protected as well. That's the way your notes would be treated, the same as any other record.

Mr. Daniel Blaikie: Well, thank you. I think that's very helpful because I have a sense that it's going to be.... I wanted you to speak to that at length because I think that's going to be a big part of the meat of what needs to be decided, both here and then in the House, when legislation comes forward.

Ms. Suzanne Legault: It is a genuine concern of people, but people have to understand that any record gets protected as it should be protected under the legislation. That's why, in covering institutions such as Parliament's administration, we're recommending to have proper exemption for parliamentary privilege. That's going to be crucial.

The Chair: Okay. That's it.

[*Translation*]

Mr. Massé, you have seven minutes.

Mr. Rémi Massé (Avignon—La Mitis—Matane—Matapédia, Lib.): Thank you, Mr. Chair.

Madam Commissioner, thank you for your presentation.

Earlier, my colleague talked about the issue of processing access to information requests and the processing times you would like to see legislated under the Access to Information Act. I would like you to say a few words about the complaints that have been lodged. What are the most common complaints? You said that processing these complaints makes up 40% of the work that your team does. I would like you to talk about processing complaints and the nature of those complaints.

Ms. Suzanne Legault: The purpose of many of the recommendations in the report is to make complaints processing more efficient. This will also address Mr. Jeneroux's concerns about the efficiency of the complaints process.

Every year, 35% to 40% of the complaints we receive are administrative, in other words, they have to do with timeliness. The answers simply are not being sent by the institutions. That makes up roughly 40% of the complaints we receive annually.

On average, we receive 1,800 complaints a year. This year, we will receive more, but there are other years when we receive less. The rest of the complaints, or 60% of them, have to do with a refusal to disclose information.

The complaints about timeliness, which we refer to as administrative complaints, are processed rather quickly by the OICC. Those types of complaints do not stay in our inventory long. Refusal complaints take the longest to process. Currently there are more than 3,000 complaints. Out of that number, 88% are refusal complaints, or more complex files.

Out of those 3,000 files, roughly 400 are about national security, 400 are about the Canada Revenue Agency, and 150 are about the CBC. The rest of the files are about different institutions. This represents the bulk of the files.

I also have files that have been lingering for quite some time. In 2009, when I arrived at the OICC, I was processing files from 1997. This year, I will be closing my last file from 2005-06. I could provide you with a table that gives a snapshot of the years for which we have an inventory, how old the files are, and the large blocks that have to do with the Canada Revenue Agency. It is the dashboard I use when I look at my inventory. It gives a good overview of what is going on.

The biggest problem right now is that it takes almost a year before a refusal complaint can be assigned. It's a real problem.

Generally speaking, once a file is assigned to an investigator, it is settled in more or less 90 days. Of course there are special cases, with files that are 20,000 or 30,000 pages long that take us a great deal of time to get through, and rightly so. There are other files that are not very big that take less time to process and are less complex.

That gives you an idea of what we are dealing with.

● (0925)

Mr. Rémi Massé: Are there any statutory grounds for the various departments to refuse to disclose information? I would like you to elaborate on that.

Ms. Suzanne Legault: When we consider a complaint to be valid, that means that the institution did not meet its obligations under the act. Nearly 80% of the administrative files are valid, in other words, the timeline was not respected. As far as refusal complaints are concerned, roughly 50% are deemed valid every year. It is roughly fifty-fifty.

There is something that has changed the game a bit in the past two years. We are doing everything we can to resolve complaints. We have a new category called “resolved”. In those cases we do not say whether the complaint is valid or not. This is simply to process the files more quickly. It is a bit like the approach to conflict resolution. We do more mediation at the beginning to move the files along more quickly. We have many files that are resolved. We do not say whether the institution acted poorly or not. Usually, when a file is resolved it is because the information was disclosed. This new category changes the game a bit. Generally, when it comes to refusal complaints, it is fifty-fifty.

Mr. Rémi Massé: I would like to get information about your dashboard, about the data you have collected, and the departments that receive the most refusal complaints. I would like an overview of all that.

I would also like to know how Canada compares to other countries when it comes to access to information, complaints, and that type of thing. It might be harder to answer all that, but I would like to know whether any studies have been done on this.

Ms. Suzanne Legault: I do not have a study on that. The comparative study we have comes from the Centre for Law and Democracy, which did an evaluation of the Access to Information Act. Again, that was an evaluation based on certain criteria in the legislative framework. It does not address implementation, or the infrastructure in place to respond to the requests and so forth.

It is very difficult to compare countries. Some countries have more progressive laws, but those laws do not necessarily result in more disclosure of information. India has a very progressive law, but does not manage its information. That system is practically impossible to manage.

In 2002, when Mexico passed access to information legislation, it put a system in place on a very advanced technology platform. When it comes to technological infrastructure, Mexico is very organized. When someone requests information from an institution, that institution responds electronically on the same technology platform on which the complaint was filed. Mexico has a commission, which has very strict deadlines for making a decision, but I am not sure whether Mexico does what we do. We do a page by page review of the file to determine whether what was redacted by the institutions was appropriate or not. In that sense, our system is in a way more sophisticated.

The other thing is that we have a lot of information and documents in Canada because we have good information management. In Mexico, before President Fox, there were no documents. It is therefore very hard to make a comparison in terms of efficiency.

However, we might look at the provinces. When you do your review work, I suggest you invite commissioners who have order powers relative to the experience in an ombudsman model because in our experience, application of the act and processing complaints becomes much more efficient.

● (0930)

[*English*]

The Chair: Thank you very much, Mr. Massé. Your time is up.

Thank you, Madam Legault.

Before I get accused of being liberal with the time, I want to now go to the five-minute round.

We'll start with Mr. Kelly.

Mr. Pat Kelly (Calgary Rocky Ridge, CPC): Thank you, Mr. Chair.

Thank you for attending our meeting. I appreciate it.

In dealing with an expanded requirement for public entities to document matters, including decision-making, deliberations, and this type of thing, how do you see that impacting on cabinet confidentiality and the concept of cabinet government where cabinet in its deliberations will have disagreements, but in the end all must mutually support its decisions? How would you see an expansion of public access to deliberation impacting cabinet confidentiality?

Ms. Suzanne Legault: It's important to understand what we're proposing. A lot of the time there's a misunderstanding about what we're proposing.

Under the law right now, cabinet confidences are described very broadly, very broadly. For instance, any record that contains anything that's described in the whole definition of cabinet confidence can be excluded as a cabinet confidence. In our investigations at this time, we are not allowed to see the records. We see a schedule, a brief description of the records. Without seeing any records, in 14% of the cases of cabinet confidence investigations we find that it was improperly applied overall and historically at the OIC. That's without seeing any of the records.

We also see under the current definition things like dates of cabinet committee meetings not being disclosed because of cabinet confidence and then being published.

What we're proposing is to narrow the scope of the definition of what is a cabinet confidence such that it protects the deliberative process that occurs within cabinet. The aim of the recommendation is that we properly protect what needs to be protected, but we don't have a definition that truly catches so much that it then becomes a shield against disclosure and there's no oversight.

● (0935)

Mr. Pat Kelly: If I may say so, you just want to make sure that the definition is there to properly exclude cabinet deliberation from the scope of access to information.

Ms. Suzanne Legault: Yes, and I'm recommending that it would be a mandatory exemption, which means that if it is a cabinet confidence, it shall be exempted, but that I would be able to review whether it is actually a cabinet confidence that's being claimed. I would have the ability to review the records. Given the sensitivity of those records, I'm recommending that the same restrictions that we have for national security be applied. That would mean a limited number of investigators in my office would be able to do this work.

Mr. Pat Kelly: Okay. Thank you.

I understand that until we are sure and have agreed on which recommendations are going to be adopted and we understand the differences in the scope of what access to information may look like.... Do you have any idea at this stage, at a time when we are entering a deficit, what you think a properly funded regime would cost?

Ms. Suzanne Legault: I don't know. It really would depend on what happens in terms of the processing of requests. I must say, though, that in all fairness, according to what we have now in terms of the recorded costs of processing an access to information request —this is data from the government—it's $1,000 per request. That, in my view, is very high, and I think it's because of the way we administer this legislation.

I have an example, which I'll report on in my annual report, and it is not unusual, of something that was completely redacted. In fact, at the end, everything should have been disclosed immediately, but that request went through a redaction process. It went through an approval process. It went through a consultation process with another institution. It led to a complaint. I had to investigate it. I am now trying to resolve it. That, sir, should have been just disclosed immediately.

I really believe there is a large inefficiency reflected in the costs.

Mr. Pat Kelly: You do not believe, in fact, that you need a larger budget; you just need more effective tools to deal with your requirements.

Ms. Suzanne Legault: I think there's a lot to be said for a proper culture of openness by default.

The Chair: That will not change overnight, but that's a great thought.

We'll now move to Mr. Saini, for five minutes. Then we'll move back to Mr. Jeneroux, and we'll need another Liberal after that. If somebody could let me know who that is, that would be great.

Mr. Raj Saini (Kitchener Centre, Lib.): Thank you very much, Madam Legault. It's always a pleasure to hear your comments.

I want to talk about recommendation 4.5, but I want to put it into the context of recommendation 3.6:

> The Information Commissioner recommends that a third party is deemed to consent to disclosing its information when it fails to respond within appropriate timelines to a notice that an institution intends to disclose its information.

I don't have an issue with that comment. What I have a little bit of trouble with, and maybe you can highlight this, is when you say that the Information Commissioner recommends that when consultation has been undertaken with another government, and the consulted government does not respond to a request within 60 days.

You mentioned earlier that certain governments in certain countries don't have the level of data management or information management that we do. Given that we are a trading nation, a nation that has a great interest in global affairs, I worry that if a request is made to another government that doesn't have the capacity, not because it's unwilling but because it doesn't have the capacity in terms of infrastructure to deliver that, it could impede the government in other areas.

I just want to know what your comments are on that.

● (0940)

Ms. Suzanne Legault: I agree with you. We were very mindful of that in the report.

You'll see two distinctions in the recommendation. One deals with when you are consulting with a government or with institutions within Canada, all the jurisdictions in Canada are subject to access to information laws as well.

Mr. Raj Saini: I'm not worried about in Canada.

Ms. Suzanne Legault: That's where, if you don't respond, you're deemed to have consented. It only applies to Canada.

For international jurisdictions, we are recommending to seek consent if it's reasonable to do so. The reason we put that there is we did a study a few years ago on these international consultations. Most of them are done with the United States. They're reasonable to consult, and then see if you receive an answer. In other jurisdictions, it's not reasonable to do so for various reasons—diplomatic relations; Iran or Iraq when we didn't have diplomatic relations, or when there is no infrastructure there for us to consult with, which was also an issue raised during our investigation.

The distinction is made, and it's only in that context.

It does happen to us quite a lot in investigating those files, and that's why we put that there. We don't get responses from national institutions in cases of historical records. We get a lot of complaints dealing with archival records. A lot of the time it involves police investigations that occurred some time ago, or other types of investigations, and we need to seek consent or the institution needs to seek consent, and the institutions in the provinces or territories don't respond. So we ask them to send letters, and so on.

It was meant to address a very specific issue, and that's why we are recommending to split those between national and international, specifically what you're raising.

Mr. Raj Saini: In recommendation 4.9 you said, “The Information Commissioner recommends a statutory obligation to declassify information on a routine basis”. I think in your recommendation you wrote 10 years is when that should be.

Please elucidate that matter. You also mentioned you would be applying an injury test. I'd like you to help me understand what the injury test is. You also mentioned that you would determine if the information still had enduring value. What do you mean by enduring value?

Ms. Suzanne Legault: It would be based on what Library and Archives, the archivists.... Each institution has to have a disposition authority. We all have to have retention and disposition authorities for our information holdings.

To give you a very simple example, in my office, because we do investigations, we have some investigations where our retention requirements are two years. We have some that are investigations of enduring value that we have to send to Library and Archives. This has to be done with the archivists. It's not something that institutions decide themselves. They have to get this retention and disposition authority from the Archives. That's the way that is settled.

The declassification is really based on the Bronskill decision in the Federal Court where the judge, in the context of the Tommy Douglas file, recommended that the government look into this so when files are sent to Library and Archives, they're at least... sometimes these files contain human sources, and those need to be protected forever. That's fine, but there's a lot of historical information in there that is of real value for Canadians, historians, and they should be declassified.

These files should be sent in a form where my office doesn't spend a lot of time investigating. They should be in a format that is ready to be disclosed to the public. This is something you might want to hear from the librarian because I think Dr. Berthiaume might have a few thoughts on that. My office and his office have a lot of investigative files together, and it's something we should declassify for Canadians for historical value.

● (0945)

The Chair: Thank you. We're well beyond the five minutes.

We'll go back to Mr. Jeneroux, please, for five minutes.

Mr. Matt Jeneroux: Thank you.

On personal information requests, if I have constituents who want to know what information the government has on them, your recommendation would be they go to you and put in a request, but if it's the RCMP, or if it's CIC, they have to go there. There's no central location right now where they can request that. Correct?

Ms. Suzanne Legault: No.

Mr. Matt Jeneroux: To get to that level, what hurdles do you see for Joe Citizen, who wants to find every organization that would fall under the act? How would they do that? Under what you're proposing, would they still need to go to every organization and request that information, which is then compiled according to the act?

Ms. Suzanne Legault: There are two things to your question.

First of all, if someone makes an access request for their own personal information, it would be covered by the Privacy Act, so I invite you to ask this question of the Privacy Commissioner, because it's not something that I looked at. What's covered under our act is if someone.... This is where the two acts intersect, by the way. It's what my colleague was talking about: the seamless code. It's the exemption for personal information. That is where the two acts intersect.

What we see in our files is that someone will make a request, a lot of the time through their employers, and they want to have information about everything having to do with their labour grievances. Their request under the Access to Information Act will deal with everything about their grievance, as opposed to their personal information. It's a much broader request under the Access to Information Act. In any event, that would have to be treated under the Access to Information Act in terms of where the information is located.

I think you'll have to ask the Privacy Commissioner if he's put any thought into your question, because that's not something that would fall within my purview.

Mr. Matt Jeneroux: I'm understanding that, for sure, but part of the Liberal campaign promise was to create that central database no-fee website where people could go. I'm just trying to get a sense from you of what your interaction is with that. What flags are raised? Is that something you could help us work through to get to that?

Ms. Suzanne Legault: It's really not something I have looked at or studied at all. What I deal with is related. There are exemptions for personal information, but the requests we deal with are not about people's own personal information. In principle, to have a central database of all personal information, I don't know how it would be done or how it would work. As I said, it's something that you need to ask my colleague.

Mr. Matt Jeneroux: Okay.

Ms. Suzanne Legault: It wouldn't mean that people would not still make the same access to information requests under the access act. Those records would still be part of that.

I don't think it would alleviate any responsibilities under the Access to Information Act or any processing of requests where there are necessary exemptions for personal information. I don't think it would diminish our workload on the access side. I'd be surprised. I think it would really be dealt with under the Privacy Act and their workload.

Mr. Matt Jeneroux: Quickly, then, before my time is up, you referenced the Financial Administration Act. I saw it in a few places in your information. In one area, you say that it's listed in the Financial Administration Act, while in others.... I forget the word you used, but it's a little bit different from “listed”. I'm hoping you can break that down to which institutions and crown corporations.... Specifically for me, being new here, I'd like to see exactly which ones we're talking about. I pulled up the Financial Administration Act yesterday. It's a big act. I'll leave it at that, but getting a bit more detail would be wonderful for us.

If you want to speak to some of it now, go for it. Otherwise, you probably could add some of it to this report you're doing. It would be great for me.

Ms. Suzanne Legault: Also, given some of the questions that have been posed this morning, we'll do more work for the committee on the coverage aspect. I think it would be helpful for the committee, so we'll do some of that work.

● (0950)

The Chair: Okay. That's it for Mr. Jeneroux.

We'll go to Mr. Saini now, who I think is willing to share this spot.

Mr. Raj Saini: Madam Legault, you took some time in your report to differentiate between the ombudsperson model versus the order-making model. From what I've read, I think part of the frustration you have is that you have so many cases that are similar and there should be some sort of precedent-setting model, such that if cases fall under that precedent, they would be easier to adjudicate. You've also talked about the cost of processing a case.

Budgetary constraints are everywhere, but if we were to adopt the order-making model, I'm wondering if you would find that your office would be more effective and efficient. In terms of the ability of your office to deal with those matters that are a little bit more complicated than the routine matters you have—because every office has routine matters—and that consume a lot of your time, that time could be saved, because precedents would have been set, using the model that you suggest. You could spend more time dealing with other issues and, once they are dealt with, they could become precedent-setting models. Can you elaborate on that, please?

Ms. Suzanne Legault: This is a very good question, and I can give you very concrete examples.

I was telling you that 40% of our files deal with administrative matters. If you're able to just say to the institution that they shall disclose the information by this date, it's a lot more efficient than having to do an investigation.

By the way, the Federal Court of Appeal case for the 1,110-day extension is not because we didn't try to mediate that with the department. We tried extensively to mediate. We could not get the department to agree to a date for disclosure, and it had to go all the way to the Federal Court of Appeal.

In an order-making model, that would have been settled within days. We would have looked at the situation, looked at how many records were involved, looked at the necessary consultations, and if we could not come to an agreement with the institution, we would have just ordered disclosure by a certain date.

This is what happens in Ontario, for example. If you speak to my colleague in Ontario, you will find that they don't have issues with delays, because the institutions know.... It's a reasonable mediation process once the institution is in default. It does happen. It will continue to happen. But the institution comes to the oversight body and there's a conversation about when this information can be disclosed, and then there is a decision that's made and the information is disclosed. That's the first step. It really solves a lot of those issues. That's one thing.

The other aspect of real efficiencies in an order-making model is the mediation aspect, and that is key. Right now when we investigate refusals to disclose information, we try to mediate. However, you have to understand that in an ombudsman's model, it's the same body that mediates or tries to negotiate something as makes the decision at the end, or the recommendations. There's no real mediation privilege around that discussion.

You will also find with my colleagues who have the order-making model that the mediation component is a lot more effective, for two reasons. One, you can have mediation privilege, i.e., if you don't agree, there's a separate adjudicative process, with separate parties. In our ombudsman's model now, we do try to negotiate, but there's no real protection or privilege for that conversation.

In an order-making model, if you don't mediate, then it goes to adjudication. That's a lot more costly. It's a lot more time-consuming. The last efficiency is that the institution has the burden to give all of its representations to justify the non-disclosure at that time.

In an ombudsman's model, if they want to give us not very strong representations, they know that ultimately I'll have to take it to court. If the government does not want to disclose, the incentive in an ombudsman's model is to not do a very solid job to justify non-disclosure, but in an order-making model, that incentive is completely reversed and the burden is truly where it should lie.

These are the three huge differences in efficiency components to that model, which are truly in sync with the quasi-constitutional right of access.

● (0955)

The Chair: That pretty much chews up the five minutes.

We're going to have some extra time, so I'll be able to make sure that everybody gets their questions in.

I'll move to Mr. Blaikie now for the last round, which is three minutes. Then I'll open up the floor. We'll have about 20 minutes left, and anybody who wants to ask more questions at that time, please indicate to me.

Mr. Blaikie.

Mr. Daniel Blaikie: Thank you very much.

In the beginning of chapter 1, you say, “Quasi-commercial entities, special operating agencies and public-private partnerships have become increasingly common modes for governments to carry out their business.”

I'm wondering if there are precedents that you can speak to for ensuring that access to information that deals with third parties, like a P3, would protect legitimate commercial interests but not create another black hole.

If part of the goal of reform is to eliminate those black holes where information can be shoved, are there precedents, or are there ideas at least, about how there could be some oversight for that?

Ms. Suzanne Legault: We investigated some cases recently.

With this issue of public-private partnerships, we're getting into a lot of subcontracting for the work that's being done within government. Public Works does a lot of big contracts. The big contracting companies subcontract to a lot of other smaller entities, and we're finding it's getting more and more difficult for people to have access to those records.

We had quite a difficult investigation. We were trying to establish that Public Works is still responsible for those records, but as you move through third and fourth subcontractors, it's very difficult to get the records. That's one issue.

In terms of protecting third party commercial information, we have put in specific proposals to amend section 20. The reason we're recommending proposals here is that it also deals with appropriate protection, trade secrets, and commercial and financial information. Also, the way the act is done right now leads to a lot of inefficiencies in the investigations, because there are about four grounds for refusing disclosure. They all overlap. Some of them are mandatory and some of them are discretionary.

Our investigation is very complex, because we have to go through each step. Everybody quadruple-banks all of these exemptions. This is really our experience in all of our investigative files with third party commercial information. We're recognizing the importance of protecting it, but we want to really streamline the way that exemption is crafted so that it really simplifies the investigation while protecting the information.

Mr. Daniel Blaikie: Thank you.

Do I have a little more time?

The Chair: Yes, you do.

Mr. Daniel Blaikie: I guess maybe I'll just use that time to make a comment that I do think it's important, especially in light of all the contracting out of government work that's going on, that there be a way to get access to the information, at least to be able to make a value-for-money assessment.

That's one of the advantages we have when things are done in-house. We can evaluate how much is spent on it and get a sense of what Canadians are actually getting for the money spent. Then, as we hire other organizations to do that work and they say that we can't access information about how that work is getting done and what it costs, there's a serious cost to Canadians in terms of being able to evaluate the quality of that work. Of course there are other costs, because you end up losing the in-house capacity, and people who actually know what's involved in doing the job can then make reasonable assessments for government about whether the price they're paying for that work makes sense, whether what they're being told needs to be done is actually something that needs to be done, or whether that contract is being padded.

It seems to me that having access to information while protecting legitimate commercial interests—but I think that's probably a lot narrower in scope than it's been traditionally defined—is important so that this House and Canadians themselves can do the work of evaluating the value for money they're getting. It's certainly something I would like to see addressed in our study.

The Chair: Well, I'm sure you'll ask very pointed questions on that in the future.

That chewed up that little bit of time, but right now we're in unofficial time territory and as I mentioned earlier, you may indicate to me if you have some questions. I have Mr. Bratina, Mr. Massé, Mr. Erskine-Smith, and Mr. Kelly.

We will start on this side of the table and then move to Mr. Kelly. Then we'll go back over here.

Mr. Bratina, you haven't had an opportunity yet, so we'll start with you.

Mr. Bob Bratina (Hamilton East—Stoney Creek, Lib.): Thanks very much.

Thanks again for the presentation.

I want to go back briefly and have you expand on the notion of culture change and whether that has to do with a kind of entitlement where people in governance might take the attitude of, "Well, it's really none of your business. Leave it in our hands, and we'll look after these matters" as opposed to—and I hate to refer back to my previous experience—institutions that failed to file information, and it was a matter of butting your head to try to get the information.

Also, I'm wondering whether a newer government with fresher faces might be more ready to actually go through that culture change.

Could you comment a little bit about what you're after in terms of culture change?

● (1000)

Ms. Suzanne Legault: That's a very good question.

We live in the Westminster style of parliamentary system. If you look at our parliamentary system historically, there's a lot of secrecy.

We grew up as a democracy in that kind of system. It's interesting when you look at history to see that parliamentary debate used to be held in secret. In London—in fact the Mayor of London.... Somebody called Hansard decided to publish these in a rogue manner, because he thought the public should be made aware of what parliamentarians were discussing in the British Parliament. And then the person was actually jailed in the Tower of London. But eventually the debates got to be published, and look: all of your discussions are now televised.

That's what I mean by a culture change. We have to go through the same culture change in the public service in the way we administer the Access to Information Act.

The way people administer the act is to look at a record and say, "Section 19 applies, section 21 applies, section 23 applies, but oh, I can also apply section 20, and oh, I think it's probably also covered by section 69 and section 15 and maybe section 13 as well." We will see cases in which we have a full slew of exemptions applied. The way we apply it is that whatever possibly applies is an exemption to disclosure, because we're risk averse in the public service; we're afraid of disclosing something we should not disclose. There is that culture that exists for sure in the public service.

What do we have to do? I think there is a very significant difference with the new generation, the millennials. All of us who have children who are in that category truly see the way that people work. I think as public institutions we're going to have to profoundly change the way we communicate our information from government, because our millennials, not only Canadian citizens but our public servants, want to share this information. They need it to work. They work this way, by using a whole broad source of information.

I also think we need to do it because sharing information with the public in today's time actually creates an innovation society, and we have to do that as well. The whole idea behind open government, in the U.S. particularly, was really based on creating an innovative society. Why? It's because we have cut a lot within our public service, and information and innovation occurs a lot outside of the public service. There needs to be this interaction so that we maximize the opportunities for innovation.

I truly believe in that. Yes, I know that people think I'm a bit of a Pollyanna, perhaps, in holding this view, but I don't think that necessarily has to be the case. If you speak to people from the Swedish government, you will find that their public servants' perspective on what needs to be disclosed is very different from ours. They have 250 years of experience with access to information laws, but their culture of disclosure is very different from ours. As part of your study, if you speak to some representatives here from the Swedish embassy you will find the way their public servants deal with disclosure information tremendously interesting.

This goes to some of the comments about how we administer this efficiently. The way they administer it is much more efficient than the way we administer it. They put much of the responsibility and the accountability on public servants directly: they make decisions on disclosure. They don't have a centralized process; they don't have approval processes; it isn't reviewed by communications people. It's a lot simpler.

There are things to think about in the change of culture, and there are examples in other jurisdictions. We need to really think about not just the risks but the opportunities of doing something like that as a country and as a public service.

● (1005)

The Chair: Okay, good.

Mr. Bratina, that was a solid question that used up the better part of six minutes.

Mr. Kelly.

Mr. Pat Kelly: Thanks, Mr. Chair.

On this general recommendation toward greater availability of documentation and the requirement to document decision-making, I listened to Mr. Blaikie's first round of questions with interest and your own anecdote in particular about having to disclose your horse doodle and whatnot. The thought I had then was, how do you guard against...? If we all agree that anything you ever create, whether it's a sketch in your notebook that might contain your own doodles, or whatever you might commit to paper, ought fairly to be part of anybody's access to information, how do we protect against an absence of context when information is disclosed? How do we protect against the types of frivolous or fishing requests that people may be encouraged to make with the knowledge that you never know what you're going to get when you see somebody's notebook, and frivolous or vexatious requests may arise from that, and information disclosed will lack context and not be understood properly?

Ms. Suzanne Legault: There are two things in your question, and I have three minutes to answer.

The first thing is contextual information. There's nothing preventing you from disclosing the context of the information if you're concerned about it. You can disclose more. There's nothing in any of the legislation preventing you from disclosing more, ever, so long as you're not disclosing something that you're not allowed to, such as a human source or something. You can provide more information in the context, and that's not something you should necessarily be worried about.

Mr. Pat Kelly: I'm sorry to interrupt. It's difficult to convey the context and elements of what is going on in a room just from a document.

Ms. Suzanne Legault: Such is life. It's the way our right is constituted. We give—and I'll be brief on that—little credence to Canadians in terms of how they understand things, and so on. I think we get a bit overly defensive in Ottawa, and perhaps we should consider that some of our information bears more importance to us than it does to the average Canadian. For the other points you made about frivolous and vexatious requests, we do make recommendations in the act around those things based on our experience. We do make a recommendation that there would be some discipline put in the act for frivolous or vexatious requests, or abuse of the right of access. It's something that does not exist in the act. Oftentimes what we see is that institutions use assessment of fees to deter this type of request. It's not something I think is appropriate, but for frivolous or vexatious requests, or abuse of the right of access, I think it's appropriate.

The other thing we're recommending is that there would be something to deal with some requesters making multiple requests within a short period of time to the same institution. We see that every year, and the institutions completely cannot absorb these. It's almost like a bombardment of institutions. We saw it with CBC. There's one institution this year that's going through the same issue. They have nothing in the act they can use to get extensions of time. There's nothing I can do either. The only thing I can do is work with them and work with what ends up being an influx of complaints as well. That's something that does need to be put into the legislation with proper parameters. I fully agree with that.

● (1010)

The Chair: Are you okay, Mr. Kelly, with that?

Mr. Pat Kelly: Yes.

The Chair: I think we've allocated up until about a quarter after. I see a couple of more people on the list who would like to ask a few questions, and I would like to ask a few questions. If you're okay to stay a bit longer then we'll do that, and then we'll use whatever time we have left over for our committee business.

We'll now go to Mr. Erskine-Smith.

Mr. Nathaniel Erskine-Smith: I want to pick up on this notion of inefficiencies, and I take that largely to mean getting to the bottom of the exclusions versus the exemptions. You would have an opportunity to review exemptions and determine whether an exemption is proper, but with an exclusion, you might have a whole fight about the exclusion. The example you provided was about something that was fully redacted. It went through many processes, a complaint, etc., and there are inefficiencies built into that.

On the flip side, and maybe you can flesh this out, the PMO, the ministers' offices, and the parliamentary support organizations are currently excluded. If we go to an exemption rather than an exclusion model, are there the resources to review the additional information that you'll necessarily have to review in order to make the determination as to the whether the exemptions are proper?

Ms. Suzanne Legault: If I understand correctly, yes, depending on how many requests that generates in the system. We don't know.

If the administration of Parliament is covered, how many requests is Parliament's administration going to get in a year's time? We don't know. You might want to speak to Mr. Bosc to see what kind of demand he thinks they would get or in terms of getting some of kind of assessment of what that would mean.

Of course, the more that information is disclosed publicly, usually the less information is requested through access to information. There's usually a period of adjustment, I'd say, as well. The CBC is a perfect example. There were a large number of requests and then they really tapered down.

Mr. Nathaniel Erskine-Smith: I'll move over to administrative penalties, which we actually haven't spoken about today.

There are existing sanctions and there are proposed sanctions. Maybe you could give us a little bit of background on the value the proposed sanctions would have and the effect you think they might have, and why the current sanctions are insufficient.

Ms. Suzanne Legault: The section on the sanctions is really based on our experience with some very specific investigative files. As I'm sure all of you know, anything that bears a criminal conviction means that it's really competing in terms of resources with the RCMP's resources. That is the body those cases would be referred to. In some instances, the level of severity is different. To have a full spectrum of administrative monetary penalties is probably more in line with the severity of some of these offences.

The other thing we're proposing is to have some amendments in terms of these infractions that exist within the act. That's really based on our investigative experience. There were some gaps we felt needed to be addressed.

The other key component is that when we refer a matter to a police body, the act predates some significant case law in that respect, and it puts my office and the people who are the target of these investigations in very difficult circumstances. It should be aligned with the way it's done in the Lobbying Act, which is a more modern piece of legislation.

Mr. Nathaniel Erskine-Smith: I have one last quick question.

You mentioned earlier the example of notes in a meeting and they were excluded but that ought not to be the case and in fact should be subject to a national security exemption. If we adopt the exemption rather than the exclusion model, do you foresee a great deal more information being publicly available, or do you think, instead, that rather than being excluded, we're just going to find the same information is exempted?

● (1015)

Ms. Suzanne Legault: It really depends. For some of the institutions that are not covered right now, such as Nav Canada, I think it would make a tremendous difference in terms of accountability if they were covered. In terms of cabinet confidences, I think that with proper oversight, if we narrowed it, there would be more information that would be at least available for disclosure. It would be a different task. It would be a different exemption. It would be subject to these recommendations being applied to a public interest override. I think there would be more information that would be subject to disclosure.

We propose a scheme in which disclosure would be improved, in my view. Even if there were new institutions that are not covered but that would become covered, or information that was excluded that would not be excluded, the scheme that we're proposing would actually have a better balance. It wouldn't mean that everything would be disclosed, because not everything should be disclosed—and I'm the first one to say that—but there would be a more appropriate balance in terms of protection and disclosure.

The Chair: Are you satisfied with that, Mr. Erskine-Smith?

Mr. Nathaniel Erskine-Smith: Thank you.

The Chair: The last person that has some questions here is Mr. Massé.

[*Translation*]

Mr. Rémi Massé: How much time do I have left, Mr. Chair?

[*English*]

The Chair: Five minutes.

[*Translation*]

Mr. Rémi Massé: Thank you.

Ms. Legault, you mentioned the difficulties you encountered in a specific case where there was a refusal to disclose information. You were engaged in a mediation and exchange process. Ultimately, you had to turn to the courts to move the case forward.

I am curious by nature, so I would like to know which department this involves because I am not aware of this aspect. I would also like to know which decision-making process was used. Ultimately, who decides not to disclose information?

Ms. Suzanne Legault: I do not know exactly which case you are talking about, because we have a number of cases in Federal Court at the moment.

The way it works—

Mr. Rémi Massé: What would you say are the worst cases?

Ms. Suzanne Legault: No one case is worse than another. Let me explain a bit how this works.

When we receive a complaint about a refusal to disclose information, we try to resolve the situation by talking with the institution in question. There is truly a mediation period. There is interaction between the investigators and the analysts. This happens among officials at both institutions. We try to determine what should be disclosed. If there are things or places where we agree that the information is being rightly protected, then we put that aside and focus on the areas where there is disagreement.

Ultimately, if we do not reach an agreement, we can invoke section 35. That is the first stage where we request formal representations from the institution. Usually, those representations go to a much higher level in the institution, maybe as high as the assistant deputy minister. If there is no agreement, then a formal letter from the commissioner is addressed directly to the minister or the director of the institution—some institutions do not have a minister. Then the person has the chance to decide whether there will be disclosure or not, according to our recommendations. If the person decides not to accept our recommendations, then the initial person requesting access to information is entitled to bring the case before Federal Court. I can also do that on behalf and with the consent of the claimant.

This is a lengthy process, but usually we resolve the cases. Very few cases go all the way to Federal Court. That generally happens when there is a difference in interpretation. It is neither bad nor good. It is simply a difference of interpretation between our office and the department. As far as I'm concerned, cases that end up in Federal Court are legitimate. We are working within legislation. As you know, the law is not like pharmaceuticals or mathematics. It is not black and white, there are no equations like 1 + 1 = 2.

Mr. Rémi Massé: I have one last question.

How many cases are currently before the Federal Court?

Ms. Suzanne Legault: The Federal Court?

● (1020)

Ms. Nancy Bélanger (General Counsel, Director of Legal Services, Office of the Information Commissioner of Canada): Mr. Massé is asking about the cases that we have brought before the Federal Court.

Ms. Suzanne Legault: We have brought three cases before the Federal Court. The first has to do with the number of passengers on the no-fly list. The second has to do with documents in the Prime Minister's office, and the third has to do with data from the long-gun registry.

There are other cases in which my office is involved. Third parties bring matters before the court, and we are sometimes asked to make interventions regarding those cases. We have a few more of those kinds of cases.

Mr. Rémi Massé: Thank you.

[*English*]

The Chair: I think we're satisfied around the table. As the chair, I'd like to use my prerogative, if it's okay with my colleagues here, to ask a couple of questions as well.

I listened to the debate and I want to thank you very much for your succinct answers.

I want one quick clarification. It seems to me there was a theme about efficiencies being found when it comes to departments. Just changing their culture and just being more proactive or meeting schedules, or whatever the case might be when it comes to actively disclosing information would solve a lot of your issues right up front.

Has anybody done a study on the cost? Yes, it costs money to do an access to information request, but it also costs money to follow a schedule and meet the publication of documents. Has anybody done a cost benefit analysis of either system?

Ms. Suzanne Legault: No, and they're not necessarily the same, i. e., what would be published through a publication scheme is not necessarily what's being requested.

The only thing we have done is we have looked at what data has been proactively published under the open government data initiative and the types of access to information requests, because they're very distinct. The only place I can see that we may be able to get data for the committee is in Scotland. In Scotland they really did have to look at publication schemes. There was an oversight process for publication schemes. They would have before and after information in terms of cost, what was published, and things like that. We can look to see if there's good information.

Remember, we used to not publish any information about travel or hospitality. We published some information about grants and contributions. These in the 1990s became almost like publication schemes. In other jurisdictions, publication schemes are based in part on those kinds of proactive disclosure.

There was some cost associated with that, but that's something the government decided to publish proactively because they were access to information requests.

The Chair: Oh, agreed. I'd be very curious to find this out.

So now we're going to Scotland and Sweden, it sounds like.

Voices: Oh, oh!

The Chair: The second question I have for you is on the generation gap you were talking about. I mean, you talked about the millennials, so I interpret that as a generation gap.

Let's take a look at the departments in the Government of Canada right now. I know there are some issues here within Parliament as well that we're talking about, but in the bureaucracy, there's a generation gap between the millennials, who are likely working in front-line or mid-management positions right now, and the folks who might be a little longer in the tooth, who are working in senior management positions. There's a cultural generational gap: a culture of secrecy, or the old way of doing things, versus the new culture, the millennial way of doing things, which is a much more collaborative, open, and transparent process.

I'm wondering if there are any good examples you can give us of where we might start looking to see how we can get government to be more open and to just kind of change that culture within the bureaucracy.

Ms. Suzanne Legault: This is not something I've looked at, but I know that Blueprint 2020, from the previous clerk, was based on something like that, on more collaborative information. They did a lot of consultation in terms of how this could be done better and things like that.

The Privy Council Office, dealing with Blueprint 2020, would probably be the best people to answer that question. They've done a lot of work with public servants.

The Chair: Okay.

My last question, on behalf of the entire committee, is that you indicated to us that the Swedish model might be of interest to this committee. You also talked a little bit about Scotland, about how they might have some befores and afters that would address my previous question.

Through the document that you've published, is there anyone that you feel this committee should be meeting with? Are there models not only provincially but from other federal governments around the world, other governments at the state or provincial levels in various other countries that we should be taking a look at with respect to incorporating or bringing in witnesses or studying the models they have? This would be from a positive perspective, as something we could do, but not necessarily only from a positive perspective; we'd like to look at it from a cautionary perspective as well, at some models that aren't working to make sure we don't go down that road.

I don't expect you to have a fulsome answer to that question right now, but perhaps you could get that to this committee in the very near future as we try to delineate who we need to talk to, or who we should be talking to. I think your recommendations would be very important, very insightful, and very helpful.

On behalf of the committee, I want to thank you and your staff for coming here today.

Yes, Mr. Erskine-Smith.

● (1025)

Mr. Nathaniel Erskine-Smith: I'd also asked Ms. Legault about the two issues in relation to the expansion. She'd mentioned that she'd report back, and I just wanted to make sure it was on her list.

Ms. Suzanne Legault: Yes.

Mr. Nathaniel Erskine-Smith: Great. Thank you very much.

The Chair: Yes, I think that's already been taken care of. Active dialogue goes on here to make sure that all of the things we ask for will come to the committee.

I want to thank you very much for your time.

Ms. Suzanne Legault: Thank you very much.

The Chair: Should we need to speak to you again before our study concludes, I do sincerely hope that we will have that opportunity. On behalf of the committee, thank you for coming this morning.

We'll now go in camera to discuss future business.

[*Proceedings continue in camera*]